

Report on Prohibiting Retaliation Against an Alleged Victim or Other Member of the Armed Forces Who Reports a Criminal Offense



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In accordance with section 1709(c) of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2014 (Pub. L. No. 113-66), the Department of Defense provides this report on whether a new Uniform Code of Military Justice (UCMJ) punitive article should be enacted to prohibit retaliation against an alleged victim or other member of the Armed Forces who reports a criminal offense.

Summary

The Department of Defense is committed to prohibiting retaliation against victims or other members of the Armed Forces who report criminal offenses, including by means of ostracism and maltreatment by peers, and to ensuring appropriate accountability where such retaliation does occur. Even before the NDAA for FY 2014 was enacted, each Service had an anti-retaliation regulation. The Department's ability to deter and respond to retaliation was bolstered by section 1714 of the NDAA for FY 2014, which enhanced the protections in section 1034 of title 10, United States Code, for service members who report criminal offenses. Protections for service members who report criminal offenses were strengthened by section 1709, which required the Department to promulgate punitive regulations against retaliation. The maximum punishment for a violation of those punitive regulations includes a dishonorable discharge, forfeiture of all pay and allowances, and confinement for two years.

The criminalization of retaliation presents constitutional challenges. Retaliation prohibitions, particularly those criminalizing ostracism, must be carefully tailored to avoid being judicially invalidated as unconstitutional limitations on the freedom of disassociation. The Services crafted their section 1709(a) implementing regulations in an effort to survive such constitutional scrutiny. In the event that the judiciary were to limit the permissible scope of a criminal retaliation offense, Service regulations can be more easily adjusted than a punitive article or Manual for Courts-Martial provision. The punitive Service regulations issued in accordance with section 1709(a) of the NDAA for FY 2014 as supplemented by existing UCMJ articles that can be applied to some specific aspects of retaliation – such as Article 93's prohibition of maltreatment and Article 133's prohibition of misconduct by commissioned officers, cadets, and midshipmen – are the optimal means of criminalizing retaliation against victims or other members of the Armed Forces who report criminal offenses.

Accordingly, the Department believes that retaliation is best addressed through the enhanced protections under section 1034 of title 10, United States Code and Service regulations rather than the adoption of a new UCMJ punitive article.

Current Laws and Regulations

A. Section 1709 of the NDAA for FY 2014

Section 1709(a) of the NDAA for FY 2014 required the Secretary of Defense to prescribe regulations, or require the Secretaries of the military departments to prescribe regulations, that prohibit retaliation against an alleged victim or other member of the Armed Forces who reports a criminal offense. The section further required that violation of those regulations be punishable under Article 92 of the UCMJ, 10 U.S.C. § 892 (2012). The regulations must define retaliation

to include, at a minimum: (a) taking or threatening to take an adverse personnel action, or withholding or threatening to withhold a favorable personnel action, with respect to a member of the Armed Forces because the member reported a criminal offense; and (b) ostracism and acts of maltreatment committed by peers of a member of the Armed Forces or by other persons because the member reported a criminal offense. The Secretary of Defense delegated the authority and responsibility for prescribing regulations consistent with section 1709(a) to the Secretaries of the Military Departments.

