

MILITARY LAW REVIEW

Volume 231

Issue 1

TRANSFORMING MILITARY JUSTICE: THE 2022 AND 2023 NATIONAL DEFENSE AUTHORIZATION ACTS

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I. Introduction

For the past decade there have been numerous and significant changes to the Uniform Code of Military Justice (UCMJ), the statutory basis for the military justice system.¹

Although the Military Justice Act of 2016 made major changes to the UCMJ,² the calls for change continued. One of the most-often heard calls for reform over the last decade has suggested removing commanders from the military justice system.³ Some have argued that a command-centric military justice system was outdated, and it was time to make the system

¹ Congress made a number of significant changes to the UCMJ in the National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, 110 Stat. 186 (1996), the National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, 126 Stat. 1631 (2013), the National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, 127 Stat. 672 (2013), and the Carl Levin and Howard P. “Buck” McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, 128 Stat. 3292 (2014). Congress also made sweeping changes to the UCMJ in the 2016 Military Justice Act, Pub. L. No. 114-328, sec. 5001, 130 Stat. 2000, 2894. Congress made additional amendments to the UCMJ in the National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, 131 Stat. 1283 and in the John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, 132 Stat. 1636 (2018). Congress made further changes in the National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, 133 Stat. 1198 (2019), and in the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, 134 Stat. 3388.

² See, e.g., sec. 5542, 130 Stat. at 2935; see generally David Schlueter, *Reforming Military Justice: An Analysis of the Military Justice Act of 2016*, 49 ST. MARY’S L.J. 1 (2017) (discussing 2016 changes to the UCMJ).

³ For example, in 2013, Senator Kirsten Gillibrand sponsored the Military Justice Improvement Act (MJIA), which proposed that commanders would no longer have jurisdiction over specified offenses and the commander’s power to grant post-trial clemency would be limited. Military Justice Improvement Act of 2013, S. 1752, 113th Cong. (2014). That proposal failed in the Senate by a close vote, despite bipartisan support. See *Actions Overview: S.1752—113th Congress (2013-2014)*, CONGRESS.GOV, <https://www.congress.gov/bill/113th-congress/senate-bill/1752/actions> (last visited Aug. 9, 2023). For another example of a modern call to decrease the commander’s role in the military justice system, see Eugene Fidell, *What Is to Be Done? Herewith a Proposed Ansell-Hodson Military Justice Reform Act of 2014*, GLOB. MIL. J. REFORM (May 13, 2014), <http://globalmjreform.blogspot.com/2014/05/what-is-to-be-done-herewith-proposed.html> (proposing “Ansell-Hodson Military Justice Reform Act of 2014”).

look more like the federal criminal procedure system.⁴ Other critics have advocated for a military justice system that looks more like those of our allied nations.⁵

In large part, those calls for reform were driven by the seemingly intractable problem of sexual assaults in the military.⁶ While there were other proposed changes to the UCMJ, calls for reducing the role of the commander took the lead.⁷

On 27 December 2021, the President signed the National Defense Authorization Act for Fiscal Year 2022 (2022 NDAA).⁸ The 2022 NDAA effected a number of significant changes to the UCMJ. In October 2022, the Department of Defense (DoD) published proposed changes to the Manual for Courts-Martial (MCM), which are intended to implement

⁴ See, e.g., Heidi L. Brady, *Justice Is No Longer Blind: How the Effort to Eradicate Sexual Assault in the Military Unbalanced the Military Justice System*, 2016 UNIV. ILL. L. REV. 193 (2016) (proposing use of independent prosecutors); Major Elizabeth Murphy, *The Military Justice Divide: Why Only Crimes and Lawyers Belong in the Court-Martial Process*, 220 MIL. L. REV. 129 (2014) (proposing that military lawyers have prosecutorial discretion over disposition of offenses); Letter from Heidi Boghosian, Exec. Dir., Nat'l Laws. Guild, to Mr. Paul S. Koffsky, Deputy Gen. Coun., Dep't of Def. (June 30, 2014) (recommending that prosecutorial discretion be placed in hands of independent prosecutors).

⁵ See, e.g., Lindsay Nicole Alleman, *Who Is in Charge, and Who Should Be? The Disciplinary Role of the Commander in Military Justice Systems*, 16 DUKE J. COMP. & INT'L L. 169 (2006) (comparing the American military system with those of Canada and Israel); Eugene Fidell, *A World-Wide Perspective on Change in Military Justice*, 48 A.F. L. REV. 195 (2000) (noting that other countries are changing how military cases are prosecuted and that American military justice pays little attention to those developments); Edward F. Sherman, *Military Justice Without Military Control*, 82 YALE L.J. 1398, 1400 (1973) (noting that other countries' approaches are "especially relevant").

⁶ Meghann Myers, *The Military's Sexual Assault Problem Is Only Getting Worse*, MIL. TIMES (Sept. 1, 2022), <https://www.militarytimes.com/news/your-military/2022/09/01/the-militarys-sexual-assault-problem-is-only-getting-worse>.

⁷ Jennifer Steinhauer, *Deal to Change How Military Handles Sexual Assault Cases*, N.Y. TIMES, Dec. 8, 2021, at A15.

⁸ National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, 135 Stat. 1541 (2021) (effective Dec. 2023). Though the effective date of the National Defense Authorization Act for Fiscal Year 2022 (2022 NDAA) is December 2023, some provisions became effective earlier and others become effective on later dates. See, e.g., *id.* sec. 539E(e).

those required changes to the UCMJ.⁹ A few months later, in the James M. Inhofe National Defense Authorization Act for Fiscal Year 2023 (2023 NDAA), Congress enacted additional changes to the UCMJ, which will further impact the changes brought by the 2022 NDAA.¹⁰ On 28 July 2023, the President signed Executive Order 14103, which amends the MCM.¹¹ While some of those amendments are effective immediately, some of them become effective on the same date as the 2022 NDAA, December 2023.¹² This article addresses those changes and suggests that certain issues, not addressed in the 2022 NDAA, will continue to present challenges to those charged with administering military justice procedures.¹³

Part II addresses the changes made to the role of the commander, which in effect create a bifurcated system of military justice. In the 2022 NDAA, Congress created the Office of Special Trial Counsel which will have, *inter alia*, the exclusive authority to refer certain “covered offense[s],” as well as other “[k]nown and related offenses... alleged to have been committed by a person alleged to have committed the covered offense”¹⁴ to court-martial. All other offenses will continue to be processed in the manner in which they have been handled since the adoption of the UCMJ in 1950.

Part III addresses the second major area of reform, the sentencing portion of courts-martial. Congress adopted a proposal in the 2022 NDAA that military judges conduct the sentencing in all courts-martial.¹⁵ In

⁹ U.S. Dep’t of Def., Annex to Manual for Courts-Martial; Proposed Amendments, 87 Fed. Reg. 63484 (Oct. 13, 2022), https://jsc.defense.gov/Portals/99/Annex%20to%20the%20draft%20E_O_.pdf.

¹⁰ See James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, Pub. L. No. 117-263, sec. 541, 136 Stat. 2395, 2579 (2022).

¹¹ Exec. Order No. 14103, 88 Fed. Reg. 50535 (July 28, 2023).

¹² See *id.*

¹³ For example, although the 2022 NDAA creates the position of special trial counsel, who will have exclusive authority in several areas of military justice, the Act does not change the role of the commander in a significant number of other areas (topics that we discuss below).

¹⁴ National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, sec. 531(a), § 824a(c)(2)(B), 135 Stat. 1541, 1692 (2021) (effective Dec. 2023).

¹⁵ See *id.*, sec. 539E(a)(1), 135 Stat. 1541, 1700 (2021). Previously a Service member could “elect sentencing by [panel] members.” MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1002(b) (2019) [hereinafter MCM].

addition, Congress mandated that the President adopt sentencing parameters and criteria.¹⁶

Part IV focuses on the provisions of the 2022 NDAA that expand victims' rights in the military justice system.

Part V addresses changes that the 2022 NDAA made to the punitive articles of the UCMJ.

In Part VI we address three changes that were made in the 2023 NDAA: requiring random selection of court members, expanding of the jurisdiction of the Service Courts of Criminal Appeals, and ensuring that the convening authority is not identified in the opening session of the court-martial.

Finally, in Part VII we offer some thoughts and recommendations on the potential impact of the 2022 and 2023 NDAAs on the American military justice system.

II. Reducing the Role of the Commander

A. An Overview of the Commander's Role in the Current System

Before discussing the 2022 NDAA changes to the military justice system, it is important to briefly review the current system of investigating and prosecuting Service members. Under the current system of military justice, commanders in an accused's chain of command¹⁷ have very broad

¹⁶ See sec. 539E(e), 135 Stat. at 1700. In 2015, the Military Justice Review Group recommended "draw[ing] upon practice and experience in the civilian sector, including under the U.S. Sentencing Guidelines," so any similarity to the Federal system may not be coincidental. MIL. JUST. REV. GRP., REPORT OF THE MILITARY JUSTICE REVIEW GROUP PART I: UCMJ RECOMMENDATIONS 511 (2015) [hereinafter MJRG REPORT].

¹⁷ It is important to note, as discussed below, reducing the commander's role in processing court-martial charges will impact multiple commanders in the accused's chain of command who are currently involved in processing court-martial charges. For example, the immediate commander would prefer charges, but other commanders are involved in disposition for a case such as the summary court-martial convening authority (e.g., battalion commander), the special court-martial convening authority (e.g., brigade commander), and general court-martial convening authority (e.g., division commander) who all have important roles in the disposition process. So, in passing the 2022 and 2023

discretion in deciding how to dispose of alleged misconduct by Service members. Upon learning of a potential offense, unit commanders have the responsibility to ensure investigations into potential charges are conducted.¹⁸

If the commander¹⁹ determines that a UCMJ violation has occurred, they have several disposition options, some of which may be used concurrently or consecutively. First, they may decide that counseling the Service member or issuing a reprimand is sufficient.²⁰ Second, the commander may decide to begin administrative proceedings to discharge the Service member.²¹ Third, the commander may decide to impose nonjudicial punishment (NJP).²² Under this third option, which is intended to be used for “minor” offenses,²³ the commander decides whether the Service member is guilty and, if so, adjudges the punishment. Finally, the commander may decide to formally prefer charges against the Service member.²⁴

If charges are preferred, they are forwarded up the chain of command for recommendations and action. If the command believes that the charges are serious enough to warrant a general court-martial, roughly the equivalent to a civilian felony trial, the commander orders that an Article 32 preliminary hearing be held.²⁵ At that hearing, the accused is entitled

NDAAs, Congress, in effect, has removed multiple commanders from the military justice system for covered offenses.

¹⁸ See generally MCM, *supra* note 15, R.C.M. 303 (providing that immediate commanders “make or cause to be made a preliminary inquiry”). Also, the Discussion to R.C.M. 303 acknowledges that law enforcement agencies will conduct investigations in serious or complex cases, including sexual assaults. See *id.* R.C.M. 303 discussion.

¹⁹ Since 2012, “commander” has had a specific meaning when addressing those offenses that will be within the special trial counsel’s purview. Memorandum from Sec’y of Def. to Sec’ies of Mil. Dep’ts, subject: Withholding Initial Disposition Authority Under the Uniform Code of Military Justice in Certain Sexual Assault Cases (20 Apr. 2012); MCM, *supra* note 15, R.C.M. 306 (2019) (elevating disposition authority of cases including allegations of rape, sexual assault, and forcible sodomy or attempting to commit those offenses to special court-martial convening authorities, very senior leaders).

²⁰ See 1 DAVID A. SCHLUETER, MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE § 1-8(B), at 56 (10th ed. 2018).

²¹ See *id.*

²² See UCMJ art. 15 (2012) (setting out procedures for nonjudicial punishment).

²³ *Id.* art. 15(b).

²⁴ See UCMJ art. 30 (2016).

