A REPLY TO CAPTAIN GREGORY E. MAGGS'S "CAUTIOUS SKEPTICISM" REGARDING RECOMMENDATIONS TO MODERNIZE THE *MANUAL FOR COURTS-MARTIAL* RULE-MAKING PROCESS

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I. Introduction

Captain Gregory E. Maggs has prepared a thoughtful response[2] expressing his "cautious skepticism" for my proposals[3] to modernize the *Manual for Courts-Martial* (*MCM* or *Manual*)[4] rule-making process. Having carefully reviewed his response, I am happy to say that I am optimistic (and not merely "cautiously" so) that the modernization of the *MCM* rule-making process will continue, and that even after fifty years of development, this "work-in-progress" is far from finished.

My optimism is based on two principal factors.

First, Captain Maggs not only finds none of my proposals "radical or dangerous,"[5] but rather finds that "[i]ndeed, each is closely analogous to the federal civilian criminal justice system. In addition, no insurmountable legal obstacles would prevent their adoption."[6] There is, of course, already a close connection between military and civilian court rules themselves.

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2. Captain Gregory E. Maggs, *Cautious Skepticism About the Benefit of Adding More Formalities to the Manual For Courts-Martial Rule-Making Process: A Response to Captain Kevin J. Barry* 166 MIL. L. REV. 1 (2000).

3. Kevin J. Barry, *Modernizing The Manual For Courts-Martial Rule-Making Process: A Work in Progress*, 165 MIL. L. REV. 237 (2000).

4. *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000) [hereinafter MCM].

5. Maggs, *supra* note 2, at 7.

6. *Id.*

Article 36 of the Code[7] provides that military rules "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." It seems a logical next step that the *process* by which those rules are adopted might appropriately also follow the district court model, and thus reap the same benefits that the civilian court rule-making process has provided for many years. The federal civilian court rule-making process has been carefully structured to ensure that the best possible rules are adopted after public consideration by a broadly constituted and diverse committee of experts, in an open and transparent process that enhances public confidence.[8] Thus, I conclude not only that Captain Maggs raises no serious objection to adoption of my proposals, but also that his observations actually argue in favor of their adoption.

Secondly, my optimism is based on the fact that there is much in Captain Maggs's approach with which I can agree. Certainly any proposed changes to an established rule-making system ought to be approached with an appropriate degree of caution, and they should be carefully studied and considered to ensure that the changes would indeed produce the anticipated benefits. Where we depart is on his ultimate conclusion that these changes should be approached with "cautious *skepticism*." I do not believe his option for "skepticism" is well founded.

Captain Maggs states his conclusion as a "cost-benefit" result:

> [I]n light of the progress that already has occurred in the methods for amending the *MCM*, none of the proposals would yield significant new benefits. At the same time, all but one or two of the proposals would impose at least some significant burdens or costs. For these reasons, at least at the present, the JSC [Joint Service Committee on Military Justice], the DOD [Department of Defense], the President, and Congress should view Captain Barry's recommendations with cautious skepticism.[9]

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7. UCMJ, art. 36(a) (2000). The Uniform Code of Military Justice (UCMJ or Code) is codified at 10 U.S.C. §§ 801-946.

8. *See generally* Barry, *supra* note 3, at 271 nn.132-37 and accompanying text.

9. Maggs, *supra* note 2, at 7.

There are three ostensible underlying bases for Captain Maggs's cost-benefit assessment, and his ultimate conclusion, which he labels "preliminary considerations:"

> First, recent history suggests that the *MCM* probably will undergo only incremental changes for the foreseeable future. Second, the process of amending the *MCM* is largely irrelevant to most of the major military justice reforms now being urged. Third, changes to the *MCM* rule-making process would affect the present balance of powers between Congress and the President, possibly producing unintended adverse consequences.[10]

As will be discussed further below, each of these three assertions is fundamentally flawed—none can withstand critical analysis. Captain Maggs's conclusion based on them is thus similarly untenable. I will briefly address each of these three "preliminary considerations" in Section II below.

In Section III, I will review Captain Maggs's sevenfold division of my proposals, and his various arguments questioning the value of each proposal. I must immediately note, however, that Captain Maggs apparently did not grasp my actual, core proposal for change. I think it critically important that I be clear on this point, so I will restate my proposal as I previously summarized it: "[This article] concludes by calling for continued study with a view to *implementing General Hodson's 1973 recommendation*,[11] thus further advancing this 'work in progress'—the modernization of the military court rule-making process."[12] In my analysis of General Hodson's proposal, I concluded that implementing his recommendation

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10. *Id.* at 6-7.

11. General Hodson's recommendation was 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." *See* Barry, *supra* note 3, at 270 n.130 and accompanying text.

12. *Id.* at 241 (emphasis added).

13. My conclusion at the end of the discussion of the Hodson proposal, and immediately prior to the "Conclusion" section, read:

> The SCAFL [ABA Standing Committee on Armed Forces Law] 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 re-

would *necessarily involve implementing most of ABA (American Bar Association) Recommendation 100*.[13]

Captain Maggs's sevenfold division does make it clear that I also made recommendations that could immediately be implemented to substantially improve the *current* Joint Service Committee (JSC) process. I will address these, as well as my other recommendations, in Section III. Finally, in Section IV, I will reach conclusions on the costs and benefits of improving this rule-making system that are decidedly contrary to—and much more optimistic for this system than—those reached by Captain Maggs.

II. Each of the Three Bases for Captain Maggs's Analysis Is Flawed

In many ways Captain Maggs seems to present a reasoned and reasonable critique of my proposal, and there is truth in much of what he says. His principal objections are not that mine are bad proposals, but that they would, in his view, have too little beneficial effect, while creating additional administrative costs and inconvenience to the government. However, his analysis, and his various conclusions, miss the mark largely because he overlooks or fails to address important facts and arguments, many of which are set forth in my article. In pursuing his analysis, Captain Maggs too often makes assertions without providing a basis for them, while at the same time ignoring contrary conclusions I have reached, that are well supported.

For example, Captain Maggs states that to adopt a rule-making process patterned on that followed by the Judicial Conference of the United States would not provide a benefit, because "the civilian rule-making procedure tends to take a long time . . . [i]n many instances . . . several years . . . [while] [b]y contrast, the JSC annual review system results in a systemic review of the *MCM* within each year."[14] The implication that *MCM* regulations can be (or are) adopted in only one year not only is misleading,

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13. (continued)

> sult 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.

Id. at 274 (footnote omitted).

14. Maggs, *supra* note 2, at 27.

but also is simply incorrect. The military rulemaking process has been a slow and cumbersome one, often taking several years, as is clearly stated (with supporting documentation and examples) in my article.[15]

It is on such unsupported (and erroneous) assertions that Captain Maggs relies to raise doubts regarding the benefits of adopting improvements to this process. Because his premises are flawed, it is *his* conclusions (and not my proposals) that should now be viewed with an appropriate degree of skepticism.

Perhaps most important of the factors overlooked by Captain Maggs in his assessment are the impact of enhanced credibility and public confidence in the system, the reduction of criticism of the system (and of the rule-making process), and the improved quality of the rules adopted, all of which would directly ensue from the adoption of improvements to this process. Having thus overlooked the principal benefits of adopting the proposals, it is not surprising that Captain Maggs urges a skeptical approach to adopting these proposals.

A. Potential Changes to the *MCM* in the Foreseeable Future Are Not Unimportant

Captain Maggs first asserts that all the important changes to the *MCM* were made prior to 1984, and that the "nature of the *MCM* amendments" has changed since then.[16] He says that changes since 1984, and those for the future, are of limited significance, and serve only three purposes: to

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15. *See* Barry, *supra* note 3, at 272 n.136 and accompanying text. In addition to the discussion and examples in the original article, it is also worthy of note that amendments to the Federal Rules of Evidence (FRE) automatically take effect in the Military Rules of Evidence (MRE) eighteen months after their effective date, unless "action to the contrary is taken by the President." MCM, *supra* note 4, M.R.E. 1102. In 1998 the delay period for the President to act was extended from six months to eighteen months. *Id.* Appendix 22 at A22-61. Clearly six months was manifestly too short a period to propose and implement a contrary rule through the JSC process. Recent events have made it clear, however, that even the eighteen-month period is proving to be totally inadequate. For example, on 11 May 1998, the JSC published a proposed rule to retain former MRE 407, in lieu of a new MRE 407 which automatically became effective following the revision of FRE 407, which had been changed on 1 December 1997. As of late October 2000, more than twenty-nine months after the proposed rule was published, a change to the *MCM* to implement this proposed rule had yet to be signed by the President. Clearly this process is a *very* protracted one.

