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Sexual Assaults Under the Uniform Code of Military Justice (UCMJ): Selected Legislative Proposals

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Summary

Recent high-profile military-related cases involving sexual assaults by U.S. servicemembers have resulted in increased public and congressional interest in military discipline and the military justice system. Questions have been raised regarding how allegations of sexual assault are addressed by the chain of command, the authority and process to convene a court-martial, and the ability of the convening authority to provide clemency to a servicemember convicted of an offense.

Under Article I, Section 8 of the U.S. Constitution, Congress has the power to raise and support armies; provide and maintain a navy; and provide for organizing and disciplining them. Under this authority, Congress has enacted the Uniform Code of Military Justice (UCMJ), which is the code of military criminal laws applicable to all U.S. military members worldwide. The President implemented the UCMJ through the Manual for Courts-Martial (MCM). The Manual for Courts-Martial contains the Rules for Courts-Martial (RCM), the Military Rules of Evidence (MRE), and the UCMJ. Members of the Armed Forces are subjected to rules, orders, proceedings, and consequences different from the rights and obligations of their civilian counterparts, and the UCMJ establishes this unique legal framework.

The UCMJ authorizes three types of courts-martial: (1) summary court-martial, (2) special court-martial, and (3) general court-martial. Depending on the severity of the alleged offense, the accused's commanding officer enjoys great discretion with respect to the type of court-martial to convene. Generally, each of the courts-martial provides fundamental constitutional and procedural rights to the accused, including, but not limited to, the right to a personal representative or counsel, the opportunity to confront evidence and witnesses, and the right to have a decision reviewed by a lawyer or a court of appeals.

In the 113th Congress, there have been no fewer than 10 separate bills introduced addressing the issue of sexual assault in the military. The bills have proposed various provisions that include, but are not limited to prohibiting enlistment in the armed forces of individuals previously convicted of sexual offenses, eliminating the statute of limitations on prosecution of sexual offenses under the UCMJ, and barring commanders from overturning convictions obtained at court-martial.

In recent months, Congress has included many provisions addressing sexual assault, including those mentioned above, in the House and Senate versions of the National Defense Authorization Act for Fiscal Year 2014 (FY2014 NDAA). Additionally, Secretary of Defense Chuck Hagel recently announced that the Department of Defense would implement a series of new initiatives designed to address sexual assaults in the military.

Due to the sheer breadth of the various provisions contained in the House and Senate versions of the FY2014 NDAA, this report will address selected legislative proposals including requiring special victims' counsel, changes to disposition and clemency authorities, creation of a mandatory minimum punishment, authority to transfer the accused, and protections for recruits and trainees.

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Introduction

Widely publicized allegations of sexual assault in the military have led to questions on how the military pursues claims of sexual misconduct. Recent high-profile military justice issues include dismissal of charges by setting aside findings in an Aviano court-martial related to sexual offenses; alleged sexual assault of a civilian by an officer serving as the Chief of the Air Force Sexual Assault Prevention & Response Branch at the Pentagon; and sexual assaults by instructors on recruits and tech school trainees at Lackland Air Force Base.¹ These incidents have raised questions regarding how allegations of sexual assault are addressed by the chain of command, the authority and process to convene a court-martial, and the ability of the convening authority to provide clemency to a servicemember convicted of an offense.

Military Courts-Martial²

The U.S. Constitution imposes on the government a system of restraints to provide that no unfair law is enforced and that no law is enforced unfairly. What is fundamentally fair in a given situation depends in part on the objectives of a given system of law weighed alongside the possible infringement of individual liberties that the system might impose. In the criminal law system, some basic objectives are to discover the truth, punish the guilty proportionately with their crimes, acquit the innocent without unnecessary delay or expense, and prevent and deter further crime, thereby providing for the public order. Military justice shares these objectives in part, but also serves to enhance discipline throughout the Armed Forces, serving the overall objective of providing an effective national defense.

The Constitution, in order to provide for the common defense,³ gives Congress the power to raise, support, and regulate the Armed Forces,⁴ but makes the President Commander in Chief of the Armed Forces.⁵ Article III, which governs the federal judiciary, does not give it any explicit role in the military, and the Supreme Court has taken the view that Congress's power "To make Rules for the Government and Regulation of the land and naval Forces"⁶ is entirely separate from Article III.⁷ Therefore, courts-martial are not considered to be Article III courts and are not subject to all of the rules that apply in federal courts.⁸

¹ Nancy Montgomery, "Case dismissed against Aviano IG convicted of sexual assault," *Stars and Stripes*, February 27, 2013, http://www.stripes.com/news/air-force/case-dismissed-against-aviano-ig-convicted-of-sexual-assault-1.209797?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed:+starsandstripes/general+%28Stars+and+Stripes%29; "Lackland sex scandal prompts U.S. Air Force to discipline former commanders," *CBS News*, May 2, 2013, http://www.cbsnews.com/8301-201_162-57582551/lackland-sex-scandal-prompts-u-s-air-force-to-discipline-former-commanders/.

² For a comprehensive discussion on the military justice system, including a comparison of procedural safeguards, see CRS Report R41739, *Military Justice: Courts-Martial, an Overview*, by R. Chuck Mason.

³ U.S. CONST. Preamble.

⁴ *Id.* art. I §8, cls. 11-14 (War Power).

⁵ *Id.* art. II §2, cl. 1.

⁶ *Id.* art. I §8, cl. 14.

⁷ See *Dynes v. Hoover*, 61 U.S. (How.) 65 (1857).

⁸ See WILLIAM WINTHROP, *WINTHROP'S MILITARY LAW AND PRECEDENTS* 48-49 (2d. ed. 1920) (describing courts-martial as "*instrumentalities of the executive power*, provided by Congress for the President as Commander-in-chief, to aid him in properly commanding the army and navy and enforcing discipline therein") (emphasis in original).

Under Article I, Section 8 of the U.S. Constitution, Congress has the power to raise and support armies; provide and maintain a navy; and provide for organizing and disciplining them. Under this authority, Congress has enacted the Uniform Code of Military Justice (UCMJ),⁹ which is the code of military criminal laws applicable to all U.S. military members worldwide. The President implemented the UCMJ through the Manual for Courts-Martial (MCM), which was initially prescribed by Executive Order 12473 (April 13, 1984). The MCM contains the Rules for Courts-Martial (RCM), the Military Rules of Evidence (MRE),¹⁰ and the UCMJ. The MCM covers almost all aspects of military law.¹¹ Because military courts are not considered Article III courts but instead are established pursuant to Article I of the Constitution, they have limited jurisdiction.¹²

Jurisdiction

The UCMJ gives courts-martial jurisdiction over servicemembers¹³ as well as several other categories of individuals, including retired members of a regular component of the Armed Forces entitled to pay; retired members of a reserve component who are hospitalized in a military hospital; persons in custody of the military serving a sentence imposed by a court-martial; members of the National Oceanic and Atmospheric Administration and Public Health Service and other organizations, when assigned to serve with the military; enemy prisoners of war in custody of the military; and persons with or accompanying the military in the field during “times of war,” limited to declared wars.¹⁴ Jurisdiction of a court-martial does not depend on where the offense was committed; it depends solely on the status of the accused.¹⁵

Types of Offenses

Courts-martial try “military offenses,” which are listed in the punitive articles of the UCMJ and are codified in 10 U.S.C. 877 et seq.¹⁶ Some “military offenses” have a civilian analog, but some are exclusive to the military.¹⁷ The President is authorized to prescribe the punishments which a court-martial may impose within the limits established by Congress.¹⁸ In addition, a

⁹ 10 U.S.C. §§801-941.

