MODERNIZING THE MANUAL FOR COURTS-MARTIAL RULE-MAKING PROCESS:

A WORK IN PROGRESS

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I. Introduction

In June 1991, Professor David A. Schlueter gave the Twentieth Annual Kenneth J. Hodson Lecture at the Judge Advocate General's School in Charlottesville, Virginia. He titled his remarks "Military Justice for the 1990's—A Legal System Looking For Respect."[2] In his lecture, Professor Schlueter noted that, while the system had his "highest respect,"[3] questions were continuously being asked, primarily by people outside the system, whether "the military justice system was fair."[4] Schlueter spent the bulk of his lecture exploring aspects of the system that historically have received the most criticism, those that tended to detract from the respect due the system. In his view, listening to—and attempting to address—criticisms from both within and without the system was "the right thing to do."[5]

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2. David A. Schlueter, *The Twentieth Annual Kenneth J. Hodson Lecture: Military Justice for the 1990's—A Legal System Looking For Respect*, 133 MIL. L. REV. 1 (1991).

3. *Id.* at 2.

4. *Id.* at 3.

5. "Those who are within the system should be the first to step forward and make changes where needed. In military jargon, those within the system must be 'proactive,' not 'reactive.'" *Id.* at 10.

The military justice system has changed much in the fifty years since the Uniform Code of Military Justice (UCMJ) was adopted, including in the decade since Professor Schlueter gave his remarks, and thus might itself appropriately be viewed as "a work in progress." Nevertheless, most of the issues he addressed remain issues today, and virtually all of his recommendations for change[6] still await implementation.

The military justice system's susceptibility to criticism, and its striving for a little respect, are, of course, not new. Professor Schlueter was speaking at the annual Hodson Lecture, and spoke in glowing terms of Major General Kenneth Hodson and his contributions not only to the military, but to the "legal profession in general."[7] It is worthy of note that, eighteen years earlier, General Hodson himself had authored a law review article[8] with an almost identical theme: that the administration of criminal justice in the armed forces has been subject to constant criticism, that the system was in need of constant review, and that military justice could be improved by implementing a series of systemic changes. As did Professor Schlueter, General Hodson listed a number of specific changes he proposed. Most, twenty-seven years later, remain unimplemented.[9]

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6. Some of Schlueter's concerns were more philosophical and perhaps can be best addressed by training and open discussion. For example, he raised the issue of whether the principal purpose of the military justice system is discipline or justice. *Id.* at 10-13. Other concerns went beyond mere thoughtful analysis and included recommendations, such as increasing the number of members on a general court-martial panel to six (and for capital cases to twelve), and reevaluating the "most vulnerable aspect" of the system: the process of selecting members of court-martial panels. Schlueter suggested, inter alia, that "the role of the prosecutor and the commander in the selection process should be reduced, if not eliminated." *Id.* at 18-20. Schlueter's entire article is worthy of careful scrutiny by anyone considering the future of the military justice system.

7. *Id.* at 1. General Hodson was a former The Judge Advocate General of the Army, and Chief Judge of the Army Court of Military Review. He was very active in the American Bar Association (ABA), and was a driving force behind the establishment of the ABA Government and Public Sector Lawyers Division. The author is aware of no other military lawyer who has contributed as much to the profession or who is more highly respected.

8. Kenneth J. Hodson, *Military Justice: Abolish or Change?*, 22 KAN. L. REV. 31 (1973) *reprinted in* MIL. L. REV. BICENT. ISSUE 577 (1975).

9. As Schlueter also did in 1991, General Hodson in 1973 addressed the "discipline vs. justice" issue, finding that the justice system will enhance discipline to the degree that it does—and is perceived to do—justice. *Id.* at 584-90. He too focused on the multiple roles of the convening authority, command influence, and the independence and impartiality of judges, defense counsel, and juries from command influence. Among Hodson's seven recommendations, three have been, at least to some degree, implemented:

Today, the military justice system still seeks respect. Criticism and questions about the fairness of the system have taken on a new life in the last few years, fired in part by the *Tailhook* incident and its aftermath, and later by the sex-scandals and the various investigations surrounding the drill instructors at Aberdeen, the Kelly Flinn case, and more recently the court-martial of Sergeant Major of the Army Eugene McKinney and the handling of the case of Major General David R. Hale. In sum, these cases have raised questions about whether the military trial process itself is fair. More significantly, they have questioned the overall system and its administration, and whether the process is evenly applied. There can be no doubt: the questions raised concerning the fairness of this system go well beyond perception alone, and they are not frivolous.[10]

One aspect of the system that bears decidedly on these perceptions of fairness has received considerably less attention than such issues as the

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9. (continued)

> (4) an accused . . . be permitted to petition the Supreme Court for a writ of certiorari;
> (5) defense counsel be made as independent of command as possible . . .;
> (6) adequate administrative and logistical support be provided to permit the military judiciary to function independently and efficiently.

The remaining four recommendations have not been implemented:

> (1) military juries be randomly selected;
> (2) military judges of general courts-martial (as well as military appellate judges) be appointed by the President to permanent courts for a term of years [and be given all writs authority, full sentencing authority, and contempt powers] . . . ;
> (3) a Military Judicial Conference, headed by the Chief Judge of the Court of Military Appeals, be established and given power to prescribe rules of procedure and evidence; . . .
> (7) commanders, at all levels, be completely relieved of the responsibility of exercising any function related to courts-martial except, acting through their legal advisors, to file charges with a court for trial, to prosecute, and, in the event of conviction, to exercise executive clemency by restoring the accused to duty.

Id. at 605.

10. An indication of the seriousness of the issues came on 12 February 1998, when a seminar co-sponsored by the National Institute of Military Justice was held in Washington, DC, at which a distinguished panel of military law experts, including a former Chief Judge of the Court of Appeals for the Armed Forces, assembled to debate the question "Can

independence of military judges, the various roles of the convening authority, or the manner in which military juries are selected. This is the crucially important issue of the method by which amendments to the *Manual for Courts-Martial* (*MCM* or *Manual*) are proposed, considered, and adopted. It is not a new issue, having been raised at least as long ago as 1973 by General Hodson (as the third of his seven proposed changes).[11] As will be discussed more fully below, the concerns focus on the lack of representation from the bench, the bar, academia, and the public on the committee preparing the proposed rule changes, and from the fact that the procedures used by that committee are not the type of open and public rule-making procedures that are established for the federal rule-making process, which are designed to instill public confidence in the process, and to insure that the best possible rules are adopted. In short, the *perception* that the process has too often left is that of a small "government" committee, operating in secret, which changes the rules (often with the appearance of benefiting only the prosecution) without explaining why. In part because of this negative perception, the subject of the *MCM* rule-making process has been much more in the forefront in the last few years. The active consideration given the rule-making process has resulted in a series of improvements in the last decade, with very significant changes being recently implemented in February of 2000, which address and resolve *some* of the longstanding concerns.

This article discusses the rule-making process in general, and traces developments over the last two decades. It reviews two recent recommendations for change arising from critical assessments of the current practice by the American Bar Association (ABA) in 1995 and 1997,[12] the first of which has largely been implemented by the recent changes. It compares the latter recommendation, which has not been adopted, with the almost

10. (continued) You Get a Fair Trial in the Military?" *See* MIL. JUST. GAZ., No. 54 (Mar. 1998). This seminar was followed six months later by another seminar with an equally distinguished panel at the Annual Meeting of the ABA in Toronto on 1 August 1998, entitled "A Retrospective: After Fifty Years under the UCMJ—Is There Justice in the Military?" No other system of justice in this country is subject to such a persistent need to defend its fundamental fairness.

11. General Hodson's third recommendation called for a complete change to the practice of adopting rules of evidence, practice, and procedure: "(3) a Military Judicial Conference, headed by the Chief Judge of the Court of Military Appeals, be established and given power to prescribe rules of procedure and evidence." Hodson, *supra* note 8, at 605. General Hodson's recommendation is further discussed *infra* at notes 126-145 and accompanying text.

12. *See infra* notes 70-81 and accompanying text (1995 Recommendation) and notes 100-125 and accompanying text (1997 Recommendation).

identical, but not so recent, recommendation for change made by General Hodson in 1973.[13] It concludes by calling for continued study with a view to implementing General Hodson's 1973 recommendation, thus further advancing this "work in progress"—the modernization of the military court rule-making process.

II. The Historical View: *MCM* Rule-making 1950-1994

Military court rule making has evolved from being a system that was almost entirely invisible from outside the government to a system that, in 2000, is much more in line with the type of notice and comment rule making common to other federal entities. To understand the current status, and the reason why further evolution is desirable, a brief review of the last half-century is warranted.

A. Statutes and Regulations—the UCMJ and the *MCM*

The military justice system in the United States is governed by two primary authorities. The UCMJ[14] sets out the system's basic statutory structure, and the *MCM* is the UCMJ's principal implementing regulation. Under Article 36 of the UCMJ, the President may prescribe regulations governing "pre-trial, trial, and post-trial procedures, including modes of proof" for cases tried before courts-martial, and certain other military tribunals.[15] The first *MCM* under the UCMJ was promulgated by Executive Order 10214 on 8 February 1951, "prescribing the *Manual for Courts-*

13. *See supra* note 11.
14. The UCMJ is codified at 10 U.S.C. §§ 801-946 (2000).
15. UCMJ art. 36 (2000). The President may prescribe rules:

> (a) Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions and other military tribunals, and procedures for courts of inquiry, may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.
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> (b) All rules and regulations made under this article shall be uniform insofar as practicable.

Martial, United States, 1951." Frequently amended and revised,[16] the *MCM* remains the principal source book—the "*sine qua non*" for those involved in any way with the court-martial process. It is the indispensable authority for determining the rules of practice, procedure, and evidence applicable not only at trials by court-martial, but throughout pre- and post-trial processing as well, and its importance in the operation of the military justice system can hardly be overstated.[17]

Because of their profound impact on the system, it seems axiomatic that the rules and regulations in the *Manual* should be the best possible

16. The 1951 *Manual for Courts-Martial* (*1951 MCM*) frequently has been revised and amended since that time. Major amendments to the UCMJ contributed to the issuance of a "new" (looseleaf format) *MCM* in 1969 (which was shortly revised to address statutory amendments). The *1969 Manual* replaced the hardbound *1951 Manual*, which had been updated frequently by "cut and paste" insertions into the hardbound book. The *1969 MCM* (Revised Edition) was replaced by another looseleaf format edition in 1984 (*1984 MCM*), which both greatly changed the *MCM* by adopting Rules for Courts-Martial, and responded to the second major statutory amendments to the UCMJ enacted in 1983. In 1994, a soft-cover bound volume *MCM* replaced the 1984 looseleaf edition (*1984 MCM (1994 Ed.)*). The new format allowed for a reissuance of the entire *Manual* upon amendment, and the *MCM* has been twice reissued, once in 1995, when the reference to the *1984 MCM* was dropped (*1995 MCM*), and most recently in 1998 (*1998 MCM*). A new 2000 edition is in production.

As originally issued in 1951, the *MCM* was, in its entirety, a regulation issued pursuant to presidential authority, and thus the entire *Manual* "had the force of law." 1 GILLIGAN & LEDERER, COURT-MARTIAL PROCEDURE, ¶ 1-54.00 at 29 (2 ed. 1991). Since 1984, the *MCM* has consisted not only of regulations so issued, but of additional "illustrative" (non-binding) materials as well. *Id*. Examples of non-binding materials are the "Discussions" accompanying the Rules for Courts-Martial, and many of the Appendices (e.g., Appendix 21 containing the "Analysis of the Rules for Courts-Martial," which appeared first in 1984, and Appendix 22 containing the "Analysis of the Military Rules of Evidence," which appeared first in 1980).

