



Overview of FY15 NDAA Changes to Military Justice

Background

Signed by the President on 19 December 2014, the FY15 NDAA made significant changes to the practice of military justice, particularly concerning convening authorities, victims, Victims' Legal Counsel (VLC), and court-martial procedure. This practice advisory summarizes notable changes. Unless otherwise noted, implementation is immediate. Detailed information about the provisions and implementation timelines are found in the enclosures.

Convening Authorities

(1) Convening Authority Action (CAA) for Straddling Offenses: Amends the restriction from the FY14 NDAA on the discretion of the convening authority to take post-trial action. This technical change simplifies CAAs for cases that contain convictions for both pre-24 June 2014 offenses AND offenses occurring on or after 24 June 2014. The new amendment reinstates the full range of post-trial action including the discretion to act on the findings and sentence for all offenses without a mandatory minimum. Due to this modification, last year's Practice Advisories (PA) 2-14 and 3-14 discussing Article 60 as modified by the NDAA FY14 are cancelled. See PA 2-15 (forthcoming) that will discuss changes to Article 60 as amended by both NDAA's FY14 and FY15. This provision takes effect on 18 January 2015. *Section 531.*

(2) Review of Non-Referral Decisions: Amends a provision from the FY14 NDAA concerning the review of a convening authority's decision not to refer certain sex-related charges to court-martial. The FY15 NDAA adds the role of a Chief Prosecutor in each of the Services for the purposes of reviewing a CA's non-referral decision (or a judge advocate appointed for that purpose). If a convening authority decides not to refer certain sexual offenses, the government counsel on the case may request review of the case file by the Chief Prosecutor of the Armed Force concerned. The Chief Prosecutor may then request review by the Departmental Secretary. Within the Marine Corps, the Deputy Director, Judge Advocate Division for Military Justice and Community Development has been appointed to conduct these reviews when forwarded by a Regional Trial Counsel. The pending Legal Support and Administration Manual (LSAM) will set forth the relevant procedures. *Section 541.*

(3) Victim Preference Considered: Requires the Secretary of Defense to establish a process to ensure victims of certain sexual offenses are consulted concerning jurisdiction of the victim's case. The CA must consider the victim's non-binding preference regarding whether an offense should be prosecuted by court-martial or in civilian court, when deciding whether to refer charges. If the victim prefers civilian court, the CA must ensure the civilian jurisdiction is notified. Further, if the CA learns of the civilian jurisdiction's decision on whether to prosecute, the CA must provide notice to the victim of the case's status. Implementation guidance is forthcoming. *Section 534.*

(4) Mandatory Minimum Sentences: This section clarifies that the FY14 NDAA's limitation of the CA's ability to change mandatory minimum sentences does not apply to Article 118 - Murder or Article 106 - Spying. *Section 531.*

Victims, VLC

(1) Reserve access to VLC: Members of the Reserve Component who are victims of an alleged "sex-related offense" are eligible for a VLC when the offense occurred while the victim served on active duty, inactive-duty for training, OR during any period, regardless of the duty status of the individual, if the circumstances of the alleged sex-

related offense have a nexus to the military service of the victim, as determined under regulations prescribed by the Secretary of Defense. *Section 533.*

(2) Right to be Heard Through VLC: In the Military Rules of Evidence, the right to be heard for a victim of an alleged sex-related offense means the victim has a right to be heard through counsel, including a VLC. Implementation required no later than 17 June 2015. *Section 534.*

(3) Petition to Court of Criminal Appeals: A victim may petition the Court of Criminal Appeals for a writ of mandamus to require the court-martial to comply with M.R.E. 412 and 513 if the victim believes a court-martial ruling violates the rights afforded under those rules. *Section 535.*

(4) Notice to Counsel on Scheduling of Proceedings: The Secretary concerned shall establish procedures to ensure that counsel for the victim, including a VLC, is provided notice of the scheduling of any hearing, trial or other proceeding in connection with the prosecution of a sex-related offense to allow the counsel to prepare for the proceeding. *Section 534.*

(5) Requests to Interview the Victim: Requests to interview the victim of an alleged sex-related offense must be made through the VLC or other counsel for the victim, if applicable. *Section 531.*

(6) Other Technical Amendments: Under Article 6b, UCMJ, the legislation replaces the term “legal guardian” with “representative” for the individual designated to assert rights for the victim, and clarifies that a representative does not need to be appointed for an individual under 18 years of age who is a member of the armed forces. In addition, crime victim’s rights under Article 6b are limited to “an individual” – an actual person not a corporation. *Section 531.*

