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October 31, 2003

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; Proposed Amendments; 68 Federal Register 48886 (August 15, 2003)

Dear Commander Carsten:

The National Institute of Military Justice (NIMJ) is a District of Columbia nonprofit corporation organized in 1991. Its overall purpose is to advance the administration of military justice in the Armed Forces of the United States. As part of our effort to foster a robust rule making process, NIMJ has helped to disseminate information about proposed or final changes to the MCM as well as related hearings convened by the Joint Service Committee (JSC) through the *Military Justice Gazette* and the NIMJ website, www.nimj.org, and has commented on several proposed rules. This letter presents NIMJ's comments on the 2003 annual review in response to the Federal Register request.

The Rulemaking Process

First of all, NIMJ applauds the Department's publication, on November 13, 2002, of its "Notice of Summary of Public Comments Received Regarding Proposed Amendments to the Manual for Courts-Martial, United States (2002 ed.)." This notice summarized the comments submitted regarding the 2002 annual review and the amendments proposed therein (*see* 67 Federal Register 65507, May 20, 2002). To our knowledge, that was the first time that the Department has published a summary of comments received to its publication of proposed amendments to the MCM, and it is a worthy advance.

Such publication of a summary of comments received is one of the requirements of the Department's program, as set forth in the Joint Service Committee's "Internal Organization and Operating Procedures of the Joint Service Committee on Military Justice," promulgated in March, 2000.

As NIMJ has previously submitted, the inclusion of the requirements governing public participation in the MCM rulemaking process *only* in an *internal* JSC document is inadequate and inappropriate. Public notice requirements ought to be made part of the Department's binding public regulations. The Department now has under review a revision of Part 152 of Title 32, Code of Federal Regulations: "Role and Responsibilities of the Joint Service Committee (JSC) on Military Justice." *See* 68 Federal Register 36915, June 20, 2003 (Interim Rule with Request for Comments). In response to this request, on August 16, 2003 NIMJ submitted comments critical of this Interim Rule and of the current Department and JSC practice, and urging substantial modification to the MCM rulemaking process, and to the governing regulations. Because those comments were part of the discussion at the public hearing conducted on October 1, 2003, and are relevant to these proposed amendments to the MCM, those comments are attached to this letter for the consideration of the JSC.

NIMJ strongly believes that despite the improvements that have been implemented in the MCM rulemaking process over the last decade, that process continues to lack openness and transparency. As long as the proposed rules continue to be published without adequate explanation, and without the public availability of background information supporting the proposed rules, the efficacy of the proposed rules will continue to be subject to doubt and question. It is incumbent on this Committee and the Department to revise the rulemaking process. Only when the process is sound will the proposed rules gain inherent credibility and reliability, and be presumptively worthy of the public's confidence.

The Proposed Rules

Of the thirty or so rules proposed, several are of considerable importance, as indicated in part by the vigorous public comment received on October 1, 2003. NIMJ offers the following. As in the past, NIMJ is limited in its ability to provide definitive (perhaps even meaningful) comment due to uncertainty as to the intent or effect of some of the proposed rules.

The proposed rules limiting the convening authority powers of joint command and joint task force commanders to only members assigned or attached to their command or task force seem appropriate. Similarly the limitations in the proposed rules – requiring that the regulations and procedures to be applied by such commanders for both courts-martial and non-judicial punishment be those of the service of the accused – appear appropriate. The regulation might be more clear were definitions readily available for terms such as "combatant or joint commander," "joint command" and "joint task force." As a general rule, the proposal suffers from the lack of discussion as to the underlying reason(s) for the need for these regulations, or the policy considerations underlying the choices the Committee made in proposing these specific rules.

The proposed rule change to RCM 912(f)(4) would change the law, and make unappealable the denial of a challenge for cause in a circumstance where the accused elected to use the single peremptory challenge military law affords. The stated justification is that this places "before the accused the hard choice faced by defendants in federal district courts." This proposed change is neither explained nor justified. NIMJ submits that it is indefensible and wrong, and it should be discarded.

When the undersigned objected to this proposed rule change at the public hearing, a Committee member asked if we had read the cited cases, and argued that a judge had suggested that the JSC take up the issue and review the policy. Having reviewed the cited cases, we are unable to identify precisely where any judge has made this suggestion. Nevertheless, and assuming that a review of the policy underlying the current law might be warranted, the change to the Analysis that is presented utterly fails to set forth what policy considerations were applicable for or against a change to the law, or what rationale

ultimately motivated the Committee to adopt this particular change. (As a matter of rulemaking practice and procedure, NIMJ submits it is patently inappropriate for members of the public to be expected (required) to read case law in order to attempt to discern the Committee's rationale and justification for a proposed rule change.)

At the public hearing, a member of the Army Appellate Defense Division presented an eloquent and thoroughly reasoned analysis of – and categorical objection to – the proposed rule. NIMJ endorses the argument it heard, in which the "hard choice" facing federal court defendants regarding use of peremptory challenges is founded on an entirely different statutory structure, one that provides not one but a large number of peremptory challenges. That argument, in its detailed and reasoned presentation of both law and policy issues, was in stark contrast to the almost total absence of discussion in the proposal. NIMJ submits that whether considered as an issue of law, or as a matter of fairness and public policy, this is a very bad rule the Committee has proposed. It will hurt the system both in actuality and in perception. NIMJ urges that the entire matter be shelved, and that it not be reconsidered unless as part of a new and comprehensive review of the entire process of member selection – something NIMJ strongly recommends.

The proposed change to RCM 1004(c)(10) changing the aggravating factors from "death is authorized under the law of war for the offense" to "the violation constitutes a grave breach of the law of war" is explained as a change merely to "clarify which law of war violations may subject the accused to capital punishment." NIMJ doubts whether even a law of war expert could discern the reasons behind, and probable effect of, this change. NIMJ believes this rule should be deferred until it can be further explained in a new proposed rule.

The multiple changes to the Analysis to the Military Rules of Evidence are almost completely without explanation. Do these amendments to the Analysis reflect a change in the current law? Are they merely implementing interpretations of the rules by the Court, or are they implementation of policy considerations by the Committee? Without some explanation, NIMJ considers itself precluded from offering meaningful comment.

The first of the changes to paragraph 2(a) of Part V affecting non-judicial punishment procedure appears to make a major change, but there is no explanation of the reason for or the intended effect of the change. NIMJ does not understand the change, and is unable to comment.

Thank you for the opportunity to submit these comments. We request that we be provided copies of any other public comments received.

Sincerely,

Kevin J. Barry

Att.: NIMJ Letter to Robert E. Reed, Associate Deputy General Counsel, dated August 16, 2003