

CORNERSTONE
LEGAL BREAKOUT FACILITATOR GUIDE

The purpose of this breakout is for participants to discuss some legal issues that may arise during command. The questions associated with the fact patterns are for discussion leaders to ask members of their respective breakout group. Note that legal personnel from the NCR will be present to assist during your discussions.

This guide includes materials on search and seizure, restitution, sexual assault, officer misconduct, social media misconduct, NJP and courts-martial, investigations, gifts, and criminal justice reporting. This guide includes updates regarding the standup of the Office of Special Trial Counsel, which is a requirement of the FY22 National Defense Authorization Act.

Read to breakout group: “In dealing with legal matters, commanders must commit to the process, not the result. Being consistent and exercising authority in an objective manner will facilitate good order and discipline, and ensure fairness. As a baseline, your first call on military justice matters should always be to your staff judge advocate. The staff judge advocate to the general court-martial convening authority is your staff judge advocate and is responsible for providing you advice.”

Fact patterns:

- 1. SEXUAL ASSAULT**
- 2. SOCIAL MEDIA MISCONDUCT AND SEXUAL HARASSMENT**
- 3. PROHIBITED ACTIVITIES AND CONDUCT POLICY**
- 4. SEARCH AND SEIZURE/RESTITUTION**
- 5. ETHICS**

1. [SEXUAL ASSAULT] On your first Sunday in command, your OOD informs you that a Marine reported she was sexually assaulted in the barracks last night.

(a) What should the commander do first?

- Ensure the safety and security of the victim.
- Notify NCIS immediately.
- Ensure the victim is afforded medical treatment and access to available victim services; notify the SARC and Victim Advocate (VA) as soon as possible. The SARC and VA will also ensure the victim receives the appropriate services. Pursuant MCO 1752.5C, the commander must specifically ensure the victim is notified of the right to consult with a Victim's Legal Counsel.
- Ensure the victim is protected from retaliation for reporting the sexual assault. Commanders must foster a command environment that encourages the reporting of sexual assaults without fear of retaliation, reprisal, ostracism, or maltreatment.

(b) Does the commander need to report this allegation to anyone?

- Submit OPREP-3/SIR. Required for all unrestricted reports of sexual assault, to include prior-to-service incidents, incidents involving civilian victims and Marine offenders, and reports converted from restricted to unrestricted. See MCO 3405.2A for details and a sample.
- Submit 8-Day Incident Report
 - The victim's commander must provide the installation commander and the first O-6 and GO in both the victim and accused's chain of command a detailed written incident report within 8 days.
 - Required when an adult sexual assault is reported involving a Service Member victim or a Service Member subject. This requirement only applies to Unrestricted Reports made to a SARC or SAPR VA and to independent investigations initiated by the MCIO.
 - Provides general or flag officer level commanders with oversight within 8 calendar days over the local response to an Unrestricted Report or an independent investigation by an MCIO of sexual assault to assure victim care, visibility, and transparency to senior leaders and system accountability.
 - Directive-type Memorandum 14-007, "Sexual Assault Incident Response Oversight (SAIRO) Report," provides detailed instruction on how to prepare and route the 8- Day Incident Report. Do not include personally identifiable information in the report.

- See Commander’s SAPR toolkit (<https://www.sapr.mil/sapro-policy-toolkit>) for additional information.

(c) Who must investigate the sexual assault allegation?

- DoDIs 5505.18 and 5505.19 require NCIS to investigate all allegations of sexual assault. As used in the instructions, the term “sexual assault” includes the following offenses under the UCMJ: Rape; Sexual Assault; Aggravated Sexual Contact; Abusive Sexual Contact; Sexual misconduct violating Article 120c, UCMJ; and attempts to commit these offenses. Additional conduct may constitute “sexual assault” if it occurred prior to 1 January 2019; therefore, investigators will have to refer to the criminal statutes as they existed at the time the criminal conduct occurred.
- NCIS must investigate reports of sexual offenses that range from rape to over-the-clothes touching of breasts, groin, inner thigh, or buttocks.

(d) What if the commander does not believe that the allegation is credible when initially reported?

- Commanders must immediately notify NCIS of all unrestricted reports and allegations of sexual assault, regardless of the commander’s assessment of the credibility of the report. The Sexual Assault Initial Disposition Authority may consider the weight of the evidence when making a disposition decision.

(e) What needs of the victim and accused should commanders consider?

- Military Protective Order (MPO). Issue an MPO whenever necessary to safeguard a victim, quell a disturbance, or ensure the safety of a person. Ensure the subject and the protected person are notified when an MPO has been issued and are provided a copy redacted for Personally Identifiable Information, except the names of the parties involved.
 - The CO must consider the purpose of the MPO and the collateral consequences for the person receiving the order. An MPO should not be issued solely to keep the accused and victim separated. If there is no evidence that the victim requires protection from the accused, but the commander seeks to keep parties from communicating, the commander should issue a no-contact order instead of an MPO.
 - Use the updated DD Form 2873, FEB 2020 when issuing MPOs. The form is at: https://www.esd.whs.mil/Portals/54/Documents/DD/forms/dd/dd2873_2020.pdf. All previous versions of DD Form 2873 are obsolete.

- MARADMIN 216/20 and MCBUL 5810 require commanders to forward MPOs within 24 hours of issuance to the responsible military law enforcement agency (LEA) to be entered into the National Crime Information Center (NCIC) protection order file (POF) and the Marine Corps authorized criminal justice information system. Commanders issuing MPOs should discuss these requirements with their SJA.
- A no contact order should never be used as a “work around” to avoid entering MPOs into NCIC. If protection of a person is required, an MPO is the appropriate order, not a no contact order.
- If an MPO is modified, commanders must notify the appropriate LEA within 24 hours with a copy of the replacement DD Form 2873. Commanders who cancel the MPO must use DD Form 2873-1, located at:
<https://www.esd.whs.mil/Portals/54/Documents/DD/forms/dd/dd2873-1.pdf>
- If a member against whom an MPO is issued transfers to another unit, not later than the date of the transfer, the commander of the unit from which the member is transferred shall notify the gaining commander of (A) the issuance of the protective order; and (B) the individuals involved in the order.
- Issuing an MPO against an alleged victim without sufficient reason or as a matter of routine response to the report of a criminal offense may form the basis for an allegation of retaliation under Article 132, UCMJ, or MCO 5354.1F.
- Reassignment of the Accused. Commanders may temporarily reassign or remove a member of their unit accused of a sexual assault offense as required by the circumstances and after consultation with the SJA. Per MARADMIN 031/14, this is normally accomplished via intra-unit or local unit transfers as opposed to PCS orders.
- Expedited Transfer of Victim. For sexual assaults falling under the Sexual Assault Prevention and Response Program (SAPR), commanding officers shall ensure that victims are provided reasonable protection from the alleged offender, to include processing an eligible victim’s request for an expedited transfer to another location. COs shall approve or disapprove the request for transfer within 5 days of receiving the signed and dated transfer request by considering factors found in MCO 1752.5C, DoDI 6495.02 Volume 1, and NAVMC 1752.5 (Sexual Assault Prevention and Response Procedures).
- RESERVES: Some units within MFR are limited in their ability to effectuate an expedited transfer of Obligated SMCR Marines (in a drilling status). This will depend on location and MOS. COs

have developed solutions, such as allowing alternate drill days/weekends for alleged victims of sexual assault and/or Marines accused of sexual assault.