16. Maggs, *supra* note 2, at 8.

"correct errors or oversights in the existing rules, conform the rules of procedure and evidence to legislative changes to the UCMJ, or bring military law into alignment with civilian criminal law."[17] Because of these perceived limitations, Captain Maggs sees changes to the rule-making process as "less important," and states that "[t]he final results probably will not vary much no matter how amendments are processed before the President approves them."[18] This seems to be a somewhat myopic view of the importance of both the rule-making process and of the potential for important rule changes to be proposed in the future.

As an example supporting his thesis, Captain Maggs cites—as one of these simple procedural rule changes—the adoption of Military Rule of Evidence (MRE) 513, the psychotherapist-patient privilege, in 1999.[19] However, MRE 513 was decidedly not a simple rule change; rather it was an issue of great importance. Its importance (and thus potentially the importance of many yet to be proposed rules) is clearly shown by the fact that the initial promulgation of the proposed rule on this privilege[20] proved to be enormously controversial. The proposed rule was objected to by the American Psychiatric Association because it specifically declined to extend the privilege to active military personnel, and contained "too numerous, expansive and over broadly drawn" exceptions even for those persons who were purportedly protected by the proposed rule.[21] Even those who agreed that the privilege should not extend to persons subject to the UCMJ objected because the proposed rule did not adequately protect even those to whom it did apply, because the exceptions were "overly broad," and would "as a practical matter, eviscerate the protection of the psychotherapist-patient privilege and with it, any hope of mutual trust and security in the therapeutic relationship."[22] In its comments to the Joint Service Committee (JSC) on the proposed rule, the National Institute of Military Justice saw a direct tie between the deficiencies in the initial proposed rule and the process by which it had been prepared:

> Perhaps in none of the proposed rules is the failure to have a system in place which provides for broad perspective and expertise

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17. *Id.* at 9.

18. *Id.* at 7-8.

19. *Id.* at 10.

20. 62 Fed. Reg. 24,640, 24,643 (May 6, 1997).

21. Letter from Melvin Sabshin, M.D., Medical Director, American Psychiatric Association, to William S. Cohen, Secretary of Defense (June 24, 1997).

22. Letter from Russ Newman, Ph.D., J.D., Executive Director for Professional Practice, American Psychological Association, to Lieutenant Colonel Paul P. Holden, Jr., Joint Service Committee (July 10, 1997).

> to be considered and brought to bear more at issue than in this rule. The rule addresses a privilege which was, in the Supreme Court, the subject of a classic confrontation of historical practice and changing societal and judicial norms. NIMJ believes that the development of this rule should allow for substantial meaningful input from a wide range of sources outside the five members of the JSC so that the many societal and public policy issues raised can be explored.[23]

When the revised rule was finally adopted[24] (well more than two years after being proposed), drastic changes had been made, including extending the privilege to active military personnel (albeit with extensive exceptions), incorporating other changes to the application and the definitions, and slightly limiting the exceptions. It simply cannot be said that the process was unimportant. Had the initial process been more broad and inclusive, the rule initially proposed would likely have been substantially different. The process *is* important, even if the resulting rules are "only" rules of evidence or procedure.[25]

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23. Letter from Kevin J. Barry, Secretary/Treasurer, NIMJ, to Lieutenant Colonel Paul Holden, Jr., Joint Service Committee (July 10, 1997). NIMJ's comments included a detailed analysis of the inadequacies in the current JSC process. The letter is reproduced at MIL. JUST. GAZ. No. 51 (Oct. 1997).

24. Exec. Order 13,140, 64 Fed. Reg. 55,115 (Oct. 6, 1999).

25. Only later, in another context, does Captain Maggs acknowledge that the proposed rule for MRE 513 drew significant public comment, which resulted in changes to the rule. He does this when arguing that the current process adequately allows for public participation and comment. Captain Maggs notes that there was written public comment received from the American Psychiatric Association, American Psychological Association, and others, and that "persuasive testimony" was received at the public hearing. He notes that these comments concerned the failure to include "clinical social worker" among those included within the definition of "psychotherapist," and that as a result, the JSC modified the definition of "psychotherapist" to include "clinical social worker." Maggs, *supra* note 2, at 20. As noted above, the objections to the proposed rule went well beyond this one item, and resulted in other significant changes. What Captain Maggs also overlooks is the fact that the JSC has received persuasive testimony on other proposed rules at other public meetings in the last eight years, but has utterly ignored that testimony, and has promulgated final rules without either change to the proposed rule, or any acknowledgment that any comments or objections had been received. It was precisely this kind of insularity and unresponsiveness that impelled the ABA to initially take up the issue of military rule-making, and this unresponsiveness was cited by the SCAFL in its 1995 Report. AMERICAN BAR ASSOCIATION, REPORT ACCOMPANYING RECOMMENDATION 115 (adopted Feb. 1995) at 4. *See also*, Barry, *supra* note 3, at 254 nn.67-69 and accompanying text.

Two other examples, discussed in my article but not addressed by Captain Maggs, also illustrate this point. Rule for Court-Martial 1004, addressing the procedures by which capital punishment is awarded, has been amended four times since 1984,[26] and Military Rule of Evidence (MRE) 707, prohibiting the admission of polygraph evidence, was adopted in 1991.[27] Both involve rules adopted under the JSC procedures, both involve rules which generated major Supreme Court litigation,[28] and both involve issues fundamental to a fair trial.[29] The process by which they were amended or adopted might well have controlled the substantive outcome, especially with regard to MRE 707.[30] The process *is* important.

B. Major Reforms Can Be—and May Well Be—the Subject of Rule-making; The Process Is Far From Irrelevant

Captain Maggs's next caution regarding my proposals begins with the premise that "proponents of reforming the *MCM* rule-making process surely do not view changing the process as an end in itself. On the contrary, they presumably see their reform proposals as the means to an end. They must believe that a better rule-making process will facilitate adoption of better rules, producing an improved military justice system."[31] I absolutely agree with Captain Maggs on this point.

However, Captain Maggs then suggests that the "kinds of changes . . . reformers want to make" are only a small number of "familiar . . . concerns about the military justice system," and that those proposing change likely do so with the "hope that new procedures will overcome long-standing Department of Defense resistance"[32] on these issues. He limits his discussion to only three "recurring criticisms" of the system: independence

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26. Exec. Order 12,550, 51 Fed. Reg. 6497 (Feb. 25, 1986), Exec. Order 12,767, 56 Fed. Reg. 30,284 (July 1, 1991), Exec. Order 12,936, 59 Fed. Reg. 59,075 (Nov. 15, 1994), and Exec. Order 13,140, 64 Fed. Reg. 55,115 (Oct. 6, 1999).

27. Exec. Order 12,767, 56 Fed. Reg. 30,284 (July 1, 1991).

28. Both these issues were addressed in my original article in some detail. *See* Barry, *supra* note 3, at 242 n.17.

29. Captain Maggs acknowledges the potential importance of aggravating factors, the subject of more than one of these amendments to RCM 1004. *See* Maggs, *supra* note 2, at 17. *See also* MCM, *supra* note 4, Appendix 21 at A21-71 to A21-76.

30. See Barry, *supra* note 3, at 242 n.17, for a discussion of the deference the Court gave to the rule implemented by the President in *United States v. Scheffer*, 118 S. Ct. 1261 (1998), and the potential impact of the rule-making process on such rules.

