2013 Changes to the UCMJ – Part 1: Overview

By Zachary D Spilman, Tuesday, January 7, 2014

This is part one of a series of posts discussing the military justice reforms in the National Defense Authorization Act for Fiscal Year 2014, signed into law by the President on December 26, 2013. The full series is available at this link.

The National Defense Authorization Act for Fiscal Year 2014 is a big piece of legislation. Contained within the 1,106 page bill are 38 sections addressing a variety of military justice issues. I’ve excerpted all 38 of these sections into a document with a table of contents (Word version available here) (PDF version available here).

From these 38 military justice sections I’ve identified the most important 15. They are: The eight sections that make ten changes to the UCMJ (two sections each make two changes), and five other sections that will significantly impact court-martial prosecutions.

The ten changes to the Code are:

- § 531. Modification of eligibility for appointment as Judge on the United States Court of Appeals for the Armed Forces.
- § 1701. Extension of crime victims’ rights to victims of offenses under the Uniform Code of Military Justice.
- § 1702(a). Revision of Article 32 (Use of Preliminary Hearings).
- § 1702(b). Revision of Article 60(c) (Elimination of Unlimited Command Prerogative and Discretion).
- § 1703. Elimination of five-year statute of limitations on trial by court-martial for additional offenses involving sex-related crimes.
- § 1704. Defense counsel interview of victim of an alleged sex-related offense in presence of trial counsel, counsel for the victim, or a Sexual Assault Victim Advocate.
- § 1705(a). Discharge or dismissal for certain sex-related offenses.
- § 1705(b). Trial of such offenses by general courts-martial.
- § 1706. Participation by victim in clemency phase of courts-martial process.
- § 1707. Repeal of the offense of consensual sodomy under the Uniform Code of Military Justice.

Of these ten sections and subsections, four do not take effect until the future. These are:

- The new Art. 32 (effective Dec. 27, 2014);
- The new Art. 60(c) (effective Jun. 24, 2014);
- The mandatory minimums for sex offenses (effective Jun. 24, 2014); and
- The requirement for trial by general court-martial for the sex offenses with mandatory minimums (effective Jun. 24, 2014).

I’ve updated our Word document version of the UCMJ to include all of the new Code provisions (there are annotations for the provisions effective in the future). I’ve also significantly reformatted the document and added a linked table of contents.

The other five sections likely to have significant impact on court-martial prosecutions are:

- § 1708. Modification of Manual for Courts-Martial to eliminate factor relating to character and military service of the accused in rule on initial disposition of offenses.
- § 1716. Designation and availability of Special Victims’ Counsel for victims of sex-related offenses.
- § 1744. Review of decisions not to refer charges of certain sex-related offenses for trial by court-martial.
§ 1753. Sense of Congress on the discharge in lieu of court-martial of members of the Armed Forces who commit sex-related offenses.

Over the rest of this week I will discuss all 15 of these provisions in this series of posts, as follows:

- Part 1: Overview (this post). CAAF eligibility change (§531).
- Part 2: Preferral-stage changes. Victims rights (§1701), SVC statute (§1716), statute of limitations (§1703), mandatory minimums (§1705(a) and (b)), repeal of consensual sodomy (§1707), and initial disposition factors (§1708).
- Part 4: Article 32. The new Art. 32 (§1702(a)), review of decisions not to refer sex-related offenses to trial (§1744), and sense of Congress provisions (§1752 and §1753).
- Part 5: Post-trial matters. The new Art 60(c) (§1702(b)) and Article 60(d) ((§1706).
- Part 6: Practice notes. Thoughts on how these new provisions will affect pretrial negotiations, trial practice, and post-trial actions.

Below is a discussion of the first change to the Code: The CAAF eligibility change.

This provision is particularly interesting for this blog, as it responds to a 2012 post that discussed Article 142's unwise limitations on the President’s discretion to pick the best possible CAAF judges, and a 2009 post entitled Let’s honor Chief Judge Baum’s memory by repealing Article 142(b)(4). Congress doesn’t repeal Article 142(b)(4) entirely, but it does make fundamental change. The old language read:

(4) For purposes of appointment of judges to the court, a person retired from the armed forces after 20 or more years of active service (whether or not such person is on the retired list) shall not be considered to be in civilian life.

The new language reads:

(4) A person may not be appointed as a judge of the court within seven years after retirement from active duty as a commissioned officer of a regular component of an armed force.

While there are no current CAAF vacancies, this expansion of eligibility creates a new pool of otherwise highly-qualified candidates for CAAF whose military experience is no longer a disqualifying factor. But the seven year cooling-off requirement gives us a reason to consider why a civilian CAAF is important.

During the early Congressional consideration of the UCMJ, the need for an independent CAAF (formerly called the Court of Military Appeals) was clearly understood. A 1949 report by the House Armed Services Committee included this discussion:

Article 67 contains the most revolutionary changes which have ever been incorporated in our military law. Under existing law all appellate review is conducted solely within the military departments. This has resulted in widespread criticism by the general public, who, with or without cause, look with suspicion upon all things military and particularly on matters involving military justice. Every Member of Congress, both present and past, is well aware of the validity of this statement. The original bill provided for the establishment of a judicial council to be composed of at least three members. In view of the fact that this is to be a judicial tribunal and to be the court of last resort for court-martial cases, except for the constitutional right of habeas corpus, we concluded that it should be designated by a more appropriate name . . . a civilian court of military appeals, completely removed from all military influence or persuasion.

