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

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Website: [www.nimj.org](http://www.nimj.org)

Address reply to:

Michelle M. Lindo McCluer  
mmccluer@wcl.american.edu

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November 13, 2008

Federal Docket Management System Office  
Docket Number - DOD-2008-OS-0112  
1160 Defense Pentagon  
Washington, DC 20332-8000

Re: Comment on Proposed Amendments to Manual for Courts-Martial  
73 Fed. Reg. 54387 (Sept. 19, 2008)  
Docket Number - DOD-2008-OS-0112

Dear Joint Service Committee:

The National Institute of Military Justice (NIMJ) is a District of Columbia non-profit 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 rule making process, and has frequently commented on proposed changes to the Manual for Courts-Martial (MCM). As part of our effort to foster a robust rule-making 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, [www.nimj.org](http://www.nimj.org). NIMJ is pleased to be able to continue to be an active participant in this important rule-making 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 rule-making process itself. Our comments today once again reflect this concern.

First, our reviewers expressed considerable frustration at the difficulty they encountered in trying to comprehend the scope of the changes. Those without access to the 2008 edition of the MCM were completely unable to determine what was being changed. Those with access to that version of the MCM were able to understand what the changes were only by doing a line by line comparison of the new provisions with those in the MCM, a tedious process. None were able to know 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 rule-making 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 fare 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 rule-making 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 and the courts, who now have difficulty in interpreting 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, which documents are known to include detailed discussions of the problems identified with the current provisions of the MCM, and the reasons why the particular change is deemed the most appropriate way to address the issue. 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 would be 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 easily be done and would be a material enhancement of the current process.

In addition, the Federal Register notice "invites members of the public to suggest changes to the Manual for Courts-Martial in accordance with the described format." The reference for this "described format" is listed as "paragraph III.B.4 of the Internal Organization and Operating Procedures of the JSC." NIMJ notes that the published public rules for the JSC and the MCM rulemaking process, DOD Dir. 5500.17 (32 CFR 152), do not include these JSC "internal" rules, so the format that is requested for public submissions is not readily available to the public, if it is available at all. We have noted in the past that it is inappropriate to include rules for public participation in the process only in an *internal* DOD document that is not published or available to the public. We again urge that this anomaly be remedied. NIMJ has many times in the past raised these and other concerns with the process and the procedures followed by the JSC. One

such time was in our August 16, 2003, letter to the Associate Deputy General Counsel of DOD. A copy of that letter is attached for your consideration.

With regard to the substantive proposals in the Federal Register notice, NIMJ offers the following comments:

The proposed change to RCM 1003(b)(3) allows a civilian subject to court-martial jurisdiction to be fined up to two-thirds of the highest pay of an E-9 at a summary court-martial. The same provision allows a civilian to be fined up to two-thirds of the highest pay of an O-10 at a special court-martial. Using 2008 pay tables, that means any contractor subject to the UCMJ could be fined more than \$4400 at a summary court-martial or nearly \$115,000 at a special court-martial. Considering the reality that servicemembers above E-4 are rarely taken to a summary court-martial, and two-thirds of the highest monthly basic pay an E-4 could receive amounts to less than \$1500, this new provision would allow a civilian to be fined three times that amount. Similarly, a maximum punishment including a fine in excess of \$100,000 seems out of all proportion with any sentence heretofore imposed at a special court-martial. Furthermore, unlike the maximum punishments applicable to servicemembers, there is no sliding scale of maximum fines based on civilian compensation. This creates the potential of putting civilians at a distinct disadvantage vis-à-vis their military counterparts, especially when one considers the possibility of imposing additional contingent confinement if the fine is not paid within the allotted period of time.

With regard to the proposed addition of child pornography offenses to Article 134, the proposed “affirmative defense” at paragraph 68b(c)(10)(b) that the individual depicted in purported child pornography is, in fact, 18 years of age or older should be deleted. If the individual is not a minor, then no offense has been committed. An affirmative defense is one in which the accused agrees that he meets the elements of the crime charged, but he is justified in his commission. If a charged image depicts an adult, there is no crime. See RCM 916 and the discussion of special defenses which follows the rule for additional explanation.

Perhaps there is a misprint, but we were unable to identify any differences between the current Article 119(b)(2)(D) which appears in the 2008 MCM and the purportedly amended version of that paragraph which appears at page 54389 in the Federal Register notice. Hence, we oppose the proposed amendment, as it is unnecessary.

The proposed changes also address the Staff Judge Advocate Recommendation (SJAR). Of course, the SJAR was at one point an SJA Review. In that format, the SJA was required to address legal questions raised in the defense’s RCM 1105 submissions. That allowed the convening authority to fix legal errors at the beginning of the process, rather than permitting problems to fester for several years until an appellate court got involved and ordered corrections. Given limited resources and the desire for judicial economy and swift justice, the Committee should consider returning to a system in which the SJA addresses such discrepancies at the outset of review of the case.

NIMJ appreciates the opportunity to comment on these proposed changes.

Sincerely,

A handwritten signature in black ink that reads "Michelle M. Lindo McCluer". The signature is written in a cursive, flowing style.

Michelle M. Lindo McCluer  
Director, NIMJ

Enclosure

# NATIONAL INSTITUTE OF MILITARY JUSTICE

2001 L Street, N.W., Second Floor  
Washington, D.C. 20036  
Tel: (202) 466-8960  
Fax: (202) 293-8103

EUGENE R. FIDELL, PRESIDENT  
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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

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](http://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).

# NATIONAL INSTITUTE OF MILITARY JUSTICE

Robert E. Reed, Associate Deputy General Counsel

August 16, 2003

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## 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, 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 rationale (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 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**

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