²⁵ See UCMJ art. 32 (2021).

to be present, to have the assistance of counsel, and to cross-examine witnesses that are produced to testify, if any.²⁶

Then, in the case of a general court-martial, the convening authority reviews the report of the Article 32 hearing officer and pretrial advice from the staff judge advocate,²⁷ and if the convening authority believes that the charges warrant a court-martial, convenes a court-martial,²⁸ selects the members,²⁹ and refers the charges to that court-martial for a trial.³⁰

During the pretrial processing of the case, and even after the charges are referred to a court-martial, commanders are involved in decisions concerning pretrial confinement,³¹ grants of immunity to witnesses,³² and disposition of the charges.³³ After the court-martial renders a verdict and sentence, the convening authority has some power to review and modify the findings and sentence of the court-martial, depending on the severity and nature of the charges that result in convictions.³⁴

Throughout this process, uniformed judge advocates are heavily engaged. Uniformed lawyers do much more than provide legal advice to the commanders. Although the practice among the Services may vary, judge advocates shepherd the criminal investigation, advise the criminal investigators on whether to title the Service member, draw up the charge sheet, represent the command at the Article 32 hearing, and prosecute the accused Service member at the court-martial.³⁵

²⁶ *Id.* arts. 32(f)(1)-(3).

²⁷ UCMJ art. 34 (2021); MCM, *supra* note 15, R.C.M. 406.

²⁸ *See* UCMJ art. 22 (2021).

²⁹ *See* UCMJ art. 25 (2016).

³⁰ *See* UCMJ art. 33 (2016).

³¹ *See* UCMJ art. 9 (1956).

³² MCM, *supra* note 15, R.C.M. 704.

³³ *Id.* R.C.M. ch. IV at II-35.

³⁴ *Id.* R.C.M. 1109, 1110.

³⁵ *See, e.g.*, U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE (20 Nov. 2020) (directing uniformed judge advocates to perform various duties).

B. The Relentless Drumbeat for Removing the Commander from the American Military Justice System

Since the founding of the country, the American military justice system has relied on commanders.³⁶ As noted in the preceding discussion, the system has been command-centric. Commanders at all levels are an integral part of preferring, processing, and referring charges to courts-martial.³⁷ In 1950, when Congress adopted the UCMJ, uniformed judge advocates became an important part of the system, but commanders—for the most part—have retained the final authority over many aspects of the military justice system. For example, until the last decade, the convening authority, the commander who referred court-martial charges, had the power to take a wide range of post-trial actions on both the findings and sentence of the court-martial.³⁸

Starting in 2010, Congress began slowly diminishing the role of commanders.³⁹ By transferring more authority to military judges and uniformed attorneys, the military justice system has taken on the look of a

³⁶ See generally 1 SCHLUETER, *supra* note 20, § 1-8 (discussing the current system of military justice, which relies heavily on commanders for pretrial processing of a court-martial).

³⁷ See generally David Schlueter & Lisa Schenck, *Taking Charge of Court-Martial Charges: The Important Role of the Commander in the Military Justice System*, 14 N.Y.U. J.L. & LIBERTY 529 (2020) (addressing commanders' important roles in the military justice system).

³⁸ See 1 SCHLUETER, *supra* note 20, § 17-7 (discussing role of convening authority in post-trial review of court-martial).

³⁹ See National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, sec. 566, 123 Stat. 2189, 2313 (2009) (directing a determination of whether DoD's standing sexual assault prevention policies and implementation plans are adequate to adjudicate violations under the UCMJ); see also National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, sec. 576(d)(1)(G), 126 Stat. 1632, 1760 (directing an assessment of "proposed legislative initiatives to modify the current role of commanders in administration of military justice and adjudication of . . . sexual assault crimes"); see also National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, sec. 1731(a)(1)(A), 127 Stat. 672, 973 (2013) (directing an assessment of "the impact . . . that removing from the chain of commander any disposition authority regarding charges preferred under . . . the [UCMJ] would have on . . . prosecution of sexual assault cases.").

lawyer-centric system that could be described as a civilianization of military justice.⁴⁰

Some argued that the frequency of sexual assault in the military must be tied to the uniqueness of the command-centric decision-making authority within the military justice system, insinuating that commanders were not taking the problem seriously.⁴¹

Some believed that uniformed judge advocates, not commanders, should be responsible for preferring and referring charges to a court-martial.⁴² Still others have suggested that the trial of Service members should be the responsibility of civilian prosecutors⁴³ or perhaps an independent military command.⁴⁴

In response to this chorus of reformers, in the 2022 NDAA, Congress addressed the commander's role in the military justice system.

C. The Compromise: The Pentagon, the Senate, and the House of Representatives Weigh In

The final provisions in the 2022 NDAA, which ultimately reduced the commander's role in the military justice system, were a compromise

⁴⁰ See generally Walter Cox, *The Army, the Courts, and the Evolution of Military Justice*, 118 MIL. L. REV. 1, 28-30 (1987); Delmar Karlen, *Civilianization of Military Justice: Good or Bad*, 60 MIL. L. REV. 113 (1973); Fredric I. Lederer, *From Rome to the Military Justice Acts of 2016 and Beyond: Continuing Civilianization of the Military Criminal Legal System*, 225 MIL. L. REV. 512 (2017).

⁴¹ See, e.g., *The Military Services' Prevention of and Response to Sexual Assault: Hearing Before the Subcomm. on Pers. of the Comm. on Armed Servs.*, 116th Cong. (2019) (statement of Sen. Kirsten Gillibrand) (stating that "one of the main causes of [continued sexual assaults in the armed forces] is that despite many good leaders, far too many commanders do not make it a priority to address the problem of sexual assault in the military in a meaningful way"). But see Jordan Stapley & Geoffrey Corn, *Military Justice Reform: The 'Be Careful What You Ask For' Act*, MIL. TIMES (June 2, 2021), <https://www.militarytimes.com/opinion/commentary/2021/06/02/military-justice-reform-the-be-careful-what-you-ask-for-act> (arguing that shifting authority away from commanders is "more symbolic than necessary").

⁴² See, e.g., *supra* note 4.

⁴³ See generally *supra* note 5.

⁴⁴ See *supra* note 3.

between proposals from the DoD, the Senate, and the House of Representatives.⁴⁵

While it does not appear that the DoD formally presented documented, proposed legislation, its views were reflected in the recommendations from the Independent Review Commission on Sexual Assault (IRC) (established by Secretary of Defense Austin) issued in May 2021.⁴⁶ That Commission recommended, *inter alia*, the establishment of the Office of the Special Victim Prosecutor in the Office of the Secretary of Defense (OSD).⁴⁷ That office would decide whether to prosecute certain offenses, including sexual assault, sexual harassment, and certain hate crimes.⁴⁸

The House and Senate approaches, both of which seemed to be attempts to implement the recommendations of the Independent Review Commission, were similar, but they included more offenses that would fall under the discretion of a special military prosecutor.⁴⁹ The House proposed delimiting the commander's prosecutorial authority for thirteen offenses, and two Senate proposals would have covered eight and thirty-eight offenses, respectively.⁵⁰

The compromise among the various proposals resulted in the creation of the Office of Special Trial Counsel, a new position for a uniformed judge advocate. The special trial counsel will be entrusted with prosecutorial discretion over fourteen of the most serious offenses, and three inchoate offenses, under the UCMJ.⁵¹ Additionally, special trial

⁴⁵ See ALAN OTT & KRISTY N. KARMARK, CONG. RSCH. SERV., R46940, MILITARY JUSTICE DISPOSITION DELIMITATION LEGISLATION IN THE 117TH CONGRESS (2021).

⁴⁶ See *generally* IND. REV. COMM'N ON SEXUAL ASSAULT IN THE MIL., HARD TRUTHS AND THE DUTY TO CHANGE: RECOMMENDATIONS FROM THE INDEPENDENT REVIEW COMMISSION ON SEXUAL ASSAULT IN THE MILITARY (2021) [hereinafter IRC HARD TRUTHS 2021] (issuing more than eighty recommendations to address sexual assault accountability and prevention).

⁴⁷ See *id.*

⁴⁸ See *id.*

⁴⁹ See OTT & KARMARK, *supra* note 45.

⁵⁰ See *id.*

⁵¹ See National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, sec. 531(a), § 824a(c)(2)(B), 135 Stat. 1541, 1692 (2021) (effective Dec. 2023); *infra* notes 57-58 and accompanying text.

counsel will take on those related offenses that may be joined with those charges at trial.⁵²

D. Creation of the Special Trial Counsel

Section 531 of the 2022 NDAA creates the Office of Special Trial Counsel by directing the addition of Article 24a to the UCMJ.⁵³ In summary, that new article provides that each military Service Secretary will promulgate regulations assigning commissioned judge advocates, uniformed lawyers, to serve as special trial counsel.⁵⁴ The lead special trial counsel must be in the grade of at least O-7,⁵⁵ with military justice experience.⁵⁶

The special trial counsel will have exclusive authority to refer court-martial charges for “covered offenses.”⁵⁷ The covered offenses include: Article 117a (Wrongful Broadcast or Distribution of Intimate Visual Images); Article 118 (Murder); Article 119 (Manslaughter); Article 120 (Rape and Sexual Assault Generally); Article 120b (Rape and Sexual Assault of a Child); Article 120c (Other Sexual Misconduct); Article 125 (Kidnapping); Article 128b (Domestic Violence); Article 130 (Stalking); Article 132 (Retaliation); Article 134 (Child Pornography); Article 80 (Attempt to commit one of the foregoing offenses); Article 81 (Conspiracy to commit one of the foregoing offenses); and Article 82 (Solicitation to commit one of the foregoing offenses).⁵⁸

⁵² Sec. 531(a), § 824a(c)(2)(B), 135 Stat. at 1692.

⁵³ *Id.* sec. 531, 135 Stat. 1541, 1692 (2021).

⁵⁴ *Id.* sec. 531(a).

⁵⁵ *Id.* sec. 531(a), § 824a(b)(2).

⁵⁶ *Id.* sec. 531(a), § 824a(b)(1)(B) (specifying that the special trial counsel shall be “qualified, by reason of education, training, experience, and temperament”). Later within the statutory scheme, Congress directs that in order to be appointment as the lead special trial counsel, an officer must have “significant experience in military justice.” *Id.* sec. 532(a), § 1044f(a)(2)(A). The Act does not further address or define what is meant by the term “significant experience in military justice.”

⁵⁷ *Id.* sec. 531(a), § 824a(c)(2)(A).

⁵⁸ *Id.* sec. 533(2), § 801(17) (amending UCMJ art. 1 by listing covered offenses).

In the 2023 National Defense Appropriations Act,⁵⁹ Congress added the following offenses to the list of covered offenses that will fall within the Office of the Special Trial Counsel's prosecutorial discretion: Article 119a (Death or injury of an unborn child);⁶⁰ Article 120a (Mails: deposit of obscene matter);⁶¹ and Article 134 (Sexual harassment) (effective at the later date of 1 January 2025).⁶²

The special trial counsel's decision to refer charges and specifications to a court-martial is binding on the convening authority.⁶³ In addition, where the covered offenses are concerned, the special trial counsel has the exclusive authority to withdraw or dismiss the charges,⁶⁴ enter into plea agreements with an accused,⁶⁵ and determine whether a rehearing would be impracticable.⁶⁶ This process stands in stark contrast to the previous system in which only designated commanding officers were authorized to convene courts-martial. These convening authorities then maintained the sole power to refer charges, thereby convening the court-martial,⁶⁷ and further maintained the sole power to enter into plea agreements with an accused Service member, although the court acted to bind the parties upon acceptance of the plea.⁶⁸

If the special trial counsel decides not to prefer or refer charges for a covered offense, the commander or convening authority may exercise any of the other options that remain available to that officer under the UCMJ, except referral of charges for a covered offense to a special or general court-martial.⁶⁹

⁵⁹ James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, Pub. L. No. 117-263, sec. 541(a)(1), 136 Stat. 2395, 2579-80 (2022).

⁶⁰ *Id.* sec. 541(a)(1), § 801(17)(A) (adding UCMJ art. 119a as a covered offense).

⁶¹ *Id.* sec. 541(a)(1), § 801(17)(A) (adding UCMJ art. 120a as a covered offense).

⁶² *Id.* sec. 541(b)(1)(B), § 801(17)(A) (adding sexual harassment as a covered offense under UCMJ art. 134).

⁶³ National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, sec. 531(c)(4), 135 Stat. 1541, 1692 (2021).