¹⁰ Rules of procedures and rules of evidence for courts-martial are established by the President and authorized by Art. 36, UCMJ (10 U.S.C. §836).

¹¹ Each military service supplements the MCM to meet its individual needs. The Army has Army Regulation 27-10; the Navy and Marine Corps have the Manual for the Judge Advocate General; and the Air Force has Air Force Instructions.

¹² Article III of the U.S. Constitution, addressing the judicial powers of the United States, contains certain requirements such as life tenure for judges and a prohibition against diminution of salaries. Article I of the U.S. Constitution, addressing legislative powers of Congress, includes the power to regulate the Armed Forces, and, by implication, the power to create legislative courts to enforce those regulations. In creating legislative courts, Congress is not limited by the restrictions imposed in Article III. *See United States v. Wuterich*, 67 M.J. 32 (2007).

¹³ The term servicemembers, as used in this report, includes uniformed members of the U.S. Army, U.S. Marine Corps, U.S. Navy, U.S. Air Force, and the U.S. Coast Guard.

¹⁴ Art. 2, UCMJ; 10 U.S.C. §802.

¹⁵ *See Solorio v. United States*, 483 U.S. 435, 447 (1987).

¹⁶ The punitive articles run from Arts. 77 through 134 of the UCMJ; 10 U.S.C. §§877-934.

¹⁷ Military-specific offenses include mutiny or sedition (Art. 94, UCMJ); insubordinate contact (Art. 91, UCMJ); failure to obey an order (Art. 92, UCMJ); cruelty and maltreatment (Art. 93, UCMJ); and misconduct as a prisoner (Art. 105, UCMJ).

¹⁸ Art. 56, UCMJ; 10 U.S.C. §856.

servicemember may be tried at a court-martial for offenses not specifically covered through the use of the General Article—UCMJ Article 134,¹⁹ which states that all “crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court martial, according to the nature and degree of the offense.” The Armed Forces have used Art. 134 to assimilate state and federal offenses for which there is no analogous crime in the UCMJ in order to impose court-martial jurisdiction.²⁰ The potential punishments for violations generally match those applicable to the corresponding civilian offense.²¹

Sex-related offenses are statutorily defined in a couple of different punitive articles. Rape and sexual assault are defined under Art. 120, while rape and sexual assault of a child are defined under Art. 120b. Other sexual misconduct, including forcible pandering, indecent exposure, and indecent viewing, visual recording, or broadcasting of the private area of another person without consent are defined under Art. 120c. Additionally, the offenses of stalking (Art. 120a) and forcible sodomy (Art. 125) are often included in the legislative proposals addressing sex-related offenses under the UCMJ discussed below. The maximum authorized punishments for the various sex-related offenses range from a dismissal to dishonorable discharge or bad-conduct discharge and confinement for one year for the offense of indecent exposure, or death or life in prison for the offense of rape.²²

Investigation

When a servicemember has reportedly committed an offense, the accused’s immediate commander will conduct an inquiry.²³ This inquiry may range from an examination of the charges and an investigative report or summary of expected evidence to a more extensive investigation, depending on the offense(s) alleged and the complexity of the case. The investigation may be conducted by members of the command or, in more complex cases, military and civilian law enforcement officials. Once evidence has been gathered and the inquiry is complete, the commander can choose to dispose of the charges by (1) taking no action, (2) initiating administrative action,²⁴ (3) imposing non-judicial punishment, (4) preferring charges, or (5) forwarding to a higher authority for preferral of charges.²⁵

The first formal step in a court-martial, preferral of charges, consists of drafting a charge sheet containing the charges and specifications²⁶ against the accused. The charge sheet must be signed by the accuser²⁷ under oath before a commissioned officer authorized to administer oaths.²⁸ Once

¹⁹ 10 U.S.C. §934.

²⁰ *See generally* Para. 60.c.(4)(c)(ii), UCMJ, Part IV, MCM (2012).

²¹ *Id.*

²² *See* Appendix 12, MCM (2012).

²³ RCM 303.

²⁴ Administrative action can include separation from the military. *See* 10 U.S.C. §§1161 et seq.

²⁵ RCM 306(c).

²⁶ A specification is a plain and concise statement of the essential facts constituting the offense charged. RCM 307(c)(3).

²⁷ Any person subject to the UCMJ may prefer charges as the accuser. RCM 307(a).

²⁸ RCM 307(b).

charges have been preferred they may be referred²⁹ to one of three types of courts-martial: summary, special, or general.³⁰ The seriousness of the offenses alleged generally determines the type of court-martial. The court-martial must be convened by an officer with sufficient legal authority, that is, the “convening authority,”³¹ who will generally be the commander of the unit to which the accused is assigned.³²

Types of Courts-Martial

Unlike with the federal courts, the Supreme Court does not promulgate procedural rules for military courts-martial. As discussed above, Congress regulates the Armed Forces largely through Title 10 of the *U.S. Code*. The military courts-martial system is specifically addressed in the UCMJ, Chapter 47 of Title 10.³³ Article 36 of the UCMJ authorizes the President to prescribe rules for “pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial.”³⁴ Such rules are to “apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts” insofar as the President “considers practicable” but that “may not be contrary to or inconsistent” with the UCMJ.³⁵ Pursuant to that delegation, the President created the RCM and the MRE.³⁶

Congress, in creating the military justice system, established three types of courts-martial: (1) summary court-martial, (2) special court-martial, and (3) general court-martial.³⁷ While the promulgated RCM and the MRE are applicable to all courts-martial, the jurisdiction and authorized punishments vary among the different courts-martial types. The function of the summary court-martial is to “promptly adjudicate minor offenses under a simple procedure” and “thoroughly and impartially inquire into both sides of the matter” ensuring that the “interests of both the Government and the accused are safeguarded and that justice is done.”³⁸ However, special and general courts-martial function to adjudicate more serious offenses, such as sexual assault, with more severe punishments, and thus the procedures are more complex. Generally, sex-related offenses are found in Art. 120.

Special Courts-Martial

The special court-martial can try any servicemember for any noncapital offense or, under presidential regulation, capital offenses.³⁹ Special courts-martial generally try offenses that are

²⁹ Referral is the order that states that charges against an accused will be tried by a specific court-martial.

³⁰ See RCM 401(c).

³¹ RCM 504.

³² RCM 103(6).

³³ 10 U.S.C. §§801 et seq.

³⁴ 10 U.S.C. §836.

³⁵ *Id.*

³⁶ The rules are set forth in the Manual for Courts-Martial (MCM), established as Executive Order 12473, Manual for Courts-Martial, United States, 49 Fed. Reg. 17152 (April 23, 1984), as amended.

³⁷ Art. 16, UCMJ; 10 U.S.C. §816.

³⁸ RCM 1301(b).