- Military Dependent Personal Safety Moves. Dependents of Service Members who are victims of abuse by the Service Member may apply for a Personal Safety Move. (JTR, Para. 051205). Contact your local Family Advocacy Program Office for specific guidance.

(f) Once the investigation is concluded, who determines whether there will be criminal charges?

(Note: The following guidance applies only for those offenses occurring on or before 27 December 2023. For offenses that occur after 27 December 2023, the Office of Special Trial Counsel (OSTC) will exercise authority over allegations of sexual assault and other covered offenses.)

- Pursuant to Department of the Navy policy, the initial disposition authority for special victim cases must be an O-6 Special Court-Martial Convening Authority (SPCMCA), or higher, known as a Sexual Assault Initial Disposition Authority (SA-IDA).
- The SA-IDA must address allegations of: rape or sexual assault in violation of UCMJ Article 120(a) or (b); aggravated sexual contact and abusive sexual contact in violation of Article 120(c) and 120(d); rape of a child, sexual assault of a child, and sexual abuse of a child in violation of Article 120b; forcible sodomy in violation of Article 125 (for forcible sodomy offenses allegedly committed prior to 1 January 2019); or attempts to commit any of these offenses in violation of Article 80, UCMJ. The SA-IDA must also address all other alleged offenses arising from the same incident whether committed by the accused or alleged victim.
- Pursuant to R.C.M. 306(e) and JAGINST 5800.7G w/CH 1 paragraph 0128, before an SA-IDA makes an initial disposition decision, the victim of sexual-related offenses occurring within the United States must be afforded the opportunity to express a preference about whether the case should be handled at court-martial or in a civilian court with jurisdiction. If the victim expresses a desire to have the case prosecuted in civilian court, the command must ensure the cognizant civilian authorities are notified of the victim's preference. The commander must ensure the victim is notified of the civilian authority's response once received, or, after consulting with the SJA, notify the victim that no civilian authority has jurisdiction over the offense.
- When the SA-IDA is making their initial disposition decision, they must consider the victim's preference; review the report of investigation; and consult with his or her SJA.
- Initial dispositions include: no action, administrative action, NJP, disposition of charges (i.e., preferral and referral of charges (an Article 32 preliminary hearing must be conducted prior to

referral to a GCM), or dismissal of charges), or forwarding to a superior commander (R.C.M. 306). The SA-IDA may NOT forward the charges to a subordinate commander.

- AdSep may be initiated by the lower-level commander once the SA-IDA decision has been made, BUT the SA-IDA or GCMCA must first decide administrative separation is appropriate and delegate authority to convene the board. When a board is convened pursuant to this delegated authority, the order appointing the board shall contain specific reference to this source of delegated authority.
- RESERVES: If no UCMJ jurisdiction exists (alleged sexual assault occurred when SNM was not in a duty status) OSJA, MFR, and the Command will work with local law enforcement and NCIS to gather evidence for civilian prosecution and possible administrative separation processing.
- Submit Uniform Command Disposition Report (replaced the Sexual Assault Disposition Report) to Judge Advocate Division upon final action.

(g) The investigation revealed that leading up to the alleged sexual assault, the victim, who was under the age of 21 at the time, consumed alcohol. What about misconduct by the victim?

- Pursuant to the DON Safe-to-Report Policy of 29 June 2022, no member of the DON may take adverse action against a service member who has made an unrestricted report of sexual assault, for minor misconduct collateral to the alleged sexual assault. The purpose of the policy is to remove a barrier to reporting by victims (i.e., a concern of getting in trouble for something as a result of coming forward).
- Initial disposition authority is withheld to the SA-IDA for all alleged offenses arising from or relating to a reported sexual assault, including victim collateral misconduct.
- The SA-IDA, in consultation with the SJA, must first determine whether the alleged victim misconduct is collateral to the sexual assault. If the misconduct *is not* collateral, the SA-IDA may take adverse action against the victim. If the misconduct *is* collateral, the SA-IDA must then, in consultation with the SJA, determine if it is minor or non-minor. A determination that the misconduct is collateral also triggers a reporting requirement; consult your SJA for details.
- If the collateral misconduct is *non-minor*, the SA-IDA may take adverse action against the victim. The SA-IDA is encouraged, but not required, to defer any disciplinary or administrative action until final disposition of the underlying sexual assault allegation. If the collateral misconduct is *minor*, the Safe-to-Report Policy applies, and no adverse action may be taken by anyone against the victim. The SA-IDA may, however, refer the victim to behavior health, substance abuse treatment, and/or suspend access to critical positions.

- Though SA-IDAs have discretion in these determinations, underage drinking at or near the time of the sexual assault is specifically identified in the policy as an example of victim misconduct that generally should be treated as minor collateral misconduct, for which adverse action is precluded.

(h) What changes after 27 December 2023? What are your continued responsibilities for these cases?

- For offenses that occur after 27 December 2023, the OSTC will have the exclusive authority to make referral decisions for allegations of sexual assault and other covered offenses¹. This means that the OSTC determines whether prosecution is warranted, and if so, a special trial counsel (STC) will sign the referral block of the charge sheet. The commander of the accused and victim may provide non-binding input to the OSTC regarding disposition of the case. The OSTC will also have the exclusive authority to withdraw and dismiss charges for covered offenses and enter into plea agreements with those accused of covered offenses.
- Many commander/convening authority responsibilities remain with respect to covered offenses: fulfilling reporting requirements; providing necessary care to the victim and accused; making decisions regarding pretrial restraint of accused; appointing an Article 32 preliminary hearing officer if requested by the OSTC; convening courts-martial and detailing members pursuant to Article 25; and paying for court-martial expenses.
- If the OSTC elects to not refer charges for a covered offense, the commander may take appropriate disciplinary or administrative action, except that the commander *may not* refer charges for covered offenses to a special or general court-martial, since the decision whether to prosecute covered offenses is exclusive to the OSTC.
- The OSTC may elect to exercise authority any over any offense related to a covered offense, such as collateral misconduct by the victim of sexual assault, though the Safe-to-Report policy equally applies to the OSTC. The OSTC may also elect to exercise authority over other known offenses committed by the same person accused of committing a covered offense, even if unrelated to the covered offense. For example, if the Marine accused of committing the sexual assault also tested positive in a urinalysis for a controlled substance, the OSTC may exercise authority over that offense. If the OSTC elects to not refer charges for related or other known offenses, the commander may take appropriate disciplinary or administrative action, *including* referral of charges to a special or general court-martial.

