

**OVERVIEW OF THE
MILITARY JUSTICE
SYSTEM AND
LEGISLATION UPDATE**

Military justice system
governs conduct of
1,448,560 active duty
military members



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1,448,560 active duty
military members

Larger than the population of 11
states (Wyoming, Vermont, North
Dakota, Alaska, South Dakota,
Delaware, Montana, Rhode Island,
New Hampshire, Maine, and Hawaii)
and the District of Columbia

Jurisdiction over active
duty service members:
24/7, 365 days a year.

Military justice system
also applies to 850,880
Reservists when
performing duties and
National Guardsmen
when performing duties
under Title 10.

Military justice system also sometimes applies to civilians (e.g.):

- Active duty retirees who are entitled to pay;
- Civilians accompanying U.S. forces in the field in time of declared war or contingency operations;
- “Persons in custody of the armed forces serving a sentence imposed by court-martial”

Rarely used.

United States Constitution



United States Constitution

Art. I, § 8. cl. 14:

“The Congress shall have Power . . . To make Rules for the Government and Regulation of the land and naval Forces”



Pre-UCMJ

Separate statutes governed the Army's and Navy's military justice systems

Army: Articles of War

Navy: Articles for the Government of the Navy
("Rocks and Shoals")

UNIFORM CODE
— of —
MILITARY JUSTICE



Text, References and Commentary
based on the Report of the
Committee on a Uniform Code of
Military Justice to
The Secretary of Defense

Passed by Congress:
April 26, 1950



Signed by
President
Truman: May 5,
1950 (effective
May 31, 1951)



UCMJ

- Establishes military justice system's structure
- Enacts punitive articles
- Delegates authority to the President

MILITARY JUSTICE SYSTEM'S STRUCTURE

Military Justice System's Structure

Convening authorities, who are generally military commanders, decide appropriate disposition of alleged offenses.

Military Justice System's Structure

4 levels of disposition (in addition to dismissal of charges and less formal responses, such as counseling):

1. Nonjudicial punishment
2. Summary court-martial
3. Special court-martial
4. General court-martial

Nonjudicial Punishment

Imposed by commanders.

Service member can refuse
(except those attached to or
embarked on vessels).

Substantial differences in
procedures among the Services.

Not a criminal conviction.

Nonjudicial Punishment (UCMJ art. 15)

Maximum punishments:

Correctional custody for up to 30 days;

Restriction for up to 60 days;

Forfeiture of up to $\frac{1}{2}$ pay per month for 2 months;

Reduction to lowest pay grade.

Nonjudicial Punishment (UCMJ art. 15)

For those attached to or embarked in vessels, confinement on bread and water for 3 days



Summary Courts-Martial (UCMJ art. 20)

Enlisted only.

May be refused.

One-officer "court-martial."

Substantial differences in procedures among the Services.

Not a criminal conviction.

Summary Courts-Martial (UCMJ art. 20)

Special Courts-Martial

Resemble federal criminal trials.

Convictions are federal criminal convictions (carry collateral consequences, such as sex offender registration and restrictions on right to own weapons).

Accused can choose trial by military judge or trial by a panel of at least 3 members.

Procedures among the Services are fairly consistent.

Special Courts-Martial

General Courts-Martial

Resemble federal criminal trials.

Convictions are federal criminal convictions (carry collateral consequences, such as sex offender registration and restrictions on right to own weapons).

Unless waived by defense, must be preceded by Article 32 hearing and SJA's advice.

Accused can choose trial by military judge or trial by a panel of at least 5 members (no trial by military judge alone in capital cases).

Procedures among the Services are fairly consistent.

General Courts-Martial

Special & General Courts-Martial

2/3 majority necessary to convict; less than 2/3 vote for conviction results in acquittal

2/3 majority necessary for sentences other than death (unanimity required) or confinement for more than 10 years (3/4 majority required)

Military Justice Statistics FY 2013

General courts-martial:	1,240
Special courts-martial:	1,213
Summary courts-martial:	1,101
Nonjudicial punishment:	62,148

General Court-Martial Process

(Air Force example, assuming a conviction and sentence including either a punitive discharge or a year or more of confinement)

Discretionary review by United States Supreme Court

Discretionary review by Court of Appeals for the Armed Forces

Automatic Appeal to Air Force Court of Criminal Appeals

**Convening authority's action
(by Numbered Air Force Commander)**

**General court-martial
(referred by Numbered Air Force Commander)**

**Article 32 investigation
(ordered by wing commander)**

Charges preferred by squadron commander

Air Force Office of Special Investigations investigates

Sexual assault reported

PUNITIVE ARTICLES

Punitive Articles

65 punitive articles (many include more than one offense)

Punitive Articles

Many military specific offenses, such as:

- absence without leave;
- desertion;
- violation of a lawful order; and
- misbehavior before the enemy.

