

# **Recent Legislative Developments: The 2022 National Defense Authorization Act**

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## **I Introduction.**

### **A. The Calls for Reform to the UCMJ.**

- For the past decade there are been a growing number of proposals to amend the UCMJ. Although major changes were made to the Code in the 2016 Military Justice Act (which became effective in January 2019), the calls for change continued. One of the most-often heard calls for reform focused on proposals to remove the commander from the military justice system.
- In large part, those calls for reform were driven by the seemingly intractable problem of sexual assaults in the military. While there were other proposed changes to the UCMJ, the role of the commander took the lead.

### **B. The 2022 NDAA.**

On December 27, 2021, the President signed the 2022 National Defense Authorization Act. That Act effected a number of significant changes to the UCMJ. This presentation covers some of the most significant changes.

### **C. The Effective Dates**

The NDAA changes to the UCMJ generally become effective in December 2023, although several provisions become effective well before that date.

## II. Changing the Role of the Commander.

### A. The Compromise—The Pentagon, the Senate, and the House.

- The provisions in the 2022 NDAA were a compromise between proposals coming from the Pentagon, the Senate, and the House of Representatives.
- The Pentagon’s proposals rested on recommendations from the Independent Review Commission on Sexual Assault (established by Secretary of Defense Austin). Those proposals recommended, inter alia, the establishment of a civilian-led Office of the Chief Special Victim Prosecutor. That office would decide whether to prosecute certain offenses, including sexual assault, sexual harassment, and certain hate crimes.
- The House and Senate approaches were similar but covered more offenses. The House proposed delimiting the commander's prosecutorial authority in 13 offenses, and two Senate proposals would have covered 8 and 38 offenses, respectively. *See* “Military Justice Disposition Delimitation Legislation in the 117th Congress,” Congressional Research Service, <https://crsreports.congress.gov>, R46940.

### B. The Special Trial Counsel.

1. Section 531 of the Act adds Article 24a to the UCMJ, which creates the Office of “Special Trial Counsel.” That new article provides that:

- Each Secretary will promulgate regulations for the detail of commissioned JAGs to serve as Special Trial Counsel.
- The lead Special Trial Counsel must be in the grade of at least O-7.
- The Special Trial Counsel will have exclusive authority to refer court-martial charges for “covered offenses.” An amendment to Article 1, UCMJ, states that covered offenses (which are listed in Section 533 of the Act) 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 82 (Solicitation to commit one of the foregoing offenses);
  - Article 81 (Conspiracy to commit one of the foregoing offenses); and
  - Article 80 (Attempt to commit one of the foregoing offenses).
- The Special Trial Counsel’s determination to refer charges and specifications to a court-martial is binding on any applicable convening authority for the referral of such charges and specifications.
  - The Special Trial Counsel has the exclusive authority to withdraw or dismiss the charges or refer the charges to a general or special court-martial.
  - The Special Trial Counsel has exclusive authority to enter into plea agreements with an accused.
  - The Special Trial Counsel has the exclusive authority to determine if a rehearing is impracticable.
  - If the Special Trial Counsel decides not to refer charges for a covered offense, the commander or convening authority may exercise any of the options available to that officer under the UCMJ, except the referral of charges for a covered offense to a special or general court-martial.
2. Section 532 of the Act sets out policies with respect to the Special Trial Counsel. That section adds Section 1044f to Chapter 53 of Title 10, which provides that:
- The Secretaries must establish policies for the Office of Special Trial Counsel. Those policies must—

- Provide for the appointment of one lead Special Trial Counsel, with a grade no less than O-7, who has “significant experience in military justice.”
  - Provide that the lead Special Trial Counsel will be responsible for the overall supervision of the Special Trial Counsel in that service and will report directly to the Secretary concerned, “without intervening authority.”
  - Ensure that the Special Trial Counsel, and other personnel assigned to that office, are independent of the military chains of command of both the victim and the accused.
  - Ensure that activities are free from “unlawful or unauthorized influence or coercion.”
  - Provide that the commanders of the victim and the accused are permitted to provide nonbinding input to the Special Trial Counsel regarding the disposition of any covered offenses.
  - Ensure that any lack of uniformity will not make any such “policy, mechanism, or procedure” unconstitutional. (There appears to be no express provision requiring uniformity among the services).
  - The term “military service” means the “Army, Navy, Air Force, Marine Corps, and Space Force.”
- The Act also provides that beginning 180 days after the date of the enactment of the Act, 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 those offices in meeting the “milestones” established by the Act.
3. Section 534 addresses the issue of who may convene courts-martial. It amends Articles 22(b), UCMJ by stating that a “commanding officer shall not be considered an accuser solely due to the role of the commanding officer in convening a general court-martial to which charges and specifications were referred by a [S]pecial [T]rial [C]ounsel in accordance

