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November 16, 2009

Federal Docket Management System Office
Docket Number - DOD-2009-OS-0133
1160 Defense Pentagon
Washington, DC 20301-1160

Re: Comment on Proposed Amendments to Manual for Courts-Martial
74 Fed. Reg. 47785 (Sept. 17, 2009)
Docket Number - DOD-2009-OS-0133

Dear Joint Service Committee:

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. Since its inception, NIMJ has been an interested observer of the rulemaking process, and has frequently commented on proposed changes to the Manual for Courts-Martial (MCM). As part of our effort to foster a robust rulemaking process, NIMJ has announced proposed or final changes to the MCM, as well as related hearings convened by the Joint Service Committee on our website, now located at www.wcl.american.edu/nimj. NIMJ is pleased to be able to continue to be an active

participant in this important process, and we appreciate the opportunity to submit these comments.

NIMJ's primary concern in past submissions over many years has been the adequacy of the rulemaking process. Our comments today reflect this concern yet again. First, our reviewers expressed frustration at the difficulty they encountered in trying to comprehend the scope of the changes. Those without access to the most recent edition of the MCM were totally unable to determine what was being changed. Those with access to the MCM were able to understand what the changes were by doing a line by line comparison of the new provisions with those in the MCM. No one was able to discern with certainty the rationale that the JSC had in mind in proposing most of the changes.

These difficulties have existed for years, and have been a major stumbling block in DOD's efforts to gain wider participation in the rulemaking process. This difficulty could be overcome if the JSC provided a preamble to the proposal that explained the scope of the changes proposed, and the reasons that they are deemed desirable. Such a preamble is standard for most changes to rules that are proposed by almost all federal agencies. While we are aware that these rules are exempt from the *requirement* that notice and comment procedures be followed, we again urge that the JSC and the DOD adopt that approach in MCM rule making. The benefits would accrue also to the users of the MCM, who now have difficulty in interpreting the intent of the changes.

Alternatively, the JSC could make available to interested members of the public the documents through which the proposed changes were first brought to the JSC's attention, as such documents are likely to include detailed discussions of the problems identified with the current provisions of the MCM, and the reasons the particular changes are deemed the most appropriate ways to address the issues. Such documents in the past have been considered internal decisional documents and have not been made available for release to the public. This is undesirable, since this process addresses rules for public federal criminal trials, and it is appropriate that those rules be made in a far more transparent process than that currently employed. All other federal court rules employ an advisory committee process that is open and on the record, and the quality of the rules reflects that process. The rules for trials under the UCMJ should be no less well conceived and drafted, and changing the process would go a long way towards meeting that goal. Even without going so far as to mimic the federal rules process, making the complete proposals and their justification available on the Internet could be done easily and would be a material enhancement of the current process.

With regard to the substantive proposals in the Federal Register notice, NIMJ offers the following comment. The proposed change to Military Rule of Evidence (MRE) 504 regarding spousal privilege does not seem to limit the privilege in a logical manner. For example, if a husband and wife both provided illegal drugs to a 12-year-old, the spouses would not be allowed to invoke their privilege against testifying against each other. However, if the wife was engaged in a sexual

relationship with the same non-relative, 12-year-old (and not acting *in loco parentis*), and the wife told the husband about the relationship, the marital privilege would remain intact. Recognizing the recent expansion of child abuse cases in which spouses may no longer invoke their privilege, it seems that MRE 504 still has room for improvement.

NIMJ appreciates the opportunity to comment on these proposed changes.

Sincerely,

//signed//
Michelle M. Lindo McCluer
Executive Director, NIMJ