17. One recent commentator has again noted that the *MCM* was along ago dubbed the military lawyer's "Bible" by the Court of Military Appeals. Gregory E. Maggs, *Judicial Review of the Manual for Courts-Martial*, 160 MIL. L. REV. 96, 97 (1999). Two recent cases highlight its overarching importance. *Loving v. United States*, 116 S. Ct. 1737 (1996), affirmed the viability of aggravating factors and procedures for awarding the death sentence, which are established not by statute but by regulations promulgated pursuant to Article 36. *See, e.g.*, MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1004, R.C.M.1004 Analysis, app. 21 at A21-A69 (1998) [hereinafter MCM]. A more telling case for the importance of *MCM* rules is *United States v. Scheffer*, 118 S. Ct. 1261 (1998), in which the issue was the viability of Military Rule of Evidence (MRE) 707, a rule prohibit ing polygraph evidence in courts-martial that was adopted under the military rule-making procedures discussed in this article. The Supreme Court overturned the decision of the Court of Appeals for the Armed Forces, and upheld the MRE. In so doing, the Court noted the "broad latitude" that the rule makers have to make rules, even though those rules

rules that can be adopted, carefully arrived at through a *process* that inspires public confidence by its openness and by the assurance that all relevant viewpoints are effectively heard and considered. Individual rules, once adopted, may not always be viewed as the "best" rules possible: the same rule might be viewed as overly harsh or overly intrusive by some, while others may view it as not being sufficiently rigorous to preserve the commander's authority and good order and discipline. Accordingly, it is of crucial importance that the *process* used for adopting the rules have fundamental integrity and be uniformly viewed as appropriate and fair. Regrettably, despite small changes to improve the process over the years,[18] the *MCM* rule-making process has for many years been subjected to criticism for falling well short of this standard.[19]

B. Rule-making under the UCMJ—the First *MCM*

The first *Manual* issued under the UCMJ (*MCM 1951*) was drafted by "a committee representing all three [Army, Air Force, and Navy] services,"[20] under the leadership of Major General Charles Decker, Judge Advoacte General's Corps (JAGC), U.S. Army, who had also been in charge of drafting the Army's 1949 *MCM* implementing the 1948 amendments to the Articles of War.[21] The effective date of the UCMJ had been put off for a year to allow sufficient time to prepare the *MCM*. Colonel Frederick Wiener, a leading commentator of the time, believed that the one-year period would be "barely enough to formulate rules, iron out differences between the services, and print and distribute the new Book."[22] In

17. (continued) excluded evidence, so long as the rules were not "arbitrary" or "disproportionate to the purposes they are designed to serve." *Id.* at 1264. Had the rule been written to *allow* polygraph evidence, the Supreme Court would likely have upheld that rule as well. The dissent noted that the rule was a violation of Article 36(a) in that it was not consistent with the Federal Rules, and there was no special military concern that justified a different rule. *Id.* at 1271-72 (Stevens, J., dissenting). One can only wonder whether the rule might not have been different had it been subjected to an open and public rule-making process, before a more balanced rule-making committee than the Joint Service Committee (JSC) (*see infra* notes 26-35 and accompanying text). Interestingly, the issue of how much (or, rather, how *little*) weight ought to be given to this rule, because of the deficient process under which it was adopted, was not argued to the Court.

18. *See infra* notes 53-61 and accompanying text.

19. The recommendations for positive change addressed below (*see infra* notes 70-81 and accompanying text and notes 100-125 and accompanying text) resulted from a careful review of these criticisms.

20. FREDERICK BERNAYS WIENER, THE UNIFORM CODE OF MILITARY JUSTICE 2 (1950).

21. 1 GILLIGAN & LEDERER, *supra* note 16, ¶ 1-54.00 at 28, n.142.

fact, the committee completed its work by early 1951, well within the year, and on 8 February 1951, President Truman signed Executive Order 10214 promulgating the *Manual*. The *MCM 1951* was not, of course, drawn from whole cloth, as there had been numerous editions of the *Manual* promulgated under the Articles of War, and the format of the new *MCM* followed that of the earlier *Manual*s. It thus "appears . . . that the current *Manual* is descended directly from the Army's" edition of the *Manual for Courts-Martial*, first appearing under that name in 1895, and several times revised through the years, most recently in 1949.[23] There is no indication that the *MCM 1951* was in any way made available for review or comment by persons or entities outside the government prior to its adoption.

From 1951 until the first major revision of the *MCM* in 1969, changes to the *Manual* were promulgated by executive order as "cut and paste" changes to the hardbound *MCM 1951*. These changes were prepared within the DOD, and seemingly were also not made available for review or comment outside the government. In the early years of the UCMJ, there was significant civilian interest in the military justice system, and there was notable input by civilian groups into the *legislative* process affecting statutory changes to military justice.[24] However, there seems to be no evidence of a similar interest or participation in the rule-making process. This situation apparently persisted throughout most of the period that the *MCM 1951* remained in effect. However, by the time of adopting the new loose-leaf format of the *MCM* in 1969, which implemented major changes to the system enacted in the Military Justice Act of 1968,[25] changes in the process for adopting *MCM* changes were in the works.

C. The Joint Service Committee

The process of amending the *MCM* became more formal in 1968 with the formation within the Department of Defense of "The Standing Committee on Keeping the *Manual for Courts-Martial* Current."[26] During 1971-1972, this Committee produced one set of changes to the *1969*

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22. WIENER, *supra* note 20, at 2. The UCMJ was enacted on 5 May 1950, and was to become effective on 31 May 1951.

23. 1 GILLIGAN & LEDERER, *supra* note 16, ¶ 1-54.00 at 27 n.138; WIENER, *supra* note 20, at 2.

24. *See, e.g.*, Joseph E. Ross, *The Military Justice Act of 1968: Historical Background*, 23 JAG. J. 125 (1969) *reprinted in* MIL. L. REV. BICENT. ISSUE 273 (1975).

25. Pub. L. No. 90-632, 82 Stat. 1335 (1968).

26. CHARTER OF THE JOINT-SERVICE COMMITTEE ON MILITARY JUSTICE 1 (1972).

MCM.[27] In 1972, the name of the Committee was changed to the "Joint-Service Committee on Military Justice" (JSC), the name the Committee retains to this day, and its duties were expanded to include recommending proposed changes to the UCMJ.[28] The Committee remained comprised of "representatives of the Judge Advocates General and of the General Counsel of the Department of Transportation [for the Coast Guard], with the chairmanship rotating biennially among the Services," and with an executive secretary provided by the Chairman's service.[29] Shortly after the JSC's inception, the Marine Corps began to provide a representative, and in 1977 a "non-voting representative" of the Court of Military Appeals began to sit with the JSC.[30] Later, a non-voting representative from the DOD was also added.[31]

The JSC 1980 operating procedures provided for an orderly process of committee meetings with advance written notice, a formal agenda, and advance distribution of proposals on which votes would be taken. The JSC was limited to one of four actions on proposals: (1) decline to consider as not within the Committee's cognizance; (2) reject the proposal; (3) table the proposal (six months maximum before either acceptance or rejection was required); or (4) accept the proposal and assign it a priority of three months, six months, or one year for completing action.[32] Proposals in almost all circumstances had to be in writing; could be submitted only by the Code Committee, members of the JSC, or those they represented; and were required to contain "a summary of the problem, a discussion of various solutions considered in addressing the problem, and a recommended solution viewed as best suited to solve the problem."[33] Files on all proposals and of all minutes of meetings were required to be maintained. A "working group" of representatives from each of the five services assisted the JSC by taking the action required to prepare proposals for further consideration and implementation.[34]

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27. *Id.*

28. *Id.*

29. *Id.*

30. JOINT SERVICE COMMITTEE ON MILITARY JUSTICE FUNCTION AND OPERATING PROCEDURE 1 (1980) [hereinafter JSC 1980 PROCEDURES].

31. Though the DOD representative began to sit much earlier, the first official mention came in 1996. DOD DIRECTIVE 5500.17, ROLE AND RESPONSIBILITIES OF THE JOINT SERVICE COMMITTEE (JSC) ON MILITARY JUSTICE, at E1.1 (May 8, 1996) [hereinafter 1996 DOD Directive].

32. JSC 1980 PROCEDURES, *supra* note 30, at 2.

33. *Id.* at 3.

34. *Id.* at 1.

The operation of the Joint Service Committee has remained largely unchanged from 1980 to the present and, as described in one leading work, the composition and operation affect the resulting proposed rules, as well as the potential to adopt potentially controversial rules:

> The *Manual* is kept current by the Joint Service Committee on Military Justice. This is a committee consisting of the officers responsible for criminal law in the armed forces (including the Coast Guard), augmented by representatives from the Department of Defense General Counsel's Office and the Court of Military Appeals. This body serves primarily as a policy-making one. The actual drafting work is customarily done by the Joint Service Committee on Military Justice Working Group, consisting of subordinates of the Committee's members. Changes may be initiated by the Working Group or drafted in response to the Committee's direction. No amendment is usually possible, however, without Committee endorsement. Proposed *Manual* changes must be coordinated with the Department of Transportation (because of the Coast Guard), the Attorney General and OMB. The President of course has the final decision. Changes in the *Manual* are inherently political, and absent unusual political machination, no change is likely to be made that does not have substantial backing, if not full consensus.[35]

D. Military Rules of Evidence—Public Comment

The 1980 operating procedures did not provide for input to the process, or review of proposals for change, except within the JSC and by the parties represented on the JSC (and later by DOD and OMB during the process for approval of an Executive Order). The process is exemplified in the adoption of the Military Rules of Evidence in 1980, at the time the most important change to the *MCM* to be considered since its inception. The Federal Rules of Evidence had recently been adopted, and there was a proposal under development to completely restructure the *MCM* provisions on evidence by adopting Military Rules of Evidence patterned closely on the Federal Rules. The detailed and structured process followed is described in the current *MCM*:

> The Military Rules of Evidence, promulgated in 1980 as Chapter XXVII of the Manual for Courts-Martial, United States,

35. 1 GILLIGAN & LEDERER, *supra* note 16, ¶ 1-54.00 at 30 n.148.

> 1969 (Rev. ed.), were the product of a two year effort participated in by the General Counsel of the Department of Defense, the United States Court of Military Appeals, the Military Departments, and the Department of Transportation. The Rules were drafted by the Evidence Working Group of the Joint Service Committee on Military Justice, which consisted of Commander James Pinnell, JAGC, U.S. Navy, then Major John Bozeman, JAGC, U.S. Army (from April 1978 to July 1978), Major Fredric Lederer, JAGC, U.S. Army (from August 1978), Major James Potuk, U.S. Air Force, Lieutenant Commander Tom Snook, U.S. Coast Guard, and Mr. Robert Mueller and Ms. Carol Wild Scott of the United States Court of Military Appeals. Mr. Andrew Effron represented the Office of the General Counsel of the Department of Defense on the Committee. The draft rules were reviewed and, as modified, approved by the Joint Service Committee on Military Justice. Aspects of the Rules were reviewed by the Code Committee as well. See Article 67(g) [now Article 146]. The Rules were approved by the General Counsel of the Department of Defense and forwarded to the White House via the Office of Management and Budget which circulated the Rules to the Departments of Justice and Transportation.
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> The original Analysis was prepared primarily by Major Fredric Lederer, U.S. Army, of the Evidence Working Group of the Joint Service Committee on Military Justice and was approved by the Joint Service Committee on Military Justice and reviewed in the Office of the General Counsel of the Department of Defense.[36]

Though not reflected in the above comment, there was some (minimal) public input into the process of adopting the Military Rules of Evidence, but this was hampered by the absence of explanatory material. Mr. Eugene R. Fidell, a noted practitioner and commentator on military justice stated:

> Copies of the first, and much larger, of the two sets of changes were circulated informally by the executive branch to a few members of the public who had expressed an interest. . . . [How-

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36. "Analysis of the 1980 Amendments to the *Manual for Courts-Martial*." *See* MCM, *supra* note 17, app. 22, at A22-1.