Report to accompany H.R. 4080 at 6-7 (April 28, 1949) (link). Article 142(b)(1) still requires that “each judge of the court shall be appointed from civilian life...,” and this seven year cooling-off period ensures that this requirement
isn’t undermined by too rapid a transition from a full active duty career to the civilian Court of Appeals for the Armed Forces.
2013 Changes to the UCMJ – Part 2: Preferral-stage changes
By Zachary D Spilman, Wednesday, January 8, 2014

This is part two of a series of posts discussing the military justice reforms in the National Defense Authorization Act for Fiscal Year 2014, signed into law by the President on December 26, 2013. The full series is available at this link.

Of the 15 NDAA provisions identified in the first part of this series, seven of them affect the earliest stages of a court-martial prosecution. They are:

- § 1701, creating “Article 6b. Rights of the victim of an offense under this chapter.”
- § 1716, codifying the special victims counsel program in 10 U.S.C. § 1044e, “Special Victims’ Counsel for victims of sex-related offenses.”
- § 1703, amending Article 43 to eliminate the 5-year statute of limitations on sexual assault (Art. 120(b)) and sexual assault of a child (Art. 120(b)). This section applies only to offenses committed on or after December 26, 2013.
- § 1705(a), amending Article 56 to create a mandatory minimum of dismissal or dishonorable discharge for the offenses of rape (120(a)) or sexual assault (120(b)), rape of a child (120b(a)) or sexual assault of a child (120b(b)), forcible sodomy (125), or attempts to commit these offenses. This takes effect and applies only to offenses committed on and after December 26, 2013 (180 days from enactment).
- § 1705(b), amending Article 18 to confer jurisdiction over the 1705(a) offenses to only general courts-martial. This also takes effect and applies only to offenses committed on and after June 24, 2014 (180 days from enactment).
- § 1708, requiring the President to amend the non-binding discussion to R.C.M. 306.
- § 1707, repealing the offense of consensual sodomy.

Discussion of each of these provisions follows.

The new Article 6b establishes “Rights of the victim of an offense under this chapter.” A victim is defined as “a person who has suffered direct physical, emotional, or pecuniary harm as a result of the commission of an offense under [the UCMJ].” The rights afforded are:

1. The right to be reasonably protected from the accused.
2. The right to reasonable, accurate, and timely notice of any of the following:
   (A) A public hearing concerning the continuation of confinement prior to trial of the accused.
   (B) A preliminary hearing under section 832 of this title (article 32) relating to the offense.
   (C) A court-martial relating to the offense.
   (D) A public proceeding of the service clemency and parole board relating to the offense.
   (E) The release or escape of the accused, unless such notice may endanger the safety of any person.
3. The right not to be excluded from any public hearing or proceeding described in paragraph (2) unless the military judge or investigating officer, as applicable, after receiving clear and convincing evidence, determines that testimony by the victim of an offense under this chapter would be materially altered if the victim heard other testimony at that hearing or proceeding.
4. The right to be reasonably heard at any of the following:
   (A) A public hearing concerning the continuation of confinement prior to trial of the accused.
   (B) A sentencing hearing relating to the offense.
   (C) A public proceeding of the service clemency and parole board relating to the offense.
5. The reasonable right to confer with the counsel representing the Government at any proceeding described in paragraph (2).
6. The right to receive restitution as provided in law.
7. The right to proceedings free from unreasonable delay.
8. The right to be treated with fairness and with respect for the dignity and privacy of the victim of an offense under this chapter.
These rights parallel the eight rights in the Crime Victims' Rights Act (18 U.S.C. § 3771), which has been considered by multiple federal courts (check out your preferred annotated version of the U.S. Code for cases and analysis).

In a related provision outside the Code, the Special Victims Counsel program is codified in a new 10 U.S.C. § 1044e. The new statute authorizes a broad range of legal services “for the purpose of providing legal assistance to an individual eligible for military legal assistance under section 1044 of this title who is the victim of an alleged sex-related offense, regardless of whether the report of that offense is restricted or unrestricted.” Interestingly, the new statute is redundant with 10 U.S.C. § 1565b. Additionally, I see nothing in either 1565b or 1044e that authorizes the provision of such services to civilians who are not military dependents.

Section 1703 of the NDAA amends Article 43 to eliminate the 5-year statute of limitations on sexual assault (Art. 120(b)) and sexual assault of a child (Art. 120b(b)). This section is merely prospective, applying only to offenses committed on or after December 26, 2013 (the date of enactment). Put differently, it won’t affect any case for another 5 years.

Section 1705 creates the mandatory minimum sentence of dismissal or dishonorable discharge for the offenses of rape (Art. 120(a)), sexual assault (Art. 120(b)), rape of a child (Art. 120b(a)), sexual assault of a child (Art. 120b(b)), forcible sodomy (Art. 125), and attempts to commit these offenses. It also amends Article 18 to confer jurisdiction over these offenses to only general courts-martial. These sections take effect and apply only to offenses committed on and after June 24, 2014 (180 days from enactment).

