



# VETERANS AND MILITARY LAW SECTION

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## **MESSAGE FROM THE CHAIR: MOVING FORWARD**

*by Robert J. DeSousa*



The Veterans and Military Law Section is moving forward nicely! We are up to 200 members, our newsletter is regularly being put out, and we have had great articles and columns in *The Federal Lawyer*. In addition, we have sponsored several CLE's across the nation including at our Annual Convention and we are embarking on a partnership with the FBA's San Juan Chapter to put on a full-day community service-based CLE. The Veterans and Military Law Section, in conjunction with the FBA's San Juan Puerto Rico Chapter, will host a full-day of

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# Military Justice Act of 2016

*by R. Peter Masterton, Chair, Military Justice Subcommittee*

The Military Justice Act of 2016, which became law on Dec. 23, 2016, contains the most comprehensive changes to the Uniform Code of Military Justice in recent history. The changes will not take effect immediately; the Act states that they will become effective on a future date “designated by the President,” but in no event later than Jan. 1, 2019. The Act also requires the President to “prescribe regulations implementing” the changes (i.e. changes to the Manual for Courts-Martial) no later than Dec. 23, 2017. This will (hopefully) allow time for changes in the Manual to catch up to the changes in the Uniform Code of Military Justice. The Act comprised the last division of the 2017 National Defense Authorization Act, which may be found on the Internet at [www.congress.gov/bill/114th-congress/senate-bill/2943?q=%7B%22search%22%3A%5B%22national+defense+authorization+act+2017%22%5D%7D&r=](http://www.congress.gov/bill/114th-congress/senate-bill/2943?q=%7B%22search%22%3A%5B%22national+defense+authorization+act+2017%22%5D%7D&r=).

The Act contains changes to most articles in the UCMJ and adds a number of new

articles. Some of the changes are minor technical amendments; others are major changes to existing procedures and punitive articles.

The Act moves many of the offenses currently defined in the catch-all provisions of Article 134 to specific punitive articles. As a result, the “prejudice to good order and discipline/service discrediting conduct” element will be eliminated for these offenses. The Act also renumbers many (but not all) of the punitive articles.

The Act also contains a number of changes to pretrial procedure. Judges will be able to conduct proceedings prior to referral - to include issuing investigatory subpoenas. The number of members in a general court-martial (except for capital cases) will be changed to a fixed number of eight members (although this number can be reduced to six if members are excused after they are empaneled). The number of members at a special court-martial will be changed to a fixed number of four. The changes also

authorize the empaneling of alternate members. The convening authority will be able to refer a case to a judge-alone special court-martial; the maximum punishment at this new forum will be limited to six months confinement and no discharge and a military magistrate can preside, with the consent of the parties. The accused will be able to ask for the judge to conduct sentencing proceedings, even if the accused elected trial by members. The percentage required for conviction and sentencing in non-capital cases will be increased to three quarters. Records of trial will be authenticated by court reporters, not the judge. In addition, the government will have the ability to appeal the sentence if it “violates the law” or is “plainly unreasonable.”

The changes include some, but not all of the changes recommended by the Military Justice Review Group. They bring the military justice system into closer conformity with civilian criminal justice systems in the United States. ●

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*CHAIR continued from page 1*

veteran related CLE’s on April 27 in beautiful San Juan, Puerto Rico. We’ve negotiated some great prices at local hotels, we have great speakers, and this is an opportunity for section members to get together around our common goals, be educated, and for an extremely reasonable price, and get to visit an island paradise! I hope you’ll consider taking a few days and coming

to San Juan for our first ever major endeavor! Puerto Rico is one of the few places you can fly to from the United States, especially the eastern seaboard, relatively inexpensively, stay at a great hotel, be guaranteed wonderful weather, and have a great time. I am personally looking forward to seeing as many of you as possible in San Juan. More details to follow. As always, thank

you for all of your contributions to our rising membership! ●

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**Robert J. DeSousa**

*Past National President, Chair of Veterans and Military Law Section of the Federal Bar Association*  
*PLEASE JOIN the Veteran’s and Military Law Section at: [www.fedbar.org/Veterans](http://www.fedbar.org/Veterans)*