31. Maggs, *supra* note 2, at 11.

32. *Id.*

of the military judiciary, the current method of selecting court-members, and the multiple roles of the convening authority. He concludes that such "major military justice reforms"[33] are unlikely to ever be the subject of Presidential rule-making.

Captain Maggs sets forth three reasons for his contention that changes in these substantive areas are unlikely to be addressed by regulation: they are beyond the power of the President to make by regulation; they are areas in which the President would be unlikely to act because they involve major reforms; or, because any new rule-making "formalities" would be of the type which "generally impede rule-making efforts," they would of their own nature tend to minimize the potential for any major change.[34] In reaching each of these three conclusions, Captain Maggs again fails to address important relevant factors, and thus his conclusions must be viewed, at the least, with skepticism.

In raising these three important *substantive* issues for discussion, Captain Maggs opens to debate a far larger terrain than simply that of the rule-making *process*, which I intended as the limited focus of my article. Having raised them, however, these are now issues that must be addressed, and I could not dispute that they are relevant to the discussion of whether to improve the rule-making process. Contrary to Captain Maggs's conclusions, a critical review of these three substantive areas makes it clear that the three objections he raises are without factual support. Rather, it is apparent that each of these three "major reform" substantive areas would be a logical and appropriate area for rule-making.[35]

1. Judicial Independence

On the judicial independence issue, Captain Maggs focuses on the lack of tenure (terms of office) for military judges, and notes that the Military Justice Act of 1983 Advisory Commission voted against the need for tenure.[36] Captain Maggs does not mention that all three civilian members

33. *Id.* at 6.

34. *Id.* at 14-15.

35. The point, of course, is not whether changes to the rule-making process will "trigger radical change or facilitate any large-scale reforms of the military justice system." *Id.* at 15. The question is whether any rule-changes that are made, large or small, will be more carefully considered, will potentially be more appropriate rule changes, and will likely inspire public confidence because they have been considered in an open and public process by a diverse, well-qualified panel.

36. *Id.* at 12 n.57.

of the Advisory Commission dissented from the Commission recommendation.[37] He correctly states that the Supreme Court has upheld the constitutionality of the current system for appointment of military judges.[38] In quoting from the opinion of the Supreme Court in *Weiss v. United States*, however, Captain Maggs fails to note that Justice Scalia, in concurring, found that the system we have in the military could not survive constitutional attack were it implemented in *any other justice system in this country*![39]

In addition, it is entirely within the power of the President to impose a system of tenure for military judges. Indeed, Captain Maggs notes that the Secretary of the Army has already (acting on his own authority) imposed such a system for the Army.[40] The other services have either implemented similar protections by regulation, or have assured the ABA Standing Committee on Armed Forces Law (SCAFL) that they are gearing up to do the same thing.[41] In addition, the DOD has appointed an *ad hoc* committee to study the issue of judicial independence, including the issue of tenure.[42] My own view is that a provision establishing mere fixed terms of office, such as has been implemented in the Army, is an inadequate guarantee of independence in this system where the judges are military officers, subject to performance evaluations, to further assignment (both as

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37. THE MILITARY JUSTICE ACT OF 1983 ADVISORY COMMISSION REPORT (1984) at 9 [hereinafter 1983 REPORT]. The recommendation was supported only by the six active duty military members. One might wonder what the result might have been had the Advisory Commission been more diverse and balanced.

38. Maggs, *supra* note 2, at 12 n.57, citing Weiss v. United States, 510 U.S. 163 (1994).

39. Justice Scalia, in his concurring opinion in *Weiss*, stated:

> The present judgment makes no sense except as a consequence of historical practice . . . . [N]o one can suppose that similar protections against improper influence [as provided in the UCMJ] would suffice to validate a state criminal-law system in which felonies were tried by judges serving at the pleasure of the Executive. I am confident that we would not be satisfied with mere formal prohibitions in the civilian context, but would hold that due process demands the structural protection of tenure in office, which has been provided in England since 1700, was provided in almost all the former English colonies from the time of the Revolution, and is provided in all the States today. (It is noteworthy that one of the grievances recited against King George III in the Declaration of Independence was that "[h]e has made Judges dependent on his Will alone, for the tenure of their offices.")

510 U.S. at 198 (citations omitted) (Scalia, J., concurring).

40. Maggs, *supra* note 2, at 12 n.54.

judges and otherwise), and in many cases are hopeful of receiving further promotion as well.[43] Rather, a more extensive system to promote judicial independence, such as those that have been proposed by Professor Lederer and Lieutenant Hundley,[44] and more recently by Brigadier General John Cooke[45] and Senior Judge Walter Cox,[46] are worthy of serious consideration.

While changes to the UCMJ could and perhaps should be effected to ensure adequate independence for miliary judges, changes well within the President's power could be made that would go a long way to accomplishing the same result. As noted above, such changes are already either partially implemented by the military services, or are under study within DOD. While a total solution may require statutory amendment, the argu-

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41. Three services, the Army, Air Force, and Coast Guard, have reported to SCAFL that they have implemented regulations addressing judicial terms of office. The Navy and Marine Corps have reported to SCAFL that their change is pending publication. Telephone interview with Major General Keithe E. Nelson, USAF (Ret.), Chair, ABA Standing Committee on Armed Forces Law (Oct. 25, 2000). The SCAFL has in the past expressed its "frustration with the delay in the services implementing promised judicial tenure rules similar to those recently implemented by the Army that established a three year tenure rule." MIL. JUST. GAZ. No. 71 (Nov. 1999).

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

43. In addition to the concerns set forth by Justice Scalia in *Weiss*, *see supra* note 39, other practical concerns, such as the desirability of the military judiciary from the perspective of future assignment have been raised. "A disturbing prognosis for the future of the military trial judiciary emerges from this Commission's work. The testimony and surveys make it clear that career judge advocates hardly view such duty as career enhancing." 1983 REPORT, *supra* note 37, at 75 (Separate Statement of Professor Kenneth F. Ripple). Some judges may seek to advance their career by being assigned (or reassigned) to positions they see as more career enhancing, such as staff judge advocate. *See, e.g.*, Kevin J. Barry, *Reinventing Military Justice*, 120/7 NAVAL INSTITUTE PROCEEDINGS 56, 58 (1994). Other judges may seek to stay on the bench, and even with the three year term of office established, as in the Army, there still remains the potential for mischief, as Senior Judge Everett recently opined: "Obviously though, when you get to the two year nine month mark, you're going to feel a little bit ill at ease, and one of the concerns has been that the person who is hanging on may favor the government in order to be reappointed." Major Walter M. Hudson (interviewer), *Two Senior Judges Look Back and Look Ahead: An Interview with Senior Judge Robinson O. Everett and Senior Judge Walter T. Cox, III*, 165 MIL. L. REV. 42, 78 (2000) [hereinafter *Senior Judge Interviews*]. Each of these concerns needs to be addressed in achieving a balanced solution.

44. Fredric I. Lederer & Barbara S. Hundley, *Needed: An Independent Military Judiciary—A Proposal to Amend the Uniform Code of Military Justice*, 2 WM. & MARY BILL RTS. J. 629 (1994).

45. Brigadier General John S. Cooke, *The Twenty-sixth Annual Kenneth J. Hodson Lecture: Manual for Courts-Martial 20X*, 156 Mil. L. Rev. 1, 18-19 (1998).

46. *Senior Judge Interviews*, *supra* note 43, at 79-80.

ment that intermediate remedial changes are of too great a magnitude to be effected by regulation is patently insupportable.