³⁹ Arts. 16 & 19, UCMJ; 10 U.S.C. §§816, 819; RCM 201(f)(2)(A). Capital offenses, as defined by RCM 103(3), for which there is not a mandated punishment in excess of the punitive power of a special court-martial may be referred (continued...)

considered misdemeanors. A special court-martial can be composed of a military judge alone, not less than three members,⁴⁰ or a military judge and not less than three members.⁴¹ Contrary to civilian criminal trials, the agreement of only two-thirds of the members of a court-martial is needed to find the accused guilty. Otherwise, the accused is acquitted.⁴² There are no “hung juries” in courts-martial. Regardless of the offenses tried, the maximum punishment allowed at a special court-martial is confinement for one year; hard labor without confinement for up to three months; forfeiture of two-thirds’ pay per month for up to one year; reduction in pay grade; and a bad-conduct discharge.⁴³ The accused is entitled to an appointed military attorney or a military counsel of his or her selection, or he or she can hire a civilian counsel at no expense to the government.⁴⁴

General Courts-Martial

A general court-martial is the highest trial level in military law and is usually used for the most serious offenses. It is composed of a military judge sitting alone, or not less than five members and a military judge.⁴⁵ It can adjudge, within the limits prescribed for each offense, a wide range of punishments to include confinement; reprimand; forfeitures of up to all pay and allowances; reduction to the lowest enlisted pay grade; punitive discharge (bad conduct discharge, dishonorable discharge, or dismissal); restriction; fines; and, for certain offenses, death.⁴⁶ The accused is entitled to an appointed military attorney or a military counsel of his or her selection, or the accused can hire civilian counsel at no expense to the government.⁴⁷

Prior to convening a general court-martial, a pretrial investigation must be conducted. This investigation, known as an Article 32 hearing, is meant to ensure that there is a basis for prosecution.⁴⁸ An investigating officer, who must be a commissioned officer,⁴⁹ presides, and the

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and tried by a special court-martial. RCM 201(f)(2)(C).

⁴⁰ Members in the military justice system are the equivalent of jurors and are generally composed of officers from the accused’s command.

⁴¹ The accused has the right to choose the composition of the court-martial or whether to be tried by a military judge alone, a military judge and members, or a panel of members. Enlisted servicemembers may request that the members’ panel include enlisted members. RCM 903.

⁴² RCM 921(c). The same is applicable to general courts-martial with the exception of offenses where the death penalty is mandatory, which require a unanimous verdict. Art. 52, UCMJ; 10 U.S.C. §852.

⁴³ Art. 19, UCMJ; 10 U.S.C. §819; RCM 201(f)(2)(B). A bad-conduct discharge, confinement for more than six months, or forfeiture of pay for more than six months, may be adjudged only if a complete record of the proceedings and testimony has been made, defense counsel was appointed, and a military judge presided over the court-martial. If a military judge could not be appointed, a detailed written statement stating the reasons why must be submitted by the commander who convened the court-martial.

⁴⁴ Art. 27, UCMJ; 10 U.S.C. §827. *See generally* United States v. Hutchins, 69 M.J. 282 (2010).

⁴⁵ Art. 16, UCMJ. The accused has the right to choose the composition of the court-martial except in capital cases, where members are required. *See* footnote 41, *supra*. And RCM 201(f)(1)(C).

⁴⁶ Art. 18, UCMJ; 10 U.S.C. §818; RCM 1003. A penalty of death may be adjudged only if the case was referred to the court martial as a capital case; one or more specified aggravating factors were present at the time of the offense; and all members of the court-martial concur. RCM 1004.

⁴⁷ Arts. 27 and 38, UCMJ; 10 U.S.C. §§827 and 838.

⁴⁸ Art. 32, UCMJ; 10 U.S.C. §832.

⁴⁹ RCM 405(d)(1). The investigating officer should be an officer in the grade of major or lieutenant commander or higher or one with legal training. A commissioned officer is a member of the uniformed services not in an enlisted pay (continued...)

accused has the same entitlements to counsel as in special courts-martial. However, unlike in a civilian grand jury investigation, where the accused has no access to the proceedings, the accused is afforded the opportunity to examine the evidence presented against him, cross-examine witnesses, and present his own arguments.⁵⁰ If the investigation uncovers evidence that the accused has committed an offense not charged, the investigating officer can recommend that new charges be added.⁵¹ Likewise, if the investigating officer believes that evidence is insufficient to support a charge, he can recommend that it be dismissed.⁵² Once the Article 32 investigation is complete, the investigating officer makes recommendations to the convening authority (CA) generally via the CA's legal advisor.⁵³ The legal advisor, in turn, provides the CA with a formal written recommendation, known as the Article 34, UCMJ advice, as to the disposition of the charges.⁵⁴ The CA then determines whether to convene a court-martial or dismiss the charges.⁵⁵

Post-Trial Review

Convictions at a general or special court-martial that include a punitive (bad conduct or dishonorable) discharge are subject to an automatic post-trial review by the CA. The process starts with a review of the trial record by the staff judge advocate (SJA), who makes a recommendation to the CA as to what action to take. This review is recognized as the accused's best hope for relief, as the CA has broad powers to act on the case.⁵⁶ Upon review of the record of trial and the SJA's recommendation, the CA may, among other remedies, suspend all or part of the sentence, disapprove a finding or conviction, or lower the sentence.⁵⁷ The CA may not increase the sentence.⁵⁸ Once the CA takes action on the case, the conviction is ripe for an appeal.⁵⁹

All court-martial convictions not reviewable by the service appellate courts⁶⁰ are reviewed by a judge advocate to determine if the findings and sentence, as approved by the CA, are correct in law and fact.⁶¹ If those criteria are met, the conviction is final.⁶² If not, the judge advocate forwards the case to the officer exercising general court-martial convening authority at the time

(...continued)

grade, and includes a commissioned warrant officer (10 U.S.C. §101).

⁵⁰ Art. 32(b)-(c), UCMJ; 10 U.S.C. §832(b)-(c); RCM 405(f). *See* United States v. Davis, 64 M.J. 445 (2007).

⁵¹ Art. 32(d), UCMJ; 10 U.S.C. §823(d); RCM 407.

⁵² RCM 405(j).

⁵³ *Id.*

⁵⁴ RCM 406.

⁵⁵ Arts. 33-35, UCMJ; 10 U.S.C. §833-835; RCM 407.

⁵⁶ United States v. Davis, 58 M.J. 100, 102 (2003).

⁵⁷ Art. 60, UCMJ; 10 U.S.C. §860; RCM 1107.

⁵⁸ Art. 60(c)(2), UCMJ; 10 U.S.C. §860(c)(2).

⁵⁹ Arts. 66 and 69a, UCMJ; 10 U.S.C. §§866 and 869a.

⁶⁰ There are three service appellate courts: the Navy-Marine Corps Court of Criminal Appeals, the Army Court of Criminal Appeals, and the Air Force Court of Criminal Appeals. A service appellate court will have jurisdiction in cases where the sentence includes confinement for one year or more, a bad-conduct or dishonorable discharge, death, or a dismissal from service in the case of a commissioned officer, cadet, or midshipman. Art. 66, UCMJ; 10 U.S.C. §866.

⁶¹ Art. 64, UCMJ; 10 U.S.C. §864; RCM 1111, 1112, and 1306.

⁶² Art. 69, UCMJ; 10 U.S.C. §869.

the court-martial was convened for corrective action.⁶³ If the CA declines to take corrective action, the case is referred to the Judge Advocate General for review.⁶⁴

Appellate Review

Convictions by a special or general court-martial are subject to an automatic⁶⁵ appeal to a service Court of Criminal Appeals if the sentence includes confinement for one year or more, a bad-conduct or dishonorable discharge, death, or a dismissal in the case of a commissioned officer, cadet, or midshipman.⁶⁶ Appeal is mandatory and cannot be waived when the sentence includes death.⁶⁷ If the conviction is affirmed by the service court, the appellant may request review by the Court of Appeals for the Armed Forces (CAAF)⁶⁸ and ultimately the U.S. Supreme Court.⁶⁹ Review by these courts is discretionary.