B. Military Whistleblower Protection Act

The Military Whistleblower Protection Act, 10 U.S.C. § 1034 as amended by section 1714 of the NDAA for FY 2014, prohibits retaliatory personnel actions against any member of the Armed Forces “for making or preparing or being perceived as making or preparing” communications to, among others, Members of Congress, an Inspector General, a member of a Department of Defense investigation or law enforcement organization, any person or organization in the chain of command, and any court-martial proceeding concerning a “violation of law or regulation, including a law or regulation prohibiting rape, sexual assault, or other sexual misconduct in violation of sections 920 through 920c of this title (articles 120 through 120c of the Uniform Code of Military Justice), sexual harassment, or unlawful discrimination.” 10 U.S.C.A. § 1034 (West Supp. 2014). An Inspector General who receives a report of a violation of that prohibition shall, subject to an exception where more than a year passed between the member learning of the personnel action and reporting it, “expeditiously determine . . . whether there is sufficient evidence to warrant an investigation of the allegation.” *Id.* at § 1034(c)(4)(A). If an Inspector General within a Military Department determines that there is insufficient evidence to warrant an investigation, “that Inspector General shall forward the matter to the Inspector General of the Department of Defense for review.” *Id.* at § 1034(c)(4)(C). Where an investigation is warranted, it shall be conducted expeditiously. *Id.* at § 1034(c)(4)(D). Reports of such investigations shall be provided to the Secretary of Defense and the Secretary of the appropriate Military Department. *Id.* at § 1034(e). When the Secretary of the Military Department determines that there is sufficient basis to conclude that a prohibited personnel action has occurred, the Secretary shall order necessary corrective measures and “take any appropriate disciplinary action against the individual who committed such prohibited personnel action.” *Id.* at § 1034(f). If a Department of Defense military member is not satisfied with the matter’s disposition, he or she “may submit the matter to the Secretary of Defense,” who “shall make a decision to reverse or uphold the decision of the Secretary of the military department concerned in the matter within 90 days after receipt of such a submittal.” *Id.* at § 1034(f).

C. DoD Directive 7050.06

DoD Directive 7050.06, “Military Whistleblower Protection” (July 23, 2007), prohibits retaliation against members of the Armed Forces who make a protected communication regarding a criminal offense. The directive states that “no person may take or threaten to take an unfavorable personnel action, or withhold or threaten to withhold a favorable personnel action, in reprisal against any member of the Armed Forces for making or preparing to make a protected communication.” A protected communication is defined, in part, as:

A communication in which a member of the Armed Forces communicates information that the member reasonably believes evidences a violation of law or

regulation, including a law or regulation prohibiting sexual harassment or unlawful discrimination . . . when such communication is made to any of the following: . . . Any person or organization in the chain of command; or any other person designated pursuant to regulations or other established administrative procedures to receive such communications.

The directive requires the Secretaries of the Military Departments to issue general regulations, enforceable under Article 92, UCMJ, prohibiting retaliatory action or restricting communications between the member and either a Member of Congress or an Inspector General.

D. Service Regulations

Even before issuing the regulations required by section 1709 of the NDAA for FY 2014, each Service had a punitive regulation prohibiting retaliation against whistleblowers who report criminal activity. Violations of those lawful general orders could and continue to be prosecutable as Article 92 offenses.

Section 1709(a) of the NDAA for FY 2014 requires regulations prohibiting retaliation against an alleged victim or other member of the Armed Forces who reports a crime, and requires that violations of those regulations be punishable under Article 92. Pursuant to the Secretary of Defense's delegation, the Secretaries of the Military Departments have issued such regulations. The Air Force issued an Air Force Guidance Memorandum, violations of which are punishable under Article 92, prohibiting retaliation, including specific protections against ostracism. The Secretary of the Army issued a directive, violations of which are punishable as Article 92 offenses, prohibiting retaliation, including specific protections against ostracism. The Secretary of the Navy issued an ALNAV message, applicable to both the Navy and the Marine Corps, establishing a prohibition against retaliation that is enforceable via Article 92. The ALNAV includes an express prohibition against "ostracism and such acts of maltreatment committed by peers of a member of the Armed Forces or by other persons because the member reported a criminal offense." The Department of the Navy is currently completing a supplementary Secretary of the Navy Instruction (SACNAVINST) that will provide additional details. Although section 1709 does not apply to the Coast Guard, that Service is complying as a matter of policy; promulgation of a Coast Guard regulation consistent with section 1709's requirements is imminent. Therefore, each Service prohibits or soon shall prohibit retaliation as defined in section 1709 in a manner enforceable under Article 92 both through whistleblower regulations that existed before enactment of the NDAA for FY 2014 and through new regulations issued in accordance with section 1709.

