



# PRACTICE ADVISORY

No. 2-17

18 January 2017

## Overview of FY17 NDAA Changes to Military Justice

### *Background*

Signed by the President on 23 December 2016, the National Defense Authorization Act for Fiscal Year 2017 (FY17 NDAA) contains the Military Justice Act of 2016, which makes sweeping changes to military justice, as well as other provisions affecting military justice. A non-exhaustive list of changes made by the Military Justice Act and other provisions are discussed below. Detailed information about the provisions and implementation will be found in the forthcoming FY17 NDAA Smartbook. Due to the number of changes contained in the FY17 NDAA, all practitioners are encouraged to review the military justice portions of the NDAA in their entirety.

## Military Justice Act of 2016

**Effective dates.** Generally, the provisions contained within the Military Justice Act of 2016 take effect on a date to be designated by the President, **which shall not be later than 1 January 2019**. The President shall prescribe regulations (amendments to the Manual for Courts-Martial (MCM)) **no later than 23 December 2017**. Those amendments to the MCM shall take effect when the changes to the Uniform Code of Military Justice (UCMJ) take effect. The amendments shall not apply to charges that have been referred prior to the effective date. Additionally, amendments to Punitive Articles and authorized sentences shall not apply to any offense committed before the effective date of the amendment. *Section 5542.*

**Nonjudicial punishment (Article 15).** Eliminates the authority to impose confinement on bread and water as punishment; may still impose confinement for not more than three days. *Section 5141.*

**Summary courts-martial (Article 20).** Specifies that summary courts-martial are non-criminal forums and a finding of guilty at a summary court-martial does not constitute a criminal conviction. *Section 5164.*

### *Pretrial*

(1) **Rights of victims of an offense (Article 6b).** Changes current requirement for military judges to designate a representative for certain victims to instead say individuals designated as suitable by the military judge may assume the rights of certain victims. Requirement for defense counsel to make any request to interview victims through their Victims' Legal Counsel or other counsel, if applicable, and requirement at any such interview take place only in the presence of the counsel for the Government, a counsel for the victim, or, if applicable, victim advocate, were moved from Article 46, UCMJ to Article 6b. Such requirements are no longer limited to cases where the victim is a victim of alleged sex-related offenses. *Section 5105.*

(2) **Military magistrates (Articles 19, 26a, and 30a).** Authorizes Services to utilize military magistrates to perform certain pre-referral duties (see #4 of this Practice Advisory (PA) under "Pretrial"), preside over special courts-martial under Article 19 with the consent of the parties (see #1 of this PA under "Trial"), or other duties of a nonjudicial nature. *Sections 5163, 5185, and 5202.*

(3) **Enlisted members (Article 25).** Eliminates the requirement that enlisted members must be from a different unit than the accused. Enlisted members on active duty are eligible to serve on a general or special court-martial for

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the trial of any other enlisted member. Enlisted accused may request that the court-martial be composed entirely of officers or that enlisted members comprise at least one third of the membership. *Section 5182.*

(4) Trial and appellate military judges (Articles 26 and 66). Requires a military judge be detailed to all general and special courts-martial. The President shall determine appropriate minimum assignment periods for trial and appellate military judges, subject to such exceptions as may be authorized by the President. *Sections 5184 and 5330.*

(5) Qualifications of defense counsel in capital cases (Article 27). In capital cases, requires the assignment of counsel learned in the law applicable to such cases. If necessary, this counsel may be a civilian and may be compensated by the U.S. Government. *Section 5186.* Applies to appellate defense counsel as well in capital cases. *Article 70; Section 5334.*

(6) Pre-referral proceedings (Article 30a). Judicial proceedings may be conducted prior to referral to review pre-referral investigative subpoenas, pre-referral warrants or orders for electronic communications, and pre-referral matters referred by an appellate court. *Section 5202.* Additionally, Section 5228 amends 18 U.S.C. 2703 and 18 U.S.C. 2711 to require service provider compliance with warrants or orders for wire or electronic communications.

