

Sexual Assault, the Military Justice System and Commanders' Authority; Recent Developments

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Over the past two decades, Congress has taken legislative action to address sexual misconduct in the military and to improve prevention, response, and accountability through the military justice system. Despite legislative changes and Department of Defense (DOD) initiatives, [sexual assault reporting and prevalence data](#) indicate continued risk factors and room for improvement across [several metrics](#). A [recent independent review](#) at Fort Hood which found “ineffective implementation” of the Army’s sexual harassment and assault prevention program, has raised additional congressional concerns.

Bills introduced the 116th and 117th Congress would require certain changes to the military justice system with respect to sexual harassment and assault. One proposed change applies to military commanders’ statutory authority, under the Uniform Code of Military Justice (UCMJ; Chapter 47, Title 10 United States Code), to dispose of certain sex-related cases. Members of Congress, victim advocacy groups, DOD officials, legal scholars, and other stakeholders continue to debate proposals to transfer this authority from commanders to career prosecutors.

In a [February 26, 2021 memorandum](#), Secretary of Defense Lloyd J. Austin III ordered the creation of a 90-day Independent Review Commission (IRC) to address sexual assault in the military. [According to DOD reporting](#), the IRC has four lines of effort: 1) accountability, 2) prevention, 3) climate and culture, and 4) victim care and support. The commission began work on March 24, 2021, and has [provided some initial recommendations](#) to Secretary Austin, including those related to the commander’s authority. While some officials have argued against transferring authority from commanders to career prosecutors, a few senior military leaders recently [expressed openness](#) to changing military justice processes.

Current Law and Practice: the Commander’s Disposition Authority

Military servicemembers are subject to punishment under the Uniform Code of Military Justice (UCMJ, [Chapter 47, Title 10 United States Code](#)). Military criminal investigative organizations (MCIOS) have

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primary jurisdiction over the investigation of serious offenses under the UCMJ, which include alleged sex-related offenses by a servicemember. Following a sexual assault allegation, the MCIO submits a report of investigation (ROI) to a military lawyer, called a Staff Judge Advocate (SJA), who reviews the ROI for legal sufficiency. The SJA then recommends to an *initial disposition authority* whether to take further action (i.e., judicial, non-judicial, or administrative). Since 2013, the military services have limited the initial disposition authority for alleged sex-related offenses to the first officer of rank O-6 or higher in the accused's chain of command who has the authority to convene special courts-martial ([10 U.S.C. §819](#)). After receiving the SJA's legal advice, this officer may exercise authority over the matter by convening a special court martial ([10 U.S.C. §818](#)). (For more information, see CRS Report R46503, *Military Courts-Martial Under the Military Justice Act of 2016*, by Jennifer K. Elsea and Jonathan M. Gaffney.) Before referring charges to a general court-martial, a pre-trial hearing is held to determine jurisdiction, probable cause, and further disposition (also called an *Article 32* hearing; [10 U.S.C. §832](#)), unless waived by the accused.

Proposed Limitations on Commanders' Disposition Authority

Legislation in the 117th Congress (S. 1520, H.R. 3224 and S. 1611) and similar bills in the 116th (S. 1789, H.R. 8270, and S. 4600) would make certain changes to the commander's authority. In particular, provisions in these bills would remove commanders' disposition authority for certain sex-related offenses (some versions of this legislation include other offenses for which the UCMJ authorizes confinement for more than one year). This authority would be centralized and reassigned under an "Office of the Chief Prosecutor" for each of the Armed Forces (other than the Coast Guard). The Chief Prosecutor would be appointed by the Judge Advocate General of the relevant service and would be a commissioned officer in the grade of O-6 or above who has significant experience prosecuting sexual assault trials by court-martial. In addition, the provisions would establish Offices of Chiefs of Staff on Courts-Martial for the Services, to convene and staff general and special courts-martial. The bills would also prohibit officers in the chain of command of the accused, or of the victim for a specified offense, from being the convening authority for a court-martial.

Aspects of the Debate

Those who support removal of the commander's authority, including [victim advocacy groups](#) and some [legal scholars](#), contend that career prosecutors are better qualified to make legal decisions than commanders. They also argue that this action may improve victim confidence in the impartiality of the military justice system and could lead to increased victim willingness to formally report sexual assaults and participate in the justice process. Supporters also contend that this change to the disposition authority would not preclude commanders from taking other disciplinary actions deemed necessary to maintain good order and discipline within their units.

Some, including prosecutors within DOD, argue against this change. The National Defense Authorization Act for Fiscal Year 2020 (NDAA, P.L. 116-92, Section 540F) required a report on the feasibility and advisability of an alternative military justice system in which judge advocates in the grade of O-6 or higher, with significant experience in criminal litigation, refer charges for trial by court-martial rather than commanding officers. This NDAA provision also requested feedback on the feasibility and advisability of a pilot program to implement this change.

The [resulting report of the Joint Service Subcommittee](#) (JSS) argues that the alternative system presents legal risks and administrative burdens to the entire military justice system, and could reduce commander

accountability for good order and discipline. The JSS pointed to a [prior study](#) by independent legal experts that found commanders have reasonably and capably decided 95% of cases under review. They also noted that there is little evidence from countries that have shifted authority away from commanders that these changes have had their desired effects. Finally, the authors argue that a pilot program would “create a system that arbitrarily subjects a subset of a uniform population to a different jurisdictional scheme. A separate jurisdictional scheme is bound to face significant and credible equal protection and due process challenges.”

Members of 117th Congress may consider these and other arguments in upcoming deliberations for the FY2022 NDAA. For additional information, see CRS Report R44944, *Military Sexual Assault: A Framework for Congressional Oversight*, by Kristy N. Kamarck and Barbara Salazar Torreon.

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