> ever, DOD] did not release an analysis of the changes until many months after [the Rules] had been signed by President Carter.[37]

Due to the volume of the changes, *and the absence of any explanatory material*, Mr. Fidell concluded that, "[n]ot surprisingly, few members of the bar commented." He lamented that the "executive branch has declined to release the Justice Department's correspondence regarding the Military Rules of Evidence."[38]

Indeed, this denial of documents is indicative of a larger concern, which has been a constant source of frustration and criticism over the past two decades. As expressed by Mr. Fidell,

> there appears to be a regrettable lack of interest on the part of some persons within the system of military justice in obtaining and considering the views of the bar on matters of military law. The consequence is that the system has tended to be more insular than can be justified. This is particularly inappropriate because military law frequently draws on civilian doctrines. Indeed, Congress has directed that the rules of procedure and evidence in courts-martial should be the same, to the extent practicable, as those applied in the trial of criminal cases in the federal district courts. Clearly the civilian bar has much to contribute to a system so closely tied to the civilian federal model.
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> . . . .
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> The Military Rules of Evidence were generated by an "Evidence Working Group" of the Joint-Service Committee on Military Justice. That group . . . met in secret for many months. With the exception of its "charter" and operating procedures, the papers of the joint-service committee have been withheld from public disclosure under the Freedom of Information Act.[39]

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37. Eugene R. Fidell, *Military Justice: The Bar's Concern*, 67 A.B.A. J. 1280 (1981).

38. *Id.*

39. *Id.* at 1280-82. The records of the JSC remain unavailable even to this day: "As internal working documents, these records are exempt from disclosure under the Freedom of Information Act." INTERNAL ORGANIZATION AND OPERATING PROCEDURES OF THE JOINT SERVICE COMMITTEE ON MILITARY JUSTICE III.F. (Initially adopted Feb. 3, 2000, corrected and readopted Mar. 2, 2000) [hereinafter JSC 2000 PROCEDURES]. These newly adopted JSC procedures are further discussed *infra*, and because of their importance are reproduced in their entirety in the Appendix. *See infra* notes 90-99 and accompanying text.

Others have noted the contrast between the process of adopting the Military Rules of Evidence and the process used to adopt equivalent federal civilian rules: "Unlike the process used for adopting the Federal Rules [of Evidence], the procedure here did not generally involve widespread public input."[40] This observation actually seems to be a marvel of understatement.

E. Federal Register Notice

The absence of notice to the public and an opportunity to comment on proposed changes to the *MCM* was a subject of enough serious concern that, in 1981, the American Bar Association adopted a recommendation urging that "in peacetime, all proposed changes to the *Manual for Court-Martial* [sic] should be published in proposed form in the *Federal Register,* and a period of at least sixty days thereafter be allowed for public comment in most cases."[41] Full text publication of the proposed changes was opposed by DOD, but in early 1982 DOD agreed to publish "notice" of proposed *MCM* changes "in the Federal Register before submission of such changes to the President."[42] The notice would provide a brief description of the matters contained in the proposed change, information on where a copy of the proposed change could be examined, information on how the public could obtain copies of the full text of the changes, and a seventy-five day waiting period to allow for public comment.[43] Thus, after more than thirty years under the UCMJ, and after a mammoth change effecting a complete redesign of the rules of evidence, interested persons outside the government were, for the first time, formally allowed a role

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40. SALTZBURG ET AL., MILITARY RULES OF EVIDENCE MANUAL xi (1997). The federal (civilian rules) process is described in detail below. *See infra* notes 132-137 and accompanying text.

41. AMERICAN BAR ASSOCIATION, POLICY AND PROCEDURES HANDBOOK 286 (1997-1998 ed.) [hereinafter ABA HANDBOOK].

42. 47 Fed. Reg. 3401 (1982).

43. *Id.* The full text of the policy read as follows:

> Notice that the Department of Defense intends to recommend changes to the *Manual for Courts-Martial* shall be published in the Federal Register before submission of such changes to the President unless the Secretary of Defense proposes that the President issue the change without such notice on the basis that notice and public procedure thereon is unnecessary or contrary to the sound administration of military justice.The notice shall include a brief description of the matters contained in the proposed change, the time and place where a copy of the

(albeit quite minimal) in the rule-making process. However, the failure to require explanatory material and analysis of the proposed changes would continue to hamper the exercise of the new opportunity to comment.

F. Codification of the Rule-making Process

From 1980 to 1984, a major revision of the *MCM* was undertaken. The task fell to the JSC Working Group, under the Chairmanship of (then) Major John S. Cooke, JAGC, USA.[44] The end result, including the transition to Rules for Courts-Martial from the prior narrative format, and the adoption of numerous changes to meet the substantial changes effected by the Military Justice Act of 1983, was promulgated on 23 April 1984, with minor modifications signed on 13 July 1984.[45]

In promulgating this, the most far-reaching change to the contents and format of the *MCM* since 1951, the President added a requirement that the "Secretary of Defense shall cause this *Manual* to be reviewed annually and shall recommend to the President any appropriate amendments."[46] To implement this "annual review" requirement, a DOD Directive (5500.17) was promulgated on 23 January 1985, and was thereafter (on 14 February 1985) incorporated as a final rule at 32 C.F.R. Part 152.

The rule formally assigned responsibility for preparation of the annual review to the JSC. Under the rule,[47] the JSC is required to send to

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43. (continued)

> proposed change may be examined, and the procedure for obtaining a copy of the proposed change. A period of not less than 75 days after publication of notice shall be allowed for public comment, but a shorter period may be prescribed when it is determined that a 75-day period is unnecessary or contrary to the sound administration of military justice. Comments shall be submitted to the Joint-Service Committee on Military Justice. This section is intended only to improve the internal management of the federal government, and is not intended to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers, or any person.

44. Analysis of the Rules for Courts-Martial. *See* MCM, *supra* note 17, app. 21 at A21-1.

45. Exec. Order No. 12473, 49 Fed. Reg. 17,152 (Apr. 23, 1984), *as modified*, Exec. Order No. 12484, 49 Fed. Reg. 28,825 (July 13, 1984).

46. *Id.*

47. Although the DOD Directive was revised in 1996, it is the superseded 1985 rule, which remains codified at 32 C.F.R. Part 152. *See infra* notes 82-89 and accompanying text.

the general counsel its draft review by February first of each year.[48] If changes are recommended, then the public notice provisions of the rule become effective.[49] The rule codifies without change the public notice provisions of the 1982 DOD policy statement,[50] thus providing only "notice" of proposed changes rather than the full text of those proposed changes.[51] This rule left unaddressed, and thus unchanged, the internal operating procedures of the JSC previously adopted.[52]

G. Years of Transition: 1985-1994

In each of the years between 1985 and 1994, the JSC conducted an annual review and proposed changes to the *MCM*. In each of the years through 1993, the JSC published a *notice* in the Federal Register pursuant to Part 152, with a brief summary of the proposed changes and information as to availability. As proposed executive orders were processed through to signature by the President, the executive order implementing the changes—with the full text of the "mandatory" changes—was published in the Federal Register.[53] It is interesting to note that, for the first four such Amendments (1986, 1987, 1990, and 1991), *only* the actual text of the executive order itself—promulgating the changes to the "mandatory" sections of the *MCM*—was published in the Federal Register,[54] and the non-binding (but extremely important[55]) changes to the Discussion and Analy-

48. 32 C.F.R. § 152.4(a)(3) (2000).

49. *Id.* § 152.4(a)(4).

50. *See supra* notes 42-43.

51. For an example of such a notice, see Manual for Courts-Martial, Notice of Proposed Amendment, 51 Fed. Reg. 31,164 (1986).

52. *See* JSC 1980 PROCEDURES, *supra* note 30, and accompanying text.

53. Draft executive orders prepared by the JSC are first reviewed within the Department of Defense. Preparation and Processing of Legislation, Executive Orders, Proclamations, and Reports and Comments Thereon, DOD Directive 5500.1 (May 21, 1964). Thereafter they are transmitted to the Office of Management and Budget (OMB) for review and approval. Once approved by OMB, they are transmitted to the Department of Justice (DOJ) for review as to both form and legality, and if approved they are then sent to the Office of the Federal Register for review as to proper form and absence from clerical error. Finally, if cleared by each level, the executive order is sent to the White House for [review and] presentation to the President. 1 C.F.R. pt. 19 (2000).

54. *See* Exec. Order No. 12,550 (Feb. 19, 1986), 51 Fed. Reg. 6497; Exec. Order No. 12,586 (Mar. 3, 1987), 52 Fed. Reg. 7103; Exec. Order No. 12,708 (Mar. 23, 1990), 55 Fed. Reg. 11353; Exec. Order No. 12,767 (June 27, 1991), 56 Fed. Reg. 30284.

55. The military appellate courts have frequently cited and relied on the analysis or discussion in ruling on a case. *See, e.g.*, United States v. Johnston, 41 M.J. 13, 16 (C.M.A 1994); United States v. Stringer, 37 M.J. 120, 131 (C.M.A. 1993).

sis sections were not published. Thereafter, starting in 1993, all Federal Register publications of *MCM* Amendments have included not only the mandatory changes contained in the executive order itself, but the non-binding portions as well.[56] Obviously, the looseleaf "Changes" to the *MCM* (which were prepared and distributed to be used to update the many copies of the *MCM* in use) necessarily included *all* the changes which affected the *MCM*, both the "mandatory" sections *and* the Discussion and Analysis, without which the *MCM* would be not only incomplete, but also difficult to impossible to comprehend or use in many cases.

During this same period, a much more significant change to the process was quietly made, again without explanation. On 14 April 1993, the JSC published the usual notice of proposed amendments resulting from the annual review, with the usual summary and notice of availability of copies of the text of the proposed changes.[57] What is remarkable is that on the very next page of the Federal Register appeared a "notice of public meeting" at which "the JSC will receive public comment concerning its 1993 Annual Review of *Manual for Courts-Martial, United States, 1984*, as published on April 14, 1993."[58] The JSC had never held a public meeting. In fact, its meetings had always been closed and its agenda had never been published. The only authority cited in the notice was " Department of Defense Directive 5500.17 of January 23, 1985," a document which does not either authorize or require public meetings. Since this first public meeting in 1993, public meetings of the JSC have been held in conjunction with every subsequent proposed rule change that has been advanced.

The following year another remarkable event occurred, again without notice or explanation. On 14 April 1994, the JSC published its usual "notice of proposed amendments" resulting from the 1994 annual review[59] and, as it did the year before, a "notice of public meeting" of the JSC.[60] The difference was that the notice of proposed amendments, instead of providing the usual (and, by regulation, required) *summary*, contained the

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56. *See, e.g.*, Exec. Order No. 13,140 (Oct. 6, 1999), 64 Fed. Reg. 55,115; Exec. Order No. 12,888 (Dec. 23, 1993), 58 Fed. Reg. 69,153 . No comment or explanation was offered either as to the fact that there was a change to the publication policy or as to the reason for the change.

57. Notice of Proposed Amendments, 58 Fed. Reg. 19,409 (1993).

58. *Id.* 19,410.

59. 59 Fed. Reg. 17,771 (1994). The only citation of authority was the usual one: "This notice is provided in accordance with DOD Directive 5500.17, 'Review of the Manual for Courts-Martial,' January 23, 1985."