⁶⁴ *Id.* sec. 531(a), § 824a(c)(3)(A).

⁶⁵ *Id.* sec. 531(a), § 824a(c)(3)(C).

⁶⁶ *Id.* sec. 531(a), § 824a(c)(3)(D).

⁶⁷ *See generally* UCMJ arts. 22, 23 (2019).

⁶⁸ UCMJ art. 53a(d) (2019). *See* Section II.E(6) *infra*.

⁶⁹ Sec. 531(a), § 824a(c)(5), 135 Stat. at 1692.

Pursuant to 2022 NDAA Section 532, the Service Secretaries must establish policies for the Office of Special Trial Counsel. Those policies must address oversight functions, responsibilities, experience level of those assigned to work for special trial counsels, insulation from unlawful command influence, and victim input. In short, the 2022 NDAA directs a deliberate, Service-specific process through explicit direction to establish an office which will supervise and oversee the special trial counsel.⁷⁰ The lead special trial counsel will be responsible for the special trial counsel in that Service and will report directly to the Secretary of the Service concerned, “without intervening authority.”⁷¹ This is an apparent intent to insure that the special trial counsel are not responsible to the established chain of command for uniformed lawyers. The special trial counsel, and other personnel assigned to that office, are to be “independent of the military chains of command of both the victims and those accused.”⁷² The special trial counsel must be experienced, well-trained, and competent to handle cases involving the covered offenses.⁷³ Cases are to be free from “unlawful or unauthorized influence or coercion.”⁷⁴ Commanders of the victim and the accused will have the ability to provide nonbinding input to the special trial counsel regarding the disposition of covered offenses.⁷⁵ Finally, the policies must reflect that any lack of uniformity will not make any such “policy, mechanism, or procedure” unconstitutional, although there appears to be no express provision requiring uniformity among the Services.⁷⁶

The 2022 NDAA also provides that beginning on 25 June 2022, the Secretary of Defense and the Secretaries of the military departments must report to the House and Senate Armed Services Committees on actions taken and the progress of the Service Offices of Special Trial Counsel in meeting the “milestones” established by the act.⁷⁷

⁷⁰ *Id.* sec. 532(a), § 1044f(a)(1), 135 Stat. at 1694.

⁷¹ *Id.* sec. 532(a), §§ 1044f(a)(2)(B)-(C).

⁷² *Id.* sec. 532(a), § 1044f(a)(3)(A).

⁷³ *Id.* sec. 532(a), § 1044f(a)(4).

⁷⁴ *Id.* sec. 532(a), § 1044f(a)(3)(B).

⁷⁵ *Id.* sec. 532(a), § 1044f(a)(5).

⁷⁶ *Id.* sec. 532(a), § 1044f(b).

⁷⁷ *See id.* sec. 532(c); *see also* JUDGE ADVOC. GEN., U.S. AIR FORCE, DEPARTMENT OF THE AIR FORCE REPORT ON THE STATE OF MILITARY JUSTICE FOR FISCAL YEAR 2022, at 1 (2022); OFF. OF JUDGE ADVOC. GEN., U.S. ARMY, U.S. ARMY REPORT ON MILITARY JUSTICE FOR

E. Creating a Bifurcated System for Courts-Martial

As previously discussed, commanders traditionally have been an integral part of the military justice system.⁷⁸ Even though the role of uniformed judge advocates has expanded over the decades, the commander has remained a key player in ensuring allegations are properly investigated and in processing court-martial charges. This section addresses the commander's role and how the 2022 NDAA diminishes it. The following discussion explains how the 2022 NDAA creates a bifurcated military justice system—one for covered offenses and one for all other offenses.

1. Pretrial Investigations

In most cases, the disposition of court-martial charges begins with an investigation or inquiry into the allegations, which in turn involves coordination with law enforcement personnel.⁷⁹ Commanders are involved in authorizing search and seizures.⁸⁰ The 2022 NDAA does not directly impact this procedure, but the indication that the special trial counsel will have “exclusive” authority over specified aspects of processing court-martial charges suggests that this power may now reside with the special trial counsel.⁸¹ But the 2022 NDAA is silent on the question of whether the special trial counsel will be involved in investigating the charges.

The 2022 changes to the MCM do not expressly address the role of the commander in the pretrial investigation stage, but the 2023 NDAA provides that when the special trial counsel becomes responsible for a case

FISCAL YEAR 2022, at 15 (2022); U.S. DEP'T OF HOMELAND SEC., U.S. COAST GUARD, MILITARY JUSTICE IN THE COAST GUARD (FY 2022): REPORT TO CONGRESS 4 (2022); U.S. DEP'T OF NAVY, U.S. MARINE CORPS, JUDGE ADVOC. DIV., U.S. MARINE CORPS REPORT ON MILITARY JUSTICE FOR FISCAL YEAR 2022, at 1-2 (2022); OFF. OF JUDGE ADVOC. GEN., U.S. NAVY, U.S. NAVY REPORT ON MILITARY JUSTICE FOR FISCAL YEAR 2022, at 1 (2022).

⁷⁸ See *supra* Part II.A.

⁷⁹ See generally 1 SCHLUETER, *supra* note 20, § 5-1 (discussing commander's investigation into alleged offenses).

⁸⁰ MCM, *supra* note 15, M.R.E. 315(d)(1).

⁸¹ National Defense Authorization Act for Fiscal Year 2022 sec. 531(a), § 824a(c)(2)(A) (“A special trial counsel shall have exclusive authority to determine if a reported offense is a covered offense and shall exercise authority over any such offense.”).

due to the inclusion of at least one covered offense alleged, the “residual prosecutorial duties and other judicial functions”⁸² of the commander will transfer to the special trial counsel, to military judges, or other authorities; the 2023 NDAA specifies that the President is charged with effecting that transfer of power in the MCM.⁸³ The 2023 NDAA states that these changes will be effective in December 2023.⁸⁴

Given the provisions in the 2023 NDAA, the commander’s role in investigating possible charges for any of the covered offenses may change depending on how each Service defines and implements policies regarding the relationship between special trial counsel and the immediate commander.

2. Placing an Accused in Pretrial Confinement

Currently, the decision to maintain an accused in pretrial confinement rests with the accused’s commander for the first seventy-two hours.⁸⁵ That decision always involves consultation with a uniformed lawyer, usually the counsel who will be responsible for prosecuting the case. After an accused is placed in pretrial confinement, the Rules for Courts-Martial (RCM) set out procedural protections for the accused, which include review by a “neutral and detached officer,” (usually a judge advocate sitting as a magistrate) of the decision to continue pretrial confinement after seven days.⁸⁶

The 2022 NDAA is silent on the issue of the potential role of the special trial counsel in a commander’s decision to confine an accused. But the 2023 amendments to the MCM indicate that if the accused is alleged to have committed one of the covered offenses, the commander who

⁸² James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, Pub. L. No. 117-263, sec. 541(c), 136 Stat. 2395, 2580 (2022). The language following this phrase suggests that “residual” in this context means tasks that the 2022 NDAA did not explicitly reassign from the commander to the special trial counsel and others. But this remains an undefined term that may include a non-exhaustive list of what one may consider “residual” during the law-making process. For ease of reference, this article identifies Section 541 as “the 2023 Residual Duties Provision.”

⁸³ *Id.*

⁸⁴ *See id.*

⁸⁵ *See* MCM, *supra* note 15, R.C.M. 305(h)(2)(A).

⁸⁶ MCM, *supra* note 15, R.C.M. 305.

placed the accused in pretrial confinement must notify the special trial counsel, as provided in regulations set out by the Service Secretary.⁸⁷

The role of the commander in deciding whether to place an accused in pretrial confinement may change because of provisions in the 2023 NDAA. Again, because the 2023 Residual Duties Provision⁸⁸ specified that the President is charged with establishing regulations for effecting the transfer of the commander's residual powers,⁸⁹ one could argue that pretrial confinement decisions should be considered residual. Thus, the commander's role in deciding whether to place an accused in pretrial confinement may change if at least one covered offense is alleged to have occurred, and the new regulations place the decision regarding pretrial confinement exclusively in the hands of the special trial counsel. If the decision-making authority regarding pretrial confinement shifts to the special trial counsel, judge advocates may find themselves attempting to persuade senior uniformed attorneys rather than commanders. If no covered offenses are involved, then the role of the commander will remain the same.

3. Initial Disposition and Preferring Court-Martial Charges Against an Accused

Another area not specifically addressed in the 2022 NDAA is the question of the commander's precise role in the disposing of alleged offenses. As discussed above, the commander generally has broad discretion in disposing of allegations of misconduct.⁹⁰ A commander, for example, may decide to take no action, issue a reprimand, take steps to administratively discharge a Service member, impose NJP, or prefer criminal charges.⁹¹ Although the MCM provides that anyone subject to the UCMJ can prefer court-martial charges,⁹² traditionally the accused's

⁸⁷ Exec. Order No. 14103, annex 2, § 2(m), 88 Fed. Reg. 50535, 50608 (July 28, 2023) (amending R.C.M. 305).

⁸⁸ James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, Pub. L. No. 117-263, sec. 541(c), 136 Stat. 2395, 2580 (2022).

⁸⁹ *Id.*

⁹⁰ See 1 SCHLUETER, *supra* note 20, § 1-8 et seq. (listing various disciplinary options available to military commanders).

⁹¹ MCM, *supra* note 15, R.C.M. 306.

⁹² See UCMJ art. 1(9) (2021); see also MCM, *supra* note 15, R.C.M. 307.

immediate commander signs the charge sheet as the accuser to prefer the charges;⁹³ then, the same immediate commander forwards those charges with a recommendation as to disposition to the next level commander in the chain of command.⁹⁴

In the 2023 amendments to the MCM, the new RCM 306A, which addresses covered offenses, states that the special trial counsel must “[p]refer, or cause to be preferred” a court-martial charge or “[d]efer the offense by electing not to prefer a charge.”⁹⁵ If the special trial counsel defers prosecution, they must “promptly forward the offense to a commander or convening authority for disposition.”⁹⁶ In addition, the new RCM 401A states only a special trial counsel may dispose or defer charges alleging a violation of a covered offense, regardless of who preferred a specification.⁹⁷ This procedure, however, limits the convening authority’s ability to take follow-on actions due to the fact that they may not refer a deferred charge to a special or general court-martial.⁹⁸

In addition to tasks such as granting immunity, the 2023 Residual Duties Provision⁹⁹ may impact preferral of charges, although it is not included within the non-exhaustive list.¹⁰⁰ At least one lawmaker’s main concern was that commanders were not preferring charges when they should have done so;¹⁰¹ in response, Congress reduced the commander’s role in sexual assault cases by enacting the directive in Section 541 of the 2023 NDAA.¹⁰² This will result in a requirement that for covered offenses,

⁹³ The process of preferral is analogous to civilian prosecutors filing charges against an individual by complaint or information. It signals the beginning of potential criminal liability followed by a grand jury’s review.

⁹⁴ See 1 SCHLUETER, *supra* note 20, § 6-1 et. seq. (discussing the preferring of charges and processing of those charges by the chain of command).

⁹⁵ Exec. Order No. 14103, annex 2, § 2(r) 88 Fed. Reg. 50535, 50618 (July 28, 2023) (R.C.M. 306A(a)(1)-(2)).

⁹⁶ *Id.* (R.C.M. 306A(a)(2)).

⁹⁷ *Id.* annex 2, § 2(z), 88 Fed. Reg. at 50623 (R.C.M. 401A(a)).

⁹⁸ *See id.*

⁹⁹ James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, Pub. L. No. 117-263, sec. 541(c), 136 Stat. 2395, 2580 (2022).

¹⁰⁰ *See id.*

¹⁰¹ See *Examining the Role of the Commander in Sexual Assault Prosecutions: Hearing Before the Subcomm. on Mil. Pers. of the H. Armed Servs. Comm.*, 116th Cong. (2019) (statement of Rep. Jackie Speier, Chairwoman, Mil. Pers. Subcomm., H. Armed Servs. Comm.) (stating that commanders prefer charges less than military lawyers would).

