

THE MILITARY COMMANDER AND THE LAW 2023 SUPPLEMENT

THE OFFICE OF SPECIAL TRIAL COUNSEL

The Office of Special Trial Counsel (OSTC) is an independent prosecutorial organization for the Department of the Air Force with exclusive disposition authority over certain covered offenses committed by Airmen and Guardians. Special Trial Counsel (STC) assigned to OSTC provide expert, independent, and ethical representation of the United States, under the direct civilian control of the Secretary of the Air Force, in the investigation and trial-level litigation of offenses over which the office exercises authority.

Key Takeaways

- » Congress enacted sweeping changes to military justice and command authority, creating an independent OSTC with authorities effective after 27 December 2023.
- » OSTC has exclusive authority to prefer, refer, defer, enter into plea agreements, withdraw, and dismiss 14 categories of “covered offenses” (see Disposition Authority).
- » OSTC operations are integrated with law enforcement and installation legal offices in a unified investigative and prosecutorial effort that includes command input.
- » Commanders remain a critical stakeholder in military justice and are responsible for command climate and good order and discipline.
- » Installation Staff Judge Advocates remain the primary legal advisor to commanders and convening authorities at their respective installation.

OSTC & the Military Justice System

- OSTC is an integrated and unified participant in the administration of military justice, partnering with commanders, law enforcement, and legal offices to ensure accountability for perpetrators of sexual assault, domestic violence, and other victim-based crimes
 - OSTC leads a collaborative effort with law enforcement and the installation legal office to investigate and prosecute offenses under its authority. Installation judge advocates continue to serve as assistant trial counsel on covered offense courts-martial under the direction of assigned STC.
 - Based upon statutory authority, OSTC has an important, but limited, role in the greater military justice system. While OSTC is responsible for the investigation and trial-level litigation of specified offenses listed below, installation legal office personnel remain the lead for all other military justice functions (e.g., post-trial processing, Victim and Witness Assistance Program (VWAP) support, and advising command).

Disposition Authority

- OSTC has initial disposition authority for 14 categories of “covered” UCMJ offenses, as well as known/related offenses. Command retains disposition authority for the remaining 91 categories of Uniform Code of Military Justice (UCMJ) offenses along with covered offenses and known/related offenses that OSTC defers back to command after exercising authority.
 - “Covered offenses” are specifically enumerated categories of UCMJ offenses established by Congress. OSTC must exercise its authority over covered offenses committed after 27 December 2023. Initial disposition authority is withheld to OSTC unless the offense is deferred to command. Covered offenses include:
 - Art 117a – Wrongful broadcast/distribution of intimate visual images
 - Art 118 – Murder
 - Art 119 – Manslaughter
 - Art 119a – Death/Injury of unborn child
 - Art 120 – Rape & Sexual Assault
 - Art 120a – Mail: Deposit of obscene matters
 - Art 120b – Rape & Sexual Assault of a child
 - Art 120c – Other sexual misconduct
 - Art 125 – Kidnapping
 - Art 128b – Domestic violence
 - Art 130 – Stalking
 - Art 132 – Retaliation
 - Art 134 – Child pornography
 - Art 134 – Sexual Harassment (Eff. 1 Jan 25)
 - Inchoate offenses of any of the above offenses (attempt, solicitation, conspiracy)
 - “Known offenses” are any non-covered offense(s) alleged to have been committed by an individual accused of a covered offense. OSTC may exercise its authority over known offenses. If OSTC exercises authority over a known offense, initial disposition authority is withheld unless the offense is deferred. If OSTC does not exercise authority over the offense, disposition authority remains within command channels.
 - “Related offenses” are any non-covered offense(s) alleged to have been committed by a victim or witness to an alleged covered offense. OSTC may exercise its authority over related offenses. If OSTC exercises authority over a related offense, initial disposition authority is withheld unless the offense is deferred. If OSTC does not exercise authority over the offense, disposition authority remains within command channels.
- Commanders of those accused of and victims of offenses under OSTC authority may provide non-binding disposition input which OSTC must consider prior to making a disposition decision. Although the SJA remains the primary legal advisor to command, STC will be available to discuss disposition decisions.

Court-Martial Authority

- For all covered offenses, and for known and related offenses over which OSTC has exercised authority and has not deferred, OSTC has the exclusive authority to refer criminal charges for trial by general or special court-martial. OSTC also retains exclusive authority to enter into plea agreements, withdraw or dismiss charges, and grant witnesses immunity.
- Command retains all other designated authorities, to include pretrial confinement orders, selection of panel members, funding of experts and witness travel, authority to direct preliminary hearings, and court-martial convening authority

Deferred Offenses

- OSTC's disposition decision is limited to: (1) preferral/referral of the offense to a general or special court-martial; or (2) deferral of the offense to command for further disposition
- For covered, known, and related offenses under OSTC authority, command may not take action unless the offense is deferred
 - If OSTC chooses not to prefer or refer a covered, known, or related offense for trial by general or special court-martial, then the offense is deferred back to command for further disposition. For deferred *known/related* offenses, command may take any lawful disposition action, including referral to trial by general or special court-martial.
 - For deferred *covered* offenses, command may take any lawful disposition action, other than referral of charges for trial by general or special court-martial. Available disposition options may include nonjudicial punishment, administrative separation, and other administrative actions.

Nonjudicial Punishment after Deferral

- Command may offer Article 15, UCMJ, nonjudicial punishment for any covered, known, or related offense that is deferred by OSTC. If an accused turns down the offer of nonjudicial punishment and demands trial by court-martial, command options will be determined by whether the underlying offense is a covered offense or a known/related offense.
 - For covered offenses, command may not refer charges to general or special court-martial, but command may seek reconsideration of the deferral decision from OSTC. If the evidence is sufficient, OSTC may then prefer and refer charges.
 - For known/related offenses, there are no restrictions on command disposition authority, so command may prefer and refer charges without OSTC involvement

Command and OSTC

- Commanders remain a critical stakeholder in military justice and continue to be responsible for command climate and good order and discipline
- The Staff Judge Advocate will remain the primary legal advisor for command. But, in all cases, STC will be available for discussion and will work closely with the servicing legal office to ensure command is fully informed as to the status of offense investigations and prosecutions.

References

Title 10, U.S.C., Section 1044f enacted by Section 532 of the National Defense Authorization Act (NDAA) for FY22 Public Law 117-81 (27 December 2021)

DAFPD 51-2, *Military Justice and Other Criminal Proceedings* (27 December 2023)

DAFI 51-201, *Administration of Military Justice* (27 December 2023)