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Military Justice Disposition Delimitation Legislation in the 117th Congress

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SUMMARY

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Military Justice Disposition Delimitation Legislation in the 117th Congress

This report provides a framework for Congress to consider the three disposition delimitation proposals in the House and Senate FY2022 National Defense Authorization Act bills. The terms "delimited disposition" and "disposition delimitation" refer to any procedure that requires disposition authority for a specified offense to be transferred from a commanding officer to a judge advocate.

Scope of Report

The first section of this report includes a brief overview of the military criminal justice system, followed by a comparative analysis of the House and Senate proposals regarding delimited disposition. The final section of the report describes the legislative considerations for each proposal's approach to delimiting disposition.

Historical Context

For more than two decades, Congress has sought to address sexual misconduct in the military by enhancing servicemember accountability under the military justice system. Despite these legislative efforts and Department of Defense (DOD) policy initiatives, independent evaluations have pointed to deficiencies in the department's approach to accountability.

In February 2021, Secretary of Defense Lloyd J. Austin directed an Independent Review Commission to assess DOD sexual assault prevention and response programs. On September 22, 2021, the Secretary issued guidance implementing the commission's recommendations. Specific instructions for the first phase of implementation are to be issued by the Under Secretary of Defense for Personnel and Readiness on October 13, 2021, with full implementation of this phase estimated to be complete by 2027.

Throughout the 1940s, Congress received evidence of military justice maladministration. The primary concerns were the system's lack of due process and independence. Congress responded to these concerns by enacting the Uniform Code of Military Justice (UCMJ) in 1950. Although legislative reforms establishing the UCMJ relied on civilian criminal law and procedure as a model, the reforms also preserved many historical attributes of military justice, such as a commander's discipline and disposition authority. Preserving certain attributes meant that although the UCMJ replicated a civilian criminal justice system overall, the reforms did not allow judge advocates to make decisions regarding the criminal prosecution of servicemembers. Prosecutorial discretion remained a function of command, and judge advocates continued to serve as advisors to commanders regarding their prosecutorial authority.

Options for Congress

The delimited disposition provisions examined in this report would allow a judge advocate to prefer or refer charges for certain offenses. This partial removal of a commander's authority would appear to place an internal control upon these offenses. Proponents of disposition delimitation may contend that the military justice system would be more equitable and effective when the disposition authority for these offenses is a judge advocate rather than a commander. Opponents acknowledge that delimitation is feasible, but they suggest that it is not advisable.

The three proposals discussed in this report present options for Congress. One option would be to disregard the proposals for disposition delimitation and maintain the discipline and disposition authority held by commanders under the UCMJ since 1951. If Congress accepts a proposal to delimit disposition, the two main considerations are: (1) the extent of delimited disposition, which subdivides military justice authority, and (2) the scope of delimited offenses, which subdivides offenses among the chain of command and judge advocate prosecutors.

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Background

This report provides a framework for Congress to consider the House and Senate disposition delimitation proposals in the FY2022 National Defense Authorization Act (NDAA). The terms "delimited disposition" and "disposition delimitation" refer to any procedure that requires disposition authority for a specified offense to be transferred from a commanding officer to a judge advocate.[1]

Disposition authority is similar to a civilian prosecutor's discretion to file charges, prosecute, plea-bargain, and recommend a sentence.[2] Besides disposition of charges for a military offense, a commanding officer may also administer nonjudicial punishment or administrative discipline as alternatives to a criminal prosecution.[3]

For more than two decades, Congress has sought to address sexual misconduct in the military by enhancing servicemember accountability under the military justice system.[4] Despite these legislative efforts and Department of Defense (DOD) policy initiatives, independent evaluations have pointed to deficiencies in the department's approach to accountability.[5]

Independent Review Commission

In February 2021, Secretary of Defense Lloyd J. Austin directed an Independent Review Commission (IRC) to assess DOD sexual assault prevention and response programs (SAPR). The IRC issued a report in June 2021 that contained eight SAPR-related problem statements.[6] One of these statements asserted that "the military justice system is not equipped to properly respond to special victim crimes."[7] The IRC concluded that unless and until special victim crimes "are

[1] 10 U.S.C. §801; *Black's* 540 (11th ed. 2019). The term "commanding officer" includes only commissioned officers. The term "judge advocate" means an officer of the Judge Advocate General's Corps of the Army, the Navy, or the Air Force; an officer of the Marine Corps who is designated as a judge advocate; or a commissioned officer of the Coast Guard designated for special duty (law).

[2] 10 U.S.C. §§830, 833, 834; *Black's* 586 (11th ed. 2019).

[3] Department of Defense, *The Manual for Courts-Martial* (MCM), *United States, Part II, Rules for Courts-Martial* (R.C.M.) *306, Initial disposition*, 2019 ed.

[4] The Government Accountability Office (GAO) reports that at least 249 statutory provisions related to military sex offenses were enacted as part of the National Defense Authorization Act (NDAA) between 2004 and 2019. Approximately one out of every five provisions was related to military justice and investigations. U.S. Government Accountability Office, *Sexual Assault in the Military: Continued Congressional Oversight and Additional DOD Focus on Prevention Could Aid DOD's Efforts*, GAO-21-463T, March 24, 2021, at https://www.gao.gov/products/gao-21-463t.

[5] *Report of the Fort Hood Independent Review Committee*, Executive Summary, November 6, 2020, p. iii, at https://www.army.mil/e2/downloads/rv7/forthoodreview/2020-12-03_FHIRC_report_exsum.pdf.; Department of Defense, *Annual Report on Sexual Assault in the Military*, Fiscal Year 2020, May 6, 2021, p. 5.

[6] Department of Defense, *Hard Truths and the Duty to Change: Recommendations from the Independent Review Commission on Sexual Assault in the Military*, June 21, 2021. See *Section II: Statement of the Problem*, pp. 17-32, (1) Broken Trust; (2) The Military Justice System is Not Equipped to Properly Respond to Special Victim Crimes; (3) Leadership is Paramount; (4) Sexual Harassment and Sexual Assault Exist on a Continuum of Harm; (5) Victims Bear a Heavy Burden; (6) Critical Deficiencies in the Workforce; (7) Outdated Gender & Social Norms Persist Across the Force; and (8) Little is Known about Perpetration.

[7] Ibid.

handled by highly trained and experienced special victim prosecutors, the military justice system will never be equipped to properly respond to special victim cases."[8]

Among the IRC's 28 recommendations, IRC Recommendation 1.1 advised the Secretary that the armed services should shift legal decisions to prosecute special victim crimes from commanders to judge advocates serving as independent special victim prosecutors (IRC 1.1).[9] In July 2021, Secretary Austin accepted IRC 1.1 and announced that he would "work with the Congress to make changes to the Uniform Code of Military Justice in such a way as to shift responsibility from military commanders for prosecuting sexual assaults and related crimes, as well as domestic violence offenses, child abuse and retaliation."[10]

On September 22, 2021, the Secretary issued guidance implementing the IRC recommendations to all DOD senior leaders and commanders.[11] The implementation is meant to consist of various actions, which are subdivided into four tiers. Specific instructions for the first tier were scheduled for issuance by the Under Secretary of Defense for Personnel and Readiness (USD(P&R)) on October 13, 2021, with full implementation of tier one estimated to be complete by 2027. IRC 1.1 is designated as a priority recommendation in the guidance, and DOD indicated that it has revised the original recommendation. Details of the revision were not included in the implementation memorandum.

Disposition Delimitation Legislation

The disposition delimitation concept in IRC 1.1 that Secretary Austin is implementing is not novel. It is similar to the concepts found in 15 legislative proposals that have been the subject of a near decade-long congressional debate (see **Appendix A**). This legislative history is the foundation for the disposition delimitation proposals in the House and Senate FY2022 NDAA (H.R. 4350, as engrossed, and S. 2792, as reported, respectively) (see **Table 1**).

There are two FY2022 NDAA bills, but there are three distinct disposition delimitation proposals, one in H.R. 4350, as engrossed, and two in S. 2792, as reported. H.R. 4350, as engrossed, includes the House IRC implementation (House-IRCI) provisions.[12] S. 2792, as reported, includes the Senate IRC implementation (Senate-IRCI) and the Military Justice Improvement and Increasing Prevention Act of 2021 (MJIIPA) provisions.[13]

The three proposals would primarily delimit serious offenses, which are offenses punishable under the authority of the Uniform Code of Military Justice (UCMJ) by death or confinement for a term exceeding one year (similar to a felony in a civilian criminal code).[14] The distinction between the proposals is that the House-IRCI and Senate-IRCI would encompass a narrow group

[8] Ibid, p. 19.

[9] Ibid, *Appendix B: Rebuilding Broken Trust: Recommendations for Accountability in the Military Justice System*, June 21, 2021, pp. 8-9.

[10] C. Todd Lopez, *DOD News*, Sexual Assaults Will No Longer Be Prosecuted by Commanders, July 2, 2021, https://www.defense.gov/Explore/News/Article/Article/2681848/sexual-assaults-will-no-longer-be-prosecuted-by-commanders/.

[11] Department of Defense, Secretary of Defense Memorandum, "Commencing DoD Actions and Implementation to Address Sexual Assault and Sexual Harassment in the Military," September 22, 2021.

[12] §§531-539I, H.R. 4350, as engrossed.

[13] §§531-552, 561-570, S. 2792, as reported.

[14] See MCM, Part IV, §84 or Army Regulation 27-10, *Military Justice*, November 20, 2020, Paragraph 5-14. In civilian criminal justice systems, a crime that is punishable by imprisonment for more than one year or by death is considered a *felony* or *serious crime* (*Black's* 762 [11th ed. 2019]).

of UCMJ offenses, each of which is designated as a special victim offense, whereas the MJIIPA would include a broad group of UCMJ offenses identified as a covered offense.[15]

UCMJ Definition of a Victim and IRC Definition of a Special Victim

A victim of a UCMJ offense is "an individual who has suffered direct physical, emotional, or pecuniary harm as a result of the commission of an offense" under the UCMJ (10 U.S.C. §806b). The IRC defined special victim crimes as "cases that disproportionately impact victims because of who they are, or what motivated the crime. These crimes are often interpersonal in nature, in which the victim and the alleged offender may have a pre-existing relationship or acquaintance. These are also crimes that require greater specialization and a sensitivity to the complex dynamics that are often present in these cases. Many sexual assault victims also have intersectional identities that result in compounded barriers to justice and place them at higher risk of re-traumatization as they engage in the criminal legal system and investigative processes" (IRC Report, *Appendix B*, p. 9).

