

C O D E 2 0 / J M J S I D E B A R

SUMMARY OF THE FISCAL YEAR 2022 (FY22) NATIONAL DEFENSE AUTHORIZATION ACT (NDAA)

This Sidebar summarizes the military justice-related provisions of the FY22 NDAA, Sections 531 through 549M of Public Law 117-81, enacted on 27 December 2021.

The FY22 NDAA contains sweeping military justice changes, including those summarized below. Most of these reforms will be effective two years from the date of enactment. As stated in the 1 November 2021 *From the Flags* titled “Independent Review Commission and Pending Military Justice Reform,” the Judge Advocate General (JAG), the Deputy JAG, and the Staff Judge Advocate (SJA) to the Commandant of the Marine Corps established a cross-functional group of Navy and Marine Corps judge advocates to help implement these change and the recommendations of the Independent Review Commission on Sexual Assault in the Military (IRC). Detailed planning and implementation efforts are already underway.

1. Creation of Special Trial Counsel and Establishment of the Office of Special Trial Counsel.

Generally, newly created Special Trial Counsel (STC) will have exclusive authority to refer charges alleging certain covered offenses to special court-martial (SPCM) or general court-martial (GCM). A STC may also exercise authority over cases related to a covered offense (e.g., a witness to a covered offense obstructs justice) and over other offenses committed by the same accused (e.g., an accused offers a false official statement during the investigation). Once referred, only a STC may withdraw the charges from court-martial or dismiss the charges completely on behalf of the Government, and only a STC may enter into a plea agreement with the accused related to a covered offense. A STC must prosecute any case referred by a STC, but the STC may seek out assignment of other trial counsel to assist on the case as appropriate.

If a STC declines to pursue a case, the commander or convening authority may exercise traditional authority over the case, but may not refer a covered offense to SPCM or GCM. The convening authority may continue to dispose of non-covered offenses at SPCM or GCM and may dispose of any offense at nonjudicial punishment, at summary court-martial, or through administrative means, as appropriate, whenever the STC has declined to exercise authority.

Covered offenses include the following UCMJ articles: 117a (crimes involving intimate visual images), 118 (murder), 119 (manslaughter), 120 (rape and sexual assault), 120b (sexual assault of a child), 120c (miscellaneous sex offenses), 125 (kidnapping), 128b (domestic violence), 130 (stalking), 132 (retaliation), 134 (child pornography); and conspiracies, solicitations, or attempts of these offenses.

A STC must be a judge advocate certified to be qualified by reason of education, training, experience, and temperament to perform the duties of STC by the JAG, or by the SJA to the Commandant for Marine judge advocates. On any specific case, the STC must be independent of the chains of command of the accused and victim, but commanders of the accused and the victim may provide non-binding input on the disposition of the case.

Subject to additional direction to be provided by the Secretary of Defense, the Service Secretaries shall establish an office within each military service to supervise the activities of the STC. The OSTC shall be led by a judge advocate from that service in a grade no lower than O-7 with significant military justice experience. The Lead STC will be responsible for the overall supervision and oversight of that service's STC and will report directly to the Service Secretary.

2. Modification of Convening Authority Function for Certain Cases.

Convening authorities will continue to exercise traditional authority over non-covered offenses. As stated above, for cases declined by the STC, convening authorities may exercise traditional authority, but may not refer covered offenses to SPCM or GCM. For cases referred by a STC, convening authorities will still have responsibility to convene the court-martial, select qualified members, produce witnesses, grant immunity, act on the findings and sentence as appropriate, and grant some forms of clemency.

3. Modification to Preliminary Hearings and Pretrial Advice in Certain Cases.

In those cases in which a STC is exercising authority, the Article 32, UCMJ, preliminary hearing report will be forwarded to the STC for a referral decision. Referral in these cases may only be made following a written determination by a STC that each specification under a charge alleges an offense under the UCMJ; there is probable cause to believe that accused committed the offense; and a court-martial would have jurisdiction over the accused and the offense. This process precludes the normal requirement for the GCMCA's SJA to prepare advice pursuant to Article 34, UCMJ.

4. Requirements of Military Defense Counsel.

Each service shall ensure that military defense counsel have sufficient funding for defense investigators, expert witnesses, pre-trial/trial/post-trial support, paralegal support, counsel travel, and other necessary resources, and that military defense counsel detailed to covered offense cases have sufficient training and experience for such cases.

5. Additional Victim Rights.

The law establishes the right of the victim to be informed in a timely manner of any plea agreement, separation-in-lieu-of-trial (SILT) agreement, or non-prosecution agreement relating to an offense under the

UCMJ, unless providing such information would jeopardize a law enforcement proceeding or would violate the privacy concerns of an individual other than the accused.

The law also expands administrative action notification rights to include alleged sex-related offenses and requires commanders to notify the victim of the type of action taken on such a 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.

6. Sentencing Reform.

Except in capital cases, the military judge shall determine and award the sentence in all SPCM and GCM. A Military Sentencing Parameters and Criteria Board, made up of the services' Chief Trial Judges, shall propose sentencing guidelines for approval by the President within two years of enactment.

7. Conduct Unbecoming an Officer

The phrase “and a gentlemen” is removed from Article 133, UCMJ.

8. New Article 134 Offense of Sexual Harassment and Related Requirements.

The law directs the President to implement an Article 134, UCMJ, offense of Sexual Harassment within 30 days of enactment

To the extent practicable, a commander who receives a formal complaint alleging a claim of sexual harassment by a member of the armed forces or civilian employee of the DOD shall direct an independent investigation into the allegation. The investigation must be completed within 14 days to the extent practicable. The commander is required to forward formal complaints to the next superior in chain who is a GCMCA and to advise the complainant of the investigation.

9. Reports and Briefing Requirements.

By 1 March 2022, each Service Secretary must provide an initial assessment of the resources – including personnel and funding – necessary to implement the changes to the military justice system. Within one year, each Service Secretary must provide a follow-on report on the resources necessary to implement changes.

Within six months of enactment and quarterly thereafter, the Secretary of Defense and the Service Secretaries must jointly provide a brief to Congress on the progress towards implementation of an OSTC.

Within one year of enactment, each Service Secretary must report on their service's implementation plans, including how they will staff STC, defense counsel, and military judge billets, and an estimate of needed resources.

Within one year, each service shall conduct an assessment and submit a report to the Senate and House Armed Services Committees and the Comptroller General on racial disparities in military personnel policies and in military justice and discipline processes. Within 180 days of the service submissions, the Comptroller General shall submit a report comparing the service assessments to existing reports assessing racial disparity in civilian criminal justice systems in the United States.

Within 180 days, the Secretary of Defense shall submit a report to the Senate and House Armed Services Committees recommending whether to establish a separate punitive article on violent extremism.

The full text of the FY22 NDAA is available at <https://www.congress.gov/bill/117th-congress/senate-bill/1605/text?q=%7B%22search%22%3A%22s1605%22%7D&r=1&s=2>. It is also posted on the Code 20 SharePoint site under the *Reference Materials and Templates* folder. A separate file containing Sections 531 through 549M (the military justice-related sections) is also posted in the same folder.

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