1. Department of the Air Force

Air Force Instruction (AFI) 90-301, "Inspector General Complaints Resolution," was originally issued on August 23, 2011, and was updated on June 6, 2012. Paragraph 6.3 of the instruction prohibits reprisal against members of the Armed Forces in connection with protected communications. Reprisal is defined as "tak[ing] (or threaten[ing] to take) an unfavorable personnel action; or withhold[ing] (or threaten[ing] to withhold) a favorable personnel action . . . against a member of the armed forces for making or preparing to make a protected communication." The definition of protected communications includes providing "information that the member reasonably believes evidences a violation of law or regulation,

including a law or regulation prohibiting sexual harassment or unlawful discrimination, gross mismanagement, a gross waste of funds or other resources, an abuse of authority, or a substantial and specific danger to public health or safety” to, among others: Member of Congress or a member of their staff; an inspector general or a member of the inspector general’s investigative staff; personnel assigned to DoD audit, inspection, investigation, law enforcement, equal opportunity, safety, or family advocacy organizations; any person in the member’s chain of command; and the Chief Master Sergeant of the Air Force, Command Chiefs, Group/Squadron Superintendents, and First Sergeants.

The instruction states that military members who violate the prohibition against reprisal are subject to prosecution, disciplinary action, and administrative action under Article 92. Civil servants who violate the protections are subject to administrative or disciplinary action.

On June 19, 2014, the Air Force published an amendment to AFI 36-2909, “Professional and Unprofessional Relationships,” through an Air Force Guidance Memorandum (AFGM);. The amendment provides further anti-retaliation protections. The AFGM expressly prohibits retaliation against an alleged victim or other member of the Armed Forces for reporting a criminal offense and states that violators may be prosecuted under either Article 92 or Article 134, UCMJ. The AFGM includes the following definitions:

11.1. Retaliation. Retaliation is taking or threatening to take an adverse personnel action, or withholding or threatening to withhold a favorable personnel action, with respect to a military member because the member reported a criminal offense.

11.2 Ostracism. Ostracism, which is a form of retaliation under this instruction, is the exclusion, from social acceptance, privilege or friendship with the intent to discourage reporting of a criminal offense or otherwise discourage the due administration of justice.

11.3 Maltreatment. Maltreatment, which is a form of retaliation under this instruction, is treatment by peers or by other persons, that, when viewed objectively under all the circumstances, is abusive or otherwise unnecessary for any lawful purpose, that is done with the intent to discourage reporting of a criminal offense or otherwise discourage the due administration of justice, and that results in physical or mental harm or suffering, or reasonably could have caused, physical or mental harm or suffering. Maltreatment under this instruction is prohibited by the National Defense Authorization Act of Fiscal Year 2014, Section 1709(b), and does not require a senior-subordinate relationship as is required for maltreatment under Article 93, UCMJ.

2. Department of the Army

Army Regulation 600-20, originally issued on March 18, 2008 and most recently revised on September 20, 2012, prohibits reprisal against Soldiers who make protected communications, which the regulation defines as a “lawful communication to any member of the chain of command, a Member of Congress, an Inspector General or any member of a DOD audit, inspection, or law enforcement organization, including any office or command official designated to receive EO complaints from Service members” that discloses information the

military member “reasonably believes evidences a violation of law or regulation, gross mismanagement, a gross waste of funds, a gross abuse of authority, or a substantial and specific danger to public health or safety.” The regulation provides that “[n]o person will restrict a member for the Armed Services from making a protected communication” to designated individuals, including Members of Congress, an Inspector General, members of an investigation or law enforcement organization, or any member of the chain of command. The regulation further provides, “Soldiers will be free from reprisal for making or preparing a protected communication.” The regulation amplifies that point by specifically providing, “No employee or Soldier may take or threaten to take an unfavorable personnel action, or to withhold or threaten to withhold a favorable personnel action, in reprisal against any Soldier for making or preparing a protected communication.”

On June 19, 2014, the Secretary of the Army issued Army Directive 2014-20, “Prohibition of Retaliation Against Soldiers for Reporting a Criminal Offense,” enforceable under Article 92, including a specific prohibition against ostracism. The directive prohibits retaliation, which it defines as:

- (1) taking or threatening to take an adverse or unfavorable personnel action, or withholding or threatening to withhold a favorable personnel action, with respect to a victim or other member of the Armed Forces because the individual reported a criminal offense or was believed to have reported a criminal offense; or
- (2) ostracism, which is defined as excluding from social acceptance, privilege or friendship a victim or other member of the Armed Forces because: (a) the individual reported a criminal offense; (b) the individual was believed to have reported a criminal offense; or (c) the ostracism was motivated by the intent to discourage reporting of a criminal offense or otherwise to discourage the due administration of justice; or
- (3) acts of cruelty, oppression or maltreatment (as these terms are described in paragraph 17c(2) [of Part IV of the Manual for Courts-Martial]), committed against a victim, an alleged victim or another member of the Armed Forces by peers or other persons, because the individual reported a criminal offense or was believed to have reported a criminal offense.