The House-IRCI would delimit disposition for 13 serious offenses, and the Senate-IRCI would do so for 8 serious offenses, designated as special victim offenses.[16] MJIIPA would delimit disposition for 38 serious offenses, which include all IRCI special victim offenses.[17] None of the proposals would delimit offenses that are unique to military activities and operations (e.g., missing movement, jumping from vessel, aiding the enemy).

Table 1. Disposition Delimitation Proposals

House and Senate Versions of the FY2022 NDAA

Legislative Proposal	Sections	Bill
House IRC Implementation	531 to 539I	H.R. 4350 (as engrossed)
Senate IRC Implementation	531 to 552	S. 2792 (as reported)
Military Justice Improvement and Increasing Prevention Act of 2021	561 to 570	S. 2792 (as reported)

Source: CRS analysis of §§532-539E, H.R. 4350, as engrossed, and §§561-570, S. 2792, as reported.

A brief overview of the military criminal justice system is included in the next section of this report, followed by a comparative analysis of the House and Senate delimited disposition proposals.[18] Legislative considerations for each proposal's approach to delimiting disposition are presented in the report's final section.

Military Criminal Justice System

Jurisdiction under military law is based on the U.S. Constitution and relevant aspects of international law.[19] Military law jurisdiction is exercised through four distinct military justice forums: (1) courts-martial, (2) courts of inquiry, (3) military commissions, and (4) nonjudicial punishment proceedings.[20] Military law comprises federal law, constitutional authority, and

[15] §534, H.R. 4350, as engrossed; §533, S. 2792, as reported; §562(b), S. 2792, as reported.

[16] §534, H.R. 4350, as engrossed; §533, S. 2792, as reported.

[17] §562(b), S. 2792, as reported.

[18] For a broader overview of the current military justice system, see CRS Report R46503, *Military Courts-Martial Under the Military Justice Act of 2016*, by Jennifer K. Elsea and Jonathan M. Gaffney.

[19] Ibid, MCM, p. I-1. The U.S. Constitution grants the Armed Forces of the United States three types of governmental power, through military jurisdiction under military law, martial law, and military government (*Black's* 1189 [11th ed. 2019]).

[20] 10 U.S.C. §§815, 816, 935, 948b.

inherent command authority.[21] It is meant to promote justice, efficiency, and discipline in the armed services.

Throughout the 1940s, Congress received evidence of military justice maladministration.[22] The primary concerns were the system's lack of due process and independence.[23] Congress responded to these concerns by enacting the UCMJ in 1950, a military law code that applies to each armed service and replaced the prior military justice system.[24]

The punitive articles in the UCMJ are military law offenses (Articles 77-134).[25] Many of the punitive articles are criminal conduct offenses that have a referent offense in modern penal codes or historical common law (e.g., rape, murder, robbery).[26] Other punitive articles are military misconduct offenses that have a referent offense in medieval chivalric codes or Roman military practices (e.g., mutiny, desertion, cowardice).[27]

Judge Advocates

Each armed service has a senior legal officer known as the Judge Advocate General (JAG).[28] These senior officials are the principal legal officers responsible for military justice matters in their respective service. The attorneys whom they appoint to serve as judge advocates are the military officers primarily responsible for implementing the military justice system.[29] The roles and functions of judge advocates who are military justice practitioners resemble those of attorneys in a civilian criminal justice system (see **Table 2**).[30]

Although legislative reforms establishing the UCMJ relied on civilian criminal law and procedure as a model, the reforms also preserved many historical attributes of military justice, such as a commander's discipline and disposition authority.[31] Preserving certain attributes meant that while the UCMJ replicated a civilian criminal justice system overall, the reforms did not allow military lawyers to make decisions regarding the criminal prosecution of servicemembers. Prosecutorial

[21] Ibid, MCM.

[22] Department of Defense, *Report of the Military Justice Review Group Part I: UCMJ Recommendations*, December 22, 2015, p. 68.

[23] Ibid.

[24] P.L. 506, 81st Congress (64 Stat. 107), May 6, 1950.

[25] 10 U.S.C. §§877-934. A crime or an offense is an act made punishable by statute or under common law (*Black's* 466 [11th ed. 2019]).

[26] For example, see the original *Model Penal Code* published by the American Law Institute in 1962 at https://archive.org/details/ModelPenalCode_ALI/mode/2up.

[27] Department of the Army, *Pamphlet 27-100-87, Military Law Review*, no. 87, "The Court-Martial: An Historical Survey" (Winter 1980): 131-132. See also "Historical Perspective: Summary of Structural Changes in the Military Justice System" (DOD, *Report of the Military Justice Review Group Part I: UCMJ Recommendations*, December 22, 2015, pp. 41-86).

[28] 10 U.S.C. §801. The term "Judge Advocate General" means, severally, the Judge Advocates General of the Army, Navy, and Air Force and, except when the Coast Guard is operating as a service in the Navy, an official designated to serve as Judge Advocate General of the Coast Guard by the Secretary of Homeland Security. The equivalent senior legal officer in the Marine Corps is the Staff Judge Advocate to the Commandant (10 U.S.C. §8046).

[29] 10 U.S.C. §806.

[30] 10 U.S.C. §827. Any commissioned officer of the Navy, Marine Corps, or Coast Guard designated to perform legal duties for a command as a "legal officer" may also be detailed to serve as a trial counsel or a defense counsel (10 U.S.C. §801(12)).

[31] Ibid, *Report of the Military Justice Review Group*, p. 70.

discretion remained a function of command, and judge advocates continued to serve as advisors to commanders regarding their prosecutorial authority.

Table 2. Active Duty Military Justice Practitioners

Judge Advocates, by Armed Force

Duty Position	Army	Navy	Marine Corps	Air Force	Coast Guard	Total
Defense Counsel	132	53	69	104	8	366
Trial Counsel	128[a]	45[b]	72	—	19	342
Military Justice Chief	58	8	41	76	1	184
Military Judge	25	12	12	20	3	72
Appellate Judge	6	5	3	10	3	27
Total	349	123	197	288	34	991

Source: CRS analysis of information provided by JAG legislative liaison officials, December 11, 2020.

Notes: A "trial counsel" is a prosecutor, and a "military justice chief" is a supervisory prosecutor. A "military judge" is a judge advocate who is detailed and designated under 10 U.S.C. §§826, 830. Air Force officials informed CRS that 67% of all the service's judge advocates notionally are available to serve as trial counsels, but this general data could not be aligned with the specific data provided by other services.

a. Army officials informed CRS that the trial counsel number of 128 is for full-time prosecutors, but there are an additional 130 trial counsels who can prosecute cases as needed.

b. Navy officials informed CRS that the trial counsel number of 45 is for full-time prosecutors, but there are an additional 51 trial counsels who can prosecute cases as needed.

Investigation

DOD policy states that only entities with statutory law enforcement or criminal investigatory authority may conduct criminal investigations.[32] Each military department has a military criminal investigative organization (MCIO).[33] MCIOs must identify a DOD nexus before initiating a criminal investigation.[34] This nexus is a reasonable likelihood that an alleged or suspected offense is related to DOD personnel, activities, or installations.[35] If a serious offense, including a sexual offense, is alleged, an MCIO must investigate the allegation.[36]

MCIO investigations take precedence over commander inquiries and other parallel investigations.[37] However, if not preempted by an MCIO, all commanders have authority to conduct inquiries into military justice matters.[38] The form of such inquiries can range from an

[32] Department of Defense, *Instruction 5505.16, Investigations by DOD Components*, June 23, 2017, §1.2.

[33] Army, *Regulation 195-2, Criminal Investigation Activities*, July 21, 2020; Navy, *Instruction 5430.107a, Mission and Functions of the Naval Criminal Investigative Service*, June 19, 2019; Air Force, *Instruction 71-101, Criminal Investigations Program*, July 1, 2019. See also Coast Guard, *Commandant Instruction 5520.5F, Coast Guard Investigative Service Roles and Responsibilities*, November 30, 2011.

[34] Department of Defense, *Instruction 5505.03, Initiation of Investigations by Defense Criminal Investigative Organizations*, March 24, 2011, §4.d.

[35] Ibid.

[36] Regarding military justice matters, generally, the term "sexual offense" includes any sexual misconduct punishable under the Uniform Code of Military Justice, federal law, or state law (MCM, *Part III, Military Rules of Evidence, Rule 413, Similar crimes in sexual offense cases*, 2019 ed., p. III-21).

[37] Ibid, DODI 5505.03, §4.b.

[38] Ibid, DODI 5505.03, §3.3.

administrative investigation to a court of inquiry. Commanders must conduct preliminary inquiries into allegations that a servicemember committed an offense.[39] Commanders are required to report alleged or suspected sexual offenses to an MCIO.[40]

Prosecution

Upon completion of an inquiry or investigation, a commander makes an initial determination regarding the allegations. Initial determination for certain sexual offenses is restricted to the first officer in the chain of command who is in pay grade O-6 (as specified in 37 U.S.C. §201(a)(1)) and a special court-martial convening authority (as specified in 10 U.S.C. §823(a)).[41] Initial determination options available to a commander are

- take no action;
- initiate administrative discipline;
- impose nonjudicial punishment;
- initiate disposition of charges; or
- forward for disposition of charges.[42]

If the initial determination is to prefer charges or forward for disposition, a superior commissioned officer may subsequently determine to dismiss the charges or to refer any or all of the charges to a court-martial, as authorized.[43] A court-martial must be convened when charges are referred, because unlike civilian criminal courts, which typically are standing courts, a court-martial is a temporary activity established by a convening authority to conduct a trial for specific charges.[44]

There are three levels of courts-martial, each with a corresponding level of convening authority: general, special, and summary.[45] Special and general courts-martial try criminal conduct offenses analogous to misdemeanors and felonies, respectively, but they may also try minor misconduct offenses.[46] A summary court-martial adjudicates minor military misconduct offenses.[47] A general court-martial referral cannot be made before the convening authority obtains legal advice from a staff judge advocate.[48]

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[39] Ibid, MCM, Part II, R.C.M. 303, *Preliminary Inquiry into Reported Offenses*.

[40] Ibid, see R.C.M. 303 *Discussion*.