# Military Pension Division: The Frozen Benefit Rule

by Mark E. Sullivan

## The New Pension Division Rule

The National Defense Authorization Act for Fiscal Year 2017 (NDAA 17) contained a major revision of how military pension division orders are written and will operate. Instead of allowing the states to decide how to divide military retired pay, Congress imposed a single uniform method of pension division on all the states, a fictional scenario in which the military member retires on the day that the Judgment of Divorce is entered. Effective December 23, 2016, the new rule up-ends the law regarding military pension division in almost every state.

The new rule applies to those still serving (active-duty, National Guard or Reserves). It is a “rewrite” of the terms for military pension division found in the Uniformed Services Former Spouses’ Protection Act, or USFSPA. From now on, what’s divided will be the hypothetical retired pay attributable to the rank and years of service of the military member at the time of the divorce. The only adjustment will be cost-of-living adjustments that occur under 10 U.S.C. § 1401a (b) between the date of divorce and the time of retirement. There are no exceptions for the parties’ agreement to vary from the new federal rule.

## How Hard Is This, Anyway?

“Frozen benefit division,” is also known as a *hypothetical clause* at the retired pay centers. It is the most difficult to draft of the pension division clauses available. Due to the difficulty of doing such orders, more expenses will be involved in the military divorce case and a whole new team of experts will pop up to help ordinary divorce attorneys comprehend and implement the new frozen benefit rule. Without the right help and the proper wording, rivers of rejection letters will start flowing back to attorneys who submit their pension orders to the retired pay center in the hope of approval. Since the new frozen benefit rule

was written by Congress, which knows next to nothing about the division of property and pensions in divorce, there will be problems galore in applying it in the courts of most states.

## Past Efforts, Future Promotions

Most courts already give consideration to how the efforts of the SM and the spouse during the marriage should be apportioned in regard to future promotions. The *time rule* is based on the “marital foundation theory,” which recognizes that the individual’s final retired pay is based on a foundation of marital effort; a servicemember would never have attained the rank of sergeant major (with 30 years of service) if it hadn’t been for the efforts expended during the marriage up to the rank of sergeant first class over 20 years, when the parties divorced. That’s one reason why a large majority of states have adopted the time rule for dividing every type of pension – it provides the fairest approach to division of this asset, whether the pension is state or federal, private or public. And it accounts for the postponement of the benefit (i.e., the spouse’s inability to obtain immediate payments in most states) by allowing for the growth in the pension over time.

That approach goes out the window under this new NDAA 17 rule. The share of the former spouse (FS) is *artificially fixed*, frozen like a fly in amber. And then the payments are put off (postponed until the SM chooses to put in for retirement). So a second shrinkage is imposed on the pension share of the FS.

## Breathing Room and Time to Adjust

How much time is allowed for states to revise their laws to accommodate this new rule? None. There is no “breathing room” for the states, no decent interval set out to allow the majority of the states to write up, propose and enact laws consistent with the “new rule.” Counsel for the FS will

need to alert the court to this problem and show that a warped formula will occur if the denominator of the marital fraction is not revised, to avoid imposition of a *double discount* on the FS.

Here’s how the double discount works: First of all, the benefit to be divided with the FS is frozen at the rank and years of service at the time of the divorce. In addition, since state laws have not been rewritten to revise the “marital fraction,” the fraction will still be calculated in 90% of the states based on years of marital pension service divided by total pension service years (marital service years ÷ total service years), rather than years of marital pension service years divided by service years *up to the date of divorce*. An example of this is illustrated in a 2014 Texas case, *Douglas v. Douglas*,<sup>1</sup> which held that the denominator in a “hypothetical clause” is the months of creditable service during marriage *up to the date of divorce*, rather than the date of retirement. The Texas Court of Appeals stated that accepting the husband’s proposition that the denominator should be total years of service would impermissibly dilute the ex-wife’s share acquired during the parties’ marriage.

