



Military Sexual Assault Issues Legislative Update May 31, 2014

Congress has not yet approved legislation, the Military Justice Improvement Act, to create an independent, objective and non-biased military justice system where cases are prosecuted by specialized prosecutors outside of the chain of command. Opponents maintain that the Department of Defense (DOD) should be given time to implement the dozens of new reforms included in the FY 2014 National Defense Authorization Act (NDAA). President Obama has given DOD until December 1st to show progress.

The development of the FY 2015 NDAA is in process and more reforms are being included thanks to the extra efforts of Senators Kirsten Gillibrand (D-NY) and Claire McCaskill (D-MO) and Representatives Jackie Speier (D-CA) and Tulsi Gabbard (D-HI). This legislative update provides a list of the pending reforms. Another vote on the chain of command legislative language sponsored by Senator Gillibrand and Reps. Speier and Gabbard could come at the end of the year, if progress has not been made.

Annual Department of Defense Authorization Bills

The House of Representatives approved its FY 2015 National Defense Authorization Act (NDAA) on May 22. Sexual assault provisions include elimination of the “good soldier defense,” a consideration of general military character toward the probability of innocence in sexual assault prosecutions. Limiting the “good military character” defense to military-specific crimes makes certain that an accused rapist can no longer be found not guilty simply for being a good soldier. The bill also calls for a review of the terms of discharge for those who are victims of sexual offenses, to ensure that they have not been persecuted for reporting crimes. Victims would also be consulted as to their preference for prosecuting offenders by court-martial or through civilian channels. The bill guarantees victims the right to appeal adverse rulings regarding the psychotherapist-patient privilege and rape shield rules, which shield victims' past sexual history; and eliminates an exception to the psychotherapist-patient privilege rule, which military judges have routinely used as a loophole to justify turning over victims' confidential therapy records to their alleged rapists. The bill also requires the Department of Defense's Inspector General to review personality disorder designations that were made following an unrestricted report of sexual assault and whether all the relevant policies and procedures were followed and determine cases where service records should be adjusted. The personality disorder designation often is used as a tool to retaliate against survivors for coming forward.

The House FY 2015 NDAA bill also requires a department Secretary to include information regarding command climate with regard to allegations of sexual assault and the response to the

victim of sexual assault by other members of the command on the performance appraisal of a commanding officer.

Earlier this month, the House Armed Services Committee failed by only 4 votes (28-34) to approve a bipartisan amendment that would have given the Chief Prosecutor of each service the discretion of whether to prosecute sexual assaults, taking it out of the chain of command. It is the first time the committee has voted on the issue. The House Rules Committee refused to allow the same amendment to be considered during floor consideration of the FY 2015 NDAA. NAESV expresses our appreciation to Representatives Jackie Speier (D-CA) and Tulsi Gabbard (D-HI) for their efforts to secure a vote in the House Armed Services Committee. Rep. Gabbard is currently a Military Police Company Commander with the Hawaii Army National Guard.

The Senate Armed Services Committee approved its FY 2015 NDAA bill on May 22. The bill will next go to the full Senate for consideration. The sexual assault prevention and response provisions include requirements for each service Secretary to review decisions by convening authorities not to refer charges of certain sex-related offenses for trial by court-martial if requested by the chief prosecutor. The bill authorizes a special victims' counsel to represent the victim of a sex-related offense at any proceeding in connection with the reporting, military investigation and military prosecution of the alleged sex-related offense, and enhances victim's rights to be heard through counsel. The bill requires modification of Rule 513 of the Military Rules of Evidence to enhance the psychotherapist/patient privilege. It authorizes court-martial convening authority or military judge to order a deposition only if the party requesting the deposition demonstrates that, due to exceptional circumstances, it is in the interest of justice that such testimony be preserved for use at an Article 32 hearing or court-martial.

The Senate NDAA requires the Secretary of Defense and Attorney General to jointly develop a strategic framework for ongoing collaboration between the Department of Defense and the Department of Justice in their efforts to prevent and respond to sexual assault. It requires the service Secretaries and the Secretary of Homeland Security to ensure that sexual assault prevention and response provisions from the National Defense Authorization Act for Fiscal Year 2014 and this Act apply to the military service academies.