¹⁰² *See* sec. 541, 136 Stat. at 2579.

the decision to prefer court-martial charges will rest exclusively in the special trial counsel.¹⁰³

The question remains as to what extent Congress intended to strip the commander's powers to impose administrative measures for covered offenses. If a covered offense is deferred, the commander can decide to impose NJP in accordance with Article 15, UCMJ; however, the commander will have no authority to refer the case to a special or general court-martial. This may cause an issue if the accused refuses the NJP, as is their right.¹⁰⁴

4. Ordering an Article 32 Preliminary Hearing

In the current system of military justice, if the chain of command believes that the preferred court-martial charges warrant a general court-martial, an Article 32 preliminary hearing officer must be appointed to hold a hearing on the charges and determine if there is probable cause to believe that the accused committed the charged offenses.¹⁰⁵ The special court-martial convening authority typically appoints that hearing officer. Once the hearing officer completes their review, they submit a written report to the special court-martial convening authority, who in turn forwards the case to the next-level commander in the chain of command, the general court-martial convening authority, who ultimately decides whether to refer the court-martial charges to a general court-martial.

Though the 2022 NDAA did not change the form or substance of an Article 32 preliminary hearing, it did change the procedure for appointing the preliminary hearing officer. For any offense committed on or after 27 December 2023, the special court-martial convening authority will continue to detail the preliminary hearing officer. If the preferred charges are for a covered offense over which a special trial counsel has authority,

¹⁰³ See IRC HARD TRUTHS 2021, *supra* note 46, at 14.

¹⁰⁴ An exception to this rule exists for Service members at sea. UCMJ art. 15(a) (2016) (“However, *except in the case of a member attached to or embarked in a vessel*, punishment may not be imposed upon any member of the armed forces under this article if the member has, before the imposition of such punishment, demanded trial by court-martial in lieu of such punishment.”) (emphasis added).

¹⁰⁵ UCMJ art. 32 (2021); *see also* 1 SCHLUETER, *supra* note 20, ch. 7 (discussing and analyzing features of an Article 32 preliminary hearing).

the special trial counsel must request that the convening authority detail a hearing officer.¹⁰⁶ The report of the preliminary hearing officer will be provided to the convening authority or to the special trial counsel, if the special trial counsel requested the detail of the hearing officer.¹⁰⁷ Generally, other than adding the ability for the special trial counsel to request a hearing officer and review the report, the Article 32 process remains largely the same.

5. *Entering into a Plea Agreement with an Accused*

Currently, the accused and the convening authority may engage in plea bargaining.¹⁰⁸ The parties may reach an agreement about dismissing one or more charges or sentencing limitations.¹⁰⁹ In accordance with the 2022 NDAA, the special trial counsel will now have exclusive authority to enter into plea agreements with an accused regarding covered offenses.¹¹⁰ Any such agreement made by the special trial counsel will be binding on the convening authority and other military commanders.¹¹¹

The amendments to RCM 705 generally track the statutory language concerning the special trial counsel's exclusive powers to enter into a plea agreement with an accused who is charged with a covered offense; the new language in RCM 705(a) adds: "[H]owever, any such agreement may bind convening authorities and other commanders subject to such limitations as prescribed by the Secretary concerned."¹¹² This language was seemingly added to emphasize that plea agreements between the special trial counsel

¹⁰⁶ Exec. Order No. 14103, annex 2, § 2(ff), 88 Fed. Reg. 50535, 50627 (July 28, 2023) (R.C.M. 405(c)(2)).

¹⁰⁷ *Id.* annex 2, § 2(ff), 22 Fed. Reg. at 50643 (R.C.M. 405(m)(1)).

¹⁰⁸ MCM, *supra* note 15, R.C.M. 705.

¹⁰⁹ *See* MCM, *supra* note 15, R.C.M. 705(b)(2)(C).

¹¹⁰ National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, sec. 531(a), § 824a(c)(3)(C), 135 Stat. 1541, 1693 (2021). This new procedure for covered offenses will generally mirror plea bargaining in civilian criminal justice systems, where the defendant and the prosecutor engage in plea bargaining. *See generally How Courts Work: Steps in a Trial*, AM. BAR ASS'N (Nov. 28, 2021), https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/pl_eabargaining.

¹¹¹ Exec. Order No. 14103, annex 2, § 2(eee) 88 Fed. Reg. 50535, 50668 (July 28, 2023) (R.C.M. 705(a)).

¹¹² *Id.*

and the accused are binding on the convening authority and the plea agreement can include non-covered offenses.

If an accused is not charged with a covered offense, then the current system of permitting the convening authority and accused to enter into a plea agreement will continue.

6. Pretrial Discovery, Grants of Immunity, and Requests for Funding Experts

Under the current system, convening authorities possess certain powers that govern pretrial discovery and grants of immunity to witnesses. For example, the convening authority or a military judge may order a deposition,¹¹³ act on requests for expert witnesses or consultants,¹¹⁴ and grant immunity.¹¹⁵

The 2022 NDAA did not make any changes to those powers, but, the 2023 Residual Duties Provision did. The provision lists the commander's powers to grant immunity, hire experts, and order depositions as examples of those residual powers.¹¹⁶ As noted above, the 2023 NDAA specifies that the President is charged with effecting that transfer of power through regulations.¹¹⁷ Accordingly, the 2023 amendments to the MCM provide that, regarding grants of immunity, in cases where a special trial counsel is exercising authority over the charges, the special trial counsel, or that counsel's designee, is authorized to grant immunity to witnesses.¹¹⁸ In addition, the 2023 amendments also transfer the convening authority's

¹¹³ MCM, *supra* note 15, R.C.M. 702(b).

¹¹⁴ MCM, *supra* note 15, R.C.M. 703(d) (requiring a convening authority to decide whether to fund such requests upon application from both the Government and defense, as well as requiring a military judge to review any denials). It is worth noting that many civilian jurisdictions process requests to fund experts through the courts focusing, primarily, on the indigency of the accused. *See e.g.*, U.S. DEP'T OF JUST., JUSTICE MANUAL § 3-8.520 (2018).

¹¹⁵ MCM, *supra* note 15, R.C.M. 704(c).

¹¹⁶ James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, Pub. L. No. 117-263, sec. 541(c), 136 Stat. 2395, 2580 (2022).

¹¹⁷ *Id.*

¹¹⁸ Exec. Order No. 14103, annex 2, § 2(bbb), 88 Fed. Reg. 50535, 50665 (July 28, 2023) (R.C.M. 704(c)(2)).

power to authorize a pre-referral deposition to the military judge;¹¹⁹ the same is true for authorizing the funding of expert assistance for the defense.¹²⁰ The 2023 Act states that these changes will be effective in December 2023.¹²¹

7. Convening a Special or General Court-Martial

Currently, a general or special court-martial convening authority is authorized to convene a court-martial.¹²² Convening a court-martial is the act of issuing a convening order, which creates the court-martial and assigns personnel to serve as members of the court-martial—the rough equivalent of jurors in a civilian criminal trial.¹²³ Convening authorities personally select the members,¹²⁴ an element of the commander’s authority that has been somewhat controversial. The 2022 NDAA made no changes to the process of convening a court-martial, but, as discussed in more detail in section VI.A of this work, the 2023 NDAA did make changes to the process of selecting the members to sit on the court-martial. Section 543 of the 2023 NDAA adds a new subdivision (4) at the end of Article 25, which provides:

When convening a court-martial, the convening authority shall detail as members thereof members of the armed forces under such regulations as the President may prescribe for the randomized selection of qualified personnel, to the maximum extent practicable.¹²⁵

The effective date of this change to Article 25—which seemingly applies to all courts-martial, not just those for the covered offenses—is 23

¹¹⁹ Exec. Order No. 14103, annex 2, § 2(x), 88 Fed. Reg. 50535, 50622 (July 28, 2023) (R.C.M. 309(b)(10)). An amendment to R.C.M. 702(b) states that in cases involving a special trial counsel, “only a military judge may order a deposition,” whether before or after referral of charges. *Id.* annex 2, § 2(xx), 88 Fed. Reg. at 50659 (R.C.M. 702(b)(2)).

¹²⁰ *Id.* annex 2, § 2(zz), 88 Fed. Reg. at 50660 (R.C.M. 703(d)(2)).

¹²¹ *See* sec. 541(c), 136 Stat. at 2580.

¹²² MCM, *supra* note 15, R.C.M. 504(a).

¹²³ *See id.* R.C.M. 504(d).

¹²⁴ *See* UCMJ art. 25(e) (2016).

¹²⁵ James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, Pub. L. No. 117-263, sec. 543(a), § 825(e)(4), 136 Stat. 2395, 2582 (2022). *See infra* Section VI.A.

December 2024, two years after the 2023 NDAA was signed.¹²⁶ Revised RCM 911, included in the 2023 MCM amendments, now requires the military judge or a designee to randomly assign numbers to panel members appointed by the convening authority and subsequently determine how many members must be present; those members must be present “according to the randomly assigned order,”¹²⁷ a practice that was previously required in accordance with the 2019 MCM.¹²⁸

8. Referring Charges to a Court-Martial

Under the current system, a convening authority refers charges to a specific court-martial, after receiving written legal advice from the staff judge advocate, as to whether there is probable cause to believe that offenses were committed, that the accused committed the charged offenses, and that the court-martial would have jurisdiction over the offenses.¹²⁹

Under the 2022 NDAA, if any of the charges include at least one covered offense, then the special trial counsel has exclusive authority to refer those charges and charges for other known or related offenses to either a special or general court-martial.¹³⁰ In the 2023 MCM amendments, RCM 601(d)(1)(B) provides that the special trial counsel is responsible for making a written determination regarding probable cause to believe that offenses were committed, that the accused committed them, and that the court-martial has jurisdiction to try the accused for those offenses.¹³¹

¹²⁶ *See id.* sec. 543(b).

¹²⁷ Exec. Order No. 14103, annex 2, § 2(jjjj) 88 Fed. Reg. 50535, 50684 (July 28, 2023) (R.C.M. 911(b)).

¹²⁸ *See* MCM, *supra* note 15, R.C.M. 912(f)(5).

¹²⁹ UCMJ arts. 34(a)(1)(A)-(C) (2021); *see also* MCM, *supra* note 15, R.C.M. 601(d)(1)(B).

¹³⁰ National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, sec. 531(a), § 824a(c)(3)(B), 135 Stat. 1541, 1692-93 (2021).

¹³¹ Exec. Order No. 14103, annex 2, § 2(ss), 88 Fed. Reg. 50535, 50652 (July 28, 2023) (R.C.M. 601(d)(1)(B)).

Moreover, either the convening authority or the special trial counsel can refer the charges to a court-martial by a personal order.¹³² In either case, a convening authority will select the members for the court-martial.

9. Post-Trial Review of a Court-Martial

Under the current system, following a conviction by a court-martial, Article 60a and RCM 1109 limit the convening authority's ability to act on the findings of guilt and the sentence.¹³³ If:

(1) [t]he court-martial found the accused guilty of—(A) [a]n offense for which the maximum authorized sentence to confinement is more than two years, without considering the jurisdictional maximum of the court; (B) a violation of Article 120(a) or (b); (C) a violation of Article 120b; or (D) a violation of such other offense as the Secretary of Defense has specified by regulation; or

(2) [t]he sentence of the court-martial includes—(A) [a] bad-conduct discharge, dishonorable discharge, or dismissal; (B) [a] term of confinement, or terms of confinement running consecutively, more than six months; or (C) [d]eath[,]

. . . [then] the convening authority may not set aside, disapprove, or take any other actions on the findings of that court-martial.¹³⁴

If the results of the court-martial do not involve any of those findings or sentences, the convening authority may take any of the following post-trial actions: “[c]hange a finding of guilty to a charge or specification . . . [of] a lesser included offense,”¹³⁵ “set aside any finding of guilty and . . .

¹³² *See id.*, 88 Fed. Reg. at 50654 (R.C.M. 601(c)).

¹³³ *See* UCMJ art. 60a (2016); MCM, *supra* note 15, R.C.M. 1109.

¹³⁴ MCM, *supra* note 15, R.C.M. 1109(a)-(b); *see* UCMJ, art. 60a (2016).

¹³⁵ MCM, *supra* note 15, R.C.M. 1110(b)(1); *see* UCMJ, art. 60b(a) (2019).