The directive requires investigation of any allegation of retaliation.

3. Department of the Navy

SECNAV INSTRUCTION 5370.7C, “Military Whistleblower Reprisal Protection,” was issued on October 14, 2005. The instruction declares:

[I]t is DON policy that . . . Members of the Armed Forces shall be free to make a protected communication to a Member of Congress; an IG; a member of a DoD audit, inspection, investigation, or law enforcement organization; any person or organization in the chain of command; or any other person or organization designated pursuant to command regulations or other established administrative procedures for such communications.

The instruction further provides, “No person shall restrict a member of the Armed Forces from making a protected communication, and members of the Armed Forces shall be free from reprisal and threats of reprisal for making or preparing a protected communication.” The instruction includes the following punitive provision, violations of which may be prosecuted under Article 92:

No person may take, or threaten to take, an unfavorable personnel action (including a referral for mental health evaluation), or withhold, or threaten to withhold, a favorable personnel action in reprisal against any member of the Armed Forces for making or preparing to make a protected communication, including an allegation of sexual harassment or unlawful discrimination, to one authorized to receive the communication.

The instruction also requires relevant officials to “[m]ake judge advocates available to assist and advise military members of their rights and responsibilities under the [Military Whistleblower Protection Act] and this instruction, with emphasis on the procedures for making and preparing a communication that qualifies for protection under the Act and for filing complaints of reprisal.”

Following enactment of section 1709, the Secretary of the Navy issued ALNAV 030/14 (April 25, 2014), which provides interim guidance regarding retaliation against alleged victims or other members of the Armed Forces who report a criminal offense. The ALNAV provides that such retaliation is punishable under Article 92 for military members and under regulations governing disciplinary actions for civilian employees. The ALNAV provides that such prohibited retaliation includes “taking or threatening to take an adverse personnel action or withholding or threatening to withhold a favorable personnel action, with respect to a member of the Armed Forces because the member reported a criminal offense.” The ALNAV further provides that prohibited retaliation “includes ostracism and such acts of maltreatment committed by peers of a member of the Armed Forces or by other persons because the member reported a criminal offense.” The ALNAV will be in effect until SECNAVINST 5370.7C, which is currently being revised, is reissued.

4. United States Coast Guard

The Coast Guard Civil Rights Manual, COMDTINST M5350.4C, the current version of which was promulgated in May 2010, prohibits “retaliation or harassment of an employee or applicant because of disclosure of information by that individual that is reasonably believed to evidence violations of law, rule or regulation”

Additionally, the Commandant of the Coast Guard is preparing to issue a lawful general regulation through a Service-wide message that will prohibit retaliation and ostracism. The regulation, when signed, will be punitive and punishable under Article 92, UCMJ.

E. Uniform Code of Military Justice Punitive Articles

Retaliation against a service member for reporting a criminal offense may be punished, in certain instances, under the following punitive articles of the UCMJ:

1. Article 92. Because every Service has implemented a regulation prohibiting retaliation against military members for reporting a criminal offense, instances of such retaliation can be punished under Article 92 as a violation of a lawful general order. The maximum authorized punishment for each such violation includes a dishonorable discharge, forfeiture of all pay and allowances, and confinement for two years.

2. Article 93. If the person who reported the offense was subject to the orders of the offender and the offender's conduct was cruel or oppressive toward the individual who reported the offense, an act of retaliation could be punished as a violation of Article 93. The maximum punishment for each such violation includes a dishonorable discharge, forfeiture of all pay and allowances, and confinement for one year.

