



Overview of FY16 NDAA Changes to Military Justice

Background

Signed by the President on 25 November 2015, the [National Defense Authorization Act for Fiscal Year 2016 \(FY16 NDAA\)](#) contains changes to the practice of military justice concerning the rights of victims, Victims' Legal Counsel (VLC), court-martial procedure, and Sexual Assault Prevention and Response program policy. This practice advisory summarizes notable changes. Unless otherwise noted, implementation is effective as of 25 November 2015. Detailed information about the provisions and implementation are found in the enclosures.

Victim Rights and Victims' Legal Counsel

(1) **Enforcement of Certain Crime Rights by a Court of Criminal Appeals:** A victim may petition a Court of Criminal Appeals for a writ of mandamus to comply with an applicable rule when the victim believes a ruling by a preliminary hearing or court-martial violates the victim's rights found in Article 6b, Article 32, MRE 412, MRE 513, MRE 514, or MRE 615. The victim may also petition for a writ of mandamus to quash an order to submit to a deposition, notwithstanding the availability of the victim to testify at court-martial. These writs shall have priority over all other proceedings before the court. This section amends Article 6b, UCMJ. *Section 531.*

(2) **DoD Civilian Employee Access to VLC:** A civilian DoD employee who is not eligible for legal assistance, but who is a victim of an alleged sex-related offense, is eligible for VLC assistance upon waiver by the Secretary of Defense or Secretary of the Military Department concerned. This section amends 10 U.S.C. 1044e(a)(2). *Section 532.*

(3) **Authority of VLC to Provide Legal Consultation in Connection with Various Government Proceedings:** VLCs may provide legal consultation and assistance with any complaint against the government including an allegation under review by an inspector general or a complaint regarding equal employment opportunities. Additionally, VLCs may assist with any request to the Government for information, including under FOIA, and any communication with Congress. This section amends 10 U.S.C. 1044e(b). *Section 533.*

(4) **Timely Notice of the Availability of VLC Assistance:** Notice of the availability of VLC shall be provided to victims of certain sex-related offenses before any military investigator or trial counsel interviews or requests statements from the victim, subject to exceptions for exigent circumstances that the Secretary of Defense may prescribe. This section amends 10 U.S.C. 1044e(f) and 10 U.S.C. 1565b(a). *Section 534.*

(5) **Improvements to the VLC Program:** The Secretary of Defense shall establish the time period for a VLC to receive training and the baseline training requirements for VLC. The Secretary of Defense, with the Services, shall establish: (1) guiding principles for the VLC programs to ensure that VLCs are assigned to locations optimal for face-to-face communication with clients or other effective communication, (2) performance measures and standards to measure the effectiveness of the VLC program and client satisfaction with the program, (3) and processes to evaluate the VLC program. This section amends 10 U.S.C. 1044e(d) and (e). *Section 535.*

Sexual Assault Prevention and Response Program

(1) **Enhancement of Confidentiality of Restricted Reporting of Sexual Assault:** Preempts state law or regulation such that any state law or regulation requiring disclosure of personally identifiable information of an adult victim or alleged subject to a state or local law enforcement agency shall not apply, except when reporting is necessary to protect the health or safety of an individual. Amends 10 U.S.C. 1565b(b). Additionally, 10 U.S.C. 1565b is amended to clarify that regarding dependents, only adult dependents may make restricted reports. *Section 536.*

(2) Improved Prevention and Response to Sexual Assaults for Male Victims: The Secretary of Defense, with the Services, shall develop a plan to improve DoD prevention and response to sexual assaults against male servicemember victims. The plan will include improved training, increased communication to raise awareness, an evaluation of whether male and female victims have different needs, and guidance to medical and mental health providers on gender-specific issues based on the results of that evaluation. *Section 538.*

(3) Preventing Retaliation against Those Who Report a Sex-Related Offense or Intervene on Behalf of a Victim: The Secretary of Defense shall develop a comprehensive strategy to prevent retaliation against victims and those who intervene to assist the victim. The strategy shall include additional training for commanders and requirements to ensure protection from retaliation. *Section 539.*

(4) SAPR Training for Administrators and Instructors of Senior Reserve Officers' Training Corps: The Service Secretaries shall ensure that the commander of each unit of the Senior Reserve Officers' Training Corps and all Professors of Military Science, senior military instructors, and civilian employees detailed, assigned, or employed as administrators and instructors of the Senior Reserve Officers' Training Corps receive regular SAPR training and education. *Section 540.*

Procedures

(1) Retention of Investigative Records for Sex-Related Offenses: By 23 May 2016, the Secretary of Defense shall update record retention policy for investigations relating to an alleged sex-related offense. The case file must include the case activity record, case review record, investigative plans, and all case notes made by the agent. The records must be retained for at least 50 years. *Section 541.*

(2) Improved implementation of Changes to the Uniform Code of Military Justice: The Secretary of Defense shall examine the process for implementing changes to the UCMJ to develop options for streamlining the process. *Section 543.*

(3) Modification of Rule for Court-Martial (RCM) on Evaluations of VLCs: By 23 May 2016, the President shall modify RCM 104(b) to prohibit giving a less favorable rating to a VLC because of the zeal with which the counsel represented a victim. See Enclosure (2), 2015 Proposed Executive Order, for the draft of this rule. *Section 544.*

(4) Modification of Military Rule of Evidence (MRE) 304(c): The President shall modify MRE 304(c) to conform to the rules governing the admissibility of the corroboration of admissions and confessions in criminal cases in U.S. district courts. See Enclosure (2), 2015 Proposed Executive Order, for the draft of this rule. *Section 545.*

Defense Advisory Committee

The Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces shall begin no later than 23 February 2016. The Advisory Committee shall advise the Secretary of Defense on the investigation, prosecution, and defense of allegations of rape, forcible sodomy, sexual assault, and other sexual misconduct involving members of the armed forces. *Section 537.*

Text of Statute: Available at <http://tinyurl.com/FY16NDAA>.

Enclosures: (1) FY16 NDAA Smartbook and (2) 2015 Proposed Executive Order.

Points of Contact: Military justice policy questions may be directed to LtCol Angela Wissman (JMJ Branch Head) at angela.wissman@usmc.mil or (703)693-9005; Maj Eldon Beck (JMJ Deputy Branch Head) at eldon.beck@usmc.mil or (703)693-8901; or Capt Harlye Carlton (JMJ Policy & Legislation) at harlye.carlton@usmc.mil or (703)693-9299.