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No. 1

This Is Not Your Grandparents' Military Justice System

The 2022 and 2023 National Defense Authorization Acts

By Professor David A. Schlueter and Associate Dean Lisa M. Schenck

This is a companion piece to the authors' recent publication in the Military Law Review titled Transforming Military Justice: The 2022 and 2023 National Defense Authorization Acts.¹

Despite the major reforms to the American military justice system in the 2016 Military Justice Act,² the drumbeat for reform has 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commanders from the military justice system.³ Some have argued that a command-centric military justice system was outdated, and it was time to make the system look more like the Federal criminal procedure system.⁴ Other critics have advocated for a military justice system that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. In large part, those calls for reform were driven by the seemingly intractable problem of sexual assaults in the military.⁵

On 27 December 2021, the President signed the National Defense Authorization Act for Fiscal Year 2022 (2022 NDAA),⁶ which effected a number of significant changes to the Uniform Code of Military Justice (UCMJ). Further changes were made to the UCMJ in the James M. Inhofe National Defense Authorization Act for Fiscal Year 2023 (2023 NDAA).⁷ On 28 July 2023, the President signed Executive Order 14103, which amends the *Manual for Courts-Martial* (MCM);⁸ some of those amendments went into effect immediately, while others went into effect in December 2023.⁹

This article briefly addresses the 2022 and 2023 NDAA changes to the military justice system and suggests that certain issues that were not addressed in the acts will continue to present challenges to those charged with administering military justice.¹⁰

Creating the Office of Special Trial Counsel

One of the 2022 NDAA's most significant changes was the addition of Article 24a to the UCMJ, which creates the Office of Special Trial Counsel.¹¹ This new article, which reduces commanders' role in the disposition of certain offenses, reflects a compromise between proposals offered by the Department of Defense (DoD), 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 Lloyd J. Austin) issued in May 2021.¹² Those proposals recommended, inter alia, establishing the Office of the Special Victim Prosecutor in the Office of the Secretary of Defense.¹³ That newly established office would decide whether to prosecute certain offenses, including sexual assault, sexual harassment, and certain hate crimes.¹⁴

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.¹⁵ 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.¹⁶

The new Article 24a, UCMJ provides that each Service Secretary will promulgate regulations assigning commissioned judge advocates, uniformed lawyers, to serve as special trial counsel.¹⁷ The lead special trial counsel must be in the grade of at least O-7¹⁸ with military justice experience.¹⁹

Special trial counsel will have exclusive authority to refer court-martial charges for "covered offenses."²⁰ The covered offenses include: Article 117a (Wrongful Broadcast or Distribution of Intimate Visual Images); Article 118 (Murder); Article 119 (Man-slaughter); 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).²¹

In the 2023 NDAA, Congress added the following offenses to the list of covered offenses that will fall within the Office of Special Trial Counsel's prosecutorial discretion: Article 119a (Death or Injury of an Unborn Child);²² Article 120a (Mails: Deposit of Obscene Matter);²³ and Article 134 (Sexual Harassment) (effective at the later date of 1 January 2025).²⁴

Pursuant to Section 532 of the 2022 NDAA, the Service Secretaries must establish policies for the Office of Special Trial Counsel. Those policies must address oversight functions, responsibilities, experience levels of those assigned to work for special trial counsel, 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 that will supervise and oversee special trial counsel.²⁵ The lead special trial counsel will be responsible for special trial counsel in that Service and will report directly to the Secretary of the Service concerned "without intervening authority."²⁶ This is an apparent intent to insure that special trial counsel are not responsible to the established chain of command for uniformed lawyers. 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."²⁷ Special trial counsel must be experienced, well-trained, and competent to handle cases involving the covered offenses.²⁸ Cases are to be free from "unlawful or unauthorized influence or coercion."²⁹ Commanders of the victim and the accused will have the ability to provide nonbinding input to special trial counsel regarding the disposition of covered offenses.³⁰