with this Chapter.” A similar amendment is made to Article 23(b), UCMJ, regarding special courts-martial.

4. Section 535 amends Article 27, UCMJ, by providing that for each general and special court-martial, a Special Trial Counsel will be detailed as trial counsel. It further provides that a Special Trial Counsel may detail other trial counsel (who are judge advocates) as necessary.

**C. Article 32 Preliminary Hearing.**

- Section 536 of the Act addresses certain issues associated with the Article 32 Preliminary Hearing. That section amends Article 32 to provide that the convening authority details the hearing officer, unless a Special Trial Counsel is exercising authority over the charges and specifications subject to the preliminary hearing. In that case, the Special Trial Counsel must request the convening authority to detail a hearing officer.
- 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.

**D. Advice to Convening Authority Before Referral for Trial.**

- Section 537 amends Article 34 by inserting a new subsection (c). That new language provides that a Special Trial Counsel may only refer charges and specifications of covered offenses if the Special Trial Counsel determines that—
  - Each specification under the charge alleges an offense under the UCMJ;
  - There is probable cause to believe that the accused committed the charged offense; and
  - The court-martial would have jurisdiction over the accused and the offense.
- If no covered offenses are involved, the convening authority refers the charges and convenes the court-martial.

**E. Plea Agreements.**

- Article 53a, UCMJ was amended by Section 539. The amended article provides that if the Special Trial Counsel is exercising authority over covered offenses, then the Special Trial Counsel will be the one who may enter into a plea agreement with the accused.
- Those agreements will have the same effect as plea agreements between a convening authority and an accused.

**F. Deciding Whether a Rehearing is Practical.**

- Section 539A amends Article 65, UCMJ. The amended Article provides that if the court-martial was referred by the Special Trial Counsel, then it will be the Special Trial Counsel who decides whether a rehearing (authorized by an appellate court) is practicable. If the Special Trial Counsel decides that a rehearing is impractical, the Special Trial Counsel will dismiss the charges.

**G. Application to Coast Guard.**

- Under Section 539B, the Secretary of Defense must consult with and reach an agreement with the Secretary of Homeland Security to apply the provisions of the Act, the amendments resulting from the Act, and the “policies, mechanisms, and processes” established by the Act.

**H. Effective Dates**

- The provisions dealing with the creation of the office and duties of the Special Trial Counsel go into effect on December 27, 2023—two years from the date the bill was signed. However, Section 539C provides that if the President does not promulgate the regulations necessary to implement those provisions within the two-year time frame, then those provisions will take effect on the date the regulations are prescribed.

That section also provides that the new regulations will apply to offenses committed on or after that effective date.

**I. What has Not Changed.**

Although the 2022 NDAA makes significant changes to the role of the commander in the military justice system, it is important to note that the commander's authority remains intact regarding other procedural aspects of court-martial practice. The commander's authority in the following areas apparently remains unchanged:

- Pretrial Investigations.
- Pretrial Confinement Decisions.
- Selection of Members for a Court-Martial.
- Grants of Immunity to Witnesses.
- Requests for Individual Military Defense Counsel.
- Requests for Witnesses.
- Post-Trial Review of the Case.

**J. Potential Issues of Application.**

**III. Reforms to Sentencing Procedures.**

**A. In General.**

- The 2022 NDAA makes significant changes to 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. 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.