These mandatory minimums are a big deal at the preferral stage. Other sections require reporting when a charged sex offense isn’t referred and limit the convening authority’s ability to reduce the sentence (even when there’s a pretrial agreement) in the case of a mandatory minimum offense. I will discuss these new rules in parts four and five of this series, but the message to prosecutors is to charge carefully lest they unnecessarily tie a commander’s hands.

Section 1708 requires the President to change the discussion to R.C.M. 306. Not the Rule… the discussion. The Congressional mandate states, in its entirety:

> Not later than 180 days after the date of the enactment of this Act, the discussion pertaining to Rule 306 of the Manual for Courts-Martial (relating to policy on initial disposition of offenses) shall be amended to strike the character and military service of the accused from the matters a commander should consider in deciding how to dispose of an offense.

The enforceability of this provision is dubious, considering that the Manual for Courts-Martial is an executive order and the commentary is self-acknowledged as non-binding. The very first discussion section in the MCM states:

> The Department of Defense, in conjunction with the Department of Homeland Security, has published supplementary materials to accompany the Manual for Courts-Martial. These materials consist of a Discussion (accompanying the Preamble, the Rules for Courts-Martial, and the Punitive Articles), an Analysis, and various appendices. These supplementary materials do not constitute the official views of the Department of Defense, the Department of Homeland Security, the Department of Justice, the military departments, the United States Court of Appeals for the Armed Forces, or any other authority of the Government of the United States, and they do not constitute rules. The supplementary materials do not create rights or responsibilities that are binding on any person, party, or other entity (including any authority of the Government of the United States whether or not included in the definition of “agency” in 5 U.S.C. §551(1)).

Discussion, Paragraph 4, Part I (Preamble), Manual for Courts-Martial (2013) (citation omitted) (emphases added) (link to excerpt). Congress might as well order a revision to the commentary on this blog.

Finally, Congress repealed the prohibition against consensual sodomy in Article 125. With changes in the law permitting homosexuals to serve openly in the armed forces, and decisions like United States v. Castellano, 72 M.J.
making every consensual sodomy case a difficult balancing act between individual liberties and special factors that remove the sexual activity from the liberty interest reinforced by 

Lawrence v. Texas, 539 U.S. 558 (2003), this change is long overdue. Forcible sodomy is still prohibited by Article 125 (and Article 120, of course), and a prohibition against bestiality is added to the Article.
2013 Changes to the UCMJ – Part 3: Discovery
By Zachary D Spilman, Wednesday, January 8, 2014

This is part three of a series of posts discussing the military justice reforms in the National Defense Authorization Act for Fiscal Year 2014, signed into law by the President on December 26, 2013. The full series is available at this link.

Since signed into law by President Truman on May 5, 1950, Article 46 of the Uniform Code of Military Justice has provided that “the trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe.”

Article 46 of the UCMJ was based on Article 22 of the Articles of War (1948) and Article 42(b) of the Articles for the Government of the Navy (1946), along with a 1947 proposal to modify the Navy rules. Those precursor rules (in their then-current and prior versions) addressed the procedural method to obtain witnesses to testify at trial, with the Article of War identifying the “Process to Obtain Witnesses,” and the Article for the Government of the Navy providing for “power to issue like process to compel witnesses to appear and testify.” During congressional hearings on the proposed Code, Assistant General Counsel for the Secretary of Defense Felix Larkin explained that Article 46 “go[es] a little further; but in essence it is the same as the provision now in effect” (link to testimony).

This history indicates that Article 46 was conceived more as a rule for process than a rule for discovery. But “military law has long been more liberal than its civilian counterpart in disclosing the government’s case to the accused and in granting discovery rights.” United States v. Killebrew, 9 M.J. 154, 159 (C.M.A. 1980). For instance, before enactment of the UCMJ, paragraph 45(b) of the 1949 Manual for Courts-Martial (link) provided:

| Ample opportunity will be given the accused and his counsel to prepare the defense, including opportunities to interview each other and any other person.

Then, the 1951 Manual for Courts-Martial (prepared specifically to implement the UCMJ, according to its separate “Legal and Legislative Basis” pamphlet) included similar language in paragraph 42c (link):

| Counsel may properly interview any witness or prospective witness for the opposing side in any case without the consent of opposing counsel or the accused.

The 1951 language remained in effect until the 1984 Manual, which was a major revision that created the modern Rules for Courts-Martial. Included in this revision was Rule for Courts-Martial 701, unequivocally stating procedures for “Discovery.” The 1984 version of Rule 701(e) (link) was:

| (e) Access to witnesses and evidence. Each party shall have adequate opportunity to prepare its case and equal opportunity to interview witnesses and inspect evidence. No party may unreasonably impede the access of another party to a witness or evidence.

And this language is unchanged in the current (2012) version of the Manual. So, whatever the original intent of Article 46, the Manual has long guaranteed the right of the Defense to interview witnesses. In the decades since establishment of the Code, military courts have repeatedly used Article 46 and the Rules for Courts-Martial to strike down restrictions on Defense access to witnesses.

But Section 1704 of the NDAA changes Article 46, creating the first ever statutory limitation on the right of a military accused or his counsel to interview a particular type of witness.

Article 46 now reads:
(a) Opportunity to Obtain Witnesses and Other Evidence. The trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe.