Punitive Articles

Many common law offenses,
such as:

- murder;
- rape;
- burglary; and
- robbery.

Punitive Articles

Article 134: "The General Article"

Includes three theories of liability:

- (1) "[A]ll disorders and neglects to the prejudice of good order and discipline in the armed forces."
- (2) "[C]onduct of a nature to bring discredit upon the armed forces."
- (3) "[C]rimes and offenses not capital."

Punitive Articles

Article 134: "The General Article"

The President has identified 52 non-exclusive offenses under Article 134, including:

- (1) Adultery;
- (2) False or unauthorized pass offenses;
- (3) Fraternization;
- (4) Breaking restriction;
- (5) Negligent homicide;
- (6) Kidnapping;
- (7) Obstructing justice;
- (8) Pandering and prostitution; and
- (9) Communicating a threat.

**DELEGATION OF
AUTHORITY TO THE
PRESIDENT**

Delegation of Authority to the President

Article 36:

- Delegates to the President authority to prescribe pretrial, trial, and post-trial procedures, including rules of evidence.
- The President is directed to “apply the principles of law and rules of evidence generally recognized in the trial of criminal cases in the United States district courts” to the extent practicable and not in conflict with the UCMJ.

Delegation of Authority to the President

Article 56:

- Delegates to the President authority to prescribe maximum punishments for court-martial offenses (except for death-eligible offenses).

MANUAL FOR COURTS-MARTIAL UNITED STATES

(2012 EDITION)



Manual for Courts-Martial

Five parts:

- I. Preamble
- II. Rules for Courts-Martial
- III. Military Rules of Evidence
- IV. Punitive Articles (including maximum punishments)
- V. Nonjudicial Punishment Procedure

Overlapping Jurisdiction

Most non-military-specific UCMJ offenses can be tried by either the military or civilian prosecutorial authorities (state or federal or sometimes both)



QUESTIONS ABOUT MILITARY
JUSTICE OVERVIEW?

