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Editor's Note: This article is a direct response to Captain Barry's article: Modernizing the Manual for Courts-Martial Rule-Making Process: A Work in Progress, which appeared in Volume 165, Military Law Review. Captain Barry's reply, which follows this article, directly addresses Captain Maggs's criticisms of his proposal, as well as the peripheral issues Captain Maggs discusses. The Editorial Board of the Military Law Review invites further comment on the Manual for Courts-Martial rule-making process.

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

CAPTAIN GREGORY E. MAGGS¹

I. Introduction

In *Modernizing the Manual for Courts-Martial Rule-Making Process: A Work in Progress*,² Captain Kevin J. Barry, U.S. Coast Guard (Retired), describes the great and steady progress that has occurred in the

1. Judge Advocate General's Corps, United States Army Reserve, and Professor of Law, George Washington University. Captain Maggs has served as an individual mobilization augmentee (IMA) assigned to the Office of The Judge Advocate General (OTJAG), Criminal Law Division (CLD) since 1996. In this capacity, he has provided support to officers assigned to the Joint Service Committee and its Working Group, which has helped develop his interest in the *Manual for Courts-Martial*, including its rule-making process. While performing a recent active duty for training in the CLD, CPT Maggs had the opportunity to begin an article expressing his views and opinions about another author's proposed amendments to the *Manual for Courts-Martial* rule-making process (see footnote 2). While writing this article, CPT Maggs received extremely helpful suggestions and assistance from Colonel Charles E. Trant, Colonel Mark W. Harvey, Lieutenant Colonel Denise Lind, and Lieutenant Colonel Lisa Schenck. For their help and assistance, CPT Maggs is most grateful. CPT Maggs acknowledges that the opinions and conclusions contained in this article are his, and do not necessarily reflect the views of the Army, The Judge Advocate General, or any government agency.

methods for adopting changes to the *Manual for Courts-Martial (MCM)*.³ As his article demonstrates,⁴ the amendment process has become much more open and responsive to outside views than in decades past. Significant improvements noted by Captain Barry include the following:

- Since 1982, the Department of Defense (DOD) has had a policy of publishing notice of amendments to the *MCM* in the Federal Register and waiting seventy-five days for public comment before submitting them to the President for promulgation by executive order.⁵
- Also since 1982, the notice printed in the Federal Register has included not only a summary of proposed amendments, but also information about where and how to obtain their full text.⁶
- Since 1993, the Federal Register has included the full text of non-binding commentary to be published with new *MCM* provisions in the familiar “Discussion” and “Analysis” sections.⁷
- Also since 1993, the Joint Service Committee on Military Justice (JSC), which has responsibility for preparing *MCM* rule changes for the President’s issuance, has held public meetings for the purpose of receiving comments during the seventy-five day waiting period.⁸
- Since 1994, the JSC has published full-text notice of proposed changes to the *MCM* and new commentary prior to the public meeting and prior to their approval as amendments to be submitted to the President.⁹
- Since 1996, a DOD Directive has obliged the JSC to “consider all views presented at the public meeting and written com-

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

3. See MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998) [hereinafter MCM].

4. See Barry, *supra* note 2, at 241-64.

5. See *id.* at 249 (citing Department of Defense Policy Notice, 47 Fed. Reg. 3401 (Jan. 25, 1982)).

6. See, e.g., 47 Fed. Reg. 15,823 (Apr. 13, 1982).

7. See Barry, *supra* note 2, at 252.

8. See *id.*

9. See *id.* at 252-53.

ments submitted during the seventy-five day period in determining the final form of any proposed amendments.”¹⁰

- Starting in 2000, the JSC will send annual calls for proposals to the judiciary, trial, and defense organizations, the Judge Advocate General schools, and elsewhere. It also will publish an invitation in the Federal Register for the public to submit proposals.¹¹

Although Captain Barry acknowledges the significance of the changes in the JSC process over the years, he believes that much room for progress still remains. He suggests that the recent high profile sexual misconduct cases relating to Lieutenant Kelly Flinn,¹² the drill sergeants at Aberdeen Proving Ground,¹³ Sergeant Major of the Army Gene C. McKinney,¹⁴ and Major General David Hale¹⁵ have “raised questions about whether the military trial process is fair.”¹⁶ Captain Barry believes that one “crucially important issue”¹⁷ that “bears decidedly on . . . perceptions of fairness” of the military justice system,¹⁸ but which has “received considerably less attention” than other issues,¹⁹ is “the method by which amend-

10. *Id.* at 259 (quoting DOD DIRECTIVE 5500.17, ROLE AND RESPONSIBILITIES OF THE JOINT SERVICE COMMITTEE ON MILITARY JUSTICE (JSC) at encl. 2, E2.4.6 (May 8, 1996) (internal quotation marks omitted) [hereinafter DOD DIRECTIVE 5500.17]).

11. *See id.* at 262.

12. On 28 January 1997, charges of disobedience of a “no contact” order, false statements, fraternization, and adultery were preferred against Lieutenant Flinn. The Assistant Secretary of the Air Force approved her resignation in lieu of trial with a characterization of general under honorable conditions. *See* Tony Capaccio, *Pilot Errors*, AM. JOURNALISM REV., Oct., 1997, at 18 (summarizing the entire Kelly Flinn incident).

13. From November 1996 to April 1998, forty-nine male cadre members and drill sergeants were investigated for sexual misconduct at Aberdeen Proving Ground (APG). Five APG drill sergeants and a training unit company commander were tried by court-martial. One former APG drill sergeant was found not guilty for misconduct while an APG drill sergeant. Captain Derrick Robertson was sentenced to confinement for three years, total forfeiture of all pay and allowances, and dismissal from the service. His pretrial agreement limited confinement to twelve months with eight months suspended. Staff Sergeant Delmar Simpson was sentenced to confinement for twenty-five years, total forfeitures, reduction to Private E-1, and a dishonorable discharge. Staff Sergeant Vernell Robinson Jr. was sentenced to confinement for six months, total forfeitures, and a dishonorable discharge. Staff Sergeant Wayne Gamble was sentenced to confinement for ten months, total forfeitures, reduction to E1, and a dishonorable discharge. Staff Sergeant Herman Gunter was sentenced to reduction from staff sergeant to specialist, and a reprimand. Staff Sergeant Marvin C. Kelley was sentenced to reduction from staff sergeant to private E-1, to be confined for ten months, and to be discharged from the service with a dishonorable discharge. *See* Tom Curley & Steven Komarow, *For Army, the Focus Now Turns to Remaining Cases*, USA TODAY, Apr. 1997 (summarizing charges and verdicts).

ments to the *Manual for Court-Martial* . . . are proposed, considered, and adopted.”²⁰ Accordingly, in Part IV of his article,²¹ Captain Barry advances various “Recommendations for the Future”²² for improving the

14. On 16 March 1999, Command Sergeant Major Gene C. McKinney, the former Sergeant Major of the Army was convicted, contrary to his pleas, by a court composed of officer and enlisted members of one specification of obstruction of justice in violation of UCMJ Article 134. He was sentenced to reduction to Master Sergeant. He was acquitted of four specifications of maltreatment of subordinates, one specification of simple assault, four specifications of wrongful solicitation to commit adultery, one specification of adultery, one specification of obstruction of justice, two specifications of communication of a threat, four specifications of indecent assault, and one specification of assault on a superior commissioned officer. The findings and sentence were approved by the general court-martial convening authority on 28 August 1998. See *McKinney v. Ivany*, 48 M.J. 908 (Army Ct. Crim. App. 1998) (providing these and other details); *ABC News, Inc. v. Powell*, 47 M.J. 363 (1997) (same).

15. On 17 March 1998, Major General David R.E. Hale was found guilty in accordance with his pleas of seven specifications of conduct unbecoming an officer and one specification of making a false official statement. Major General Hale had improper relationships with the spouses of four subordinates and then lied about it to his superiors. Major General Hale was sentenced by a military judge to receive a reprimand, forfeiture of \$1500 pay per month for twelve months and a \$10,000 fine. In accordance with the terms of a pretrial agreement, the general court-martial convening authority reduced the forfeitures to \$1000 pay per month for twelve months, and approved the remainder of the adjudged sentence. See Harry G. Summers, *Defining Deviancy Down in the Army*, WASH. TIMES, Mar. 23, 1999, at A19. He was subsequently retired at the direction of the Secretary of the Army in the grade of Brigadier General. See *Army Secretary Takes Back Star from Retired General; Demoted Officer Convicted of Affairs with Wives of Four Subordinates*, BALT. SUN, Sept. 3, 1999, at 4A.

16. Barry, *supra* note 2, at 239.

17. *Id.* at 240.

