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August 16, 2003

Robert E. Reed
Associate Deputy General Counsel
Military Justice and Personnel Policy
ODGC (P&HP)
Room 3E999
1600 Defense Pentagon
Washington, DC 20302-1600

Re: 32 C.F.R. Part 152; Interim Rule with Request for Comments; 68 Federal Register 36915
(June 20, 2003): Review of the Manual for Courts-Martial

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Dear Mr. Reed:

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 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 in response to the Federal Register request.

NIMJ applauds the Department's decision to update the CFR by publishing the current version of the rules governing the Review of the Manual for Courts-Martial. This will eliminate the confusion that has existed since DOD Directive 5500.17 (Role and Responsibilities of the Joint Service Committee (JSC) on Military Justice) was updated on May 8, 1996, while the CFR remained unchanged, continuing to contain the January 23, 1985 version of the Directive. We similarly note and approve the inclusion in the CFR of the Appendix to DOD Directive 5500.17, setting forth many of the specific procedures under which the JSC operates.

NIMJ's comments are limited to the procedures set forth, which address the JSC's operation relative to reviewing and proposing changes to the Manual for Courts-Martial (MCM). We do not address those aspects relative to proposing legislation to amend the Uniform Code of Military Justice (UCMJ).

Organization of JSC

We note that the Chief Counsel of the Coast Guard is now also The Judge Advocate General of the Coast Guard. Part 152.4 (c)(5) could be modified to so reflect.

Part 152.4(e) provides that the "Military Service of the JSC Chairman shall provide an Executive Secretary for the JSC." While rotation of the JSC Chair may be valid and viable, the rotation of the Executive Secretary among the services seemingly has proved to be burdensome and inefficient. NIMJ recommends that serious consideration be given to establishing a permanent Executive Secretary of the JSC, with an adequate staff, to carry out the various duties of the JSC. The Coast Guard has already indicated it is unable to handle these duties because of its size, and the imposition of this role on a rotating basis must necessarily present a periodic challenge to the staffs of the various Services' military justice offices. This function is too important to continue to be handled on an *ad hoc* "out of hide" basis.

Public Notice and Participation

In the May 8, 1996 edition of DOD Directive 5500.17 (E2.4.2.), in addition to Federal Register notice of proposed changes to the MCM, the Department called for notice to be "disseminated through other means to the Public to the greatest extent practicable." This sentence has not been carried forth in the current version or in the Interim Rule. (App. A (b)(3)). It would be most unfortunate if the elimination of this sentence reflected a pulling back from the steady progress toward greater public participation in the process that has characterized the recent past.

NIMJ has always been pleased to participate in this public notice effort through placing notices of MCM changes and public meetings in the *Military Justice Gazette*, and on our website. We believe,

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indeed, that an expansion of public notice efforts is feasible and desirable. Other steps, such as maintaining a mailing list of interested observers and commentators, who might be routinely notified of proposed MCM amendments, would be consistent with practice in other agencies and would be beneficial. We encourage adoption and enforcement of more aggressive public notice policies and practices.

In this regard, we note that the Interim Rule steps back from several previously mandatory requirements, making them only “normally” necessary (*e.g.*, App. A(d)(2), (d)(4) and (d)(5)). We have difficulty imagining circumstances where DOD would seriously consider stepping back from the “normal” practice, and would encourage restoration of the prior language.

NIMJ favors the change that requires the publication of the “full text of the proposed changes, including discussion and analysis.” (App. A (d)(4)). This change actually reflects current practice. We are, however, hard pressed to envision a situation where publication should be abbreviated because it might “unduly burden the Federal Register,” and recommend deletion of that proviso.

There is no obvious reason for reducing the former 75-day comment period to a 60-day period. The longer period allowed for the public meeting to be held sufficiently in advance of the end of the period so that an opportunity (and sufficient time) existed for the submission of comments after the meeting. We would continue to encourage the allowance of at least 15 days for comments following the public meeting.

Further Improving Public Participation

The Interim Rule continues practices that diminish and undermine the value of public participation. Under App. A(b)(3), all submissions received either by solicitation (within the Services), or by Federal Register notice, are reviewed by the JSC to “determine whether the proposal should be considered under paragraph (a)(2) of this appendix by determining if one or more of the JSC voting member(s) intends to sponsor the proposed change.” It appears that if none do, the proposal dies. NIMJ submits that this is a wrong policy. *Every* proposal submitted should be fully considered, including evaluation by the working group, and vote by the JSC. In fact, NIMJ understands that solicited proposals from the Services never reach the JSC at all until after they have been reviewed *and approved* by that service’s JSC representative. Thus, these solicited proposals are not ever granted review by the JSC or its working group unless that single service representative determines that the proposal should be sponsored. If this understanding is correct, it reflects an unwholesome policy that mandates for solicited proposals a far lesser standard of consideration than for proposals submitted by members of the public. This in our view is plainly wrong.