**RECENT
LEGISLATION
AND EXECUTIVE
ACTIONS**

National Defense Authorization Act for Fiscal Year 2014

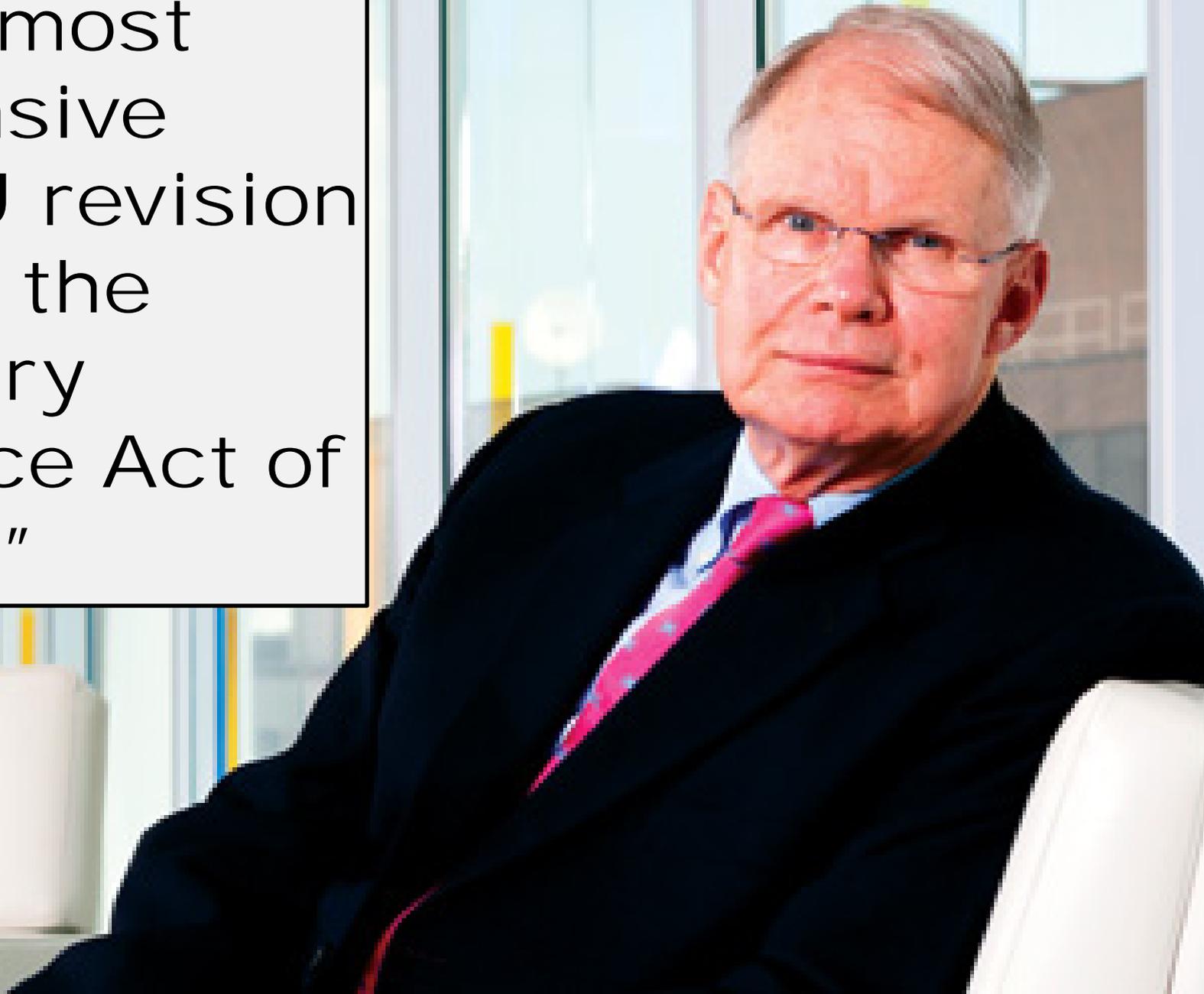
Enacted December 26, 2013

Title XVII—Sexual Assault Prevention and Response and Related Reforms

36 sections

16 military justice reforms

"The most extensive UCMJ revision since the Military Justice Act of 1968."



Two major themes

- Enhanced victims' rights
- Constrained convening authority power and discretion

16 substantive revisions to military justice system

- Some applicable only to sexual offense cases, some applicable to all cases
- Some changes effective immediately, others phased in

Reforms

1. Enacted crime victims' rights article within the UCMJ (Article 6b) (modeled on 18 U.S.C. § 3771) (effective immediately; implementing provisions to be developed by December 26, 2014)

Reforms

2. Requires military legal assistance programs to represent victims of certain offenses (includes not only sexual assaults of adults, but also victims of stalking, voyeurism, forcible pandering, indecent exposure, and child sexual offenses)

5 reforms to pretrial process

Reforms (Pretrial process)

3. Article 32 investigations transformed into “preliminary hearings”

(applies to offenses committed on or after December 26, 2014)

Article 32 reform

- Scope of the hearing limited
- Military victims given option not to testify
- Hearing must be recorded; upon request, victim will be given access to the recording
- Preliminary hearing officer usually must be judge advocate and equal to or senior in grade to detailed government and defense counsel



Reforms (Pretrial Process)

4. Defense counsel required to seek interview of sexual assault victim through the trial counsel
5. Character and military service of the accused required to be eliminated from Manual for Courts-Martial discussion as factors commanders should consider in disposition decisions
(completed on June 13, 2014)

Reforms

(Pretrial Process)

6. Jurisdiction over charges of rape, sexual assault, forcible sodomy, or attempts to commit those offenses limited to GCMs (applies to offenses committed on or after June 24, 2014)
7. GCM convening authorities' decisions not to refer charges for those offenses subjected to higher-level review

Reforms (Sentencing)

8. Punitive discharge required for convictions of rape, sexual assault, rape or sexual assault of a child, forcible sodomy, or attempts to commit those offenses (applies to offenses committed on or after June 24, 2014)

4 reforms to post-trial
process

Reforms (Post-trial Process)

9. Victim given right to make post-trial submission to the convening authority
10. Convening authority prohibited from considering information about the victim's character that was not admitted at trial

Reforms (Post-trial Process)

