

THE MILITARY JUSTICE REVIEW PANEL

ENSURING OFFICE OF THE SPECIAL
TRIAL COUNSEL PROSECUTORIAL
INDEPENDENCE



January 2025



THE MILITARY JUSTICE REVIEW PANEL
ARTICLE 146, UNIFORM CODE OF MILITARY JUSTICE

January 17, 2025

The Honorable Roger Wicker
Chairman
Committee on Armed Services
United States Senate
Washington, DC 20510

The Honorable Jack Reed
Ranking Member
Committee on Armed Services
United States Senate
Washington, DC 20510

The Honorable Mike Rogers
Chairman
Committee on Armed Services
U.S. House of Representatives
Washington, DC 20515

The Honorable Adam Smith
Ranking Member
Committee on Armed Services
U.S. House of Representatives
Washington, DC 20515

Dear Chairs and Ranking Members,

Pursuant to 10 U.S.C. § 946, Article 146, Uniform Code of Military Justice (UCMJ), and on behalf of the Military Justice Review Panel (MJRP), I enclose our special report *Ensuring Office of the Special Trial Counsel Prosecutorial Independence*.

The MJRP expresses our sincere appreciation for the opportunity to use our collective expertise for this critical effort and your consideration of our recommendations to ensure OSTC independence.

Respectfully submitted,

Elizabeth L. Hillman, Chair

Encl:

As stated

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Executive Summary:

In 2021, Congress granted exclusive authority to prosecute certain offenses under the Uniform Code of Military Justice (UCMJ) to the newly created Offices of Special Trial Counsel (OSTC).¹ With some service members reporting a lack of trust in the decisions of non-lawyer convening authorities,² this change gave independent prosecutors decision-making authority over the most serious cases.³

After reviewing the legal and regulatory framework governing the OSTC, the Military Justice Review Panel (MJRP or Panel) has concluded that it may not meet Congress' intent to protect the OSTC's independence. The MJRP recommends implementing two changes without delay to protect the integrity of the new military justice structure: *first*, promulgate uniform standards for removal of Lead Special Trial Counsel (LSTCs) to ensure due process; and *second*, amend the UCMJ and Manual for Courts-Martial (MCM) to ensure the rules prohibiting unlawful command influence account for the new OSTC. In addition, we recommend that Congress consider changing the LSTC's reporting chain so that they report directly to their senior service judge advocate rather than to their service secretary.

Recommendation 1: Formalize uniform standards and procedures for suspension and removal of LSTCs that would provide due process to include, at a minimum, the right to reasonable notice and an opportunity to be heard.

After the OSTCs were established, the Secretary of Defense directed the Service Secretaries to "promulgate issuances governing the grounds and procedures for relieving a Lead Special Trial Counsel for cause." This 2022 directive was intended to maximize "both the appearance and the actuality of independence" for the OSTC.⁴

In December of 2023, however, the Secretary of the Army relieved the Army's first LSTC without following any apparent procedure. According to the Secretary's official spokesperson, the LSTC was relieved "based on a loss of trust and confidence" shortly after the Secretary learned of a decade-old email in which the LSTC, then a lieutenant colonel leading a regional defense services office, "negatively characterized developments in sexual assault response at the time and was dismissive of the principle of civilian control of the military exercised by both the executive branch and Congress."⁵

While the Panel takes no position on the merits of that decision, it is troubled by the lack of a process to

¹ National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81 [FY22 NDAA], §§ 531–535, 135 Stat. 1692 (2021). The OSTCs began exercising their authority for offenses taking place on or after December 28, 2023. Covered offenses include murder, manslaughter, sexual assault, and domestic violence; sexual harassment became a covered offense as of January 1, 2025.

² See HARD TRUTHS AND THE DUTY TO CHANGE: RECOMMENDATIONS FROM THE INDEPENDENT REVIEW COMMISSION ON SEXUAL ASSAULT IN THE MILITARY 21 (July 2021) [IRC Report], *available at* <https://media.defense.gov/2021/Jul/02/2002755437/-1/-1/0/IRC-FULL-REPORT-FINAL-1923-7-1-21.PDF/IRC-FULL-REPORT-FINAL-1923-7-1-21.PDF>.

³ Article 24a, UCMJ (2024 ed.)

⁴ DoD Special Trial Counsel Policy, *supra* n. 6, at IV.A.2.

⁵ Lolita C. Baldur, "Lawyer picked as Army's first top sexual assault prosecutor fired." *The Army Times*, Dec. 5, 2023. <https://www.armytimes.com/news/your-army/2023/12/05/lawyer-picked-as-armys-first-top-sexual-assault-prosecutor-fired/>.

