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To Professionalize the Military Justice System and Reduce Sexual Assault
How The SASC FY14 NDAA Falls Short
And Why The Military Justice Improvement Act Must Be Passed

The military justice system is plagued by conflict of interest, bias, and inefficiencies. Fundamental reform is needed in order for victims of sexual assault to see justice. This reform must start with removing "convening authority" (CA) from the chain of command and placing "disposition authority," the power to decide whether to go forward to trial, with trained and competent military prosecutors.

Currently, the Senate Draft 2014 National Defense Authorization Act (NDAA)[1] falls short of real reform and fails to fix a broken system. The following are key changes proposed in the Mark:

- Keep the disposition and convening authority in the chain of command, but require review for Uniform Code of Military Justice (UCMJ) Article 120 cases (rape and sexual assault) as follows:
    - If a Staff Judge Advocate recommends that charges of Article 120 *should* be referred to court-martial and the commander/convening authority decides not to refer the case, then the convening authority shall forward the case to the *Secretary of that military department* for review.
    - If a Staff Judge Advocate recommends that charges of Article 120 should *not* be referred to court-martial and the commander/convening authority decides not to refer the case, then the convening authority shall forward the case to *his superior commander* for review.
- Makes retaliation against victims of rape and sexual assault a specific crime under Article 92 (Orders Violation).
    - Requires the services to create a general order prohibiting retaliation, which "…shall include, as a minimum, taking or threatening to take any adverse personnel action, or failing to take or threatening not to take a favorable personnel action, with respect to a member of the Armed forces because the member reported a criminal offense."

Unfortunately, this provision fails to hold the military accountable and fails to protect victims for the following reasons:

- The bill does not materially address victims' distrust of the system, which deters reporting. Most commanders already discuss criminal cases with their Staff Judge Advocate (SJA) – this is nothing new. Often, the SJA works directly for the convening authority, who controls the SJA's professional evaluation.

[1] 2014 National Defense Authorization Act (NDAA), Senate Committee on Armed Services Mark, Title V, Subtitle E, Part II, Section 552.

There is little to keep the SJA from feeling pressured to recommend what the commander wants, thus retaining the bias inherent in the current system. Furthermore, SJAs handle a variety of administrative legal issues and are typically not experts in criminal law. It is common for SJAs to have little courtroom experience themselves, making them ill equipped to advise on the strength of a criminal case.

- Instead, a senior prosecutor should be assigned the duties outlined above. Replacing the SJA in this role with a senior prosecutor would reduce the bias and other deficiencies. An even better approach would be to give disposition authority to that senior, independent prosecutor.
- Although it is laudable to make retaliation a specific orders violation and thus a crime, it is unlikely to effectively protect against most forms of retaliation such as: a victim's inability to report the crime due to pressure from his or her superior, errant medical diagnosis, failure to promote, refusal of safety transfers, and inappropriate charging of collateral offenses against the victim. Many of these may be retaliatory acts committed by superiors and it would be very difficult to prove criminal intent. Also, much retaliation occurs in amorphous, hard to criminalize ways – such as being ostracized professionally and socially. In all likelihood, offenders will rarely be held accountable under the proposed law.
- This amendment does nothing to resolve the appearance of bias in the system and will not encourage victims to report. There are already laws that prevent harassment, obstruction of justice, and other behaviors that violate good order and discipline.

Real reform must address the actual problems head on – and must start by removing the convening authority from the chain of command. The Military Justice Improvement Act achieves this reform through the following changes:

- Gives disposition authority to prosecutors in pay grade O-6 or higher, who will determine whether a case goes to court-martial.
- Creates separate offices for convening authorities under the Chiefs of Staff; requires the CA to be on O6 or above who is not in either the victim's or the accused's chain of command.
- Applies to serious crimes for which the authorized sentence under the UCMJ is confinement for more than one year, including sexual assault. Leaves convening authority for military and minor crimes with the commanders.
- Requires the prosecutors to have significant experience and be entirely independent from the chain of command of the accused.
- Addresses the "good military character defense" by prohibiting the accused's character and military service from being considered when deciding whether to take a case to trial.
- Modifies the post-trial powers of convening authorities by prohibiting CAs from overturning a conviction or changing a guilty finding to a lesser-included offense.

The Military Justice Improvement Act contains substantive changes designed to fix a broken process. It calls for real reform and would bring justice for victims and legitimacy to the military justice system.

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