¹ Covered offenses are violations of Articles 117a (wrongful broadcast or distribution of intimate visual image), 118 (murder), 119 (manslaughter), 119a (death or injury of an unborn child), 120 (rape and sexual assault), 120a (depositing obscene matters in the mail), 120b (rape and sexual assault of a child), 120c (other sexual misconduct), 125 (kidnapping), 128b (domestic violence), 130 (stalking), 132 (retaliation), 134 (child pornography). On 1 January 2025, formal, substantiated complaints of Article 134 sexual harassment will also become a covered offense.

Responsibilities:

- Consult the SJA, NCIS, the Sexual Assault Response Coordinator (SARC), and the Victim Advocate (VA).
- Submit OPREP-3/SIR and 8-Day Incident Report.
- Ensure the victim is afforded medical treatment and access to available victim services.

Authorities:

- DoDI 5505.18
- DoDI 5505.19
- DoDI 6495.02
- SECNAVINST 1752.4C
- MCO 1752.5C
- NAVMC 1752.5
- MARADMIN 216/20
- MARADMIN 031/14
- MCBUL 5810
- JAGINST 5800.7G w/CH 1

Resources:

- Commander's SAPR toolkit (<https://www.sapr.mil/sapro-policy-toolkit>).
- The SJA, NCIS, SARC, VA.

2. [SOCIAL MEDIA MISCONDUCT AND SEXUAL HARASSMENT] The Victim Witness Assistance Coordinator (VWAC) in your unit, Sgt Victor, advises you, the XO, and the 1stSgt that LCpl Alpha from your S-3 section reported being a victim of non-consensual distribution of a consensually taken picture of herself engaged in a sexually explicit act with LCpl Bravo. LCpl Alpha reported that LCpl Bravo wrongfully shared the image with his SNCOIC, SSgt Charlie, as well as other unknown Service Members on a social media website. Both Marines exchanged disparaging comments regarding LCpl Alpha. In addition to posting disparaging comments, SSgt Charlie is reported to have wrongfully distributed the same downloaded images to other SNCOs within the unit via text message. LCpl Bravo and SSgt Charlie are both members of your unit, outside of the S-3 section.

(a) Who should you consult for guidance?

- Contact NCIS and your SJA. The misconduct alleged by LCpl Alpha falls within the conduct proscribed by Article 117a, UCMJ—wrongful broadcast or distribution of intimate visual images. (Note: Article 117a, UCMJ, is also a covered offense, which means that after 27 December 2023, the OSTC must be notified, and if the OSTC determines that the allegation constitutes a violation of Article 117a, the OSTC will exercise authority over it.)
- This misconduct may also constitute a violation of MCO 5354.1F, Prohibited Activities and Conduct Prevention and Response Policy, which may be prosecuted under Article 92, UCMJ. See MCO 5354.1F regarding required Discrimination and Sexual Harassment (DASH) reporting via the command Equal Opportunity Representative/Advisor. Also evaluate whether the alleged misconduct meets the threshold for OPREP-3/SIR reporting per the MCO 5354.1F, MCO 3504.2A (Joint Reporting Structure), and MARADMIN 168/17.

(b) Does rank of the accused matter in deciding on forum?

- That is a matter of discretion. Many factors must be taken into consideration and balanced, including, to the extent practicable, the accused's history of misconduct and appropriateness of the authorized punishment available to a particular accused. The goal should be a disposition that facilitates a fair and effective response to local conditions, in the interests of justice and good order and discipline. (See Appendix 2.1, MCM)

(c) Does the duty status of the alleged Marine offender matter?

- **RESERVES:** Yes. The Marine must be in a duty status (inactive duty training (IDT) or active duty) when the offense was committed to establish UCMJ jurisdiction. If the image was not distributed while LCpl Bravo was in a duty status, then jurisdiction would not exist pursuant to Article 2, UCMJ. However, LCpl Bravo would remain subject to administrative processing IAW the MCO 1900.16 w/CH 2 (MARCORSEPMAN) and MCO 5354.1F.

(d) LCpl Bravo: You decide to address LCpl Bravo's misconduct at Battalion NJP:

- **Who do you want to attend the NJP hearing?**

- Service Members are afforded the right to a personal appearance before the NJP authority, except when appearance is prevented by the unavailability of the NJP authority or by extraordinary circumstances. (See para. 4.c.(1), Part V, MCM)
- The Service member may be accompanied by a spokesperson who may speak for the Service member, but may not question witnesses except as allowed by the NJP authority. (See para. 4.c.(1)(B), Part V, MCM)
- Witnesses, including those adverse to the Service member, should be in attendance if requested by the accused and if their statements will be relevant and they are reasonably available. (See para. 4.c.(1)(F), Part V, MCM)
- The presence of representative members of the command as observers is authorized and encouraged to demonstrate integrity and fairness of the imposition of NJP. (See para. 0110.c., JAGINST 5800.7G w/ CH-1). However, formation NJPs are not recommended; public shaming must be avoided.
- The proceeding should be open to the public upon the accused's request unless the NJP authority determines that the proceedings should be closed for good cause. (See para. 4.c.(1)(G), Part V, MCM)

- **What evidence do you want to be able to consider?**

- Any relevant matter may be considered (see para. 4.c.(3), Part V, MCM). The Military Rules of Evidence, other than with respect to privileges, do not apply at NJP proceedings.
- The accused is entitled to present matters in defense, extenuation, and mitigation orally, in writing, or both. The accused may also have witnesses attend the proceeding if they are reasonably available and relevant. (See para. 4.c.(1)(E)–(F), Part V, MCM)
- The accused is also entitled to examine documents and physical objects the commanding officer considered as evidence in determining whether and how much punishment to impose.

(See para. 4.c.(1)(D), Part V, MCM). We recommend the NJP notification and a package of the evidence be provided to the LSSS for the defense counsel to review with the accused so the accused may make an informed decision about whether to accept NJP or demand trial by court-martial. Ensure all PII and Law Enforcement Sensitive information is redacted/removed from this package.