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remove the LSTC from his position.⁶ There are currently no established procedures for handling the circumstances under which LSTCs might be suspended or removed from their duties for cause.⁷ This lack of clarity makes it more likely LSTCs will be removed without the notice and due process that would be provided to a truly independent decisionmaker.⁸

A comparison with the American Bar Association's (ABA's) *Criminal Justice Standards for the Prosecution Function* (4th ed. 2017) is instructive. The ABA recommends that "[f]air and objective procedures should be established by appropriate legislation" to govern those instances in which a chief prosecutor is accused of misconduct or "gross deviation from professional norms." These procedures should require "a public finding after reasonable notice and hearing that the prosecutor is incapable of fulfilling the duties of office."⁹

The absence of procedures on the removal of LSTC's is in stark contrast with the detailed procedures in the Manual for Courts-Martial for the investigation, suspension and removal of military judges. Rule for Courts-Martial (R.C.M.) 109 specifies how each step of the process should occur, from initial complaint through the appointment of an Ethics Commission. It provides guidance on who should conduct an initial inquiry and what standard of proof should be used to substantiate an allegation. It also outlines the actions that can be taken by a service's Judge Advocate General (TJAG) or, for the Marine Corps, the Staff Judge Advocate to the Commandant (SJA to CMC) and requires at a minimum that the subject of a complaint be "given notice and an opportunity to be heard."¹⁰

The independence of LSTCs is sufficiently important to warrant removal procedures comparable to that of military judges and chief civilian prosecutors. The current structure, however, falls far short of providing LSTCs with the detailed procedures that protect other independent actors from suspension or removal for "improper or irrelevant partisan or personal reasons."¹¹ The Panel unanimously recommends remedying this structural deficiency as soon as practicable.

⁶ In July 2024, the Panel requested information from the Services about unlawful command influence (UCI) motions filed following the relief of the Army LSTC. While the information provided was incomplete, it is clear the removal resulted in substantial UCI litigation.

⁷ The Service policies describe removal of an LSTC in varying degrees of detail. The Navy-Marine Corps Policy, *supra* n. 9, at IV.A.5, states that an LSTC may be relieved when the Secretary "loses confidence" in his ability to perform his duties; the Army Policy, *supra* n. 9, at 6.a.(3), states simply that only the Secretary can relieve an LSTC. The Air Force Policy, *supra* n.9, at Encl. 1, IV.a.6, is the most detailed, with specific grounds for removal including substantiated reports of criminal misconduct or professional responsibility complaints. The Service policies are all silent as to the procedure prior to removal.

⁸ Note that other top federal prosecutors, such as U.S. Attorneys, can be removed from their positions without notice or due process. The controversy that frequently surrounds such removals when they are apparently politically motivated lends weight to the Panel's recommendation.

⁹ American Bar Association, *Criminal Justice Standards for the Prosecution Function* 3-2.5 [ABA Standards]. https://www.americanbar.org/groups/criminal_justice/resources/standards/prosecution-function/.

¹⁰ R.C.M. 109(c)(1)-(8).

¹¹ ABA Standards, *supra* n. 13.

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Recommendation 2: Amend Article 37, UCMJ, and R.C.M. 104 to account for the newly implemented OSTC organizations.

The current structure contains an anomaly: although service secretaries now exercise sole and direct supervisory authority over the military's chief prosecutors, they are also insulated from accountability for some forms of unlawful command influence.

Commonly referred to as “the mortal enemy of military justice,”¹² the concept of unlawful command influence (UCI) refers to the possibility that military authorities may try to pressure court-martial participants into reaching a certain outcome.

UCI is prohibited under Article 37 of the UCMJ.¹³ Article 37(a)(1) states that convening authorities and commanding officers cannot “censure, reprimand or admonish the court or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercise of its or his functions in the conduct of the proceeding.” Article 37(a)(2), which also applies only to convening authorities and commanding officers, says they may not “deter or attempt to deter a potential witness” from testifying or participating in an investigation. By contrast, Article 37(a)(3) contains a more general prohibition: it states that “No person subject to this chapter may attempt to coerce or, by any unauthorized means, attempt to influence the action of a court-martial or any other military tribunal or any member thereof.” Lastly, Article 37(b) bars any person subject to the UCMJ from considering a servicemember’s “performance of duty as a member of a court-martial” in “the preparation of an effectiveness, fitness, or efficiency report” or for determining whether they are retained or promoted or how they are assigned.¹⁴

Since the service secretaries are court-martial convening authorities,¹⁵ they cannot “censure, reprimand or admonish” a court-martial participant under Article 37(a)(1); likewise, Article 37(a)(2) prohibits them from deterring or attempting to deter a witness. But service secretaries, as civilians, are not subject to the UCMJ unless they are also military retirees.¹⁶ As a result, the more general prohibitions contained in Article 37(a)(3) and Article 37(b) do not apply to the service secretaries.