11. Convening authorities' power to set aside court-martial convictions limited to certain minor offenses (applies to offenses committed on or after June 24, 2014)

Reforms (Post-trial Process)

12. Convening authorities' power to reduce sentences constrained; convening authorities generally prohibited from eliminating punitive discharge from sex offense sentences (applies to offenses committed on or after June 24, 2014)

4 reforms to criminal law

Reforms (Criminal law)

13. Statute of limitations eliminated for sexual assault and sexual assault of a child (applies to offenses committed on or after December 26, 2013)
14. Consensual sodomy repealed as an offense (applies to acts committed on or after December 26, 2013)

Reforms (Criminal law)

15. Regulations enforceable under UCMJ required to prohibit retaliation against an alleged victim or a non-victim who reports an offense

Reforms (Criminal law)

16. Service regulations enforceable under UCMJ required to prohibit relationships between those in entry-level processing and training and those who exercise control over them

Executive Order 13669

June 13, 2014

Six main provisions, many of which enhanced victims' rights

Executive Order 13669

June 13, 2014

1. Authorizes trial counsel and investigating officers (IOs) to issue subpoenas duces tecum for Article 32 investigations.
2. Requires Article 32 IOs to use same rape shield procedures that military judges use.

Executive Order 13669

June 13, 2014

3. Establishes procedures for providing victims in sex offense cases with a copy of the record of trial.
4. Implements an NDAA for FY 2014 provision establishing victims' right to submit matters for the convening authority's consideration post-trial.

Executive Order 13669

June 13, 2014

5. Implements an NDAA for FY 2014 provision precluding convening authorities from considering information about victims' character that was not admitted at trial.
6. Implements an NDAA for FY 2014 requirement that character and military service of the accused be eliminated from Manual for Courts-Martial discussion as factors commanders should consider in disposition decisions.

**2015
PENDING
LEGISLATION**

ROLE OF THE COMMANDER



ROLE OF THE COMMANDER

MILITARY JUSTICE IMPROVEMENT ACT, S. 1752



Military Justice Improvement Act

1. Partial transfer of prosecutorial discretion from commanders to judge advocates.



Military Justice Improvement Act

1. Partial transfer of prosecutorial discretion from commanders to judge advocates.
2. New CAs for cases in which judge advocate disposition authority directs trial by SPCM or GCM.



Military Justice Improvement Act

1. Partial transfer of prosecutorial discretion from commanders to judge advocates.
2. New CAs for cases in which judge advocate disposition authority directs trial by SPCM or GCM.
3. No new resources.



Military Justice Improvement Act

March 6, 2014:
Cloture failed
55 - 45.



May 7, 2014

HASC rejected two proposals to restrict commanders' prosecutorial discretion.



May 7, 2014



- Proposal to transfer prosecutorial discretion for all serious non-military offenses to a chief prosecutor for each Service defeated 13-49.

May 7, 2014



- Proposal to transfer prosecutorial discretion for sexual assault offenses to a chief prosecutor for each Service defeated 28-34.

Military Justice Improvement Act

March 6, 2014:
Cloture failed
55 - 45.



VICTIMS PROTECTION ACT, S.1917





March 10, 2014:
Passed Senate
without amendment
97 – 0.

April 16, 2014:
Referred to House
Judiciary Committee's
Subcommittee on Crime,
Terrorism, Homeland
Security, and
Investigations.



Victims Protection Act

1. Requires Service Secretary's review of non-referral decisions where the senior detailed trial counsel disagrees with a convening authority's non-referral.
2. Victim's preference for military vs. civilian prosecution must be solicited and given "great weight."
3. Performance appraisals must include an assessment of the extent to which the rated service member supports the Service's sexual assault prevention and response program.
4. Command climate assessments required "following an incident involving a covered sexual offense for each of the command of the accused and the command of the victim."

Victims Protection Act

5. Each Service required to establish a confidential BCMR/BCNR process for sexual assault victims to challenge the characterization of their discharge or separation.
6. Admissibility of good military character evidence during the findings stage limited to instances where it is relevant to an element of a charged offense.
7. Application of Title XVII of the NDAA for FY 14 to Military Service Academies and Coast Guard Academy required.
8. Collaboration between DoD and DOJ required for prevention of and response to sexual assaults.