The new law is effective and binding on the states immediately upon enactment (i.e., 12/23/2016). Although the method of dividing pensions, as well as the date of valuation and classification of marital or community property, has always been a matter of state law, that will change in the military case. Since no time has been allowed for state legislatures to adjust to the change and rewrite state laws, lawyers will need to make adjustments “on the fly” to deal with military pension division cases which are presently on the docket or which come to trial before the state legislature can act.

[Parts 2 and 3 of this article will cover the strategies for the former spouse and

servicemember under the new pension division rule.]

## Resources

A complete guide to problems and pitfalls stemming from the “Frozen Benefit Rule” is in the [Silent Partner](#) infoletter, “Fixing the Frozen Benefit Rule.” How to write acceptable military pension clauses may be found at the [Silent Partner](#), “Guidance for Lawyers: Military Pension Division.” For the necessary terms for the MPDO, see the [Silent Partner](#), “Getting Military Pension Orders Honored by the

Retired Pay Center”; this guide includes the necessary elements and language for a proper hypothetical clause. All these infoletters are located at [www.nclamp.gov](http://www.nclamp.gov) > For Lawyers, the website of the N.C. State Bar’s military committee. ●

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## Endnotes

<sup>1</sup>Douglas v. Douglas, 2014 Tex. App. LEXIS 12398, citing Berry v. Berry, 647 S.W.2d 945, 946-47 (Tex. 1983). See also Dziamko v. Chuhaj, 193 Md. App. 98, 996 A.2d 893, 903 (2010) (explanation of results from denominator of marital fraction which ends upon divorce vs. one which ends upon retirement).

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# New Military Transgender Policy

*by R. Peter Masterton, Chair, Military Justice Subcommittee*

On June 30, 2016, Secretary of Defense Ash Carter announced a new policy for the service of transgender personnel in the Armed Forces. Among other things, the policy stated that “[o]therwise qualified Service members can no longer be involuntarily separated, discharged, or denied reenlistment or continuation of service just for being transgender.” This article will briefly describe the new policy. More detailed information can be found on the Department of Defense Internet site at [www.defense.gov/News/Special-Reports/0616\\_transgender-policy](http://www.defense.gov/News/Special-Reports/0616_transgender-policy).

Under the new policy a “transgender person” is one whose internal sense of being male or female (gender identity) is different from the sex they were assigned at birth. The new policy differentiates between “sex” (one’s identity as male or female, based on anatomy) and “gender” (the socially defined roles and characteristics of being male or female). The policy recognizes that some people’s gender identity does not match the sex they were born with. This may lead to “gender dysphoria” – a medical diagnosis referring to distress some transgender individuals experience as a result of this mismatch.

The policy permits open service by

transgender persons in the military. It also states that all service members, including those who are transgender, are entitled to equal opportunity in an environment free from sexual harassment and unlawful discrimination. The policy prohibits discrimination on the basis of gender identity.

The new policy allows service members to transition to the opposite gender while still serving in the military. Under the policy, gender transition begins when service members receive a diagnosis from a military medical provider indicating their gender transition is medically necessary. The medical transition plan may include sex-change surgery, cross-sex hormone therapy, mental health treatment and real-life experience when the individuals commence living socially in the gender role consistent with their preferred gender. The transition is complete when the service members are stable in their new preferred gender. At the conclusion of the transition the service members’ gender marker will be changed in their official record in the Defense Enrollment Eligibility Reporting System (DEERS). Since the medical transition plan does not have to include sex-change surgery, transgender service members who

have completed gender transition may still have the anatomy associated with their original sex.

Once transgender service members have completed gender transition and their gender marker has been changed, they will be treated in accordance with the new gender marker. This means the service members must meet the uniform, grooming and physical training standards of their new gender. It also means they will use the latrine, showers and quarters assigned to the new gender.

