NATIONAL INSTITUTE OF MILITARY JUSTICE

4801 MASSACHUSETTS AVENUE, N.W.
WASHINGTON, D.C. 20016
TEL. (202) 274-4322

Address reply to:
Kathleen A. Duignan
4801 Massachusetts Avenue, NW
Washington, DC 20016-8181
duignan@wcl.american.edu
Tel. (202) 274-4322

October 18, 2006

Joint Service Committee on Military Justice
ATTN: Lieutenant Colonel L. Peter Yob
Office of the Judge Advocate General
Criminal Law Division
1777 North Kent Street
Rosslyn, VA 22209-2194
louis.yob@hqda.mil

Re: *Federal Register, Vol. 71, No. 154, Aug. 10, 2006, Proposed changes to the Manual for Courts-Martial, United States (2005 ed.) (MCM)*

This letter comments on the Joint Service Committee's (JSC) proposed changes to the Manual for Courts-Martial. We write in response to the notice in the Federal Register on August 10, 2006.

The National Institute of Military Justice (NIMJ) is a District of Columbia non-profit corporation organized in 1991 to advance the fair administration of military justice and foster improved public understanding of the military justice system. NIMJ's board of directors and advisors include law professors, private practitioners, and other experts – none of whom are on active duty, but most of whom have served as military lawyers, several as flag and general officers. In 2005, NIMJ affiliated with the Washington College of Law, American University. NIMJ

frequently comments on proposed regulations and legislation that impacts military law.

First and foremost, we reiterate our concern that the current practice of the JSC fails to give the public a meaningful opportunity to comment on proposed changes to the MCM. See attached letter dated August 16, 2003, to Robert E. Reed. ODGC (P&HP), Office of the General Counsel of the Department of Defense, 1600 Defense Pentagon, Room 3E999, Washington, DC 20301–1600. The entry in the Federal Register invites comment but makes that comment exceedingly difficult. Two critical deficiencies in the presentation of these proposed changes warrant notice:

1) There is no useful summary of the proposed amendments. The CFR entry presents 17 pages of detailed changes to the MCM with a single phrase of cursory summary ("[t]he proposed changes concern the rules of procedure and evidence and the punitive articles applicable in trial by court-martial"). From reading the CFR entry, an observer would have no inkling that these changes completely overhaul the sexual misconduct provisions of the MCM. In addition, because of a formatting error, the "supplementary information" section, at 45780, misleads the reader by stating the "material in bold or underlined is new" when in fact italics, not bold face or underlined type, is used to mark new sections. Those same italics are also used, inconsistently, to distinguish section headings. This formatting error worked to deter even interested observers from assessing the changes quickly or easily. We believe that the availability of an electronic bulletin board at www.regulations.gov, and of correctly formatted copies upon special request of the JSC, help to ameliorate, but not solve, these problems.

2) The entry does not explain what is being changed, nor does it explain why such changes are being contemplated. The only explanatory sections appear at 45794 to 45797, where the "Changes to the Discussion" sections in the MCM, the maximum punishment chart, the analysis of the RCM, the analysis of the MRE, and the analysis of the punitive articles are reviewed. These explanatory sections do not address the extent, substance, impact, or motivation behind the proposed changes. From the text of the CFR entry, it is literally impossible to tell what will be changed in the MCM if the proposal is adopted. In order to decipher the proposed amendments, an observer must already know the text of the existing MCM and must be familiar with all of the myriad areas of substantive laws and procedural rules that are affected.

Given these challenges, it is very difficult to ascertain the meaning and intent of the proposed amendments. We recognize that many of the changes were

drafted in response to the mandate set by the National Defense Authorization Act for Fiscal Year 2006. That public law, however, is the beginning, not the end, of a rigorous assessment of these changes. Without further explanation, this lengthy catalog of proposed changes appears cryptic even to a knowledgeable observer, and is entirely incomprehensible to someone without a thorough and current understanding of military criminal justice.