60. 59 Fed. Reg. 17,772.

full text of *all* the changes, including the non-binding changes to the analysis and discussion. The JSC had finally, thirteen years later, acceded to the bar's recommendation for full-text publication.[61]

These three changes in the process—(1) publication of the *entire MCM* amendments (including discussion and analysis along with the mandatory portions) in the executive order in 1993, (2) holding public meetings of the JSC that same year to receive public comment on proposed changes, and (3) full text publication of the *proposed changes* to the *MCM* in 1994—were a direct result, in the opinion of one knowledgeable observer, from the fact that there was critical public review and comment on the *MCM* rule-making process from civilians *outside* the DOD.[62] The conclusion that civilian bar influences played a substantial part in DOD's reconsideration of the *MCM* rule-making process are likely on target. Particularly during the early 1990s, the interest of the bar became more visible, and with it came markedly increased critical evaluation and recommendations for change in the *MCM* rule-making process.

For example, the education process and the ready availability of information regarding the military justice system increased dramatically after the founding of The National Institute of Military Justice (NIMJ), an independent non-profit organization, in 1991,[63] and the appearance of NIMJ's informational newsletter, the *Military Justice Gazette*, which typically includes notices regarding items of interest and proposed changes concerning the military justice system.[64] In addition, the American Bar Association Standing Committee on Military Law (SCML)[65] continued its

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61. The ABA had first sought full-text publication in August 1981. *See supra* note 41 and accompanying text.

62. "Civilian interest, involvement, and monitoring of proposals for change were the catalyst for the changes in the process of rule-making, and without that outside involvement, the changes in the process would never have occurred." Telephone Interview with John B. Holt, Commissioner, U.S. Court of Appeals for the Armed Forces (Feb. 25, 2000). Mr. Holt served as the court's non-voting representative to the JSC during much of the period in question.

63. NATIONAL INSTITUTE OF MILITARY JUSTICE, SUMMARY OF ACTIVITIES 1991-1998 AND FUTURE PLANS 13 (1998).

64. For example, the first issue of the *Military Justice Gazette* in February 1992 noted the availability of the Annual Report of the Code Committee on Military Justice. *See* MIL. JUST. GAZ. No. 1 (Feb. 1992). The first public meeting of the JSC received lengthy comment in the *Military Justice Gazette*. *See* MIL. JUST. GAZ. No. 9 (May 1993). Proposed changes to the *MCM* or UCMJ received comment in a variety of early issues. *See, e.g.*, MIL. JUST. GAZ. No. 5 (Jan. 1993) (discussing Change to R.C.M. 1112 and 1201(b) in ABA Recommendation 107A); MIL. JUST. GAZ. No. 3 (Aug. 1992).

longstanding focus on the rule-making process,[66] asking challenging questions[67] and later sponsoring recommendations concerning the system.[68] In addition, individual members of the bar were proposing changes to *MCM* provisions and raising questions regarding the *MCM* rule-making process.[69]

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65. In August 1994, the Standing Committee on Military Law (SCML) was merged with the Standing Committee on Lawyers in the Armed Forces (SCLAF) to create the currently active Standing Committee on Armed Forces Law (SCAFL).

66. Involvement of the SCML as early as 1979 has been noted: "The need to involve individuals and groups outside the Department of Defense in revisions of the *Manual for Courts-Martial* was emphasized in 1979 by the American Bar Association Standing Committee on Military Law." Fidell, *supra* note 37, at 1282. The same concerns regarding the need for meaningful public comment that were expressed by Mr. Fidell in 1981 were repeated in reports accompanying recommendations adopted by the ABA in 1995 and 1997, as are further addressed below.

67. *See, e.g.*, Letter from Keithe E. Nelson to Stephen W. Preston (Acting General Counsel, DOD) (May 26, 1994). Major General Nelson, a retired Judge Advocate General of the Air Force, was serving as Chair of the SCML and addressed the difficulties that the SCML had experienced in reviewing proposed changes (Change 9) to the *MCM*: "[O]ur efforts were again hampered by the absence of an understanding of the reasons for the changes which were being proposed." *Id.* Major General Nelson noted that the presence of two members of the JSC that had adopted the proposed changes at the SCML meeting was not helpful, for

> due in part to the passage of time since they had considered the issues, they were not able to enlighten the Committee as to the problems which were intended to be corrected by these changes. The discussion made crystal clear the need for a more comprehensive assessment and analysis to be published along with the proposed changes so that they can be better understood, and so that this Committee, and all others who might wish to review and comment on such changes, can do so intelligently.

Id. Major General Nelson went on to detail flaws in the rule-making *process*, and to call for substantial change, essentially along the lines later adopted by the ABA in Recommendation 115. *See infra* notes 70-81 and accompanying text. In her response, the DOD General Counsel listed the steps in the current process, and indicated an interest in increased public participation, but saw this as being accomplished in conjunction with "continue[d] operations within our current framework." Letter from Judith A. Miller to Major General Keithe E. Nelson (Ret), at 3 (Nov. 18, 1994). Despite the fact that full-text publication of proposed changes had already been done in 1994, the general counsel indicated that only a summary need be published: "[O]ur procedures do not provide for full text publication." *Id.* at 2. Notwithstanding the absence of any authorizing "procedures," her list *did* include holding a public hearing. *Id.* In fact, such meetings had already been held twice, in 1993 and 1994.

68. Later initiatives by the ABA and SCAFL are further discussed below. *See infra* notes 70-81 and accompanying text and notes 100-125 and accompanying text.

69. *See, e.g.*, MIL. JUST. GAZ. No. 10 (June 1993) (including the May 14, 1993 Code

III. Recent Changes Responsive to ABA Recommendations

It is safe to say that in the period from 1994 to the present, there has been more attention given to the process of military court rule making than at any time in the preceding forty-five years. The period saw two major ABA Recommendations for substantial change in that process, one of which (Recommendation 115 in 1995) was largely implemented by DOD in 2000, almost exactly five years after its adoption by the ABA House of Delegates. The second ABA Recommendation (100 adopted in 1997) has not yet been implemented; it will be addressed below.

A. 1995—Recommendation 115

The letter of SCML chair General Nelson to the DOD acting general counsel in 1994[70] was one of the early steps in an increasing dialog between the ABA Committees and representatives of the DOD and the JSC on the rule-making process. Later, in 1994, the SCML was merged with the Standing Committee on Lawyers in the Armed Forces, then chaired by RADM John S. Jenkins, JAGC, U.S Navy (Ret.), a former Judge Advocate General of the Navy, to form the Standing Committee on Armed Forces Law, chaired by Eileen Riley of the Maryland Bar, a Naval Reserve judge advocate. The first items of business on the agenda[71] at that committee's first meeting were General Nelson's letter, and a draft of a

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69. (continued) Committee meeting discussion of changes to composition of JSC initiated by the author, with suggestion by Code Committee Chair that the matter be brought to the attention of DOD General Counsel Jamie S. Gorelick); Letter from Kevin J. Barry to Jamie S. Gorelick (July 14, 1993) (noting Code Committee Chair suggestion on May 14, 1993 and recommending changes to the composition of and the procedures followed by the JSC); MIL. JUST. GAZ. No. 5 (Jan. 1993) (noting proposal for *MCM* changes submitted to JSC by G. Arthur Robbins, and that the same recommended changes were on the agenda (Recommendation 107A addressing R.C.M. 1112, 1201(b) and 1203(c)) for the upcoming ABA meeting in Boston). These proposed changes were designed "to ensure that convicted service members have the right to review and comment on all stages of military administrative review of their case" and "to provide for the opportunity for convicted service members to review and submit petitions to the appropriate service Judge Advocate General for certification of a case to the [Court of Appeals for the Armed Forces]. *Id.* The ABA House of Delegates adopted the proposals in February 1993. ABA HANDBOOK, *supra* note 41, at 285. The proposals have not been implemented.

70. *See supra* note 67.

71. *See* AMERICAN BAR ASSOCIATION, STANDING COMMITTEE ON ARMED FORCES LAW, AGENDA III.A. (Oct. 15, 1994).

report and recommendation later proposed on the same subject.[72] The concern of the ABA was that "a better system to obtain meaningful public input during the process of adopting . . . changes to the MCM" was needed.[73] The report noted the current procedures under 32 C.F.R. Part 152, but found the current practice "less than satisfactory."[74] The report expressed concern with the inability of the Committee and others to obtain any information on the "reasons for the changes" proposed.[75] The Committee noted that because the JSC was the "primary (and virtually the sole) organization which prepares changes to the MCM, and which proposes changes to the Uniform Code of Military Justice," its work was particularly important. It thus was essential that there be a better mechanism for obtaining information, because it was "difficult (sometimes impossible) to discern the rationale for the various changes."[76] The Committee also noted that other aspects of the process contributed to the problem: "the meetings of the JSC are generally closed to the public [fn 3], and records of the agenda, the disposition of various proposals, or of the deliberations generally, are not open or available to the public."[77]

The Committee's recommended solution was for the DOD to follow Federal Register-type notice and comment rule making:

> RESOLVED, that the American Bar Association urges the Secretary of Defense to adopt rules requiring that all recommendations for changes to the [MCM], the Presidentially promulgated regulation prescribing rules of procedure and evidence for actions governed by the [UCMJ], be promulgated with the same formality of public notice, opportunity for comment, and analysis of comments received as are changes to other important rules and regulations published pursuant to the Administrative Proce-

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72. Recommendations, accompanied by reports, are the vehicle for the ABA House of Delegates to adopt policy positions for the Association. ABA HANDBOOK, *supra* note 41, at 94.

73. American Bar Association, REPORT ACCOMPANYING RECOMMENDATION 115 (adopted Feb. 1995) at 1 [hereinafter 1995 ABA REPORT].

74. *Id.* at 3.

75. *Id.* at 2.

76. *Id.* at 2, 4.

77. *Id.* at 2-3. Footnote 3, which contrasts the procedures followed by the JSC with those used by the Committees which propose other federal rules, such as the Federal Rules of Criminal Procedure and the Federal Rules of Evidence, read as follows:

> *See*, for example, the "Procedures for the Conduct of Business by the Judicial Conference Committees On Rules of Practice and Procedure,"

> dure Act and the Federal Register Act, and that no further changes to the MCM be implemented until such rules are adopted.[78]

It was the Committee's belief that detailed analysis of the changes "must exist, and are necessary for each DOD reviewer, and ultimately the President, to determine the desirability of approving and implementing the proposed changes," and that "public availability of such analysis is equally necessary for the members of the SCAFL, and for the members of the public in general, to evaluate proposed changes."[79] The Committee expressed the view that what was needed was something equivalent to the "detailed 'preamble' which accompanies most Notices of Proposed Rulemaking in

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77. (continued)

Federal Civil Judicial Procedure and Rules (West, 1994) at xv. These rules are promulgated pursuant to Federal Law (28 U.S.C. 331), under which the Judicial Conference of the United States is required to carry on a "continuous study" of the rules of practice and procedure in Federal Courts, and to recommend changes to the Supreme Court. The detailed "Procedures" established for the Conference Committees require public notice of all meetings, which are to be open to the public, extensive publication of proposed changes, public notice and hearings (with transcriptsand full records) regarding all proposed changes, acknowledgment of suggested changes which are submitted, and advisories to the person recommending suggested changes of the action taken thereon. Additional procedures are set forth, all designed to ensure "as wide as practicable" publication and comment on proposed changes, and maximum participation by all interested parties.

78. ABA, Recommendation 115 (adopted Feb. 1995). The "formalities" of APA/Federal Register-type rule-making that the Committee sought include (1) publication of a

78. (continued) detailed "Preamble" when proposed rules are published in the Federal Register, which explains what problem exists with the current rule, what change is proposed, and why this change was selected from among the various other potential solutions to the problem that were considered; (2) providing an opportunity for interested persons to comment on the proposed changes; and (3) when final rules are published in the Federal Register, publication of an analysis of significant comments received, why the comments were deemed worthy or were not agreed to, and the changes made to the proposed rules in view of comments received.