The policy recognizes that the open service of transgender service members can lead to challenges. For example, male service members who transition to become females without sex-change surgery may be assigned to use female open-bay showers even though they still have male anatomy. The implementing guidelines encourage commanders to use their discretion to ensure that all of service members are treated fairly. In the example above, commanders could install individual shower stalls or curtains or adjust the timing of showers to ensure the privacy of everyone in their unit.

All service members are required to be trained on the new policy by July 1, 2017. ●

# Military Justice Update: Executive Order 13740 of Sept. 16, 2016

by Adam M. Hill, Member, Military Justice Subcommittee

In September 2016, President Obama signed Executive Order (EO) 13740 that made significant and long-awaited changes in the Manual for Courts-Martial, the central repository of most military criminal and procedural rules. The Manual for Courts Martial was created and is amended by the President of the United States by executive order. Often, these amendments are made in response to Congressional changes in the Uniform Code of Military Justice (UCMJ), the basic military criminal code. EO 13740 was signed by President Barack Obama on Sept. 16, 2016 and published in the Federal Register on Sept. 22, 2016. This article will highlight some of the significant changes to the MCM found in the new EO. The changes to the EO originate from multiple sources, to include amendments to the UCMJ contained in the Fiscal Year 2011, 2012, 2014, and 2015 National Defense Authorization Acts (NDAAs).

The EO is the second to address military justice in 2016: the first was Executive Order 13730 signed on May 20, 2016. EO 13730 also made significant changes to the MCM. For example, it amended the corroboration requirement for admissibility of an admission or confession by the accused by changing the focus from the truth of the statement to only its trustworthiness. EO 13730 also expanded the circumstances where an out-of-court prior consistent statement of a witness is not hearsay, including “to rehabilitate the declarant’s credibility as a witness when attacked on another ground.” Mil. R. Evid. 801(d) (1)(B)(ii) (2016). Another change made objections for failure to state an offense a waivable ground for dismissal. The previous rule allowed a charge or specification to be dismissed at any stage of the proceeding if it failed to state an offense. R.C.M. 907(b)(1) (B) (2015). EO 13730 required motions to dismiss defective specifications to be made prior to adjournment of the court-martial;

otherwise the issue is waived. R.C.M. 907(b)(2)(E) (2016).

Executive Order 13740, signed on September 16, has several noteworthy substantive changes. The EO changed Rule for Court Martial (R.C.M.) 307(c)(3) and Part IV, Para. 60 to require Article 134 specifications to expressly allege a terminal element (prejudice to good order and discipline or service discrediting conduct). This change eliminates the ability of the government to “fairly imply” the terminal element in the language describing the underlying misconduct, as discussed in the case of *United States v. Goings*, 72 M.J. 202 (C.A.A.F. 2013) (court found that the Appellant was not prejudiced by the Government’s failure to explicitly allege a terminal element of the charged Article 134 offense of indecent acts).

EO 13740 also changes R.C.M. 701(e) and 703(a), by requiring defense counsel to request any interview with an alleged victim of a sex-related offense through the victim’s counsel. Under the new rules, the defense counsel must conduct interviews with certain people present, to include government counsel, counsel for the victim, or a victim advocate. These important changes implement section 1704 of the NDAA for Fiscal Year (FY) 2014, as amended by section 531 of the FY15 NDAA. Section 1704 of the NDAA created a new statutory limitation on the right of a military accused or his counsel to interview a certain type of witness. The new rule changes decades of precedent by military courts striking down restrictions on access to witnesses by the defense. (See the article by Colonel Nelson Van Eck “Defense Service and the Pressures of Increased Accountability in the Army National Guard, Fall 2016 FBA Veteran’s and Military Law Section Newsletter for further discussion).