Under App. A(d)(6), public proposals and comments “should include a reference to the specific provision to be changed, a rational (*sic*) for the proposed change, and specific and detailed proposed language to replace the current language. Incomplete submissions might be insufficient to receive the consideration desired.” This policy inappropriately burdens the public with preparing technical corrections to the MCM, and has the potential to discourage members of the public from submitting *conceptual* improvements to the Manual. NIMJ submits that the implementation of Manual changes, and the business of making technical changes to the various sections of the MCM that may be affected by a

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proposed change, are properly the work of the JSC and its working group. The current policy risks the loss of valuable suggestions from persons who might deem themselves unable to prepare appropriate detailed MCM provisions to implement their ideas.

Another significant flaw is the failure to include in the Interim Rule crucial procedural rules and processes addressing public proposals that are currently mandated for the JSC, but are now contained only in the “Internal Organization and Operating Procedures of the Joint Service Committee on Military Justice.” See Kevin J. Barry, *Modernizing The Manual For Courts-Martial Rule-Making Process: A Work in Progress*, 165 MIL. L. REV. 237, 260-64 (2000). In February of 2000, Major General Walter Huffman, The Judge Advocate General of the Army, announced to the American Bar Association’s Standing Committee on Armed Forces Law that the department had adopted detailed additional rules to enhance public participation in the MCM rulemaking process. These rules imposed specific requirements on the JSC regarding solicitation, review, and accounting (including public acknowledgment and notice of disposition) of proposals received from the public. However these rules were promulgated only through the mechanism of the JSC’s *internal* written guidance. Clearly such rules are an appropriate subject for *public* rulemaking documentation, including promulgation in the Federal Register and codification in the CFR. It is inappropriate that they be issued *only* in internal JSC operating documents – documents not readily available to the public.

NIMJ strongly recommends that the rules governing the consideration of proposals for change to the MCM be uniform without regard to the source of the proposal, that they not impose undue burdens on members of the public, that they provide for serious consideration of *all* proposals on their merits, and that they provide for public acknowledgment of *all* proposals and public accountability for their disposition. We further recommend that the relevant matters set forth in the “Internal Organization and Operating Procedures of the Joint Service Committee on Military Justice” be reviewed and updated to meet these standards, and that they then be made part of this public rulemaking, and upon adoption be published in the CFR.

Public Availability of Background Reports and JSC Records

The work of the JSC proposing and adopting proposed changes to the MCM constitute the making of rules for a system of criminal justice affecting millions of American servicemembers. Rules for this system should be adopted through a process that is as open and public as feasible, and the records of that process should be available for review by scholars and others with an interest. To date, however, the records of the JSC have been largely unavailable. The proposals, the rationales supporting them, and records of the JSC’s deliberations and votes, are not available to members of the public.

The Interim Rule authorizes the JSC to “create a file system and maintain appropriate JSC records,” and the JSC has done so for many years. However, the JSC Internal Rules noted above clearly state: “[a]s internal working documents, these records are exempt from disclosure under the Freedom of Information Act.” JSC Internal Rules, II.F. NIMJ submits that it is inappropriate for criminal rules under which American servicemembers are tried – and may be thereafter sentenced even to death – to be made through a process that is hidden from public view. The CFR rules should be amended to meet this standard as well.

The Rulemaking Process – Expanding the Breadth of the Rulemaking Committee

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NIMJ notes that rules for the federal courts are made in a process that uses broadly constituted advisory committees that bring a breadth of judicial, academic, and practitioner perspective and expertise to the court rulemaking process. *See, e.g.,* Peter G. McCabe, *Renewal of the Federal Rulemaking Process*, 44 Am. U. L. Rev. 1655 (1995) (describing in detail the federal court rulemaking procedures). Many benefits would derive from the establishment of a rulemaking body within the military court rulemaking process that would transcend and complement the perspective of the current five voting members, each the administrator of the military justice system for the member's Service. NIMJ suggests that adoption of an organization and process patterned after that employed by the Federal Judicial Conference – and the court rules advisory committees – in adopting the Federal Rules of Criminal Procedure would substantially benefit the military rulemaking process, result in better rules, and enhance public confidence in the resulting rules, as well as in the military justice system as a whole.

Thank you for the opportunity to submit these comments.

Sincerely,

Kevin J. Barry