2. Selection of Court-Martial Members

The same rationale applies to the issue of selection of court-members. UCMJ changes could be effected to accomplish reform, and to end a system that, even if not inherently unfair, certainly is widely viewed by military professionals as being unfair.[47] Chief Judge Young of the Air Force has proposed statutory changes to the selection process to accomplish this result,[48] and for almost 30 years others have also proposed both statutory and non-statutory changes to this process.[49] A number of these commentators have suggested a method of random selection of military jurors, often completely within the current statutory constraints of Article 25(d)(2), UCMJ, which requires the convening authority to select members deemed "best-qualified." One noted authority in 1991 proposed computerized random selection, consistent with Article 25, UCMJ, as a solution: "I cannot believe that the same ingenuity that coordinated the massive air strikes in the Middle East could not be used to select court members for a court-martial when a service member's liberty and property interests are at stake."[50] The process of selection of court members "is the most vulnerable aspect of the court-martial system; the easiest for the critics to attack."[51] To suggest that improvements in the system of selection

47. "[I]t is impossible to convince even military judges from other countries that our current system of selecting court members is fair." Colonel James A. Young III, *Revising the Court Member Selection Process*, 163 MIL. L. REV. 91, 125 (2000).

48. *Id.* at 127-37.

49. Major R. Rex Brookshire, II, *Juror Selection Under the Uniform Code of Military Justice: Fact and Fiction*, 58 MIL. L. REV. 71 (1972); Joseph Remcho, *Military Juries: Constitutional Analysis and the Need for Reform*, 47 IND. L.J. 193 (1972); Kenneth J. Hodson, *Military Justice: Abolish or Change?*, 22 KAN. L. REV. 31 (1973), reprinted MIL. L. REV. BICENT. ISSUE 577 (1975) (random selection of military juries was Hodson's first of seven suggestions for improvement of the military justice system; removal of the commander from *inter alia* the military jury selection process was the seventh); Captain John D. Van Sant, *Trial by Jury of Military Peers*, JAG. L. REV. 185 (Summer, 1974); Major Gary E. Smallridge, *The Military Jury Reform Movement*, AIR FORCE L. REV 343 (1978); Major Stephen A. Lamb, *The Court-Martial Panel Selection Process: A Critical Analysis* 137 MIL. L. REV. 103 (1992); Guy P. Glazier, *He Called for His Pipe, and Called for his Bowl, and He Called for his Members Three—Selection of Military Juries by the Sovereign: Impediment to Military Justice*, 157 MIL. L. REV. 1 (1998).

50. 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, 20 (1991).

51. United States v. Smith, 27 M.J. 242, 252 (C.M.A. 1988) (Cox, J., concurring).

of court-members could not, or should not, or would not be expected to come by regulation, is to ignore what has seemed not only possible and plausible, but also necessary, to numerous commentators. It is clearly not a justification for failing to improve the process, and thus to enhance the quality of any such rule changes ultimately adopted.

3. The Role of the Convening Authority

The final substantive issue raised by Captain Maggs concerns the multiple—and potentially or actually conflicting—roles played by convening authorities. The most troublesome aspect of these multiple roles is the fact that the commander, who exercises command and control of the unit and its personnel, also has the two duties of exercising prosecutorial discretion and hand-selecting, normally from subordinates who may be from her own personal staff, the members of the court-martial panel (the "jury") who will sit in judgment over the accused. As noted by Chief Judge Young, in suggesting a change to our system of selecting members, it is "impossible" to convince military judges from other countries that this system is fair.[52]

This should come as no surprise. The analogy in the civilian system would be requiring the United States Attorney, who decides whether a suspect will be brought to trial and for what specific crimes, to hand-select the jury from government employees who work for the Department of Justice (or even from government employees who work on the U.S. Attorney's own staff). Such a scenario would, of course, be completely intolerable, and would certainly appear illegal and unconstitutional as well. Notwithstanding the fact that the military is a separate society with certain vastly different interests—including good order and discipline—that must be served by its justice system, it is the opinion of these non-U.S. military judges referred to by Chief Judge Young, and of many U.S. legal professionals (both within and without the military), that the current involvement of the convening authority in this military jury selection process simply asks too much of one official, and does not live up to current perceptions of what constitutes the minimal requirements of due process. Even if the selection process is not unfair as a whole, or if it is not actually unfair in any given case, it is difficult if not impossible to get past the potential for—

52. *See* Young, *supra* note 47, at 125.

or the appearance of—unfairness, and thus of the potential for the denial of a fair trial in a given case.

Although statutory changes would be required to fundamentally alter the convening authority's role, adoption of a method of random selection within the current parameters of Article 25, which may be accomplished by presidential regulation, would seemingly be a large step in the right direction toward allaying these concerns.

C. Presidential Power Unaffected

Captain Maggs finally urges that changes to the *MCM* rule-making process would affect the present balance of powers between the President and the Congress.[53] This concern is unfounded.

Under Article 36, the President is the statutorily authorized rulemaker for the military justice system. The President has elected to use the JSC, and its current procedures, to prepare the executive orders to promulgate amendments to the *MCM*. The President could choose to follow the ABA recommendations, and establish an advisory committee to participate in or oversee a revised rule-making process. Similarly the President could resume reporting rule changes to Congress. No new statute would be required. Presidential power would be unaffected.

Alternatively, the Congress could choose to establish a military judicial conference to oversee the rule-making process and the preparation of proposed changes to the *MCM*, without changing in any way the President's ultimate authority as military court rule-maker. General Hodson recommended forming such a conference, headed by the chief judge of the Court of Military Appeals, now the Court of Appeals for the Armed Forces (CAAF).[54]

There is currently no limitation on the authority of the President to promulgate rule changes that have not first been prepared and presented by the JSC, though as a practical matter it is not known that any President has ever acted independently of the JSC or of the usual review process for JSC

53. Maggs, *supra* note 2, at 15-17.

54. *See supra* note 11. I express no view on whether a judicial conference such as recommended by General Hodson could (or if it could, whether it should) be created by the President through regulation.

proposals.[55] Despite Captain Maggs's conclusions to the contrary, there is no suggestion—in either my proposal or the ABA recommendations—that the President's ultimate authority would be one bit lessened under such a model; rather we both suggest the opposite: it would be "effectively enhanced."[56] Certainly the concerns Captain Maggs raises regarding separation of powers are important, and may require taking more care to ensure that the President's authority is not constrained, but is instead more fully supported by the military judicial conference. As discussed below, that would be easy to do, even while maintaining all the benefits that such a system would otherwise provide. Captain Maggs's balance of powers concerns are unfounded.

III. The Proposals are Warranted

Captain Maggs finds in my article seven separate proposals, and he provides his comments on each. Even if I were to accept his enumeration, I find it to be short by at least one recommendation. I strongly suggested that the internal JSC Organization and Operating Procedure document issued in February 2000[57] was an inadequate mechanism for promulgating changes to procedures for a rule-making process involving the public.[58] This is particularly so where such procedures had previously been promulgated in a DOD Directive which was published in the Code of Federal Regulations (CFR). It was my clear recommendation that these procedures be suitably published both in departmental regulation and the CFR, as well as in the *MCM* itself. It is unclear why Captain Maggs does not address this

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55. *See* Barry, *supra* note 3, at 251 n.53 (providing a summary of this review process).

56. *Id.* at 269; *see also id.* at 269 nn.120-29 and accompanying text. The Chair of SCAFL believed that adoption of the ABA Recommendation 100 was "bound to improve the final product and *enhance* the President's rule-making function." *Id.* at 269 (quoting letter from Francis S. Moran, Jr. to N. Lee Cooper, ABA President, 3 (Jan. 27, 1997) (emphasis added) [hereinafter Moran letter]).

57. INTERNAL ORGANIZATION AND OPERATING PROCEDURES OF THE JOINT SERVICE COMMITTEE ON MILITARY JUSTICE (initially adopted 3 February 2000, corrected and readopted 2 March 2000) [hereinafter JSC 2000 PROCEDURES]. These JSC procedures are discussed in my article. *See* Barry, *supra* note 3, at 260 nn.90-99 and accompanying text. Because of their importance, they were reproduced in their entirety in the Appendix to my article. *See id.* at 277-80.