Supreme Court review by writ of certiorari is limited to cases where the CAAF has conducted a review, whether mandatory or discretionary, or has granted a petition for extraordinary relief.⁷⁰ The Court does not have jurisdiction to review a denial of discretionary review by the CAAF,⁷¹ nor does it have jurisdiction to consider denials of petitions for extraordinary relief.⁷² Servicemembers whose petitions for review or for extraordinary relief are denied by the CAAF may seek additional review only through collateral means, for example, by petitioning for habeas corpus to an Article III court, which could provide an alternate avenue for Supreme Court review.

Selected Legislative Proposals

Congress, exercising its constitutional authority to raise, support, and regulate the armed forces,⁷³ has attempted to address the issue of sexual assaults and other sex-related offenses under the UCMJ through the introduction of various legislative proposals.⁷⁴ The proposed language, if enacted, would prohibit the enlistment of individuals previously convicted of sexual offenses,⁷⁵

⁶³ Art. 64(c)(3), UCMJ; 10 U.S.C. §864(c)(3); RCM 1112.

⁶⁴ *Id.*

⁶⁵ Military appellate courts are required to review cases over which they have jurisdiction unless the appellant waives his or her right to appeal (Art.61, UCMJ; 10 U.S.C. §861).

⁶⁶ Art. 66, UCMJ; 10 U.S.C. §866.

⁶⁷ RCM 1110.

⁶⁸ See Art. 67, UCMJ; 10 U.S.C. §867. The Court of Appeals for the Armed Forces (CAAF) is a civilian court composed of five civilian judges appointed by the President.

⁶⁹ The U.S. Supreme Court did not have jurisdiction over decisions of the CAAF until Congress granted it in 1984. Military Justice Act of 1983, P.L. 98-209, 97 Stat. 1393, 28 U.S.C. §1259.

⁷⁰ Art. 67a, UCMJ; 10 U.S.C. §867a.

⁷¹ *Id.*

⁷² For an additional discussion on Supreme Court jurisdiction over military justice cases, see CRS Report RL34697, *Supreme Court Appellate Jurisdiction over Military Court Cases*, by R. Chuck Mason.

⁷³ U.S. CONST. art. I §8, cls. 11-14.

⁷⁴ Megan Scully, "Addressing Military's Sexual-Assault Issues Through Legislation," *Roll Call*, May 21, 2013, http://www.rollcall.com/news/addressing_militarys_sexual_assault_issues_through_legislation-225013-1.html.

⁷⁵ S. 548, 113th Cong. (1st Sess. 2013).

eliminate the statute of limitations on prosecution of sexual offenses,⁷⁶ and prohibit commanders from overturning a court-martial conviction as part of the post-trial review process.⁷⁷

The House and Senate have included numerous provisions addressing sexual assault, including those mentioned above, in the respective versions of the National Defense Authorization Act for Fiscal Year 2014 (FY2014 NDAA).⁷⁸ For example, the House version includes at least 20 provisions requiring statutory changes to the UCMJ, modification of the Rules for Courts-Martial, and other policy changes;⁷⁹ while the Senate version, as reported by the Senate Armed Services Committee, incorporates at least 26 changes.⁸⁰ Additionally, Secretary of Defense Chuck Hagel recently announced that the Department of Defense would implement a series of new initiatives designed to address sexual assaults in the military, many of which are addressed by proposals contained in the House and Senate versions of the FY2014 NDAA.⁸¹

Due to the sheer number and scope of the provisions contained in the House and Senate versions of the FY2014 NDAA, this report addresses selected proposals including requiring creation of special victims' counsel programs, changes to disposition and clemency authorities, mandatory minimum punishments, commander's authority to transfer an accused, and protections for recruits and trainees.

Special Victims' Counsel

The Air Force Special Victims' Counsel Program was implemented on January 28, 2013, as a pilot program for the Department of Defense.⁸² The program "provides support to victims of sexual assault through independent representation; builds and sustains victim resiliency; empowers victims; increases the level of legal assistance provided to victims."⁸³ As of August 9, 2013, the Air Force reports that 419 victims have requested representation and that Special Victims' Counsel have attended and represented clients in 70 Article 32 hearings and 73 courts-martial as well as over 400 interviews with investigators, defense counsel, and trial counsel.⁸⁴ The Department of the Navy recently implemented a version of a special victims' counsel program called Victims' Legal Counsel Program, and the Coast Guard launched a similar program called the Office of the Special Victims' Counsel.⁸⁵

⁷⁶ H.R. 1867, 113th Cong. (1st Sess. 2013).

⁷⁷ S. 967, 113th Cong. (1st Sess. 2013).

⁷⁸ H.R. 1960, 113th Cong. (1st Sess. 2013); S. 1197, 113th Cong. (1st Sess. 2013).

⁷⁹ H.R. 1960, 113th Cong. (1st Sess. 2013) *See generally* Subtitle D—Military Justice and Legal Matters, Including Sexual Assault Prevention and Response.

⁸⁰ S. 1197, 113th Cong. (1st Sess. 2013) *See generally* Subtitle E—Sexual Assault Prevention and Response and Military Justice Matters.

⁸¹ Department of Defense, "Secretary Hagel's Statement on New Sexual Assault Prevention and Response Measures," press release, August 15, 2013, <http://www.defense.gov/Releases/Release.aspx?ReleaseID=16205>.

⁸² Department of the Air Force, "Air Force Special Victims' Counsel Program," press release, August 9, 2013, <http://www.afjag.af.mil/shared/media/document/AFD-130129-005.pdf>.

⁸³ Department of the Air Force, "Air Force Special Victims' Counsel Program: About," <https://www.facebook.com/airforcesvc/info>.

⁸⁴ Department of the Air Force, "Air Force Special Victims' Counsel Program," press release, August 9, 2013, <http://www.afjag.af.mil/shared/media/document/AFD-130129-005.pdf>.

⁸⁵ Jacqueline Klimas and Antonieta Rico, "Navy, Coast Guard to offer legal advisers for sex assault victims," *Army Times*, August 7, 2013, [http://www.armytimes.com/article/20130807/NEWS/308070020/Navy-Coast-Guard-offer-\(continued...\)](http://www.armytimes.com/article/20130807/NEWS/308070020/Navy-Coast-Guard-offer-(continued...))

The House, in Section 536 of the FY2014 NDAA, requires that each military service designate legal counsel to serve as “Victims’ Counsel” for victims of alleged sex-related offenses.⁸⁶ Victims’ Counsel are authorized to provide various types of legal assistance including services similar to that of a defense attorney,⁸⁷ claims attorney,⁸⁸ and a traditional military legal assistance attorney.⁸⁹ The House defines qualifying sex-related offenses as alleged violations of UCMJ Articles 120 (rape and sexual assault generally), 120a (stalking), 120b (rape and sexual assault of a child), 120c (other sexual misconduct), 125 (sodomy), and 80 (attempts to commit the specified offenses).⁹⁰ An alleged victim of any of the specified offenses qualifies for representation by a Victims’ Counsel regardless of whether the report of the offense is restricted or unrestricted.⁹¹

The Senate FY2014 NDAA, in Section 539, requires the implementation of programs providing for Special Victims’ Counsel in each military service.⁹² Much like the House version, the Senate authorizes the Special Victims’ Counsel to provide various types of legal assistance including services similar to that of a defense attorney,⁹³ claims attorney,⁹⁴ and a traditional military legal assistance attorney.⁹⁵ However, a substantial difference between the House and Senate versions exists in how the Senate defines offenses that qualify for representation by a Special Victims’ Counsel. The Senate limits qualifying offenses to alleged violations of UCMJ Articles 120 (rape and sexual assault) and 80 (attempted rape and sexual assault).⁹⁶ Also, in concurrence with the House version, the Senate authorizes the assignment of a Special Victims’ Counsel to an alleged victim regardless of whether the report of the offense is restricted or unrestricted.⁹⁷

The House and Senate versions also contain one clause that arguably could be problematic if enacted. With respect to authorized types of legal assistance, both bills specifically provide for advice/consultation regarding the potential for civil litigation against other parties, other than the

(...continued)

legal-advisers-sex-assault-victims.

