

Criminal Law

Updates to the Uniform Code of Military Justice and Military Justice System

On December 26, 2013, the President signed the Fiscal Year 2014 National Defense Authorization Act (FY14 NDAA), codifying over 30 reforms to military justice and sexual assault response systems in the military, including immediate revisions to articles of the Uniform Code of Military Justice (UCMJ), and new provisions and policies taking effect over the next year. These reforms are in addition to the ongoing review of systems used to investigate and prosecute adult sexual assault crimes undertaken by the Response Systems Panel established by Congress and the Comprehensive Review of the UCMJ directed by the Secretary of Defense. Some key NDAA changes are highlighted below.

A major theme of these reforms is the expansion and protection of victim rights. Victims of sexual assault are entitled to advice and assistance from legal counsel, and communications with counsel are protected by the attorney-client privilege. Article 46, UCMJ now requires defense counsel to request interviews of sexual assault victims through the prosecutor when notified that the victim

may be a witness. Upon request, the victim has the right to have the prosecutor, victim's attorney, or a victim advocate present during such interviews.

Additionally, the federal Crime Victims' Rights Act is now incorporated into the UCMJ. The rights apply to victims of crime at all stages of the military justice process and include the right to be heard at certain hearings. Congress also directed the development and implementation of mechanisms to enforce these rights and sanction violators.

Another key theme in the NDAA is the placement of limitations on convening authority discretion in cases involving charges of rape, sexual assault, rape and sexual assault of a child, forcible sodomy, and attempts to commit these offenses. Convening authority discretion is limited in both pretrial referral and post-trial actions. At the pretrial referral stage, where a general court-martial convening authority's

staff judge advocate (GCMCA SJA) recommends referral of charges to court-martial in formal, written advice and the convening authority declines to refer the charges, the case must be forwarded for review by the Service Secretary. Alternatively, if the GCMCA SJA recommends against referring charges to court-martial and the convening authority agrees, the case must be forwarded for review by the next superior GCMCA.

With respect to post-trial action under Article 60, UCMJ, when an accused is convicted of any offense described above or of an offense for which the maximum authorized punishment exceeds two years, or the accused is sentenced to a dismissal, dishonorable discharge, bad conduct discharge, or confinement for more than six months, the convening authority may not dismiss a charge or specification or change a finding of guilty to a lesser included offense except as part of a pretrial agreement or, in limited circumstances, upon the recommendation of the trial counsel.

Furthermore, victims are given a formal opportunity to submit comments to the convening authority before action is taken on the case. In cases where the convening authority dismisses

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or changes a charge, or reduces an adjudged sentence, a written explanation must be inserted into the record.

While each Service policy differs, most convicted sex offenders will be processed for separation from the military. However, the NDAA also mandates that a notation be placed in a member's service record if the member is convicted of a "sex-related offense" by a court-martial or receives non-judicial punishment or administrative action for such an offense. Commanding officers are required to review newly-reporting members' service records to familiarize themselves with the member's history.

Within the year, UCMJ Article 32 pretrial investigations will also be revised. Its scope and purpose will be limited to a determination of whether probable cause exists to believe an offense was committed and the accused committed it. The new "preliminary hearing" will no longer be used for the purpose of defense discovery and crime victims will not be required to testify at the hearing.

Other reforms include limiting jurisdiction over the sex-related offenses discussed above to general courts-martial and mandatory dismissal or dishonorable discharge upon conviction. Additionally, consensual sodomy is removed as an offense and the five-year statute of limitations for the enumerated offenses of sexual assault and sexual assault of a child is removed, permitting prosecution for those offenses regardless of when committed (but only for offenses committed after December 26, 2013).

The Services remain focused on reforms that ensure our military justice system remains fair, effective and efficient, holds offenders appropriately accountable, protects the due process rights of the accused, provides justice to victims, and maintains the highest standard of discipline. 🌐