58. *See* Barry, *supra* note 3, at 264.

recommendation—it is one of those easy remedies which can and should be immediately adopted.[59]

I am not, however, anxious to accept Captain Maggs's sevenfold division because it tends to distort my actual proposal. My recommendation was to call 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,"[60] and as noted above,[61] I incorporated the ABA Recommendations in this proposal. Nevertheless, for the sake of clarity, I will address my proposal which incorporates the ABA recommendations (the first three of Captain Maggs's division) as implemented within General Hodson's proposal (the fourth of Captain Maggs's division). Before doing that, however, I will first address the last three items in Captain Maggs's division, which constitute the three recommendations which concern the *current* JSC process.

A. Improving the Current JSC Process

In my article I made a variety of observations about ways the *current* JCS process could and should be further improved. This current rule-making process was addressed in part as background and as preface to my Hodson recommendation, and also as a necessary portion of my review of the fifty-year history of the *MCM* rule-making process. My suggestions for changes to the current process were—either derived from or restated suggestions long made by the ABA—included the three proposals addressed by Captain Maggs at Sections III. E., III. F., and III. G. Even in the absence of further study or more extensive reform, each of these could be easily and quickly implemented by DOD by slight modifications to the

59. *See id.* at 264. I also noted that the current DOD Regulation 5500.17 issued in 1996 has not yet been published in the CFR, which still contains the outdated and superseded 1985 DOD Regulation. This is a four-year oversight that is long overdue for remedial action. *Id.* However, to now publish the 1996 directive would establish as current federal law a process no longer applicable. What is now required is for DOD to revise its regulation to conform with current practice, or with a new practice modified to conform to these recommendations, and to publish that regulation in the CFR, and in the *MCM*. Due to the public nature of the issue, a notice and comment rule-making process would be appropriate. *See id.* at 258 n.81.

60. *Id.* at 241.

61. *See supra* notes 12-13 and accompanying text.

JSC 2000 Procedures, and would materially enhance the perceived fairness of the *current* system.

The first suggestion addresses the question of public availability of internal DOD proposals, and it is clear that no great effort would be required to accomplish this needed improvement. Detailed proposals, with full justifications, already exist: they have been required by the JSC regulations for years.[62] Currently the JSC refuses to make them available. The fundamental principle I apply in this regard is that rules for a system of justice that tries the most serious crimes and imposes capital punishment should not be made in secret. Making the proposals available to the public would involve only limited administrative cost since, as Captain Maggs notes, justifications are already available both for proposals which are adopted, and for any changes to proposals which are made by the JSC prior to their adoption. Thus, the burden of making them available "does not seem very great."[63]

The same analysis should apply to the JSC's justifications for *rejecting* proposals for rule changes. If a serious proposal is rejected, it should be for a good reason, and there should be no hesitancy to publicly express that reason. Captain Maggs believes that the JSC has "understandable reasons for wishing to avoid the process of justifying its decisions not to adopt proposals . . . [and that] providing explanations may take a great deal of work."[64] He does not clearly state what these "understandable reasons" are, except to suggest that additional personnel might be required, that the JSC members might have to "neglect their other duties so that they could write reasons for rejecting the proposals,"[65] or that it "might cause unnecessary and harmful embarrassment"[66] to the proposer. Even if true, such arguments do not seem very weighty, when balanced with the benefits of making these important rules in a manner that will inspire confidence in the system.

The second suggestion addresses the public availability of the JSC's minutes. Captain Maggs acknowledges that he has seen the minutes of the JSC meetings, but that he believes they contain "minimal information about its decisions."[67] However, he also states that "[b]ecause the JSC and its working group diligently keep these records, the proposal [to make

62. *See* Barry, *supra* note 3, at 245.
63. Maggs, *supra* note 2, at 32.
64. *Id.*
65. *Id.*
66. *Id.* at 33.

them publicly available] would impose little or no burden on them."[68] The failure to make available the full proposals, with their rationales and justifications, and the minutes of meetings, to provide explanations for JSC decisions, casts doubt on the credibility of this rule-making process, and undermines public confidence in the military justice system. Even when recommendations for rule changes are made by such organizations as the SCAFL and the ABA, the JSC does not release the minutes or explain why the recommendations are not adopted.[69] The objections raised by Captain Maggs do not weigh heavily when compared with the values that would be supported by full disclosure. The refusal to make available unredacted minutes can and should be rectified immediately.

The third suggestion concerns whether to expand the membership of the JSC—or even just to give the current CAAF and DOD representative a vote. Both are ideas that SCAFL thought desirable several years ago, but ultimately agreed should be left to the discretion of DOD, accepting DOD's argument that the JSC is an *internal* DOD committee.[70] The idea has been discussed again at several recent SCAFL meetings, and sugges-

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67. *Id.* The JSC has released redacted minutes of JSC meetings to the author pursuant to the Freedom of Information Act. These contain lengthy blanked-out sections during which issues are apparently being discussed and debated, and also contain sections wherein the votes by the voting members of the JSC are also masked. These redacted minutes are uniformly unhelpful in ascertaining why proposals are being made, what the intended effects are, or what arguments for or against their adoption have been considered. Whether the unredacted minutes contain minimal information or not is an unverifiable conclusion that can be drawn only by one such as Captain Maggs who is allowed access to them.

68. *Id.*

69. In February 1993, the ABA adopted Recommendation 107A proposing that RCMs 1112 and 1201(b) be amended to provide an opportunity for convicted service members to review and submit matters for consideration at all stages of military administrative review, and that RCM 1203(c) be amended to allow convicted members the same opportunity provided to government attorneys to petition the Judge Advocate General to certify an issue to the United States Court of Military Appeals. *See* AMERICAN BAR ASSOCIATION, POLICY AND PROCEDURES HANDBOOK 293 (1999-2000 Ed.); AMERICAN BAR ASSOCIATION, RECOMMENDATION 107A (adopted Feb. 1993). The same recommendations for change had already been presented to the JSC by the Coast Guard appellate defense counsel. *See* MIL. JUST. GAZ., No 3 (Aug. 1992). Two years later, in response to his written request, and contrary to its stated policy, the JSC provided a minimal explanation to the submitter, G. Arthur Robbins (formerly the Coast Guard appellate defense counsel) regarding the reasons the JSC declined to adopt his recommendation. This explanation included the following two arguments: that "the certification process should be non-adversarial" (apparently as justification for not giving the defense a copy of government requests for certification of issues in the case), and that "certification is the Government's vehicle for appeal and not a right of the accused." Letter from Kristen M. Henrichsen, to G. Arthur Robbins (Jan. 12, 1995).

70. *See* Barry, *supra* note 3, at 267-68.

tions have included adding additional members from within the governmental community, such as by adding an appellate military judge, a military trial judge, and one or more representatives of the appellate defense community.[71] It would seem that DOD could, without affecting the "internal" nature of the JSC, vastly improve both the appearance and the actual fairness of the rule-making process by adding representatives from some of the other "communities" affected by the *MCM* and its rules, including defense counsel, prosecutors, academics, and trial and appellate judges.

For a system seeking credibility and respect, implementing each of these three suggestions would bring the same sort of instant favorable response as did promulgating the JSC 2000 Procedures. The DOD can, without any change to statute and without even involving the President, accomplish all these recommended improvements in the current JSC rule-making process, and to do so would, I submit, be welcomed and applauded by all who seek to see this system improved. Such improvements would not only allay concerns and criticisms, but would enhance the quality of the resulting rules, and their inherent credibility, and thus would enhance as well the confidence with which they are accepted.[72]

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71. *See id.* at 268, n.116. SCAFL had initially pushed for expansion of the JSC, including adding non-governmental members, but abandoned this idea in response to the DOD "internal committee" arguments. *Id.*

72. Recently a potential difficulty with the new JSC 2000 Procedures has become evident, which might now constitute a fourth recommendation for improving the current JSC process. Under the new procedures, proposals submitted to the JSC from outside the military services are submitted to and voted on by the JSC itself, and are to be acknowledged in writing, with the submitter being notified of the decision of the JSC (though apparently not of the reasons for the decision). *See* JSC 2000 PROCEDURES, *supra* note 57, ¶ III.D.3. However, proposals submitted from within the services do not go to the JSC, but rather go to and are screened by that service's JSC representative, who then submits only those proposals that the JSC representative deems "appropriate." *See id.* ¶ III.B.3. There does not appear to be any requirement for a written acknowledgment of proposals from members of the services, or for any notification or explanation why the service JSC representative declined to forward the proposal, or for notification of (or explanation for) action taken by the JSC on those proposals which are forwarded. There seems to be no good policy reason why proposals submitted from an appellate military judge, or a professor of law at one of the Judge Advocate General's schools, or a trial or appellate defense or government counsel, should be subject to screening by the service's JSC representative, while proposals from their counterparts not in uniform are automatically considered by the JSC. This appears to be one of those areas where appearances of fairness weigh heavily in favor of an immediate adjustment to eliminate the gate-keeper role of the service's JSC representative, and to treat all who propose changes to the rules equally.