⁸⁶ H.R. 1960, §536, *Victims’ Counsel for Victims of Sex-Related Offenses and Related Provisions*, 113th Cong. (1st Sess. 2013).

⁸⁷ *Id.* (Legal consultation regarding potential criminal liability of the victim stemming from or in relation to the circumstances surrounding the alleged sex-related offense and the victim’s right to seek military defense services).

⁸⁸ *Id.* (Legal consultation regarding the potential for civil litigation against other parties (other than the Department of Defense)).

⁸⁹ *Id.* (Legal consultation and assistance in personal legal civil matters in accordance with 10 U.S.C. §1044.)

⁹⁰ 10 U.S.C. §§902, 920a, 920b, 920c, 925; and 880.

⁹¹ *Id.* (Restricted reporting allows a victim of sex-related offense to confidentially disclose the details of the offense to specified individuals and receive treatment and counseling, without triggering the official investigative process. Unrestricted reporting requires an official investigation and potential prosecution of the accused under the UCMJ.)

⁹² S. 1197, §539, *Special Victims’ Counsel for Victims of Sexual Assault Committed by Members of the Armed Forces*, 113th Cong. (1st Sess. 2013).

⁹³ *Id.* (Legal advice and assistance regarding any potential criminal liability of the victim).

⁹⁴ *Id.* (Legal advice regarding the potential for civil litigation against other parties (other than the Department of Defense)).

⁹⁵ *Id.* (Legal assistance in personal civil legal matters in connection with the sexual assault in accordance with 10 U.S.C. §1044.)

⁹⁶ 10 U.S.C. §920; 10 U.S.C. §880.

⁹⁷ S. 1197, §539, 113th Cong. (1st Sess. 2013). (Unrestricted reporting allows a person who is sexually assaulted to access medical treatment and counseling and request an official investigation of the allegation using existing reporting channels; restricted reporting allows a person who is sexually assaulted to disclose the assault in a confidential manner and receive medical treatment without triggering an official investigation.)

Department of Defense. However, this provision fails to consider that Coast Guard attorneys operate under the Department of Homeland Security. This raises the question of whether Congress intended to prohibit counsel from advising on potential civil litigation against the Department of Homeland Security, as well as the Department of Defense.

Secretary of Defense Hagel announced on August 15, 2013, that the Department of Defense would implement special victims' advocacy programs across the military services.⁹⁸ Specifically, the Secretaries of the Military Departments shall each establish a program best suited for that Service that "provides legal advice and representation to the victim throughout the justice process."⁹⁹ Each program is required to have an initial operating capability not later than November 1, 2013, and a fully established program by January 1, 2014.¹⁰⁰

Disposition Authority

Disposition authority is the authority granted a commander over whether or not to pursue prosecution of an offense. According to Rules for Courts-Martial 306, "[e]ach commander has discretion to dispose of offenses by members of that command."¹⁰¹ Once evidence has been gathered and an inquiry into the allegations is complete, the commander can choose to dispose of the charges by (1) taking no action, (2) initiating administrative action,¹⁰² (3) imposing non-judicial punishment, (4) preferring charges, or (5) forwarding to a higher authority for referral of charges.¹⁰³ However, the decision to dispose of allegations of offenses is not done in a vacuum; many "factors must be taken into consideration and balanced," including the "nature of the offenses, any mitigating or extenuating circumstances, the character and military service of the accused, ... the interest of justice, military exigencies, and the effect of the decision on the accused and the command."¹⁰⁴

Both the House and Senate versions of the FY2014 NDAA include language addressing the ability of the commander to consider the character and military service of the accused in the initial disposition of alleged offenses.¹⁰⁵ The House language prohibits the consideration of these factors when determining initial disposition of sex-related offenses,¹⁰⁶ while the Senate language prohibits consideration of the factors in the initial disposition of all alleged offenses under the UCMJ, not only sex-related offenses. One aspect of both versions that invites the attention of

⁹⁸ Department of Defense, "Secretary Hagel's Statement on New Sexual Assault Prevention and Response Measures," press release, August 15, 2013.

⁹⁹ Secretary of Defense Chuck Hagel, *Sexual Assault Prevention and Response*, Department of Defense, Memorandum, Washington, DC, August 14, 2013.

¹⁰⁰ *Id.*

¹⁰¹ RCM 306(a).

¹⁰² Administrative action can include separation from the military. *See* 10 U.S.C. §§1161 et seq.

¹⁰³ RCM 306(c).

¹⁰⁴ RCM 306(b), Discussion.

¹⁰⁵ H.R. 1960, §546, *Amendment to Manual for Courts-Martial to Eliminate Considerations Relating to Character and Military Service of Accused in Initial Disposition of Sex-Related Offenses*, 113th Cong. (1st Sess. 2013); S. 1197, §565, *Modification of Manual for Courts-Martial to Eliminate Factor Relating to Character and Military Service of the Accused in Rule on Initial Disposition*, 113th Cong. (1st Sess. 2013).

¹⁰⁶ H.R. 1960, 113th Cong. (1st Sess. 2013) (sex-related offenses defined as alleged violations of UCMJ Articles 120 (rape and sexual assault generally), 120a (stalking), 120b (rape and sexual assault of a child), 120c (other sexual misconduct), 125 (sodomy), and 80 (attempts to commit the specified offenses)).

Congress concerns ambiguity in the proposed language. The House and Senate cite Rule 306 of the MCM as the focus of the change; however, there are two Rule 306s in the MCM—RCM Rule 306 and MRE Rule 306. Clarifying the proposed language to specifically cite Rule 306 of the RCM would eliminate any ambiguity as to which rule is in question.

The Department of Defense, under Secretary of Defense Leon Panetta, took action with respect to disposition authority of certain sex-related offenses in 2012.¹⁰⁷ The implemented policy requires only officers possessing at least special court-martial convening authority and grade of O-6 (i.e., colonel or Navy captain) or higher have initial disposition authority for offenses under UCMJ Articles 120 (rape and sexual assault), 125 (forcible sodomy), and 80 (attempts of the specified offenses).¹⁰⁸ The current Secretary of Defense, Secretary Hagel, has added additional reporting requirements within the chain of command when an unrestricted report of sexual assault has been made.¹⁰⁹ Under the new policy requirement, status reports of unrestricted sexual assault allegations and actions taken must be made to the first general/flag officer within the chain of command, without delaying reporting to the relevant military criminal investigation organization.¹¹⁰ The policy is to be implemented no later than November 1, 2013.¹¹¹

Clemency

A recent Air Force case¹¹² has attracted considerable congressional focus on the Convening Authority's ability to grant clemency.¹¹³ In the specific case, the CA dismissed the conviction of an Air Force officer who had been tried, convicted, and sentenced to prison at a court-martial for the sexual assault of a civilian.¹¹⁴ The authority of the CA to modify the findings and sentence of the court-martial is a matter of command prerogative involving the sole discretion of the convening authority.¹¹⁵ Action by the CA to disapprove, commute, or suspend a sentence, or to set aside a finding of guilty, is not appealable by the United States. As a matter of command prerogative, the decision by the CA is final upon issuance. Additionally, the UCMJ does not currently afford the victim the right to participate in the clemency phase of the post-trial review.