79. 1995 ABA REPORT, *supra* note 73, at 4. In reaching its recommendations, SCAFL specifically rejected the argument that adequate rationale was already made available in the non-binding "Analysis" portion of the *MCM*. "We are aware of the limited rationale of the changes which is made available to the public in the few lines intended for the 'Analysis' section of the *MCM*. We view this as wholly insufficient, however." *Id.*

the Federal Register, and which provides in-depth analysis of the reasons for the proposed changes."[80]

Finally, the Committee noted and rejected the argument that DOD need not follow public notice and comment rule-making procedures for *MCM* rule changes because there was no legal requirement to do so. In the Committee's view,

> it has been past practice of the Department, and of other agencies of government, to seek public comment using full APA and Federal Register publication on matters of importance even though the law did not require such treatment.[fn 6] It is our perception that changes to the *MCM* are certainly no less important (and perhaps more important) than these changes to other regulations within the military structure.[81]

In February 1995, the ABA House of Delegates adopted Recommendation 115.

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80. *Id. See supra* note 78. Others have noted the great difficulty in evaluating proposed changes, even when the full text of the change is available. Because the changes do not include either a "section-by-section" analysis, or a "redlined" text showing how the current provision is being changed, it is almost impossible to determine simply by reading the(continued) proposed change what is being changed or why. Rather, it is necessary to do a comparative reading of the current provision, evaluate how the change would affect it, and then try to reason (or speculate) as to why that change was being proposed. "The whole current system is entirely unsatisfactory." Telephone Interview with James R. Klimaski (Mar. 1, 2000). Mr. Klimaski is one of the few members of the civilian bar who have attended open meetings of the JSC and provided comments in response to proposed *MCM* amendments.

81. 1995 ABA REPORT, *supra* note 73, at 4-5. The footnote [fn 6] in the quoted text read in part as follows:

> As an example, *see* 41 Fed. Reg. 116 at 31663 (June 17, 1981) proposing DOD Directive 1332.14, addressing "Enlisted Administrative Separations," and noting that "[a]lthough Part 41 pertains solely to agency management and personnel, thus obviating the requirement under 32 C.F.R. 296 (1978) for notice and public comment, the proposed rule nonetheless is set forth herein to obtain the views of the public." . . . *See also* the Notice of Proposed Changes to the Rules of Practice and Procedure of the United States Court of Military Appeals. (59 Fed. Reg. 94, at 25622 dated May 17, 1994). The extensive discussion of the meits of the issue by the majority and the minority members of the Court's Rules

B. DOD Directive 5500.17—Reissued 8 May 1996

More than a year after the ABA adopted Recommendation 115, DOD reissued its directive governing the JSC.[82] This directive was in large measure a restatement of the 1985 Directive, but did bring the regulation into line with then-current practice, including calling for full-text publication of proposed rule changes[83] and for a public meeting of the JSC to receive public input during the seventy-five-day comment period.[84] Under this rule, the JSC is required to "consider all views presented at the public meeting and written comments submitted during the 75-day period in determining the final form of any proposed amendments to [the *MCM*]."[85] What the directive does not do is require that there be any accounting to the public (or even any response to the commentators) regarding the results of that consideration.

What the directive also does not do is specifically address the issues raised in the 1995 ABA Report on Recommendation 115, or implement the recommendation for a rule-making process with the detailed explanation and justification common to Federal Register/APA rule-making.[86] It does, however, lean slightly in that direction, imposing a requirement that, when the JSC prepares the draft of the annual review (by May first each year), it should not only set forth "any specific recommendations for changes" to the *MCM*, but should in addition "include a concise statement of the basis and purpose of any proposed change."[87] This was a healthy new addition to the regulation, and should have begun to serve the purpose of providing some rationale for the changes proposed. Unfortunately, a review of the

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81. (continued)

> Advisory Committee (pp. 25622-25) make it clear that the adoption of the proposed rule is a matter on which reasonable minds can differ, and makes it much easier for members of the public to make meaningful comments. If it is desirable for the rules of the highest military *appellate* court to have its rules adopted with public notice and comment, it would seem to be at least as desirable that the same benefits be available for the adoption of changes to the military *trial and intermediate appellate* court rules contained in the MCM.

82. 1996 DOD Directive, *supra* note 31. *See also supra* notes 47-52 and accompanying text for the superseded 1985 directive.

83. 1996 DOD Directive, *supra* note 31, encl. 2, at E2.4.2.

84. *Id.* encl. 2, at E2.4.6.

85. *Id.*

86. *See supra* note 78.

87. 1996 DOD Directive, *supra* note 31, encl. 2, at E2.1.4.

proposed amendments resulting from the three annual reviews conducted since this 1996 DOD Directive was issued indicates that prior practice remains unchanged. To the extent that one can find any indication at all of the "basis and purpose" of the many changes proposed in the last three years, it is the usual summary that traditionally has been prepared for inclusion in the "Analysis" section of the *MCM*. This is the identical type of statement that has been found "less than satisfactory"[88] by the ABA to allow for meaningful review and comment.[89]

What is perhaps most surprising is that, although the 1996 DOD Directive "canceled" and superseded the 1985 version of the same directive, it is the former version which—four years later—remains codified at 32 C.F.R. Part 152. The failure to publish and file the directive in the Federal Register, and thus to update the Code of Federal Regulations, only results in confusion as to what the current law and practice really is. In addition to publishing the procedures for amending the *MCM* in the CFR, the DOD should consider placing them in the *MCM* itself, where they will be readily available to the users of the *Manual* (who are the ones most likely to have suggestions for change).

C. 2000—Changes to JSC Procedures Implement Most of Recommendation 115

In 1997 SCAFL proposed—and the ABA adopted—a second recommendation (100)[90] regarding *MCM* rule making, which, like the earlier 1995 Recommendation, was opposed by DOD. It has received no action. Despite the lack of implementing action in DOD, the active consideration of aspects of the military justice system by SCAFL continued, as did the active dialogue between SCAFL and DOD and the JSC.

In the spring of 1999, at its meeting in Groton, Connecticut, SCAFL considered two versions of a proposed report and recommendation calling

88. *See supra* note 74 and accompanying text, and note 79.

89. *See* Notice of Proposed Amendments, 62 Fed. Reg. 24,640 (May 6, 1997); Notice of Proposed Amendments, 63 Fed. Reg. 25,835 (May 11, 1998); Notice of Proposed Amendments, 64 Fed. Reg. 27,761 (May 21, 1999). In addition to these three "Annual Review" proposals, one additional proposal addressing the offense of adultery was promulgated on 14 August 1998. Notice of Proposed Amendments, 63 Fed. Reg. 43,687. This proposal, while containing a statement of the reason for the proposal in general, also lacked any statement of the "basis and purpose" for the actual changes to the *MCM*.

90. *See infra* notes 100-125 and accompanying text.

for Congress to use the occasion of the fiftieth anniversary of the enactment of the UCMJ as an appropriate occasion to require (or itself conduct) a comprehensive review of the military justice system, something not accomplished in many years. One version would have had the review accomplished by Congress, the other by a diverse and broadly constituted commission. The proposals were discussed, and the concept was preliminarily adopted, subject to a revision of the report.[91] At SCAFL's next meeting in August 1999, the proposal was tabled, and a redraft of the report was ordered. In October 1999, at the SCAFL meeting in Washington, D.C.,

> three of the five senior service attorneys were present at the meeting and spoke strongly against the recommendation . . . as unnecessary . . . [but] . . . the TJAGs indicated their belief that there were things that could be done to address the concerns of the ABA and legal commentators, and that they could do a better job of seeking and accounting for public comments and proposals to modify the system. Specifically addressed were providing a summary of comments received and the rational for not adopting suggested changes.[92]

At the next SCAFL meeting, at the ABA mid-year meeting in Dallas on 12 February 2000, during the discussion on the redrafted UCMJ review commission proposal, Major General Walter Huffman, The Judge Advocate General (TJAG) of the Army, speaking for the service branch TJAGs, announced that a new document (Internal Organization and Operating Procedures of the Joint Service Committee on Military Justice) had been adopted that substantially modified the military rule-making process.[93] General Huffman announced the new procedures in general terms, and distributed copies of the new regulation. The following, the most significant of the new procedures, have been keyed to the relevant paragraphs of the regulation set forth in the Appendix to this article:

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91. *See* AMERICAN BAR ASSOCIATION, STANDING COMMITTEE ON ARMED FORCES LAW, AGENDA, Tab A (Aug. 7, 1999).

92. MIL. JUST. GAZ. No. 71 (Nov. 1999).

93. The new regulation is reproduced in its entirety in the Appendix. *See* JSC 2000 PROCEDURES, *supra* note 39. Many of the procedures set forth in the new regulation closely follow the earlier JSC 1980 Procedures and this document presumably supersedes the earlier document. *See* JSC 1980 PROCEDURES, *supra* note 30.

a. An annual call for proposals would be sent to appropriate entities, including the judiciary, trial and defense organizations, judge advocate general schools, etc. [¶¶ III.B.1, III.B.2.]
b. An invitation would be published in the *Federal Register* inviting the public to submit proposals. [¶¶ III.B.4, II.A.6]

c. All proposals received would be acknowledged in writing. [¶ II.A.3.]

d. All proposals received from the public would be acknowledged in writing, [¶ III.D.3.a.] and placed on the agenda for the next meeting of the JSC. [¶ III.D.3.b.] The individual or entity submitting such a proposal would be notified in writing whether the JSC voted to decline the proposal as not within the JSC's cognizance, to reject it, to table it, or to accept it. [¶ III.D.3.c.] (It does not appear, however, that any statement of the reasons for the JSC's decision is required to be given as part of the notice.)

e. Except for those submitted by the DOD General Counsel or the Code Committee (and presumably by the public), all proposals are required to be signed by a responsible official, [¶ III.D.1.] and to contain "a summary of the problem, a discussion of various solutions considered in addressing the problem, and a recommended solution viewed as best suited to solve the problem." [¶ III.D.2.]

f. All proposals would be published for public comment in the Federal Register "in accordance with DoDD 5500.17, Enclosure 2, paragraph E2.4." [¶ II.A.6.][94]

g. Comments received would be summarized, and an explanation of JSC action to adopt or not to adopt suggested changes, and the reasons why, will be prepared. Both will be published in the Federal Register. [¶ II.A.7.]

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94. Paragraph E2.4.2. of Enclosure 2 to DOD Directive 5500.17 requires that in most cases "[t]he full text of proposed changes, including analysis and discussion, shall be published." Presumably this "analysis and discussion" would (it certainly *should*) include the full rationale required to be submitted by ¶ III.D.2. of the new JSC procedures.

As noted in favorable comments at the SCAFL meeting,[95] the new regulations seem to substantially implement the ABA's 1995 Recommendation 115 calling for Administrative Procedure Act (APA)/Federal Register-type rule making for *MCM* changes. Once effected, there *should be* no noticeable difference in the processing of these rules and the processing of other important federal rules that are subject to the APA (and which receive full publication, with a preamble setting forth the background and rationale for proposed rule changes, and which receive an accounting of the department's views of substantial comments received when promulgating final rules).[96] After hearing these new procedures, and further discussion, SCAFL elected to cancel further consideration of the proposal for a UCMJ review commission.[97]

The promulgation of this new regulation is a giant step forward in the process of *MCM* rule making. The DOD had maintained for years that such publication and accounting for action on proposals is not required by law.[98] However, there is no prohibition to following procedures equivalent to the APA rule-making procedures when appropriate,

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95. *See* MIL. JUST. GAZ. No. 75 (Feb. 2000).