[d]ismiss the specification and, if appropriate, the charge,”¹³⁶ or “[o]rder a rehearing.”¹³⁷

It is important to note that Congress did not make changes to Article 60a in either the 2022 NDAA or the 2023 NDAA, and there are no proposed amendments to the post-trial RCM. Thus, the convening authority’s post-trial powers, for both covered and non-covered offenses, will remain the same.

III. Transforming Sentencing Procedures

The 2022 NDAA significantly changes sentencing procedures in the military. The first major change requires that in all non-capital special and general courts-martial, the military judge will impose the sentence.¹³⁸ The second major change requires the establishment of sentencing parameters and sentencing criteria, which will be used in imposing a sentence on a convicted accused.¹³⁹

A. The Military Judge’s Role in Sentencing

For decades, commentators and others have recommended that the military adopt the sentencing procedures used in Federal courts—with the judge imposing the sentence, applying Federal Sentencing Guidelines.¹⁴⁰

¹³⁶ *Id.* R.C.M. 1110(b)(2)(A); *see* UCMJ, art. 60b(a) (2019).

¹³⁷ *Id.* R.C.M. 1110(b)(2)(B); *see* UCMJ, art. 60b(a) (2019).

¹³⁸ National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, sec. 539E(a)(1), § 853(b)(1), 135 Stat. 1541, 1700 (2021). Compare this to MCM, *supra* note 15, R.C.M. 1002(b) (2019), which permits an accused Service member to choose between the panel and the judge to assign a sentence.

¹³⁹ *See* sec. 539E(e), 135 Stat. at 1700.

¹⁴⁰ *See, e.g.*, MJRG REPORT, *supra* note 16, at 475-76; Colin A. Kisor, *The Need for Sentencing Reform in Military Courts-Martial*, 58 NAVAL L. REV. 39 (2009); James Kevin Lovejoy, *Abolition of Court Member Sentencing in the Military*, 142 MIL. L. REV. 1 (1993); Captain Megan N. Schmid, *This Court-Martial Hereby (Arbitrarily) Sentences You: Problems with Court Member Sentencing in the Military and Proposed Solutions*, 67 A.F. L. REV. 245, 267-68 (2011). The Military Justice Review Group recommended that the military should align more closely to Federal civilian practice, and, according to the Military Justice Review Group, this would also:

Prior to the 2016 Military Justice Act, the accused could not request trial by members and sentencing by the military judge. If court-martial panel members tried the accused, they would then adjudge the sentence against them. This limitation on sentencing proved controversial because, in most civilian jurisdictions, jurors decide on the defendant's guilt, but the judge determines the sentence.¹⁴¹ The Military Justice Act of 2016 provided military accused with the option to request trial by members and sentencing by the military judge (except in capital cases).¹⁴²

In the 2022 NDAA, Congress made an even more extensive change to military sentencing procedures, adopting an approach similar to Federal sentencing. Specifically, Section 539E provides that if an accused is convicted of non-capital offenses in a general or special court-martial (without regard to whether any of the offenses are considered "covered offenses" discussed above) the military judge will impose the sentence and that sentence is "the sentence of the court-martial."¹⁴³ In capital cases, members must decide (1) whether the sentence for the offense will be "death or life in prison without the eligibility for parole;" or (2) "the matter should be returned to the military judge for a determination of a lesser punishment."¹⁴⁴ The military judge must then sentence the accused in

conform military sentencing standards to the practice in the vast majority of state courts, as reflected in the ABA Standards for Criminal Justice in Sentencing, which state: "Imposition of sentences is a judicial function to be performed by sentencing courts. The function of sentencing courts is to impose a sentence upon each offender that is appropriate to the offense and the offender. The jury's role in a criminal trial should not extend to determination of the appropriate sentence."

MJRG REPORT, *supra* note 16, at 475. According to the Group's report, requiring judge-alone sentencing would allow for other reforms in the sentencing process, such as expansion of evidence and information provided to the sentencing authority to adjudge an appropriate sentence, increased transparency in the sentencing process, use of victim-impact statements as in civilian courts, and expansion of R.C.M. 1002 to implement "sentencing guidance," promoting greater consistency. *Id.* at 476.

¹⁴¹ See MJRG REPORT, *supra* note 16, at 475.

¹⁴² See UCMJ arts. 53(b), 53(c)(1) (2021); see also Military Justice Act of 2016, Pub. L. No. 114-328, sec. 5236, 130 Stat. 2000, 2916; see generally David A. Schlueter, *Reforming Military Justice: An Analysis of the Military Justice Act of 2016*, 49 ST. MARY'S L.J. 1 (2017) (discussing 2016 changes to the UCMJ).

¹⁴³ National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, sec. 539E(a)(1), § 853(b)(1), 135 Stat. 1541, 1700 (2021).

¹⁴⁴ *Id.* sec. 539E(a)(2), §§ 853(c)(1)(A)(i)-(ii).

accordance with the court members' determination.¹⁴⁵ Essentially, the 2022 NDAA removes any discretion that an accused had under the 2016 Military Justice Act to decide whether the sentence would be imposed by the military judge or the panel members.

B. Sentencing Parameters and Criteria

In addition to requiring military judge alone sentencing, the 2022 NDAA requires that the President establish sentencing parameters and criteria, and it creates the Military Sentencing Parameters and Criteria Board within the DoD. Establishing sentencing parameters and criteria essentially requires military judges to apply guidelines, a procedural and substantive change that experts and critics have recommended in the past.¹⁴⁶ Specifically, in its comprehensive 2015 report, the Military Justice Review Group recommended that Congress amend the UCMJ to require sentencing parameters.¹⁴⁷ While the Senate version of the Military Justice Act of 2016 included a provision to that effect, the House version, which ultimately passed instead, implemented mandatory minimum discharge characterizations in some cases, sentencing factors in Article 56.¹⁴⁸

Section 539E(e) of the 2022 NDAA required the President to prescribe, within two years of the date of enactment, sentencing parameters and criteria for offenses under the UCMJ.¹⁴⁹ Previously, for most charges, rather than prescribing sentencing ranges including a

¹⁴⁵ *Id.* § 853(c)(1)(B).

¹⁴⁶ *See, e.g.*, MJRG REPORT, *supra* note 16, at 511-14 (recommending established sentencing parameters to guide military judges).

¹⁴⁷ According to the group's report, providing sentencing guidance would: 1) promote greater consistency and uniformity among sentencing authorities with respect to the goals of military sentencing and the factors that must be considered and balanced in each individual case; 2) eliminate the need for member instructions and voting before sentencing and issues on appeal; and 3) enhance review of sentence determinations by appellate courts. *See id.*

¹⁴⁸ *See* H.R. REP. 114-840, at 1542 (2016); *see also* Major Steven M. Immel, *Development, Adoption, and Implementation of Military Sentencing Guidelines*, 165 MIL. L. REV. 159 (2000).

¹⁴⁹ National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, sec. 539E(e), 135 Stat. 1541, 1704 (2021); *see also infra* note 154 and accompanying text.

minimum periods of confinement,¹⁵⁰ the military justice system relied on a Maximum Punishment Chart, which imposed a requirement not to exceed the listed time in confinement, forfeiture, or discharge description.¹⁵¹

The 2022 NDAA requires that the President establish sentencing parameters that must cover (1) “sentences of confinement” and (2) “lesser punishments, as the President determines appropriate.”¹⁵² The sentencing parameters shall:

(A) identify a delineated sentencing range for an offense that is appropriate for a typical violation of the offense, taking into consideration—(i) the severity of the offense; (ii) the guideline or offense category that would apply to the offense if the offense were tried in a United States district court; (iii) any military-specific sentencing factors; (iv) the need for the sentencing parameter to be sufficiently broad to allow for individualized consideration of the offense and the accused; and (v) any other relevant sentencing guideline.

(B) include no fewer than 5 and no more than 12 offense categories;

(C) assign each offense under the this chapter to an offense category unless the offense is identified as unsuitable for sentencing parameters . . . ; and

(D) delineate the confinement range for each offense category by setting an upper confinement limit and a lower confinement limit.¹⁵³

¹⁵⁰ Rape, sexual assault, rape or sexual assault of a child, or attempts or conspiracies to commit any of these offenses do carry a mandatory dismissal or dishonorable discharge (but no minimum confinement). UCMJ art. 56 (2021); *see also* MCM, *supra* note 15, app. 12, arts. 120, 120a, 120b, at A12-5.

¹⁵¹ *See* MCM, *supra* note 15, R.C.M. 1003, app. 12.

¹⁵² Secs. 539E(e)(1)(A)-(B), 135 Stat. at 1704.

¹⁵³ *Id.* secs. 539E(e)(2)(A)-(D).

Accordingly, the 2023 MCM amendments revised Appendix 12A, “Presidentially-Prescribed Lesser Included Offenses Pursuant to Article 79(b)(2) Uniform Code of Military Justice;” added a new Appendix 12B, “Sentencing Parameter Table – Confinement Range Categories;” and added a new Appendix 12C, “Offense Category Chart.”¹⁵⁴ The Sentencing Parameter Table sets out the maximum and minimum months of confinement for each category of offense. For example, for a category one offense, the range of confinement is zero to twelve months.¹⁵⁵ The new Appendix 12C Offense Category Chart sets out the sentencing category for each of the offenses listed in the UCMJ.¹⁵⁶

In addition to establishing sentencing parameters, the 2022 NDAA requires the President to establish sentencing criteria that identifies offense-specific factors the military judge should consider and any collateral effects of the available punishments. This would be used to assist the military judge in imposing a sentence where there is no applicable sentencing parameter for a specific offense.¹⁵⁷ The 28 July 2023 amendments to the MCM added Appendix 12D, “List of Sentencing Criteria Offenses.”¹⁵⁸ That appendix lists offenses considered sentencing criteria offenses. Not all UCMJ offenses are included in the list, but the appendix then sets out sentencing criteria for each of the listed offenses.¹⁵⁹

C. Application of Sentencing Parameters and Criteria

The 2022 NDAA makes several amendments to Article 56, UCMJ, that support and explain the application of the sentencing parameters and

¹⁵⁴ Exec. Order No. 14103, §§ 2-3, 88 Fed. Reg. 50535, 50535 (July 28, 2023). For appendix 12A, see *id.*, annex 2, § 6, 88 Fed. Reg. at 50699. For appendix 12B itself, see *id.*, annex 3, § 2, 88 Fed. Reg. at 50731. For appendix 12C, see *id.*, annex 3, § 3, 88 Fed. Reg. at 50732.

¹⁵⁵ *Id.*, annex 3, § 2, 88 Fed. Reg. at 50731.

¹⁵⁶ *Id.*, annex 3, § 3, 88 Fed. Reg. at 50732.

¹⁵⁷ See National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, sec. 539E(e), 135 Stat. 1541, 1704 (2021).

¹⁵⁸ Exec. Order No. 14103, annex 3, § 4, 88 Fed. Reg. 50535, 50740 (July 28, 2023).

¹⁵⁹ *Id.* at 50741. For example, for the offense of Desertion, Article 85, the Appendix indicates that the sentencing criteria include, among other things, “[t]he age and experience of the accused,” “[a]ny mental impairment or deficiency of the accused,” and “[w]hether the offense disrupted or, in any way, impacted the operations of any organization.” *Id.* at 50742.

criteria. If an accused is convicted in a general or special court-martial of an offense for which a sentencing parameter has been established, the military judge must sentence the accused for that offense within the specified parameter.¹⁶⁰ A military judge may sentence an accused outside an applicable sentencing parameter if the judge finds specific facts that warrant a departure from the parameter.¹⁶¹ In that case, the military judge must include a written statement in the record setting out the factual basis for the departure.¹⁶²

In announcing a sentence under Article 53, UCMJ, the military judge in a general or special court-martial, regarding “each offense of which the accused [was] found guilty, [must] specify the term of confinement, if any, and the amount of a fine, if any.”¹⁶³ If the military judge is imposing a sentence for more than one offense, the military judge must “specify whether the terms of confinement [will] run consecutively or concurrently.”¹⁶⁴

Sentencing parameters and sentencing criteria do not apply in deciding whether the death penalty should be imposed.¹⁶⁵

If the accused is convicted of an offense for which a court-martial may impose a sentence of confinement for life, the military judge may impose a sentence of “life without eligibility for parole.”¹⁶⁶ In that case, the accused will be confined for the remainder of their life, barring certain actions by the convening authority or applicable Service secretary, post-trial appellate action, or executive pardon.¹⁶⁷

D. Appellate Review of Sentences by Service Courts of Criminal Appeals

Section 539E(d) of the 2022 NDAA also amended Article 66, UCMJ, which addresses the review powers of the military courts of criminal

¹⁶⁰ National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, sec. 539E(c), § 856(c)(2)(A), 135 Stat. 1541, 1701 (2021).