18. *Id.*

19. *Id.*

20. *Id.* Captain Barry’s assertion that the process for amending the *MCM* has received little public attention appears correct. The Office of The Judge Advocate General (OTJAG), Criminal Law Division (CLD), is responsible for answering most questions from the public about the Army cases in the military justice system that are directed to the President, Congress, Secretary of the Army, Chief of Staff of the Army, and The Judge Advocate General. Colonel Mark Harvey, Deputy Chief, OTJAG-CLD, indicated that approximately 1500 letters were received from the public from 1996-2000. Aside from correspondence from the Standing Committee on Armed Forces Law, the National Institute of Military Justice, and lawyers affiliated with these organizations, no correspondence requesting more public participation in the JSC was received. Out of hundreds of newspaper articles relating to the Aberdeen Proving Ground cases, and the courts-martial of Sergeant Major of the Army Gene C. McKinney and Major General David R.E. Hale, none expressed concern about the JSC process. Interview with Colonel Mark W. Harvey, Deputy Chief, Office of the Staff Judge Advocate, Criminal Law Division, in Arlington, Va. (21 July 2000) [hereinafter Harvey Interview].

21. See Barry, *supra* note 2, at 264-76.

method of creating and amending the procedural and evidentiary rules for courts-martial.

Although Captain Barry does not enumerate them, he puts forth a total of seven specific proposals. Three recommendations are based on a resolution of the American Bar Association (ABA) House of Delegates.²³ In 1997, at the recommendation of the ABA's Standing Committee on Armed Forces Law (SCAFL), the ABA House of Delegates approved the following resolution:

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 amending other Federal court rules of practice, procedure, and evidence by establishing:

(1) 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 procedure in Federal civilian courts;

(3) requirements for reporting to Congress [and] a waiting period for rules of procedure and evidence at courts-martial.²⁴

The fourth proposal is derived from a 1973 law review article by Major General Kenneth Hodson.²⁵ In the article, General Hodson urged 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."²⁶ As described more fully below,²⁷ this proposal relates closely to the ABA's second recommendation because the

22. *Id.* at 264.

23. *See id.* at 264-69.

24. American Bar Association, Summary of Action of the House of Delegates, 1997 Midyear Meeting, San Antonio, Texas 2 (1997) [hereinafter ABA Summary].

25. *See* Kenneth J. Hodson, *Military Justice: Abolish or Change*, 22 KAN. L. REV. 31 (1973).

26. *Id.* at 53.

27. *See infra* Part III.D.

Judicial Conference headed by the Supreme Court leads the court rule-making procedure in civilian courts.

The final three recommendations for the future come from Captain Barry himself. First, Captain Barry urges creating an enforceable “mechanism to make available to the public the contents and justifications for . . . proposals . . . generated within the DOD.”²⁸ Second, Captain Barry recommends making available to the public “the minutes of the meetings of JSC (and of its working group) and the decisions on proposals generated within the JSC and the DOD.”²⁹ Third, Captain Barry advocates expanding the membership of the JSC beyond “the five officers chiefly responsible for the administration of military justice in the five services.”³⁰

When Captain Barry addresses the subject of military justice, his thoughts warrant attention and reflection because of his long and distinguished experience in the field. During his twenty-five years on active duty in the Coast Guard, Captain Barry served in a variety of important positions, including Chief Trial Judge, appellate military judge, and chief of the Coast Guard’s Legislative Division.³¹ Since retiring from active service, Captain Barry has developed an extensive private practice in military and veterans law. He also has played key roles in leading military law professional organizations, including the National Institute of Military Justice, the Judge Advocates Association, and the ABA’s SCAFL.³² The SCAFL’s views are similarly influential because of the vast military and legal experience of its membership, including dozens of retired judge advocates, some of whom are retired general officers. The specific endorsement of most of the proposals by the ABA and by the legendary Major General Hodson, needless to say, makes Captain Barry’s ideas even more worthy of study.

This article addresses Captain Barry’s proposals. Part II, begins by discussing three preliminary considerations concerning the *MCM* rule-making procedure.³³ 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*

28. Barry, *supra* note 2, at 275.

29. *Id.*

30. *Id.*

31. *See id.* at 237 n.1.

32. *See id.*

33. *See infra* Part II.

rule-making process would affect the present balance of powers between Congress and the President, possibly producing unintended adverse consequences.

Part III then responds to each of Captain Barry's seven recommendations.³⁴ On the whole, none of the proposals is radical or dangerous. Indeed, each is closely analogous to the federal civilian criminal justice system. In addition, no insurmountable legal obstacles would prevent their adoption. Yet, closer inspection suggests that, in light of all 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 present, the JSC, the DOD, the President, and Congress should view Captain Barry's recommendations with cautious skepticism.³⁵

II. Preliminary Considerations

Before assessing the desirability of adding new procedures and formalities to the *MCM* rule-making process, three preliminary considerations require attention: (1) the nature of future amendments to the *MCM* or, put another way, what the *MCM* rule-making process likely will be used for; (2) the kinds of reforms now being sought for the military justice system; and (3) the effect changes to the *MCM* rule-making process might have on the balance of powers between the President and Congress. The following discussion addresses these three considerations.

A. Changes to the *MCM* that Will Occur in the Future

What kind of changes to the *MCM* will occur in the future? The nature of the changes certainly matters a great deal to the process. If only adjustments to individual rules of evidence and procedure are likely to happen, rather than sweeping systemic changes, then the need for an extensive revision of the *MCM* rule-making process seems less important. The

34. See *infra* Part III.

35. See *infra* Part IV.

final results probably will not vary much no matter how amendments are processed before the President approves them.

The *MCM*, to be sure, has seen dramatic changes in the past fifty years. In 1951, the President promulgated a new version of the *MCM*,³⁶ designed to conform to the newly enacted UCMJ.³⁷ The President approved a significantly revised version of the *MCM* in 1969,³⁸ taking into account the extensive changes in military law wrought by the Military Justice Act of 1968.³⁹ In 1980, the President codified the Military Rules of Evidence,⁴⁰ largely following the codification of the civilian Federal Rules of Evidence in 1975.⁴¹ The last major revision occurred in 1984. In that year, the President adopted the codified Rules for Courts-Martial (R.C.M.),⁴² and made substantial changes to address revisions in the UCMJ caused by the Military Justice Act of 1983.⁴³ These major revisions undoubtedly had a dramatic effect on the substance and practice of military law.

The nature of *MCM* amendments, however, has changed since 1984. The President has amended the *MCM* regularly, but as military jurisprudence has become more similar to civilian criminal procedure (except in

36. See MANUAL FOR COURTS-MARTIAL, UNITED STATES (1951); see also COLONEL CHARLES L. DECKER, DEP'T OF ARMY, LEGAL AND LEGISLATIVE BASIS, MANUAL FOR COURTS-MARTIAL UNITED STATES 1951, The Army Library, Washington D.C. (1951) (discussing the history, preparation, and processing of the 1951 *MCM*).

37. Congress enacted the UCMJ on 5 May 1950, but delayed its effective date until 31 May 1951. See Act of May 5, 1950, 64 Stat. 108 (codified as amended at 10 U.S.C. §§ 801-946); see also INDEX AND LEGISLATIVE HISTORY UNIFORM CODE OF MILITARY JUSTICE (1950) (setting forth the extensive legislative history, hearings, reports, and floor debates prior to passage of the Uniform Code of Military Justice).

38. See MANUAL FOR COURTS-MARTIAL, UNITED STATES (1969); see also U.S. DEP'T OF ARMY, PAM. 27-2, ANALYSIS OF CONTENTS OF MANUAL FOR COURTS-MARTIAL, UNITED STATES 1969, REVISED EDITION (July 1970) (containing a paragraph by paragraph analysis of the changes made in the 1969 *MCM*).

39. See Military Justice Act of 1968, 82 Stat. 1334 (1968). This act, which became effective in 1969, among other things established the present role of the military judge in courts-martial. See John S. Cooke, *Military Justice and the Uniform Code of Military Justice*, ARMY LAW., Mar. 2000, at 3 (discussing this history).

40. See STEPHEN A. SALTZBURG ET AL., MILITARY RULES OF EVIDENCE MANUAL (3d ed. 1991).

41. See STEPHEN A. SALTZBURG ET AL., FEDERAL RULES OF EVIDENCE MANUAL 4 (7th ed. 1998).

42. Exec. Order No. 12,473, 49 Fed. Reg. 17,152 (Apr. 23, 1984); Exec. Order No. 12,484, 49 Fed. Reg. 28,825 (July 13, 1984).

43. See Military Justice Act of 1983, Pub. L. No. 98-209, 97 Stat. 1393 (1983); John S. Cooke, *Highlights of the Military Justice Act of 1983*, ARMY LAW., Feb. 1984, at 4. The

the area of sentencing), sweeping revisions appear to have become something of the past. Most of the recent amendments to the *MCM* have strived to serve one of three limited purposes. These amendments either correct errors or oversights in 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. They have not attempted bold reforms that effect the overall structure of the *MCM*.

The 1999 amendments to the *MCM* provide good illustrations of the incremental character of recent changes.⁴⁴ The first section of the President's executive orders alters six procedural rules. These alterations correct oversights and vestiges from past laws. For example, the first change deletes the words "active duty" from the qualifications for military judges in R.C.M. 507(c).⁴⁵ This revision allows Reserve Component judges to conduct trials during inactive duty training and travel.⁴⁶ The revisions also

43. (continued) Military Justice Act of 1983 directed the Secretary of Defense to establish a commission to study and make recommendations to Congress regarding the following issues:

1. Whether the sentencing authority in court-martial cases should be exercised by a military judge in all non-capital cases to which a military judge has been detailed;
2. Whether military judges and the Courts of Military Review should have the power to suspend sentences;
3. Whether the jurisdiction of the special court-martial should be expanded to permit adjudgment of sentences including confinement of up to one year, and what, if any, changes should be made to current appellate jurisdiction;
4. Whether military judges, including those presiding at special and general courts-martial and those sitting on the Courts of Military Review, should have tenure;
5. What should be the elements of a fair and equitable retirement system for the judges of the United States Court of Military Appeals.

