

Law Review 14088

October 2014

UCMJ Reforms in the National Defense Authorization Act

By Gavriel Swerling¹

12.0 [Military Criminal Justice](#)

Q: I saw on the news that President Barack Obama is reforming the Uniform Code of Military Justice (UCMJ). How will these reforms affect the average service member?

A: President Barack Obama signed the 2014 National Defense Authorization Act (NDAA) into law on December 26, 2013. The main purpose of the NDAA each year is to authorize military appropriations for the fiscal year. A secondary purpose of the 2014 act is to reform the UCMJ in order to prevent and reduce sexual assault in the military by changing some of the procedures used in courts martial. The 2014 NDAA does not create any new crimes,² but it changes some of the procedures for courts martial and adds new protections for victims. Most service members will not be affected by these changes, unless they are involved in a court martial as the defendant or the victim of a UCMJ offense.

The Uniform Code of Military Justice

The military has always been governed by a separate legal code, different from the federal and state legal codes that apply to the general population. The Supreme Court has deemed this practice to be constitutional because “the military constitutes a specialized community governed by a separate discipline from that of the civilian”. *Orloff v. Willoughby*, 345 U.S. 83, 93, 73 S.Ct. 534, 97 L.Ed. 842 (1953); *see also Gilligan v. Morgan*, 413 U.S. 1, 10, 93 S.Ct. 2440, 37 L.Ed.2d 407 (1973). Originally, each branch had its own legal code. The UCMJ was enacted in 1951, replacing the service-specific legal codes with one set of laws for the entire military.³ It is codified at 10 U.S.C. §§801-946.⁴

Changes to the UCMJ instituted by the 2014 National Defense Authorization Act

¹ Gavriel Swerling recently passed the Maryland bar exam and will go on active duty in the Marine Corps, as a judge advocate, in June 2015. Thank you to RADM James J. Carey and the Washington Scholars for sending him our way. The views expressed in this article do not represent the Marine Corps, the Department of the Navy, the Department of Defense, or the United States Government.

² The NDAA eliminated consensual sodomy as a crime under Article 125 of the UCMJ. Section 1707 of the NDAA. That is the only change that the NDAA made to the UCMJ in regards to what constitutes a crime.

³ The UCMJ applies to our nation’s five armed forces—the Marine Corps, Navy, Army, Air Force, and Coast Guard.

⁴ The United States Code (U.S.C.) consists of 49 titles (broad subject areas), and sections are numbered consecutively within each title. Title 10 deals with the armed forces.

The official purpose of the NDAA is to “authorize appropriations for fiscal year 2014 for military activities of the Department of Defense, for military construction, and for defense activities of the Department of Energy, to prescribe military personnel strengths for such fiscal year, and for other purposes”. The National Defense Act for Fiscal Year 2014 Preamble.⁵

Title 17 Subtitle A of the NDAA addresses changes to the UCMJ aimed at preventing sexual assault in the military. The main changes are to UCMJ Articles 6b, 32, 43, 46, 56, and 60.⁶

Articles 6b, 32, 43, 46, and 56

These articles address concerns about the protection of victims, especially in cases of rape or sexual assault. Article 6b is a new article guaranteeing the right of an alleged victim “to be reasonably protected from the accused”, to be given notice of any proceedings involving the offense, and to be given notice of the release or escape of the alleged offender. 10 U.S.C. §§806b(a)(1) and (2). Article 6b also guarantees the right of a victim to be heard at a sentencing, parole, or clemency hearing related to the offense. 10 U.S.C. §806b(a)(4). In addition, the article has a catch-all clause guaranteeing “the right to be treated with fairness and with respect for the dignity and privacy of the victim of an offense under this chapter”. 10 U.S.C. §806b(a)(8). This new article is in section 1701 of the NDAA.

Article 32 lays out the procedure for conducting a preliminary hearing to determine if there is enough evidence to establish probable cause that the accused committed a crime, if the convening authority has jurisdiction over the accused, and what the charges will be. 10 U.S.C. §832(a)(2). These hearings are conducted by an investigating officer. Under the new changes, the investigating officer must be an impartial judge advocate. 10 U.S.C. §832(b). In addition, the direct and cross-examination of any witnesses or the accused must be limited to the scope of the hearing and the victim may refuse to testify. 10 U.S.C. §832(d). This limitation was implemented to prevent the accused from attacking the character of a victim (especially the victim’s sexual conduct and preferences). These changes to article 32 are in Section 1702 of the NDAA.

Article 43 has been amended to remove the five-year statute of limitations on rape cases. Any rape case can now be tried by court martial at any time. 10 U.S.C. §843(a). This allows victims to bring rape cases even after five years have passed. This change is in section 1703 of the NDAA.

Article 46 has been amended to restrict the defense’s access to the victim of a sex-related offense. There is a new section requiring that the defense make any request to interview the victim through the trial counsel, and that any such interview must “take place only in the presence of trial counsel, a counsel for the victim, or a Sexual Assault Victim Advocate”. 10 U.S.C. §846(b). The new section of article 46 is in section 1704 of the NDAA.

⁵ The full text of the act is available at: <http://www.gpo.gov/fdsys/pkg/CPRT-113HPRT86280/pdf/CPRT-113HPRT86280.pdf>

⁶ Codified as 10 United States Code Annotated Sections 806b, 832, 843, 846, 856, and 860 respectively

Article 56 has been amended to add mandatory minimum sentences for article 120 and 125 crimes. Articles 120 and 125 codify rape, sexual assault, and forcible sodomy. 10 U.S.C. §§920 and 925. Anyone found guilty of those crimes must be punished by dismissal or dishonorable discharge at the minimum. 10 U.S.C. §856(b). This change will eliminate circumstances in which victims of sex crimes have to remain in the same units as their attackers. This change is in section 1705 of the NDAA.

Article 60

Article 60 covers the responsibilities of the convening authority (i.e., the officer in charge of the court martial). The convening authority used to have the ability to overturn a guilty verdict, reduce the guilty verdict of a major offense to a lesser offense, or modify the sentence. Convening authorities no longer have the authority to do that without the approval of the secretary of the service concerned, for any felonies or sexual assault cases. 10 U.S.C. §860(c).

Note on Article 34⁷

Under Article 34, the convening authority (i.e. the commander that called for a court-martial) must request the advice of his or her judge advocate with regards to jurisdiction, evidentiary thresholds, and jurisdiction. 10 U.S.C. §834(a). The judge advocate must respond to the request and make a recommendation on whether or not the convening authority should proceed with the case. 10 U.S.C. §834(b). This procedure remains unchanged. In cases involving sexual assault, however, special review is required if the convening authority decides not to proceed. If the convening authority decides not to proceed against the recommendation of his or her judge advocate, “the convening authority shall forward the case file to the Secretary of the military department concerned for review as a superior authorized to exercise general court-martial convening authority”. NDAA Section 1744(c). If the convening authority decides not to proceed in accordance with the recommendation of his or her judge advocate, “the convening authority shall forward the case file for review to the next superior commander authorized to exercise general court-martial convening authority”. NDAA Section 1744(d)

The NDAA codifies many other minor changes to the UCMJ and military procedures in an effort to address problems regarding sexual assault in the armed forces. All of these changes are codified in title 17 of the bill.

⁷ Article 34 was not amended. There are, however, new laws affecting its implementation.