¹⁶¹ *Id.* sec. 539E(c), § 856(c)(2)(B).

¹⁶² *Id.*

¹⁶³ *Id.* sec. 539E(c)(1)(B), § 856(c)(4).

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* sec. 539E(c)(1)(B), § 856(c)(5).

¹⁶⁶ *Id.* sec. 539E(c)(1)(B), § 856(c)(6)(A).

¹⁶⁷ *Id.* sec. 539E(c)(1)(B), §§ 856(c)(6)(B)(i)-(iii).

appeals.¹⁶⁸ Under a new provision, the courts may review whether a sentence violates the law or is inappropriately severe. When determining severity, the court should apply these factors:

- (i) if the sentence is for an offense for which the President has not established a sentencing parameter . . . ; or
- (ii) in the case of an offense for which the President has established a sentencing parameter . . . , if the sentence is above the upper range of such sentencing parameter.¹⁶⁹

In addition to law violations and inappropriate severity, the courts may also consider “whether the sentence is plainly unreasonable.”¹⁷⁰ If the “sentence [is] for an offense for which [there is a] . . . sentencing parameter,” appellate courts may also consider “whether the sentence is the result of an incorrect application of that parameter.”¹⁷¹ And, if the sentence was death or life in prison without the eligibility of parole, they may consider “whether the sentence is otherwise appropriate under the rules prescribed by the President.”¹⁷²

The amended Article 66 provides that when the Government is appealing an adjudged sentence, the record on appeal must contain: (1) “any portion of the record that is designated to be pertinent by any party;”¹⁷³ (2) “the information submitted during the sentencing proceeding;”¹⁷⁴ and (3) “any information required by rule or order of the Court of Criminal Appeals.”¹⁷⁵

E. Military Sentencing Parameters and Criteria Board

Section 539E(e)(4) of the 2022 NDAA creates—within the DoD—the Military Sentencing Parameters and Criteria Board.¹⁷⁶ That board will

¹⁶⁸ *Id.* sec. 539E(d).

¹⁶⁹ *Id.* sec. 539E(d)(2), §§ 866(e)(1)(B)(i)-(ii).

¹⁷⁰ *Id.* sec. 539E(d)(2), § 866(e)(1)(D).

¹⁷¹ *Id.* sec. 539E(d)(2), § 866(e)(1)(C).

¹⁷² *Id.* sec. 539E(d)(2), § 866(e)(1)(E).

¹⁷³ *Id.* sec. 539E(d)(2), § 866(e)(2)(A).

¹⁷⁴ *Id.* sec. 539E(d)(2), § 866(e)(2)(B).

¹⁷⁵ *Id.* sec. 539E(d)(2), § 866(e)(2)(C).

¹⁷⁶ *Id.* sec. 539E(e)(4)(A).

consist of five voting members: (1) the chief trial judges designated under Article 26(g), UCMJ; (2) a trial judge of the Navy if there is no chief trial judge in the Navy under Article 26(g); and (3) a trial judge of the Marine Corps if Article 26(g) does not include a chief trial judge in the Marine Corps.¹⁷⁷ Section 539E(e)(4) also provides that the board will include the following nonvoting members: (1) a designee by the chief judge of the United States Court of Appeals for the Armed Forces, (2) a designee by the chairman of the Joint Chiefs of Staff, and (3) a designee by the general counsel of the DoD.¹⁷⁸ A vote of at least three members is required for any board action.¹⁷⁹

Section 539E(e)(4) also sets out the board's duties.¹⁸⁰ Those duties include: (1) determining the appropriateness of creating sentencing parameters for punitive discharges, forfeitures, fines and other lesser punishments; (2) submitting to the President proposed changes to the RCM regarding sentencing procedures and maximum punishments; and (3) consulting with various constituencies of the military justice system, including commanders, senior enlisted personnel, those with experience in trying courts-martial, and any other groups the board considers appropriate.¹⁸¹ The board must also develop means of measuring the effectiveness of the applicable sentencing, penal, and correctional practices regarding the sentencing factors and policies of Section 539E.¹⁸² This 2022 NDAA Section also repeals the provisions of Section 537 of the 2020 NDAA, which required secretarial guidelines on sentences.¹⁸³

F. Potential Issues Regarding New Sentencing Procedures

The 2022 NDAA reflects a clear change in the sentencing process in the military justice system, from indeterminate sentencing¹⁸⁴ to

¹⁷⁷ *Id.* secs. 539E(e)(4)(B)(i)-(iii).

¹⁷⁸ *Id.* sec. 539E(e)(4)(C).

¹⁷⁹ *Id.* sec. 539E(e)(4)(E).

¹⁸⁰ *Id.* sec. 539E(e)(4)(F).

¹⁸¹ *Id.* secs. 539E(e)(4)(F)(i)-(v).

¹⁸² *Id.* sec. 539E(e)(4)(F)(vi).

¹⁸³ *Id.* sec. 539E(g).

¹⁸⁴ UCMJ art. 56 (2021) (prescribing mandatory minimums and reserving discretionary maximum sentences for the President); *see also* LISA M. SCHENCK, MODERN MILITARY JUSTICE: CASES AND MATERIALS 351-52 (3d ed., 2019) (explaining sentencing pursuant to UCMJ art. 56).

determinate sentencing similar to that of the Federal system. The lingering question is whether the framework established by the Federal Sentencing Commission can or should be applied in the military setting.

The Federal criminal justice system transitioned from indeterminate sentencing to determinate sentencing with the Sentencing Reform Act of 1984, when Congress created the U.S. Sentencing Commission (an independent organization within the judicial branch).¹⁸⁵ The commission was tasked with creating the Federal sentencing guidelines framework.¹⁸⁶ Determinate sentencing was established by creating mandatory guidelines, eliminating parole, and greatly reducing awarded credit for good behavior.¹⁸⁷ Congress sought to enhance the criminal justice system's ability to combat crime through an effective, fair sentencing system with three congressional objectives. The first objective was to enhance honesty in sentencing; to assist in avoiding "confusion and implicit deception that arose out of the pre-guidelines sentencing system."¹⁸⁸ This system required a court-imposed indeterminate sentence of confinement and an empowered parole commission to determine that the offender would actually serve the sentence.¹⁸⁹ The second objective was to provide reasonable uniformity in sentencing by narrowing sentence disparity "for similar criminal offenses committed by similar offenders."¹⁹⁰ The final congressional objective was to provide sentencing proportionality by imposing "appropriately different sentences for criminal conduct of differing severity."¹⁹¹ The U.S. Sentencing Commission's *Guidelines Manual* sets forth details regarding how to sentence a convicted felon, further ensuring uniformity.¹⁹²

Some Federal sentences hold a mandatory minimum, while others require the judge to apply the Federal sentencing guidelines and

¹⁸⁵ See U.S. SENT'G COMM'N, GUIDELINES MANUAL 2021, at 2-3 (2021) [hereinafter GUIDELINES MANUAL].

¹⁸⁶ *Id.*

¹⁸⁷ LUCIEN B. CAMPBELL & HENRY J. BEMPORAD, AN INTRODUCTION TO FEDERAL GUIDELINE SENTENCING 1-2 (8th ed. 2004).

¹⁸⁸ GUIDELINES MANUAL, *supra* note 185, at 3.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

consider the factors provided in 18 U.S.C. § 3553(a)¹⁹³ to determine a sentence range based on offense type, offense severity, and the defendant's criminal history.¹⁹⁴ The table's vertical axis reflects one to forty-three offense conduct levels (higher levels are more severe crimes with increased sentences), determined by a base-level offense, which can be increased or decreased due to specific characteristics (such as "with a firearm").¹⁹⁵ The base-level offense is also increased or decreased based on victim-related adjustments, the offender's role in the offense, and obstruction of justice.¹⁹⁶ When there are multiple offenses, the guidelines provide instructions directing judges how to combine offense levels.¹⁹⁷ Judges also may decrease the base offense level by two if the judge decides that the defendant has accepted responsibility for their offense.¹⁹⁸ The horizontal axis of the sentencing table reflects I to VI criminal history categories.¹⁹⁹

In addition to using the guidelines and policies provided by the commission, the judge receives a detailed presentencing report, which includes a sentence recommendation from the Federal Court Probation Office.²⁰⁰ Federal court sentencing hearings occur months after trial on the findings and the convicted defendant may be incarcerated pending the sentencing hearing.²⁰¹

¹⁹³ See CHARLES DOYLE, CONG. RSCH. SERV., R41326, FEDERAL MANDATORY MINIMUM SENTENCES: THE SAFETY VALVE AND SUBSTANTIAL ASSISTANCE EXCEPTIONS 2 (2022) (explaining that Federal law's requirement for judges to impose minimum sentences for Federal offenses is subject to exceptions that consider the defendant's characteristics and 18 U.S.C. § 3553 factors).

¹⁹⁴ GUIDELINES MANUAL, *supra* note 185, at 407-08.

¹⁹⁵ See *id.*; see also See U.S. SENT'G COMM'N, AN OVERVIEW OF THE FEDERAL SENTENCING GUIDELINES 1 (n.d.), https://www.usc.gov/sites/default/files/pdf/about/overview/Overview_Federal_Sentencing_Guidelines.pdf.

¹⁹⁶ See U.S. SENT'G COMM'N, *supra* note 195, at 2 (explaining adjustments that increase or decrease offense level).

¹⁹⁷ See *id.*

¹⁹⁸ See *id.*

¹⁹⁹ *Id.* at 3; see also GUIDELINES MANUAL, *supra* note 185, at 407-08.

²⁰⁰ See GUIDELINES MANUAL, *supra* note 185, at 487 ("The probation officer must conduct a presentence investigation and submit a report to the court before it imposes a sentence . . .").

²⁰¹ See *Steps in the Federal Criminal Process: Sentencing*, DEP'T OF JUST.: OFFS. OF THE U.S. ATT'YS, <https://www.justice.gov/usao/justice-101/sentencing> (last visited Aug. 11,

So, how will sentencing parameters and criteria be implemented within the existing presentencing structure in the military justice system? Probation is not available as there is no probation office in the military justice system.²⁰² And rather than relying on presentencing reports, court-martial presentencing procedure is an adversarial hearing. The Government presents aggravation evidence,²⁰³ to include sworn testimony from all prosecution witnesses. The defense presents extenuating and mitigating sentencing evidence²⁰⁴ including a sworn or unsworn (not subject to cross examination) statement from the accused.²⁰⁵ The victim may present sworn testimony during the Government's sentencing case, an unsworn statement after the close of the Government's sentencing case, or sworn testimony (if called as a defense witness) during the defense's sentencing case.²⁰⁶ Following the defense evidence, the prosecution presents matters on rebuttal, and the parties present arguments regarding what sentence the court should impose.²⁰⁷ Also, the criminal history provision generally does not apply, because having a prior criminal record is a discriminating factor for entry into the

2023) ("A few months after the defendant is found guilty, they return to court to be sentenced.").

²⁰² See U.S. DEP'T OF DEF., INSTR. 1325.07, ADMINISTRATION OF MILITARY CORRECTIONAL FACILITIES AND CLEMENCY AND PAROLE (11 Mar. 2009) (C4, 19 Aug. 2020) [hereinafter DODI 1325.07] (reflecting the absence of probation programs in the military justice system).

²⁰³ The prosecution first will present presentencing evidence including:

- (i) service data relating to the accused taken from the charge sheet;
- (ii) personal data relating to the accused and of the character of the accused's prior service as reflected in the personnel records of the accused;
- (iii) evidence of prior convictions, military or civilian;
- (iv) evidence of aggravation; and
- (v) evidence of rehabilitative potential.