[41] 10 U.S.C. §823; MCM, Part II, R.C.M. 306(a); the memorandum of the Secretary of Defense titled "Withholding Initial Disposition Authority Under the Uniform Code of Military Justice in Certain Sexual Assault Cases" and dated April 20, 2012, or any successor memorandum; DOD, *Instruction, 6495.02, Volume 1, Sexual Assault Prevention and Response: Program Procedures*, March 28, 2013, as amended; Coast Guard, *COMDTINST M5810.1H, Military Justice Manual*, Ch. 5, §C, p. 5-2. The specific term "sex-related offense" is distinguishable from the general term "sexual offense." A sex-related offense is defined as a violation of 10 U.S.C. §§920, 920b, 920c, or 930, or an attempt to commit any of these offenses as punishable under 10 U.S.C. §880 (10 U.S.C. §1044e(h)).

[42] MCM, Part II, R.C.M. 306(c).

[43] MCM, Part II, R.C.M. 401. The term "superior commissioned officer" means a commissioned officer superior in rank or command (10 U.S.C. §801(5)).

[44] MCM, Part II, R.C.M. 504.

[45] 10 U.S.C. §816.

[46] 10 U.S.C. §§819, 818. See also MCM, Part II, R.C.M. 201.

[47] 10 U.S.C. §820. See also MCM, Part II, R.C.M. 1301.

[48] 10 U.S.C. §834.

Court-Martial Procedure: Preferring, Referring, and Convening

Among the various military justice procedures, certain sequential steps must occur before a military offense can be prosecuted in a trial by court-martial. A proper authority

- must first *prefer* charges (press charges and provide notice to the accused); and
- may then *refer* the charges to a court-martial (present charges and serve them upon the accused); and
- may then *convene* a court-martial (conduct a trial to adjudicate the charges against the accused).[49]

Under the legislative proposals for disposition delimitation, these three steps of a military criminal prosecution—prefer, refer, and convene—are the juridical elements that are delimited for certain offenses.

Incarceration

Servicemembers who receive a sentence of confinement may be confined in any facility under the control of an armed force or the United States, or a place the United States may use.[50] Such confinement typically occurs in a military confinement facility (MCF), unless a military offender is subsequently transferred to a federal civilian facility.[51] According to the *Annual Correctional Report* issued by each armed service, the total MCF population at the beginning of 2021 was 1,180 military offenders (759 military sex offenders and 421 other military offenders; 64% and 36%, respectively).[52] Military offenders transferred to a Federal Bureau of Prisons (BOP) facility as *military inmates* are not included in the *Annual Correctional Report* data.[53] The total BOP transferred military offender population in May 2021 was 247 military inmates (116 military sex offenders and 131 other military offenders; 47% and 53%, respectively).[54]

Disposition Delimitation

The proposed FY2022 NDAA delimited disposition provisions would allow a judge advocate to prefer or refer charges for certain offenses. This partial removal of a commander's disposition authority appears to act as an internal control placed upon disposition of these offenses.[55] Proponents of disposition delimitation may contend that the military justice system would be more equitable and effective when the disposition authority for these offenses is a judge advocate

[49] A preliminary hearing is required to convene a general court-martial (10 U.S.C. §832; MCM, Part II, R.C.M. 405).

[50] 10 U.S.C. §858.

[51] DOD, *Instruction 1325.07, Administration of Military Correctional Facilities and Clemency and Parole Authority*, March 11, 2013, Enclosure 2.

[52] U.S. Army; U.S. Navy; U.S. Marine Corps; U.S. Air Force; *DD Form 2720, Annual Correctional Report*, DD-P&R(A)2067, January 1, 2021, §13.b. Military sex offenders transferred to Bureau of Prisons federal facilities are not included in the data.

[53] BOP is required to accept up to 500 military inmates (DOD and DOJ, *Memorandum of Agreement Between Department of the Army and the Federal Bureau of Prisons, Transfer of Military Prisoners to the Federal Bureau of Prisons*, May 27, 1994).

[54] BOP, Office of Research & Evaluation, *Military Inmates Convicted of Sexual Offenses in Federal Custody—By Branch*, May 20, 2021.

[55] An internal control is a procedure to provide reasonable assurance of achieving objectives in effectiveness and efficiency of operations, compliance with applicable laws and regulations, and conformity with GAO or inspector general recommendations (e.g., 31 U.S.C. §7501(a)(10) and 34 U.S.C. §11103(44)).

rather than a commander.[56] Opponents acknowledge that delimitation is feasible, but they suggest that it is not advisable.[57]

Comparative Legislation

The various provisions in in the House and Senate proposals are distinguishable (see **Table 3**). For a comparison of military justice provisions associated with the proposals that are not related directly to disposition delimitation, see **Appendix B**.

Table 3. Comparison of Disposition Delimitation Proposals

House and Senate Versions of the FY2022 NDAA

H.R. 4350 (as engrossed) House-IRCI	S. 2792 (as reported) Senate-IRCI	S. 2792 (as reported) MJIIPA
Sec. 531 would cite sections 531-539E as the IRC Implementation Act of 2021.	No similar provision.	**Sec. 561** would cite sections 561-570 as the Military Justice Improvement and Increasing Prevention Act of 2021.
Sec. 532 would add an article to the UCMJ authorizing a special victim prosecutor (pay grade O-6), and their assistant prosecutors, in each armed service with exclusive authority to determine if a criminal matter is a special victim offense and authority to prosecute such offense and any related offenses. This provision would also authorize the Secretary of Defense to prescribe duties for special victim prosecutors by regulations "in consultation with the Secretary of Homeland Security." **SAP:** The Administration recommends that a special victim prosecutor be authorized at pay grade O-5 because of limited availability of pay grade O-6 officers.	**Sec. 531** is similar in purpose to Section 532 in H.R. 4350, and it would establish the authority to determine special victim offenses, but it would truncate overall disposition delimitation because it does not authorize prosecution authority. Special victim prosecutors could refer charges and specifications to a commander with convening authority, but the decision to convene a court-martial to conduct a trial would remain with the chain of command. This provision would also authorize more than one special victim prosecutor in each armed service, without a specified grade requirement, along with assistant special victim prosecutors. **Sec. 551** would require the Secretary of Defense to consult and enter into an agreement with the Secretary of Homeland Security to apply Senate-IRCI to the Coast Guard when it is operating in the Department of Homeland Security.	**Sec. 562** would authorize judge advocate officers designated as a court-martial convening authority (pay grade O-6 or higher) with authority to prosecute certain serious offenses and their lesser included offenses. This provision and other provisions in MJIIPA directly apply to the Department of Homeland Security and members of the Coast Guard.
Sec. 533 would add a provision to Title 10, *U.S. Code*, requiring DOD	**Sec. 532** is similar in purpose to Section 533 in H.R. 4350, but the	**Sec. 562** would require secretaries of military departments, and the

[56] The Government Accountability Office (GAO) defines the term "equity" as the consistent, systematic, fair, just, and impartial treatment of all individuals, including individuals belonging to groups that have been denied such treatment, and it defines the term "effectiveness" as the extent to which a program or intervention is achieving its intended goals (GAO, *Program Evaluation Key Terms and Concepts*, March 2021, p. 4).

[57] See Department of Defense, Joint Service Committee on Military Justice, *Report of the Joint Service Subcommittee Prosecutorial Authority Study* (JSS-PAS), September 2, 2020.

H.R. 4350 (as engrossed) House-IRCI	S. 2792 (as reported) Senate-IRCI	S. 2792 (as reported) MJIIPA
to issue uniform policies implementing special victim prosecutor authorities and requiring the secretaries of military departments to establish an independent secretariat-level Office of Special Victim Prosecutor headed by a judge advocate flag or general officer directly reporting to the secretary with assigned judge advocates who are independent from their JAG. **SAP:** The Administration states that a senior executive service civilian with similar qualifications should be added as an option for office head.	prosecutorial entity established would be a "dedicated office in the Secretariat of each military department from which office the activities of the special victim prosecutors of the military services concerned shall be supervised and overseen." Such office would be headed by a lead special victim prosecutor at grade O-6 who would be "under the authority, direction, and control of the secretary concerned", but this is a restatement of the general organizational relationship between a department and its secretary, which does not necessarily include direct reporting authority.[a]	Secretary of Homeland Security, to issue uniform policies implementing MJIIPA. **Sec. 563** would require each armed services chief to establish an independent Office of the Chief of Staff on Courts-Martial with authority to convene courts-martial for certain offenses.
Sec. 534 would amend the UCMJ by enumerating 13 special victim offenses, and 3 associated inchoate offenses, and by defining the terms *special victim prosecutor* and *assistant special victim prosecutor*.	**Sec. 533** would amend the UCMJ by enumerating eight special victim offenses and three associated inchoate offenses, and by defining the term *special victim prosecutor*.	**Sec. 562** would enumerate 38 covered offenses, and 3 associated inchoate offenses that are delimited. It would also enumerate 64 excluded offenses that are not delimited.
Sec. 535 would amend the UCMJ by clarifying that a commander who is a convening authority shall not be considered an accuser when convening a court-martial for charges and specifications referred by special victim prosecutor.	**Sec. 535** contains similar text as Section 535 in H.R. 4350.	MJIIPA does not contain a similar provision.
Sec. 536 would amend the UCMJ by requiring a trial counsel detailed to a court-martial for a special victim offense to be a special victim prosecutor, and it would authorize such prosecutor to detail assistant special victim prosecutors or other counsel.	**Sec. 543** is similar to Section 536 in H.R. 4350, except it specifies that regulations issued by the President are required to implement this provision.	**Sec. 563** authorizes a designated judge advocate to be detailed to a court-martial for delimited offenses.
Sec. 537 would amend the UCMJ by permitting a special victim prosecutor to determine that a preliminary hearing is not required or to request a military judge or magistrate to serve as a preliminary hearing officer pursuant to regulations issued by the President, and by adding the special victim prosecutor as a recipient of a preliminary hearing officer's report.	**Sec. 542** contains similar text as Section 537 in H.R. 4350.	MJIIPA does not contain a similar provision.
Sec. 538 would amend the UCMJ by limiting to a special victim prosecutor the authority to refer special victim offenses, and related	**Sec. 541** is similar to Section 538 in H.R. 4350, except it would establish a fourth element for the existing UCMJ Article 34	**Sec. 562** would preclude the application of Article 34 of the UCMJ to a designated judge advocate if there is a determination

