What the FY 2022 NDAA does, and does not do, to Military Justice

On December 15, the Senate passed the NDAA 22 bill by a vote of 89-10, sending the bill (which was approved by the House last week by a margin of 363-70) to President Biden for signature.

Among other authorizations, the new law will affect the UCMJ in the following important ways:

- The Act creates a novel independent "Office of the Special Trial Counsel" for each Service (Army, Navy, Marine Corps, Air Force, and Space Force, but not Coast Guard), reporting directly to the civilian Secretary of that Service, not to The Judge Advocate General or Chief of Staff of that Service. The TJAG, however, selects STCs (who are necessarily judge advocate officers, not civilian prosecutors in or outside the Department of Defense) based on qualifications akin to those expected of panel members chosen by a Court-Martial Convening Authority under Article 25, UCMJ ("education, training, experience, temperament"). There will be senior "Lead Special Trial Counsel" for each Service who will be a judge advocate in the grade of at least O-7 (brigadier general or rear admiral (lower half)).

- This STC will have "exclusive authority" to do several things only a commander with court-martial convening authority could do before:

    - (1) to determine which reported offenses are "covered offenses" and thus subject to his or her discretion;
    - (2) to withdraw or dismiss charges of a covered offense;
    - (3) to refer the covered offense charges to a court-martial;
    - (4) to enter into plea agreements with the accused

    Notably, the STC will have this exclusive authority over the covered offense and "related" offenses, as well as "any other offense" alleged to have been committed by the accused. So, for example, the STC would have prosecutorial authority over a soldier accused of sexual assault (Article 120) and extramarital sexual conduct (Article 134) related to the same incident, as well as any alleged martial deficiencies and offenses, like dereliction of duty (Article 92) or willfully disobeying a superior commissioned officer (Article 90) even if the latter offenses occurred before or after, or located nowhere near, the alleged Article 120 and Article 134 offenses.

- The Act defines "covered offenses" as: wrongful broadcast or distribution of intimate visual images (Article 117a); murder (Article 118); manslaughter (Article 119); rape and sexual assault, including of children, and certain other types of "sexual misconduct" (Articles 120, 120b, 120c); kidnapping (Article 125); domestic violence (Article 128b); stalking (Article 130); retaliation (Article 132); and producing, processing, receiving, viewing, and distributing child pornography (Article 134); as well as conspiring to, attempting, or soliciting any of the above (Articles 80, 81, 82).

- If the STC declines to prefer or refer a charge for a "covered offense," the convening authority may still take *other* regularly authorized actions regarding that allegation, except for referring it to a special or general court-martial.

- Interestingly, in a reversal of current practice, "commanders of the victim and the accused in a case involving a covered offense shall have the opportunity to provide input to the special trial counsel regarding case disposition, but that the input is not binding on the special trial counsel." So, where senior staff judge advocates once gave advice to the court-martial convening authority prior to a binding referral decision by that commander, now the commander may provide advice to the senior judge advocate serving as the STC before that judge advocate refers a "covered offense" to a court-martial.

- The STC has the authority to detail "regular" trial counsel, presumably from the Office of the Staff Judge Advocate at the installation where the accused was stationed, to assist in the prosecution of the case.

- The STC's decision to refer a case to a special or general court-martial shall be in writing, and essentially detail the same determinations currently made by a Staff Judge Advocate prior to referral under Article 34, UCMJ (each specification alleges an offense under the Code, probable cause exists to believe the accused committed the offense, and the court-martial would have jurisdiction over the accused).

- These provisions related to the new STC go into effect two years from the bill's enactment and will be related to misconduct allegedly committed after that effective date. But this comes with an interesting caveat: the President must prescribe regulations that put into effect these reforms within two years of enactment; if the President fails to do so, these changes become effective only on the date the Regulations are actually prescribed.

- The Act makes sexual harassment a new UCMJ offense, but only under Article 134. This means such behavior (also defined by this Act) is not criminalizable conduct *unless* the sexual harassment is, under the case-by-case circumstances, "of a nature to bring discredit upon the armed forces" and (or) is "prejudicial to good order and discipline."

- In another twist, *all other* listed Article 134 offenses are defined by the President in the Manual for Courts-Martial. That is, the factual elements that must be proven beyond a reasonable doubt are actually determined and prescribed by Executive Order for such offenses. However, Congress has defined the specific elements for the new Sexual Harassment offense and requires the President to revise the Manual accordingly.

- Military judges, not panels, will now make the sentence determination for all non-capital convictions, regardless of type of offense, at special and general courts-martial.