96. Whether in fact the new JSC procedures will bring this rule-making process into harmony with other APA rule making has yet to be shown. An apparent divergence in the JSC 2000 Procedures is that there is no obligation to set forth reasons for the initial JSC action on a proposal submitted in response to a Federal Register invitation. Paragraph III.D.3. addresses processing of proposals from *other than* DOD agencies and the Code Committee. This paragraph states that the "Chairman will acknowledge receipt of the proposal in writing." Paragraph III.D.3.b. requires the proposal to be "placed on the agenda of the next JSC meeting and discussed according to procedures for new business [which provide four options: to decline the proposal as not within the JSC's cognizance, reject it, table it, or accept it]." Paragraph III.D.3.c. states: "The individual or agency submitting the proposal shall be notified in writing whether the JSC voted to decline the proposal as not within the JSC's cognizance, reject it, table it or accept it." There is no requirement that there be any reasons stated for the action taken. This seems, in light of the discussions at the SCAFL meeting, and the intent in adopting the new procedures, to be an oversight in the new regulation—one which should be corrected.

97. MIL. JUST. GAZ. No. 75 (Feb. 1999).

98. 5 U.S.C. § 553(a)(1) exempts "a military or foreign affairs function" from the rule-making provisions of the Administrative Procedure Act. *See generally* Thomas R. Folk, *The Administrative Procedure Act and the Military Departments*, 108 MIL. L. REV. 135 (1985). Whether military court rule making, in the normal course of events, in peacetime, properly fits within this exemption, has never been adjudicated. Whether court rules for a system of justice such as this (which tries every manner of crime during both peace and war, and has power to sentence offenders to death) *ought* to fit into this exemption is a question which can be addressed as a matter of public policy. It appears that that policy call has now been made, and at least starting in 2000, the determination is that changes to the

even if not strictly required, and to do so is not novel.[99] For DOD to do so in this instance is the right thing to do, and the department and the military services should be recognized and credited for taking this step.

In view of the importance and public nature of the activity now set forth in these operating procedures, however, some more formal mechanism for promulgation should be chosen than the JSC's internal operating procedures document, which is signed only by the members of the JSC. These regulations ought to be more officially promulgated, such as by an amendment to DOD Directive 5500.17. Thereafter, as noted in the prior section, the DOD directive should be published in the CFR, and the procedures should be placed in the *MCM* as well.

IV. Recommendations for the Future

Despite the recent changes and advances, the DOD and the JSC still have before them at least two major recommendations for change to this rule-making process that are designed to address deficiencies in the process that were not addressed either by ABA Recommendation 115 or by the recent February 2000 changes to the operating procedures. Until these are seriously studied, and until they are implemented in some substantial form, this system will still not be adequate either to instill public confidence or to ensure that the best rules are adopted.

A. 1997—ABA Recommendation 100

In February 1997, the ABA House of Delegates adopted Recommendation 100, sponsored by SCAFL (along with a number of other entities). The recommendation called for a major revision in the way the *MCM* rule-making process was carried out and for changes to the entities responsible for proposing changes to the *MCM*. The recommendation read as follows:

> RESOLVED, That the American Bar Association recommends that federal law be amended to model court-martial rule-making procedures on those procedures used in proposing and

98. (continued) rules for this system of justice ought to—and henceforth will—follow rule-making procedures essentially equivalent to those set forth in the APA. It is clearly a policy call that the ABA and other commentators should—as this one does—heartily applaud.

99. *See, e.g.*, *supra* note 81.

> amending other Federal court rules of practice, procedure, and evidence by establishing:
>
> (l) a broadly constituted advisory committee, including public membership and including representatives of the bar, the judiciary, and legal scholars, to consider and recommend rules of procedure and evidence at courts-martial;
>
> (2) a method of adopting rules of procedure and evidence at courts-martial which is generally consistent with court rule-making procedures in Federal civilian courts;
>
> (3) requirements for reporting to Congress [and] a waiting period for rules of procedure and evidence at courts-martial.[100]

Clearly this recommendation represents a significant step past the APA/Federal Register-type notice and comment rule making that had been the thrust of SCAFL's recommendation two years earlier. It is important to review how and why the issue had moved forward to a call for a new rule-making process paralleling that in other federal courts, and the substantial development that had occurred in the analysis by SCAFL members of what was at the heart of the problem in *MCM* rule making.

Throughout 1995 and 1996, SCAFL had maintained an ongoing dialog with representatives of the JSC and the DOD general counsel's office regarding the *MCM* rule-making process and the issues raised by Recommendation 115.[101] As the discussions continued, it became clear that the DOD was not disposed to implement Recommendation 115. The reissuance of DOD Directive 5500.17 on 8 May 1996,[102] with no mention of Recommendation 115 more than a year after its adoption, made it apparent that the DOD was unwilling to require the kind of explanations and rationale for *MCM* changes that the bar was seeking.

A variety of suggestions for improving the rule-making process continued to be discussed within SCAFL and with the representatives of the DOD and the JSC. As these discussions progressed, an awareness developed within SCAFL that, even if Recommendation 115 were adopted, it would not be able to solve the more fundamental problems inherent in the

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100. ABA RECOMMENDATION 100 (adopted Feb. 1997).

101. REPORT TO ACCOMPANY RECOMMENDATION 100, at 4 (Feb. 1997) [hereinafter 1997 ABA REPORT].

102. *See supra* notes 82-89 and accompanying text.

JSC rule-making apparatus. Much earlier, SCAFL had been aware of (and cited) the broad public notice and "on the record" comment process followed by the advisory committees charged with recommending changes to other federal court rules (such as the Federal Rules of Evidence, and the Federal Rules of Criminal Procedure).[103] It was a short step beyond that to look also at the *composition* of those advisory committees, which under federal law were required to be composed of "members of the bench and the professional bar and trial and appellate judges,"[104] and to realize that the JSC did not fare well by comparison. SCAFL noted that the voting membership of the JSC consists of only five members, one senior uniformed attorney for each service, and quoted from an "authoritative source" that identified the JSC members as "the officers responsible for criminal law in the armed forces."[105] SCAFL noted also that "there is no representation on the JSC from the bench or bar, including the defense bar, from academia, or from the public generally."[106] The broader advisory committees employed in other federal rules "are designed to secure 'as broad an outlook and base as possible' in studying and recommending court rules and rules changes" to the Supreme Court, the congressionally authorized rule maker for such federal rules.[107] Moreover, SCAFL observed that the procedures followed by the JSC were not the "type of open and public rule-making procedures established for the Federal court rule-making process, which are designed to instill public confidence in the courts, as well as to insure that the best possible rules are adopted."[108] Finally, the Committee observed that the other federal rules were required to be reported to Congress, with "an appropriate waiting period required to ensure effective congressional oversight."[109] Because of these factors, the Committee reached the conclusion that "the DOD process, even if modi-

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103. *See supra* note 77.

104. 28 U.S.C. § 2073(a)(2) (2000). "The Advisory Committee on Criminal Rules has 12 members from the bench, bar and academia, in addition to the chair, and is assisted by a reporter, a secretary and a liaison member." 1997 ABA REPORT, *supra* note 101, n.9 (quoting West, *Federal Civil Judicial Procedure and Rules*, xxvii (1996 ed.)).

105. 1997 ABA REPORT, *supra* note 101, at 8 (setting forth verbatim the same quotation from GILLIGAN & LEDERER previously addressed). *See supra* note 35 and accompanying text.

106. 1997 ABA REPORT, *supra* note 101, at n.3.

107. *Id.* at 2.

108. *Id.* at 2, 3.

109. *Id.* at 3. The *MCM* rules were, from 1950 until 1990, required to be reported to Congress. However, "in 1990, as part of the Defense Authorization Act Pub. L. 101-510 and Title XIII Reduction in Reporting Requirements, Congress inexplicably repealed the reporting requirement of Article 36, UCMJ." *Id.* at 8.

fied, would remain unable to provide the President with the benefits now enjoyed in every other Federal court rule-making process."[110]

The 1997 ABA Report includes an extensive review of the background and policy considerations underlying the Rules Enabling Act and related statutes[111] under which the judicial conference of the United States and the federal rules advisory committees operate, and in which rules are proposed in a process that is entirely "on the record," with meetings noticed in the Federal Register and open to the public, and with all papers, proposals, minutes, and the like, available to the public.[112] The report noted also that the federal rule-making process satisfies long published ABA policy on the subject, but that the military process falls short. SCAFL could find no military necessity justifying the current procedures, and concluded that a similar process to that followed by the Federal Judicial Conference and the federal court rules advisory committees would substantially benefit the military rule-making process, result in better rules, and enhance public confidence in the resulting rules, as well as in the military justice system as a whole.[113]

In reaching its recommendations, SCAFL did specifically consider actions that could be taken by the DOD both to implement Recommendation 115 or to modify or expand the operation of the JSC. One option had repeatedly surfaced and been given serious consideration by SCAFL: the expansion of the JSC to include public members (as had been done in 1983 with the Code Committee).[114] The Department of Defense and JSC representatives vigorously opposed this option, arguing that the JSC was an "internal" DOD committee, and that it would be inappropriate to add public members, or to deprive DOD of this internal committee, which also was tasked with proposing legislative proposals to amend the UCMJ. The DOD and JSC also argued that there were Federal Advisory Committee Act considerations,[115] and that an advisory committee with outside mem-

110. *Id.* at 4.

111. *See, e.g., id.* at 4; 28 U.S.C. §§ 2071-2077, §§ 331-335.

112. 1997 ABA REPORT, *supra* note 101, at 5-7, 9-10.

113. *Id.* at 11, 12.

114. *See* Pub. L. No. 98-209, § 12(a)(1) (1983) (amending 10 U.S.C. § 867(g)). This 1983 amendment, in addition to adding two public members to be appointed by the Secretary of Defense, added the senior lawyer from both the Marine Corps and the Coast Guard to the Code Committee, previously comprised only of the judges of the Court of Military Appeals and The Judge Advocates General.

115. Some of the considerations advanced were the policy against the proliferation of advisory committees, the cost, and the fact that such a committee would introduce additional delay into the process of adopting rule changes.

bers was inappropriate for legislative or other internal DOD review functions. SCAFL accepted the logic of this argument, and concluded that what was needed was not an expanded internal committee, but rather a separate advisory committee, similar to the other federal advisory committees, which could draw from all sources in making proposals.[116]

SCAFL concluded that even full implementation of Recommendation 115 would be insufficient to address the concerns that now were evident.

> The Standing Committee is now persuaded that a more fundamental change is necessary, consistent with the practice in Federal civilian courts. The present Recommendation does not address in any way the process employed within the Department of Defense (DOD). Rather, it reflects the Standing Committee's view that that DOD process, even if modified, would remain unable to provide the President with the benefits now enjoyed [by the Supreme Court as rulemaker] in every other Federal court rule-making process.[117]

The DOD opposed the adoption of Recommendation 100 in the strongest terms.[118] The DOD argued, inter alia, that the proposal would substantially lengthen the process with negligible value added, would "burden, and hence diminish, the authority of the President, the DOD, and the military departments," ignored the unique expertise in the military departments, and was unnecessary since the process "is not broken and does not need mending."[119] In response to this letter, Colonel Frank Moran, a retired Air Force judge advocate and the then-Chair of SCAFL,[120] specifically challenged the underlying premise that "the Presi-

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116. The option of expanding the JSC to include other "internal" members, from the military trial and/or appellate judiciary, or the military defense, was surfaced at the SCAFL meeting in October 1999. "One TJAG raised the possibility of expanding the Joint Services Committee widely considered to be currently understaffed, to include voting representatives from the military judiciary and military defense bar." MIL. JUST. GAZ. No. 71 (Nov. 1999). Such an expansion, if implemented, would help to meet some of the concerns regarding the limited and homogeneous membership of the JSC. Both this option, and the possibility of putting public members on the JSC, were again raised at the February 2000 SCAFL meeting, but once again drew essentially negative responses from DOD and JSC representatives.

117. 1997 ABA REPORT, *supra* note 101, at 4.

118. Letter from Judith A. Miller to N. Lee Cooper (President, ABA) (Jan. 21, 1997). This letter was co-signed by the general counsels of each of the military departments, each of the Judge Advocates General, and the Staff Judge Advocate to the Commandant, USMC.