H.R. 4350 (as engrossed) House-IRCI	S. 2792 (as reported) Senate-IRCI	S. 2792 (as reported) MJIIPA
offenses, to a general or special court-martial. But if prosecution of a related offense is declined by the prosecutor, then a convening authority could refer such offense to any type of court-martial.	requirement for general court-martial convening authority SJA advice by adding: "there is sufficient admissible evidence to obtain and sustain a conviction on the charged offense." This new element would also apply to a special victim prosecutor by requiring such prosecutor to make a written determination for a general or special court-martial that all four Article 34 elements are satisfied.	by the judge advocate that an offense is alleged, that there is probable cause supporting the allegation, and that a court-martial would have jurisdiction over the accused and offense.
Sec. 539 would amend the UCMJ by extending former jeopardy protections to an accused when a case is dismissed or terminated by a special victim prosecutor.	**Sec. 540** contains similar text as Section 539 in H.R. 4350.	MJIIPA does not contain a similar provision because convening authorities are part of the proposed Offices of the Chief of Staff on Courts-Martial, not the chain of command.
Sec. 539A would amend the UCMJ by granting a special victim prosecutor authority to enter into plea agreements for special victim offenses and would add express language that such agreement is binding on a convening authority as one of the "parties."	**Sec. 538** contains similar text as Section 539A in H.R. 4350.	MJIIPA does not contain a similar provision.
Sec. 539B would amend the UCMJ by granting a special victim prosecutor the authority to determine that a rehearing is impracticable for special victim offenses.	**Sec. 537** is similar to Section 539B in H.R. 4350, with technical corrections.	There is no similar provision in MJIIPA, but Section 562 would require the Secretary of Defense to recommend such changes to the MCM as are necessary to ensure compliance with this section.
No similar provision.	**Sec. 539** would amend the UCMJ by authorizing a special victim prosecutor and special victim counsel to issue a subpoena to compel the production of evidence.	No similar provision.
Sec. 539C would amend the UCMJ by creating a new article criminalizing sexual harassment. The House-IRCI would enumerate this offense as article 120d and define it as a special victim offense,	**Sec. 536** would require an amendment to the MCM making sexual harassment a nominative offense under Article 134 of the UCMJ (general article) instead of making it a separate punitive article like the Section 539C provision in H.R. 4350. Among other matters, Section 536 would (1) increase the requirements for proving fault; (2) require that the armed service was also harmed by the conduct of the accused; and (3) require proof that the accused had "actual knowledge" of committing the prohibited act, so intoxication would be a defense to	There is no similar provision in MJIIPA.

H.R. 4350 (as engrossed) House-IRCI	S. 2792 (as reported) Senate-IRCI	S. 2792 (as reported) MJIIPA
	committing sexual harassment. The Senate-IRCI would define this offense as a special victim offense.	
Sec. 539D would amend the UCMJ by adding the term "dating partner" to the terms "intimate partner" and "immediate family member" as a category of victim in the UCMJ offenses of Stalking and Domestic Violence.	**Sec. 534** contains similar text as Section 539D in H.R. 4350.	No similar provision.
No similar provision.	**Sec. 549** would require the military departments to give defense counsel entities authority over their budgets and ensure that such counsel have all required support. It would also require defense counsel detailed to special victim cases to have specialized skills and training.	No similar provision.
No similar provision.	**Sec. 550** would require the Secretary of Defense to submit a report to Congress detailing the resourcing necessary to implement the Senate-IRCI.	**Sec. 564** would require the secretaries concerned to implement MJIIPA using personnel, funds, and resources otherwise authorized by law, and it would not authorize personnel or funds for the implementation of MJIIPA.
H.Rept. 117-118 on H.R. 4350 directs the Secretary of Defense, in coordination with the military department secretaries, to submit a report to the defense committees by March 1, 2022, describing a training plan for military justice practitioners and identifying the plan's costs and benefits (p. 141).	No similar provision.	**Sec. 567** would require DOD to increase and enhance specialized training for prosecutors of sexual assault and domestic violence cases and to provide a report to the defense committees on the program implemented under this provision.
Sec. 539E provides that all amendments in the IRC Implementation Act of 2021 shall take effect two years after its enactment and apply to an offense occurring after the date the act takes effect.	**Sec. 552** contains similar text as Section 539E in H.R. 4350.	**Sec. 570** provides that MJIIPA shall take effect 180 days after its enactment and apply to an allegation of an offense made after the date the act takes effect.
Sec. 539G would require the Secretary of Defense, 180 days after the House-IRCI is enacted, to provide a report to Congress issued by an independent commission that examined whether independent prosecutions should include offenses other than special victim offenses.	No similar provision.	No similar provision.

H.R. 4350 (as engrossed) House-IRCI	S. 2792 (as reported) Senate-IRCI	S. 2792 (as reported) MJIIPA
Sec. 539H would require the Secretary of Defense, 180 days after the FY2022 NDAA is enacted, to provide a report to Congress on the status of IRC implementation with specific recommendations related to the four IRC lines of effort.	**Sec. 532** would require the Secretary of Defense 270 days after the FY2022 NDAA is enacted to submit a report on the status of IRC implementation with quarterly briefings to the House and Senate armed services committees thereafter.	**Sec. 565** would amend Title 10, *U.S. Code §156 Note*, to require the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces to advise the Secretary of Defense on the implementation of MJIIPA.

Source: CRS analysis of H.R. 4350, as engrossed, and S. 2792, as reported; Executive Office of the President, Office of Management and Budget, *Statement of Administration Policy, H.R. 4350 – National Defense Authorization Act for Fiscal Year 2022*, September 21, 2021, p. 2.

Note: SAP denotes Statement of Administration Policy.

a. For example, see 10 U.S.C. 113(b) and section 4 of DOD Instruction 5100.01, "All functions in the Department of Defense are performed under the authority, direction, and control of the Secretary of Defense."

Comparative Policy

The extent of delimitation in the three proposals is distinguishable. Under the House and Senate IRCI, a commander with special or general court-martial convening authority is delimited from convening either of these courts-martial for a special victim offense.[58] Under MJIIPA, a commander with general court-martial convening authority is delimited from convening a general court-martial for covered offenses.[59] See **Table 4** for a comparison of the proposed disposition delimitation policies.

Under the proposals, special victim offenses and covered offenses are included in disposition delimitation, but all other offenses are excluded. However, a special victim prosecutor under the House and Senate IRCI may exercise exclusive authority over an excluded offense if it is related to a special victim offense. Under MJIIPA, a designated judge advocate may do the same for an excluded offense if it is a lesser included offense of a covered offense.[60] See **Appendix C** for a comparison of the excluded offenses over which commanding officers retain disposition authority to prefer and refer charges.

Table 4. Comparison of Proposed Disposition Delimitation Policies

House and Senate Versions of the FY2022 NDAA

H.R. 4350 (as engrossed) House-IRCI	S. 2792 (as reported) Senate-IRCI	S. 2792 (as reported) MJIIPA
Promulgation		
Armed forces in DOD, consultation with the Secretary of Homeland Security required.	Armed forces in DOD, agreement with Secretary of Homeland Security for Coast Guard required.	All armed forces, including the Coast Guard.

[58] §532, H.R. 4350, as engrossed; §531, S. 2792, as reported.

[59] §562(d)(2), S. 2792, as reported.

[60] §532, H.R. 4350, as engrossed; §562(d)(3), S. 2792, as reported. The term "lesser included offense" means an offense that is necessarily included in the offense charged and any lesser included offense so designated by regulation prescribed by the President (10 U.S.C. §879; MCM, Part II, R.C.M. 307(c)(3)).

H.R. 4350 (as engrossed) House-IRCI	S. 2792 (as reported) Senate-IRCI	S. 2792 (as reported) MJIIPA
Prosecutor		
Special victim prosecutor must be • in grade O-6 or higher • a judge advocate • a bar member in a federal court or highest state court • certified as qualified for special victim prosecutor duty Assistant special victim prosecutor must be • Same as above • five years' experience	Special victim prosecutor or assistant must be • commissioned officer • a bar member in a federal court or highest state court • certified as qualified for special victim prosecutor duty Lead special victim prosecutor must be • in grade O-6 • significantly experienced in court-martial litigation	Designated judge advocate must be • in grade O-6 or higher • certified under article 27 of the UCMJ • serving outside the chain of command of the accused and victim • designated as a court-martial convening authority • significantly experienced in court-martial litigation
Prosecution		
A special victim prosecutor shall have exclusive authority to determine if an offense is a special victim offense and shall, upon completion of a relevant investigation, determine whether to prefer or refer charges for such offense and any related offense.	A special victim prosecutor shall have exclusive authority to determine if a reported offense is a special victim offense and shall determine whether to prefer or refer charges for such offense and any related offense.	A designated judge advocate shall have exclusive authority to determine whether to prefer or refer charges for a delimited offense, and any lesser included offense, and shall be designated as a court-martial convening authority.
A special victim prosecutor shall have exclusive authority to make a determination to cause charges to be preferred or to refer charges to a court-martial for trial that shall be binding on any applicable convening authority for the referral of such charges.	A special victim prosecutor shall have exclusive authority to make a determination to cause charges to be preferred, but does not have exclusive authority to refer charges to a court-martial because such referral is nonbinding on a convening authority.	A designated judge advocate shall have exclusive authority to make a determination to cause charges to be preferred or to refer charges to a court-martial for trial that shall be binding on any applicable convening authority for the referral of such charges.
Independence		
Direct reporting authority to secretary. Authority to prefer and refer charges for offenses is binding on commanders.	Authority to prefer charges for offenses is binding on commanders.	Direct reporting authority to service chief. Authority to prefer and refer charges for offenses is binding on commanders. Court-martial convening authority outside the chain of command
Synchronization		
A special victim prosecutor has primary authority to prosecute a special victim offense and any related offenses. A chain of command convening authority has primary authority to prosecute an offense that is not a special victim offense or its related offense. A convening authority can prosecute a related offense that is	Same as H.R. 4350 House-IRCI, except before exercising disposition authority, a special victim prosecutor must "provide that commanders of the victim and the accused in a special victim case shall have the opportunity to provide their candid input to the special victim prosecutor regarding case disposition, but that the input is not	A designated judge advocate has primary authority to prosecute a delimited offense and its lesser included offenses. A chain of command convening authority has primary authority to prosecute an offense for which the maximum punishment authorized includes confinement for one year or less, except four specified offenses under Article 134 of the

H.R. 4350 (as engrossed) House-IRCI	S. 2792 (as reported) Senate-IRCI	S. 2792 (as reported) MJIIPA
declined for prosecution in any type of court-martial the authority is authorized to convene. A convening authority can exercise any UCMJ authorities the authority possesses over a special victim offense that is declined for prosecution, except referral to a special or general court-martial.	binding on the special victim prosecutor" (§532(a)(6)).	UCMJ that are excluded from prosecution by a convening authority regardless of the maximum punishment authorized. A convening authority can prosecute a delimited offense and a lesser included offense that are declined for prosecution in a summary or special court-martial.
Implementation		
The military department secretaries must establish within their secretariat a head of the Office of Special Victim Prosecutors, who must be a judge advocate flag or general officer under the jurisdiction of such secretary and who shall report directly to the secretary without intervening authority.	DOD shall have policies that establish an office in the secretariat of each military department from which activities of the special victim prosecutors shall be supervised and overseen by a lead prosecutor at grade O-6, but this prosecutor does not have specific authority for directly reporting to the secretary.	Each service chief shall establish an office for courts-martial that is staffed with officers in grade O-6 or higher, among other personnel, who would convene courts-martial referred to them by a designated judge advocate. No additional resources or personnel would be authorized for this requirement.