Thus, there is currently nothing in Article 37 that prohibits a service secretary, as the LSTCs direct supervisor, from taking prosecutorial decisions into account when evaluating performance. This would be true even if the service secretary intended that action to influence a particular court-martial – conduct that would certainly constitute UCI if performed by anyone in uniform.¹⁷

¹² See, e.g., *United States v. Thomas*, 22 M.J. 388, 393 (C.M.A. 1986).

¹³ Article 37 is implemented in the Manual for Courts-Martial by R.C.M. 104.

¹⁴ Article 37(a-b), UCMJ (2024 ed.)

¹⁵ Articles 22, UCMJ, states that general courts-martial may be convened by “the Secretary concerned.” Articles 23 and 24 extend that authority to other types of courts-martial.

¹⁶ In *Bergdahl*, see *supra* n. 5, a U.S. senator was held to be capable of committing UCI because he was subject to the UCMJ as a retired naval officer. See also Article 2, UCMJ.

¹⁷ See, e.g., *United States v. Gilmet*, 83 M.J. 398 (C.A.A.F. 2023), where a conviction was reversed due to conduct by the colonel in charge of assignments at Judge Advocate Division, Headquarters Marine Corps.

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Furthermore, the list of persons protected under Article 37(a)(3) must be expanded to account for the new OSTC structure. As currently written, Article 37(a)(3) prohibits bringing unlawful influence to bear against “any convening, approving or reviewing authority or preliminary hearing officer” with respect to their duties. The LSTC – who under Article 24a may refer charges to court-martial but is not a convening authority – falls outside these explicit protections.

Finally, Article 37(b) currently protects judge advocates from receiving a “less favorable rating or evaluation” because of “the zeal with which [they] . . . as counsel represented any person in a court-martial proceeding.” This offers explicit protection to defense counsel and victim’s counsel, who clearly represent “persons” involved in a court-martial. Since trial counsel, special trial counsel and LSTCs represent the government rather than a “person,” they are not similarly protected.

The Panel therefore unanimously recommends the following four changes to Article 37 and, correspondingly, to R.C.M. 104:

First, amend Article 37(a)(3) to read: “Neither the President, Vice President, Secretary of Defense, Service Secretaries, nor any person subject to this chapter” vice “No person subject to this chapter.” These changes would close the gap referenced above and better protect the LSTC’s prosecutorial independence.¹⁸

Second, amend Article 37(a)(3) to insert “or any special trial counsel” following “the action of any convening, approving or reviewing authority” and preceding “or preliminary hearing officer.” This would ensure that the prosecutorial decisions made by the OSTC are protected from UCI to the same extent as the actions of other military justice decisionmakers.

Third, amend Article 37(b) to read: “Neither the President, Vice President, Secretary of Defense, Service Secretaries, nor any person subject to this chapter” vice “No person subject to this chapter.” Under the current structure, this would prohibit service secretaries from negatively evaluating the LSTCs based on their independent prosecutorial decisions.

Fourth, amend Article 37(b) to read “any person or party in a court-martial proceeding” rather than simply “any person.” The Panel can discern no reason why prosecutors, special trial counsel and LSTCs should not be equally insulated from unfair evaluations based on the zeal with which they carry out their duties.

Recommendation 3: Consider placing the LSTCs in the direct reporting chain of the Service TJAGs rather than the Secretary of the Military Department.

Congress created the OSTC to help strengthen trust in the military justice system, reflecting, in part, a concern that non-lawyer commanders may act in the interests of readiness or personal loyalty to

¹⁸ While this recommendation would broaden the scope of protections against command influence, it would still be narrower than the similar provision applied at military commissions, which prohibits *any* person from unlawfully influencing the action of a commission. See Rule 104, Manual for Military Commissions (2019).

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members of the command rather than justice.¹⁹ Equally important is ensuring that servicemembers, including those accused of serious offenses, have confidence that fairness, not politics or public opinion, takes precedence in prosecutorial decision-making.²⁰

Placing LSTCs under the direct civilian control of the service secretaries was intended to enhance independent decision-making by removing some prosecutorial decisions from the military chain-of-command altogether.²¹ The Panel has identified several potential obstacles that could undermine this policy goal.