Special trial counsel's decision to refer charges and specifications to a court-martial is binding on the convening authority.³¹ In addition, where the covered offenses are concerned, special trial counsel have the exclusive authority to withdraw or dismiss the charges,³² enter into plea agreements with an accused,³³ and determine whether a rehearing would be impracticable.³⁴ But, apparently, the convening authority will retain the power to select the members and convene the court-martial.³⁵

If a special trial counsel decides not to prefer or 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.³⁶

Traditionally, commanders have been an integral part of the military justice system. Even though the role of uniformed judge advocates has expanded over the decades, the commander has remained a key player in the investigation phase and processing of court-martial charges. One of the questions raised by the addition of special trial counsel is how those new prosecutors will interact with commanders on a wide variety of decisions arising throughout the processing of court-martial charges. Potential issues include: pretrial investigations (such as Rule for Courts-Martial (RCM) 303, command-

er's inquiries³⁷) that in turn may result in allegations that the accused committed an offense; ordering an accused into pretrial confinement; initial disposition determination and coordination and preferring of court-martial charges against an accused; grants of immunity; approval of an accused's request for individual military counsel; requests for witnesses; and post-trial actions by the convening authority.³⁸

In the 2023 NDAA, Congress included a provision specifying that the President is charged with effecting the transfer of the commander's residual powers in the MCM.³⁹ Section 541 of that act provides that when the special trial counsel becomes responsible for a case due to the inclusion of at least one covered offense alleged, the "residual prosecutorial duties and other judicial functions"⁴⁰ of the commander will transfer to special trial counsel, to military judges, or other authorities;⁴¹ these changes will be effective in December 2023.⁴² The recent amendments to the MCM indicate that on the question of granting immunity to witnesses, for covered offenses, special trial counsel or their delegee may grant immunity.⁴³ The MCM amendments also transfer the power to authorize pre-referral depositions to the military judge;⁴⁴ the same applies to authorizing the funding of expert assistance for the defense.⁴⁵ The question, however, remains as to what extent Congress intended to strip the commander's powers to impose administrative measures for covered offenses.

The creation of the Office of Special Trial Counsel generates a bifurcated military justice system. If the alleged offense is not a covered offense, then the current system will continue; that is, commanders will be responsible for deciding how to dispose of alleged wrongdoing, including referral of court-martial charges.

Transforming Sentencing Procedures

Military Judge Sentencing

The 2022 NDAA makes two 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.⁴⁶ That follows



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decades-long recommendations from commentators and others that the military adopt the sentencing procedures used in Federal courts—with the judge imposing the sentences using Federal Sentencing Guidelines.⁴⁷ In capital cases, however, 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.”⁴⁸ The military judge must then sentence the accused in accordance with the court members’ determination.⁴⁹

Establishing Sentencing Parameters and Criteria

In addition to requiring military judge alone sentencing, the 2022 NDAA requires the President to establish sentencing parameters and criteria and creates the Military

Sentencing Parameters and Criteria Board within the DoD.⁵⁰ 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.⁵¹

The 2022 NDAA requires the President to establish sentencing parameters that must cover (1) “sentences of confinement” and (2) “lesser punishments, as the President determines appropriate.”⁵² The parameters must:

(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 [five] and no more than [twelve] 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.⁵³

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.”⁵⁴ This “sentencing criteria” would be used to assist the military judge in imposing a sentence where there is no applicable sentencing parameter for a specific offense.⁵⁵

Application of Sentencing Parameters and Criteria

The 2022 NDAA includes several amendments to Article 56, UCMJ that support and explain the application of the sentencing parameters and criteria. Subject to certain exceptions, the military judge must sentence the accused within the specified parameters.⁵⁶

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.”⁵⁷ 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.”⁵⁸ Sentencing parameters and sentencing criteria do not apply in deciding whether the death penalty should be imposed.⁵⁹

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.”⁶⁰ 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.⁶¹

Appellate Review of Sentences by Courts of Criminal Appeals

Section 539E(d) of the 2022 NDAA also amends Article 66, UCMJ, which addresses the review powers of the military courts of criminal appeals.⁶² 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.⁶³

In addition to law violations and inappropriate severity, the courts may also consider “whether the sentence is plainly unreasonable.”⁶⁴ 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.”⁶⁵ 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.”⁶⁶

