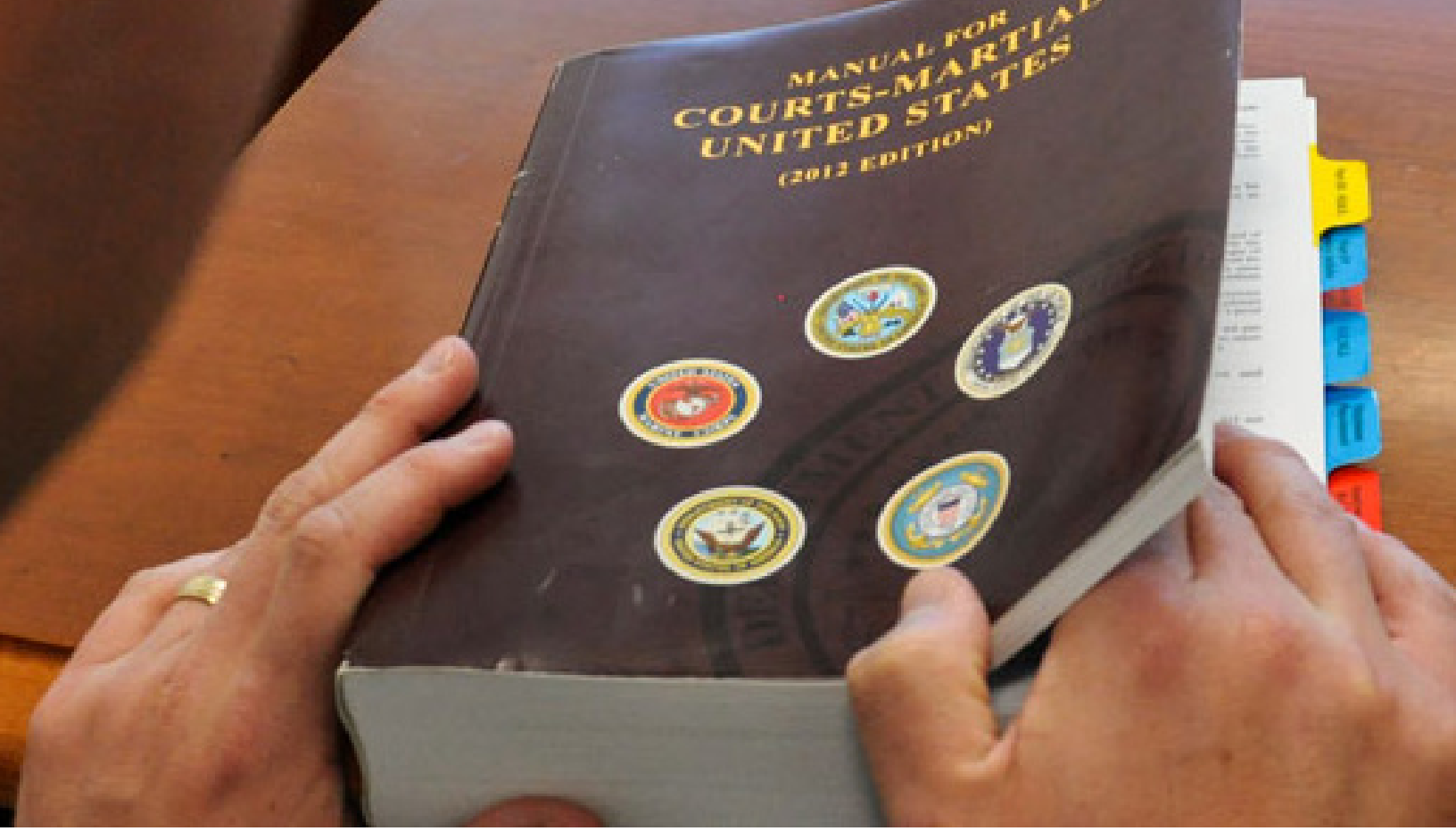

Uniform Code of Military Justice Revised, Particularly In Sex Crimes

By David Vergun

Army News Service

WASHINGTON — The National Defense Authorization Act, passed in December, requires sweeping changes to the Uniform Code of Military Justice, particularly in cases of rape and sexual assault.