- **What if you learn during the hearing that LCpl Bravo has not had an opportunity to consult with counsel?**
 - The hearing should be halted and the accused given an opportunity to consult with defense counsel.
 - While there is no right for an accused to consult with defense counsel prior to imposition of NJP, COs should permit the accused an opportunity to consult with defense counsel prior to imposition of NJP, absent exigent circumstances. This is designed to ensure the accused fully understands the NJP process, their rights, and the ramifications of NJP.
 - Failure to provide the opportunity for an accused to consult with counsel prior to NJP does not preclude the imposition of NJP; however, it does preclude the admissibility of the record of NJP in aggravation at a later court-martial (see para. 0109.a.(1), JAGINST 5800.7G w/CH-1).
- **What if you learn during the hearing that LCpl Bravo may have been involved in the distribution of other images of LCpl Alpha that LCpl Bravo recorded non-consensually?**
 - The hearing should be halted and NCIS contacted to further investigate.
 - The accused may be involved in the wrongful distribution of a *non-consensually* recorded image, and this offense carries a more severe maximum punishment than non-consensual distribution of a *consensually* recorded image. Distribution of a non-consensual “indecent visual recording” may be a violation of Article 120c, UCMJ. (Note: Article 120c, UCMJ, is also a covered offense, which means that after 27 December 2023, the OSTC must be notified, and if the OSTC determines that the allegation constitutes a violation of Article 120c, the OSTC will exercise authority over it.)
- **After you review the evidence and hear from witnesses, you decide to impose punishment. What factors should guide your decision?**
 - Whether NJP is appropriate, and if so, the nature and amount of punishment, if any, are matters of discretion. Commanders considering NJP should consider the nature of the offense, the record of the Service member, the needs for good order and discipline, and the

effect of NJP on the Service member and the Service member's record. (para 1.d., Part V, MCM).

- **What if you decide that punishment is not appropriate?**
 - The commanding officer has a range of options, including imposing no punishment and suspending punishment. Punishment may also later be mitigated, remitted, or set aside. (See para. 5–6, Part V, MCM; see also MCO 5800.16, Volume 14).
- **What administrative actions are required after the NJP?**
 - A Unit Punishment Book (UPB) form (NAVMC 10132) will be used to record the imposition of NJP for enlisted Marines. Once the UPB is complete with all signatures, a copy is provided to the member and IPAC or Administrative section for unit diary reporting and scanning into the Marine's official military personnel file (OMPF) and Electronic Service Record (i.e., 3270 in MCTFS) (see MCO 5800.16, Volume 14).
 - The commanding officer imposing NJP will have a summary transcript of the proceedings prepared. This may be accomplished by using the form prescribed in JAGINST 5800.7G w/CH 1, Appendix A-1-f or a locally prepared form. This summary will be appended to the UPB form (see MCO 5800.16, Volume 14).
 - When an appeal from NJP is forwarded to higher authority for decision, compliance with JAGINST 5800.7G w/CH 1 sections 0116 and 0117 is required. Furthermore, applicable Page 11 entries, the Marine's Record of Service (Cpl and below), the original UPB form, the summarization of proceedings, and all allied papers shall be forwarded to higher authority (see MCO 5800.16, Volume 14).
 - Commanders are required to process Marines for administrative separation following the first substantiated incident of certain types of sexual harassment and wrongful distribution of intimate images (see para. 6210.8.c., MCO 1900.16 w/CH 2 (MARCORSEPMAN)).
 - A 6105 counseling entry is not required in cases where the basis requires mandatory processing. A 6105 counseling should only be used when a Marine will be given an opportunity to correct deficiencies.

(e) SSgt Charlie: You decide that NJP is not sufficient for a SNCO engaged in wrongful distribution of consensually recorded intimate images.

- **What are your options?**
 - Summary court-martial, special court-martial, non-BCD special court-martial, or general court-martial. (Note: After 27 December 2023, the OSTC shall exercise authority over the

Article 117a offense, but may defer the offense back to the command, who may take any appropriate action except refer the Article 117a offense to a special or general court-martial.)

- **You decide to refer the case to a summary court-martial (SCM). Are there any downsides to this COA?**
 - For sergeants and above, summary courts-martial may not adjudge confinement, hard labor without confinement, or reduction except to the next pay grade. In the case of SSgt Charlie (E-6), he may only be reduced to E-5 and no confinement could be imposed (see R.C.M. 1301(d)(2)).
 - The Military Rules of Evidence (Part III of the MCM) apply to summary courts-martial. The summary court-martial officer must be familiar with the Military Rules of Evidence and prepared to take action on motions of the accused.
 - The command is responsible for providing significant administrative support to the summary court-martial officer, to include arranging for the presence of witnesses.
 - If the accused pleads not guilty and the summary court-martial becomes contested, the proceedings may take on a level of complexity that the summary court-martial officer is not prepared for. Furthermore, upon conclusion of the proceeding, the summary court-martial is required to undergo a review by a judge advocate to ensure compliance with applicable Rules for Courts-Martial (see Article 64, UCMJ).
 - Summary courts-martial are not criminal courts; therefore, a finding of guilty at summary court-martial does not constitute a criminal conviction (see Art. 20(b), UCMJ).
- **When notified that you will refer his case to SCM, SSgt Charlie exercises his right to object to SCM. What do you do now?**
 - The accused has a right to object to SCM prior to arraignment, even if that person also refused NJP and demanded trial by court-martial for the same offenses (see R.C.M. 1303).
 - The convening authority may refer the charges to a special court-martial.
 - Commanders also have the authority to refer charges to a special court-martial required to be tried by a judge alone in which no discharge is authorized and only six months confinement, reduction to lowest enlisted pay grade, and forfeiture of 2/3 pay for six months are authorized. The accused may only object to this forum if a conviction would require the DoD to notify local jurisdictions that the accused should be registered as a sex offender or if the maximum punishment authorized is greater than two years (with the exception of drug

cases under Art. 112a) (see Art. 16(c)(2), UCMJ); R.C.M. 201(f)(2)(E)). Commanders should consult their SJAs to determine if this is an appropriate forum.

- If a commander with only special court-martial convening authority determines the appropriate disposition is a general court-martial, then the commander may forward the charges to the first general court-martial convening authority in the chain of command, or the commander may direct an Article 32 Preliminary Hearing.
- At either a special or general court-martial, the convening authority is responsible for administrative requirements, including funding for travel of relevant and necessary defense and government witnesses and funding for defense and government expert witness testimony or consultation.

- **Why might SSgt Charlie have objected to Summary Court-Martial?**

- SSgt Charlie realizes that a conviction at summary court-martial for a substantiated incident of sexual harassment violating MCO 5354.1F will require mandatory administrative separation processing (see MCO 1900.16 w/CH 2 (MARCORSEPMAN)) and he may receive an Other-Than-Honorable characterization of service. He may believe that trial before members or military judge at a special or general court-martial is more likely to result in an acquittal, which would negate the mandatory processing requirement. Further, if found guilty at a court-martial where a discharge is authorized and he does not receive a punitive discharge, the lowest characterization of service he may receive at an administrative separation board is a general (under honorable conditions), absent DC (M&RA) approval (see MCO 1900.16 w/CH 2).