MCM, *supra* note 15, R.C.M. 1001(a)(1)(A)(i)-(v).

²⁰⁴ MCM, *supra* note 15, R.C.M. 1001(d)(1)(A)-(B). Prosecution witnesses present sworn testimony, including the victim if called as a prosecution witness. A victim may present an unsworn statement after the close of the government's sentencing case and the Defense may present the sworn testimony of the victim. See *id.* R.C.M. 1001(c).

²⁰⁵ See *id.* R.C.M. 1001(d)(2).

²⁰⁶ See *id.* R.C.M. 1001(a)(3)(A), (c), (d), (f).

²⁰⁷ *Id.* R.C.M. 1001(a)(1)(D)-(F).

military.²⁰⁸ In short, Service members rarely have any criminal record of note.²⁰⁹

In most cases, this adversarial presentencing process occurs immediately after findings and there is no need for the accused to be incarcerated pending sentencing by the military judge. Also, unlike the Federal system, the Government and the accused can appeal the sentence.²¹⁰

The framework that accompanies the Federal sentencing guidelines will not easily transfer to the military justice system without major changes to the RCM. For example, the horizontal axis on the sentencing table reflecting criminal history categories is somewhat inapplicable, because, rather than trial by court-martial, commanders have the alternative of administratively separating (discharging) Service members from the military when they engage in misconduct.²¹¹ Unlike the Federal system, parole (rather than probation) is available in the military corrections system.²¹² The 2023 amendments to the MCM do not reflect any major changes to the military justice presentencing procedures,²¹³ so it does not appear that the addition of sentencing parameters, criteria, and the accompanying board will include a complete overhaul of the presentencing process in the military justice system.

²⁰⁸ See 10 U.S.C. § 504(a) (2018) (“No person who . . . has been convicted of a felony . . . may be enlisted in any armed force.”); see also 32 C.F.R. § 66.6(b)(8) (2016) (listing the “character/conduct” enlistment ineligibility criteria, including being “under any form of judicial restraint” or having “a significant criminal record”).

²⁰⁹ Applicants are able to apply for a waiver to enlist despite a criminal conviction. See 32 C.F.R. § 66.7(a)(3) (2016).

²¹⁰ See UCMJ, arts. 66 (2021), 67a (2016); see also MCM, *supra* note 15, R.C.M. 1117(a), 1203, 1204.

²¹¹ See MCM, *supra* note 15, R.C.M. 306 (giving commanders authority to dispose of violations without resorting to courts-martial through administrative action, nonjudicial punishment, or summary court-martial); see also UCMJ arts. 15, 20 (2016).

²¹² See DoDI 1325.07, *supra* note 202 (directing parole policies and procedures within the military justice system).

²¹³ See generally Exec. Order No. 14103, 88 Fed. Reg. 50535 (July 28, 2023).

IV. Victims' Rights

A. In General

Over the past decade, the Armed Forces have implemented extensive protections for victims' rights in the military justice system. Those rights are set forth expressly in the UCMJ,²¹⁴ in the RCM,²¹⁵ or in Service regulations.²¹⁶ The 2022 NDAA included further changes designed to protect victims and provide them with procedural rights.²¹⁷

²¹⁴ See, e.g., UCMJ art. 6b (2021). Article 6b of the UCMJ provides:

- (a) A victim of an offense under this chapter has the following rights:
 - (1) The right to be reasonably protected from the accused.
 - (2) The right to reasonable, accurate, and timely notice
 - . . .
 - (3) The right not to be excluded from any public hearing or proceeding
 - (4) The right to be reasonably heard at any of the following:
 - (A) A public hearing concerning the continuation of confinement prior to trial of the accused.
 - (B) A sentencing hearing relating to the offense.
 - (C) A public proceeding of the service clemency and parole board relating to the offense.
 - (5) The reasonable right to confer with the counsel representing the Government at any proceeding described in paragraph (2).
 - (6) The right to receive restitution as provided in law.
 - (7) The right to proceedings free from unreasonable delay.
 - . . .
 - (9) The right to be treated with fairness and with respect for the dignity and privacy of the victim of an offense under this chapter.

Id.

²¹⁵ See, e.g., MCM, *supra* note 15, R.C.M. 1001(c)(1) ("After presentation by trial counsel, a crime victim of an offense of which the accused has been found guilty has the right to be reasonably heard at the presentencing proceeding relating to that offense.").

²¹⁶ See, e.g., U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY para. 7-8 (explaining the Army's policy against sexual assault and how it offers support to victims).

²¹⁷ See, e.g., National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, secs. 545, 546 135 Stat. 1541, 1711, 1712 (2021) (codifying sexual assault victims' rights to notification when a case is not referred to court-martial and continuing legal services support through special victims' counsel).

B. The Right to Be Informed of Military Justice Proceedings

One of the key provisions in Article 6b of the UCMJ is the requirement that the victim be apprised of the status of the case.²¹⁸ The 2022 NDAA expands Article 6b(a), UCMJ, by adding a new provision, which states—

(8) The right to be informed in a timely manner of any plea agreement, separation-in-lieu-of-trial agreement, or non-prosecution agreement relating to the offense, unless providing such information would jeopardize a law enforcement proceeding or would violate the privacy concerns of an individual other than the accused.²¹⁹

The application of this requirement potentially implicates both counsel and commanders, even if commanders are no longer involved in the formal prosecution of covered offenses. For example, if the case involves covered offenses, the special trial counsel leading the preferral and referral process is best suited to oversee and ensure the required timely updates to any victims. In cases involving noncovered offenses the trial counsel is better suited for ensuring compliance with Article 6b(a) requirements. Additionally, in a case involving a military victim, the commander of the victim, who already has the responsibility to ensure their subordinate receives appropriate care, should be aware of the new provisional requirement that the victim receive information about dispositional decisions.²²⁰

C. Referral of Complaints of Sexual Harassment to Independent Investigator

Only one portion of the 2022 NDAA is expressly titled “Military Justice Reforms,” however, other portions of the act provide additional reformative language. Specifically, the 2022 NDAA also amended Section 1561 of Title 10 thereby requiring that a commander who receives a formal complaint of sexual harassment, to direct, within seventy-two hours of

²¹⁸ UCMJ art. 6b (2021).

²¹⁹ Sec. 541, 135 Stat. at 1708.

²²⁰ See, e.g., U.S. DEP’T OF DEF., INSTR. 1030.02, VICTIM AND WITNESS ASSISTANCE para. 3.2 (27 July 2023) (assigning responsibilities to commanders to assist victims and witnesses).

receiving the complaint, that an independent investigation be conducted.²²¹ The commander must report on the results of that investigation to the next superior officer within twenty days after the investigation commences and every fourteen days thereafter until the investigation is completed, and then submit a final report on the results of the investigation and any actions taken as a result of that investigation.²²²

D. Modification of Notice to Victims of Disposition of Cases

Section 545 of the 2022 NDAA modifies Section 549 of the National Defense Authorization Act for Fiscal Year 2020²²³ by adding language that requires a commander, after final disposition of a case, to notify a victim of “the type of action taken on such case, the outcome of the action (including any punishments assigned or characterization of service, as applicable), and such other information as the commander determines to be relevant.”²²⁴

E. Civilian Positions to Support Special Victims’ Counsel

Section 546 of the 2022 Act states that each Secretary of a military department may establish one or more Civilian positions within every Office of Special Victims’ Counsel. Those individuals are to provide support to special victims’ counsel, which will include “legal, paralegal, and administrative” support.²²⁵ Section 546 states that the purpose of these Civilian positions is to provide continuity of legal services when special victims’ counsel transition to other positions.²²⁶

²²¹ Sec. 543(a), § 1561(b), 135 Stat. at 1709.

²²² *Id.* sec. 543(a), § 1561(d).

²²³ National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, 133 Stat. 1198 (2019).

²²⁴ Sec. 545, 135 Stat. at 1712.

²²⁵ *Id.* sec. 546(b)(1).

²²⁶ *Id.* sec. 546(b)(2).

V. Changes to the Punitive Articles

A. The New Offense of Sexual Harassment

Section 539D of the 2022 NDAA requires the President, within thirty days of the act's enactment, to include in the MCM the offense of sexual harassment under Article 134.²²⁷ Section 539D(b) of the 2022 NDAA sets out the elements of the new offense of Sexual Harassment as follows:

- (1) that the accused knowingly made sexual advances, demands or requests for sexual favors, or knowingly engaged in other conduct of a sexual nature;
- (2) that such conduct was unwelcome;
- (3) that, under the circumstances, such conduct—
 - (A) would cause a reasonable person to believe, and a certain person did believe, that submission to such conduct would be made, either explicitly or implicitly, a term or condition of that person's job, pay, career, benefits, or entitlements;
 - (B) would cause a reasonable person to believe, and a certain person did believe, that submission to, or rejection of, such conduct would be used as a basis for decisions affecting that person's job, pay, career, benefits, or entitlements; or
 - (C) was so severe, repetitive, or pervasive that a reasonable person would perceive, and a certain person did perceive, an intimidating, hostile, or offensive working environment; and
- (4) that, under the circumstances, the conduct of the accused was—

²²⁷ *Id.* sec. 539D(a).

(A) to the prejudice of good order and discipline in the armed forces;

(B) of a nature to bring discredit upon the armed forces;
or

(C) to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces.²²⁸

On 26 January 2022, the President signed Executive Order 14062 amending the MCM to reflect the new offense.²²⁹ The executive order adds a new paragraph 107a in Part IV of the MCM, for the offense of Sexual Harassment, and also makes other amendments to existing offenses in Part IV.²³⁰ One of those amendments covers the existing offense of Domestic Violence (Article 128b), which is covered in the new Paragraph 78a.²³¹

B. Amendments to Article 133

Article 133 of the UCMJ is one of two general articles, the other being Article 134. Article 133 focuses on the conduct of commissioned officers.²³² This punitive article has been commonly referred to as “conduct unbecoming an officer and a gentleman.”²³³ Section 542 of the 2022 NDAA amended Article 133 making gender-neutral by removing the words “and a gentleman.”²³⁴ Apparently, Congress did not intend to make any other changes to the coverage of Article 133 with this amendment.

²²⁸ *Id.* sec. 539D(b).

²²⁹ *See* Exec. Order No. 14062, 87 Fed. Reg. 4763 (Jan. 26, 2022).

²³⁰ *See id.*, annex, § 1(p), 87 Fed. Reg. at 4784.

²³¹ *See id.*, annex, § 1(o), 87 Fed. Reg. at 4777.

²³² UCMJ art. 133 (2021). *See generally* 1 SCHLUETER, *supra* note 20, § 2-5 (discussing offenses under Article 133).

²³³ UCMJ art. 133 (1956).

²³⁴ National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, sec. 542(a), 135 Stat. 1541, 1709 (2021); *see also* Nino C. Monea, *An Officer and a Gentlewoman: Why Congress Should Modernize Article 133 of the UCMJ*, 61 WASHBURN L.J. 345 (2022) (recommending Article 133 be amended to make the language gender-neutral).

VI. Other Provisions in the 2023 NDAA

The 2023 NDAA included additional provisions that will have a dramatic impact on military justice. The following section of this article briefly addresses those changes.

A. Random Selection of Court Members

As previously discussed in Section II.E.7, one of the hallmarks of the American military justice system is the convening authority's power to select the members to serve on courts-martial. Article 25, UCMJ states that in selecting the members, the convening authority "shall detail as members thereof such members of the armed forces as, in his opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament."²³⁵ Although commentators have proposed reforms for the methods of selecting members,²³⁶ and in particular random selection of members,²³⁷ random selection has not been

²³⁵ UCMJ art. 25(e)(2) (2016).

²³⁶ See generally Joseph Remcho, *Military Juries: Constitutional Analysis and the Need for Reform*, 47 IND. L.J. 193 (1973) (proposing reforms); Major Gary C. Smallridge, *The Military Jury Selection Reform Movement*, 19 A.F. L. REV. 343, 380-81 (1977) (proposing various changes to methods of selecting members, including random selection); Captain John D. Van Sant, *Trial by Jury of Military Peers*, 15 A.F. L. REV. 185 (1973) (noting attempts by Senator Birch Bayh to change methods of selecting members); Major Craig Schwender, *One Potato, Two Potato . . . : A Method to Select Court Members*, ARMY LAW., May 1984, at 12 (proposing changes to method of selecting members).