**B. The Role of the Military Judge in Sentencing.**

**1. In General**

- For decades, commentators and others have recommended that the military adopt the sentencing procedures used in federal courts—the judge imposes the sentence. *See, e.g.*, MILITARY JUSTICE REVIEW GROUP, REPORT OF THE MILITARY JUSTICE REVIEW GROUP, REPORT OF THE MILITARY JUSTICE REVIEW

GROUP, 475-76 (2015); Kisor, *The Need for Sentencing Reform in Military Courts-Martial*, 58 NAVAL L. REV. 39 (2009); Lovejoy, *Abolition of Court Members Sentencing in the Military*, 142 MIL. L. REV. 1 (1994); 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 (2011).

- In the 2022 National Defense Authorization Act, Congress finally adopted that approach for sentencing. 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 *supra*) the military judge will impose the sentence. The sentence imposed by the military judge is considered the sentence of the court-martial.
- 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. The military judge must then sentence the accused in accordance with the court members determination.
- The Act 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 members.

## **2. Potential Issues.**

### **C. Establishing Sentencing Parameters and Criteria.**

#### **1. In General.**

- In its comprehensive 2015 Report, the Military Justice Review Group, recommended that Congress amend the UCMJ to provide for sentencing parameters. MILITARY JUSTICE REVIEW GROUP, REPORT OF THE MILITARY JUSTICE REVIEW GROUP, 511-14 (2015). While the Senate version of the Military Justice Act included a provision to that effect, the House version which included sentencing factors in Article 56, which prevailed, did not. *See also* Immel, *Development, Adoption, and Implementation of Military Sentencing Guidelines*, 165 MIL. L. REV. 159 (2000).

- Section 539E(e) of the Act requires that the President must prescribe, within two years of the date of enactment, sentencing parameters and sentencing criteria for offenses under the UCMJ.

## 2. Sentencing Parameters

- The sentencing parameters must (1) include sentences of confinement and (2) include lesser punishments as the President deems appropriate.
- The parameters must:
  - (1) Identify a “delineated sentencing range for an offense that is appropriate for a typical violation of the offense” considering—
    - The severity of the offense;
    - A guideline or category of offense that would apply to the offense if the offense was tried in a United States District Court;
    - Any military-specific sentencing factors;
    - The need for the parameter to be sufficiently broad to allow for individualized consideration of the accused and the offense; and
    - Any other relevant “sentencing guideline.”
  - (2) Include no fewer than 5 and no more than 12 offense categories;
  - (3) Assign each offense under the UCMJ to an offense category, unless the offense is identified as unsuitable for sentencing parameters; and
  - (4) Delineate the confinement range for each offense category by establishing an upper confinement limit and a lower confinement limit (i.e. ranges).

### **3. Sentencing Criteria.**

- In addition to establishing “sentencing parameters,” the President must establish “sentencing criteria,” which must identify offense-specific factors which the military judge “should” consider and any collateral effects of the available punishments, which may aid the military judge in imposing a sentence, where there is no applicable sentencing parameter for a specific offense.

#### **D. Application of Sentencing Parameters and Criteria.**

- The Act makes a number of amendments to Article 56, UCMJ, which spell out the application of the sentencing parameters and 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.
- A military judge may sentence an accused outside an applicable sentencing parameter if the military judge finds specific facts that warrant a departure from the parameter. In that case, the military judge must include a written statement in the record setting out the factual basis for the departure.
- If an accused is charged with an offense for which the President has established sentencing criteria, the military judge in imposing a sentence, must consider the applicable sentencing criteria.
- In announcing a sentence under Article 53, UCMJ, the judge in a general or special court-martial must—regarding each offense for which the accused was found guilty—specify the term of confinement, if any, and the amount of a fine, if any. 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.
- Sentencing parameters and sentencing criteria do not apply in deciding whether the death penalty should be imposed.
- 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. In that case the accused will be

confined for the remainder of his or her life, unless (1) the sentence is set aside or modified as a result of action taken by the convening authority or the Secretary concerned, or (2) any other action during post-trial procedures or review under the UCMJ or (3) the accused receives a pardon or another form of Executive clemency.