Source: CRS analysis of H.R. 4350, as engrossed, and S. 2792, as reported.

Notes: The term "armed forces" is defined as the Army, Navy, Air Force, Marine Corps, Space Force, and Coast Guard (10 U.S.C. §101(a)(4)).

Comparative Offenses

Table 5 compares the special victim offenses and covered offenses that would be delimited under the proposed House and Senate versions of the FY2022 NDAA. In addition to its enumerated special victim offenses, the House-IRCI also designates any offense in which the victim was a child who had not attained the age of 18 years as a special victim offense.[61]

Table 5. Comparison of Delimited Offenses

House and Senate Versions of the FY2022 NDAA

Article	UCMJ Offense	S. 2792 (as reported) Senate-IRCI 8 offenses	H.R. 4350 (as engrossed) House-IRCI 13 offenses	S. 2792 (as reported) MJIIPA 38 offenses
80	Attempts (to commit any of the following offenses)	delimited	delimited	delimited
81	Conspiracy (to commit any of the following offenses)	delimited	delimited	delimited
82	Soliciting commission of offenses (any of the following offenses)	delimited	delimited	delimited

[61] §534, H.R. 4350, as engrossed.

Article	UCMJ Offense	S. 2792 (as reported) Senate-IRCI 8 offenses	H.R. 4350 (as engrossed) House-IRCI 13 offenses	S. 2792 (as reported) MJIIPA 38 offenses
93a	Prohibited activities with military recruit or trainee by person in position of special trust	—	—	delimited
117a	Wrongful broadcast or distribution of intimate visual images	delimited	delimited	delimited
118	Murder	—	—	delimited
119	Manslaughter	—	—	delimited
119a	Death or injury of an unborn child	—	delimited	delimited
119b	Child endangerment	—	delimited	delimited
120	Rape and sexual assault generally	delimited	delimited	delimited
120a	Mails: deposit of obscene matter	—	—	delimited
120b	Rape and sexual assault of a child	delimited	delimited	delimited
120c	Other sexual misconduct	delimited	delimited	delimited
121	Larceny and wrongful appropriation	—	—	delimited
121a	Fraudulent use of credit cards, debit cards, and other access devices	—	—	delimited
121b	False pretenses to obtain services	—	—	delimited
122	Robbery	—	—	delimited
124	Frauds against the United States	—	—	delimited
124a	Bribery	—	—	delimited
124b	Graft	—	—	delimited
125	Kidnapping	—	delimited	delimited
126	Arson; burning property with intent to defraud	—	—	delimited
127	Extortion	—	—	delimited
128	Assault (subsections (b) and (c))	—	—	delimited
128a	Maiming	—	—	delimited
128b	Domestic violence	delimited	delimited	delimited
130	Stalking	delimited	delimited	delimited
131	Perjury	—	—	delimited
131a	Subornation of perjury	—	—	delimited
131b	Obstructing justice	—	—	delimited
131c	Misprision of serious offense	—	—	delimited
131d	Wrongful refusal to testify	—	—	delimited
131e	Prevention of authorized seizure of property	—	—	delimited

Article	UCMJ Offense	S. 2792 (as reported) Senate-IRCI 8 offenses	H.R. 4350 (as engrossed) House-IRCI 13 offenses	S. 2792 (as reported) MJIIPA 38 offenses
131f	Noncompliance with procedural rules	—	—	delimited
131g	Wrongful interference with adverse administrative proceeding	—	—	delimited
132	Retaliation	delimited	delimited	delimited
134[a] MCM-Pt. IV §95	Child pornography	delimited	delimited	delimited
134[a] MCM-Pt. IV §103	Homicide, negligent	—	—	delimited
134[a] MCM-Pt. IV §104	Indecent conduct	—	—	delimited
134[a] MCM-Pt. IV §105	Indecent language communicated to any child under the age of 16 years	—	delimited	delimited
134[a] MCM-Pt. IV §106	Pandering and prostitution	—	delimited	delimited

Source: CRS analysis of H.R. 4350, as engrossed, and S. 2792, as reported.

Note: The inchoate offenses of attempts, soliciting, and conspiracy are not included in the total count of offenses because they are common to all offenses—excluded and delimited.

a. Article 134 (10 U.S.C. §934) makes punishable acts in three categories of offenses not specifically covered in any other article of the UCMJ. They are offenses that involve (1) disorders and neglects to the prejudice of good order and discipline in the armed forces, (2) conduct of a nature to bring discredit upon the armed forces, and (3) noncapital crimes or offenses that violate federal civilian law (MCM, Part 4, §91).

Legislative Considerations for Congress

The three disposition delimitation proposals discussed in this report present options for Congress. One option would be to disregard the proposals and maintain the discipline and disposition authority held by commanders under the UCMJ since 1951. If Congress accepts a proposal to delimit disposition, there are two main considerations: (1) the extent of delimited disposition, which subdivides UCMJ authority, and (2) the scope of delimited offenses, which subdivides offenses among the chain of command and judge advocate prosecutors.

In addition to any consideration of a proposal's impact on sexual misconduct in the military, another consideration may be whether a proposal will have an adverse or positive effect on command authority, the service's judge advocate branches, or racial disparities in the military justice system.[62]

[62] U.S. Government Accountability Office, *Military Justice: DOD and the Coast Guard Need to Improve Their Capabilities to Assess Racial Disparities*, GAO-20-648T, June 16, 2020, at https://www.gao.gov/products/gao-20-648t.

Congress may also consider the function of disposition delimitation. Congress and others have used the term "alternative military justice system" to describe the proposals, but this legislation would not create a new system; rather it would bifurcate the process for convening courts-martial and the procedures for preferring and referring charges.[63] Other than subdividing disposition, most aspects of how the military justice system works would remain the same. Additionally, Congress may consider whether a legislative proposal that does not authorize a prosecutor to make referral determinations that are binding on a convening authority is adequate for the purpose of disposition delimitation.

Extent of Delimitation

The principal utility of delimited disposition appears to be the capacity that a special victim prosecutor and a designated judge advocate have to direct the convening of a court-martial for the charges that they refer.[64] Like past bills with disposition delimitation provisions, the House-IRCI and MJIIPA would authorize prosecutors to refer charges that are binding to a convening authority in the chain of command, who must then convene a court-martial for the referred charges.[65] The IRC recommendation for a special victim prosecutor does not include binding referral authority, and the Senate-IRCI would not authorize such authority for a special victim prosecutor.[66] Instead, a commander with proper authority would determine whether to convene a court-martial based on the referral of charges and specifications by a special victim prosecutor. See **Table 6** for a comparison of disposition delimitation authorities under the three proposals.

Table 6. Comparison of Disposition Delimitation Authority

Preferring, Referring, and Convening

Disposition Delimitation Authority	H.R. 4350 (as engrossed) House-IRCI	S. 2792 (as reported) Senate-IRCI	S. 2792 (as reported) MJIIPA
Direct reporting authority to service chief or secretary	✓	—	✓
Preferral authority for charging offenses is binding on commanders	✓	✓[a]	✓
Referral authority for prosecuting cases is binding on commanders	✓	—	✓
Court-martial convening authority outside the chain of command	—	—	✓

Source: CRS analysis of H.R. 4350, as engrossed, and S. 2792, as reported.

a. See Section 532 of S. 2792, as reported. Commanders must have an opportunity "to provide their candid input to the special victim prosecutor regarding case disposition, but that the input is not binding on the special victim prosecutor." See also Article 37 of the UCMJ (Command influence) (10 U.S.C. §837).

Under the three proposals, commanders with proper authority would have disposition authority over offenses excluded from delimitation, unless a special victim prosecutor or a designated judge advocate assumes authority over an excluded offense as an offense related to a special victim offense or as a lesser included offense of a covered offense, respectively. The chain of command

[63] For example, see the *Executive Summary* on pages 1-4 of the DOD *Report of the Joint Service Subcommittee Prosecutorial Authority Study* (JSS-PAS) issued on September 2, 2020.

[64] §532, H.R. 4350, as engrossed; §562(d)(4), S. 2792, as reported.

[65] Ibid.

[66] Ibid, IRC Report, Appendix B, p. 15.

would have no UCMJ authority over any offense prosecuted by a special victim prosecutor or designated judge advocate.

However, commanders would have residual disposition authority for offenses over which a special victim prosecutor or designated judge advocate declines to prefer or refer charges. Under the House-IRCI and the Senate-IRCI, a commander with proper authority may exercise special and general court-martial convening authority over a declined related offense, but not over a declined special victim offense. Under MJIIPA, a commander has no authority to exercise general court-martial convening authority over any type of declined offense, but the commander may exercise any other UCMJ authority over a declined offense (see **Table 7**).

Since June 24, 2014, only general courts-martial are authorized to try offenses involving rape and sexual assault of any child or adult, or attempts to commit these offenses.[67] This existing limitation on the chain of command's UCMJ authority over such offenses would apply to all three proposals.

Table 7. Comparison of Chain of Command Residual UCMJ Authority

Preferring, Referring, and Convening

Prosecutor Declines to Prefer Charges or Refer Charges to a Court-Martial						
	H.R. 4350 (as engrossed) House-IRCI		S. 2792 (as reported) Senate-IRCI		S. 2792 (as reported) MJIIPA	
Chain of Command's Residual Authority for UCMJ Actions	Special Victim Offense	Related Offense	Special Victim Offense	Related Offense	Covered Offense	Lesser Included Offense
General Court-Martial	—	✓	—	✓	—	—
Special Court-Martial	—	✓	—	✓	✓	✓
Summary Court-Martial	✓	✓	✓	✓	✓	✓
Non Judicial Punishment	✓	✓	✓	✓	✓	✓

Source: CRS analysis of H.R. 4350, as engrossed, and S. 2792, as reported.