May 22, 2014:



House of
Representatives passes
Howard P. "Buck"
McKeon National
Defense Authorization
Act for Fiscal Year 2015



11 sections in military
justice subtitle



1. Requires improved DoD collection and reporting of domestic violence statistics.

2. Requires Judicial Proceedings Panel to study use of alleged victims' mental health records in Article 32s and courts-martial.

3. Requires application of Title XVII of NDAA for FY 2014 to Military Service Academies and Coast Guard Academy.

4. Requires consultation with victim as to preference for military or civilian prosecution of sex-related offenses in U.S.



5. Provides for mandamus review of alleged violations of a victim's rights under rape shield rule or psychotherapist-patient privilege.

6. Requires two-year mandatory minimum confinement for penetrative sexual offenses or attempts.



7. Admissibility of good military character evidence limited for findings purposes.
8. Confidential review of characterization of discharge for victims of sexual offenses required.
9. Eliminates "constitutionally required" exception for psychotherapist-patient privilege.

10. Allows return of personal property in an evidence file "after the conclusion of all legal, adverse action, and administrative proceedings related to such incident."



11. Requires establishment of a phone service for the reporting of hazing incidents.



Carl Levin
National Defense
Authorization Act for
Fiscal Year 2015



Favorably
reported by SASC to
the Senate 25-1 on
June 2, 2014



Military Justice
And Legal Matters
subtitle (Subtitle E)
includes 16 sections,
some of which include
multiple reforms



1. Amendment of Art.
49 governing depositions (Sec.
541).

Limits reasons for which depositions
may be ordered.



2. Modification of Mil. R. Evid. 513 (psychotherapist-patient privilege) (Sec. 542).
 - a. Requires coverage of "communications with other licensed mental health professionals."
 - b. Requires clarification or elimination of constitutionally required exception.



2. Modification of Mil. R.
Evid. 513 (psychotherapist-
patient privilege) (Sec. 542).

c. Requires more demanding
burden on party seeking to
obtain records of
psychotherapist-patient
communications.



2. Modification of Mil. R.
Evid. 513 (psychotherapist-
patient privilege) (Sec. 542).

d. Requires heightened standard
for a military judge to order an
in camera review of records of
psychotherapist-patient
communications.



3. Enhancement of services provided by SVCs (Sec. 543).

- a. Expressly authorizes SVC representation of the victim during military prosecutions of an alleged sex offense.
- b. Requires MCM amendments to provide that a victim may exercise right to be heard through counsel.



3. Enhancement of services provided by SVCs (Sec. 543).

c. Requires prompt and adequate notice to SVCs of scheduling of any hearings or trials.



4. Availability of SVCs to members of the Reserve Component (Sec. 544).

Members of a Reserve Component not authorized to receive legal assistance "shall be deemed to be eligible for the assistance of a Special Victims' Counsel."

5. Victim preference for military versus civilian prosecution (Sec. 545).



- a. SVCs shall advise victims of advantages and disadvantages of prosecution by military versus civilian authorities.
- b. Victims of alleged offenses occurring in U.S. will be consulted concerning their preference for prosecution by military versus civilian authorities.

5. Victim preference for military versus civilian prosecution (Sec. 545).



c. The victim's preference, "while not binding, should be considered in the determination of whether to prosecute the offense by court-martial or by a civilian court."

d. Where a victim has expressed a preference for prosecution by civilian authorities and civilian authorities determine not to prosecute, "the victim shall be promptly notified of that determination."

6. Performance appraisals (Sec. 545).



- a. Written performance appraisals of every service member must include assessment of support for the SAPRO program.
- b. Commanders' performance appraisals shall include an assessment of command climate for fair treatment of sexual assault allegations and ability to report without fear of retaliation, including ostracism.

7. Review of command climate assessment (Sec. 545).



8-day report will include a review of the most recent command climate assessment and "an assessment of whether another such climate assessment should be conducted."

8. Review of characterization of terms of discharge of victims of sexual offenses (Sec. 545).



Confidential BCMR/BCNR process to be established for victims of rape, sexual assault, forcible sodomy, or an attempt to commit one of those offenses to challenge terms or characterization of discharge.

9. Limitation on good military character evidence (Sec. 545).



Requires amendment of Mil. R. Evid. 404(a) to preclude admission of good military character evidence during the findings stage for designated offenses and where not relevant to an element of a charged offense.