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”;⁶⁷ (2) “the information submitted during the sentencing proceeding”;⁶⁸ and (3) “any information required by rule or order of the Court of Criminal Appeals.”⁶⁹

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.⁷⁰ That 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.⁷¹ 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.⁷²

The Board is charged with reviewing the sentencing parameters and recommending any appropriate changes.⁷³ The Board must also develop a means of measuring the effectiveness of the applicable sentencing, penal, and correctional practices, regarding the sentencing factors and policies of Section 539E.⁷⁴ This 2022 NDAA Section also repeals the provisions of Section 537 of the National Defense Authorization Act for Fiscal Year 2020 (2020 NDAA), which required secretarial guidelines on sentences.⁷⁵

Potential Issues in Sentencing

The 2022 NDAA reflects a clear change in the sentencing process in the military justice system, from indeterminate sentencing⁷⁶ to 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 procedures for imposing sentences in Federal courts is very different from the military’s current system. For example, in Federal practice, a probation officer completes a detailed presentence report, which recommends a particular sentence to the Federal judge.⁷⁷ Federal court sentencing hearings occur months after trial on the findings and the convicted defendant may be incarcerated pending the sentencing hearing.⁷⁸ Given those key differences, it remains to be seen whether the new sentencing scheme will work efficiently and effectively.

Victims’ Rights

In General

Over the past decade, the armed forces have implemented wide-ranging protections to safeguard the rights of sexual assault victims in the military justice system. Victims’ rights are set forth expressly in the UCMJ. For example, Article 6b provides victims with the rights “to be reasonably protected from the accused”; “to reasonable, accurate, and timely notice” throughout the process; “not to be excluded from any public hearing or proceeding”; “to be reasonably heard” at certain public hearings regarding the case; “to confer with [Government] counsel” in

the proceedings; to “restitution as provided in law”; to “proceedings free from unreasonable delay”; and “to be treated with fairness and with respect.”⁷⁹ Other victims’ rights are provided in the RCM (such as Rule 1001(c)(1), providing the right to be reasonably heard at the presentencing proceeding)⁸⁰ or in Service regulations.⁸¹