Scope of Delimited Offenses

When considering the scope of delimited offenses, Congress has at least three choices. Two of these choices are for special victim offenses, namely (1) House-IRCI (13 offenses) or (2) Senate-IRCI (8 offenses), and one is for covered offenses (3) MJIIPA (38 offenses, including special victim offenses).[68] Congress may also take into account whether DOD should establish a uniform enumeration of offenses for the various categories of sexual offenses in DOD policy. If delimited disposition offenses are added as a category, DOD would have varying enumerations of sexual offenses that differ in scope. See **Appendix D** for a comparison of sex-related offenses, registerable sex offenses, and delimited sexual offenses.

[67] 10 U.S.C. §818(c); MCM, Part II, R.C.M. (f)(1)(D), (f)(2)(D).

[68] The inchoate offenses of attempts, soliciting, and conspiracy are not included in the total count of offenses because they are common to all offenses—excluded and delimited.

Punitive Article on Sexual Harassment

The House-IRCI would amend the UCMJ by creating a new article (120d) criminalizing sexual harassment. The Senate-IRCI would create a nominative offense of sexual harassment under general article 134 in the MCM, which would require implementation by the President. On September 21, 2021, the Office of Management and Budget issued a *Statement of Administration Policy* for H.R. 4350 that included language urging Congress "to pass its requested sexual harassment punitive articles."[69]

Although the statement is associated with H.R. 4350, it is not clear if the Administration is urging the passage of the House or Senate version of the sexual harassment article. As proposed, the House and Senate versions of the sexual harassment offense provisions differ significantly. Selected portions of both versions are presented in a side-by-side format in **Appendix E**.

Those who support making sexual harassment a criminal offense have argued that it would "make a strong military-wide statement about the seriousness of these behaviors and the military's zero tolerance policy for them." [70] Those who oppose a military offense for sexual harassment claim that "making sexual harassment a crime could raise the stakes for the involved service members (both the alleged perpetrator and victim) and thereby deter reporting and resolution of incidents of sexual misconduct."[71]

Special Victim Offense

DOD has announced its intention to implement the IRC recommendation of delimitation by special victim offenses.[72] In testimony to the House Committee on Armed Services, Subcommittee on Military Personnel, on July 20, 2021, Deputy Secretary of Defense Dr. Kathleen Hicks provided DOD's rationale for accepting the IRC's approach of delimiting only special victim offenses.

Dr. Hicks noted that the IRC's mandate was limited to addressing issues related to sexual offenses and that DOD had not undertaken a similar review to determine the advisability of delimiting other serious offenses from commanders. She also conveyed DOD's concern that expanding the scope of the reform would draw attention and resources from the effort to address special victim offenses, stating:

> I think the biggest challenge we face is making sure we can effectuate positive change on sexual assault and sexual harassment in a timely manner that builds faith back into the system.... So, we do have a concern that, at once, we are trying to accomplish this important goal on sexual assault and sexual harassment. We would be swamping it and diffusing our efforts with other goals.[73]

Some opponents of delimiting disposition only for special victim offenses argue that most special victims are likely to be women. Focusing on offenses by type of victim, opponents argue, would create a court-martial venue dedicated to female victims, which could undermine unit cohesion by creating the perception of a lack of due process and independence.[74]

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[69] Executive Office of the President, Office of Management and Budget, *Statement of Administration Policy*, H.R. 4350 – *National Defense Authorization Act for Fiscal Year 2022*, September 21, 2021, p. 2.

[70] DOD, *Sexual Assault Accountability and Investigation Task Force*, April 30, 2019, p. 6, at https://media.defense.gov/2019/May/02/2002127159/-1/-1/1/SAAITF_REPORT.PDF.

[71] Laura T. Kessler and Sagen Gearhart, "Sexual Harassment is not a Crime: Aligning the Uniform Code of Military Justice with Title VII," *University of Pennsylvania Journal of Law & Public Affairs*, vol. 6, no. 3 (March 2021), p. 418.

[72] Department of Defense, Secretary of Defense Memorandum, "Commencing DoD Actions and Implementation to Address Sexual Assault and Sexual Harassment in the Military," September 22, 2021.

[73] U.S. Congress, House Committee on Armed Services, Subcommittee on Military Personnel, *The Findings and Recommendations of the Independent Review Commission on Sexual Assault in the Military*, 117th Cong., 1st sess., July 20, 2021.

[74] Eugene R. Fidell et. al., "Military justice reform, 'pink courts,' and unit cohesion," *The Hill*, June 10, 2021.

Covered Offense

Those in favor of delimiting serious offenses beyond special victim offenses have posited that a layperson should not be allowed to oversee complex juridical matters and exercise prosecutorial discretion over a process that can result in the equivalent of a federal felony conviction for general criminal conduct offenses. For example, in a July 2021 House Committee on Armed Services, Subcommittee on Military Personnel, hearing, Representative Jackie Speier proffered the following rationale for expanded delimitation:

> I believe the commission's rationale for removing sexual assault prosecution decisions from the chain of command also applies to other felony-level offenses that are nonmilitary specific.
>
> Crimes like murder, arson, and robbery are complex to investigate and prosecute, and commanders who are not attorneys do not have the expertise or experience to make high-quality prosecution decisions, and victims and their loved ones may perceive a conflict of interest that discourages reporting.[75]

In addition, this rationale may reflect concerns identified by GAO regarding racial disparities in the military justice system.[76] Some in favor of the broader MJIIPA approach to delimit other serious offenses from the commander's disposition authority suggest that expanding delimitation might also address these racial disparities. While the IRC recommended delimiting only special victim offenses, the report addresses the special nature of crimes that are motivated by, or associated with, individual attributes such as race, ethnicity, or sexual orientation.

DOD's reported rationale for not delimiting other serious offenses appears to be that it is impracticable to do so at the same time the department is delimiting special victim offenses. If the immediate administrative burden is the only factor DOD contends is preventing it from delimiting such offenses, then the concern over the quality and competence of special victim offense prosecutions may potentially be generalizable to any other serious offense. DOD's decision to make IRC 1.1 a priority recommendation suggests that the department acknowledges its responsibility to ensure that the military justice system can effectively prosecute special victim offenses.[77] Presumably, this duty of effective prosecution would extend to a trial for any serious offense against a person, such as a complex murder prosecution that could include the death penalty.[78]

Another possible reason why DOD finds it more practical to focus on special victim offenses could be that these offenses possibly represent a significant number of the cases prosecuted in the

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[75] U.S. Congress, House Committee on Armed Services, Subcommittee on Military Personnel, *The Findings and Recommendations of the Independent Review Commission on Sexual Assault in the Military*, 117th Cong., 1st sess., July 20, 2021.

[76] U.S. Government Accountability Office, *Military Justice: DOD and the Coast Guard Need to Improve Their Capabilities to Assess Racial Disparities*, GAO-20-648T, June 16, 2020.

[77] Department of Defense, Secretary of Defense Memorandum, "Commencing DoD Actions and Implementation to Address Sexual Assault and Sexual Harassment in the Military," September 22, 2021.

[78] Under the UCMJ, 14 offenses have death as a maximum punishment. One is for murder, two are for spying and espionage, and the remaining 11 offenses are military misconduct offenses, four of which must occur in time of war (MCM, Appendix 12). The last military execution occurred 60 years ago on April 13, 1961, by hanging for a conviction of rape and attempted murder. There have been 49 courts-martial since 1984 in which the death penalty was sought, 15 of which the death sentence was adjudged. Of these military offenders, two had their sentence commuted and eight had it overturned. Of the five remaining on death row, three have appeals pending and two have exhausted all appeals. For the two that have exhausted their appeals, one is awaiting an order to be executed and the other received an order of execution that has been appealed. (See *Military Facts and Figures*, Death Penalty Information Center, at https://deathpenaltyinfo.org/state-and-federal-info/military/facts-and-figures.)

military justice system. If this consideration is the basis for DOD's narrower approach to implementing disposition delimitation, the addition of 25 or 30 offenses under the broader approach of MJIPPA would not be what risks overwhelming the implementation of special victim prosecutors; instead, it would be the immediate effect of the 8 or 13 special victim offenses.

Appendix A. Legislation

Table A-1 lists the legislative proposals that have been the subject of a near decade-long congressional debate over disposition delimitation. This legislative history is the foundation for the disposition delimitation proposals in H.R. 4350, as engrossed, and S. 2792, as reported.

Table A-1. Selected Delimited Disposition Legislative Proposals

2013-2021

Date	Congress	Bill	Title
06/23/2021	117th	H.R. 4104	(1) Military Justice Improvement and Increasing Prevention Act
05/13/2021	117th	S. 1611	(2) I am Vanessa Guillen Act of 2021
05/13/2021	117th	H.R. 3224	(3) I am Vanessa Guillen Act of 2021
04/29/2021	117th	S. 1520	(4) Military Justice Improvement and Increasing Prevention Act of 2021
09/16/2020	116th	S. 4600	(5) I Am Vanessa Guillen Act
09/16/2020	116th	H.R. 8270	(6) I Am Vanessa Guillen Act of 2020
06/25/2020	116th	S. 4049	(7) Military Justice Improvement Act of 2020[a]
06/11/2019	116th	S. 1789	(8) Military Justice Improvement Act of 2019
05/16/2019	116th	S. 1500	(9) Military Special Victims Protection Act of 2019
11/16/2017	115th	S. 2141	(10) Military Justice Improvement Act of 2017
12/09/2014	113th	S. 2992	(11) Military Justice Improvement Act of 2014
12/02/2014	113th	S. 2970	(12) Military Justice Improvement Act of 2014
11/20/2013	113th	S. 1752	(13) Military Justice Improvement Act of 2013
05/16/2013	113th	S. 967	(14) Military Justice Improvement Act of 2013
05/16/2013	113th	H.R. 2016	(15) Military Justice Improvement Act of 2013

Source: CRS analysis of legislative proposals at https://www.congress.gov/.

a. Proposed amendment to Fiscal Year 2021 National Defense Authorization Act, S. 4049 (S.Amdt. 2106, 116th Congress (2019-2020), S3543-3544, June 25, 2020).

Appendix B. Military Justice Provisions

Table B-1 compares military justice provisions associated with the House and Senate proposals that are not directly related to disposition delimitation.