- **While awaiting special court-martial, a fitness report occasion comes due for SSgt Charlie. Should you write the fitness report or wait until the trial is completed? If you write the report, can you make any mention of the misconduct?**

- The RS will not comment on pending NJP, court-martial, civil/criminal action, or investigation. Discussion of these matters, if the MRO was found innocent or non-culpable, would be premature and prejudicial and thereby unfairly penalize the Marine. If the Marine is found guilty, the results can be included in the reporting period when the adjudication (including the appellate process) is completed. The RS should also refrain from giving the MRO a lower attribute marking for the alleged misconduct (see para. 12.e.(1), Chapter 4, MCO 1610.7A (Performance Evaluation System)).

- **You refer charges against SSgt Charlie to a special court-martial and he has elected to be tried by members with enlisted representation. How do you select members for the court-martial panel?**
 - The members detailed to a court-martial shall be those persons who, in the opinion of the convening authority, are best qualified for the duty by reason of their age, education, training, experience, length of service, and judicial temperament (see Art. 25, UCMJ; R.C.M. 502(a)(1)).
 - An enlisted accused may request that members of the special court-martial include at least one-third enlisted members. If such a request is made, the court-martial may not proceed without at least one-third enlisted members, unless the appropriate number of eligible enlisted members cannot be obtained because of physical conditions or military exigencies (see R.C.M. 503(a)(2)).
 - When a request for enlisted representation is made, the convening authority should detail an appropriate number of enlisted members to the court-martial and, if appropriate, relieve an appropriate number of commissioned or warrant officers.
 - Generally, the S-1, or appropriate administrative personnel section, will generate a roster of all potential members. The command will provide questionnaires to the potential eligible members to help the convening authority determine those who are best qualified. Best practice is to contact the SJA to ensure appropriate procedures are followed when selecting court-martial members. The convening authority must consider all ranks senior to the accused (by date of rank). Convening authorities are prohibited from systematically excluding otherwise qualified personnel from serving as court-martial members (e.g., excluding personnel by reason of sex, race, or rank). Convening authorities may not engage in “court stacking” (i.e., assigning members to, or excluding members from, a court-martial panel in order to achieve a particular result as to findings or sentence).
- **After you select members, you learn that your XO provided some unofficial guidance to the members on how the case should be resolved. What should you do?**
 - No person subject to the UCMJ may attempt to coerce or, by any unauthorized means, attempt to influence the action of a court-martial member; this is referred to as unlawful command influence (see Article 37 and R.C.M. 104).
 - The commander should notify the SJA, who will notify the trial counsel and the defense counsel.

- The commander should take appropriate measures to prevent the actual or perceived appearance of unlawful command influence. Some solutions may be to detail new members from the command that did not hear the guidance from the XO or detail members from an adjacent command (see Art. 37, UCMJ; R.C.M. 503(a)(3)).
- **SSgt Charlie is convicted by members and sentenced to forty-five days confinement; forfeiture of 2/3 pay for two months; reduction to E-4; and a reprimand. Immediately after the trial, the defense counsel submits a clemency request asking that you not confine SSgt Charlie and that you take action so that his family will not lose pay. What can you do at this point?**
 - The commander may defer the confinement, adjudged forfeitures, or adjudged rank reduction to postpone the running of the sentence. This is not a suspension of the sentence or a form of clemency (see R.C.M. 1103). (Note: there is a provision for automatic forfeitures based on a sentence not at issue in this scenario. For requests for deferment and waiver of automatic forfeitures, contact your SJA.)
 - In deciding whether to grant a deferment, the commander should consider: the probability of the accused's flight; the probability of accused committing other offenses, intimidation of witnesses, or interference with the administration of justice; the nature of the offenses of which the accused was convicted (including the effect on the victim); the sentence adjudged; the command's immediate need for the accused; the effect of deferment on good order and discipline; the accused's character, mental condition, family situation, and service record (see R.C.M. 1103(d)(2)).
- **When you take Convening Authority's action, can and should you grant clemency?**
 - Clemency is the process permitting the accused to submit any matters to the convening authority for consideration prior to taking any action on the findings or sentence. (See R.C.M. 1106).
 - The convening authority is required to consider the clemency matters submitted before taking action (see R.C.M. 1109(d)(3) and 1110(d)).
 - **Note that a convening authority has limited authority to grant clemency if a serious offense is involved. Contact your SJA to determine what, if any, clemency may be granted.**
 - In some cases, the convening authority may, but is not required to, take action on the sentence. If the convening authority decides to act, the action will be in writing and include an explanation for the decision. It shall clearly state if any part of the sentence is disapproved. For minor offenses, the convening authority may disapprove, reduce,

commute, or suspend a sentence in whole or in part (see R.C.M. 1110(c)(1)). The sentence may not be increased.

- **SSgt Charlie (now Cpl) has completed his confinement. Do you need to process him for separation?**
 - Yes. Processing is required unless the sentence approved by the convening authority includes a punitive discharge. **NOTE:** If a court-martial does not award a punitive discharge, the lowest characterization of service he may receive at an administrative separation board is a general (under honorable conditions), absent DC (M&RA) approval.
- **If SSgt Charlie (now Cpl) had been tried at a “limited special court-martial” where no discharge is authorized, would this change the separation process?**
 - Yes. Due to the limits placed on the sentencing authority of limited special courts-martial, Marines subject to a limited special court-martial were never placed in jeopardy of receiving a punitive discharge. Therefore, they can be processed for administrative separation and subject to an Other-Than-Honorable characterization of service through the regular separation authority and without DC (M&RA) approval.

(f) Suppose instead that LCpl Alpha submits a formal complaint of sexual harassment against SSgt Charlie under the PAC Order for the sexually disparaging comments. How must this be handled?

- Pursuant to ALNAV 024/22, formal complaints of sexual harassment must be forwarded within 72 hours to the next higher commander. The next higher commander must then appoint an investigating officer from outside the chain of command of both the subject and the complainant. ALNAV 024/22 and Practice Directive 1-22 provide more detailed guidance.

Responsibilities:

- Consult the SJA and contact NCIS.
- Comply with DASH and OPREP-3/SIR reporting requirements.

Authorities:

- MCO 5354.1F
- MARADMIN 168/17
- MCO 3504.2A
- JAGINST 5800.7G w/CH-1
- MCO 5800.16

- MCO 1900.16 w/CH 2
- MCO 1610.7A

Resources:

- The SJA, NCIS, Equal Opportunity Advisor.