(7) Preliminary hearings (Article 32). Preliminary hearing officers must analyze materials submitted after the hearing by the parties or victim that are relevant to disposition. Adds clarification that a victim's declination to testify shall not serve as the sole basis for ordering a deposition under Article 49. *Section 5203.*

(8) Disposition guidance (Article 33). The Secretary of Defense will issue non-binding guidance regarding factors that commanders, convening authorities, staff judge advocates, and judge advocates should take into account when exercising duties with respect to disposition of charges and specifications. *Section 5204.*

(9) Advice to convening authority before referral for trial (Article 34). Requires Staff Judge Advocates' recommendation as to disposition be tied to interest of justice and discipline. Before referral of charges and specifications to a special court-martial for trial, the convening authority shall consult with a judge advocate on relevant legal issues. *Section 5205.*

(10) Investigative subpoenas (Article 46). Subpoenas may be issued to compel production of evidence for an investigation of an offense under the UCMJ. This includes prior to referral of charges if a general court-martial convening authority so authorizes counsel for the government to issue such a subpoena. *Section 5228.* This will replace the current procedure by which subpoenas are obtained at the Article 32 phase of a court-martial.

## ***Trial***

(1) Judge-alone special courts-martial (Articles 16 and 19). Creates a new class of special courts-martial (SPCMs) with judge-alone findings and sentencing where the sentence may not include a bad conduct discharge, confinement for more than six months, or forfeitures of pay for more than six months. The military judge, with the consent of the parties, may designate a military magistrate to preside over the SPCM. These SPCMs are subject to limitations as may be prescribed by the President. *Sections 5161 and 5163.*

(2) Fixed member panels (Articles 16, 25, 25a, and 29). Member panels fixed at four members for SPCMs, eight members for general courts-martial (GCMs), and twelve members for capital cases. After the members are impaneled, the number of members for GCMs may reduce to six before the proceedings must cease to impanel new members. The convening authority may authorize alternate members. *Sections 5161, 5182, 5183, and 5187.* Except for capital cases, at least three-fourths of the members must agree on the findings and sentence. *Section 5235.*

(3) Military judge and member sentencing (Articles 25, 53, and 56). For non-capital sentencing, the default is military judge sentencing. However, where the accused is convicted of an offense by a general or special court-martial consisting of a military judge and members, the accused may elect to be sentenced by members. If the accused elects sentencing by military judge, the military judge shall specify the term of confinement and fine, if any, for each offense of which the accused is found guilty. Additionally, the military judge shall specify whether any terms of confinement are to run consecutively or concurrently. If the accused elects sentencing by members, the

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members shall announce a single sentence for all of the offenses of which the accused was found guilty. *Sections 5182, 5236, and 5301.* The Military Justice Review Panel (Article 146) will gather sentencing data and submit a report to the Committees on Armed Services of the Senate and House of Representatives setting forth the Panel's findings and recommendations on the need for sentencing reform no later than 31 Oct 20. *Section 5521.*

(4) Statute of limitations (Article 43). Extends statute of limitations for child abuse offenses from five years or the life of the child, whichever is longer, to ten years or the life of the child, whichever is longer. For fraudulent enlistment or appointment cases, the statute of limitations is during the period of enlisted or appointment or five years, whichever is longer. Modifies statute of limitations where DNA testing implicates an identified person in the commission of an offense punishable by confinement for more than one year. *Section 5225.*

(5) Former jeopardy (Article 44). Provides when jeopardy attaches in a court-martial when said court-martial is comprised of a military judge alone and when said court-martial is comprised of a military judge a members. *Section 5226.*

(6) Pleas of the accused (Articles 45). The accused may plead guilty to any offenses for which the death penalty is not mandatory. Adds a new provision that variance from Article 45 is harmless error if the variance does not materially prejudice the accused. *Section 5227.*

(7) Plea agreements (Article 53a). This is a new article that provides for the accused and convening authority entering into a plea agreement. The military judge may reject a plea agreement under certain circumstances. In the case of a plea agreement for a sentence below a mandatory minimum, the military judge may accept a plea agreement that provides for a bad-conduct discharge and upon recommendation of the trial counsel, in exchange for substantial assistance by the accused, the military judge may accept a plea agreement that provides for a sentence less than the mandatory minimum sentence for the offense charged. *Section 5237.*

(8) Sentencing (Article 56). Conspiracy to commit violations of Article 120(a) or (b) and violations of Article 120(b) or (b) is added to list of offenses that require mandatory dismissal or dishonorable discharge. With the approval of the Judge Advocate General concerned, the Government may appeal a sentence to the Court of Criminal Appeals on the grounds that the sentence violates the law or is plainly unreasonable. *Section 5301.*