First, we note that the leaders of the defense services organizations are supervised by their respective TJAG or the SJA to CMC. The new reporting structure may create the perception that the independence of the LSTC is more important than that of the defense, which could degrade the trust of servicemembers and members of the public.

Second, the service secretaries are political appointees responsible for implementing strategic-level policies, programs and budgets. They may have no military justice experience and often are not attorneys, meaning they may have a limited understanding of the ethical and professional responsibilities of a prosecutor. The importance of attorneys supervising other attorneys is well established²² and a longstanding part of military practice.²³

Third, although the current construct does not give them supervisory authority over the LSTCs, the TJAGs and SJA to CMC remain largely responsible for allocating resources, including personnel, to the OSTCs.²⁴ Separating the supervisory chain from the resources chain may be less efficient and may tend to hamper the critical mission of the OSTC.

¹⁹ Servicemembers often see their immediate commanders as either turning a blind eye to problematic behaviors or laboring under a conflict of interest. Even those who hold their commanders in high esteem often question how qualified they are to decide who should be prosecuted and for what crimes. IRC Report, *supra* n. 2, at 18.

²⁰ See, e.g., *United States v. Barry*, 78 M.J. 70, 74-75 (C.A.A.F. 2018), in which a convening authority was urged, due to the “political pressures on the military justice system in relation to sexual assault,” not to “put a target on his back” by disapproving a conviction. C.A.A.F. dismissed the case with prejudice to “protect the court-martial process and foster public confidence in the fairness of our system.” *Id.* at 79. The case of *Bowe Bergdahl*, convicted of desertion after five years in Taliban captivity, is also instructive. *United States v. Bergdahl*, 80 M.J. 230 (C.A.A.F. 2020).

²¹ Memorandum from U.S. Secretary of Defense to Secretaries of the Military Departments, *Policies Governing Offices of Special Trial Counsel I* (Mar. 11, 2022) [DoD Special Trial Counsel Policy].

²² The American Bar Association recognizes the importance of attorneys supervising other attorneys for the purpose of ensuring adherence to the rules of professional conduct. See American Bar Association, *Model Rules of Professional Conduct*, Rule 5.1. Though each Service has separate rules for professional responsibility, they are all adopted directly from the ABA Model Rules. Compare ABA Model Rule 3.8 with Air Force Instruction 51-110, Attachment 2, Rule 3.8; Judge Advocate General Instruction 5803.1E, Enclosure (1), Rule 3.8; and Army Regulation 27-26, Appendix B, Rule 3.8.

²³ Rule for Courts-Martial 109 (2024 ed.) makes each TJAG solely responsible for the professional supervision and discipline of that Service’s uniformed attorneys. The same principle has been codified in every modern version of the Manual for Courts-Martial, starting with the first in 1951. See para. 43, M.C.M. (1951 ed.), which permitted the TJAGs to promulgate regulations governing conduct that would disqualify attorneys before a court-martial.

²⁴ The various Service policies make clear that TJAGs and SJA to CMC retain these resourcing responsibilities. See Memorandum from Secretary of the Air Force to Assistant Secretaries, *Policies Governing the Department of the Air Force Office of Special Trial Counsel* Encl. 1, III.D.2 (Sep. 7, 2022) [Air Force Policy]; Memorandum from Secretary of the Navy

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All three of these potential issues could be resolved or mitigated if the LSTCs were directly supervised by the TJAGs or SJA to CMC in a manner that does not compromise Congress' goal of removing prosecutorial decision-making from commanders and assigning highly qualified attorneys.

Conclusion:

Prosecutorial independence to pursue justice is critical to a military justice system that earns the trust of service members, victims and the public. Although the new OSTC structure was intended to mitigate conflicts of interest and enhance independence, there are aspects of it that may have the opposite effect. The MJRP recommends immediate adoption of formal standards and procedures for removal of LSTCs, along with changes to the UCI statutes to account for the new OSTC. In addition, we recommend Congress reconsider the LSTC supervisory structure.

to Assistant Secretaries, *Policies Governing the Navy and Marine Corps Offices of Special Trial Counsel* III.B.5 (Sep. 7, 2022) [Navy-Marine Corps Policy]; Memorandum from Secretary of the Army to Assistant Secretaries, *Policies Governing the U.S. Army Office of Special Trial Counsel* 6.b.(6) (Sep. 23, 2022) [Army Policy].