(b) Defense Counsel Interview of Victim of Alleged Sex-Related Offense-

(1) Upon notice by trial counsel to defense counsel of the name of an alleged victim of an alleged sex-related offense who trial counsel intends to call to testify at a preliminary hearing under section 832 of this title (article 32) or a court-martial under this chapter, defense counsel shall make any request to interview the victim through trial counsel.

(2) If requested by an alleged victim of an alleged sex-related offense who is subject to a request for interview under paragraph (1), any interview of the victim by defense counsel shall take place only in the presence of trial counsel, a counsel for the victim, or a Sexual Assault Victim Advocate.

(3) In this subsection, the term `alleged sex-related offense’ means any allegation of—

(A) a violation of section 920, 920a, 920b, 920c, or 925 of this title (article 120, 120a, 120b, 120c, or 125); or

(B) an attempt to commit an offense specified in a paragraph (1) as punishable under section 880 of this title (article 80).

(c) Process. Process issued in court-martial cases to compel witnesses to appear and testify and to compel the production of other evidence shall be similar to that which courts of the United States having criminal jurisdiction may lawfully issue and shall run to any part of the United States, or the Commonwealths and possessions.

(emphasis added). The reference to “paragraph (1)” in paragraph (b)(3)(B) is likely a typo and should refer to “subparagraph (A).”

While the language is unwieldy, the meaning of this new provision is clear. A service member’s defense counsel may contact an alleged sexual assault victim only through the prosecutor, and then may not speak with the victim without a chaperone if the victim so chooses.

Except that it’s not so clear. Rather, the text has numerous flaws that muddy the interpretative waters.

For instance, the new Article 46(b) doesn’t apply prior to “notice by trial counsel to defense counsel.” Logically, this “46(b) notice” can’t occur before military defense counsel is detailed. It also can’t occur prior to preferral of charges, since the existence of an “alleged victim” depends on the existence of an allegation of certain specified offenses. But a service member may retain civilian counsel long before charges are preferred (even before a trial counsel is assigned) and that civilian counsel is free to question whomever he chooses at that early stage. Because of this, anyone charged with a sex offense must now give new consideration to hiring such counsel as early as possible.

Additionally, Article 46(b) repeatedly uses the term “defense counsel.” It is “defense counsel” who gets notice from the trial counsel, and “defense counsel” who may contact the victim only through the trial counsel. Not “any defense counsel,” or “counsel for the accused,” but “defense counsel.”

In a court-martial, “defense counsel” refers to a certain person who is detailed to represent the accused (pursuant to Article 27) and assigned certain duties (pursuant to Article 38); it is not just any “defense attorney” who happens to come along. Since statutory interpretation demands that we assume that Congress means what it says, there’s a strong case to be made that the repeated references to “defense counsel” in Article 46(b) mean that the restrictions apply only to the detailed defense counsel, and not to other counsel, or assistants, or paralegals, or investigators, or clerks, or friends of the accused, or newspapermen . . .

Besides these textual issues, Article 46(b) will likely face numerous challenges on constitutional grounds, and rightfully so. It’s one thing to provide support services and even legal counsel to an alleged victim, but such a broad prohibition on a defense counsel contacting a prosecution witness is likely unprecedented in American jurisprudence. Notably, the prohibition exists in the total absence of any legislative findings about the vulnerability of such victims or the need for such a prohibition, or any justification through the finding of case-specific facts. And
the prohibition is unlimited in time once invoked; it seems that defense counsel may never contact the alleged victim directly, even long after the case is resolved.

Put differently, this provision looks to be an unconstitutional prior restraint on speech.

There’s also the issue of enforcement. Once this provision is invoked by trial counsel, regardless of its applicability, its enforceability is another issue entirely.

For starters, Article 98 is a punitive article that criminalizes “knowingly and intentionally fail[ing] to enforce or comply with any provision of [the UCMJ] regulating the proceedings before, during, or after trial of an accused.” A military defense counsel could be prosecuted under Article 98 for violation of the new Article 46(b). But a civilian defense counsel (who is not a retired service member receiving pay) is not subject to the UCMJ and cannot be prosecuted under Article 98.

Similarly, the President will undoubtedly revise Rule for Courts-Martial 701(e) to incorporate the new restrictions on the defense, but there is still no mechanism to enforce that rule against a civilian in the early stages of a case. A military judge could use the contempt power under Article 48, but that power doesn’t exist until a case is referred and the court-martial is convened (because “military judges do not have any inherent judicial authority separate from a court-martial to which they have been detailed.” Weiss v. United States, 510 U.S. 163, 175 (1994)).

What remains is the various service Rules of Professional Conduct and the threat of disciplinary action by a JAG leading to reciprocal action by a state bar. But using the RPC to enforce a one-sided, poorly drafted, prior restraint on speech wouldn’t do much to stem the military justice crisis mentality of the past year. Rather, it would just spark the next crisis.

That crisis may be unavoidable. I suspect it won’t be long before a defense attorney, or his assistant, deliberately contacts an alleged sexual assault victim without the blessing of the trial counsel.
2013 Changes to the UCMJ – Part 4: Article 32
By Zachary D Spilman, Thursday, January 9, 2014

This is part four of a series of posts discussing the military justice reforms in the National Defense Authorization Act for Fiscal Year 2014, signed into law by the President on December 26, 2013. The full series is available at this link.