3. [PROHIBITED ACTIVITIES AND CONDUCT POLICY] Good order and discipline amongst junior enlisted Marines of Charlie Company has been in steady decline ever since a few key SNCO billets were gapped. Although morale is still high, you can tell standards are not being readily enforced and have declined. You anticipate the situation will resolve itself with the arrival of your new 1stSgt. 1stSgt Standards comes in with a great reputation and the few interactions you have had with him prior to his check in have been positive. After a few months of the 1stSgt's leadership you notice standards are back up in Charlie Company with the exception of a few Marines. One morning as you are walking into the Battalion building you notice 1stSgt Standards counseling LCpl Disaster in the open for being without a proper shave. The 1stSgt is being firm in his counseling and you do not observe anything to cause concern. Later in the day, you overhear Cpl Witness tell another Marine in the hallway that 1stSgt Standards told LCpl Disaster that he looked like a "bum" for not having an appropriate shave during the counseling.

(a) Is this a violation of MCO 5354.1F? What do you do?

- No, it is not a violation of the order. From what you observed, and taking into account what Cpl Witness observed, it was a proper verbal counseling addressing a performance or conduct deficiency—failing to abide by standards.
- However, is there a need to call or compare a Marine being counseled in public to a "bum?" The 1stSgt may have made the comparison for emphasis and with no motive to humiliate the Marine. However, he has just provided the Marine with an opportunity to allege that he was harassed or bullied. Under MCO 5354.1F (PAC order), harassment can include, "offensive jokes; epithets or name calling; ridicule or mockery; insults or putdowns," and bullying can include, "teasing; taunting; oral or written berating of another person with the purpose of belittling or humiliating." These examples are broad and can capture conduct that is best handled through mentorship and education. Context is important when making a determination on whether to substantiate an allegation.
 - The PAC order provides guidance for commanders to consider. It provides, "this policy prohibiting harassment is not a 'general civility' code. Behavior that is rude, ignorant, abrasive, or unkind, but does not adversely affect the work environment . . . is not harassment."
- Talk with your 1stSgt about the situation. Advise the 1stSgt that he exposed himself to an allegation of a PAC order violation. While an allegation may be unsubstantiated, it consumes time and

resources. Inform 1stSgt Standards that counseling does not require extraneous language. Use of extraneous language can make a counseling a personal confrontation vice a professional interaction.

- ADMIN NOTE: Keep your counseling simple. Do not opine on whether you believe the 1stSgt's conduct was a violation of the PAC order. Giving your opinion may conflict you out of handling any potential complaint LCpl Disaster makes. Additionally, you provide another line of argument for appeal by either the 1stSgt or the LCpl if a complaint is made. To avoid this scenario, an option is to have your SgtMaj address the situation with the 1stSgt.

(b) What if 1stSgt Standards adds other colorful or expletive language? What if the 1stSgt has counseled more than one Marine in the same manner? What if the same Marine has been counseled in this manner on multiple occasions?

- Commanders are faced with the challenge of applying broad definitions within the PAC order. You will be faced with situations in which an officer or senior enlisted leader with a good record has an allegation leveled against them by a Marine that may not be the best performer or has previous disciplinary issues. Your SJA and Equal Opportunity Advisor (EOA) are available to assist you in your decision-making process.
- If the conduct complained of is potentially on the low end of the spectrum of prohibited conduct, discuss with your SJA and EOA the "reasonable person standard." Discuss whether the conduct falls within the category of proper counseling and whether there has been an adverse impact to the work environment. Some factors to consider are whether this is a pattern or isolated incident, whether it is a weakness in the subject's counseling technique, and whether the conduct is malicious.
- Most of your appeals will come from these borderline cases. Ultimately, you want to be consistent in your decision making and be able to justify your decision if it is appealed. Reasonable minds may differ on whether to substantiate in these borderline cases. As long as your decision is reasonable and supported by the facts, it should be upheld.

(c) A few weeks later, LCpl Disaster makes a complaint to the Battalion EOR of bullying and harassment by 1stSgt Standards, alleging a hostile working environment. LCpl Disaster not only includes the counseling incident described above but other incidents in which 1stSgt Standards has counseled LCpl Disaster publicly. LCpl Disaster is not interested in informal resolution. What do you do?

- Ensure the EOA is informed so they can take the appropriate actions. The EOA will need to ensure that the complaint is properly recorded on a NAVMC 11512 form, make the appropriate DASH reporting, and assign a DASH number to the case. Contact your SJA and inform them of the complaint and what you know so far. Once you receive the completed NAVMC 11512 complaint form, consult with your SJA concerning the best way ahead. You must make a decision to either dismiss or accept the complaint. If you accept the complaint, you are required to convene an investigation and look into the matter. (For the purposes of this vignette, you have accepted the complaint.)
- Prior to making a decision to substantiate or not substantiate a PAC violation, you are required to receive both an SJA legal sufficiency review and EOA Advisory Opinion on the command investigation. It is important to engage both the SJA and EOA in resolution of a PAC complaint and remain engaged until closure.
- Substantiation of a PAC order violation no longer triggers a mandatory page 11 counseling entry for the Marine. Substantiation will be documented in the DASH² system, but a corresponding page 11 is not required. This gives commanders the flexibility to handle low level PAC issues with greater flexibility. Commanders maintain the ability to address the conduct through counseling and mentorship of the Marine.
- Some actions to consider and talk through with the SJA and your staff: Based on the nature of the complaint, should these two Marines be physically separated or given an order to avoid contact with each other? If they should be separated, who do you move? If you move LCpl Disaster, you risk a follow-on complaint of reprisal. However, you do not want to move the 1stSgt until this situation is resolved. Have the EOA or your SgtMaj ask LCpl Disaster his preference. If LCpl Disaster prefers to move, your decision is simplified (document this discussion and LCpl Disaster's preference). At a minimum, a member of Battalion leadership should talk to the 1stSgt about letting the process get to the truth and not to interfere with it.

² The DASH system keeps a record of all PAC complaint cases where the commander accepts the complaint, whether substantiated or not. It does not have any tie to a service member's OMPF and does not get briefed at boards. The system provides retention of institutional knowledge over the Marine's conduct.

For example, a Marine belonging to unit A is found to have committed harassment, but not serious enough to merit a page 11 entry. The Marine completes a PCS to unit B and is found to have committed the same type of harassment. In this case, the DASH system provides the commander for unit B the knowledge that this is the Marine's second offense, which may cause the commander to take disciplinary or adverse administrative action.

(d) After consultation with the EOA and your SJA, you decide to accept the complaint, utilize the formal Complaint Resolution process, and appoint an investigating officer. A few days later, the investigating officer informs you that LCpl Disaster had reported to the Company XO suspected waste of government resources by members of the Company staff. After LCpl Disaster made this report, his leave was cancelled by 1stSgt Standards. This action was not disclosed to the EOA or recorded on the initial NAVMC 11512. What do you do?