B. The Hodson and the ABA Recommendations

Captain Maggs addresses my core proposal as four separate entities (at Sections III. A., III. B., III. C., and III. D.). As previously addressed,[73] I actually called for study of General Hodson's military judicial conference recommendation, incorporating the three aspects of ABA Recommendation 100, thus establishing a single cohesive structure that would bring the military rule-making system into parity with the civilian system, with all the benefits (and if there be such, disadvantages) of that system. For clarity, I will address various discrete concerns raised regarding the elements of my proposal, but I submit that they are best understood as elements of a unified military judicial conference structure.

General Hodson did not flesh out his recommendation, and I attempted to do that by incorporating within his military judicial conference the structure recommended by the ABA, which I view as entirely consistent with (and complementary to) his recommendation. One difference, of course, is that the ABA recommendation itself could be entirely implemented by the President, without the need for legislation.[74] He could issue an executive order (EO) establishing a broadly constituted advisory committee that would review all proposals in accordance with "on the record" public procedures clearly established in the EO. The EO could also require that all amendments to the *MCM* be presented to Congress upon their adoption. Presumably, the draft executive order for each proposed change to the *MCM* would be reviewed for approval following a process similar to that used today for all proposed (draft) EOs prepared by the JSC to promulgate rule changes, including review within DOD, the Department of Justice (DOJ), the Office of Management and Budget, and finally by the White House Counsel, prior to submission for signature by the President.[75]

Captain Maggs does not doubt that such a program as recommended by the ABA could be implemented by the President. He asks, however, whether it would be of "any substantial benefit."[76] He asserts that neither I nor the ABA "explain in any detail how their proposal would improve the current rule-making process. On the contrary . . . the ABA's report for the

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73. *See supra* notes 12-13 and accompanying text.

74. Captain Maggs acknowledged that implementing the core points of the ABA recommendation did not require legislation. *See* Maggs, *supra* note 2, at 18-19 (advisory committee), 24 (public rule-making procedures).

75. The review process is more fully described in my original article. *See* Barry, *supra* note 3, at 251 n.53.

76. *See* Maggs, *supra* note 2, at 24.

most part simply notes that the federal courts use a different system"[77] I cannot agree with Captain Maggs on this point. The report accompanying Recommendation 100, which was prepared by SCAFL, contained fifteen pages, most of which explained in depth the importance of and the reasons for the recommendation. The report was sufficiently detailed and persuasive that the ABA House of Delegates adopted Recommendation 100 almost unanimously.[78] In addition, the objections of DOD to the recommendation[79] were answered in detail in the letter by SCAFL Chair Colonel Frank Moran,[80] and I set forth the rationale for these proposals at length in my article.[81] If Captain Maggs is correct that neither the ABA materials, nor my article, give a rationale for the proposed change, than I doubt that any explanation that anyone could prepare would pass muster.

With regard to both the Hodson and the ABA recommendations, Captain Maggs posits certain assumptions as "fact," and then sets out problems that he sees arising from these "facts," which he believes cast doubt on the efficacy of the recommendations. I will address the most significant of these assumptions, first discussing the concerns regarding the military judicial conference, and then the aspects of the ABA proposals.

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77. *Id.*

78. The most concise statement of the benefits to be achieved by adopting a rule-making process modeled on the federal civilian rule-making system, was stated in the ABA proposal itself. The ABA first addressed the federal civilian process. "The process enables the adoption of carefully considered rules in a process designed not only to result in the most appropriate rules being adopted, but to enhance the prestige of the courts and the public's confidence both in the courts and in their rule-making process." AMERICAN BAR ASSOCIATION, REPORT ACCOMPANYING RECOMMENDATION 100 (adopted Feb. 1997) at 7. The ABA believed that those benefits would carry over to the military system, as succinctly stated in its conclusion: "Both the quality of the resulting military court rules, and the public's confidence in the military justice system, will be enhanced. The military court rule-making process will then be deserving of the same respect and public confidence presently afforded rules for civilian Federal courts." *Id.* at 12.

79. *See* letter from Judith A. Miller, General Counsel, DOD, to N. Lee Cooper, President, ABA (Jan. 21, 1997). *See also* Barry, *supra* note 3, at 268 nn.118-19 and accompanying text.

80. *See* Moran letter, *supra* note 56. *See also* Barry, *supra* note 3, at 269 nn.120-29 and accompanying text.

81. *See* Barry, *supra* note 3, at 265 nn.100-25 and accompanying text (discussing ABA Recommendation 100), 270 nn.126-45 and accompanying text (discussing Hodson proposal).

1. Military Judicial Conference

Captain Maggs raises important constitutional separation of powers issues regarding a military judicial conference, since in his view the required amendment to Article 36, UCMJ, would "have to say that the President could not alter the rules of evidence and procedure except upon the Court of Appeals for the Armed Force's recommendation."[82] Possibly General Hodson's 1973 recommendation, as written,[83] could be read or implemented in such a way as to bind the President and raise such objections. That, however, is not the necessary result, nor is it my recommendation. Rather, I proposed the following structure.

> 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 rulemaker. Once approved by the President, the rules would be reported to Congress 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.[84]

This structure would seem to raise no such constitutional infirmity. This approach follows the Judicial Conference model, in which the advisory committee recommendations are forwarded through the Judicial Conference to the Supreme Court, which, as the civilian court rule-maker, is not bound to accept every recommendation that the Judicial Conference presents.[85] The President would retain his current discretion to reject proposed rules. In addition, the President would continue to be able to effect

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82. Maggs, *supra* note 2, at 30.

83. "[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." *See, e.g.*, Barry, *supra* note 3, at 270 n.130 and accompanying text.

84. *Id.* at 274.

85. *See, e.g.*, Peter G. McCabe, *Renewal of the Federal Rulemaking Process*, 44 AM. U.L. REV. 1655, 1674 (1995). Indeed, after the creation of the Judicial Conference of the United States in 1958, the "Supreme Court retained its statutory authority to promulgate the rules, but it would henceforth do so by acting on recommendations made by the Judicial Conference." *Id.* at 1659. There is no reason why a similar approach should not be taken with regard to the President's rule-making authority when a military judicial conference is established.

rules without awaiting a proposal from within the rule-making structure, just as he presently can under the current JSC process.

Nor would this structure raise the suggested political problems between the President and the judges of the CAAF.[86] There is no suggestion in General Hodson's recommendation that any specific number of judges from the CAAF be appointed to the military judicial conference, and presumably none other than the chief judge would be on the conference.[87] All the "political" concerns raised by Captain Maggs are founded on a mistaken understanding of my proposal.

2. Advisory Committee

In addressing the advisory committee proposed by the ABA, Captain Maggs posits that it would be a resource for, and be subservient to, the JSC.[88] However, a careful review of the ABA report accompanying Recommendation 110, and the supporting documentation, makes it clear that the SCAFL had the opposite organizational structure in mind: the JSC would, as DOD's internal committee,[89] have the same freedom to submit proposals to the advisory committee as would other entities or individuals, similar to the relationship DOJ now has with the advisory committees within the Judicial Conference.[90] Thereafter, it would be the advisory committee that would finalize the proposed changes and submit them for consideration within the Administration (as proposed in the ABA Recommendation) or to the Judicial Conference for review and approval prior to submission within the Administration (as in the Hodson/Barry recommendation). Just as with the advisory committees in the Judicial Conference, I accept it as a given that DOJ (or at least DOD) would be rep-

86. *See* Maggs, *supra* note 2, at 29-31.

