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December 22, 2004

LCDR James Carsten, JAGC, USN
Executive Secretary
Joint Service Committee
Office of the Judge Advocate General
716 Sicard Street, SE
Suite 1000
Washington, DC 20374-5047

Re: Manual for Courts-Martial (MCM); Proposed Amendments; 69 Federal Register 55600 (September 15, 2004); Additional Comments

Dear Commander Carsten:

I am in receipt of Captain Bryant's email of December 6, 2004 noting our submission (by e-mail) of an advance copy of our November 30, 2004 letter to you forwarding comments on the Proposed Amendments. Captain Bryant kindly provided a copy of the March 24, 2004 Federal Register "Notice of Summary of Public Comment Received" to the JSC's 2003 Annual Review. Clearly we were unaware of this publication of this "Summary," otherwise we would not have criticized the Department's failure to publish this required summary.

Several issues are presented.

First, NIMJ has in the past suggested that the Department maintain a mailing list of interested parties, and provide copies of proposed changes, and of other relevant Federal Register notices, directly to such parties. This is the common and required practice in promulgating other federal court rules. The UCMJ is an area of the law for which there is a limited number of commentators, and it would not be a major undertaking for the Department to maintain such a list and to mail notices to interested parties.

However, to date, the Department has not chosen to do so. Thus we are left with the unhappy situation where a party (NIMJ) that does take a major interest in this subject – and which actually was one of the very few parties that submitted written comments on this rulemaking – remained unaware of publication of the Federal Register "Summary."

Now that we are aware, we have examined the March 24, 2004 Notice (Summary), and find it seriously deficient. The purpose of the Notice is to publish a "Summary of Public Comment Received" regarding the proposed amendments. Yet of the 4 pages in the Federal Register, the vast majority is devoted to republishing *without any change* the original proposed amendments. Only 3 small paragraphs are devoted to summarizing the comments received, and these paragraphs are wholly inadequate summaries of the comments received.

First of all, the three paragraphs (summaries) deal only with the comments received on the substantive changes to the rules. NIMJ submitted extensive comments on the rulemaking *process*, including a copy of a four-page letter dated August 16, 2003 to the Associate Deputy General Counsel of the Department. Until the rulemaking *process* has transparency and integrity, it will not be possible for the actual rules to be viewed as inherently reliable and credible. A fair summary of comment received would at least note such extensive objection to the process followed by the JSC.

But process aside, the Notice itself presents a *prima facie* case for its own insufficiency. There was, as we noted in our October 31, 2003 letter commenting on the 2003 proposed changes, "vigorous public comment received on October 1, 2003" at the public hearing. NIMJ provided written comments (on Oct. 30), and presumably others did as well. The three minimal paragraphs in the Summary do not adequately summarize even the written comments of NIMJ, much less the vigorous comments presented at the meeting. In fact, no one reading the Summary – even a military justice expert – could possibly understand what the commentators were actually objecting to without going back to the original proposed rules, and without in addition consulting the Manual for Courts-Martial and the cases cited (without explanation) in the proposed rule, and the objections themselves.

Finally, the JSC has chosen not to address or answer the substance of the comments received. Rather they are summarily dismissed with short paragraphs consisting of cursory and conclusory statements that do not address either the policies or the rationale underlying the changes. Only one rule change – that involving peremptory challenges – draws any comment at all, and that comment is dismissive, completely failing to address the merits of the objection. Thus this "summary" is so far outside traditional federal rulemaking as to be another genre entirely.

In our letter of November 30, 2004, when we criticized the JSC and the Department for the rulemaking process (erroneously believing that no Summary of Public Comment Received had been published), we cautioned:

> The failure this year to publish a summary of comments, in contravention of the Department's own rules, coupled with the Departments virtually unblemished record in failing to change any proposed rule in response to a public comment, contributes to the perception that the process is at most window-dressing, and at worst a sham.

Now that we have viewed the actual published Summary, we are even more uncomfortable with the process, and restate our very serious concern. We submit that this summary has materially contributed to a most unhealthy perception of both this process and the organizations that persist in adhering to it.

Further Comment on the 2004 Annual Review

In our letter of November 30, 2004, we vigorously objected to the proposed rule change to RCM 703(b)(1), a change that would allow remote testimony, even by solely auditory means, on interlocutory issues in a trial. We found the change wholly unexplained and lacking justification, and in apparent contravention of Article 46 of the UCMJ.

We now have learned that at least one federal circuit has overturned a conviction that relied on remote testimony that was less offensive than that in the proposed rule, in that it was a two-way visual closed circuit hookup and not merely an auditory only connection. The court found the testimony violated the defendants' right to confront witnesses against them under the Confrontation Clause of the Constitution. *See* United States v. Yates, No. 02-13645 (11th Cir., Nov. 24, 2004).

As we noted in our November 30, 2004 letter, a change to court-martial practice without any reason being given for the change, and without any empirical data, is unwarranted. Mere convenience to the government is an inadequate justification for such a drastic proposed rule change. No important "case specific" justification has been presented. No important public policy argument has been presented. And no assurance concerning the reliability of the testimony has been presented. We call the Committee's attention to this case and its underlying rationale – including that the Supreme Court has recently rejected an apparently similar change proposed for the Federal Rules of Criminal Procedure. This proposed change should similarly be scuttled.

We appreciate the opportunity to present these comments.

Sincerely,

Kevin J. Barry

Enclosures: NIMJ Letter to LCDR James Carsten dated October 31, 2003 (w/o encl.)

Copy: w/ encl: Hon. H.F. "Sparky" Gierke, Chair, Code Committee on Military Justice