10. Review of decisions not to prosecute (Sec. 546).

Review requirement for non-referral of sexual assault cases expanded to require the Service Secretary's review of non-referral decision when requested by the Service's chief prosecutor or a judge advocate designated for that purpose by the Judge Advocate General or SJA to CMC.



11. Authority to return personal property upon completion of proceedings (Sec. 547).

“[P]ersonal property retained as evidence in connection with an incident of sexual assault involving a member of the Armed Forces may be returned to the rightful owner of such property after the conclusion of all legal, adverse action, and administrative proceedings related to such incident.”



12. Requires inclusion of some information about restricted report incidents in DSAID (Sec. 548).

- The name of the alleged assailant, if known, must be included in DSAID for both unrestricted and restricted reports.
- Information from restricted reports may be accessed only by military criminal investigators.

13. Technical revisions and clarifications to Title VII of the NDAA for FY 2014 (Sec. 549).



- Explicitly authorizes the convening authority to act on a court-martial's findings for a qualifying offense.
- Fixes mistakes concerning qualifying vs. non-qualifying offenses.

13. Technical revisions and clarifications to Title VII of the NDAA for FY 2014 (Sec. 549).



- Resolves ambiguity in timing of victims' window to submit comments to the convening authority during the post-trial phase.
- Eliminates an inconsistent definition of "victim."
- Restores accused's ability to waive Article 32 hearing.

13. Technical revisions and clarifications to Title VII of the NDAA for FY 2014 (Sec. 549).



- Restores convening authorities' ability to enter pretrial agreements including reduction of mandatory minimum confinement for premeditated murder and felony murder.

13. Technical revisions and clarifications to Title VII of the NDAA for FY 2014 (Sec. 549).



- Removes trial counsel as gatekeeper for defense interviews of victims and replaces them with “the Special Victims’ Counsel or other counsel for the victim, if applicable.”
- Clarifies that SVCs are not authorized to provide legal consultation regarding civil litigation against the United States, not just DoD.

13. Technical revisions and clarifications to Title VII of the NDAA for FY 2014 (Sec. 549).



- Provides conforming amendments arising from repeal of consensual sodomy as a UCMJ offense.
- Clarifies those civilians with whom military recruiters are prohibited from engaging in certain relationships.
- Clarifies that only natural persons are entitled to the rights under the new military crime victims rights article.

13. Technical revisions and clarifications to Title VII of the NDAA for FY 2014 (Sec. 549).



- Eliminates the term “legal guardian” for the individual who assumes the crime victim rights of a minor or incompetent individual.
- Exempts service members who are younger than 18-years-old from the provision requiring appointment of an individual to assume the victim’s rights.

14. Applicability of Title XVII of the NDAA for FY 2014 to military Service academies (Sec. 550).



Requires Service Secretaries to ensure that Title XVII of the NDAA for FY 2014 applies to the United States Military Academy, the Naval Academy, the Air Force Academy, and the Coast Guard Academy.

15. Additional requirement for annual SAPRO report to Congress (Sec. 551).



Requires annual SAPRO report to Congress to include the number of unrestricted reports that were resolved by: (A) conviction by court-martial; (B) acquittal of all charges at court-martial; (C) NJP; (D) administrative action; or (E) dismissal of all charges (including reasons for dismissal and stage of the proceedings).

16. Establishment of a Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (Sec. 552).



Requires the Secretary of Defense to establish a sexual assault investigation, prosecution, and defense advisory committee of not more than 20 members; committee required to review and analyze "a representative sample of cases involving allegations of rape, forcible sodomy, sexual assault, and other sexual misconduct."

17. Collaboration between DoD and DOJ on efforts to prevent and respond sexual assault (Sec. 553).



Requires the Secretary of Defense and Attorney General to “jointly develop a strategic framework for ongoing collaboration between the Department of Defense and the Department of Justice in their efforts to prevent and respond to sexual assault.”

Consider appointment of an “advisor on military sexual assaults” within DOJ, with representatives and designees at military installations.

18. Modification of terms for CAAF judges (Sec. 554).



19. Report on review of the Office of Diversity Management and Equal Opportunity (Sec. 555).



Requires the Secretary of Defense to submit a report to HASC and SASC on the results of the Secretary of Defense's review of the Office of Diversity Management and Equal Opportunity.

20. Repeal of an obsolete provision from the NDAA for FY 2011 regarding tracking of domestic violence offenses (Sec. 556).





QUESTIONS ABOUT
LEGISLATIVE UPDATE?