- Sentencing determinations are to be made within certain new "sentencing parameters;" a judge may depart from the parameters if the judge includes the factual basis and reason for that departure in writing in the record of trial. The "sentencing parameters," as well as "sentencing criteria," shall be prescribed by the President, based upon recommendations devised by a newly-established "Military Sentencing Parameters and Review Board" reporting to the

Secretary of Defense. These parameters, having the same purpose as the federal Sentencing Guidelines, must be prescribed within two years of this section's enactment.

- And, finally, Article 133's "Conduct unbecoming an officer and a gentleman" offense is revised to strike "*and a gentleman*." It only took seventy years.

Notably, the military justice portions of the final bill reflect a contentious compromise that evolved out of competing versions in the House and Senate, developed over the last year and which generated an intense amount of press coverage, a reactionary (but meant to be curative) Department of Defense "Independent Review Commission," no small amount of opinion-writing, and a higher than normal Congressional interest in this part of Title 10. The various proposals were distinguished by – primarily – how much discretionary court-martial disciplinary authority would be removed from commanders (would it be for some types of crime, like sexual assault, or for all "felonies" or "major crimes?") and what kind of authority would fill the vacuum (would it be some type of military or civilian independent prosecutorial office answering to senior civilian officials in the Pentagon rather than a disaggregated population of senior commanding officers?). In both respects, the NDAA's reform does unequivocally depart from what has been the historic and constitutionally-validated American practice for more than two centuries, long justified by claims of senior military officials.

It remains to be seen whether – in effect – this reform to military justice will meet or exceed the positive expectations set upon it, even those by President Biden (the "most significant reform to our military in recent decades"), or be remembered instead as "hobbling" a military commander's ability to discipline troops, leading to what some consider to be a regrettable, preventable, natural and foreseeable consequence: degraded national security. As one retired general put it:

> Depriving commanders of the ability to send serious criminal cases to a court-martial undermines their ability and responsibility to enforce good order and discipline, which in turn erodes their ability to fight and win wars. There is no evidence to suggest that this change would address the very real issue of sexual assault or other crime in the military. Instead, it would likely make matters worse.

To be fair, we must acknowledge a slippery slope argument, based on conjecture and personal anecdotal experience alone) when it is made. There is no actual evidence (beyond the "trust us" assertions about "good order and discipline" by senior uniformed officers testifying) offered to prove that the reform will "*likely make matters worse*" or will "*in turn erode their ability to fight and win wars.*" Actual empirical evidence from other modern militaries, in fact, with similar limitations on commanders' prosecutorial power suggest the opposite. It is, at least, a significantly *different* bill than that proposed by UCMJ reform's most ardent protagonist, Senator Gillibrand (D-NY), who was clearly disappointed by the modifications negotiated "behind closed doors" as the NDAA drafts were being hammered out by the Armed Services committees. There are some changes – consistent with the ongoing "civilianization" – that could have been enacted but were not. For example, guilty verdicts may still be made by a less-than-unanimous panel even though the Supreme Court (as recently as 2020) declared that such verdicts are unconstitutional in state and federal courts alike.

It is misleading to suggest, and a misunderstanding to believe, that commanders at all echelons have lost the better part of their prosecutorial power designed to foster good order and discipline and thus

increase the job performance reliability of those in the Armed Forces. To wit, the NDAA's reform does *nothing* to change the commanders' current ability and discretion to:

- Investigate relatively minor misconduct, especially that of a "martial" character (commanders at all echelons, from junior company or battery commanders to Fleet Admirals)

- Authorize a "search" and/or "seizure" for potential evidence, based on an independent and neutral probable cause determination, without seeking an authorization from a military magistrate (commanders at all levels)

- Place soldier in pre-trial restraint or confinement (commanders with court-martial convening authority)

- Determine whether to charge, refer to court-martial, pursue non-judicial punishment under the provisions of Article 15, UCMJ, impose administrative corrective measures, or do nothing at all for allegations of all the *non*-"covered offenses" (*and there are nearly 100 such offenses*, ranging from typical martial misconduct like disobeying an order, fraternization, AWOL, malingering, and misbehavior before the enemy, to conventional "civilian"-type major felonies, like forgery, use and distribution of controlled substances, rioting, larceny, robbery, bribery, extortion, assault, burglary, and arson)

- Make recommendations on how to dispose of a matter to higher commander in the chain-of-command (commanders at all levels)

- Withdraw and dismiss charges for any reason before findings (for the multitude of non-"covered" offenses) (commanders with court-martial convening authority)