Section 1702(a) of the NDAA rewrites Article 32 of the UCMJ. The changes aren’t effective until one year after enactment, but they eliminate the century-old requirement of a “thorough and impartial investigation” of charges before trial, and the similarly ancient guarantee that an accused can present to the investigator anything he wishes in his own defense.

Paragraph 76 of the 1918 version of the Manual for Courts-Martial (link) required an investigation for any charge forwarded past the summary court-martial level, and explicitly guaranteed “the accused an opportunity to make any statement, offer any evidence, or present any matter in extenuation that he may desire to have considered in connection with the accusation against him.” This guarantee was enacted into Article 70 of the Articles of War in 1920 (link), along with the specific requirement that the investigation be “thorough and impartial.” And this early requirement for a pretrial investigation was considered by the Supreme Court in Humphrey v. Smith, 336 U.S. 695 (1949), where a divided Court determined that it was “important,” but not jurisdictional.

When the UCMJ was enacted in 1950, Article 32 incorporated both the requirement of a “thorough and impartial investigation” and the right of an accused “to present anything he may desire in his own behalf,” along with making the process “binding” but not jurisdictional. The scope of the investigation included, but notably was not limited to, “inquiry as to the truth of the matter set forth in the charges, consideration of the form of charges, and a recommendation as to the disposition which should be made of the case in the interest of justice and discipline.”

This language was left untouched for more than 60 years, but the revision contained in Section 1702(a) of the FY14 NDAA will, when effective, eliminate it entirely. Beginning on December 27, 2014, there will be no more pretrial investigations.

Instead, there will be “preliminary hearings,” with specific limitations:

(2) The purpose of the preliminary hearing shall be limited to the following:
   (A) Determining whether there is probable cause to believe an offense has been committed and the accused committed the offense.
   (B) Determining whether the convening authority has court-martial jurisdiction over the offense and the accused.
   (C) Considering the form of charges.
   (D) Recommending the disposition that should be made of the case.

(emphasis added). Moreover, the accused may no longer “present anything he may desire.” Rather, the future Article 32(d) states:

(2) The accused may cross-examine witnesses who testify at the preliminary hearing and present additional evidence in defense and mitigation, relevant to the limited purposes of the hearing, as provided for in paragraph (4) and subsection (a)(2).

…

(4) The presentation of evidence and examination (including cross-examination) of witnesses at a preliminary hearing shall be limited to the matters relevant to the limited purposes of the hearing, as provided in subsection (a)(2).
Additionally, a “victim” (defined in part as someone who “is named in one of the specifications”) will not be required to testify at the hearing. But the hearing will be recorded, and the victim “may request the recording and shall have access to the recording as prescribed by the Manual for Courts-Martial.”

The wisdom of the future rule is debatable, and there’s reason to believe that even Congress doesn’t quite understand what it’s done. For instance, describing this provision to the United States Senate on December 9, 2013, Senator Carl Levin (D-MI), said (link to transcript) that it will “make the Article 32 process more like a grand jury proceeding.”

But it will do nothing of the sort. A federal grand jury is both “grand,” consisting of at least 16 people, and a “jury,” chosen at random from the community. In contrast, both the current and the future versions of Article 32 require a hearing conducted by only one officer, and that officer is appointed by the commander responsible for the prosecution. Article 32 proceedings are also open to the public and the press, while grand juries are protected by secrecy rules that preserve the independence of their investigative function. And the victim who will be allowed to refuse to participate in an Article 32 proceeding could never do so when served with a grand jury subpoena.

As mentioned above, the future Article 32 isn’t effective until one year after enactment, so there’s plenty of time for further examination. But two other provisions in the NDAA that can impact an Article 32 proceeding are effective immediately. They are the requirement for review of decisions not to refer sex-related offenses to trial (§1744), and the sense of Congress provisions (§1752 and §1753).

In Section 1744 of the bill, Congress mandates:

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IN GENERAL- The Secretary of Defense shall require the Secretaries of the military departments to provide for review of decisions not to refer charges for trial by court-martial in cases where a sex-related offense has been alleged by a victim of the alleged offense.
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This review is required for charges of attempted or completed rape (Art. 120(a)), sexual assault (Art. 120(b)), or forcible sodomy (Art. 125). Additional requirements on the nature of the review are established in the legislation, but the offense-specific limitation adds an interesting twist. On its face, the review only applies to preferred charges not referred for trial. So, prosecutorial overreaching at the charging stage to prefer one of these sex-related offenses will add significant bureaucracy if the charge is not referred to trial. However, prosecutorial restraint at the charging stage, coupled with an aggressive presentation at the Article 32 stage (where uncharged offenses may be considered under both the current and the future rules), will avoid the review requirement if the evidence doesn’t support the uncharged sex-related offense. Whether military prosecutors will recognize the advantages of such restraint remains to be seen.

Congress also passed two “Sense of Congress” provisions, Sections 1752 and 1753. These provisions state Congressional preference for trial by court-martial, rather than nonjudicial punishment or administrative action (including discharge in lieu of trial), in the case of attempted or completed rape (Art. 120(a)), sexual assault (Art. 120(b)), or forcible sodomy (Art. 125). These provisions are also offense-specific, meaning that a prosecutor’s restraint at the beginning of a case can prevent Congressional wrath at the end.
In prior posts of this series I discussed aspects of military law, such as discovery rules and the pretrial investigation, that developed a century ago. Command discretion is another ancient part of our law. But the “Elimination of Unlimited Command Prerogative and Discretion” in Section 1702(b) of the FY14 NDAA isn’t the first time Congress has restricted a commander’s ability to modify the findings and sentence of a court-martial. Rather, it’s merely the first time Congress has done so to the possible detriment of an accused.