The resulting Military Justice Act of 1983 Advisory Commission was composed of six military and three civilian members. Over a one-year period, the Commission heard testimony from twenty-seven witnesses, including civilian experts, and received public comment from sources including retired military leaders, public interest groups, bar associations and experts in military justice and criminal law. The Commission's charter and notice of hearings was published in the Federal Register. See THE MILITARY JUSTICE ACT OF 1983 ADVISORY COMMISSION REPORT (1984) [hereinafter 1983 REPORT].

44. See Exec. Order No. 13,140, 64 Fed. Reg. 55,115 (Oct. 6, 1999).

45. *Id.*

46. See Martin Sitler, *Explanation of the 1999 Amendments to the Manual for Courts-Martial*, ARMY LAW., Nov. 1999, at 27.

bring military law into accord with recent developments in civilian criminal procedure. For instance, the amendments create special rules for testimony by children in child abuse and domestic violence cases,⁴⁷ and recognize a psychotherapist-patient privilege.⁴⁸ Additional changes make adjustments to existing rules. For instance, the changes expand the evidence admissible at sentencing, identify a new aggravating factor in capital cases, and define an offense of reckless endangerment under UCMJ Article 134.⁴⁹ Other recent proposals have similarly limited scopes.⁵⁰

The near future probably holds more of the same. The military justice system has matured during the fifty years since passage of the UCMJ.⁵¹ The number of courts-martial held annually has declined dramatically.⁵² Most importantly, the *MCM* now has a modern, codified structure likely to endure for the long term. Consequently, most new changes to the MCM are likely to correct problems affecting a few cases, or to adapt the rules of evidence and procedure so that they conform to incremental amendments to the UCMJ by Congress or developments occurring outside the armed forces.

In the military, leaders always must look forward and must avoid the mistake—as the quip goes—of preparing to fight the last war, instead of the next. Accordingly, in assessing the procedures for amending the *MCM*, the question should not be whether the current procedures could have handled massive revisions of the kinds seen in 1951, 1969, 1980, or 1984.⁵³

47. *See id.* at 28.

48. *See id.* at 29.

49. *See id.*

50. Changes proposed by the JSC in 1998 and 2000 will conform the *MCM* to legislative amendments to the UCMJ concerning Article 56a (Sentence to Confinement Without Eligibility for Parole) and Article 19 (Jurisdiction of Special Courts-Martial). *See* 65 Fed. Reg. 39,883 (June 28, 2000); 63 Fed. Reg. 25,835 (May 11, 1998).

51. The military appellate courts and Court of Appeals for the Armed Forces have authored more than 100 volumes over the last fifty years of military justice caselaw, providing a significant body of law filling in the details and providing a judicial explanation for the UCMJ and *MCM*.

52. During the past three years alone, the total number of general and special courts-martial in the Army, Navy, Air Force, and Coast Guard have fallen from 5259 to 4397, for a total decrease of 16%. *Compare* Annual Reports on Military Justice for the Period October 1, 1998 to September 30, 1999 secs. 3-6, *available at* <http://www.armfor.uscourts.gov/annual/FY97/FY97Rept.htm> (last visited 4 Aug. 2000) (same). The long-term decreasing trend is even more dramatic in the Army. *See* Lawrence J. Morris, *Our Mission, No Future: The Case for Closing the United States Army Disciplinary Barracks*, 6 KAN. J.L. & PUB. POL'Y 77, 88 (1996) (noting that the number of general and special courts-martial in the Army has fallen from 6803 in 1980 to 1178 in 1995).

Rather, the question is whether the current procedures—which are now far more open—will satisfy the needs of the present and future, during which times the *MCM* likely will face annual revisions that add or adjust only a few rules at a time.

B. Limitations of Changes to the Rule-Making Process

Captain Barry and other 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.

Accordingly, in assessing the need for reforming the *MCM* rule-making procedures, two questions arise: (1) What kinds of changes to the military justice system do reformers want to make?; and (2) Will altering the *MCM* rule-making procedures bring about those changes?

For decades, commentators repeatedly have raised a familiar set of concerns about the military justice system. Presumably, many of the advocates who want to reform the *MCM* rule-making process hope that new procedures will overcome long-standing Department of Defense resistance to changing the system to address these concerns. They also may expect a new process to help them deal with other serious problems in the future.

For example, one recurring criticism of the military justice system, articulated mostly by attorneys rather than the general public, concerns the

53. This article does not suggest that the *MCM* rule-making procedures were necessarily inadequate in the past. Historically, major changes to the *MCM* generally have occurred in response to amendments to the UCMJ by Congress. In this context, greater public participation in the *MCM* rule-making process would have provided the President only limited benefits. The President had little discretion in conforming the *MCM* to the UCMJ revisions. Congress, moreover, typically has received significant public input before amending the UCMJ. As Captain Barry carefully describes, “[i]n 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. However, there seems to be no evidence of a similar interest or participation in the rule-making process.” Barry, *supra* note 2, at 244. It also bears noting that the President and the DOD have never shut out the public; although organizations and individuals with an interest in the military justice process sometimes have not availed themselves of the opportunity, they have always been free to communicate with the President and military officials regarding military justice matters.

independence of the military judiciary. Under the UCMJ and *MCM*, trial and appellate judges have no tenure of office.⁵⁴ In theory, if these judges render unpopular decisions, the Judge Advocate General for the service concerned could reassign them to non-judicial duties.⁵⁵ Although tenure of office does not necessarily immunize judges from outside pressure (as elected and appointed civilian judges have experienced), some commentators have argued that giving military judges fixed terms would make them more independent.⁵⁶ To date, however, neither Congress nor the Supreme Court has required the services to give their judges tenure of office.⁵⁷

54. See 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, 629-30 (1994). The civilian judges of the Court of Appeals for the Armed Forces serve for terms of fifteen years. See 10 U.S.C. § 142(b) (2000). In 1999, the Secretary of the Army approved limited tenure for Army judges. See U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE, paras. 8-1g and 13-12 (1999) (providing tenure for Army trial and appellate judges for a minimum of three years with limited exceptions).

55. See Lederer & Hundley, *supra* note 54, at 629-30.

56. See Hodson, *supra* note 25, at 53; Lederer & Hundley, *supra* note 54, at 668-73; Michael I. Spak & Jonathon P. Tomes, *Courts-Martial: Time to Play Taps*, 28 SW. U. L. REV. 481, 531-33 (1999); Andrew M. Ferris, Comment, *Military Justice: Removing the Probability of Unfairness*, 63 U. CIN. L. REV. 439, 488-92; Karen A. Ruzic, Note, *Military Justice and the Supreme Court's Outdated Standard of Deference: Weiss v. United States*, 70 CHI.-KENT. L. REV. 265, 284-89 (1994).

57. At the request of Congress, the Military Justice Act of 1983 Advisory Commission considered this issue and recommended against providing tenure to military trial and appellate judges. See 1983 REPORT, *supra* note 43, at 8-9. In *Weiss v. United States*, 510 U.S. 163, 181 (1994), the Supreme Court held that the accused failed to demonstrate that the factors favoring a fixed term of office "overcome the balance struck by Congress." The court gave the following three reasons for its decision:

- (1) [A]lthough a fixed term of office is a traditional component of the Anglo-American civilian judicial system, a fixed term of office has never been a part of the military justice tradition, given that courts-martial have been conducted in the United States for more than 200 years without the presence of a tenured judge and for more than 150 years without the presence of any judge at all; (2) while this does not mean that any practice in military courts which might have been accepted at some time in history automatically satisfies due process, the historical fact that military judges have never had tenure is a factor which must be weighed; and (3) applicable UCMJ provisions and corresponding regulations, by insulating military judges from the effects of command influence, sufficiently preserve judicial impartiality

Id.

A second recurring criticism deals with the selection of court members. At present, the convening authority selects the members eligible to serve on courts-martial.⁵⁸ Although judicial decisions forbid commanders from using the power of selection to pack the court for the purpose of obtaining a specific result,⁵⁹ a commander with a lack of integrity potentially could skew choices in favor of the prosecution. Some reformers would like to see panel members selected randomly, much like juror venires in civilian criminal cases, in order to remove any temptation a convening authority might have to pervert the military justice system.⁶⁰ Congress and the JSC recently have been studying this issue.⁶¹

A third, often repeated, criticism deals with the influence commanders have over the military justice system.⁶² Under current law, command-

58. See 10 U.S.C. § 825(d)(2) (2000) (“When convening a court-martial, the convening authority shall detail as members thereof such members of the armed forces as, in his opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament.”).