¹⁰⁷ Secretary of Defense Leon Panetta, *Withholding Initial Disposition Authority Under the Uniform Code of Military Justice in Certain Sexual Assault Cases*, Department of Defense, Memorandum, Washington, DC, April 20, 2012.

¹⁰⁸ *Id.*

¹⁰⁹ Secretary of Defense Chuck Hagel, *Sexual Assault Prevention and Response*, Department of Defense, Memorandum, Washington, DC, August 14, 2013.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² Nancy Montgomery, "Case dismissed against Aviano IG convicted of sexual assault," *Stars and Stripes*, February 27, 2013, http://www.stripes.com/news/air-force/case-dismissed-against-aviano-ig-convicted-of-sexual-assault-1.209797?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed:+starsandstripes/general+%28Stars+and+Stripes%29.

¹¹³ Art. 60, UCMJ; 10 U.S.C. §860.

¹¹⁴ Nancy Montgomery, "Case dismissed against Aviano IG convicted of sexual assault," *Stars and Stripes*, February 27, 2013, http://www.stripes.com/news/air-force/case-dismissed-against-aviano-ig-convicted-of-sexual-assault-1.209797?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed:+starsandstripes/general+%28Stars+and+Stripes%29.

¹¹⁵ Art. 60, UCMJ; 10 U.S.C. §860.

The House addresses the authority of the CA to act on the findings and sentence of a court-martial in the FY2014 NDAA.¹¹⁶ Under the proposed language, if the CA elects to take action, the CA may not dismiss the charge or specification or modify the findings to be a lesser included offense unless the case is a qualifying offense.¹¹⁷ Qualifying offenses do not include offenses charged under UCMJ Articles 120 (rape and sexual assault), 128 (assault of a child under 16 years of age), 134 (indecent language communicated to a child under 16 years of age) and any offenses where the maximum sentence of confinement that may be adjudged is greater than two years and the sentence adjudged does not include a dismissal, bad-conduct discharge, or dishonorable discharge and confinement for more than six months.¹¹⁸ Additionally, in any instance where the CA elects to dismiss or change any charge or offense, the CA must include a written explanation for the reasons for such action and the explanation must be made part of the record of trial.¹¹⁹

The Senate also addresses the authority of the Convening Authority to modify findings of a court-martial in the FY2014 NDAA.¹²⁰ However, the Senate language differs in how qualifying offenses are defined by excluding offenses charged under UCMJ Articles 120 (rape and sexual assault), 120a (stalking), 120b (rape and sexual assault of a child), 120c (other sexual misconduct), and any offenses where the maximum sentence of confinement that may be adjudged is greater than one year and the sentence adjudged does not include a dismissal, bad-conduct discharge, or dishonorable discharge and confinement for more than six months.¹²¹ The Senate language also requires the CA to include a written justification, for any action undertaken, as part of the record of trial.¹²²

As noted above, the UCMJ does not currently afford the complaining witness with a right to be heard as part of the clemency phase during post-trial review. The House and Senate versions of the FY2014 NDAA both include language creating this new right.¹²³ The underlying concept is the same, allowing the complaining witness to participate in clemency, but the language creating this right differs between the House and Senate versions. Whereas the House language allows the complaining witness to submit matters to the CA prior to any acts of clemency, the Senate bill provides that the complaining witness is also allowed to review any submissions by the accused that refer to the complaining witness prior to any action by the CA.¹²⁴ Additionally, in both versions, the CA is not allowed to consider any matters that go to the character of the complaining witness unless such matters were presented at the court-martial.¹²⁵ Finally, this new right afforded

¹¹⁶ H.R. 1960, §531, *Limitations on Convening Authority Discretion Regarding Court-Martial Findings and Sentence*, 113th Cong. (1st Sess. 2013).

¹¹⁷ *Id.* (Under the current Art. 60, UCMJ (10 U.S.C. §860) the convening authority may dismiss any charge or specification by setting aside a finding of guilty, or change a finding of guilty to a charge or specification to a finding of guilty to an offense that is a lesser included offense of the original offense. Additionally, the CA may commute or suspend a sentence, but may not increase the punishment.)

¹¹⁸ *Id.*; 10 U.S.C. §§920, 928, and 934.

¹¹⁹ *Id.*

¹²⁰ S. 1197, §555, *Limitation on Authority of Convening Authority to Modify Findings of a Court-Martial*, 113th Cong. (1st Sess. 2013).

¹²¹ *Id.*; 10 U.S.C. §§920, 920a, 920b, and 920c.

¹²² *Id.*

¹²³ H.R. 1960, §544, *Participation by Complaining Witness in Clemency Phase of Courts-Martial Process*, 113th Cong. (1st Sess. 2013); S. 1197, §556, *Participation by Complaining Witness in Clemency Phase of Courts-Martial Process*, 113th Cong. (1st Sess. 2013).

¹²⁴ *Id.*

¹²⁵ *Id.*

the complaining witness is not limited to sex-related offenses; it is applicable to all offenses under the UCMJ.¹²⁶

In accordance with the proposed legislative language creating a right for a complaining witness to participate in the clemency phase of post-trial review, the Secretary of Defense has directed action to allow victims greater opportunity to participate in post-trial matters.¹²⁷ Specifically, Secretary Hagel has directed Department of Defense General Counsel to develop draft language for an executive order to amend the Manual for Courts-Martial affording victims the right to provide input to the post-trial action phase of courts-martial.¹²⁸ The General Counsel is to deliver the proposed language no later than October 15, 2013.¹²⁹

Minimum Punishment and General Court-Martial

Generally speaking, the military justice system affords great discretion in adjudging a sentence for a conviction at court-martial. For example, a general court-martial may adjudge, subject to limitations prescribed by the President, any punishment not forbidden by the UCMJ.¹³⁰ Additionally, it is possible that an accused be sentenced to no punishment beyond that of the court-martial conviction.¹³¹ However, as an exception to this broad discretion, Congress has mandated the death penalty for a conviction of Article 106 (spies) and a mandatory minimum sentence of life with the possibility of parole for convictions under Article 118 (premeditated murder and felony murder).¹³² As noted above, the commander has great discretion in the disposition of an offense under the UCMJ, and as such the commander can choose to dispose of the charges by (1) taking no action, (2) initiating administrative action,¹³³ (3) imposing non-judicial punishment, (4) preferring charges, or (5) forwarding to a higher authority for prefferal of charges.¹³⁴ Congress, through the UCMJ, has not required that an offense be disposed of in a certain manner or at a specific type of court-martial.

Language in the House FY2014 NDAA, Section 533, institutes a mandatory punishment for sex-related offenses and also requires that sex-related offenses be tried only at a general court-martial.¹³⁵ The minimum punishment for a qualifying offense must include a dishonorable discharge or dismissal from the service.¹³⁶ Qualifying offenses are defined to include offenses under UCMJ Articles 120(a) (rape), 120(b) (sexual assault), 125 (forcible sodomy), and 80

¹²⁶ *Id.*

¹²⁷ Department of Defense, “Secretary Hagel’s Statement on New Sexual Assault Prevention and Response Measures,” press release, August 15, 2013.

¹²⁸ Secretary of Defense Chuck Hagel, *Sexual Assault Prevention and Response*, Department of Defense, Memorandum, Washington, DC, August 14, 2013.