### ***Post-trial***

(1) Post-trial processing in general and special courts-martial (Articles 54 and 60). The court reporter shall certify the record of trial. The Report of Results of Trial shall be replaced with the "Statement of Trial Results." This document will be entered into the record of trial by the military judge and will include each plea and finding, the sentence, if any, and any other information as prescribed by the President. *Sections 5238 and 5321.*

(2) Effective dates of sentences (Article 57). Except for sentences of death and punitive discharges, general and special courts-martial sentences are self-executing or effective upon entry of judgment without further approval by the convening authority. Summary courts-martial sentences are effective when the convening authority acts on the sentence. *Section 5302.*

(3) Reduction in enlisted grade (Article 58a). Mandates that an enlisted member in the pay grade above E-1 automatically reduces to the pay grade E-1 upon entry of judgment when the judgment of the court includes a dishonorable discharge or bad-conduct discharge, confinement, or hard labor without confinement. *Section 5303.*

(4) Limited authority to act on sentence in specified post-trial circumstances (Article 60a). The convening authority may only take limited action on the sentence—and may not act on the findings—in cases where the maximum sentence for any offense for which the accused is found guilty is two or more years, where the total confinement, running consecutively, is more than six months, where the sentence includes a dismissal, dishonorable discharge, or bad conduct discharge, or where the accused was found guilty of Article 120(a) or (b) or Article 120b. Upon recommendation of the military judge, the convening authority may suspend a sentence of confinement, in

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whole or in part, or a sentence of dismissal, dishonorable discharge, or bad conduct discharge. Upon recommendation by trial counsel, if the accused provided substantial assistance in the investigation or prosecution of another person, the convening authority may reduce, commute, or suspend a sentence including mandatory minimum sentences. In general and special courts-martial, there is no longer a requirement for the convening authority to act; therefore there is no Convening Authority Action required any longer. Instead, the decision of the convening authority shall be forwarded to the military judge or chief trial judge, depending on the nature of the decision, for inclusion in the judgment. *See section 5322.*

(5) Post-trial actions in summary courts-martial and certain general and special courts-martial (Article 60b). For any court-martial not specified in Article 60(a)(2), the convening authority may take numerous actions on the findings and sentence. In general and special courts-martial, there is no longer a requirement for the convening authority to act; therefore there is no Convening Authority Action required any longer. Instead, the decision of the convening authority shall be forwarded to the military judge for inclusion in the judgment. *See section 5323.*

(6) Entry of judgment (Article 60c). In a general or special court-martial, at the conclusion of any post-trial actions, the military judge shall enter the judgment into the record of trial. The judgment shall consist of the Statement of Trial Results and any modifications of, or supplements to, the Statement of Trial Results as a result of a post-trial convening authority action or ruling, order, or other determination of the military judge that affects a plea, finding, or the sentence. *Section 5324.*

(7) Appeal to Courts of Criminal Appeal (Articles 65 and 66). The Courts of Criminal Appeals (CCAs) shall automatically review courts-martial where the judgment entered includes a sentence of death, dismissal, dishonorable discharge, or bad conduct discharge, or confinement for two years or more. The accused may appeal to the CCAs where the sentence extends to confinement for more than six months and not subject to automatic review. *Sections 5329 and 5330.*

### ***Punitive Articles***

(1) Restructures punitive articles. Moves many offenses currently addressed by the President via executive order under Article 134 to the enumerated articles, thereby eliminating the requirement to prove the terminal element when charging those offenses. See enclosure (1) for a list of the punitive articles after implementation of the FY17 NDAA. The subsections below discuss a few of the most significant changes to the punitive articles.