During congressional hearings in 1919, Major General Enoch H. Crowder, The Judge Advocate General of the Army, discussed regulations that actually permitted a commander to return a case for reconsideration of an acquittal or to increase a sentence (link to transcript). General Crowder presented Congress with a review of 1,000 cases, of which 56 were returned to the members for reconsideration of acquittals. Of these 56 cases, an acquittal was changed to a conviction in a whopping 18 (one third). This provoked popular outcry and press attention, and in 1920 Congress revised Article 40 of the Articles of War to expressly prohibit returning a record for reconsideration of an acquittal or increasing the severity of a sentence (old text) (new text) (and this prohibition still exists within Article 60).

Popular and press outrage is now focused on the exact opposite scenario: Lieutenant General Franklin’s action that changed a conviction into an acquittal in the Wilkerson case (our #5 story of 2013). And just as Congress removed the ability to change an acquittal into a conviction or increase a sentence in 1920, Congress now limits a commander’s ability to reverse a conviction or reduce a sentence.

In Section 1702(b) (that will not take effect until June 24, 2014 – 180 days after enactment) Congress rewrites Article 60(c) of the UCMJ to limit a convening authority’s ability to modify either the findings or the sentence of a court-martial. Current law permits a convening authority to set aside any finding of guilty, either entirely or by substituting a finding of guilty to a lesser included offense. It also gives the convening authority unlimited discretion to disapprove any part or all of a sentence. But the future law allows modification of the findings or sentence only in certain cases.

The full text of the future Article 60(c) follows:

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(c)

(1) Under regulations of the Secretary concerned, a commissioned officer commanding for the time being, a successor in command, or any person exercising general court-martial jurisdiction may act under this section in place of the convening authority.

(2) (A) Action on the sentence of a court-martial shall be taken by the convening authority or by another person authorized to act under this section. Subject to regulations of the Secretary concerned, such action may be taken only after consideration of any matters submitted by the accused under subsection (b) or after the time for submitting such matters expires, whichever is earlier.

(B) Except as provided in paragraph (4), the convening authority or another person authorized to act under this section may approve, disapprove, commute, or suspend the sentence of the court-martial in whole or in part.

(C) If the convening authority or another person authorized to act under this section acts to disapprove, commute, or suspend, in whole or in part, the sentence of the court-martial for an offense (other than a qualifying offense), the convening authority or other person shall provide, at that same time, a written explanation of the reasons for such action. The written explanation shall be made a part of the record of the trial and action thereon.

(3)```

The full series is available at this link.
(A) Action on the findings of a court-martial by the convening authority or by another person authorized to act under this section is not required.

(B) If the convening authority or another person authorized to act under this section acts on the findings of a court-martial, the convening authority or other person—
   (i) may not dismiss any charge or specification, other than a charge or specification for a qualifying offense, by setting aside a finding of guilty thereto; or
   (ii) may not change a finding of guilty to a charge or specification, other than a charge or specification for a qualifying offense, to a finding of guilty to an offense that is a lesser included offense of the offense stated in the charge or specification.

(C) If the convening authority or another person authorized to act under this section acts on the findings to dismiss or change any charge or specification for an offense (other than a qualifying offense), the convening authority or other person shall provide, at that same time, a written explanation of the reasons for such action. The written explanation shall be made a part of the record of the trial and action thereon.

(D) (i) In this subsection, the term 'qualifying offense' means, except in the case of an offense excluded pursuant to clause (ii), an offense under this chapter for which—
   (I) the maximum sentence of confinement that may be adjudged does not exceed two years; and
   (II) the sentence adjudged does not include dismissal, a dishonorable or bad-conduct discharge, or confinement for more than six months.

(ii) Such term does not include any of the following:
   (I) An offense under subsection (a) or (b) of section 920 of this title (article 120).
   (II) An offense under section 920b or 925 of this title (articles 120b and 125).
   (III) Such other offenses as the Secretary of Defense may specify by regulation.

This provision looks complicated, and it places a lot of limitations on a convening authority, but it’s pretty easy to understand if considered in three parts.
The first part is paragraphs (1) and (2). These largely maintain the current procedure, except that paragraph (2)(C) requires the convening authority to provide a written explanation for any reduction in the sentence (except for a “qualifying offense,” but the term is not defined in this paragraph, though it is defined in paragraph (3)). As a practical matter, convening authorities often provide such explanation already, by justifying any sentence reduction as either required by a pretrial agreement, as an act of clemency, or as a remedy for legal error.

The second part is paragraph (3). This is the big change, addressing disapproval of a finding of guilty, either outright or by approval of a lesser included offense. Under the new provision (effective on June 24, and only for offenses committed on or after that date), a convening authority may not disapprove a finding of guilty, or reduce the finding to guilty of a LIO, unless the original finding is guilty of a “qualifying offense.” A qualifying offense is one that meets two criteria:

1. The maximum authorized punishment for the offense includes confinement for two years or less; and
2. The adjudged sentence does not include dismissal, a dishonorable or bad-conduct discharge, or confinement for more than six months.

