

Article 132 (New Provision) – Retaliation

10 U.S.C. § 932

1. Summary of Proposal

This proposal would create a new Article 132 (Retaliation). Part II of the Report will address the Manual for Courts-Martial provisions implementing the new Article 132.

2. Summary of the Current Statute

Article 134, the General Article, prohibits conduct that is prejudicial to good order and discipline or service discrediting. MCM, Part IV, ¶96 (Obstructing Justice) requires a showing that the accused did a wrongful act in the case of a person subject to criminal proceedings, with the intent to influence, impede or otherwise obstruct the due administration of justice. This offense addresses a broad spectrum of conduct analogous to, though not controlled by, offenses codified in Title 18, Chapter 73 (Obstruction of Justice) of the U.S. Code.¹ Because the offense falls under Article 134, the prosecution also must prove that the offense was prejudicial to good order and discipline or that it was service discrediting.

3. Historical Background

The military offense of obstructing justice began as an Article 134 clause 3 offense, assimilating the federal statute.² In 1952, the Court of Military Appeals determined that a servicemember also could be prosecuted under the first two clauses of Article 134 for obstruction or interference with the administration of military justice, independent of other federal statutes.³ The President first designated the offense of obstruction of justice under Article 134 in the 1969 MCM.⁴

4. Contemporary Practice

The President, under Article 56, has prescribed the following maximum punishment for the offense of Obstructing Justice: dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.⁵ The analysis to ¶96 in the Manual for Courts-Martial makes

¹ See MCM, App 23 (Analysis of Punitive Articles), ¶96, (citing 18 U.S.C. §§ 1503, 1505, 1510, 1512, 1513). *But see also* United States v. Caudill, 10 M.J. 787, 789 (A.F.C.M.R. 1981) (elements of obstruction of justice under Article 134 are not controlled by the elements of similar offenses denounced by the United States Code).

² United States v. Long, 6 C.M.R. 60, 71 (C.M.A. 1952).

³ *Id.* at 65.

⁴ MCM 1969, App 6(c), ¶165.

⁵ MCM, Part IV, ¶95e.

specific reference to 18 U.S.C. § 1513 (Retaliating against a witness, victim, or an informant).⁶ Additionally, retaliatory conduct in the military that is in violation of Department of Defense and service regulations may be punished under Article 92 or as conduct prejudicial to good order and discipline under Article 134.⁷

5. Relationship to Federal Civilian Practice

18 U.S.C. § 1501 et seq. (Obstruction of Justice) set forth similar offenses to the offense of obstructing justice in Article 134. 18 U.S.C. § 1513(e) (Retaliating against a witness, victim, or an informant) prohibits retaliation against witnesses, victims, and other persons who provide truthful information to law enforcement relating to the commission or possible commission of a federal offense.

6. Recommendation and Justification

Recommendation 132: Enact a new enumerated Article 132 (Retaliation).

The offense of retaliation is inherently prejudicial to good order and discipline and of a nature to discredit the armed forces. Accordingly, this offense does not rely upon additional proof of the “terminal element” of Article 134 as the basis for its criminality.

7. Relationship to Objectives and Related Provisions

This proposal supports MJRG Operational Guidance by employing the standards and procedures applicable to the offense of retaliation against victims and witnesses in the civilian sector insofar as practicable in military criminal practice.

8. Legislative Proposal

SEC. 1050. RETALIATION.

Subchapter X of chapter 47 of title 10, United States Code, is amended by inserting after section 931g (article 131g of the Uniform Code of Military Justice), as added by section 1049, the following new section (article):

⁶ MCM, App 23, ¶96.

⁷ See DOD DIRECTIVE 7050.06, “Military Whistleblower Protection” (July 23, 2007); AIR FORCE INSTRUCTION 36-2909; ARMY REGULATION 600-20 and ARMY DIRECTIVE 2014-20; SECNAV INSTRUCTION 5370.7D (applicable to Navy and Marine-Corps); Coast Guard Civil Rights Manual, COMDTINST M5350.4C; see also 10 U.S.C. § 1034.

“§932. Art. 132. Retaliation

“Any person subject to this chapter who, with the intent to retaliate against any person for reporting or planning to report a criminal offense, or with the intent to discourage any person from reporting a criminal offense—

“(1) wrongfully takes or threatens to take an adverse personnel action against any person; or

“(2) wrongfully withholds or threatens to withhold a favorable personnel action with respect to any person;

shall be punished as a court-martial may direct.”.

9. Sectional Analysis

Section 1050 would amend Article 132 in its entirety and retitle the statute as “Retaliation.” This new offense would provide added protection for witnesses, victims, and persons who report or plan to report a criminal offense to law enforcement or military authority. Article 132 would not preempt service regulations that specify additional types of retaliatory conduct that may be punishable at court-martial under Article 92 (Failure to obey order or regulation), nor would it preempt other forms of retaliatory conduct from being prosecuted under other appropriate Articles, such as Article 109 (destruction of property), Article 93 (Cruelty and maltreatment), Article 128 (Assault), Article 131b (Obstructing justice), Article 130 (Stalking), or Article 134 (General article).