



DEPARTMENT OF DEFENSE  
OFFICE OF GENERAL COUNSEL  
1600 DEFENSE PENTAGON  
WASHINGTON, DC 20301-1600

APR 7 2005

The Honorable John W. Warner  
Chairman, Committee on Armed Services  
United States Senate  
Washington, D.C. 20510

Dear Mr. Chairman:

On behalf of the Secretary of Defense, I enclose proposed changes to the Uniform Code of Military Justice and the Manual for Courts-Martial that improve the ability of the military justice system to address sexual assault offenses and conform more closely to other Federal laws and regulations that address such issues.

The Joint Service Committee on Military Justice (JSC) initiated a review of these offenses as part of its 2004 annual review process. After Congress requested a similar review in section 571 of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, the JSC augmented its staffing, established a special subcommittee that focused on this matter, and concluded the review. The JSC report of its review is enclosed.

As a result of this process, the Department of Defense will be proposing certain improvements to the Uniform Code of Military Justice (UCMJ) and the Manual for Courts-Martial (MCM). It will specifically propose amending Articles 39, 43, 120, and 125 of the UCMJ (10 U.S.C. §§ 839, 843, 920, and 925, respectively) and establishing the new offense of "stalking," which would be codified as a new Article 93a (10 USC § 893a). The Department also will propose complementary changes to Part IV of the MCM ("Punitive Articles") that would restructure and expand upon the treatment of sexual assault and other sex-related offenses, including a reorganization and consolidation of the cognizable offenses listed in Article 134 of the UCMJ. Additionally, the Department will propose changes to the Military Rules of Evidence and the Rules for Courts-Martial. To provide a better understanding of the entirety of the Department's proposed actions in this regard, copies of the initial drafts are also enclosed.

These proposals, taken as a whole, will clarify the differing degrees of gravity for each sexual offense and the proper correlation to the applicable punishment. They also find a balance between conforming the format of the UCMJ and MCM to the format in Federal law, as envisioned by Article 36 of the UCMJ (10 U.S.C. § 836), and remaining consistent with their general format.

I am sending a similar letter to the Chairman of the House Armed Services Committee.

Sincerely,

Daniel J. Dell'Orto  
Principal Deputy General Counsel

cc: The Honorable Carl Levin  
Ranking Member

Enclosures: As Stated.





DEPARTMENT OF DEFENSE  
OFFICE OF GENERAL COUNSEL  
1600 DEFENSE PENTAGON  
WASHINGTON, DC 20301-1600

APR 7 2005

The Honorable Duncan Hunter  
Chairman, Committee on Armed Services  
U. S. House of Representatives  
Washington, D.C. 20515

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I am sending a similar letter to the Chairman of the Senate Armed Services Committee.

Sincerely,

Daniel J. Dell'Orto  
Principal Deputy General Counsel

cc: The Honorable Ike Skelton  
Ranking Member

Enclosures: As Stated.





DEPARTMENT OF THE ARMY  
OFFICE OF THE JUDGE ADVOCATE GENERAL  
1777 North Kent Street  
Rosslyn, Virginia 22209-2194

REPLY TO  
ATTENTION OF:

DAJA-CL

18 February 2005

MEMORANDUM FOR Office of the General Counsel, DoD, ATTN: Mr. Robert E. Reed,  
1600 Defense Pentagon, Room 3E999, Washington, D.C. 20301-1600