87. The Judicial Conference of the United States is comprised of the Chief Justice, the chief judge of each judicial circuit, the chief judge of the Court of International Trade, and a district court judge from each judicial circuit. 28 U.S.C. § 331 (2000). A military judicial conference could, as but one possibility, be comprised of the chief judge of the CAAF, the chief judge of each court of criminal appeals, and the chief trial judge from each service and one or more district and circuit court judges from the federal system. Such would seemingly not raise any of the political problems for the President that Captain Maggs suggests.

88. "The JSC . . . could compile a list of names of potential advisors who would agree to serve on an advisory committee without pay. This advisory committee from time to time could offer suggestions for changes to rules of evidence and procedure in the *MCM*." Maggs, *supra* note 2, at 18-19.

89. *See* Barry, *supra* note 3, at 267 nn.114-16 and accompanying text.

resented on the advisory committee, and as noted in the basic article would have a great (if not controlling) influence on the final product.[91] Captain Maggs's assumptions are therefore unsupported.

Captain Maggs's principal objections to an advisory committee seems to be that it is unnecessary, since all interested parties "already have the ability to recommend changes directly to the JSC."[92] He then suggests that creating an advisory committee actually "might reduce the input because federal advisory committee members may fall within the scope of federal conflict of interest laws. As a result, *defense attorneys* who serve on the committee might not be able to participate in decisions that would benefit their clients."[93] This entire concern is unfounded. In fact, for the advisory committees in the Judicial Conference, the number of private practicing attorneys has been *increasing*, and recommendations to further increase those numbers have been made.[94] Private attorneys constituted approximately a third of the members of the Civil Procedure, Criminal Procedure, and Evidence Rules Advisory Committees in 1995, with apparently no hint of any disability created for those private attorneys (or, for that matter, for the judges or government attorneys) serving on these committees.[95]

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90. My recommendation followed the ABA on this point:

> 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.

Id. at 274.

91. *See id.* at 274 n.145.

92. Maggs, *supra* note 2, at 19. Captain Maggs does not, in this discussion, address the efficacy of that "input," or the fact that the ability to make suggestions actually works to the detriment of the system when the perception is that such suggestions are routinely ignored or rejected, without any explanation from the JSC. *See, e.g.*, *supra* notes 64-69 and accompanying text.

93. *Id.* at 21 (emphasis added) (footnote omitted). Defense counsel are the only group that Captain Maggs lists as being so affected. Interestingly, he does not address why any such conflicts would not affect government (prosecuting) attorneys or other groups serving on the committee.

94. McCabe, *supra* note 85, at 1665 n.69.

95. *Id.* at 1665-66.

3. Rule-Making Process

For the ABA's recommendation to change the process of considering rules changes, Captain Maggs first gives a balanced presentation of the current Judicial Conference process,[96] but then makes unfounded assumptions in assessing the application of this model to the military rule-making process.[97] He states: "One likely possibility would involve a military judicial conference composed of military judges and headed by the JSC."[98] This suggested composition is a straw-man constructed by Captain Maggs out of whole cloth, and it is entirely contrary to both the ABA and my recommendations.[99] General Hodson suggested the chief judge of CAAF as the head of the military judicial conference, but did not further define its composition. Nor did I, in my article, set forth any specific recommended composition for the military judicial conference, but I do indicate one possibility in this article.[100] One thing is entirely clear, however. If the JSC were to head it, as Captain Maggs suggests, it obviously could not be a *judicial* conference, since no member of the JSC is a judge.

Captain Maggs also sees problems with advisory committees (and a civilian rulemaking process) generally, because each would "invite the meddling of special interest groups" and allow for the process to become "politicized."[101] He identifies only one such "special interest" group, and again it is *defense counsel*. Captain Maggs does not address why, for example, the JSC itself should not be considered to represent a particular "special interest."[102] Captain Maggs cites several commentators in support of his concerns, and suggests these concerns weigh heavily against adoption of new procedures.[103] However, these are not valid objections to adopting improved rule-making procedures, as can be seen from the exam-

96. Maggs, *supra* note 2, at 22 (§ III.B.1).

97. *Id.* at 24 (§ III.B.2). Arguably much of the following discussions would more appropriately be included in the discussion of the military judicial conference proposal, or he advisory committee proposal, but since Captain Maggs includes them in his discussion of the rule-making process, I will also.

98. *Id.* at 24.

99. *See, e.g.*, *supra* note 90 and accompanying text (discussing my recommendation, which envisions an advisory committee and a military judicial conference both separate from and superior to the JSC). Both my and the ABA recommendations clearly stated that the current process "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." Barry, *supra* note 3, at 269 (quoting Moran letter, *supra* note 56 at 3).

100. *See supra* note 87. *See also* Barry, *supra* note 3, at 274.

101. Maggs, *supra* note 2, at 25.

ple of the Judicial Conference advisory committee structure, which has functioned so successfully for so many years without any serious conflict of interest issues noted. In any event, any such perceived concerns are wholly outweighed by the fundamental integrity of, and the benefits to the justice system that are inherent in the process itself. As Peter McCabe notes:

> The process by which the federal rules are promulgated, although subject to periodic criticism, has been praised as "perhaps the most thoroughly open, deliberative, and exacting process in the nation for developing substantively neutral rules."[104]

McCabe goes on to say that the "essence of the federal rulemaking process has remained constant for the past sixty years," and that the first of its "basic features" is "the drafting of new rules and rule amendments by prestigious advisory committees composed of judges, lawyers, and law professors."[105] Perhaps if the military used such diverse "prestigious advisory committees," our system would not be subject to criticism for its failure to be a "thoroughly open . . . and exacting process." By adopting new procedures modeled on such a time-tested and well-regarded process, the military justice system would enhance its credibility and reap the immeasurable benefits of increased public esteem and confidence, while gaining a vastly improved potential for adopting higher quality, more "substantively neutral" rules.

Captain Maggs finally argues that new procedures are not really needed because "the JSC usually follows changes that already occurred in civilian rules of evidence and procedure."[106] He uses as examples the rules recently adopted for child witnesses, and the rule governing the psycho-

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102. It has been noted (including by the SCAFL) that the JSC is comprised of "the officers responsible for criminal law in the armed forces." *See, e.g.*, Barry, *supra* note 3, at 266 n.105 and accompanying text. As a result of their status and of events over the years, "the *perception* [of the JSC] . . . is that of a small 'government' committee, operating in secret, which changes the rules (often with the appearance of benefitting only the prosecution) without explaining why." *Id.* at 240. The JSC certainly seems to have been a far more influential and effective "special interest group" in this process than any other group has been (or conceivably could be).

103. Maggs, *supra* note 2, at 24-26.

104. McCabe, *supra* note 85, at 1656 (quoting COMMITTEE ON LONG RANGE PLANNING, JUDICIAL CONFERENCE OF THE UNITED STATES, PROPOSED LONG RANGE PLAN FOR THE FEDERAL COURTS RECOMMENDATION 30 (1995)).