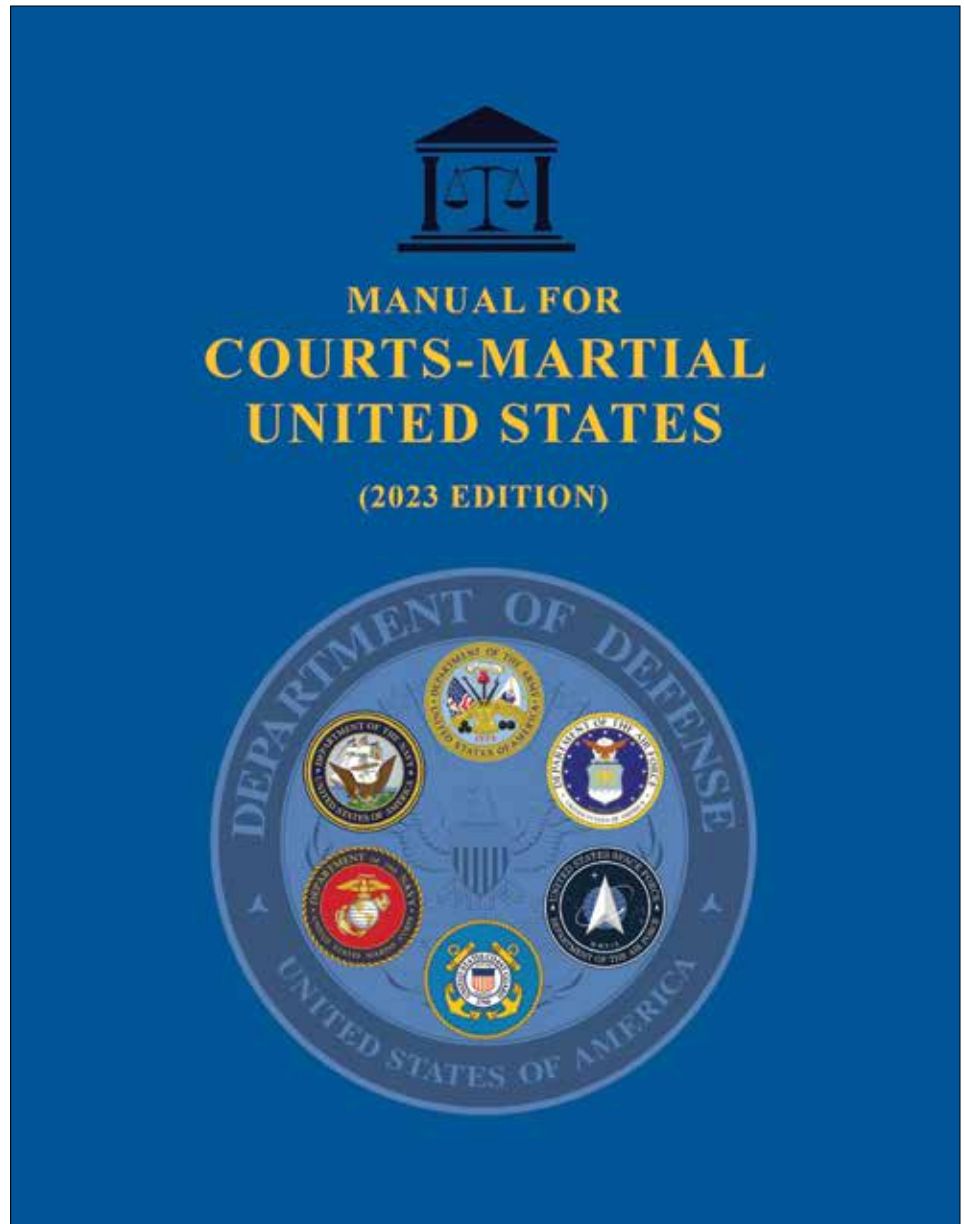
The 2022 NDAA included further changes designed to protect victims and provide them with procedural rights.⁸² One of the key provisions in Article 6b of the UCMJ is the requirement that the victim be apprised of the case status.⁸³ The 2022 NDAA expands Article 6b(a) by adding a new provision, which states:

(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.⁸⁴

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,⁸⁵ should be aware of the new provisional requirement that the victim receive information about dispositional decisions.

Modification of Notice to Victims of Disposition of Cases

Section 545 of the 2022 NDAA modifies Section 549 of the 2020 NDAA⁸⁶ 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



The new Article 24a, UCMJ, provides that each Service Secretary will promulgate regulations assigning commissioned judge advocates to serve as special trial counsel. The lead special trial counsel must be in the grade of at least O-7, with military justice experience. (Credit: jsc.defense.gov)

punishments assigned or characterization of service, as applicable), and such other information as the commander determines to be relevant.”⁸⁷

Referral of Sexual Harassment Complaints to Independent Investigator

The 2022 NDAA also amends Section 1561 of Title 10 to require that a commander who receives a formal complaint of sexual harassment must direct, within seventy-two hours of receiving the complaint, that an independent investigation be conducted.⁸⁸

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.⁸⁹

Civilian Positions to Support Special Victims’ Counsel

Section 546 of the 2022 NDAA states that each Secretary of a military department



(Credit: Ulf - stock.adobe.com)

may establish one or more civilian positions within every Office of Special Victims' Counsel.⁹⁰ Those individuals are to provide support to special victims' counsel, which will include "legal, paralegal, and administrative" support.⁹¹ 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.⁹²

Changes to the Punitive Articles

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 134.⁹³ On 26 January 2022, the President

signed Executive Order 14062, amending the MCM to reflect the new offense.⁹⁴ 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.⁹⁵ One of those amendments includes the existing offense of Domestic Violence (Article 128b), which is covered in the new Paragraph 78a.⁹⁶

Article 133 Amendment

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.⁹⁷ This punitive article has been commonly referred to as "conduct unbecoming an officer and a gentleman."⁹⁸ Section 542 of the 2022 NDAA made

Article 133 gender-neutral by removing the words "and a gentleman."⁹⁹ This punitive article was otherwise unchanged.