**E. Appellate Review of Sentences by Courts of Criminal Appeals.**

- Section 539E(d) amends Article 66, UCMJ, which addresses the review powers of the Courts of Criminal Appeals. The Act added a new provision dealing with the courts' powers to review courts-martial sentences.
- The new provision states that in reviewing court-martial sentences, the courts may consider:
  - Whether the sentence violates the law;
  - Whether the sentence is inappropriately severe—
    - If the sentence is for an offense for which the President has not established a sentencing parameter or in the case of an offense for which the President has established a sentencing parameter, the sentence is above the upper range of that parameter;
    - If the sentence is for an offense for which there is a sentencing parameter, whether the sentence is the result of an incorrect application of that parameter;
  - Whether the sentence is plainly unreasonable; and
  - If the sentence was death or life in prison without the eligibility of parole, whether the sentence is otherwise appropriate under the rules established by the President.
- The amended Article 66 provides that if the Government is appealing a sentence, the record on appeal must contain: (1) any portion of the record that is designated to be pertinent by any party; (2) the information submitted during

the sentencing proceeding; and (3) any information required by rule or order of the Court of Criminal Appeals.

**F. Military Sentencing Parameters and Criteria Board.**

- Section 539E(e)(4) creates—within the Department of Defense—the Military Sentencing Parameters and Criteria Board.
- The Board will 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.
- That section also provides that there will be nonvoting members of the Board: (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 Department of Defense.
- A vote of at least three members is required for any action by the Board.
- The section also sets out the duties of the Board. 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 Rules for CourtsMartial regarding sentencing procedures and maximum punishments; and (3) consulting with various constituencies of the military justice system—including commanders and senior enlisted personnel and those with experience in trying courts-martial, and any other groups the Board considers appropriate.
- 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.
- This Section also repeals the provisions of Section 537 of the 2020 NDAA which required Secretarial Guidelines on Sentences.

**G. Potential Issues.**

**IV. Changes to the Punitive Articles**

**A. The New Offense of Sexual Harassment.**

**1. In General.**

- Section 539D of the Act states the President is required to include in the Manual for Courts-Martial the offense of sexual harassment under Article 134.
- The President must do so within 30 days of the date of the Act's enactment.
- On January 26, 2022, the President signed Executive Order 14062 amending the Manual for Courts-Martial to reflect the new offense. *See* <https://www.whitehouse.gov/briefing-room/presidentialactions/2022/01/26/executive-order-on-2022-amendments-to-the-manual-for-courts-martial-united-states/>. The Executive Order adds a new Paragraph 107a in Part IV of the Manual, to reflect the new offense of Sexual Harassment and also makes other amendments to existing offenses in Part IV. One of those amendments covers the existing offense of Domestic Violence (Article 128b), which is now covered in new Paragraph 78a.

**2. Elements of the Offense of Sexual Harassment.**

- Section 539D(b) sets out the elements of the new offense:

“(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—

(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.”

**B. Amendments to Article 133.**

- Section 542 of the 2022 NDAA amends Article 133 by removing the reference to the words “and a gentleman.”

**C. Possible Addition of Punitive Article on Violent Extremism.**

- Section 549A directs the Secretary of the Defense to report to the Committees on Armed Services of the Senate and the House on any appropriate regulations concerning the establishment of a new punitive article on violent extremism.
- That report is to be submitted within 180 days of the enactment of the NDAA.

**V. Victims' Rights.**

**A. In General.**

- The 2022 NDAA made several changes designed to protect victims and provide procedural rights to them.

**B. The Right to Be Informed of Military Justice Proceedings.**

- Section 541 of the Act amends Article 6b(a) 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.”

**C. Referral of Complaints of Sexual Harassment to Independent Investigator.**

- Section 543 amends Section 1561 of Title 10 by requiring that if a commander receives a formal complaint of sexual harassment, the commander must direct, within 72 hours of receiving the complaint, that an independent investigation be conducted.
- The commander must report on the results of that investigation to the next superior officer within twenty days after the investigation commences and every 14 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.

**D. Modification of Notice to Victims of Disposition of Cases.**

- Section 545 modifies Section 549 of the 2020 NDAA (Public Law 116-92, 10 USC 806b note) by adding language which 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.”

**E. Civilian Positions to Support Special Victims’ Counsel.**

- Section 546 states that each Secretary of a military department may establish one or more civilian positions within each Office of Special Victims’ Counsel.
- Those individuals are to provide support to Special Victims’ Counsel, which will include “legal, paralegal, and administrative” support.
- 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.

**VI. Other Changes.**

**VII. Concluding Thoughts.**