59. See *United States v. Hilow*, 32 M.J. 439, 440 (C.M.A. 1991) (prohibiting stacking of the pool of potential members of the court-martial).

60. See James A. Young, *Revising the Court Member Selection Process*, 163 MIL. L. REV. 91 (2000); 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); Hodson, *supra* note 25, at 53.

61. In 1999, Congress directed the Secretary of Defense to submit a report on the method of selection of members of the Armed Forces to serve on courts-martial. See National Defense Authorization Act for Fiscal Year 2000 § 552, Pub. L. No. 106-65, 113 Stat. 513 (Oct. 5, 1999). Congress required that the report examine alternatives, including random selection, to the current system of selection of members by courts-martial by the convening authority. Congress specified that any alternative considered be consistent with member selection criteria of 10 U.S.C. § 25(d)(2). The JSC studied the issue and concluded that the current practice best applies the criteria of Article 25(d), UCMJ, consistent with demands of fairness and justice in the military justice system. See REPORT OF THE DOD JOINT SERVICE COMMITTEE ON THE METHOD OF SELECTION OF MEMBERS OF THE ARMED FORCES TO SERVE ON COURTS-MARTIAL, EXECUTIVE SUMMARY (August 1999) (on file at the Criminal Law Division of the Army Office of The Judge Advocate General).

62. Colonel Mark Harvey, of the OTJAG-CLD, indicated the most frequent criticism by the public of the military justice system relates to the unit commander’s discretionary decision to prefer charges and thereafter the general court-martial convening authority’s decision to refer the charges to court-martial. Following trial, there is frequent criticism of the findings and sentence, and performance of the defense counsel. Complaints usually originate from the accused, victim or from their family members and friends. Criticism that the convening authority has too many roles or too much power in the military justice system is extremely rare. Colonel Harvey could recall less than ten complaints that the convening authority had too much authority under the UCMJ. Harvey Interview, *supra* note 20. See also *supra* note 20 (describing the role of OTJAG, CLD in responding to questions from the public).

ers determine whether to convene a court-martial⁶³ and what charges to refer.⁶⁴ After trial, they also have the power to approve or disapprove guilty verdicts and the power to remit punishments.⁶⁵ In addition, although commanders may not attempt to influence courts-martial,⁶⁶ the reality remains that the accused, the court-members, the witnesses, and the trial counsel usually fall within their commands. Many commentators, accordingly, believe that commanders should have less direct and indirect control over military justice.⁶⁷

If reformers want to address these kinds of criticisms, the question arises whether changing the *MCM* rule-making process would help to achieve them. Generalizations are difficult because critics may see different solutions. I am doubtful, however, that reforming the rule-making process would have much effect on efforts to address these kinds of criticisms for three reasons.

First, the UCMJ limits the kinds of changes that the President may make through amendments to the *MCM*. Although the President has the power to promulgate rules of evidence and procedure, these rules may not contradict anything in the UCMJ, such as the panel member selection criteria in Article 25(d).⁶⁸ As a result, no matter what the *MCM* rule-making process looks like, the President generally cannot effect radical changes to the military justice system. For example, the President could not amend the *MCM* to take away the commander's discretion to decide which kinds of courts-martial to convene, which charges to refer to courts-martial, or which service members are eligible to serve as members of particular courts-martial.

63. See 10 U.S.C. §§ 822-824 (power to convene courts-martial).

64. See *id.* § 834 (referral of charges).

65. See *id.* § 860 (actions of the convening authority after trial).

66. See *id.* § 837 (prohibiting unlawful command influence).

67. See Spak & Tomes, *supra* note 56, at 512 (discussing the problems of the commander's strong influence); Hodson, *supra* note 25, at 45 (proposing a requirement to limit prosecutorial discretion by requiring a judge advocate to review a commander's charges for legal sufficiency); Donald W. Hansen, *Judicial Functions for the Commander*, 41 MIL. L. REV. 1, 40 (1968) (advocating a similar proposal).

68. See 10 U.S.C. § 836 (authorizing the President to promulgate rules of evidence and procedures "which may not be contrary to or inconsistent with" the UCMJ). See also *supra* note 61 (discussing the Report of the DOD Joint Service Committee on the Method of Selection of Members of the Armed Forces to Serve on Courts-Martial).

Second, even if the *MCM* rule-making process allowed more external input, the President seems unlikely to use the process to make major reforms of the military justice system. In the past, the President has reformatted the rules of evidence and procedure, but has not changed the overall operation of the system. Instead, the President has left that kind of task to Congress. For example, as noted above, Congress created military judges in the Military Justice Act of 1968;⁶⁹ the President did not attempt this dramatic reform of the military justice system through executive order.

Third, proposals for reforming the *MCM* rule-making process generally involve adding more formalities. For instance, as noted above, Captain Barry advocates creating new committees, imposing new publication requirements, delaying the effective date of changes, and so forth.⁷⁰ Experience from other fields suggests that adding formalities of these kinds generally impedes rule-making efforts.⁷¹ Indeed, the more significant and the more controversial a desired amendment, the more likely someone will use a formal procedure to block it.

In sum, changes to the process of amending the *MCM*, no matter how reasonable, will not trigger radical change or facilitate any large-scale reforms of the military justice system. Rather, as noted in the previous discussion, they mostly will affect the manner in which the President makes adjustments to the rules of evidence and procedure, either to correct errors and oversights, or to implement incremental legislative changes, or to conform the *MCM* to developments in the civilian courts.

C. Separation of Powers Concerns

The structure of the military justice system reflects a balance of power between Congress and the President. At present, Congress controls the content of the UCMJ, while the President has authority over the *MCM*.⁷² Imposing new restrictions or procedures on the rule-making process may

69. See *supra* note 39.

70. See *supra* Part I.

71. See Todd D. Rakoff, *The Choice Between Formal and Informal Modes of Administrative Regulation*, 52 ADMIN. L. REV. 159, 162-65 (2000) (noting how movements to less formal rule-making increase the number of rules made by administrative agencies).

72. See 10 U.S.C. § 836 (granting the President power to promulgate the rules in the *MCM*, so long as they do not conflict with the UCMJ).

dilute the President's power. Accordingly, any change to the *MCM* rule-making process necessarily affects the overall balance of power.

Balances of power may shift from time to time within the boundaries established by the Constitution. Yet, caution dictates careful thought before weakening one political branch. In many instances, tampering with long established balances of powers may have far-reaching effects and unintended consequences. As one example, reducing the President's power over the *MCM* might cause him or his political subordinates to adjust the manner in which they exercise their discretion in dealing with military justice issues. For instance, as noted below, the President may use greater political scrutiny when appointing judges to the Court of Appeals for the Armed Forces.

One response to the observation that the military justice system reflects a balance of power might be that the President derives his power to promulgate *MCM* provisions through UCMJ Article 36.⁷³ If Congress desired, it could eliminate this delegation. Using its power to "To make Rules for the Government and Regulation of the land and naval forces,"⁷⁴ Congress could establish its own rules of evidence and procedure by statute. Accordingly, the argument would be that the balance of power has no great constitutional significance.

This reasoning, although not necessarily incorrect, fails to take into account the special role of the President in our system of government. Article II, section 2 makes the President the Commander in Chief.⁷⁵ In *United States v. Swaim*,⁷⁶ the Supreme Court held that this status gives the President at least some authority over courts-martial, even in the absence of legislation from Congress.⁷⁷ The precise implications of this holding

73. *See id.*

74. U.S. CONST. art. I, § 8, cl. 14.

75. *See id.* art. 2, § 2, cl. 1.

76. 165 U.S. 553 (1897).

77. *See id.* at 558 (holding that "it is within the power of the president of the United States, as commander in chief, to validly convene a general court-martial" even without express statutory authorization).

78. *See* William F. Fratcher, *Presidential Power to Regulate Military Justice: A Critical Study of Decisions of the Court of Military Appeals*, 34 N.Y.U. L. REV. 861, 862-63 (1959) ("Unless restricted by express statute, the President has power, under the Constitution, to issue regulations defining offenses within the armed forces, prescribing punishments for them, constituting tribunals to try such offenses, and fixing the mode of procedure and methods of review of proceedings of such tribunals."). *See also* CLINTON ROSSITER, *THE SUPREME COURT AND THE COMMANDER IN CHIEF* 109 (1951) (reaching similar

remain unclear, but some commentators have concluded that the President could have promulgated the rules in the *MCM* even without the grant of authority from Article 36.⁷⁸ The Court of Military Appeals, moreover, has upheld an *MCM* provision in at least one instance based solely on the President's constitutional authority and not any statutory grant of power.⁷⁹

Another response to worries about separation of powers might be that the President in reality exercises little power over the *MCM*. In most instances, the JSC prepares the changes and the President simply signs an executive order putting them into effect. As a result, the President and his political subordinates probably would have little objection to changing the rule-making process, even if the changes theoretically weakened executive power.

This response has much truth in it. Still, in a few instances, the President or political members of the DOD may want specific amendments to deal with politically charged topics. The list of aggravating factors such as capital offenses (of which at least one must be found for a sentence of death), may provide one example.⁸⁰ A President with strong views on capital punishment may wish to retain plenary power to alter the list. If restrictions on the *MCM* rule-making process inhibit the President, then the President might react by using other powers to influence the military justice system.