Table B-1. Selected Military Justice Proposals

House and Senate Versions of the FY2022 NDAA

H.R. 4350 (as engrossed) House-IRCI	S. 2792 (as reported) Senate-IRCI	S. 2792 (as reported) MJIIPA
Sec. 5391 would require DOD to report on its efforts to implement the recommendations from the May 2019 report of the Government Accountability Office titled "Military Justice: DOD and the Coast Guard Need to Improve Their Capabilities to Assess Racial and Gender Disparities."	No similar provision	No similar provision
No similar provision	No similar provision	**Sec. 566** would prohibit DOD from amending its sexual assault prevention and response programs (SAPR) policy relating to the treatment and handling of unrestricted and restricted reports of sexual assault, until 30 days after notifying the congressional defense committees of the proposed amendment or modification.
No similar provision	No similar provision	**Sec. 568** would require increased and enhanced education and training on military sexual assault prevention developed specifically for three discrete groups: service academy students, officer candidates and ROTC cadets, and senior commissioned and noncommissioned officers.
No similar provision	No similar provision	**Sec. 569** would require DOD to improve and enhance the physical security of all lodging and living spaces on military installations, to include CCTV surveillance, lock repair or replacement, and other passive security measures to increase the prevention of crimes, including sexual assault.

Source: CRS analysis of H.R. 4350, as engrossed, and S. 2792, as reported.

Appendix C. Excluded Offenses

Offenses that are not delimited are excluded from disposition delimitation. However, a special victim prosecutor may exercise exclusive authority over an excluded offense if it is related to a special victim of a UCMJ offense. A designated judge advocate may do the same for an excluded offense if it is a lesser included offense of a covered offense.[79] **Table C-1** compares offenses that are excluded from delimited disposition and retained for disposition by commanding officers with proper authority to prefer and refer charges.

Table C-1. Comparison of Excluded Offenses

House and Senate Versions of the FY2022 NDAA

Article	UCMJ Offense	S. 2792 (as reported) Senate-IRCI	H.R. 4350 (as engrossed) House-IRCI	S. 2792 (as reported) MJIIPA
83	Malingering	excluded	excluded	excluded
84	Breach of medical quarantine	excluded	excluded	excluded
85	Desertion	excluded	excluded	excluded
86	Absence without leave	excluded	excluded	excluded
87	Missing movement; jumping from vessel	excluded	excluded	excluded
87a	Resistance, flight, breach of arrest, and escape	excluded	excluded	excluded
87b	Offenses against correctional custody and restriction	excluded	excluded	excluded
88	Contempt toward officials	excluded	excluded	excluded
89	Disrespect toward superior commissioned officer; assault of superior commissioned officer	excluded	excluded	excluded
90	Willfully disobeying superior commissioned officer	excluded	excluded	excluded
91	Insubordinate conduct toward warrant officer, noncommissioned officer, or petty officer	excluded	excluded	excluded
92	Failure to obey order or regulation	excluded	excluded	excluded
93	Cruelty and maltreatment	excluded	excluded	excluded
93a	Prohibited activities with military recruit or trainee by person in position of special trust	excluded	excluded	—
94	Mutiny or sedition	excluded	excluded	excluded
95	Offenses by sentinel or lookout	excluded	excluded	excluded
95a	Disrespect toward sentinel or lookout	excluded	excluded	excluded
96	Release of prisoner without authority; drinking with prisoner	excluded	excluded	excluded
97	Unlawful detention	excluded	excluded	excluded
98	Misconduct as prisoner	excluded	excluded	excluded

[79] §532, H.R. 4350, as engrossed; §562(d)(3), S. 2792, as reported.

Article	UCMJ Offense	S. 2792 (as reported) Senate-IRCI	H.R. 4350 (as engrossed) House-IRCI	S. 2792 (as reported) MJIIPA
99	Misbehavior before the enemy	excluded	excluded	excluded
100	Subordinate compelling surrender	excluded	excluded	excluded
101	Improper use of countersign	excluded	excluded	excluded
102	Forcing a safeguard	excluded	excluded	excluded
103	Spies	excluded	excluded	excluded
103a	Espionage	excluded	excluded	excluded
103b	Aiding the enemy	excluded	excluded	excluded
104	Public records offenses	excluded	excluded	excluded
104a	Fraudulent enlistment, appointment, or separation	excluded	excluded	excluded
104b	Unlawful enlistment, appointment, or separation	excluded	excluded	excluded
105	Forgery	excluded	excluded	excluded
105a	False or unauthorized pass offenses	excluded	excluded	excluded
106	Impersonation of officer, noncommissioned or petty officer, or agent or official	excluded	excluded	excluded
106a	Wearing unauthorized insignia, decoration, badge, ribbon, device, or lapel button	excluded	excluded	excluded
107	False official statements; false swearing	excluded	excluded	excluded
107a	Parole violation	excluded	excluded	excluded
108	Military property of United States–Loss, damage, destruction, or wrongful disposition	excluded	excluded	excluded
108a	Captured or abandoned property	excluded	excluded	excluded
109	Property other than military property of United States—Waste, spoilage, or destruction	excluded	excluded	excluded
109a	Mail matter: wrongful taking, opening, etc.	excluded	excluded	excluded
110	Improper hazarding of vessel or aircraft	excluded	excluded	excluded
111	Leaving scene of vehicle accident	excluded	excluded	excluded
112	Drunkenness and other incapacitation offenses	excluded	excluded	excluded
112a	Wrongful use, possession, etc., of controlled substances	excluded	excluded	excluded
113	Drunken or reckless operation of a vehicle, aircraft, or vessel	excluded	excluded	excluded
114	Endangerment offenses	excluded	excluded	excluded
115	Communicating threats	excluded	excluded	excluded
116	Riot or breach of peace	excluded	excluded	excluded
117	Provoking speeches or gestures	excluded	excluded	excluded

Article	UCMJ Offense	S. 2792 (as reported) Senate-IRCI	H.R. 4350 (as engrossed) House-IRCI	S. 2792 (as reported) MJIIPA
118	Murder	excluded	excluded	—
119	Manslaughter	excluded	excluded	—
119a	Death or injury of an unborn child	excluded	—	—
119b	Child endangerment	excluded	—	—
121	Larceny and wrongful appropriation	excluded	excluded	—
121a	Fraudulent use of credit cards, debit cards, and other access devices	excluded	excluded	—
121b	False pretenses to obtain services	excluded	excluded	—
122	Robbery	excluded	excluded	—
122a	Receiving stolen property	excluded	excluded	excluded
123	Offenses concerning Government computers	excluded	excluded	excluded
123a	Making, drawing, or uttering check, draft, or order without sufficient funds	excluded	excluded	excluded
124	Frauds against the United States	excluded	excluded	—
124a	Bribery	excluded	excluded	—
124b	Graft	excluded	excluded	—
125	Kidnapping	excluded	—	—
126	Arson; burning property with intent to defraud	excluded	excluded	—
127	Extortion	excluded	excluded	—
128	Assault	excluded	excluded	—
128a	Maiming	excluded	excluded	—
129	Burglary; unlawful entry	excluded	excluded	—
131	Perjury	excluded	excluded	—
131a	Subornation of perjury	excluded	excluded	—
131b	Obstructing justice	excluded	excluded	—
131c	Misprision of serious offense	excluded	excluded	—
131d	Wrongful refusal to testify	excluded	excluded	—
131e	Prevention of authorized seizure of property	excluded	excluded	—
131f	Noncompliance with procedural rules	excluded	excluded	—
131g	Wrongful interference with adverse administrative proceeding	excluded	excluded	—
133	Conduct unbecoming an officer and a gentleman	excluded	excluded	excluded
134[a] MCM-Pt. IV §92	Animal abuse	excluded	excluded	excluded

Article	UCMJ Offense	S. 2792 (as reported) Senate-IRCI	H.R. 4350 (as engrossed) House-IRCI	S. 2792 (as reported) MJIIPA
134[a] MCM-Pt. IV §93	Bigamy	excluded	excluded	excluded
134[a] MCM-Pt. IV §94	Check, worthless making and uttering-by dishonorably failing to maintain funds	excluded	excluded	excluded
134[a] MCM-Pt. IV §96	Debt, dishonorably failing to pay	excluded	excluded	excluded
134[a] MCM-Pt. IV §97	Disloyal statements	excluded	excluded	excluded
134[a] MCM-Pt. IV §98	Disorderly conduct, drunkenness	excluded	excluded	excluded
134[a] MCM-Pt. IV §99	Extramarital sexual conduct	excluded	excluded	excluded
134[a] MCM-Pt. IV §100	Firearm, discharging-through negligence	excluded	excluded	excluded
134[a] MCM-Pt. IV §101	Fraternization	excluded	excluded	excluded
134[a] MCM-Pt. IV §102	Gambling with subordinate	excluded	excluded	excluded
134[a] MCM-Pt. IV §103	Homicide, negligent	excluded	excluded	—
134[a] MCM-Pt. IV §104	Indecent conduct	excluded	excluded	—
134[a] MCM-Pt. IV §105	Indecent language communicated to any child under the age of 16 years	excluded	—	—
134[a] MCM-Pt. IV §106	Pandering and prostitution	excluded	—	—
134[a] MCM-Pt. IV §107	Self-injury without intent to avoid service	excluded	excluded	excluded
134[a] MCM-Pt. IV §108	Straggling	excluded	excluded	excluded

Source: CRS analysis of H.R. 4350, as engrossed, and S. 2792, as reported.

a. Article 134 (10 U.S.C. §934) makes punishable acts in three categories of offenses not specifically covered in any other article of the UCMJ. They are offenses that involve (1) disorders and neglects to the prejudice of good order and discipline in the armed forces, (2) conduct of a nature to bring discredit upon the armed forces, and (3) noncapital crimes or offenses that violate federal civilian law (MCM, Part 4, §91).

Appendix D. Offense Categories

The term "sexual offense" under the Military Rules of Evidence includes any sexual misconduct punishable under the UCMJ, federal law, or state law.[80] DOD further defines sexual offenses as sex-related offenses (10 U.S.C. §1044e(h)) and registerable sex offenses (DODI 1325.07).[81] Combining all existing and proposed categories results in 14 sexual offenses and 3 inchoate offenses. **Table D-1** compares the UCMJ punitive articles for these offenses by category of sexual offense.