3. Article 133. All commissioned officers, cadets, and midshipmen have a duty to refrain from behavior that seriously compromises the officer's character as an officer and a gentleman, a term that "includes both male and female commissioned officers, cadets, and midshipmen." An officer, cadet, or midshipman who engages in retaliation could be charged under Article 133. The maximum punishment includes a dismissal (the equivalent of a dishonorable discharge for officers, cadets, and midshipmen), forfeiture of all pay and allowances, and confinement for a period analogous to the maximum term of confinement for the underlying misconduct.

4. Article 134. Any misconduct that is prejudicial to good order and discipline or of a nature to discredit the Armed Forces may be charged as a violation of Article 134. An act of retaliation that is prejudicial to good order and discipline or of a nature to discredit the Armed Forces could be prosecuted under Article 134 if not preempted by another UCMJ offense.

Recommendation

With the implementation of the new regulations required by section 1709(a) and the recent amendment of section 1034 of title 10, United States Code, to bolster protection of service members who report rapes, sexual assaults, and other sexual offenses, there is no need to enact a new punitive article prohibiting retaliation. Retaliation through unfavorable personnel actions against members who report criminal offenses has been prohibited by statute as well as DoD and Service regulations for years. Retaliation through ostracism and maltreatment is now prohibited by newly issued regulations, as required by section 1709(a). Some such actions are also prohibited by Article 93 and – when committed by officers, cadets, or midshipmen – Article 133. To the extent that they are not prohibited by other punitive articles, such acts can also be prosecuted under Article 134. The military Services thus have adequate means to prosecute service members who retaliate against those who report crimes.

Additionally, potential constitutional challenges to the criminalization of retaliation, particularly retaliatory ostracism, further caution against enactment of a new punitive article. "Ostracism" is commonly defined as "banishment or exclusion from a group," *American Heritage Dictionary* 880 (2d College ed. 1982), or "exclusion by general consent from common privileges or social acceptance." Merriam Webster Online, *available at* <http://www.merriam-webster.com/dictionary/ostracism>. Ostracism thus requires collaborative action by a social group to exclude the individual. Based on these common definitions, it appears that no single actor

could ostracize someone by himself or herself; rather, a group must collectively decide to stop associating with that person.

The freedom of association is a “cherished” right guaranteed by the First Amendment. *Elfbrandt v. Russell*, 384 U.S. 11, 18 (1966). “Freedom of association,” the Supreme Court has observed, “plainly presupposes a freedom not to associate.” *Roberts v. U.S. Jaycees*, 408 U.S. 609, 623 (1984). While the military can order its members to do many things, it cannot order them to associate with individuals in social interactions when there is no direct and palpable connection to a military purpose. Punishing service members who choose not to associate on a social level with another member who reported a crime would be vulnerable to being declared unconstitutional by the judiciary.

When adopting regulations in accordance with section 1709, the Services have sought to define ostracism in a manner likely to survive constitutional scrutiny. The Air Force Guidance Memorandum amending AFI 36-2909, for example, defines ostracism as “the exclusion, from social acceptance, privilege or friendship with the intent to discourage reporting of a criminal offense or otherwise discourage the due administration of justice.” This definition focuses on the intent of the actor, which is to discourage an individual from reporting a criminal offense or from continuing to participate in the military justice process. The specific intent element is similar to, though still distinct from, the specific intent element of the obstructing justice offense under paragraph 96 of the Manual for Courts-Martial. The inclusion of this specific intent element is crafted to shield the ostracism prohibition from being declared unconstitutional.

Leaving the Services’ carefully crafted anti-retaliation provisions in place avoids the risk of alternative legislative language being found unconstitutional. In the event that the judiciary were to rule that portions of even the carefully crafted anti-retaliation language are unconstitutional, Service regulations could be more quickly modified than could a statute or a Manual for Courts-Martial provision, thus allowing an enforceable retaliation offense to be restored expeditiously.

Conclusion

Current law and regulations clearly prohibit retaliation against victims and other service members who report criminal offenses, including by means of ostracism and maltreatment, and establish sufficient means to hold those who engage in such prohibited retaliation appropriately accountable. Punitive Service regulations, rather than a new punitive article, are the optimal means of promoting such appropriate accountability. The Department of Defense, therefore, recommends that Congress not enact a new punitive UCMJ article addressing retaliation.