III. Assessment of Captain Barry's Seven Proposals

Captain Barry's proposals appear modest and reasonable at first glance. The recommendations generally strive to make more information available, to expand the number of persons who can participate in the *MCM* revision process, and to establish additional stages of review. The

78. (continued) conclusions about the President's inherent power to regulate discipline in the armed forces); EDWARD S. CORWIN, *THE PRESIDENT, OFFICE AND POWERS* 316 (3d ed. 1948) (same). *But see* Ziegel W. Neff, *Presidential Power to Regulate Military Justice*, 30 *JUDGE ADVOCATE J.* 6, 6-11 (1960) (arguing that the Constitution does not grant the President plenary power over military justice).

79. *See* *United States v. Ezell*, 6 M.J. 307, 316-18 (C.M.A. 1979) (upholding a provision in the 1969 *MCM* allowing commanding officers to issue search warrants, even though the UCMJ at that time did not authorize the President to create rules governing pre-trial activities).

80. *See* *MCM*, *supra* note 3, R.C.M. 1004(c) (listing aggravating factors, at least of one of which is necessary for a sentence of death).

support for most of the suggestions, from the ABA House of Delegates and from Major General Hodson, gives them weight.

Yet, upon closer inspection, the benefits from adding new procedures and formalities to the *MCM* amendment process turn out to be largely illusory. The proposals at best would offer only marginal improvements to the present procedure, while imposing additional burdens—sometimes substantial burdens—on the system. For these reasons, Congress, the President, and the DOD should hesitate to adopt them without more evidence that the benefits of change will outweigh the costs.

A. The ABA's Advisory Committee Proposal

In 1997, as noted above, the ABA House of Delegates by formal resolution recommended creating “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.”⁸¹ The report accompanying this recommendation explains that members of the bar would include military trial and defense counsel as well as civilian practitioners.⁸²

Captain Barry and the report accompanying the ABA proposal provide little substantive argument for this recommendation. On the contrary, they justify the recommendation solely by pointing out that the Federal Judicial Conference has the benefit of a similar advisory committee to assist it in devising rules of evidence and procedure for the federal courts.⁸³ They would like to see the same kind of assistance in the military context.

81. ABA Summary, *supra* note 24, at 2.

82. STANDING COMMITTEE ON ARMED FORCES LAW ET AL., REPORT TO THE HOUSE OF DELEGATES 5 (1997) (“First, the Committee recommends a statute be enacted by Congress establishing a broadly constituted advisory committee, including public membership, to make recommendations concerning presidential rulemaking affecting courts-martial and appeals, similar to committees prescribed for other Federal courts.”).

83. *See id.* at 3, 11. Federal law provides: “The Judicial Conference may authorize the appointment of committees to assist the Conference by recommending rules to be prescribed . . . under this title. Each such committee shall consist of members of the bench and the professional bar, and trial and appellate judges.” 28 U.S.C. § 2073(a)(2) (2000).

This proposal is neither radical nor dangerous. Its implementation would not require dramatic effort. The JSC, or a similar body, 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*.

Why then has the DOD declined to establish an advisory committee? One reason may be that little need exists for such a committee. Members of the bench and bar, academics, and others already have the ability to recommend changes directly to the JSC. They do not have to act through an advisory committee, although they certainly could create their own private committees if they desired. Indeed, as Captain Barry indicates, SCAFL has periodically made recommendations to the JSC that were carefully considered by the JSC.

Department of Defense Directive 5500.17 requires the JSC to conduct an annual review of the *MCM*, with an eye to finding needed amendments.⁸⁴ The same directive explicitly provides: "It is DOD policy to encourage public participation in the JSC's review of [the *MCM*]."⁸⁵ The JSC has implemented these requirements.⁸⁶ As a result, any member of the public or Armed Forces may communicate suggestions to the JSC for changing rules of procedure or evidence.

Members of the JSC's working group, indeed, long have urged soldiers and civilians to participate in the amendment process. In 1992, working group member Major Eugene Milhizer published an article explaining the process in *The Army Lawyer*. At the end of the article he proclaimed:

Amending the Manual should be a cooperative process that incorporates input and ideas from a variety of interested sources. All persons concerned with the quality of the military justice system are encouraged to submit to the JSC their suggestions for amending the Manual.⁸⁷

84. DOD DIRECTIVE NO. 5500.17, *supra* note 10, § E2.1.

85. *Id.* § E3.4.2.

86. See JOINT SERVICE COMMITTEE OF MILITARY JUSTICE, INTERNAL ORGANIZATION AND OPERATING PROCEDURES OF THE JOINT SERVICE COMMITTEE ON MILITARY JUSTICE pt. III (March 2000) [hereinafter JSC OPERATING PROCEDURES].

87. Eugene Milhizer, *Amending the Manual for Courts-Martial*, ARMY LAW., Apr. 1992, at 81.

After giving the mailing address for sending comments, Major Milhizer concluded: "Take the time to help improve military justice. It certainly is worth the effort."⁸⁸ For the past seven years, the JSC has used similar notices published in the Federal Register to solicit comments and suggestions.⁸⁹

Starting in 2000, moreover, the JSC service representatives have begun sending annual calls for proposals to the judiciary, trial, and defense organizations, and judge advocate general schools.⁹⁰ The JSC will acknowledge all proposals received from individuals or organizations outside DOD, discuss the proposal, and notify the sender in writing whether the JSC voted to decline the proposal as not within the JSC's cognizance, reject it, table it, or accept it.⁹¹ Although these organizations previously have had the opportunity to make suggestions, these new procedures may provide them greater encouragement.

The process of implementing the new psychotherapist-patient privilege into Military Rule of Evidence 513 provides an excellent example of public participation under the current system of military rule-making and the impact it may have. The initial draft of Military Rule of Evidence 513 developed by the JSC and published in the Federal Register did not include "clinical social worker" within the definition of "psychotherapist." This draft received a large volume of oral and written public comment, including suggestions from the American Psychiatric Association, and the American Psychology Association. At the public hearing, the JSC heard persuasive testimony about the extensive and important role of clinical social workers in psychotherapy. As a result of this informed public comment from experts in the field, the JSC modified the definition of "psychotherapist" to include "clinical social workers."⁹²

88. *Id.*

89. *See, e.g.*, 58 Fed. Reg. 19,409, 19,410 (1993) (soliciting comments on proposed changes to the *MCM*).

90. Each JSC service representative evaluates proposals received within the service and sponsors proposals, as appropriate to the JSC for consideration in the next annual review cycle. *See* JSC OPERATING PROCEDURES, *supra* note 86, pt. III.

91. *See id.*

92. Exec. Order No. 13,140, 64 Fed. Reg. 196, § 2(a) (Oct. 12, 1999).

Captain Barry himself briefly alludes to another reason that JSC has not sought to create an advisory committee. In particular, the proposed advisory committee almost certainly would come within the coverage of the Federal Advisory Committee Act.⁹³ This Act imposes nontrivial record keeping and other requirements on advisory committees.⁹⁴ It also expressly discourages the creation of unnecessary committees.⁹⁵

Although the JSC undoubtedly could insure compliance with the Act, the effort does not seem worthwhile. As noted previously, interested members of the bench and bar already have ample means to advance proposals for changing the *MCM*. Creating an advisory committee, ironically, probably would not make more input possible. On the contrary, it might reduce the input because federal advisory committee members may fall within the scope of federal conflict of interest laws.⁹⁶ As a result, defense attorneys who serve on the committee might not be able to participate in decisions that would benefit their clients. This sacrifice seems too great; some of the most likely advisory committee members—like Captain Barry—have active legal practices with many clients.

Finally, Captain Barry notes that changes to the *MCM* are political.⁹⁷ Although he is quite correct, creating an advisory committee would not ensure more democratic results than those achieved under the present system. Members of advisory committees are no more politically accountable than the JSC. If the problem is that certain proposals to change the military justice system are likely to raise substantial political controversy, then Congress or the President ought to play the lead role in making them. Unlike advisory committees, they are subject to democratic pressures.

93. 5 U.S.C. app. 2 §§ 1-12.

94. *See id.* § 10 (requiring meetings open to the public, detailed minutes, and public inspection of documents).

95. *See id.* § 2(b)(1) (“[N]ew advisory committees should be established only when they are determined to be essential and their number should be kept to the minimum necessary.”).

96. *See* Michelle Nuskiewicz, Note, *Twenty Years of the Federal Advisory Committee Act: Its Time for Some Changes*, 65 S. CAL. L. REV. 957, 961 (1992) (arguing that 18 U.S.C. § 208 bars advisory committees from participating in matters in which they or their firms have a financial interest). The Federal Advisory Committee Act itself mandates that advisory committees not “be inappropriately influenced . . . by any special interest.” 5 U.S.C. app. 2 § 5(b)(2).

97. *See* Barry, *supra* note 2, at 246 (quoting 1 FRANCIS A. GILLIGAN & FREDRIC I. LEDERER, *COURT-MARTIAL PROCEDURE* ¶ 1-54.00, at 30 n.148 (2d ed. 1999)).