(2) Lesser included offenses (Article 79). The President is authorized to designate lesser included offenses. *Section 5402.*

(3) New Article 93a: Prohibited activities with military recruit or trainee by person in position of special trust. Prohibits officers, noncommissioned officers, and petty officers who are in a training leadership positions from engaging in prohibited sexual activity with “specially protected” junior members of the armed forces. These “specially protected” members include members assigned to or awaiting assignment to basic training or other initial active duty for training, midshipmen and officer candidates, or others in programs identified as a training program for initial career qualification. *Section 5410.*

(4) Amendments to Article 120: Rape and sexual assault offenses. Numerous amendments to Article 120, including removing element of “causing bodily harm” and adding a new element of “without consent” in sexual assault; redefining “sexual act,” “sexual contact,” and “consent”; and adding a definition for “incapable of consenting.” *Section 5430.*

(5) New Article 121a: Fraudulent use of credit cards, debit cards, and other access devices. Criminalizes persons subject to the UCMJ who knowingly and with intent to defraud uses certain cards or devices without authorization to obtain anything of value. *Section 5432.*

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(6) New Article 123: Offenses concerning Government computers. Criminalizes certain crimes involving government computers, including accessing a Government computer with an unauthorized purpose and obtaining classified information, and knowingly causing the transmission of a program, information, code, or command and as a result intentionally causes damage without authorization to a Government computer. *Section 5436*.

(7) New Article 132: Retaliation. Prohibits persons subject to the UCMJ from taking or threatening to take adverse personnel actions against, or withholding or threatening to withhold favorable personnel actions from any person for reporting or planning to report a criminal offense, or making or planning to make a protected communication, or with the intent to discourage any person from reporting a criminal offense or making or planning to make a protected communication. *Section 5450*.

### ***Other Military Justice Provisions in the Military Justice Act of 2016***

(1) Articles to be explained (Article 137). Requires officers—in addition to enlisted personnel—receive training on the UCMJ upon initial entry of the officer on active duty and periodically thereafter. Officers with the authority to convene courts-martial shall receive specific training on the purposes and administration of the UCMJ. The Secretary of Defense shall prescribe regulations to provide additional specialized training regarding the purposes and administration of the UCMJ officers assigned to duty in a combatant command who have convening authority. *Section 5503*.

(2) Case management; data collection and accessibility (Article 140a). The Secretary of Defense will prescribe uniform standards and criteria for (a) the collection and analysis of data, (b) case processing and management, (c) timely, efficient, and accurate production and distribution of records of trial, and (d) access to docket information, filings, and records. *Section 5504*. *No later than 23 Dec 18, the Secretary of Defense shall carry out Article 140a. No later than 23 Dec 20, the standards and criteria under Article 140a shall take effect.*

(3) Military Justice Review Panel (Article 146). Creates a thirteen-member panel to conduct independent periodic reviews and assessments of the operation of the UCMJ. The Panel's initial assessment will be completed in Fiscal Year 2020. Then in 2024 and every eight years thereafter, the Panel will conduct a comprehensive review and assessment of the UCMJ. The panel will also conduct a sentencing assessment by 31 Oct 20, as discussed previously in the Sentencing section of this PA. *Section 5521*.

(4) Annual reports (Article 146a). Modified from the former Article 146, Article 146a requires the Judge Advocates General and the Staff Judge Advocate to the Commandant of the Marine Corps to submit a report on various military justice issues to the Committee on Armed Services of the Senate, the Committee on Armed Services of the House of Representatives, to the Secretary of Defense, and the Secretaries of the military departments. *Section 5522*.

## **Other Changes to Military Justice**

(1) Court of Appeals for the Armed Forces Judges. Various modifications to matters concerning judges for the Court of Appeals for the Armed Forces to include authority to administer oaths (Articles 136), modification of terms (early retirement authorized for one current judge and staggering of future appointments), repeal of requirement relating to political party status of judges, and modification of daily rate of compensation for senior judges (Article 142), and repeal of dual compensation provision relating to judges of the court (Article 145). *Section 541*. *Effective immediately; however, the provision affecting “staggering of future appointments” applies with respect to appointments made on or after the date of the enactment of the FY17 NDAA (23 Dec 16).*

(2) Deliberate professional development process. The Service Secretaries shall establish and use a system of military justice experience designators or skill identifiers to identify judge advocates with skill and experience in military justice proceedings to ensure that that such judge advocates are assigned to develop less experienced judge advocates.