- Inform the IO to pause the investigation until further notice. Call the SJA and IG to discuss whether the IG needs to handle this latest revelation as a potential retaliatory action arising from LCpl Disaster's protected communication. Retaliation (negative or omission of favorable personnel action taken against an individual based on that individual making a protected communication) is the exclusive jurisdiction of the IG. (Note: After 27 December 2023, Article 132, UCMJ, retaliation is a covered offense. Only the OSTC can make disposition determinations over covered offenses. Consult with your SJA and inform the OSTC about this allegation.)

Responsibilities:

- Consult the SJA. Assess whether the incident requires an investigation.
- Enter an accepted complaint into the Discrimination and Sexual Harassment (DASH) system.

Authorities:

- MCO 5354.1F

Resources:

- The SJA, Inspector General, Equal Opportunity Advisor.

4. [SEARCH AND SEIZURE/RESTITUTION] During your first full day in command, your sergeant major informs you that in the last month, four Marines have reported cell phones, money, and an X-Box stolen from their barracks rooms. This morning, LCpl Smith reported his cell phone was missing and that LCpl Sticky-Fingers was seen leaving LCpl Smith's room shortly before the phone went missing. When LCpl Smith confronted LCpl Sticky-Fingers, he denied stealing the cell phone, however LCpl Smith was able to see four cell phones, an X-Box, and a bag of a green leafy substance through an opened door of LCpl Sticky-Fingers' wall locker. LCpl Smith immediately reported the theft to the duty, but LCpl Sticky-Fingers was seen leaving in his car with a cell phone in his hand before the duty could stop him. LCpl Sticky-Finger's car was spotted at the enlisted club.

(a) What actions should be taken prior to a search authorization?

- If there is probable cause to believe that evidence of a crime exists in a certain area, any officer or SNCO/NCO on your staff has the authority to freeze the scene until a proper command authorized search and seizure can be obtained.
- This means that you would post a Marine outside the door and ensure that no one enters or exits the scene while another Marine briefs the appropriate commander. While the scene is frozen, you may order the suspected Marine out of the barracks room or prevent him from entering the barracks or the car.

(b) When is it appropriate to authorize a search?

- Searches must be authorized by a competent authority (i.e., the commander who exercises control over the area subject to the search). The unit battalion commander likely has control over LCpl Sticky-Fingers' barracks room; the installation commander exercises control over the parking lot at the enlisted club. Many bases, such as Camp Pendleton, assign area commanders who may authorize searches within their respective areas. There will be instances where multiple commanders could authorize a search (e.g., unit CO, Area Co, and Installation CO could authorize search of barracks). When in doubt, consult with your SJA to identify the competent authority.
- Searches must be based on probable cause—a reasonable belief that a crime has been committed and that contraband or evidence of the crime will be found in the particular place to be searched.
- Probable cause is based on an examination of the totality of the circumstances. Several factors should be considered, including: type of evidence presented to the commander (oral or physical); reliability of the evidence (anonymous tip or first-hand account); timing of the evidence (e.g.,

observed today or 6 months ago); the training and experience of the person presenting the evidence (e.g., NCIS agent trained to recognize evidence of criminal behavior); and the nexus between the evidence or search location and the crime.

(c) What are some additional factors to consider when preparing a search authorization?

- ALWAYS document why you believe there is probable cause and include a list of the factors considered. JAGINST 5800.7G CH-1 contains a suggested format for a written authorization for search and seizure.
- Carefully consider the scope of your search authorization. Searches can only be executed in areas where the type of evidence sought could be found. If your scope is too narrow and only lists one item, such as a 60” television, you can only search in areas that could fit a 60” television (i.e., a searcher can’t open desk drawers). Consider whether there is a probable cause to search electronic devices (phones, computers, etc.) that permits including them in the search authorization.

(d) What are the implications of searching without proper authority?

- Searching without probable cause or ordering a subterfuge search (e.g., health and comfort inspection ordered immediately following reports of criminal activity in the barracks), will likely cause all evidence seized to be suppressed and prevented from being used in a court-martial. Furthermore, any information or evidence that was derived from or learned of during this search may be suppressed pursuant to the “fruit of the poisonous tree” doctrine. For example, if evidence of LCpl Sticky-Fingers dealing drugs was discovered on the phones seized from his room, that evidence will be suppressed in addition to the phone being suppressed.

(e) What is your authority to order a search of PPV Housing on and off of the base? How about a POV off-base?

- Public Private Venture housing is a complex issue. Whether an installation commander can search this housing will depend on the terms of the contract, for instance, whether the terms designate that the property remains within military control. Other factors include whether the property is occupied by military or civilian occupants, its location inside or outside the gate, the degree of control exercised by the military, and whether the property is under exclusive federal jurisdiction or concurrent federal/state jurisdiction. If the status of a particular house you wish to search is in question, consult with your SJA to determine how far your authority reaches.

- For POVs off base and PPVs with concurrent jurisdiction or exclusive state jurisdiction, have law enforcement (NCIS or CID) apply for a state or federal search warrant from an appropriate magistrate. Your SJA and law enforcement will coordinate on the application.

(f) After being advised of his Article 31(b) rights, LCpl Sticky-Fingers confesses to stealing all the items and selling them, but has already sent the money back to “help his sick mom.” Do the victims have any right to restitution?

- A complaint may be filed pursuant to Article 139, UCMJ within 90 days of the incident. The commander will appoint an investigating officer to determine whether LCpl Sticky-Fingers took the items wrongfully. If the IO determines by a preponderance of the evidence that LCpl Stick-Fingers wrongfully stole the items, the commander can order repayment. The order goes to IPAC, and they arrange for garnishment of LCpl Sticky-Fingers’ wages at the rate of no more than 1/2 of 1 month’s pay until the victims are fully repaid. (See JAGINST 5800.7G CH-1, Chapter 4)
- Alternatively, restitution may be made a term of a Plea Agreement with LCpl Sticky-Fingers. (Payment before trial is the best COA).

Responsibilities:

- Consult the SJA. Assess whether there is probable cause and authority over that location to authorize a search.

Authorities:

- Military Rule of Evidence 315, Uniform Code of Military Justice.
- JAGINST 5800.7G CH-1

Resources:

- The SJA, PMO, CID, NCIS.

5. [ETHICS] A letter arrives addressed to your command from a local military appreciation society made up of local businesses and civic groups. The appreciation society makes two separate offers to your command: 1) to provide, free of charge, a wooden gazebo for the “smoke pit” of your command’s barracks, in order to provide Marines from the command with a gathering place and shelter from the elements, and 2) a BBQ lunch for your Marines, to include food, non-alcoholic beverages, and beer. The estimated value of the wooden gazebo is \$1300.00. The estimated value of the BBQ lunch for your command’s Marines is \$600.00.

(a) Call the SJA.

- Accepting gifts from outside sources can be problematic.

(b) What concerns or questions, if any, do you have regarding the source of these offers?