B. The ABA's Rule-making Procedure Proposal

The ABA, as noted above, also wants to see “a method of adopting rules of procedure and evidence at courts-martial which is generally consistent with court rule-making procedure in Federal civilian courts.”⁹⁸ Evaluating this proposal first requires an understanding of the rule-making procedure in the federal civilian courts. It then calls for an assessment of the benefits and costs that the proposal would produce.

1. Overview of Federal Civilian Rule-Making Procedure

Various authors have described the rule-making procedure in the federal civilian courts.⁹⁹ By statute, Congress has given the Supreme Court the power to “prescribe general rules of practice and procedure for the federal courts.”¹⁰⁰ These rules include the Federal Rules of Criminal Procedures and Federal Rules of Evidence, which govern federal civilian criminal proceedings and serve the same purpose as the Rules for Courts-Martial and the Military Rules of Evidence.

The Supreme Court does not draft procedural and evidentiary rules itself. Instead, the Court relies on the recommendations of a body called the “Judicial Conference of the United States.”¹⁰¹ The Chief Justice of the United States chairs the Judicial Conference.¹⁰² Its other members include the chief judges of the United States Courts of Appeals, twelve district court judges, and the Chief Judge of the Court of International Trade.¹⁰³

The Judicial Conference relies heavily on an important committee known as the “Standing Committee on Rules of Practice and Procedure.”¹⁰⁴ The Judicial Conference also receives assistance from various advisory committees, including an Advisory Committee on Criminal

98. ABA Summary, *supra* note 24, at 2.

99. See, e.g., Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy*, 87 GEO. L.J. 887 (1999); Thomas E. Baker, *An Introduction to Federal Court Rule Making*, 22 TEX. TECH. L. REV. 323, 324 (1991); David L. Shapiro, *Federal Rule 16: A Look at the Theory and Practice of Rulemaking*, 137 U. PA. L. REV. 1969 (1989).

100. 28 U.S.C. § 2072(a) (2000).

101. See Baker, *supra* note 99, at 328.

102. See *id.*

103. See *id.*

104. *Id.* at 329.

Rules.¹⁰⁵ The membership of the advisory committees includes state and federal judges, practicing lawyers, and law professors.¹⁰⁶ The Chief Justice appoints the members of all the committees.¹⁰⁷

Each advisory committee has a continuing obligation to study the rules within its field.¹⁰⁸ It may consider suggestions for revisions from any source, and may generate its own proposals.¹⁰⁹ Proposals approved by the advisory committee undergo review first by the Standing Committee.¹¹⁰ If the Standing Committee approves them, the Judicial Conference reviews them next.¹¹¹ The Judicial Conference then may forward them to the Supreme Court.¹¹²

The Supreme Court generally approves the recommendations of the Judicial Conference. It then must forward the proposals to Congress during a regular session, but prior to the start of May.¹¹³ To give Congress the opportunity for review, the rules do not become effective until December.¹¹⁴ During the interim, Congress may pass legislation disapproving them.¹¹⁵ Congress also can bypass the Federal Civilian Rule-making procedure in whole or in part.¹¹⁶

105. *See id.*

106. *See id.*

107. *See id.*

108. *See* 28 U.S.C. § 2073(b) (2000).

109. *See Baker, supra* note 99, at 329.

110. *See id.*

111. *See id.*

112. *See id.*

113. *See* 28 U.S.C. § 2074(a).

114. *See id.*

115. *See id.*

116. For example, Congress went against the recommendations of the Advisory Committee when it adopted Federal Rules of Evidence 413, 414, and 415. Congress originally bypassed the normal rule-making process and passed these three evidentiary rules subject to reconsideration upon objection by the Judicial Conference. The Advisory Committee on Evidence Rules met and considered eighty-four written comments, overwhelmingly opposing the new rules. The Judicial Conference objected and proposed, in the alternative, that Federal Rules of Evidence 404 and 405 be amended to correct ambiguities and constitutional infirmities in Federal Rules of Evidence 413, 414, and 415. At the time, the Standing Committees were composed of over forty judges, practicing lawyers, and academics. Everyone, except the Department of Justice, opposed proposed Federal Rules of Evidence 413, 414, and 415. In spite of overwhelming opposition by federal rule makers, Congress declined to reconsider its original passage of Federal Rules of Evidence 413, 414, and 415 and these rules became law in 1995. *See* FED. CRIM. CODE & RULES 256-58 (2000); SALTZBURG, *supra* note 41, at 673-74.

2. *Benefits of Adopting the Civilian Rule-Making Process*

Neither Captain Barry nor the ABA explain fully how they envision the civilian rule-making procedures working in the military context. One likely possibility would involve a military judicial conference composed of military judges and headed by the JSC. The military judicial conference would make proposals after receiving recommendations from advisory committees. The President would promulgate changes to the *MCM* only after the advisory committees, the military judicial conference, and the JSC all had approved them.

This approach probably would not require new legislation. The President has the power to create advisory committees and could direct military judges to serve as part of a judicial conference. (By contrast, as discussed below, Major General Hodson's proposal to involve members of the Court of Appeals for the Armed Forces would require action by Congress.) The President could further exercise discretion not to issue amendments unless they had obtained full approval.

The more important issue is whether a new rule-making process of this sort would provide any substantial benefit. Captain Barry and the ABA, unfortunately, do not explain in any detail how their proposal would improve the current rule-making process. On the contrary, as mentioned previously, the ABA's report for the most part simply notes that the federal courts use a different system. Presumably, they believe that the formal participation of large numbers of experienced personnel, and the multiple stages of review, would provide better proposals for changes to the *MCM*.

Their view that a judicial conference would enhance the process might prove true, if tested, but I see substantial reason for some skepticism. In particular, Captain Barry and the ABA fail to note that a wide range of commentators recently have criticized the federal civilian court rule-making process. Although no one has called for scrapping the process altogether, their valid objections do raise doubts about the benefits of importing similar formalities into the *MCM* amendment process.

Professor Thomas Baker, who has served on an advisory committee for civil procedure, has advanced perhaps the leading criticism of the civilian court rule-making process. He has observed that most of the participants in the process make their decisions based simply on anecdotal evidence and subjective normative judgments.¹¹⁷ Although the judges, practitioners, and academics who serve on the various committees have

extensive practical experience, they generally have no empirical or scientific basis for assessing the merits of proposed amendments.¹¹⁸ Other observers also have advanced this criticism.¹¹⁹

The JSC, at present, undeniably has the same problem when it evaluates proposals for changing the *MCM*. It often must make determinations based on informed intuition rather than on any kind of objective data. But involving more experts in the process will not necessarily make this problem go away. Advisory panels and multiple layers of review will add more opinions, but they may not provide any better information than the JSC already can obtain through its study of the military justice system and by receiving public comment.¹²⁰

Another problem with the civilian rule-making process is that it invites the meddling of special interest groups. Professor Linda S. Mullenix, who like Professor Baker also has served on the civil procedure advisory committee, has documented how the process has become increasingly politicized.¹²¹ Because procedural rules often will affect some persons more than others, the most concerned individuals inevitably have a strong desire to seek favorable treatment, regardless of the consequences to others. Various other scholars have made similar observations.¹²²

117. See Baker, *supra* note 99, at 335.

118. See *id.*

119. See Laurens Walker, *Avoiding Surprise from Federal Civil Rule Making: The Role of Economic Analysis*, 23 J. LEGAL STUD. 569, 575-82 (1994).

120. Consider, for analogy, the famous "Emperor of China" fallacy. If you asked everyone in China how tall the emperor is, would their average answer tell you his actual height to the ten thousandth or ten millionth of an inch? Obviously not, unless everyone you asked had some basis for knowing the true height, and was not merely guessing.

121. See Linda S. Mullenix, *Hope over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C. L. REV. 795 (1991).

122. See, e.g., Paul D. Carrington, *Making Rules Dispose of Manifestly Unfounded Assertions: An Exorcism of the Bogy of Non-transubstantive Rules of Civil Procedure*, 137 U. PA. L. REV. 2067, 2075 (1989) (describing lobbying efforts); Roy D. Simon, Jr., *The Riddle of Rule 68*, 54 GEO. WASH. L. REV. 1, 17-18 (1985) (same).

Professor Mullenix laments that advisory committees really have no good option for addressing this form of politicization. She states:

The Advisory Committee's dilemma, then, is this: On the one hand, it can . . . shunt all potentially controversial rule reforms to Congress. If this happens, the Advisory Committee will become an ineffective third branch institution. On the other hand, the Advisory Committee can embrace the new openness, [and] meet interest group demands . . .¹²³

The second choice, obviously, does not help the system because it produces results that favor the most vocal advocates over all others, regardless of the merits of their positions. This problem is particular troubling when the results concern maintenance of good order and discipline in the military, because this important objective often has no particular spokesperson.¹²⁴

True, under current procedures, special interest groups already might attempt to influence the JSC. Defense counsel, for example, can submit comments and proposals to the JSC advocating positions that specifically would aid their clients.¹²⁵ They also can participate at public meetings. They further can write law review articles or newspaper editorials.