Table D-1. Comparison of Sexual Offenses, by Category

Positive Law, DOD Policy, and the House and Senate Versions of the FY2022 NDAA

Article	UCMJ Offense	10 U.S.C. §1044e(h) Special Victim Counsel	DODI 1325.07 Sex Offender Register	S. 2792 Senate IRCI	H.R. 4350 House IRCI	S. 2792 MJIIPA
80	Attempts (to commit any of the following offenses)	✓	✓	✓	✓	✓
81	Conspiracy (to commit any of the following offenses)	—	✓	✓	✓	✓
82	Solicitation (to commit any of the following offenses)	—	✓	✓	✓	✓
117a	Wrongful broadcast or distribution of intimate visual images	—	—	✓	✓	✓
119b	Child endangerment	—	—	—	✓	✓
120	Rape and sexual assault generally	✓	✓	✓	✓	✓
120a	Mails: deposit of obscene matter	—	—	—	—	✓
120b	Rape and sexual assault of a child	✓	✓	✓	✓	✓
120c	Other Sexual Misconduct	✓	✓	✓	✓	✓
128b	Domestic violence	—	—	✓	✓	✓
130	Stalking	✓	—	✓	✓	✓
133[a]	Conduct unbecoming an officer, other (moral turpitude)	—	✓	—	—	—
134[b] MCM-Pt. IV §95	Child pornography	—	✓	✓	✓	✓
134[b] MCM-Pt. IV §104	Indecent conduct	—	—	—	—	✓

[80] Ibid, MCM, Part III, M.R.E. 413. *Similar crimes in sexual offense cases*, p. III-21.

[81] 10 U.S.C. §1044e(h); Department of Defense, *Directive 6495.01, Sexual Assault Prevention and Response (SAPR) Program*, January 23, 2012, §4.l; 34 U.S.C. §20931; 10 U.S.C. §131 Note; Department of Defense, *Instruction 5525.20, Registered Sex Offender (RSO) Management in DOD*, November 14, 2016, §1.1.

Article	UCMJ Offense	10 U.S.C. §1044e(h) Special Victim Counsel	DODI 1325.07 Sex Offender Register	S. 2792 Senate IRCI	H.R. 4350 House IRCI	S. 2792 MJIIPA
134[b] MCM-Pt. IV §105	Indecent language communicated to any child under the age of 16 years	—	—	—	✓	✓
134[b] MCM-Pt. IV §106	Pandering and prostitution	—	✓	—	✓	✓

Source: CRS analysis of 10 U.S.C. §1044e(h); DOD, *Instruction 1325.07, Administration of Military Correctional Facilities and Clemency and Parole Authority*, March 11, 2013, Appendix 4 to Enclosure 2; H.R. 4350, as engrossed; S. 2792, as reported.

a. Article 133 (10 U.S.C. §933), the general offense of *conduct unbecoming an officer and a gentleman*, includes the specific offense of *committing or attempting to commit a crime involving moral turpitude* (MCM, Part IV, §90).

b. Article 134 (10 U.S.C. §934) makes punishable acts in three categories of offenses not specifically covered in any other article of the UCMJ. They are offenses that involve (1) disorders and neglects to the prejudice of good order and discipline in the armed forces, (2) conduct of a nature to bring discredit upon the armed forces, and (3) noncapital crimes or offenses that violate federal civilian law (MCM, Part IV, §91).

Appendix E. Criminalizing Sexual Harassment

The House-IRCI would amend the UCMJ by adding a new punitive article criminalizing sexual harassment. The Senate-IRCI also would make sexual harassment a military offense, but it would do so by directing the President to add sexual harassment to the MCM as a nominative offense under Article 134 of the UCMJ, an existing statute that is a general article serving as the basis for 17 other nominative offenses.[82] Besides the distinguishable promulgation, the House and Senate sexual harassment offense provisions differ significantly in substance.

The Senate-IRCI sexual harassment provision would establish a seemingly subjective fault element—*a certain person does believe*. The House-IRCI version would establish an objective fault element—*cause a reasonable person to believe*. Moreover, the current UCMJ punitive article used for punishing sexual harassment—Article 93 (cruelty and maltreatment)—is based on an objective fault element:

> The cruelty, oppression, or maltreatment, although not necessarily physical, must be measured by an objective standard. Assault, improper punishment, and sexual harassment may constitute this offense. Sexual harassment includes influencing, offering to influence, or threatening the career, pay, or job of another person in exchange for sexual favors, and deliberate or repeated offensive comments or gestures of a sexual nature.[83]

The subjective aspect in the Senate's proposed sexual harassment offense could increase the evidentiary requirements for establishing the fault element by having to meet a different subjective standard in each case to show that an alleged victim suffered from prohibited conduct, rather than relying on an objective standard to do so. Additionally, the principal fault element of the Senate-IRCI provision appears to require more than one act of sexual harassment by making "sexual advances" necessary instead of a single "sexual advance", which is the requirement under the House-IRCI version and Article 93 of the UCMJ. The Senate-IRCI version also would expand the offense's fault element to include the armed service as a necessary and simultaneous second victim. The fault element in the House-IRCI provision would not require an institutional victim.

Both proposed provisions appear to establish sexual harassment as a general intent crime (*knowingly*). However, the Senate-IRCI provision would seemingly supplement the mental state element by requiring the accused to have actual knowledge of making sexual advances, demands, or requests for sexual favors, or engaging in other conduct of a sexual nature. This requirement potentially would have the effect of making sexual harassment a specific intent offense (*purposely*). Among other matters, requiring the highest level of criminal culpability for the offense of sexual harassment could allow the accused to rely on intoxication as a defense against an element of specific intent, knowledge, or willfulness.[84]

Additionally, the required mental state in the Senate-IRCI sexual harassment provision would be greater than the level of culpability required for the cruelty and maltreatment punitive article currently used to punish sexual harassment.[85]

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[82] See MCM, Part IV, §91.

[83] 10 U.S.C. §893 (Article 93 of the UCMJ); see MCM, Part IV, §19(c)(3).

[84] See *Defenses* in MCM, R.C.M. 916(l)(2). Voluntary intoxication is not a defense to an offense, generally, but it is a legitimate defense against an element of premeditation, specific intent, knowledge, or willfulness in any crime; it is not a defense to crimes involving only a general intent. Evidence of any degree of voluntary intoxication may be introduced for the purpose of raising a reasonable doubt as to the existence of actual knowledge, specific intent, or willfulness.

[85] Any person subject to the UCMJ who is guilty of cruelty toward, or oppression or maltreatment of, any person

Table E-1 presents a side-by-side comparison of the proposed provisions.

Table E-1. Selected Portions of Proposed Sexual Harassment Offense Provisions

House and Senate Versions of the FY2022 NDAA

House-IRCI	Senate-IRCI
I. Elements—A person subject to this chapter commits sexual harassment when—	**I. Elements—**The required elements constituting the offense of sexual harassment are as follows:
A. Such person knowingly— **1.** makes a sexual advance, **2.** demands or requests a sexual favor, or **3.** engages in other conduct of a sexual nature.	**A.** That the accused knowingly made sexual *advances*, demands, or requests for sexual *favors*, or engaged in other conduct of a sexual nature.
B. The conduct described in paragraph (A) that such person committed is unwelcome.	**B.** That such conduct was unwelcome.
C. Under the circumstances, on the basis of the record as a whole, such conduct would cause *a reasonable person to*— **1.** believe that submission to, or rejection of, such conduct would be made, either explicitly or implicitly, a term or condition of a person's military duties, job, pay, career, benefits, or entitlements; **2.** believe that submission to, or rejection of, such conduct would be used as a basis for military career or employment decisions affecting that person; or **3.** perceive an intimidating, hostile, or offensive duty or working environment due to the severity, repetitiveness, or pervasiveness of such conduct.	**C.** That under the circumstances, such conduct— **1.** would cause a reasonable person to believe, *and a certain person does believe*, that submission to such conduct would be made, either explicitly or implicitly, a term or condition of a person's job, pay, career, benefits, or entitlements; **2.** would cause a reasonable person to believe, *and a certain person does believe*, that submission to, or rejection of, such conduct would be used as a basis for career or employment decisions affecting that person; or **3.** was so severe, repetitive, or pervasive, *that* a reasonable person would perceive, *and a certain person does perceive*, an intimidating, hostile, or offensive duty or working environment.
D. A person, who by some duty or military-related reason works or is associated with the accused, *did reasonably believe or perceive* as described in subparagraph (1), (2), or (3) of paragraph (C).	See "III. Nature of Victim" below.
No similar element.	**D.** That under the circumstances, the conduct of the accused was either— **1.** to the prejudice of good order and discipline in the Armed Forces, **2.** of a nature to bring discredit upon the Armed Forces, or **3.** to the prejudice of good order and discipline in the Armed Forces and of a nature to bring discredit on the Armed Forces.
II. Other Conduct—For purposes of subsection (I)(A)(3), whether other conduct would cause *a reasonable person to believe* it is of a sexual nature shall be dependent upon the circumstances of the act alleged and may include conduct that, without context, would not appear to be sexual in nature.	**II. Scope of Conduct Considered Sexual in Nature—**Whether other conduct is "of a sexual nature" shall be dependent upon the circumstances of the act or acts alleged and may include conduct that, without context, would not appear to be sexual in nature.

subject to his orders shall be punished as a court-martial may direct. Elements: (1) that a certain person was subject to the orders of the accused; and (2) that the accused was cruel toward, or oppressed, or maltreated that person. For example, "In that the accused did maltreat a person subject to his or her orders by ..." (10 U.S.C. §893 (Article 93 of the UCMJ); see MCM, Part IV, §19).

House-IRCI	Senate-IRCI
See "D" above.	**III. Nature of Victim—**For purposes of paragraph (I)(C), a "certain person" extends to any person, regardless of gender or seniority, or whether subject to the Uniform Code of Military Justice, who by some duty or military-related reason may work or associate with the accused.
III. Location and Means of Act—An act constituting sexual harassment under this section— **A.** may occur at any location and without regard to whether the victim or accused is on or off duty at the time of the alleged act; **B.** does not require physical proximity between the victim and the accused; and **C.** may be transmitted through any means, including written, oral, online, or other electronic means.	**IV. Timing and Location of Act—**The act constituting sexual harassment can occur at any location, regardless of whether the victim or accused is on or off duty at the time of the alleged act or acts. Physical proximity is not required, and the acts may be committed through online or other electronic means.
No similar element.	**V. Mens Rea—**The accused must have *actual knowledge* that the accused is making sexual advances, demands, or requests for sexual favors, or is engaging in other conduct of a sexual nature. Actual knowledge is not required for the other elements of the offense.

Source: CRS analysis of H.R. 4350, as engrossed, and S. 2792, as reported.

Notes: Selected portions of proposed sexual harassment offense provisions are renumbered and reformatted for clarity and presentation, emphasis added.

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