- The composition of the society may make it a “prohibited source.” A prohibited source is (1) any person who is seeking official action by the Marine Corps or DON, (2) any person who does business or seeks to do business with the Marine Corps or DON, (3) any person who conducts activities regulated by the Marine Corps or DON, (4) any person who has interests that may be substantially affected by the performance or nonperformance of official duties by Marine Corps or DON personnel, or (5) is an organization a majority of whose members are described by (1) through (4). Gifts from prohibited sources require heightened sensitivity because of the risk of embarrassing the Marine Corps or DON and, depending upon the value of the gift, may require routing through Judge Advocate Division and the DON OGC for approval.

(c) Can the offered gazebo be accepted as a gift? If so, by whom?

- The gift cannot be accepted by you as the commander in your personal capacity, but can be accepted as a gift to the Marine Corps. Officers exercising special court-martial convening authority are authorized to accept gifts of personal property to the Marine Corps of a value not exceeding \$3000.00. This authority may NOT be delegated.

(d) Is the gazebo a “fixture?”

- If so, fixtures and other forms of real property (as opposed to personal property) must be routed to the Under Secretary of the Navy for approval. In this case, the removable nature of the gazebo probably means it’s not a fixture, so approval authority remains with the SPCMCA.

(e) Can you as the commander accept the offered BBQ lunch as a gift? Why or why not?

- The offer of food and non-alcoholic beverages can be accepted, but the offered beer cannot. Any Marine commander may accept gifts of consumable or perishable products such as food, nonalcoholic beverages, flowers, candy, etc., intended for personnel of that command, provided the acceptance of the gift does not violate applicable policy. Alcoholic beverages and tobacco may not be accepted. The authority is limited to items which will be consumed at one specific event (command picnic, pool party, etc.).
- If the gift cannot be accepted, 5 C.F.R. § 2635.206 explains how to handle improper gifts from outside sources. Diplomatically refuse the gift (if possible) and explain the restrictions on acceptance of gifts by Federal employees. You may also pay the donor the fair market value of the gift. For perishable items, they may be donated to charity or destroyed with the approval of the supervisor or ethics counselor.

Responsibilities:

- Consult the SJA. Assess whether the gift requires approval by Judge Advocate Division or the Department of the Navy, Office of the General Counsel.

Authorities:

- Code of Federal Regulations (5 C.F.R. § 2635).
- Joint Ethics Regulation (DoD 5500.7-R).

Resources:

- The SJA.

CORNERSTONE
FACILITATOR GUIDE FOR MILITARY JUSTICE CHANGES

This document provides a snapshot of military justice changes that were recently implemented and will be in effect after 27 December 2023.

1. CHANGES RECENTLY IMPLEMENTED

- a. Article 134, UCMJ (Sexual Harassment): On 26 January 2022, the President established an enumerated sexual harassment offense under Article 134, UCMJ.
- b. Article 6b, UCMJ: Amended to include the following right of a victim: “The right to be informed in a timely manner of any plea agreement, separation-in-lieu-of-trial agreement, or non-prosecution agreement relating to the offense, unless providing such information would jeopardize a law enforcement proceeding or would violate the privacy concerns of an individual other than the accused.
- c. Independent Investigating Officers for Sexual Harassment Investigations
 - i. The Secretary of the Navy issued ALNAV 024/22 on 22 April 2022, requiring the appointment of an independent investigating officers for all formal sexual harassment complaints.
 - ii. Within 72 hours of receipt of a formal complaint of sexual harassment, the accused’s O-5 commander must forward it to the next higher commander in the grade of O-6 or above. The next higher commander must appoint an investigating officer from outside the O-5 level command of the subject and complainant.
- d. Safe-to-Report Policy
 - i. The Secretary of the Navy issued the DON Safe-to-Report Policy on 19 August 2022, immediately prohibiting any member of the DON from taking adverse action against a Service Member who has made an unrestricted report of sexual assault, for minor misconduct collateral to the alleged sexual assault.
 - ii. The SA-IDA must determine if alleged victim misconduct is collateral to the sexual assault report. If it is *not collateral*, the SA-IDA may take adverse action against the victim. If it is *collateral*, the SA-IDA must then determine if the collateral misconduct is minor or non-minor. If the collateral misconduct is *minor*, no member of the DON may take adverse action against the victim. If the collateral misconduct is *non-minor*, the SA-IDA may take adverse action against the victim.

2. CHANGES IN EFFECT AFTER 27 DECEMBER 2023

- a. Office of the Special Trial Counsel (OSTC): The OSTC shall be responsible for prosecuting the following *covered offenses*: 117a (wrongful broadcast or distribution of intimate visual image), 118 (murder), 119 (manslaughter), 119a (death or injury of an unborn child), 120 (rape and sexual assault), 120a (depositing obscene matters in the mail), 120b (rape and sexual assault of a child), 120c (other sexual misconduct), 125 (kidnapping), 128b (domestic violence), 130 (stalking), 132 (retaliation), 134 (child pornography). On 1 January 2025, formal, substantiated complaints of Article 134 sexual harassment will also become a covered offense.
- b. Authorities of the Special Trial Counsel (STC)
 - i. *Covered offenses*, *other known offenses*, and *related offenses* committed after 27 December 2023.
 1. Covered Offenses: The STC shall possess exclusive authority to make referral determinations for covered offenses.

2. Other Known Offenses: When a covered offense exists, the STC may also exercise authority over any other known offenses committed by the individual accused of committing the covered offense.
 3. Related Offenses: When a covered offense exists, the STC may also exercise authority over any other offense related to the covered offense, regardless of who is alleged to have committed it. The STC possesses the exclusive authority to determine whether an offense is a related offense. As an example, this would include the collateral misconduct of a victim, if determined by the STC to be related to the covered offense.
- ii. Disposition Authority of the STC: For covered offenses, other known offenses, and related offenses as described above, the STC shall possess exclusive authority to:
 1. Refer charges to court-martial;
 2. Withdraw or dismiss charges;
 3. Enter into a plea agreement with the accused; and
 4. Determine if an ordered rehearing is impracticable.
- c. Remaining Authorities of Commanders/Convening Authorities: Commanders will continue to serve as convening authorities by *convening* courts-martial, detailing members to the panel pursuant to Article 25, UCMJ, and funding court-martial related expenses. However, the STCs shall possess exclusive authority to *refer* covered offenses and may exercise authority over other known offenses and related offenses. As a practical matter, this means that the STC will be signing the referral block of the charge sheet. If an STC defers a covered offense, the commander may take any appropriate action except for referring that covered offense to a special or general court-martial. If an STC defers an other known or related offense, the commander may take any appropriate action, *including* referral to a special or general court-martial.
 - d. Sentencing. For all non-capital offenses committed after 27 December 2023, the military judge shall sentence the accused, if convicted, utilizing sentencing parameters and criteria established by the President.