This type of input by special interests, however, differs in an important respect from the kind that Professor Mullenix discusses. Under current rules, private parties have no formal role in the amendment procedure. They can make suggestions, but they cannot vote on proposals. The JSC thus does not have to confront the dilemma described by Professor Mullenix.

In addition, to a large extent, the civilian rule-making process serves a different function from the current *MCM* rule-making procedures. When the federal courts amend their rules, they usually are breaking new ground. They are creating novel evidentiary standards or they are implementing procedural innovations. These kinds of changes in theory might benefit

123. Mullenix, *supra* note 121, at 836-37.

124. *See* Parker v. Levy, 417 U.S. 733 (1974) (noting the differences between the military community and the civilian community, and between military law and civilian law and concluding that the UCMJ cannot be equated to a civilian criminal code).

125. For example, in March 2000, the Army Defense Appellate Division submitted nine proposals for change to the Army JSC service representative. *See National Institute of Military Justice*, 76 MILITARY JUSTICE GAZETTE 2 (Apr. 2000).

from the prolonged deliberation that the civilian rule-making procedures foster.

The JSC does important work, but realistically it plays a less innovative role than the Judicial Conference. The JSC usually follows changes that already have occurred in civilian rules of evidence and procedure. The 1999 amendments to the *MCM* provide a good example.¹²⁶ In those amendments, as discussed above, the President created a psychotherapist-patient evidentiary privilege and also certain special rules for child witnesses in sexual abuse cases.¹²⁷ These amendments, while significant, did not require the JSC to engage in original thinking. The federal civilian courts have recognized a psychotherapist-patient evidentiary privilege since 1996,¹²⁸ and state courts have had special procedures for child testimony for many years.¹²⁹ Thus, the public commentary and other complicated procedures used by the federal courts for rule-making infiltrate through the JSC into the *MCM*.

Finally, the civilian rule-making procedure tends to take a long time.¹³⁰ The process, as described above, involves multiple layers of approval and review. In many instances, minor, uncontroversial, but important changes may take several years to go into effect. By contrast, the JSC annual review system results in a systemic review of the *MCM* within each year. Indeed, its annual review contemplates that it generally will solve all problems that arise.

The civilian rule-making process has produced a workable and not overly controversial set of rules for the federal courts. The *MCM* rule-making procedure, however, has achieved the same result for military courts. In deciding whether the military should adopt the civilian process, the question boils down to whether the benefits outweigh the burdens. In view of the difficulty of stating the benefits of replicating the civilian pro-

126. See Exec. Order No. 13,140, 64 Fed. Reg. 55,115 (Oct. 6, 1999).

127. See *id.*

128. See *Jaffee v. Redmond*, 518 U.S. 1, 16-18 (1996) (holding that Federal Rule of Evidence 501 requires federal courts to recognize a psychotherapist-patient privilege).

129. See John G. Douglass, *Beyond Admissibility: Real Confrontation, Virtual Confrontation, and the Right to Confront Hearsay*, 67 GEO. WASH. L. REV. 191, 214-15 (1999) (discussing this trend and the constitutional implications).

130. See Mark Owens Kasanin, *Amending Rule 9(h): An Example of How the Federal Rules of Civil Procedure Get Changed*, 27 J. MAR. L. & COM. 417 (1996) (providing an interesting narrative account of a minor amendment to a rule affecting admiralty cases).

cess, and the apparent problems replicating it would introduce, a convincing case has not been made.

C. The ABA's Congressional Oversight Proposal

In addition to its two other recommendations, the ABA also has asked for “requirements for reporting to Congress [and] a waiting period for rules of procedure and evidence at courts-martial.”¹³¹ The federal civilian court rule-making procedure, as noted above, incorporates these features.¹³² It requires the Supreme Court to transmit proposed changes to Congress and affords Congress at least seven months to intervene before new rules go into effect.

The pertinent statute governing federal civilian court rule-making says:

The Supreme Court shall transmit to the Congress not later than May 1 of the year in which a rule prescribed under section 2072 is to become effective a copy of the proposed rule. Such a rule shall take effect no earlier than December 1 of the Year in which such rule is so transmitted unless otherwise provided by law.¹³³

Two points about this provision require specific mention. First, the statute does not require Congress to take any action. If Congress does nothing, the new rules become effective. Second, to block proposed changes, Congress must pass an actual law. Both houses must approve a bill and present it to the President for signature or veto.

Imposing a similar waiting period for amendments to the *MCM* rule-making procedures would not work a fundamental change in the JSC's current procedures. At present, as noted above, the JSC waits seventy-five days after announcing changes to the *MCM* before transmitting them to the President.¹³⁴ Without great difficulty, the JSC could extend the delay to

131. ABA Summary, *supra* note 24, at 2.

132. *See infra* Part III.B.1.

133. 28 U.S.C. § 2073(a) (2000).

134. *See* DOD DIRECTIVE 5500.17, *supra* note 10, at E2.4.5.

seven months to give Congress the same amount of time that it has to review changes in the civilian rules.

Still, I doubt that Congress actually would take advantage of an extended period of delay to block proposed *MCM* changes. In general, Congress has deferred to the military in determining the procedural and evidentiary needs of military justice system. To my knowledge, it has never attempted to overrule any *MCM* provisions by statute. Indeed, it often has amended the UCMJ to comport with the DOD on policy recommendations. Thus, the proposal would do little more than prolong the *MCM* rule-making process.

In addition, recent experience from federal civilian court rule-making procedure suggests that a required delay before rules become effective may give more power to special interest groups who want to defeat proposed changes. For example, several years ago, the Supreme Court transmitted to Congress a new civil procedure rule requiring litigants to make certain disclosures in discovery.¹³⁵ Lobbyists nearly killed the measure in Congress.¹³⁶

D. General Hodson's Military Judicial Conference Proposal

More than twenty-five years ago, Major General Hodson urged that "a Military Judicial Conference, headed by the Chief Judge of the Court of Military Appeals [now the Court of Appeals for the Armed Forces], be established and given power to prescribe rules of procedure and evidence."¹³⁷ This proposal for altering the *MCM* rule-making procedure resembles the ABA's second recommendation, but with a major difference. It would take authority away from the JSC and President, and vest it in the civilian judges on the Court of Appeals for the Armed Forces.

The previous discussion has highlighted some of the reasons to doubt that the judicial conference model of rule-making greatly would improve the present work of the JSC. Major General Hodson's proposal, though,

135. See Carl Tobias, *Some Realism About Federal Procedural Reform*, 49 FLA. L. REV. 49 (1997).

136. See *id.*

137. Hodson, *supra* note 25, at 53.

would have a further potentially harmful effect. In particular, it would tend to upset the balance of power between Congress and the President.

To put Major General Hosdon's proposal into effect, Congress would have to amend UCMJ Article 36.¹³⁸ The amendment 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. Otherwise, the President simply could ignore the Court of Appeals for the Armed Forces in the rule-making process.¹³⁹

This amendment to Article 36 would raise possible constitutional questions. The UCMJ prevents the President from discharging members of Court of Appeals for the Armed Forces for any reason other than neglect of duty, misconduct, or mental or physical disability.¹⁴⁰ In general, Congress may not impose restrictions on the President's ability to discharge individuals who exercise executive functions, if the restrictions would "unduly trammel on executive authority."¹⁴¹

The President would have a substantial argument that deciding the kinds of rules that courts-martial should have is an executive function. The President has created rules for courts-martial for half a century under the UCMJ and did the same earlier under the Articles of War. Indeed, the President even has established rules in the absence of legislation under his powers as Commander-in-Chief.¹⁴² Because a duty to act only with the Court of Appeals for the Armed Force's approval would trammel on this important function, the only question is whether the effect is excessive.

In any case, even if the provision would not violate the Constitution, it would alter the current balance of power between Congress and the President. The measure clearly would weaken the President's role in the process. Congress would retain complete control over the content of the

138. *See* 10 U.S.C. § 36 (2000) (authorizing the President to promulgate procedural and evidentiary rules).

139. Major General Hodson's proposal also would require legislation mandating that the Court of Appeals for the Armed Forces participate in the rule-making process. *Cf.* 10 U.S.C. § 946 (requiring judges of the Court of Appeals for the Armed Forces to serve on a committee to review the UCMJ).

140. *See id.* § 142(c).

141. *See Morrison v. Olson*, 487 U.S. 654, 691 (1988).

142. *See supra* Part II.C.

UCMJ, while the President would lose the power to change the *MCM* without approval from others.

The President might overlook this shift in power. Just as easily, however, the proposal might have far reaching consequences. For example, the President's selection of judges for the Court of Appeals for the Armed Forces might become more political. Similarly, the President might put greater pressure on the service secretaries to oversee criminal justice issues. Again, the question is whether the potential benefit outweighs the possible cost.

E. Captain Barry's Public Availability Proposal

Captain Barry, as noted above, does not merely advocate adopting the proposals of the ABA and of Major General Hodson. On the contrary, he also advances three significant additional recommendations of his own. He first urges creating an enforceable "mechanism to make available to the public the contents [of] and justifications for . . . proposals . . . generated within DOD."¹⁴³ Captain Barry states: "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."¹⁴⁴

This recommendation requires some background information to evaluate. At present, although anyone may suggest *MCM* changes to the JSC, traditionally most proposals do not come from the general public. Instead, they originate from within the DOD. Either service members make them, or they come down from the DOD leadership.