The procedure adopted by the JSC prevents the millions of U.S. servicemembers who are subject to the military justice system from understanding either the nature of the proposal or its potential impact on their lives and liberty. It also prevents members of the civilian bar, many of whom have significant expertise and interest in military law, from considering and commenting on the proposal in productive fashion. *See, e.g.,* Kevin J. Barry, Modernizing the Manual for Courts-Martial Rule-Making Process: A Work in Progress, 165 Mil. L. Rev. 237 (2000).

In order to remedy these deficiencies, we request that the proposal be republished in the CFR with adequate explanations. We also request the release of the minutes of the JSC meetings where these issues were discussed and voted on and copies of the proposals that were submitted for the JSC consideration.

On the substance of the proposed changes, we offer the following thoughts for your consideration:

1) Why preserve the separate offense of sodomy, under Article 125, when Article 120 (now titled "Rape, Sexual Assault, and Other Sexual Misconduct") and the capacious definitions of "sexual act" and "sexual contact" so clearly make Article 125 redundant? Keeping Article 125 also encourages needless litigation over the application of Lawrence v. Texas, 539 U.S. 558 (2003), to the military justice system. Adult, consensual sodomy should no longer be a military crime.

2) We applaud the effort to update and expand Article 120. Many of the changes appear to be a welcome response to recent criticism of how the armed forces have handled allegations of sexual assault. But the changes are based on a federal statute, the Sexual Abuse Act of 1986, that reflects the best thinking of legal reformers some *twenty years* ago. The law of rape and other sexual assaults has evolved significantly since then in state courts, where these offenses are almost always prosecuted. Today, for example, sixteen states and the District of Columbia criminalize non-consensual sexual penetration without proof of force. For a recent survey of state statutes, see Michelle J. Anderson, *All-American Rape*, 79 ST. JOHN'S L. REV. 625 (2005).

We hope that state statutes, state court decisions, and official guidance to district attorneys and other state prosecutors will be consulted as this new sexual assault code is implemented.

3) The extensive marital exemptions to most of the crimes specified in Article 120 should be narrowed or eliminated. The marital exemption to rape has been fading fast in American jurisdictions for decades now. Other countries such as Australia, Canada, England, Germany, Spain, and Sweden have entirely repealed marital immunity for rape. The U.S. military, which asks so much of the families of servicemembers and depends so heavily on the support of military spouses, should not be caught behind this trend. In the proposed changes, most troubling are the exemptions for "aggravated sexual assault" and "aggravated sexual assault of a child." Servicemembers who commit aggravated sexual assaults against their spouses –that is, who cause their spouses to engage in sexual acts by threats, fear, or bodily harm, or who take advantage of their spouses' incapacity—should be vulnerable to prosecution at court-martial.

4) As you are aware, CDR Wayne L. Johnson, a retired Navy officer, has made several suggestions for change. The NIMJ concurs with CDR (ret) Johnson in his assertion that communications between military attorneys and servicemembers regarding whether to accept nonjudicial punishment (NJP) should be privileged. Currently, neither Article 15 nor Part V of the MCM (which deals with NJP) mention attorney-client communications, and practice among the services differs. Such communications are privileged in the Army, Air Force, and Coast Guard but not in the Navy and Marine Corps. In today's operational environment, a uniform practice is not only advisable, it is essential. In joint commands, a member of one service often receives advice from an attorney of a different service. To resolve this disparity, we recommend that a provision be added to Part V to establish that communications between military attorneys and servicemembers who have been offered, but have yet to accept, NJP are privileged.

5) CDR Johnson also recommends amending MRE 707, which prohibits the use of polygraph results in courts-martial. There is no corresponding prohibition on the use of polygraph results in the federal district courts. As the Hamdan case points out, Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006), Article 36 of the UCMJ mandates that procedures in courts-martial, insofar as practicable, be the same as district court practices. Recommend, therefore, that MRE 707 be eliminated, as it is inconsistent with Article 36.

Thank you for the opportunity to comment.

Sincerely yours,

Eugene R. Fidell
President

Elizabeth L. Hillman
Director

Encl: (1) Letter dated August 16, 2003, to Robert E. Reed. ODGC (P&HP), Office of the General Counsel of the Department of Defense.

Copy: CDR Wayne L. Johnson, JACG, USN (Ret.)