EO 13740 changes Part IV of the MCM, paragraphs 43.c.(5)(b) and 44.b.(2)(d),

by eliminating consensual sodomy as an Article 125 offense. This follows Section 1707 of the NDAA for FY15, repealing the offense of consensual sodomy. It also is consistent with the opinion of *United States v. Hartman*, 69 M.J. 467, (C.A.A.F. 2011), where the court set aside the appellant’s plea of guilty to consensual sodomy in violation of Article 125 because the court’s inquiry did not adequately establish why the conduct was criminal in light of liberty interests identified in *Lawrence v. Texas*, 539 U.S. 558, and *United States v. Marcum*, 60 M.J. 198 (C.A.A.F. 2004).

EO 13740 changed Part IV of the MCM, paragraphs 45, 45(b), and 45(c) by providing elements and explanations for Articles 120 (the military rape and sexual assault statute), 120(b) (defining rape and sexual assault of a child) and 120(c) (defining other sexual misconduct, to include indecent viewing, recording or broadcasting, forcible pandering and indecent exposure). EO 13740 includes a number of additions that will be important to the military justice practitioner, to include sample specifications for these offenses. EO 13740 also codifies the mandatory minimum sentence of dismissal or dishonorable discharge for rape and sexual assault and rape and sexual assault of a child.

EO 13740 amends Part IV of the MCM, paragraph 90 by establishing a new offense of indecent conduct. This offense proscribes conduct that was previously prohibited by the offense of indecent acts with another, which was eliminated from the MCM by a previous executive order in 2007. However, unlike the earlier offense of indecent acts with another, the new offense does not require that the conduct occur in the presence of “another.”

EO 13740 states that any nonjudicial punishment proceeding, restraint, preliminary hearing, referral of charges, trial in which arraignment occurred, or other

action commenced prior to the signing of the EO shall not be invalidated by the new rules, and, if still in progress, may proceed as if the new rules had not yet come into effect. *See also United States v. Nicholas*, 6 C.M.R. 27 (C.M.A. 1952). The September 22, 2016 Military Justice Branch Practice Advisory issued by Headquarters Marine Corps states that if a “discrete military justice event began before EO 13740 was signed, the

rules that applied to the event when it began continue to apply until the event concludes. Therefore, if an accused was arraigned before 16 September 2016, the new rules would not take effect for that trial.”

On Nov. 8, 2016, the Joint Service Committee on Military Justice (JSC) published supplementary materials accompanying the MCM as amended by Executive Orders 13643, 13669, 13730, and 13740.

Although these materials do not constitute an official position of the Department of Defense, they are a helpful compilation of all of the changes to military justice implemented by recent executive orders. These materials can be found on the Federal Register website at [www.federalregister.gov/documents/2016/11/08/2016-26947/manual-for-courts-martial-publication-of-supplementary-materials](http://www.federalregister.gov/documents/2016/11/08/2016-26947/manual-for-courts-martial-publication-of-supplementary-materials).●

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## Re: FEDERAL BAR ASSOCIATION, Veterans and Military Law Section

*January 11, 2017*

Dear VMLS Member:

On behalf of the VMLS Membership Committee we are seeking your help to build our membership. Increasing our membership improves the opportunity for professional growth and to network with lawyers who share a common interest in veterans and military law.

As part of our 2017 membership drive we are asking our members to identify another attorney who you believe may benefit from becoming a member of our section. Once identified to the Membership Committee we will send an invitation and instructions on how to join our ranks.

If you have any questions please contact Membership Committee members Raymond Bily at [Rbilyesq@aol.com](mailto:Rbilyesq@aol.com) or, Alan Goldsmith at [aeg4451@aol.com](mailto:aeg4451@aol.com).

Thank you for your help in making our section grow.

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The views expressed herein do not necessarily represent those of the FBA. Send all articles or other contributions to Raymond J. Toney at [rjtoncy@militarylawpro.com](mailto:rjtoncy@militarylawpro.com). Yanissa Pérez de León, managing editor.

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