"These are the most changes to the Manual for Courts-Martial that we've seen since a full committee studied it decades ago," said Lt. Col. John L. Kiel Jr., the Policy Branch chief at the Army's Criminal Law Division in the Office of the Judge Advocate General.

Key provisions of the Uniform Code of Military Justice, rewritten under the National Defense Authorization Act for fiscal year 2014 — signed Dec. 26 by President Obama — are Articles 32, 60, 120 and 125.

ARTICLE 32

NDAA14 now requires the services to have judge advocates serve as Article 32 investigating officers, or IOs. Previously, the Army was the only service where judge advocates routinely did not serve as Article 32 IOs.

Article 32 hearings are held to determine if enough evidence exists to warrant a general court-martial — the most serious type of court-martial used for felony-level offenses such as rape and murder.

Congress decided that the services needed trained lawyers — judge advocates — to consider the evidence, because in their view trained lawyers are often in the best position to make determinations to go forward with general courts-martial, Kiel said.

The reason judge advocates didn't always serve as 32 IOs in the Army was "largely because we try four times the number of cases of any of the other services," so there aren't enough judge advocates for the high volume of cases.

The Army asked Congress to consider its resourcing issue so the legislators wrote an exception, stating that "where practicable, you will have a judge advocate conduct the Article 32 investigation," he said.

Kiel explained what "where practicable" means, citing a number of circumstances where it could apply:

Many courts-martial were conducted over the years in Iraq and Afghanistan, where Soldiers were deployed. Some of those involved war crimes, he said. In these cases, the Army found it was sometimes best to have line officers serve as the Article 32 IOs because they could best put themselves in the shoes of the accused.

Those line officers "understood what it's like to make decisions in the heat of battle better than a lawyer without those experiences. They added a level of judgment that sometimes judge advocates could not."

Another example, Kiel said, might be travel fraud.

"In the case of complex TDY (temporary duty) fraud for instance, you might want to have a finance officer as the IO," he explained.

Besides subject-matter experts being in the best position to be Article 32 IOs, there might not be enough judge advocates in the area of the installation, he said. For example, there would probably be enough judge advocates in U.S. Army Forces Command to do 32 hearings, but if a number of hearings came up at once in U.S. Army Training and Doctrine Command installations, they might come up short.

That might jeopardize the right to a speedy trial if the clock runs out, he noted. And, if a judge advocate is flown in from another installation, travel costs would be incurred.

"Those are very real situations that could impact the ability to get it done expeditiously and cost effectively," Kiel explained.

Other attorneys on an installation cannot always be tapped for Article 32 IO work, he said.

On larger installations, "we have operational law attorneys who potentially could cover down on some of these areas, but we don't have a lot of those."

On other installations, administrative law attorneys might have conflicts of interest if they have previously rendered some kind of legal review on a case for example, he said.

"And, our administrative law attorneys are always busy reviewing various sorts of investigations and helping the command deal with such things as ethics and family readiness issues," he said. "Then we have our criminal law advocates, trial counsels and defense counsels. They're all conflicted out from being IOs, because they're actually tasked with presenting evidence during the 32 as they're acting as counsel to the government or to the accused."

NDAA14 gives the services one year to phase in this change to Article 32, stipulating that where practicable, judge advocates conduct the investigations.

This one-year period provides needed time to see if enough judge advocates are available to fill the requirement to cover down on all the Article 32 hearings and determine which installations are struggling to meet the requirements, he said.

Another impact to courts-martial practice is the new requirement for a special victims counsel, Kiel said.

The special victims counsel's task is to provide support and advice to the victim, he said. For example, they must inform the victim of any upcoming hearings — pre-trial confinement, parole board, clemency and so on — that he or she can choose to attend. The victim will also be notified in advance of trial dates and delays.

Furthermore, he said, the special victims counsels may represent the victims during trial.

The Rape Shield Rule or Military Rule of Evidence 412, prevents admission of evidence on sexual predisposition and behavior of victim of sexual assault.

Before NDAA14, victims of sexual assault were ordered to show up at Article 32 hearings and frequently were asked to testify.

"Congress thought that wasn't fair, since civilian victims of sexual assault didn't have to show up or testify," Kiel said. "Now, any victim of a crime who suffers pecuniary, emotional or physical harm, and is named in one of the charges as a victim, does not have to testify at the hearing."