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Service Secretaries shall carry out a five-year pilot program to assess the feasibility and advisability of establishing a deliberate professional developmental process for judge advocates. *Section 542. Effective immediately.*

***Text of Statute:*** The FY17 NDAA is located on the JMJ public website here:

<http://www.hqmc.marines.mil/sja/Branches/Military-Justice-Branch-JMJ/> and on the JSC public website here:

<http://jsc.defense.gov/Military-Law/Changes-Since-2012-MCM/>

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# PRACTICE ADVISORY

No. 2-17

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## Punitive Articles after Implementation of FY17 NDAA

- 77. . Principals.
- 78. Accessory after the fact.
- 79. Conviction of offense charged, lesser included offenses, and attempts.
- 80. Attempts.
- 81. Conspiracy.
- 82. Soliciting commission of offenses.
- 83. Malingering.
- 84. Breach of medical quarantine.
- 85. Desertion.
- 86. Absence without leave.
- 87. Missing movement; jumping from vessel.
- 87a. Resistance [sic], flight, breach of arrest, and escape.
- 87b. Offenses against correctional custody and restriction.
- 88. Contempt toward officials.
- 89. . Disrespect toward superior commissioned officer; assault of superior commissioned officer.
- 90. . Willfully disobeying superior commissioned officer.
- 91. Insubordinate conduct toward warrant officer, noncommissioned officer, or petty officer.
- 92. . Failure to obey order or regulation.
- 93. Cruelty and maltreatment.
- 93a. Prohibited activities with military recruit or trainee by person in position of special trust.
- 94. Mutiny or sedition.
- 95. Offenses by sentinel or lookout.
- 95a. Disrespect toward sentinel or lookout.
- 96. Release of prisoner without authority; drinking with prisoner.
- 97. Unlawful detention.
- 98. Misconduct as prisoner.
- 99. Misbehavior before the enemy.
- 100. Insubordinate compelling surrender.
- 101. Improper use of countersign.
- 102. Forging a safeguard.
- 103. Spies.
- 103a. Espionage.
- 103b. Aiding the enemy.
- 104. Falsifying records offenses.
- 104a. Fraudulent enlistment, appointment, or separation.
- 104b. Unlawful enlistment, appointment, or separation.
- 105. Forgery.
- 105a. False or unauthorized pass offenses.
- 106. Impersonation of officer, noncommissioned or petty officer, or agent or official.
- 106a. Wearing unauthorized insignia, decoration, badge, ribbon, device, or lapel button.
- 107. Falsifying official statements; false swearing.
- 107a. Parole violation.
- 108. Military property of the United States—Loss damage, destruction, or wrongful disposition.
- 108a. Captured or abandoned property.
- 109. Property other than military property of the United States—Waste, spoilage, or destruction.
- 109a. Mail matter: wrongful taking, opening, etc.
- 110. Improper hazarding of vessel or aircraft.
- 111. Leaving scene of vehicle accident.
- 112. Drunkenness and other incapacitation offenses.
- 112a. Wrongful use, possession, etc., of controlled substances.
- 113. Reckless or reckless operation of a vehicle, aircraft, or vessel.
- 114. Endangerment offenses.
- 115. Communicating threats.
- 116. Riot or breach of peace.
- 117. Provoking speeches or gestures.
- 118. Murder.
- 119. Manslaughter.
- 119a. Death or injury of an unborn child.
- 119b. Child endangerment.
- 120. Rape and sexual assault generally.
- 120a. Mails: deposit of obscene matter.
- 120b. Rape and sexual assault of a child.
- 120c. Other sexual misconduct.
- 121. Larceny and wrongful appropriation.
- 121a. Fraudulent use of credit cards, debit cards, and other access devices.
- 121b. False pretenses to obtain services.
- 122. Robbery.
- 122a. Receiving stolen property.
- 123. Offenses concerning Government computers.
- 123a. Making, drawing, or uttering check, draft, or order without sufficient funds.
- 124. Offenses against the United States.
- 124a. Bribery.
- 124b. Graft.
- 125. Kidnapping.
- 126. Arson; burning property with intent to defraud.
- 127. Extortion.
- 128. Assault.
- 128a. Maiming.
- 129. Burglary; unlawful entry.
- 130. Stalking.
- 131. Perjury.
- 131a. Subornation of perjury.
- 131b. Obstructing justice.
- 131c. Misprision of serious offense.
- 131d. Wrongful refusal to testify.
- 131e. Prevention of authorized seizure of property.
- 131f. Noncompliance with procedural rules.
- 131g. Wrongful interference with adverse administrative proceeding.
- 132. Retaliation.
- 133. Conduct unbecoming an officer and a gentleman.
- 134. General article.