²³⁷ See, e.g., Major Guy P. Glazier, *He Called for His Pipe, and He Called for His Bowl, and He Called for His Members Three—Selection of Military Juries by the Sovereign: Impediment to Military Justice*, 157 MIL. L. REV. 1, 72 (1998) (recommending development of computer database to randomly select court members and noting that random selection promotes diversity and fairness); Major R. Rex Brookshire, *Juror Selection under the Uniform Code of Military Justice: Fact and Fiction*, 58 MIL. L. REV. 71, 106-07 (1972) (recommending random selection of members).

required.²³⁸ Nonetheless, some installations have used random selection²³⁹ and the Army Court of Military Review approved an experimental program for random selection.²⁴⁰

As previously discussed, in the 2023 NDAA, Congress made random selection a reality by adding a new provision to Article 25(e), which states:

When convening a court-martial, the convening authority shall detail as members thereof members of the armed forces under such regulations as the President may prescribe for the randomized selection of qualified personnel, to the maximum extent practicable.²⁴¹

This amendment will go into effect on 22 December 2024, two years after the President signed the Bill.²⁴²

New RCM or regulations, that would provide an efficient and randomized selection process, would also have to be consistent with the current Article 25 requirements for selecting the best-qualified members.²⁴³ And while there are good arguments for using a randomized

²³⁸ In the Defense Authorization Act for Fiscal Year 1999, Congress directed the Secretary of Defense to study the possibility of using randomly selected members in courts-martial. Strom Thurmond National Defense Authorization Act for Fiscal Year 1999, Pub. L. No. 105-261, sec. 552, 112 Stat. 1920, 2023 (1998). No changes were made to Article 25. *See* Smallridge, *supra* note 236, at 354 (noting prior attempts by Congress to require random selection of members).

²³⁹ *See* Lieutenant Colonel Bradley J. Huestis, *Anatomy of a Random Court-Martial Panel*, ARMY LAW., Oct. 2006, at 22 (discussing procedures used by Army's V Corps to select randomly court members and satisfying requirements of Art. 25).

²⁴⁰ *See* United States v. Perl, 2 M.J. 1269, 1271 (A.C.M.R. 1976) (approving an "experimental program [at Fort Riley, Kansas,] for the selection of court members on a random basis").

²⁴¹ James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, Pub. L. No. 117-263, sec. 543(a), § 825(e)(4), 136 Stat. 2395, 2582 (2022). The issue of random selection was before Congress two decades ago. The Secretary of Defense was tasked with studying the possibility of using randomly selected juries in the military; that report was due in April 1999, *see* Strom Thurmond National Defense Authorization Act for Fiscal Year 1999, Pub. L. No. 105-261, sec. 552, 112 Stat. 1920, 2023 (1998), but no changes resulted from the report.

²⁴² Sec. 543(b), 136 Stat. at 2582.

²⁴³ *See* John S. Cooke, *The Twenty-Sixth Annual Kenneth J. Hodson Lecture: Manual for Courts-Martial 20x*, 156 MIL. L. REV. 1, 25 (1998) (noting that random selection process could be administratively cumbersome and disruptive of military operations).

selection process,²⁴⁴ it is important to note that it reduces the convening authority's power to use their discretion in selecting the members for a particular trial.

B. Expanding the Jurisdiction of the Service Courts of Criminal Appeals

Article 66 of the UCMJ addresses the jurisdiction of the Service Courts of Criminal Appeals.²⁴⁵ Currently, Article 66(b)(1) provides that an accused can appeal their court-martial conviction if the sentence adjudged is more than six months;²⁴⁶ the Government has previously appealed a ruling by a military judge under Article 62, UCMJ;²⁴⁷ the Government has appealed a court-martial sentence;²⁴⁸ or the accused has filed an application for review of a decision by the Judge Advocate General.²⁴⁹ On the other hand, review by the Service courts is automatic if the judgment entered by the court-martial includes a sentence of death, dismissal of a commissioned officer, cadet, or midshipman, a dishonorable discharge, a bad-conduct discharge, or confinement for two years or more.

In the 2023 NDAA, Congress dramatically amended Article 66(b)(1) by deleting the existing provisions and inserting new language, to include the provisions below, which provides that the Service appellate courts will have jurisdiction over:

(A) a timely appeal from the judgment of a court-martial, entered into the record under section 860c(a) of this title (article 60c(a)), that includes a finding of guilty; and

(B) a summary court-martial case in which the accused filed an application for review with the Court under

²⁴⁴ See David A. Schlueter, *The Twentieth Annual Kenneth J. Hodson Lecture: Military Justice for the 1990's—A Legal System Looking for Respect*, 133 MIL. L. REV. 1 (1991) (noting the “appearance of evil” of commanders selecting the members, the continual proposals for changing the selection process, and that random selection should be considered).

²⁴⁵ UCMJ art. 66 (2021); see *supra* Section III.D.

²⁴⁶ *Id.* art. 66(b)(1)(A).

²⁴⁷ *Id.* art. 66(b)(1)(B).

²⁴⁸ *Id.* art. 66(b)(1)(C).

²⁴⁹ *Id.* art. 66(b)(1)(D).

section 869(d)(1) of this title (article 69(d)(1)) and for which the application has been granted by the Court.²⁵⁰

The amendment eliminates the ability of the accused to appeal to a Service court if the Government has appealed a ruling under Article 62 or if the Government has appealed a sentence. So, while on the one hand the accused's ability to seek review by a Service appellate court has been reduced in those two instances,²⁵¹ on the other hand the courts' jurisdiction will be expanded because an accused will be able to appeal a court-martial conviction, regardless of the adjudged sentence, and regardless of whether it was a special or general court-martial. These amendments apparently went into effect the date the President signed the bill, 22 December 2022.

In addition, Congress amended Article 69, UCMJ, which provides for review by the Judge Advocate General of certain court-martial convictions.²⁵² That article was amended, *inter alia*, by changing the deadlines for seeking Judge Advocate General review. As with the amendments to Article 66 above, these changes apparently went into effect the date the President signed the bill: 22 December 2022.

C. Prohibiting Identification of Convening Authority

At the first session of the court-martial, the trial counsel announces the convening order, which created the court-martial, and the names of the parties who are present in the courtroom.²⁵³ Those announcements, on the record, help ensure any jurisdictional prerequisites of the court-martial are noted on the record.²⁵⁴ However, in the 2023 NDAA, Congress directed the amendment of RCM 813, and other rules, to make sure that at the

²⁵⁰ James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, Pub. L. No. 117-263, sec. 544(b)(1), § 866(b)(1), 136 Stat. 2395, 2582 (2022).

²⁵¹ Even though the amendment removes language that provided the accused with those two paths to the Service appellate courts, in reality, if the Government has appealed a military judge's ruling under Article 62 or has appealed the sentence, the accused will be provided with an opportunity to appear before the Service court, albeit on a more limited basis.

²⁵² Sec. 544(c), § 869, 136 Stat. at 2582.

²⁵³ MCM, *supra* note 15, R.C.M. 813(a).

²⁵⁴ *See id.* R.C.M. 201(b)(1) (providing that as a jurisdictional matter “[t]he court-martial must be convened by an official empowered to convene it”); *see also* UCMJ arts. 17 (1956), 18-19 (2016).

beginning of the court-martial the name, rank, or position of the convening authority are not announced.²⁵⁵ The exception to that rule is if the convening authority is the President, the Secretary of Defense, or the Secretary concerned.²⁵⁶ No similar amendment is being made to announcing who referred the charges to the court-martial.

It is not clear why Congress thought this change was necessary. Perhaps lawmakers were concerned that announcing who convened the court-martial amounts to some sort of unlawful command influence; but it is not clear that that has ever been a serious argument. And the beginning session of a court-martial may be a pretrial hearing under Article 39(a), UCMJ, where the court members are not present.²⁵⁷ In any event, the amendment seems to cut against the transparency that is so important in military justice. As a practical matter, if the parties have reason to believe that the court-martial convening authority was not authorized to convene the court, the matter should still be resolved in an out-of-court session, on the record.

VII. Concluding Thoughts

It is clear that the 2022 and 2023 NDAs will effect major changes to the military justice system. The real question is whether the changes will result in the outcomes that Congress intended.

For example, reserving charging decisions for special trial counsel will certainly provide what some reformers have been arguing for—more control by uniformed judge advocates. But, will that shift result in more sexual assault prosecutions and convictions, the perceived goals of the legislation? Perhaps not. If lawyers alone are examining the evidence and measuring the credibility of witnesses, they may be even more hesitant to bring a close case to trial. Under the current system, both the commander and a uniformed lawyer are involved in the decision as to whether and what charges should be preferred. As such, there may be cases where the two parties do not agree on those questions; in a command-centric system, the commander's view can prevail. It is important to recall that uniformed

²⁵⁵ Sec. 541(d), 136 Stat. at 2580.

²⁵⁶ *Id.*

²⁵⁷ UCMJ art. 39(a) (2017); *see also* MCM, *supra* note 15, R.C.M. 803; *see generally* 1 SCHLUETER, *supra* note 20, ch. 12 (discussing procedures in Article 39(a) pretrial sessions).

lawyers, unlike commanders, are bound by rules of professional responsibility, such that a decision by a uniformed lawyer must be informed by those rules. If the new system results in fewer prosecutions, then what is Congress to do next—remove uniformed judge advocates from the equation?

Because the new system will be bifurcated, there are bound to be expected—at least initially—problems of coordination and communication. Commanders will need to be aware that they may find themselves dealing with at least two different types of prosecution teams: one for Service members who allegedly commit covered offenses and another for Service members who allegedly committed offenses that are not covered. And depending on how each Service organizes their Office of Special Trial Counsel, there will be potential communication problems up and down that chain of command and in communications between local and area and regional special trial counsel and investigators working on cases involving covered offenses. Much will depend on whether the Services rely on local special trial counsel or counsel at a higher level. It will also be necessary to work out the new working relationships between staff judge advocates and the special trial counsel. The latter will no longer be in the chain of command for the staff judge advocate; there will certainly be a need to maintain clear lines of authority and communication.

As we point out above, adopting something like the Federal sentencing guidelines is likely to create a number of unintended consequences, one of which is a dramatic increase in appellate review of sentences imposed by military judges who may have erred in applying sentencing parameters or criteria.

It remains to be seen whether the changes in the 2022 and 2023 NDAA's will have a negative effect on the efficiency and speed that have been hallmarks of the American military justice system and, ultimately, on one of the goals of military justice—promoting and maintaining good order and discipline. Scholars have addressed the issue of the growing complexity of legal systems and agree that complexity in justice systems can be problematic.²⁵⁸ Implementing a new sentencing regimen and

²⁵⁸ See, e.g., Peter H. Schuck, *Legal Complexity: Some Causes, Consequences, And Cures*, 42 DUKE L.J. 1, 6-7 (1992) (citing other scholarly works on the issue of complexity in legal

creating the Office of Special Trial Counsel certainly will introduce new complexities.

Finally, to avoid such potentially adverse consequences to the military justice system, we encourage Congress in the future to hold extensive hearings on proposed amendments to the UCMJ.²⁵⁹ Congress should hear the views of a wide range of stakeholders and interest groups and also consider the full extent of ripple effects from its proposals so that the American military justice system is transformed at a principled and measured pace. In that way, Congress will be able to more effectively carry out its constitutional mandate to make rules and regulations affecting the military.

systems and stating that many commentators have noted the administrative and transaction costs, which complexity generates); *see also* J.B. Ruhl & Daniel Martin Katz, *Measuring, Monitoring, And Managing Legal Complexity*, 101 IOWA L. REV. 191 (2015) (addressing the issue of measuring legal complexity).

²⁵⁹ In enacting the extensive legislation in the 2016 Military Justice Act, Congress held no real hearings on the legislation. In subsequent NDAAAs, few comprehensive hearings have been held.