SUBJECT: Review of Sexual Assault Offenses

1. Section 571 of the Fiscal Year 2005, Ronald Reagan National Defense Authorization Act (NDAA, FY 05) requires the Secretary of Defense to conduct a review of the Uniform Code of Military Justice (UCMJ) and Manual for Courts-Martial (MCM), with the objective of determining what changes, if any, are required to improve the ability of the military justice system to address issues relating to sexual assault and to more closely conform the UCMJ and MCM to other Federal laws and regulations that address such issues. Additionally, the NDAA, FY05 requires the Secretary of Defense to report to Congress recommendations for revision to the UCMJ by 1 March 2005.
2. In March 2004, the Joint Service Committee on Military Justice (JSC) established a subcommittee, including experts in the area of military justice from all of the services and DoD, to review sexual assault offenses under the UCMJ. The subcommittee, chaired by Colonel Mark Harvey, Senior Judge, U.S. Army Court of Criminal Appeals, completed their review and forwarded their cover letter accompanied by their report to the JSC on 13 January 2005. The subcommittee concluded that they were unable to identify any sexual misconduct that cannot be prosecuted under the current UCMJ and MCM. The subcommittee did, however, consider and make recommendations on various options that they believed would improve the military justice system and more closely conform the military justice system to Federal laws and regulations.
3. After careful consideration of the subcommittee's report, the JSC submits the attached legislative (Encl 1) and draft MCM (Encl 2) proposals. The attached legislative proposal improves the military justice system and more closely conforms that system to Federal laws and regulations. The legislative proposal eliminates from Article 120, UCMJ, the government's requirement to prove as an element, the victim's lack of consent to sexual intercourse. This statutory change is consistent with the majority of U.S. state jurisdictions and the federal prosecution scheme under Title 18, U.S. Code, Sections 2241 *et al.* The elimination of "without consent" from the statute allows the government to focus on the accused and the force applied to the victim rather than the victim's manifestation of lack of consent. The draft MCM proposal recognizes varying degrees of culpability with corresponding changes in

maximum punishment based upon the amount and type of force applied. These degrees of culpability are also included in proposed changes to the MCM for prosecuting forcible sodomy under Article 125, and for prosecuting indecent assault under Article 134. Conceptually, this approach is consistent with the majority of U.S. state jurisdictions and the federal prosecution scheme under Title 18, U.S. Code, Sections 2241 *et al.* The specific revisions and rationale behind those revisions are incorporated in the legislative proposal and its sectional analyses. The MCM provisions are still in draft form and need to be reviewed and approved by the JSC. If the legislative proposal is passed, the JSC will promptly finalize the provisions. Also enclosed is the subcommittee's report with forwarding letter from the chair (Encls 3 and 4).

3. If you have any questions, please contact me at 703-588-6746.

  
MICHAEL S. CHILD  
COL, JA  
Executive Chair, Joint Service  
Committee on Military Justice

4 Encls

1. Legislative Proposal, Arts. 43, 120, 125
2. Draft of Corresponding MCM Provisions
3. Cover Letter, COL Harvey, 13 Jan 05
4. Subcommittee Report



DEPARTMENT OF THE ARMY  
U.S. Army Legal Services Agency  
901 North Stuart Street  
Arlington, Virginia 22203

January 13, 2005

REPLY TO  
ATTENTION OF:

Subcommittee Chair  
Joint Service Committee

Chair, Joint Service Committee  
1777 North Kent Street  
Rosslyn, Virginia 22209-2194

Dear Colonel Child:

As requested, the subcommittee to the Joint Service Committee on Military Justice proposed alternatives to the current sexual offenses in the Uniform Code of Military Justice (UCMJ) and *Manual for Courts-Martial (MCM)*. The subcommittee also reviewed sexual offenses under Title 18, state laws and the Model Penal Code.

The *MCM* states that the purpose of the military justice system is to promote justice, to assist commanders in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness within the military establishment, and thereby to strengthen the national security of the United States. With this purpose foremost in mind, the subcommittee members evaluated six options and discussed each option's positive and negative attributes.

The subcommittee members were unable to identify any sexual conduct (that the military has an interest in prosecuting) that cannot be prosecuted under the current UCMJ and *MCM*. Based on this determination, the subcommittee unanimously concluded that change is not required. A majority of the subcommittee believed that the rationale for significant change was outweighed by the confusion and disruption that such change would cause. Nevertheless, a majority of the subcommittee members concluded that if higher authorities direct a UCMJ and *MCM* change to substantially conform to Title 18, Option 5 is the alternative that best takes into account unique military requirements.

Sincerely,

A handwritten signature in cursive script that reads "Mark W. Harvey".

MARK W. HARVEY  
Colonel, Judge Advocate  
Subcommittee Chair