Procedures

(1) Depositions: Article 49, UCMJ, was amended to allow a convening authority or military judge to order a deposition only if the requesting party demonstrates that, due to exceptional circumstances, it is in the interest of justice that the testimony of the prospective witness be taken and preserved for use at a preliminary hearing or court-martial. *Section 532.*

(2) Good Military Character of the Accused: The Military Rules of Evidence will be amended to prohibit the use of the good military character of the accused for the purpose of showing the probability of innocence to allegations of having violated Articles 120-123a, 125-127, 129-132, any other offense which evidence of the general military character of the accused is not relevant, or to any attempt or conspiracy to have violated any of the above numerated Articles. Implementation required no later than 180 days after enactment. *Section 536.*

(3) M.R.E. 513 Psychotherapist/Patient Privilege: The protections of the psychotherapist/patient privilege are increased by 1) expanding the scope to include communications with other licensed mental health professionals, 2) eliminating the constitutionally required exception, 3) increasing the requirements for the party seeking production of mental health records or communications, 4) allowing for an in camera review if the moving party meets its burden and an examination is necessary to rule on production or admissibility, and 5) requiring that any production or disclosure permitted by the military judge be narrowly tailored to only specific records or communications that meet a M.R.E. 513 exception. Implementation required no later than 17 June 2015. *Section 537.*

(4) Article 32, Preliminary Hearing: Made the new Article 32, UCMJ, effective on 26 December 2014, regardless of the date of the alleged offense, and adds language explicitly authorizing an accused’s waiver of an Article 32 preliminary inquiry. See ALNAV 086/14 for preliminary hearing procedures and training requirements and MARADMIN 681/14 for additional guidance to Marine judge advocates and non-JA preliminary hearing officers. *Section 531.*

(5) Return of Personal Property: Allows for the return of personal property taken during a sexual assault investigation to its rightful owner after the conclusion of all legal, adverse action and administrative proceedings. *Section 538.*

(6) Requirements for Sexual Assault Forensic Examiners (SAFE): Specifies who may be assigned duty as a SAFE and provides training and certification requirements. *Section 539.*

(7) Other Technical Amendments: In Articles 43, 118 and 125, UCMJ, clarifies the definition of forcible sodomy. Amends section 1741 of the NDAA FY14 (10 USC preceding 501) to add those who are “pursuing or has recently pursued becoming a member of the Armed Forces” for purposes of inappropriate or prohibited relationships. *Section 531.*

Reports

(1) Use of Information on Restricted Reports by Military Criminal Investigative Organizations (MCIO): Requires the Secretary of Defense to submit a plan, within 1 year after enactment of the FY15 NDAA, to Congress that will allow an individual who files a restricted report in a sexual assault case to elect to permit a MCIO, on a confidential basis and without affecting the restricted nature of the report, to access certain information including the identity of the alleged perpetrator, for the purpose of identifying individuals suspected of perpetrating multiple sexual assaults. *Section 543.*

(2) Domestic Violence: The Secretary of Defense shall develop a comprehensive plan to address the deficiencies in domestic violence reporting. Implementation required no later than 19 December 2015. *Section 544.*

(3) Judicial Proceedings Panel (JPP) Additional Duties: The JPP will also conduct a review of the impact of mental health records of the victim by the accused during Article 32 hearings and court-martial proceedings as compared to civilian proceedings and will conduct a review of the establishment of a privilege covering communications to the DOD Safe Helpline or DOD Safe HelpRoom. *Section 545.*

(4) Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault: 30 days after the disestablishment of the JPP, the SECDEF shall establish this advisory committee to advise the SECDEF on the investigation, prosecution and defense of rape, forcible sodomy, sexual assault, and other sexual misconduct by members of the Armed Forces. *Section 546.*

Characterization of Service

Requires the Service Secretaries to establish a confidential process through the Boards for Correction of Military Records for victims of sex-related offenses to challenge the terms or characterization of their discharge or separation from the service on the grounds that the characterization was adversely affected by the member being a victim of a sex-related offense. *Section 547.*

Enclosures: NDAA FY15 Smartbook, implementation charts. The NDAA FY15 may be found here: <https://www.congress.gov/bill/113th-congress/house-bill/3979?q=%7B%22search%22%3A%5B%22hr+3979%22%5D%7D>

Points of Contact

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