Random Selection of Court Members

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."¹⁰⁰ Although commentators have proposed reforms for the methods of selecting members,¹⁰¹ and in particular

random selection of members,¹⁰² random selection has not been required.¹⁰³ Nonetheless, some installations have used random selection¹⁰⁴ and the Army Court of Military Review approved an experimental program for random selection.¹⁰⁵

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.¹⁰⁶

This amendment will go into effect on 22 December 2024.¹⁰⁷ The challenge will be to draft RCM or other regulations that will utilize an efficient and randomized selection process and at the same time reflect the current guidance in Article 25, UCMJ for selecting the best-qualified members.

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.¹⁰⁸ Currently, Article 66(b)(1) provides that an accused can appeal their court-martial conviction if the sentence adjudged is more than six months;¹⁰⁹ the Government has previously appealed a ruling by a military judge under Article 62, UCMJ;¹¹⁰ the Government has appealed a court-martial sentence;¹¹¹ or the accused has filed an application for review of a decision by the Judge Advocate General.¹¹² 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, 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 ([A]rticle 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 section 869(d)(1) of this title ([A]rticle 69(d)(1)) and for which the application has been granted by the Court.¹¹³

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,¹¹⁴ 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 the Judge Advocate General's review of certain courts-martial convictions.¹¹⁵ That article was amended, *inter alia*, by changing the deadlines for seeking review by the Judge Advocate General. These amendments also went into effect the date the President signed the bill: 22 December 2022.

Concluding Thoughts

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

To avoid potentially adverse consequences to the military justice system, we encourage Congress in the future to hold extensive hearings on proposed amendments to the UCMJ.¹¹⁶ 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. **TAL**

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Notes

1. David A. Schlueter & Lisa M. Schenck, *Transforming Military Justice: The 2022 and 2023 National Defense Authorization Acts*, 231 MIL. L. REV. 1 (2023). The authors gratefully acknowledge the assistance of U.S. Army Captain Kendall Stanley, J.D. 2024, the George Washington University Law School, for her assistance in preparing this article.

2. 2016 Military Justice Act, Pub. L. No. 114-328, sec. 5001, 130 Stat. 2000, 2894; 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 Uniform Code of Military Justice).

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/bills/113/congress/senate/bills/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").

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 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>.