119. *Id.* at 2.

dent could not substantially benefit from additional expertise, including that of this Association, in the process of military court rule making."[121] He quoted at length from General Nelson's 1994 letter[122] in response to the contention that the system was "not broken." He confirmed that rather than ignoring the expertise within the DOD, the committee had acknowledged it, but questioned "the lack of breadth of the [JSC's] expertise," and reached the conclusion that the "breadth of expertise which will be available in an advisory committee will add substantial value to the considerable (but limited) perspectives of the military members of the JSC."[123] Rather than diminishing the President's power, that power would be effectively enhanced, since "the resultant rules forwarded for consideration . . . would be of higher quality, and would come with full and public consideration and justification."[124] In summary, and against the remaining arguments, Colonel Moran concluded definitively:

> I feel strongly that the military rule-making process desperately needs expanded perspectives and experience by the addition of military and civilian counsel and judges, and academicians, all who may have substantial experience in military law. The adoption of a more open process modeled on one that has worked so successfully in other federal courts is bound to improve the final product and enhance the President's court-martial rule-making function.[125]

When the debating was concluded, the House of Delegates adopted the proposal. To date, there has been no apparent change to the position of the DOD on the recommendation.

B. General Hodson's 1973 Call for a Military Judicial Conference

What the SCAFL proposal did not do is precisely define how its military rules advisory committee would interact with the JSC, and how it would fit into the structure of presidential rule making. What is clear is

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120. Letter from Francis S. Moran, Jr. to N. Lee Cooper (Jan. 27, 1997) [hereinafter Moran Letter].

121. *Id.* at 1.

122. *See supra* note 67 and accompanying text.

123. Moran Letter, *supra* note 120, at 2.

124. *Id.* at 3.

125. *Id.*

that under this proposal, the President's authority to act as rule maker, both under statute and under broader constitutional authority, would be unchanged.[126] SCAFL believed its proposal "would complement the expertise of the Joint Service Committee,"[127] and that the "President in exercising his congressionally authorized rule-making for courts-martial should be afforded the benefits of participation and assistance of the civilian professional bar as well as the military professional bar, in a public rule-making process."[128] The clearest statement of the interrelationships comes from Colonel Moran's response to the DOD General Counsel:

> The only thing that will change is that all proposed rules, whether proposed within DOD or from without, would be considered by a broadly constituted committee which would bring to the table considerably more breadth and expertise than is now the case, and that the resultant rules forwarded for consideration within the administration for implementation by the President would be of higher quality, and would come with full and public consideration and justification. The President's authority would be no less than were he to create an advisory committee under current authority for that purpose.[129]

Nowhere in the reports or discussions of SCAFL, over the two-year period that the 1997 ABA Report was developed, is there any mention of General Hodson's earlier recommendation that "a Military Judicial Conference, headed by the Chief Judge of the Court of Military Appeals, be established and given power to prescribe rules of procedure and evidence,"[130] and it is clear that the committee was unaware of it. Had the members known of this proposal, there is no doubt that it would have been given consideration, and would have been cited as persuasive authority in

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126. "The President's authority is unchanged." *Id.* SCAFL made no specific recommendation to change Article 36, UCMJ, but Colonel Moran noted that "[t]he President's authority would be no less than were he to create an advisory committee under current authority for that purpose. In fact, the Recommendation contemplates a statutory committee in part due to refusal of DOD in the past to consider and recommend that such a committee be established." *Id.*

127. 1997 ABA REPORT, *supra* note 101, at 11.

128. *Id.* at 11-12. The Report immediately thereafter lists the benefits of this proposal: "Both the quality of the resulting military court rules, and the public's confidence in military justice will be enhanced. The military court rule-making process will then be deserving of the same respect and public confidence presently accorded rules for civilian Federal courts." *Id.* at 12.

129. Moran Letter, *supra* note 120, at 3.

130. Hodson, *supra* note 8, at 605.

support of the principles underlying their proposal. Perhaps more, SCAFL may well have modified its proposal to use the same "military judicial conference" language used by General Hodson. The two proposals seem to be identical in their intended effect, as well as in virtually all of their particulars. Indeed, while SCAFL in calling for a rules advisory committee never took the next step to call for a "military judicial conference," its report spends several pages setting forth the statutes and policy underlying the Rules Enabling Act and the related statutes which authorized the advisory committees formed within the structure of the Federal Judicial Conference. SCAFL identified this federal structure as the model for its proposed changes to military court rule making. SCAFL called for the establishment of an advisory committee with precisely the same broad composition and open and public rule-making procedures as are followed by the federal rules advisory committees.

Regrettably, General Hodson did not develop his recommendation for a military judicial conference in any detail. One can surmise, however, from his use of the term "judicial conference" that what he envisioned is exactly that same sort of structure that has been in place at least since 1958 in the civilian court rule-making process.[131] A review of that process, both as set forth in the 1997 ABA report and in other sources, indicates that General Hodson's proposal is entirely consistent with that of SCAFL, but adds the judicial conference element, allowing for a more clear understanding of how the SCAFL recommendation could be implemented. Application to the military of a similar judicial conference structure to that employed in the federal court arena would clearly define the place of the military court rules advisory committee in the overall structure.

Under the civilian model, the Supreme Court is the rule maker, and acts on recommended changes which are initially developed by one of five advisory committees, are then reviewed by the "standing committee" (Committee on Rules of Practice and Procedure), and thereafter reviewed and approved by the judicial conference.[132] "The Standing Committee and the various advisory committees are composed of federal judges, practicing lawyers, law professors, state chief justices, and representatives of the

131. *See* WEST, FEDERAL CIVIL JUDICIAL PROCEDURE AND RULES ix (1999).

132. ADMINISTRATIVE OFFICE OF THE U.S. COURTS, THE FEDERAL RULES OF PRACTICE AND PROCEDURE (1993) [hereinafter FEDERAL RULES PAMPHLET]. This pamphlet, produced by the Administrative Office, sets forth a concise summary of the rule-making structure and process. With only one advisory committee in the military structure, the need for the level of review provided by the "Standing Committee" would disappear, as would the need for the Standing Committee itself.

Department of Justice."[133] The committees have the assistance of the Support Office of the Administrative Office of the U.S. Courts.[134] The process followed by the advisory committees is totally open and "on the record."[135] The entire process "demands exacting and meticulous care," is "time-consuming,"[136] and involves a "minimum of seven stages of formal comment

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133. *Id.* "Each Committee has a reporter, a prominent law professor, who is responsible for coordinating the committee's agenda and drafting appropriate amendments to the rules and explanatory committee notes." *Id.* A military rules advisory committee would presumably have a similarly qualified reporter. It is also assumed that the DOD would be prominently represented, along with the DOJ.

134. A military rules advisory committee would need to have adequate administrative support. Such support could be provided by the military judicial conference, either independently or perhaps through arrangement with the Support Office of the Administrative Office of the U.S. Courts. Indeed, it would appear that some savings of resources and some gleaning of expertise could be had by the latter arrangement. In previous studies regarding the military justice system, it has normally been DOD that has supplied administrative support. As the entity which represents a party in all litigation in this system, and that administers the system within the services, it would seem appropriate that DOD not be the entity tasked to provide administrative support. (It is noted that DOJ does not serve the role of support agency to the Federal Judicial Conference.) On the other hand, DOD provides administrative support to the Court of Appeals for the Armed Forces, apparently with no suggestion that this would be a function better served by the Administrative Office of the U.S. Courts or an equivalent body.

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> Meetings of the rules committees are open to the public and are widely announced. All records of the committees, including minutes of committee meetings, suggestions and comments submitted by the public, statements of witnesses, transcripts of public hearings, and memoranda prepared by the reporters, are public and are maintained by the secretary. Copies of the rules and proposed amendments are available from the Rules Committee Support Office.

FEDERAL RULES PAMPHLET, *supra* note 132. Contrast the closed nature of the process by the current military court rules committee, the JSC.

136. As a result of this careful process, it "usually takes two to three years for a suggestion to be enacted as a rule." *Id.* This period might on first glance seem too long for military rules that may have to be amended quickly to adapt to changing (for example, wartime) circumstances. However, it took two years to prepare the changes that resulted in the Military Rules of Evidence, and four years to prepare the changes that substituted the Rules for Courts-Martial and the rest of the new *MCM* in 1984 for the prior narrative version. In addition, it typically now takes two years (or often much more) to enact changes under the current process. For example, rules implemented in Executive Order (E.O.) 12,888 signed by President Clinton on 23 December 1993, were originally noticed to the public on 29 June 1990. 55 Fed. Reg. 26,740. This amounts to a three-and-one-half year delay from initial notice of proposed rules to enactment. *The delay is actually considerably longer.* The initial notice to the public does not constitute the beginning of the process, but is actually the *end* of the JSC process, and reflects the judgment of the JSC that the rules, initially pro-

and review."[137] However, because there would be but one rules advisory committee in a military judicial conference model, there would be no need for the coordinating functions of a "standing committee," and this step would be unnecessary. Accordingly, what looks like a lengthy process should actually be somewhat shorter in the military judicial conference structure.

The SCAFL proposal to add "three critical features" to the current practice ("an advisory group with broad representation, . . . a broad, public rule-making method, . . . [and] meaningful congressional oversight"[138]) melds seamlessly into Hodson's proposal for a military judicial conference patterned after the civilian judicial conference model.[139] It would, however, necessitate certain changes to current practice.

Under the current scheme, the only statutory requirement to review the military justice system is placed on the Code Committee.[140] The JSC has no statutory mandate to conduct an annual review.[141] It is envisioned that the military judicial conference, once created, would be given the stat-

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136. (continued) posed on earlier dates (which are not made available to the public) ought to be adopted. Other recent rules have experienced lengthy delays as well. For example, rules implemented by E.O. 12960 on 12 May 1995, were originally noticed to the public on 14 April 1993 (58 Fed. Reg. 19,409) or on 14 April 1994 (59 Fed. Reg. 17,771). The conclusion to be drawn is that the civilian process, a well-ordered one, actually might result in rules being enacted more swiftly than has been the common experience under the current practice. The President's authority to bypass the usual process, and to implement rules on an emergency basis, would remain intact.

137. 1- Initial consideration, 2- Publication and public comment, 3- Consideration of public comment and final approval by the Advisory Committee, 4- Approval by the Standing Committee, 5- Judicial Conference approval, 6- Supreme Court approval, and 7- Congressional review. FEDERAL RULES PAMPHLET, *supra* note 132.

138. 1997 ABA REPORT, *supra* note 101, at 11.

139. SCAFL concluded that a military rule-making process modeled on the civilian model "which has worked so successfully . . . is bound to improve the final product and enhance the President's court-martial rule-making function." Moran Letter, *supra* note 120, at 3.

140. 10 U.S.C. § 946(a) requires the Code Committee to conduct "an annual comprehensive survey of the operation of this chapter." The Code Committee is comprised of the judges of the Court of Appeals for the Armed Forces, the Judge Advocates General of the Army, Navy, and Air Force, the Chief Counsel of the Coast Guard, the Staff Judge Advocate to the Commandant of the Marine Corps, and two members of the public appointed for three-year terms by the Secretary of Defense. 10 U.S.C. § 946(b), (d).

141. The JSC's authority and mandate derive from DOD Directive 5500.17, which implements the provision in E.O. 12473 that requires that the Secretary of Defense conduct an Annual Review and recommend appropriate amendments. *See supra* note 46 and accompanying text.

utory task of conducting an annual review/comprehensive survey of the operation of the military justice system, and that the mechanism to accomplish that would be patterned after 28 U.S.C. 331, the statute that sets forth the Federal Judicial Conference functions, including that of carrying on a "continuous study of the operation and effect of the . . . rules of practice and procedure." The DOD and the JSC would be represented on the advisory committee, just as the Department of Justice (DOJ) is currently represented on the various federal rules advisory committees and the standing committee.[142] Concerning the membership of the military judicial conference, consideration should be given to including, in addition to judges from Court of Appeals for the Armed Forces, other military trial and appellate judges, and trial and appellate judges from the federal system.