¹²⁹ *Id.*

¹³⁰ Art. 18, UCMJ; 10 U.S.C. §918.

¹³¹ Department of the Army, *Military Judge’s Benchbook*, Pamphlet 27-9, January 1, 2010.

¹³² Art. 106, UCMJ; 10 U.S.C. §906. Art. 118, UCMJ; 10 U.S.C. §918. *See also* David Jason Rankin Frakt, “When Mandatory Isn’t Required: Mandatory Sentences Under the UCMJ” (Legal Studies Research Paper Series, Working Paper No. 2012-23, University of Pittsburgh School of Law, 2012).

¹³³ Administrative action can include separation from the military. *See* 10 U.S.C. §§1161 et seq.

¹³⁴ RCM 306(c).

¹³⁵ H.R. 1960, §533, *Discharge or Dismissal for Certain Sex-Related Offenses and Trial of Offenses by General Courts-Martial*, 113th Cong. (1st Sess. 2013).

¹³⁶ *Id.*

(attempts to commit the specified offenses).¹³⁷ Under the UCMJ only a general court-martial is authorized to adjudge a dishonorable discharge or dismissal from the service,¹³⁸ and, as such, the House language requires qualifying offenses to be tried at a general court-martial. In another section of the House FY2014 NDAA, Section 550a, language purports to do essentially the same thing as Section 533, but adds an additional requirement that the minimum sentence include confinement for two years.¹³⁹ While the former section includes language establishing general court-martial jurisdiction, the latter section does not include the jurisdictional amendments. The difference in the sections invites Congress's attention as to the intended minimum punishment.

The Senate FY2014 NDAA also addresses minimum punishment for sex-related offenses and general court-martial jurisdiction.¹⁴⁰ The Senate language includes the jurisdictional language much like the House version, but the qualifying offenses are different. The Senate defines the qualifying offenses to include those charged under UCMJ Articles 120 (rape, sexual assault, aggravated sexual assault, and abusive sexual assault), 120b (rape and sexual assault of a child), 125 (sodomy), and 80 (attempts of the specified offenses),¹⁴¹ whereas the House includes only Subsections (a) and (b) (rape and sexual assault) of Article 120.

Authority to Transfer Accused

Congress previously provided for the transfer of victims of certain sex-related offenses in order to provide protection against retaliation for reporting the alleged offense.¹⁴² In the House and Senate versions of the FY2014 NDAA, language reinforces the ability of a commander to temporarily reassign or remove a servicemember accused of a covered sex-related offense.¹⁴³ The House and Senate language is essentially the same, except for what constitutes a covered sex-related offense. The House language includes offenses under UCMJ Articles 120 (rape and sexual assault), 120a (stalking), 120b (rape and sexual assault of a child), and 120c (other sexual misconduct).¹⁴⁴ The Senate language includes all of the offenses above, but also adds Article 125 (sodomy) as a covered offense.¹⁴⁵ Under both versions of the bill, an accused may be "temporarily reassigned or removed from a position of authority or assignment, not as a punitive measure, but solely for the purpose of maintaining good order and discipline within the member's unit."¹⁴⁶

The Secretaries of the Military Departments have been directed by Secretary of Defense Hagel to develop and implement policy allowing the administrative reassignment or transfer of a member

¹³⁷ 10 U.S.C. §§920(a), 920(b), 925, and 880.

¹³⁸ Art. 18, UCMJ; 10 U.S.C. §918.

¹³⁹ H.R. 1960, §550a, *Discharge or Dismissal, and Confinement Required for Certain Sex-Related Offenses Committed by Members of the Armed Forces*, 113th Cong. (1st Sess. 2013).

¹⁴⁰ S. 1197, §554, *Mandatory Discharge or Dismissal for Certain Sex-Related Offenses Under the Uniform Code of Military Justice and Trial of Such Offenses by General Courts-Martial*, 113th Cong. (1st Sess. 2013).

¹⁴¹ 10 U.S.C. §§920, 920b, 925, and 880.

¹⁴² 10 U.S.C. §673.

¹⁴³ H.R. 1960, §535, *Consideration of Need for, and Authority to Provide for, Temporary Administrative Reassignment or Removal of a Member on Active Duty Who is Accused of Committing a Sexual Assault or Related Offense*, 113th Cong. (1st Sess. 2013); S. 1197, §532, *Temporary Administrative Reassignment or Removal of a Member of the Armed Forces on Active Duty Who is Accused of Committing a Sexual Assault or Related Offense*, 113th Cong. (1st Sess. 2013).

¹⁴⁴ 10 U.S.C. §§920, 920a, 920b, and 920c.

¹⁴⁵ 10 U.S.C. §925.

¹⁴⁶ H.R. 1960, §535, 113th Cong. (1st Sess. 2013); S. 1197, §532, 113th Cong. (1st Sess. 2013)

accused of committing a sexual assault or related offense, balancing the interests of the victim and the accused.¹⁴⁷ The policy is to be implemented within each Service no later than January 1, 2014.¹⁴⁸ However, unlike the legislative proposals discussed above, the Secretary of Defense did not specifically define which offenses under the UCMJ would be qualifying offenses, and therefore the potential exists that each Service could have differing qualifying offenses and differing policies.

Protection of New Servicemembers

Lackland Air Force Base,¹⁴⁹ as the site of numerous complaints of sexual misconduct involving military trainers committed against new recruits and tech school trainees,¹⁵⁰ has received extensive congressional interest. Sexual misconduct was alleged to have begun in 2009, but allegations against specific individuals did not surface until 2011.¹⁵¹ As of August 14, 2013, 26 instructors have been tried by courts-martial for offenses such as rape, sexual assault, and sending inappropriate messages to trainees over social media.¹⁵² While there are various provisions under the UCMJ under which the prosecution of inappropriate contact between trainers and trainees as evidenced by the concluded courts-martial, the House and Senate versions of the FY2014 NDAA address this issue differently.

The House version includes language requiring the establishment of a policy that uniformly defines and prescribes what constitutes “an inappropriate and prohibited relationship, communication, conduct, or contact, including when such an action is consensual, between a member of the Armed Forces ... and prospective member or [new] member of the Armed Forces....”¹⁵³ Further, the House language requires a servicemember who violates the policy be subject to prosecution under the UCMJ, as well as processed for administrative separation.¹⁵⁴ Additionally, the House requires the Secretary of Defense to submit to the Committees on Armed Services of the Senate and the House of Representatives, within one year of the date of enactment, a proposed amendment to the UCMJ creating a punitive article related to violations of the new policy.¹⁵⁵ In contrast to the House version, the Senate addresses the trainer/trainee issue by requiring the Secretary of Defense to submit to the respective committees, within 120 days of enactment, recommendations for legislative action to modify the UCMJ to prohibit sexual acts and contacts between military instructors and their trainees.¹⁵⁶

¹⁴⁷ Secretary of Defense Chuck Hagel, *Sexual Assault Prevention and Response*, Department of Defense, Memorandum, Washington, DC, August 14, 2013.

¹⁴⁸ *Id.*

¹⁴⁹ Under the 2005 BRAC process, Lackland Air Force Base installation support facilities were combined with Randolph Air Force Base and the Army’s Fort Houston, creating what is now called Joint Base San Antonio.

¹⁵⁰ “Lackland sex scandal prompts U.S. Air Force to discipline former commanders,” *CBS News*, May 2, 2013, http://www.cbsnews.com/8301-201_162-57582551/lackland-sex-scandal-prompts-u.s-air-force-to-discipline-former-commanders/.