105. *Id.*

106. Maggs, *supra* note 2, at 27.

therapist-patient evidentiary privilege. He states: "These amendments, while significant, did not require the JSC to engage in original thinking."[107]

I would argue that, had a more diverse body been involved, perhaps someone might have engaged in at least a bit more "original thinking,"[108] and the original proposed rule for the psychotherapist-patient privilege might not have been so unbalanced, with the result that the storm of controversy that erupted might thereby have been much abated. Captain Maggs argues that the controversy, and the resultant changes made by the JSC to the rule, show that the current process works. My answer is that while the process in this case may have "worked" (in that a less objectionable result eventually was achieved), it did not work very well, and in a system concerned with rapid promulgation of rules, this rule does not well stand as a model for the future.[109]

None of the objections or arguments Captain Maggs makes regarding either the ABA Recommendations or the Hodson proposal warrant the conclusions he would draw that the costs of adopting these reforms outweigh the benefits to be derived. His concerns rest on his unsupported assumptions, and such concerns become insignificant when considered in the light of facts and arguments Captain Maggs has overlooked. The Hodson proposal, as I would complete it by incorporating the structure and process set forth by the ABA (following the Judicial Conference model), deserves to be approached and studied openly, without preconception or "skepticism." Whatever "costs" there would be to implement a military judicial conference—and I expect they would actually exceed the minimal[110] administrative inconvenience and costs Captain Maggs has identified—would be marginal when balanced against the substantial benefits a credible open and public rulemaking process would provide. The civilian

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107. *Id.*

108. I cannot agree that the JSC does not engage in original thinking. It is my impression that considerable effort and thought go into their deliberations. What is missing is original thinking from persons with different (and more diverse) knowledge, experience and perspective, to complement that of the members of the JSC.

109. The Supreme Court decision announcing the new rule came on 13 June 1996. Jaffe v. Redmond, 518 U.S. 1 (1996). The initial publication of a proposed rule, which differed drastically from the federal rule announced in *Jaffe*, came almost a year later on 6 May 1997. 62 Fed. Reg. 24,640 (May 6, 1997). The final rule was not promulgated until almost two and one-half years after its initial notice. Exec. Order No. 13,140, 64 Fed. Reg. 55,115 (Oct. 6, 1999). Considering Captain Maggs's conclusion that the civilian process "tends to take a long time," Maggs, *supra* note 2, at 27, the current military process hardly seems a preferred option. *See also supra* note 15 and accompanying text.

system has paid those minimal costs, and reaped the benefits. The military system should do the same.

IV. Conclusion

In Captain Maggs's view, as I understand it, there has been very great advancement in the *MCM* rule-making process over the last few years, but such change has (at least for the present) gone far enough, and the *status quo* in the process now should not be disturbed. Rather than a "work in progress," he would have the rule-making process be viewed (at least for some indeterminate period) as a *fait accompli*, and one not to be further modified.

Such a perspective is not in any way modern. Rather it is entirely consistent with the view traditionally taken by those within the military justice system,[111]—including those at the highest levels:[112] a view resistant to any change to the status quo. Such a view, however, does not adequately respect either the concept that the perception of what constitutes fundamental due process is constantly evolving, or even the more basic concept that recognizes that the one constant—in law as in life—is change. Happily, there is evidence that such views are changing, even at the highest levels.[113]

Today, in addition to those such as General Moorman,[114] others within the system also see the need to change—sometimes not only because they view it as right and necessary, but also as a means to control the pace of that change and to guard against changes deemed less desirable, including those coming from outside the system, and from "segments of society unfamiliar with the military justice system."[115] The adoption of

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110. I recognize that Captain Maggs states that "all but one or two of [my] proposals would impose at least some *significant* burdens and costs," *see supra* text accompanying note 8 (emphasis added), but I do not believe his discussions of the actual administrative costs support this categorization.

111. "Traditional opinion within the service has always held that each successive reform would bring ruin and collapse." VALLE, ROCKS AND SHOALS: ORDER AND DISCIPLINE IN THE OLD NAVY 1800-1861, at 299 (1880).

112. It has been the traditional approach for the Judge Advocates General of the various services to stoutly resist changes to the system. *See, e.g.*, JONATHAN LURIE, ARMING MILITARY JUSTICE - VOLUME I - THE ORIGINS OF THE UNITED STATES COURT OF MILITARY APPEALS, 1775-1950, at 256-67 (1992): "As retired [Judge Advocate General of the Army] George Prugh stated in 1975, the JAGS 'are not going to be the originators of ideas that are going to change the military justice system, at least not very often.'"

the JSC 2000 Procedures in early 2000 was, in this author's opinion, motivated in substantial part by the perceived threat posed by the pending SCAFL recommendation that there be a broadly constituted commission appointed to review the operation of the entire UCMJ.[116] It is worthy of note that immediately after these new JSC procedures were announced by

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113. The changes to the military rule-making process adopted in the JSC 2000 Procedures and announced at the February 2000 SCAFL meeting obviously had the support and concurrence of the TJAGs. Further evidence that the old order is changing is provided in a recent article by The Judge Advocate General of the Air Force, Major General William A. Moorman:

> The central question presented today is, "does the [UCMJ] need to be changed?" There can be only one answer. Of course it needs to be changed! For 50 years, the UCMJ and the Manual for Courts-Martial which implements it, have been anything but static documents. The real questions are: "If change is inevitable, what changes should be made? Why should change occur? And, when should changes be made?"
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> . . .
>
> Our system, like all other legal systems, is subject to the dynamics of change. No legal system can remain static, each must change to reflect the needs and demands of society or risk becoming an anachronistic relic of a dead or dying society. For that reason, we are always looking for and evaluating ways to improve military justice.

Major General William A. Moorman, *Fifty Years of Military Justice: Does the Uniform Code of Military Justice Need to be Changed*?, 184 A.F. L. REV. 185 (2000).

114. *See id.*

115. Young, *supra* note 47, at 124.

116. As quoted in the SCAFL Agenda Book, the Recommendation under consideration in February 2000 read as follows:

> RESOLVED, That the American Bar Association urges the Congress to use the 50th Anniversary of the enactment of the Uniform Code of Military Justice (UCMJ) in 1950 as an appropriate occasion to establish a diverse and broadly constituted Commission to undertake a thorough and comprehensive review of the military justice system, with a view toward ensuring that the American system of military justice is fully capable of operating effectively and efficiently in peace and war, and is, in both appearance and reality, as fair and just a system as is feasible.

AMERICAN BAR ASSOCIATION, STANDING COMMITTEE ON ARMED FORCES LAW, AGENDA III, Tab C (Feb. 12, 2000). The wording of the recommendation is from the report and recommendation considered at the Fall 1999 meeting. Though the report was revised for the February 2000 meeting, *see id.* Agenda Item II, Tab B, no changes to the wording of the Recommendation were included in the revised report.

Major General Walter Huffman, The Judge Advocate General of the Army, at the February 2000 SCAFL meeting, SCAFL voted "not to forward its revised recommendation for a UCMJ Review Commission to the [ABA] House of Delegates."[117] The same perceived threat of a UCMJ Review Commission, or of other undesirable change imposed from "outside" the system, was addressed by Chief Judge Young as part of the basis for his recent recommendation for change in the court-martial member selection process.[118]

Captain Maggs does not argue absolutely against the changes proposed, but rather suggests that they are unwarranted at this time, in part because the public has not loudly complained about *this* aspect of the system.[119] Truthfully, what better time could there be to make a change seen as desirable by so many professional observers than when there is no "heat" from Congress or the public. In the midst of a *Tailhook*-type scandal, reasoned and balanced change becomes considerably more difficult. These proposed changes have been carefully studied and recommended by leading experts in the field starting more than a quarter century ago with the "legendary Major General Hodson."[120] Now is the time for the JSC, the DOD, the President and the Congress to discard prejudgments and "skepticism" and with due care and deliberation[121] to undertake a careful study of these proposals "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."[122]

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117. MIL. JUST. GAZ. No. 75 (Mar. 2000).

118. Young, *supra* note 47, at 124-25.

119. *See, e.g.*, Maggs, *supra* note 2, at 4 n.20.

120. *Id.* at 6.

121. Major General Moorman provides a model for the careful consideration of proposals for change which ought to be required reading for those who have a role in proposing or considering changes to this system. His discussion concludes with the view that the UCMJ "should only be changed if the change enhances the two purposes of the military justice system, the promotion of good order and discipline and the provision of real, fair, and measured justice to all servicemembers." Moorman, *supra* note 113, at 194. I read his comments as applying to regulatory changes as well as statutory changes, and not to be limited to substantive law changes. Application of the steps in his model for consideration of change argue strongly for a more open and fair rule-making process which will lead to better, more broadly considered and balanced rules, as proposed in my article.

122. Barry, *supra* note 3, at 241.