The bill requires Special Victims' Counsel to advise victims of sexual assault on jurisdictional options for prosecution of certain sexual offenses and requires that the victim's preference be considered; requires that all written performance appraisals assess support for sexual assault prevention and response, and performance appraisals of commanding officers address command climate; requires that the 8-day incident report of a sexual assault include review of the most recent command climate survey of the unit of the accused and of the victim; requires a confidential board for correction of military records procedure for victims of sexual assault to challenge their discharge or separation; and requires that the Military Rules of Evidence be amended to provide that the general military character of an accused is not admissible to show the probability of innocence of specified offenses.

The Senate bill authorizes the return of personal property to the rightful owner that was retained as evidence relative to an incident of sexual assault upon completion of legal and administrative

action. It requires the Secretary of Defense to establish and maintain a Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces.

The Senate FY 2015 NDAA also requires biennial surveys of civilian employees of the Department of Defense to solicit information on gender issues, including issues relating to gender-based assault, harassment, and discrimination, and the climate in the Department for forming professional relationships between male and female employees of the Department, and requires the Secretary of Defense to report on the feasibility of conducting similar surveys of military dependents and DOD contractors.

The bill authorizes the assistance of Special Victims' Counsel for a member of a reserve component who is a victim of a sex-related offense who is not otherwise entitled to legal assistance. The bill also requires the Secretary of Defense to ensure that the annual report on sexual assault in the military includes an update on DOD's progress toward developing and implementing survivor experience surveys and a report on responses received and associated lessons learned.

The committee report expresses the committee's belief that sexual violence prevention programs should use evidence-based methods that evaluate the impact of bystander prevention curricula on participant attitudes and behaviors in order to inform and strengthen ongoing prevention and response activities. The bill requires the Secretary of Defense to prescribe policies to include information from restricted sexual assault reports about alleged assailants in the sexual assault database. It requires the Secretary of Defense to report to Congress on a review of the role of the Office of Diversity Management in sexual harassment cases, and it requires that the annual report on sexual assault in the military include additional analysis of the disposition of sexual assault cases.

Many of these reforms were included in S. 1917, the Victims Protection Act sponsored by **Senators Claire McCaskill (D-MO), Kelly Ayotte (R-NH) and Deb Fischer (R-NE), which** passed as a stand-alone bill on March 10 by a vote of 97-0.

Gillibrand Military Justice Bill Stalled in Senate: On March 6, the Senate voted 55-45 on the Military Justice Improvement Act (S. 1752), but was 5 votes short of the 60 votes needed to cut off debate and overcome a filibuster, so the measure failed to move forward for a vote. This is a parliamentary procedure which defeated the bill for now, setting the stage for Senator Gillibrand to work to include other reforms in the FY 2015 NDAA bill moving forward.

National Guard Military Sexual Trauma Parity Act

In quick action resulting from the veterans' services scandal, the House of Representatives passed bipartisan legislation (H.R. 2527) sponsored by Representative Dina Titus (D-NV) to close a loophole in current law and enable victims of sexual trauma who are members of the National Guard to receive the resources and services they need, no matter when the sexual assault took place. Under current law, victims of military sexual assault who are in the National Guard can qualify for VA benefits and services, such as counseling and other forms of treatment, only if the assault occurred while on active duty. Benefits and services do not extend to victims

sexually assaulted during mandatory training missions. Members of the National Guard are required to spend one weekend a month and two weeks a year on training missions. It is yet to be seen whether or not the Senate will take action on this legislation as a stand-alone bill or include its provisions in a broader veterans health care bill.

Next Steps: Senate debate of chain of command legislation and media coverage of specific cases have generated significant attention to sexual assault. Advocates must make certain that congressional leaders continue to warn the Pentagon that commanders should be held accountable for a climate within their unit of zero tolerance and that victims of sexual assault should be treated with dignity and respect. High profile cases and the media continue to influence public opinion.