ARTICLE 60

Like Article 32 changes, modifications to Article 60 are to be phased in over 12 months. Article 60 involves pre-trial agreements and actions by the convening authority in modifying or setting aside findings of a case or reducing sentencing.

Changes to Article 60 were influenced last year by a case involving Air Force Lt. Col. James Wilkerson, a former inspector general convicted of aggravated sexual assault, Kiel said. The convening authority, Air Force Lt. Gen. Craig Franklin, overturned the findings of guilt.

"That got Congress stirred up," Kiel said.

In NDAA14, legislators said the convening authority can no longer adjust any findings of guilt for felony offenses where the sentence is longer than six months or contains a discharge. They cannot change findings for any sex crime, regardless of sentencing time.

One way a commander can still modify a sentence is "if the trial counsel comes forward and says, 'This particular accused was very helpful in securing evidence or cooperating with the government in prosecuting someone who was accused of committing an offense under the UCMJ.' That is a trigger for the convening authority to be able to modify a sentence," Kiel said.

The other way a convening authority can modify a sentence, even those involving rape and sexual assault, is if a pre-trial agreement is in place, he said, meaning that the case could close, but the pre-trial agreement would take effect.

Congress realized that Article 60 was needed to continue the option for pre-trial agreements, he said. Had Article 60 been terminated, that "would have likely meant all courts-martial would have gone to full contest and that would have bottlenecked the entire process."

It also would have meant that victims of sexual assault would probably have to testify. "Sometimes victims supported the pre-trial agreement, supported the potential sentence and supported the fact that they didn't have to testify — when it was in their best individual interest," he said.

Other changes to courts-martial practice were made.

Congress decided that the military character of the accused should have no bearing on whether or not he or she has committed a sexual assault or other type of felony.

Also, before NDAA14, "sometimes the SJA would say, 'Take the case to a general court-martial' and the convening authority would disagree and say 'I'm not going forward.'" Now, he said, "if the convening authority disagrees, the case has to go to the secretary of the service concerned and he would have to decide whether or not to go forward."

Additionally, in the case of a rape or sexual assault where "the SJA and the convening authority say, 'don't go forward' because there's a lack of evidence or for whatever reason, that case has to go up to the next highest general court-martial convening authority and they will do an independent review," Kiel said.

So if the case occurred at the division level in the Army, and a decision were made at that level not to go forward, then the division would need to take the victim's statements, its own statements for declining the case, and forward them and the investigative file to the next level up — in this case, the corps.

At the corps level, the SJA and the corps commander would then review the file, look at the evidence and make a determination whether or not to go forward, Kiel explained.

If it's moved forward, to avoid unlawful command influence, the case would be referred at the corps level instead of sending it back down to the division, he added.

ARTICLES 120 and 125

Under Articles 120 and 125, there are mandatory minimum punishments. The minimum punishment for the Soldier convicted is dishonorable discharge for enlisted and dismissal for an officer, Kiel said.

Article 120 deals with rape and sexual assault upon adults or children and other sex crimes and Article 125 deals with forcible sodomy.

The accused must appear before a general court-martial with no opportunity to be tried at a summary or special court-martial, Kiel said.

A summary court-martial is for relatively minor misconduct and a special court-martial is for an intermediate-level offense.

Furthermore, Congress urged the services not to dispose of sexual assault cases with adverse administrative action or an Article 15, which involves non-judicial punishment usually reserved for minor disciplinary offenses, Kiel said.

Rather, Congress favors that those cases be tried at a general court-martial and has mandated that all sexual assault and rape cases be tried only by general courts-martial. Also, there's no statute of limitations on rape and sexual assault on adults and children under Article 120 cases, he said.

Congress also repealed the offense of consensual sodomy under Article 125 in keeping with previous Supreme Court precedent, Kiel said.

Congress also barred anyone who has been convicted of rape, sexual assault, incest or forcible sodomy under state or federal law, from enlisting or being commissioned into military service. ■

NCO JOURNAL
https://www.armyupress.army.mil/Journals/NCO-Journal/
https://www.facebook.com/NCOJournal
https://twitter.com/NCOJournal

NCO Journal provides a forum and publishing opportunity for NCOs, by NCOs, for the open exchange of ideas and information in support of training, education and development.
https://www.armyupress.army.mil/Journals/NCO-Journal/