The origin within the DOD of the majority of proposals should not come as a surprise. Judge advocates have the most involvement in the military justice system. They also tend to understand the proper channels through which to make recommendations for amending the *MCM*. Despite the newly instituted annual call to the public for suggestions, judge advocates probably will continue to have a dominant role in the process.

Although Captain Barry does not state this point explicitly, he may be assuming—and, if so, correctly—that the DOD could implement a requirement that any DOD personnel who make recommendations provide writ-

143. Barry, *supra* note 2, at 275.

144. *Id.* (emphasis in original).

ten justifications for them. The DOD then could require the JSC to publish these proposals and their justifications in the Federal Register. The JSC then would have to disclose and explain any action taken on the proposals.

This recommendation, like all of Captain Barry's suggestions, appears reasonable enough. The JSC could follow his suggestion without having to give up any aspect of its current practices. Again, the only question is whether the benefit justifies the burden.

The public might benefit from disclosure of the JSC's reasons for rejecting proposals. Civilian defense counsel, for instance, may wish to criticize what they consider insufficient reasons for rejecting proposals that might benefit their clients. In addition, a public record of what the JSC has and has not considered would assist anyone thinking about submitting future changes.

The burden of the proposal, in some ways, does not seem very great. Most DOD personnel who make proposals already are providing written justifications for their adoption. When the JSC decides to make changes, moreover, it usually writes an analysis or discussion section explaining their purpose and effect. Accordingly, Captain Barry's proposal would impose a significant new burden only in requiring to the JSC to explain its reasons for declining to adopt proposals generated within the DOD.

The JSC, however, has understandable reasons for wishing to avoid the process of justifying its decisions not to adopt proposals. Unless they are superficial and unhelpful (for example, "The proposed changes are unwarranted."), providing explanations may take a great deal of work. If the JSC rejected a large number of proposals, it might have to increase the number of personnel assigned to its working group or ask the current members to neglect their other duties so that they could write reasons for rejecting the proposals. Efficiency of operation is of particular concern as the military services have been downsized.

Experience in other areas also indicates that the task of providing written justifications in formal rule-making procedures can become increasingly burdensome. The Administrative Procedure Act, for example, requires agencies to provide a "concise general statement" of its rationale for rules.¹⁴⁵ Many agencies have found that if they provide only a short statement, they open themselves up to criticism. Accordingly, they try to provide as comprehensive justifications as possible. Professor Todd

145. 5 U.S.C. § 553(c) (2000).

Rakoff has observed: "Statements of Justification that used to be a few paragraphs or pages now run to tens of pages, each three columns wide."¹⁴⁶

From the JSC's perspective, moreover, providing reasons for each action not taken might cause unnecessary and harmful embarrassment. For example, suppose a judge on the Army Court of Criminal Appeals recommends changes to the *MCM* and the JSC decides not to implement them. The JSC certainly would not relish the task of calling public attention to what it considers the flaws in the judge's ideas. Fear of public criticism, moreover, might dissuade others from recommending changes.

In sum, the issue has two sides, and no clear answer. Here, the stakes do not seem very large. Although the JSC probably should decline to act, it could attempt to follow Captain Barry's suggestion on a trial basis. If the burden proves excessive, then it could rethink the issue.

F. Captain Barry's Minutes Proposal

Captain Barry also has recommended that the JSC make available to the public the minutes of its meetings and the minutes of its working group.¹⁴⁷ I have seen the minutes of a few meetings, and they generally contain only minimal information about its decisions. Because the JSC and its working group diligently keep these records, the proposal would impose little or no burden on them. The JSC, indeed, already publishes the analysis to proposed changes in the Federal Register.

On the other hand, confidentiality often serves important purposes. For example, Congress exempted deliberative process material from disclosure under the Freedom of Information Act for three policy reasons: first, to encourage, open, frank discussions on matters of policy between subordinates and superiors; second to protect against premature disclosure of proposed policies before they are finally adopted; and third, to protect against public confusion that might result from disclosure of reasons and rationales that were not in fact ultimately the grounds for agency action.¹⁴⁸

146. See Todd D. Rakoff, *The Choice Between Formal and Informal Modes of Administrative Regulation*, 52 ADMIN. L. REV. 159, 165 (2000).

147. See Barry, *supra* note 2, at 275.

148. See U.S. DEP'T OF JUSTICE, FREEDOM OF INFORMATION GUIDE AND PRIVACY ACT OVERVIEW 216 (1998).

Releasing the JSC minutes potentially could harm all of these interests and particularly the third.

G. Captain Barry's JSC Proposal

Captain Barry finally complains that the JSC's membership at present does not extend beyond the "five officers chiefly responsible for the administration of military justice in the five services." Although he does not spell out exactly whom he would like to see included, he does note that the ABA's Standing Committee on Armed Forces Law previously has urged the expansion of the JSC to "include public members."¹⁴⁹

This proposal raises some of the same considerations as the earlier proposal to create a broadly-constituted advisory board.¹⁵⁰ To the extent that the additional members would serve only to provide advice and make proposals, questions of need again arise. Given that any member of the public already can suggest changes to the *MCM*, adding more members to the JSC solely for that purpose would not accomplish much.

The new members, however, probably would want to do more than just make suggestions. They also would want to vote for or against proposals for changing the *MCM*. Voting power would raise questions about how the JSC could avoid the distorting effects of special interests. The Federal Advisory Committee Act and conflict of interest rules also may pose problems.

At present, some bias may exist within the JSC, but its extent should not be exaggerated. As Captain Barry rightly notes, the five members of the JSC have primary responsibility for administration of military justice in their services. This responsibility does not mean that they represent only the interest of the prosecutors. On the contrary, they represent the needs of the entire system. In fact, JSC members normally have had experience either as defense counsel or trial judges, or both.

Sometimes the JSC takes positions that favor the government. At other times, however, the JSC approves measures favorable to the accused. For example, as noted earlier, last year the JSC approved new *MCM* provisions creating a psychotherapist-patient evidentiary privilege.¹⁵¹ This

149. Barry, *supra* note 2, at 275.

150. See *supra* Part III.B.

provision aids the accused, who may have made incriminating statements to psychiatrists or social workers. Another example of an amendment that favors the accused is the 1998 amendment to Rule for Court-Martial 916(j) that provides a mistake of fact defense to a prosecution for carnal knowledge when the accused believed that the victim was at least sixteen years old at the time of the sexual intercourse.¹⁵²

By contrast, if members of the public were to serve on the JSC, they might have difficulty subordinating any professional interests that may differ from the general needs of the military justice system. Defense counsel, for instance, naturally and justifiably would seek rules that tend to aid their clients, while voting against amendments favorable to the prosecution. This type of bias could have a distorting effect on the *MCM*.

Perhaps to some extent, the JSC could cancel out potential bias by including members with opposing interests. For example, although logistics might prove difficult, the JSC conceivably could include trial counsel or commanders to weigh against the views of defense counsel. In the end, however, the question remains whether it makes sense to disturb the JSC's formally neutral composition. I am skeptical of the need in view of the JSC's own experience and its willingness to obtain outside views.

V. Conclusion

The JSC has made significant progress in opening up the process of amending the *MCM*. Much of credit for this development must go to SCAFL and other organizations in which Captain Barry has served with distinction. Although Captain Barry modestly declines to identify his personal contribution, he undoubtedly played a key role, and deserves ample credit.

The question now arises whether the JSC or DOD might take further steps to change the *MCM* rule-making process. Captain Barry believes

151. *See supra* Parts II.A., III.B.

152. *See* Exec. Order No. 13,086, 63 Fed. Reg. 30,065 (June 2, 1998). The amendment to RCM 916(j) conformed the *MCM* to a 1996 Congressional Amendment to Article 120, which created a mistake of fact as to age defense to a prosecution for carnal knowledge. The JSC proposed this legislation and followed up with *MCM* changes when the legislation was enacted. *See* National Defense Authorization Act for Fiscal Year 1996 § 1113, Pub. L. No. 104-106, 110 Stat. 186, 462.

that they can and should, and his views deserve careful consideration. Nonetheless, the case for the changes that he requests is difficult to make.

The seven proposals discussed in Captain Barry's article would add more formalities to the *MCM* amendment process. The JSC would have to seek input or perhaps even approval from advisory committees. It would have to adhere to new waiting periods and publication requirements. It also might have to explain more publicly its reasons for certain actions or inactions.

The JSC and DOD in short order could implement most of these formalities. The changes, however, probably would not do much good. They would not bring fundamental reforms to the *MCM*. Indeed, they might not change much of anything. At worst, they would risk upsetting the present balance of power that has evolved between Congress and the President.

For these reasons, this response has recommended hesitation in embracing the seven proposals that Captain Barry has recommended. Perhaps the JSC will want to experiment with some of them, such as making more records available to the public or maybe giving reasons for rejecting proposed amendments to the *MCM*. Before doing so, however, it also must consider what else it has on its list of priorities for improving the military justice system.