- Determine who will be assigned to serve on court-martial panels (commanders with general court-martial convening authority and UCMJ-designated civilian officials (e.g., the president, secretaries of the services) with general court-martial convening authority)

- Provide immunity for testimony in cases of non-"covered" offenses (commanders and UCMJ-designated civilian officials with general court-martial convening authority)

- Approve plea agreements for non-"covered" offenses (commanders and UCMJ-designated civilian officials with general court-martial convening authority)

- Order pre-trial inquiries into a suspect's mental capacity and mental responsibility (commanders and UCMJ-designated civilian officials with general court-martial convening authority)

- Approve or modify findings (guilty or not guilty) and sentences (punishment) in limited scenarios (commanders with court-martial convening authority)

- Defer or suspend portions of a sentence for certain offenses (commanders with court-martial convening authority)

- Grant limited forms of clemency after a conviction and sentencing (commanders with court-martial convening authority)

What should be obvious from this non-exhaustive list is that commanding officers below the rank of Major General or Rear Admiral (upper half) (where general court-martial convening authority usually begins) have not lost any relevant and valuable authority to investigate, mitigate, resolve, and discipline most forms of misconduct affecting their troops' morale, cohesion, readiness for duty, or military effectiveness. Moreover, the forms of misconduct that have been removed from their purview by this NDAA (the "covered" offenses) are of notably exceptional legal and factual complexity and do not directly or *necessarily* implicate the commanders' ability to do what Congress demands, by law, of military leaders:

> (1) to show in themselves a good example of virtue, honor, patriotism, and subordination;
> (2) to be vigilant in inspecting the conduct of all persons who are placed under their command;
> (3) to guard against and suppress all dissolute and immoral practices, and to correct, according to the laws and regulations of the Army, all persons who are guilty of them; and
> (4) to take all necessary and proper measures, under the laws, regulations, and customs of the Army, to promote and safeguard the morale, the physical well-being, and the general welfare of the officers and enlisted persons under their command or charge.

Nor do these reforms directly or *necessarily* imperil the commanders' ability to do what the President as Commander-in-Chief demands of military leaders: "to promote justice, to assist in maintaining good order and discipline in the armed forces, [and] to promote efficiency and effectiveness in the military establishment" (according to the Preamble of the Manual for Courts-Martial), and make prosecutorial decisions in a "reasoned and structured manner, consistent with the principle of fair and evenhanded administration of the law" and while still "protecting the civil rights of Service members (per the MCM's "non-binding disposition guidance"). In fact, the reforms could arguably "contribute to the effective utilization of the Government's law enforcement and prosecutorial resources" (again, from the President's own guidance to commanders and judge advocates in the MCM).

Moreover, these reforms take place in a constitutional context in which the U.S. Supreme Court (1) defers to the rational judgment of Congress when it enacts "rules for the government and regulation" of the armed forces; (2) recognizes that military justice has evolved to satisfy certain operational demands implicit in providing national defense and only concerns a "specialized community" of professionals; and which (3) now also states the *primary purpose* of this military justice system is to effectuate "justice," not the commander's need for well-ordered subordinates (which it considers *incidental* to the main effort, analogous to civilian systems of justice).

In sum, the most significant changes wrought by the NDAA this year only shift the burden of prosecutorial judgment from certain flag officers in command to actual experienced and specialized prosecutors, who also happen to be uniform and who swear the same oath to protect and defend the Constitution. These judge advocates, in addition, may consider the well-considered advice and recommendations of those very commanders whose troops were impacted, one way or another, by a certain limited menu of offenses they no longer have the discretion to address personally. Finally, the transfer of this burden is a foreseeable next step along the decades-long arc of "de-militarizing" military justice across, not just in the United States but all over the world. This civilianization has happened in all the key and essential matters of due process and civil rights enjoyed by civilians facing criminal charges and punishment by the state. There is little reason to think that this arc will not continue in the same

direction. As the list above reveals, there remains a host of prosecutorial and judicial-like powers that may, ultimately, cede to uniformed lawyers or civilian courts. This NDAA reform – as compromise-ridden as the final bill ultimately became – proves that the Executive Branch has not yet sufficiently justified the continuing relevance and necessity of these powers on principled grounds, *to the satisfaction of Congress*. Arguments and defenses of the status quo based on little more than historical precedence and commander-preferences did not work.

POC: LTC Dan Maurer, daniel.maurer@westpoint.edu; daniel.d.maurer.mil@army.mil