Additionally, offenses under Articles 120(a), 120(b), 120b, and 125 will never be qualifying offenses (though their maximums are too high anyway). But more significantly, the Secretary of Defense may exclude other offenses by regulation. This means that the Secretary could, if he wanted to, prohibit disapproval or reduction of a finding of guilty in every case.

Curiously, paragraph (3)(C) requires a written explanation for the disapproval or reduction of a finding of guilty “for an offense (other than a qualifying offense).” This directly contradicts paragraph (3)(B), which allows such disapproval or reduction only in the case of a “qualifying offense.” Congress probably intended to require a written explanation for changing a finding of guilty of a qualifying offense, but that’s not what the law says. In my discussion of the changes to Article 32, I commented that “there’s reason to believe that even Congress doesn’t quite understand what it’s done.” Ditto with this provision.

The third part is paragraph (4), which addresses reduction of the sentence. This part appears to be the most complicated, but really has its own three simple rules:

- First, there are no restrictions on reducing sentences that are not confinement for more than six months, dismissal, dishonorable discharge, or a bad-conduct discharge. So a convening authority can disapprove or suspend a sentence of confinement for six months or less, reduction, restriction, forfeitures, a fine, hard labor without confinement, or a reprimand, without limit and for any reason (though, as discussed above, he has to explain why in writing under some uncertain circumstances).
- Second, there are no restrictions on reducing any sentence when the trial counsel recommends such reduction “in recognition of the substantial assistance by the accused in the investigation or prosecution of another person who has committed an offense.” Those familiar with the federal sentencing guidelines will see similarities to §5k1.1.
- Finally, there are no restrictions on reducing any sentence pursuant to a pretrial agreement, except for a sentence adjudged as part of a mandatory minimum. In that case, a pretrial agreement alone will only support reduction of a dishonorable discharge to a bad-conduct discharge. Disapproving or suspending a dismissal or a bad-conduct discharge for a mandatory minimum offense requires a trial counsel recommendation in addition to the pretrial agreement.

In the last part of this series I will discuss some practice tips gleaned from this section, such as “avoid guilty pleas for mandatory minimum offenses,” and “where the facts support it, ensure that the PTA requires the trial counsel to make a recommendation based on substantial assistance.”

The change to Article 60(c) won’t take effect for six months, but Congress also created a new Article 60(d) in Section 1706 of the NDAA. The new Article 60(d) is effective immediately, and it gives “a victim” the opportunity to submit matters to the convening authority before the convening authority takes action on the results of the court-martial. This provision looks easy to understand, but it is actually pretty complicated.
For instance, the definition of “a victim” in the new Article 60(d) is different from other definitions of “a victim” now part of the UCMJ (there are actually five different definitions of “a victim” in the NDAA; something I will discuss further in Part 6 of this series). For post-trial purposes, a victim includes anyone:

- who has suffered a direct physical, emotional, or pecuniary loss as a result of a commission of an offense under this chapter (the Uniform Code of Military Justice) and on which the convening authority or other person authorized to take action under this section is taking action under this section.

(emphasis added). This is not to be confused with “a victim” as defined by the new Article 6b (discussed in part 2 of this series):

- In this section, the term victim of an offense under this chapter means a person who has suffered direct physical, emotional, or pecuniary harm as a result of the commission of an offense under this chapter (the Uniform Code of Military Justice).

(emphasis added). Of course, “harm” and “loss” mean different things, and a post-trial victim is clearly a narrower class of persons than a pre-trial victim (as actual “loss” is a greater injury than mere “harm”). Also, emotional “loss” seems to be a novel concept.

A source of additional confusion is that this new provision (giving victims the right to submit matters) became effective at enactment on December 26, 2013, so any case already in the post-trial process will require delay to address this new rule. But since the definition of a victim for post-trial purposes isn’t limited to persons named in the specifications (that’s the definition of a victim under the future Article 32), some cases may require actual investigation to identify the victims. The new Article 60(d) doesn’t explicitly require an investigation to discover victims, but it does state that “the victim shall be provided an opportunity to submit matters” (emphasis added) and it sets a 10-day time limit based on service of the record of trial and the staff judge advocate’s recommendation upon the victim.

The obvious problem is that if the victim is known to exist but can’t be reached, that 10-day countdown can’t begin. For example, consider a case involving possession of child pornography. That’s an offense under Article 134 of the UCMJ, often involving known victims who have suffered significant pecuniary losses. Such a case can easily involve dozens of such victims. But these people aren’t necessarily easy for prosecutors or SJAs to contact.

However, Congress now requires that each of those victims receive a copy of the record and the SJA’s recommendation, and that each “shall” be provided an opportunity to submit matters to the convening authority within ten days after receipt of these things.

Being a Staff Judge Advocate just got a lot harder.
2013 Changes to the UCMJ – Part 6: Practice notes
By Zachary D Spilman, Friday, January 10, 2014

This is part six of a series of posts discussing the military justice reforms in the National Defense Authorization Act for Fiscal Year 2014, signed into law by the President on December 26, 2013. The full series is available at this link.