6. 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).
7. *See* James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, Pub. L. No. 117-263, sec. 541, 136 Stat. 2395, 2579 (2022).
8. Exec. Order No. 14103, 88 Fed. Reg. 50535 (July 20, 2023).
9. *See id.*
10. 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 commander's role in a significant number of other areas (topics that we discuss below).
11. Sec. 531, 135 Stat. at 1692.
12. *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) (issuing more than eighty recommendations to address sexual assault accountability and prevention).
13. *See id.* at 7 (recommending the creation of the Office of the Special Victim Prosecutor).
14. *See id.* (recommending the Office of the Special Victim Prosecutor makes decisions about sexual assault case prosecutions instead of the chain of command).
15. *See* ALAN OTT & KRISTY N. KARMAK, CONG. RSCH. SERV., R46940, MILITARY JUSTICE DISPOSITION DELIMITATION LEGISLATION IN THE 117TH CONGRESS (2021).
16. *See id.*
17. National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, sec. 531(a), 135 Stat. 1541, 1692 (2021).
18. *Id.* sec. 531(a), § 824a(b)(2).
19. *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 appointed 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.”
20. *Id.* sec. 531(a), § 824a(c)(2)(A).
21. *Id.* sec. 533(2), § 801(17) (amending UCMJ art. 1 by listing covered offenses).
22. James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, Pub. L. No. 117-263, sec. 541(a)(1), § 801(17)(A), 136 Stat. 2395, 2579-80 (2022) (adding UCMJ art. 119a as a covered offense).
23. *Id.* (adding UCMJ art. 120a as a covered offense).
24. *Id.* sec. 541(b)(1)(B), § 801(17)(A) (adding sexual harassment as a covered offense under UCMJ art. 134).
25. National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, sec. 532(a), § 1044f(a)(1), 135 Stat. 1541, 1694 (2021).
26. *Id.* sec. 532(a), §§ 1044f(a)(2)(B)-(C).
27. *Id.* sec. 532(a), § 1044f(a)(3)(A).
28. *Id.* sec. 532(a), § 1044f(a)(4).
29. *Id.* sec. 532(a), § 1044f(a)(3)(B).
30. *Id.* sec. 532(a), § 1044f(a)(5).
31. *Id.* sec. 531(c)(4), 135 Stat. at 1692.
32. *Id.* sec. 531(a), § 824a(c)(3)(A).
33. *Id.* sec. 531(a), § 824a(c)(3)(C).
34. *Id.* sec. 531(a), § 824a(c)(3)(D).
35. *See* UCMJ art. 25(e) (2016); 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) (“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.”).
36. Sec. 531(a), § 824a(c)(5), 135 Stat. at 1693.
37. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 303 (2019) [hereinafter MCM].
38. *See* Schlueter & Schenck, *supra* note 1, Section II.E.
39. Sec. 541(c), 136 Stat. at 2580.
40. *Id.* 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 lawmaking process.
41. *Id.*
42. *See id.*
43. Exec. Order No. 14103, annex 2, § 2(bbb), 88 Fed. Reg. 50535 (July 28, 2023) (R.C.M. 704(c)(2)).
44. *Id.* annex 2, § 2(x), 88 Fed. Reg. at 50622 (R.C.M. 309(b)(10)).
45. *Id.* annex 2, § 2(zz), 88 Fed. Reg. at 50660 (R.C.M. 703(d)(2)).
46. 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).
47. *See, e.g.,* MIL. JUST. REV. GRP., REPORT OF THE MILITARY JUSTICE REVIEW GROUP PART I: UCMJ RECOMMENDATIONS 475-76 (2015) [hereinafter MJRG REPORT]; Colin A. Kisor, *The Need for Sentencing Reform in Military Courts-Martial*, 58 NAVAL L. REV. 39 (2009); James Kevin Lovejoy, *Abolition of Court Members 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:
- 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* 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.
48. Sec. 539E(a)(2), §§ 853(c)(1)(A)(i)-(ii), 135 Stat. at 1700.
49. *Id.* § 853(c)(1)(B).
50. *Id.* sec. 539E(e)(4), 135 Stat. at 1704.
51. *Id.* sec. 539E(e)(1).
52. *Id.* secs. 539E(e)(1)(A)-(B).
53. *Id.* secs. 539E(e)(2)(A)-(D).
54. *Id.* sec. 539E(e)(3).
55. *See id.* sec. 539E(e).
56. *Id.* sec. 539E(c), § 856(c)(2)(A), 135 Stat. at 1701.
57. *Id.* sec. 539E(c)(1)(B), § 856(c)(4).
58. *Id.*
59. *Id.* sec. 539E(c)(1)(B), § 856(c)(5).
60. *Id.* sec. 539E(c)(1)(B), § 856(c)(6)(A).
61. *Id.* sec. 539E(c)(1)(B), §§ 856(c)(6)(B)(i)-(iii).
62. *Id.* sec. 539E(d).
63. *Id.* sec. 539E(d)(2), §§ 866(e)(1)(B)(i)-(ii).
64. *Id.* sec. 539E(d)(2), § 866(e)(1)(D).
65. *Id.* sec. 539E(d)(2), § 866(e)(1)(C).
66. *Id.* sec. 539E(d)(2), § 866(e)(1)(E).
67. *Id.* sec. 539E(d)(2), § 866(e)(2)(A).
68. *Id.* sec. 539E(d)(2), § 866(e)(2)(B).
69. *Id.* sec. 539E(d)(2), § 866(e)(2)(C).
70. *Id.* sec. 539E(e)(4)(A).
71. *Id.* secs. 539E(e)(4)(B)(i)-(iii).
72. *Id.* sec. 539E(e)(4)(C).
73. *Id.* secs. 539E(e)(4)(F)(i)-(v).
74. *Id.* sec. 539E(e)(4)(F)(vi).
75. *Id.* sec. 539E(g).
76. 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).
77. *See* U.S. SENT’G COMM’N, GUIDELINES MANUAL 2021, at 487 (2021) [hereinafter GUIDELINES MANUAL]. (“The probation officer must conduct a presentence investigation and submit a report to the court before it imposes a sentence . . .”).
78. *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 Sept. 21, 2023) (“A few months after the defendant is found guilty, they return to court to be sentenced.”).
79. UCMJ art. 6b (2021).
80. MCM, *supra* note 37, 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.”).