¹⁵¹ *Id.*

¹⁵² Kristin Davis, “26th Lackland MTI heads to court-martial,” August 13, 2013, <http://www.airforcetimes.com/article/20130813/NEWS06/308130014/26th-Lackland-MTI-heads-court-martial>.

¹⁵³ H.R. 1960, §548, *Enhanced Protections for Prospective Members and New Members of the Armed Forces During Entry-Level Processing and Training*, 113th Cong. (1st Sess. 2013).

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ S. 1197, §557, *Secretary of Defense Report on Modifications to the Uniform Code of Military Justice to Prohibit* (continued...)

Secretary of Defense Hagel directed the Under Secretary of Defense for Personnel and Readiness to ensure that current policies prohibiting inappropriate relations between trainers and trainees and recruiters and recruits are consistent across the Services.¹⁵⁷ The findings of the survey are to be reported to Secretary Hagel no later than November 1, 2013.¹⁵⁸ The Department of Defense action with respect to this issue does not address potential changes to the punitive articles of the UCMJ, as contemplated by the House and Senate versions of the FY2012 NDAA.

A Different Approach

In addition to the various provisions discussed above, Senator Kirsten Gillibrand (NY) introduced a bill with a different approach to sex-related offenses.¹⁵⁹ S. 967 addresses sex-related offenses under the UCMJ by modifying the authority to proceed to trial by court-martial,¹⁶⁰ modifying the Manual for Courts-Martial to eliminate the factor relating to character and military service of the accused on initial disposition,¹⁶¹ modifying the authority to convene general and special courts-martial,¹⁶² creating a deadline for a military judge to call general and special courts-martial into session,¹⁶³ modifying clemency authority of the convening authority,¹⁶⁴ and requiring command action on reports of sexual offenses.¹⁶⁵ It remains unclear if the bill will be introduced in whole or part as amendments during the Senate debate on the FY2014 NDAA. However, as an example of a different approach to an issue receiving significant congressional interest, the various sections are discussed below.

Section 2 modifies the authority to determine to proceed to trial by courts-martial. The language, if enacted, would create a bifurcated military justice system. Offenses for which the maximum confinement adjudged may be greater than one year fall under a separate military justice system with respect to disposition and convening authority.¹⁶⁶ However, certain offenses are excluded—for example, Article 106 (spies) and Article 112a (wrongful use, possession of controlled substance)—and would remain under the military justice system as it is established today, with the commanding officer retaining disposition authority.¹⁶⁷ Disposition authority under the new system is held by an officer in the grade of O-6 (i.e., colonel or Navy captain) or higher who is available as a trial counsel (JAG officer), has significant experience in trials by general and

(...continued)

Sexual Acts and Contacts Between Military Instructors and Trainees, 113th Cong. (1st Sess. 2013).

¹⁵⁷ Secretary of Defense Chuck Hagel, *Sexual Assault Prevention and Response*, Department of Defense, Memorandum, Washington, DC, August 14, 2013.

¹⁵⁸ *Id.*

¹⁵⁹ S. 967, 113th Cong. (1st Sess. 2013) (the Military Justice Improvement Act of 2013).

¹⁶⁰ *Id.* at §2.

¹⁶¹ *Id.* at §3.

¹⁶² *Id.* at §4.

¹⁶³ *Id.* at §5.

¹⁶⁴ *Id.* at §6.

¹⁶⁵ *Id.* at §7.

¹⁶⁶ *Id.* at §2(a)(1).

¹⁶⁷ *Id.* at Sec 2(a)(2). (Excluded offenses include Articles 83-91, 93-117, and 133 of the UCMJ (10 U.S.C. §§883-891, 893-917, and 933).)

special courts-martial, and is outside of the chain of command of the accused.¹⁶⁸ The officer with the disposition authority determines whether to try the charges by a special or general court-martial.¹⁶⁹ The determination on how to proceed is binding on any applicable convening authority, and shall be free from any unlawful or unauthorized influence or coercion.¹⁷⁰

Section 3, which modifies the MCM to eliminate the factor relating to the character and military service of the accused in the initial disposition of charges, uses essentially the same language contained in the House and Senate versions of the FY2014 NDAA discussed above. The language suffers from the same ambiguity as the House and Senate language, in that Rule 306 is cited as Rule 306 of the MCM and not specifically cited as Rule 306 of the RCM.¹⁷¹

The Section 4 provision that changes the officers authorized to convene general and special courts-martial is a concept that is not reflected in the House and Senate versions of the FY2014 NDAA. If enacted, certain officers currently authorized to convene courts-martial would lose that authority.¹⁷² Additionally, officers granted disposition authority under Section 2 of S. 967 (discussed above) would also be granted convening authority, except in instances when the accused and/or victim are in the officer's chain of command.¹⁷³ Finally, new offices are created within each military service called the "Chief of Staff on Courts-Martial," with the responsibility to convene general and special courts-martial and detail military judges to convened courts-martial, as well as detail members to convened courts-martial.¹⁷⁴

Section 5, creating a deadline for military judge to call general and special courts-martial into session, is a concept that is not included in the House and Senate versions of the FY2014 NDAA. If enacted, the section would require a military judge to call the court into session not later than 90 days after the authority determines to try such charges by court-martial.¹⁷⁵ The language cites UCMJ Article 39¹⁷⁶ with respect to sessions of the court-martial when creating the 90 day deadline. However, the language does not address UCMJ Article 40, which authorizes a military judge, for reasonable cause, to grant a continuance to any party for such time, and as often, as may appear to be just.¹⁷⁷ Absent further clarification, conflict exists between statutory provisions requiring a deadline to proceed and the ability to grant continuances.

Section 6, addressing the convening authority and clemency, is largely reflected by the House and Senate versions of the FY2014 NDAA (discussed above). The biggest difference being that

¹⁶⁸ *Id.* at Sec 2(a)(3)(A).

¹⁶⁹ *Id.* at §2(a)(3)(B).

¹⁷⁰ *Id.* at §2(a)(3)(C) and (D).

¹⁷¹ *Id.* at §3.

¹⁷² *Id.* at §4(a)(1). (The following officers would lose authority to convene a general court-martial: the commanding officer of an Army Group, an Army, and Army Corps, a division, a separate brigade, or a corresponding unit of the Army or Marine Corps; the commander in chief of a fleet, the commanding officer of a naval station or larger shore activity of the Navy beyond the United States; the commanding officer of an air command, an air force, or air division, or a separate wing of the Air Force or Marine Corps; and any other commanding officer designated by the Secretary concerned).

¹⁷³ *Id.* at §4(a)(2) and (b).

¹⁷⁴ *Id.* at §4(c).

¹⁷⁵ *Id.* at §5.

¹⁷⁶ 10 U.S.C. §839.

¹⁷⁷ 10 U.S.C. §840.

Section 6 prohibits the CA from dismissing any charge or specification by setting aside a finding of guilty or changing a finding of guilty to a charge to a finding of a guilty of a lesser included offense,¹⁷⁸ while the House and Senate versions restrict the CA's authority to specific offenses.

Section 7, if enacted, would require that a commanding officer, immediately upon receiving a report of a sexual-related offense involving a member of the Armed Forces in his or her chain of command, refer the report to the responsible criminal investigation office.¹⁷⁹ The proposed language does not define what constitutes a sexual-related offense, which could result, in theory, in some offenses falling through the reporting requirements.

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¹⁷⁸ S. 967 at §6(b).

¹⁷⁹ *Id.* at §7.