After working through the military justice provisions in the NDAA and writing this series of posts, it’s clear that the first practice note is that it’s important for you to read the new provisions for yourself. It’s worth at least skimming all 38 military justice provisions from the NDAA in this bookmarked PDF. I also recommend using our Word version of the UCMJ, and reading in full:

- Article 6b (“Rights of the victim…”). Also check out the Crime Victims’ Rights Act (18 U.S.C. § 3771).
- The future Article 32 (discussed in this post).
- The new Article 46 (discussed in this post).
- The future Article 60(c) and the new Article 60(d) already in effect (discussed in this post).
- The future Article 56 (sex offense mandatory minimums) and Article 18 (jurisdiction for the mandatory minimums).

I think that there are more potential pitfalls for prosecutors than for defense counsel in the new rules. For starters, prosecutors need to be more cautious when making charging decisions. Charging the most serious sex offenses will implicate the mandatory minimums and the restrictions on the convening authority’s ability to reduce a sentence, even when there is a PTA. They will also invoke the requirement for review if not referred to trial. A victim named in a specification will have the option to refuse to participate in the Article 32 preliminary hearing, and the VWAP process will likely get more attention now that victims shall have an opportunity to submit post-trial matters. The trial counsel must also affirmatively act to invoke the victim-interview provisions of Article 46(b).

But there’s plenty of danger for defense counsel, who will need to get more creative in presenting a case under the future Article 32. And the mandatory minimums are hard to avoid, even when the accused pleads guilty, unless the plea is to a lesser offense that doesn’t have a minimum. There’s also the issue of the recommendation from a trial counsel for sentence reduction in recognition of substantial assistance. Such a recommendation isn’t required in a case with a pretrial agreement and no mandatory minimum sentence, but it’s going to be a distinguishing feature of a deserving accused. Wherever the facts support such a recommendation, defense counsel should try to get it, perhaps as a term of the PTA. And the defense has to tread carefully around the victim-interview provisions of Article 46 (for now, at least).

Both sides will get much more familiar with the deposition rules once victims can refuse to participate in an Article 32. And both sides will have to watch out for pitfalls from the provisions that don’t take effect until the future and apply only to offenses committed on or after their effective date (Articles 32 and 60(c), and the mandatory minimums). The normal practice of combining all known offenses into a single court-martial will create situations where two separate versions of the Code to apply to a single case. For example, offenses committed in November, 2014, and in January, 2015, and destined for the same general court-martial, will require two separate Article 32 proceedings (one an “investigation” of the November offenses, and the other a “preliminary hearing” on the January offenses). Similar difficulties will arise late this summer, when convening authorities start acting on cases that both pre- and post-date the new Article 60(c).

Both sides will likely fight Special Victims Counsel, who may yet try to appear on behalf of an alleged victim who is a civilian not authorized to receive legal assistance, in violation of the new 10 U.S.C. § 1044e.

And the post-trial process, already the source of much confusion and delay, will only become more confusing and time-consuming now that a victim has the right to submit post-trial matters.

Speaking of victims, I count five separate definitions of “victim” in the new provisions:
The new Article 6b defines a victim as:

(b) Victim of an Offense Under This Chapter Defined- In this section, the term ‘victim of an offense under this chapter’ means a person who has suffered direct physical, emotional, or pecuniary harm as a result of the commission of an offense under this chapter (the Uniform Code of Military Justice).

The future Article 32 defines a victim as:

(h) Victim Defined- In this section, the term ‘victim’ means a person who—
(1) is alleged to have suffered a direct physical, emotional, or pecuniary harm as a result of the matters set forth in a charge or specification being considered; and
(2) is named in one of the specifications.

The new Article 46(b) defines a victim as any:

. . . alleged victim of an alleged sex-related offense who trial counsel intends to call to testify at a preliminary hearing under section 832 of this title (article 32) or a court-martial under this chapter . . .

The new Article 60(d) defines a victim as:

(5) In this section, the term ‘victim’ means a person who has suffered a direct physical, emotional, or pecuniary loss as a result of a commission of an offense under this chapter (the Uniform Code of Military Justice) and on which the convening authority or other person authorized to take action under this section is taking action under this section.

And the new 10 U.S.C. § 1044e (the SVC statute) defines a victim as:

…An individual eligible for military legal assistance under section 1044 of this title who is the victim of an alleged sex-related offense [defined as attempted or completed violations of Articles 120, 120a, 120b, 120c, or 125]

Besides the absurdity of so many various and vague definitions for “a victim,” I’m struck by the difference in the definitions in the victims’ rights statute (Article 6b) and the post-trial matters statute (Article 60(d)) (as discussed in part 5 of this series). Both encompass “direct physical, emotional, or pecuniary” effect, but Article 6b requires only “harm” while Article 60(d) requires actual “loss.” This difference isn’t just semantic. An appellant could win a new post-trial action based on denial of clemency after the convening authority considered matters submitted by a victim who suffered only “harm,” and not actual “loss.”

This tangent into the definition of victim isn’t without a purpose. Military law is a large and growing body of jurisprudence. While the reforms in the NDAA made some dramatic changes in the military justice system, they are neither impervious to judicial interpretation nor do they make the system unrecognizable. Commanders are still the dominating force, the roles and responsibilities of counsel, military judges, and members are largely unchanged, and we’ll have plenty to write about.