81. 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). Of course, the appellate courts may weigh in on the extent, applicability, and implementation of those rights. For example, in *Fink v. Y.B. and United States*, the U.S. Court of Appeals for the Armed Forces (CAAF) described the appropriate appellate process for a victim’s writ of mandamus petition to a Service court of criminal appeals. 83 M.J. 222 (C.A.A.F. 2023). In *Fink*, the U.S. Coast Guard Court of Criminal Appeals granted the victim’s petition for mandamus regarding the military judge’s Military Rule of Evidence 412 ruling. See *In re Y.B.*, 83 M.J. 501 (C.G. Ct. Crim. App. 2022). The accused appealed that adverse decision to CAAF and that court held that notwithstanding its decision in *Randolph v. HV*, 76 M.J. 27 (C.A.A.F. 2017), a 2017 amendment to Article 67(c)(1)(B) now extended the CAAF’s jurisdiction to consider the accused’s appeal. 83 M.J. at 225. Essentially, the court held that if the victim of an offense petitions a Service court of criminal appeals for a writ of mandamus under Article 6b(e), UCMJ, challenging a military judge’s decision or order, and if the Service court affirms or sets aside the military judge’s decision or order, the accused may petition the CAAF for review under Article 67(a)(3), UCMJ. *Id.* Pursuant to Article 67(c)(1)(B), the CAAF, in turn, may act with respect to the military judge’s decision or order. See UCMJ art. 67(c)(1)(B). Also, in *M.W. v. United States*, CAAF held that despite recent amendments to Article 6b, UCMJ, the court still lacks jurisdiction to hear an appeal filed by the victim of an offense. *M.W. v. United States*, No. 23-0104, 2023 CAAF LEXIS 472, at *14 (July 13, 2023). Most recently, *H.V.Z v. United States & Fewell* is currently pending review at CAAF to determine, inter alia, the applicable standard of appellate review for issuance of a writ of mandamus under Article 6b(e). *In re HVZ*, Misc. Dkt. No. 2023-03, 2023 CCA LEXIS 292 (A.F.C.C.A. July 14, 2023), rev. granted, *H.V.Z v. United States*, No. 23-0250/AF, 2023 CAAF LEXIS 651 (C.A.A.F. Sept. 13, 2023).

82. See, e.g., National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, secs. 545, 546 135 Stat. 1541, 1711-12 (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).

83. UCMJ art. 6b (2021).

84. Sec. 541, 135 Stat. at 1708.

85. 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).

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

87. Sec. 545, 135 Stat. at 1712.

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

89. *Id.* sec. 543(a), § 1561(d).

90. *Id.* sec. 546(a), 135 Stat. at 1712.

91. *Id.* sec. 546(b)(1).

92. *Id.* sec. 546(b)(2).

93. *Id.* sec. 539D(a).

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

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

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

97. UCMJ art. 133 (2021). See generally 1 DAVID A. SCHLUETER, MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE § 2-5 (10th ed. 2018) (discussing offenses under Article 133).

98. UCMJ art. 133 (1956).

99. 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).

100. UCMJ art. 25(e)(2) (2016).

101. 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).

102. 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).

103. In the National 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 101, at 354 (noting prior attempts by Congress to require random selection of members).

104. 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 randomly select court members and satisfy Article 25 requirements).

105. 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”).

106. 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.

107. Sec. 543(b), 136 Stat. at 2582.

108. UCMJ art. 66 (2021).

109. *Id.* art. 66(b)(1)(A).

110. *Id.* art. 66(b)(1)(B).

111. *Id.* art. 66(b)(1)(C).