With such a military judicial conference model, the JSC would presumably continue its present functions, operating as an internal DOD committee, and its proposals for changes to the *MCM* would be forwarded, along with those of other proposers, to the advisory committee, similar to the way the DOJ now makes proposals to the federal rules advisory committees. The advisory committee would in due course make recommendations directly to the military judicial conference. Once the military judicial conference completed its review, it would make its recommendations to the President as rule maker. Once approved by the President, the rules would be reported to Congress[143] prior to implementation. The precise mechanism for issuing the final rule could be through promulgation of an executive order, or by other mechanism set forth by statute. As noted above, though this process sounds lengthy, it should be less so than the federal rules process, which is accomplished in a two-to-three-year time frame from initial proposal to rule implementation.[144]

The SCAFL proposal, merged with the almost identical but more complete Hodson proposal, presents an appropriate and needed improvement that will provide significant benefits to the President as military court rule maker, will result in better rules, and will enhance the stature of the military justice system and the credibility of its rule-making process. No good reason exists not to implement this proposal.[145]

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142. *See* WEST, *supra* note 131, at xvii-xix.

143. In 1990, the requirement that amendments to the *MCM* be reported to Congress was removed. *See supra* note 109. Surely, reporting rules for court-martial to the Congress should rise to a level of importance that would exclude their elimination as a mere "paperwork reduction" measure, as occurred here.

144. *See supra* notes 136-137 and accompanying and following text.

145. Such a mechanism as outlined would not likely relieve DOD of responsibility

V. Conclusion

There can be no doubt that the military rule-making process has been in a state of evolution in the fifty years since enactment of Article 36 as part of the original UCMJ. That process has accelerated since 1978, and particularly since 1993. It took a quantum leap forward in February 2000 with the announcement of the new procedures for involving the public in a much more meaningful and accountable way. The process of change in the military court rule-making process is a dynamic one indeed.

Just as clearly, there can be no doubt that the process of change can, ought to, and will continue. The move to full-text publication of proposed changes, to public hearings, and now to accounting for public proposals has been dynamic and helpful. However, there is still no clear or enforceable mechanism to make available to the public the contents and justifications for the majority of proposals that are initiated: those generated within the DOD. This is a serious flaw in the current regulations. An open process that would allow for access not only to *all* proposals—*but to their justifications and explanations as well*—would clearly be a huge improvement.[146]

Similarly, the minutes of the meetings of the JSC (and of its working group) and the decisions on proposals generated within the JSC and the DOD remain unavailable to the public. The process, though vastly improved, still remains largely a secret one. In addition, the membership of the JSC continues to be the five officers chiefly responsible for the administration of military justice in the five services. The breadth of perspective available from judges and counsel, and from academia and the public, is not available during the decision-making process. As noted by SCAFL, even full compliance with the 1995 ABA recommendation calling

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145. for being the prime proposer of amendments to the *MCM*, but would limit the amount of direct control that the Department could exercise over the process and over the ultimate rules adopted. The influence of DOD, however, would likely be only marginally reduced. As reported by Professor David Schlueter at the November 1999 meeting of SCAFL in Washington, D.C., the DOJ is the "800 pound gorilla" in the Federal Criminal Procedure Rules Advisory Committee rule-making process, and it is rare and difficult for any amendments to be adopted without DOJ support. It is expected that DOD would be well represented on the advisory committee (as would DOJ) and would exercise similar influence. (Professor Schlueter serves not only as a member of SCAFL, but serves as the reporter for the Federal Criminal Procedure Rules Advisory Committee. WEST, *supra* note 131, at xix.)

146. Such a change would provide full implementation of ABA Recommendation 115.

for rule-making along APA/Federal Register lines would still leave the system unable to meet the goals set forth in virtually every policy statement from Congress or the ABA regarding court rule-making.

The process of change must continue to go forward. Twenty-seven years ago, one of the most renowned and respected students of this system recommended an extraordinary series of changes, including one to address the rule-making problem through the adoption of a military judicial conference. Twenty-four years later, unaware of his recommendation, the primary bar committee reviewing this system, comprised of very experienced present and former (mostly retired) military judge advocates, recommended changes along almost identical lines. General Hodson was no doubt a true visionary, and a thinker ahead of his time. Perhaps these proposals were far "out in front" a quarter-century ago; that can no longer be said. These are changes that need now to be given serious consideration—and to be implemented—by the policy makers and lawmakers who govern and operate this system.

Just as change is inevitable in the UCMJ and in the various rules contained in the *MCM*, so also is change inevitable in the process by which the UCMJ and the *MCM* are modified. The process, like the rubrics it produces, is a "work in progress." As review and consideration of the *process* of military court rule-making goes forward, one can only hope that it will not be very long before these reforms are adopted, thereby allowing the system to evolve into one which will provide greatly enhanced integrity for the system, along with vastly increased public confidence. The final words of SCAFL in its 1997 ABA report[147]

147. 1997 ABA REPORT, *supra* note 101, at 12.

APPENDIX

Internal Organization and Operating Procedures of the Joint Service Committee on Military Justice

I. Purpose. These operating procedures govern the operation of the Department of Defense (DoD) Joint Service Committee (JSC) on Military Justice. They are permitted by DoD Directive 5500.17, Role and Responsibilities of the Joint Service Committee (JSC) on Military Justice (May 8, 1996), Enclosure 2, paragraph E2.5.1.

II. Organization. The JSC Voting Group is headed by the Chairman. The chairmanship rotates biennially among the Services in the order Army, Air Force, Marine Corps, Navy and Coast Guard. An Executive Secretary is provided by the Chairman's Service. The Executive Secretary normally chairs the Working Group.

A. Duties of the Executive Secretary. The Executive Secretary is responsible for the general administration of the JSC including, but not limited to, the following:

1. Preparation of the agenda for each meeting;

2. Notification of the representatives of the JSC of each meeting, including forwarding agenda and copies of proposals, at least one week prior to the meeting;

3. Receipt and acknowledgement of and accounting for all proposals for consideration by the JSC. A log of the proposals on hand, with appropriate columns indicating date received, date acknowledged and current status, shall be maintained. Copies of the log shall be distributed and representatives briefed, as necessary, to keep them current on proposals before the Committee;

4. Preparation of the minutes of each meeting's proposals;

5. Maintenance of files on all proposals received and all minutes of the Committee;

6. Arranging for publication in the Federal Register of proposals in accordance with DODD 5500.17, Enclosure 2, paragraph E2.4; the same notice shall include an invitation for members of the public to submit proposals for consideration in the next annual review cycle;

7. Summarizing comments received during the public comment period, providing an explanation of action taken, and arranging for publication of both in the Federal Register after coordination with the Office of the General Counsel, DOD; and

8. Such other actions as may be directed by the Chairman.

B. Duties of the Working Group. The Working Group consists of representatives of the Army, Navy, Air Force, Marine Corps, Coast Guard and the non-voting member of the Court of Appeals of the Armed Forces. It assists the Voting Group in staffing various proposals. It conducts studies of proposals and other military justice related topics at the direction of the Voting Group, and makes reports to the Voting Group, as directed.

III. Operating Procedures. The following operating procedures are hereby established:

A. Annual Review Cycle: Each annual review cycle begins on 1 May. Changes proposed by the JSC shall be forwarded to the General Counsel, DoD, for action in accordance with the provisions of DoDD 5500.17 not later than the following 1 May.

B. Call for Proposals:

1. By not later than 31 January each year, JSC Service representatives shall ensure that a solicitation for proposals is sent to appropriate agencies within their respective services.

2. Such agencies shall include, but are not limited to, the judiciary, trial and defense organizations, and judge advocate general schools.

3. Upon receipt of proposals from service agencies, each JSC representative shall review all proposals received and sponsor proposals, as appropriate, to the JSC for consideration in the next annual review cycle beginning on 1 May.

4. Members of the public will be invited to submit proposals via notice in the Federal Register, in accordance with the procedures set forth in Sections II A(6) and III D(3).

C. Meetings:

1. The JSC shall meet at the call of the Chairman, or on the request of two members of the JSC.

2. Unless good reason exists to the contrary, each member shall be notified in writing of a meeting. Each notification shall include an agenda of the meeting and copies of proposals on which a vote will be taken.

3. The Chairman shall preside and conduct the meeting normally in the following sequence:

a. The minutes of the last meeting shall be approved by a majority vote.

b. Old business shall be discussed and disposed of in the same manner as new business.

c. New business shall be discussed and appropriate action taken. Except

where a member has not received a copy of a proposal at least one week in advance of the meeting and declines to waive that right, the JSC shall, by a majority vote, take one of the following actions on all proposals:

(1) decline to consider as not within the JSC's cognizance;

(2) reject the proposal;

(3) table the proposal (a tabled proposal shall be accepted or rejected within 6 months after it is tabled); or

(4) accept the proposal assigning it one of the following priorities:

(a) I (action shall be completed within three months);

(b) II (action shall be completed within six months);

(c) III (action shall be completed within one year).

4. A proposal deferred by a member due to insufficient notification shall normally be considered at the next Voting Group meeting.

5. The Working Group report on the status of each proposal referred to it shall be considered. The Chairman of the JSC may, at his or her discretion, grant an extension of up to 30 days from any priority deadline. Longer extensions shall be approved by a majority of the JSC.

6. Minutes for each Voting Group and Working Group meeting shall be prepared by the Executive Secretary and forwarded to each representative within seven working days. The minutes shall contain, at a minimum, persons attending the meeting, a summary of the matters considered and every action taken on a proposal.

D. Proposals:

1. Except for matters referred by the Code Committee or the DoD General Counsel, each proposal forwarded for consideration by the JSC shall be in writing signed by a (voting/non-voting) member of the JSC, the Judge Advocate General of a service of the armed forces, the General Counsel of the Department of Transportation, the Chief Counsel of the Coast Guard, or Staff Judge Advocate to the Commandant of the Marine Corps.

2. The proposal shall contain a summary of the problem, a discussion of various solutions considered in addressing the problem, and a recommended solution viewed as best suited to solve the problem. The proposal shall be sent to the Executive Secretary for inclusion in the agenda for the next meeting of the JSC.

3. Proposals received from individuals or organizations other than DOD agencies and the Code Committee shall be dealt with in the following manner:

a. The Chairman will acknowledge receipt of the proposal in writing.

b. The proposal shall be placed on the agenda of the next JSC meeting and discussed according to the procedures outlined for new business in Section III C(3)(c) above.

c. The individual or agency submitting the proposal shall be notified in writing whether the JSC voted to decline the proposal as not within the JSC's cognizance, reject it, table it or accept it.

E. Public Comment: Each service representative shall ensure that appropriate agencies within their respective services are notified when proposals are placed in the Federal Register for public comment.

F. Record Keeping. The Army, as Executive Agent for the JSC, shall establish and maintain a system of records for the JSC. As internal working documents, these records are exempt from disclosure under the Freedom of Information Act.

At minimum, records shall be identified by calendar year, whether Voting or Working Group, and subject. The Executive Secretary shall coordinate with the Executive Agent to insure that files and documents maintained by the him or her are delivered to the Executive Agent for inclusion in the system of records.

Signed this 2nd day of March, 2000.

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JOHN C. GREENHAUGH,
COL, JA, USA
Army Representative

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KENNETH R. BRYANT
CAPT, JAGC, USN
Navy Representative

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JAMES W. RUSSELL, III
COL, USAF
Air Force Representative

_____
MARC W. FISHER, JR.
LtCol, USMC
Marine Corps Representative

_____
JAMES R. MONGOLD
CAPT, USCG

Coast Guard Representative