112. *Id.* art. 66(b)(1)(D).

113. 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).

114. 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.

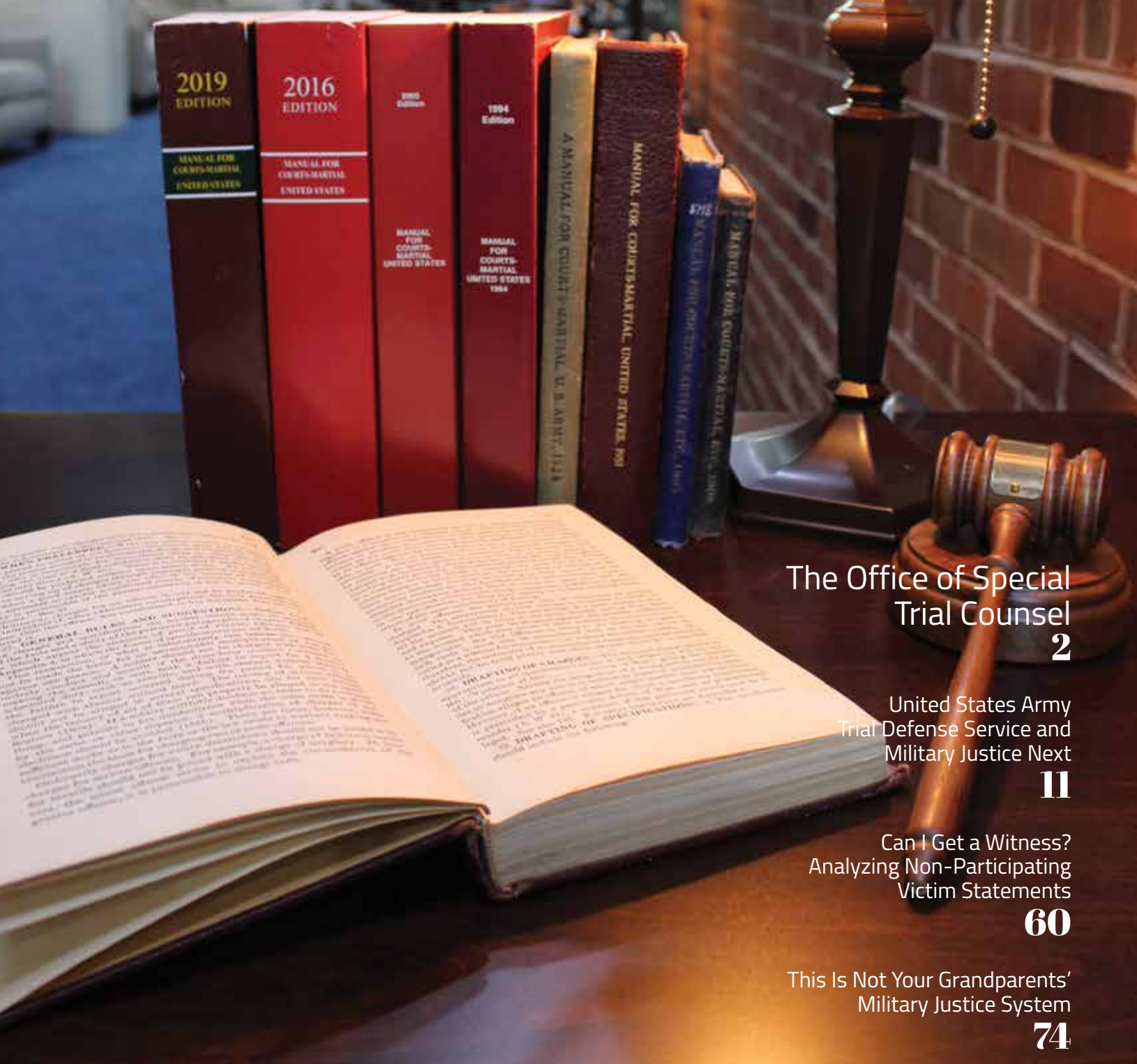
115. Sec. 544(c), § 869, 136 Stat. at 2582.

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

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