

**DEFENSE ADVISORY COMMITTEE
ON INVESTIGATION,
PROSECUTION, AND DEFENSE
OF SEXUAL ASSAULT
IN THE ARMED FORCES**



Letter on Article 34,

**Uniform Code of
Military Justice**

April 2024



THE DEFENSE ADVISORY COMMITTEE ON
INVESTIGATION, PROSECUTION, AND DEFENSE OF
SEXUAL ASSAULT IN THE ARMED FORCES

April 4, 2024

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

The Honorable Roger Wicker
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

The Honorable Lloyd J. Austin III
Secretary of Defense
1000 Defense Pentagon
Washington, DC 20301

Dear Chairs, Ranking Members, and Mr. Secretary:

The DAC-IPAD believes it is necessary at this time for Congress to amend Article 34, UCMJ, to align the statute with the most recent regulatory guidance from the Department of Defense regarding uniform prosecution standards. The Committee is concerned that without a statutory change, there could be confusion among military practitioners and commanders, given the difference between the statute and the newest requirements in the Manual for Courts-Martial, Appendix 2.1, and Rule for Courts-Martial 601(d)(2).

Four years ago, this Committee recommended amending Article 34, UCMJ, to require a determination of sufficient admissible evidence to obtain and sustain a conviction before a charge could be referred to trial by general court-martial. That recommendation was the result of a three-year comprehensive case study that culminated in the DAC-IPAD's October 2020 *Report on Investigative Case File Reviews for Military Adult Penetrative Sexual Offense Cases Closed in Fiscal Year 2017*. In that report, the DAC-IPAD found a systemic problem with the referral of penetrative sexual offense charges to trial by general court-martial when there is not sufficient admissible evidence to obtain and sustain a conviction. In the Committee's view, the decision to refer charges to trial by general court-martial in the absence of sufficient admissible evidence to obtain and sustain a conviction has significant negative implications for the accused, the victim, and the military justice process. As a remedy, the DAC-IPAD recommended that Congress amend Article 34, UCMJ. However, Congress did not act.

Then, in the DAC-IPAD’s June 2023 report, *Reforming Pretrial Procedures and Establishing Uniform Prosecution Standards: Recommendations for Article 32, UCMJ, and the Secretary of Defense’s Disposition Guidance in Appendix 2.1, MCM*, this Committee recommended that the Secretary of Defense revise Appendix 2.1, Manual for Courts-Martial, to establish uniform prosecution standards. The recommendation aimed to enhance uniformity, reliability, and consistency in case disposition and charging decisions. These standards are also familiar to every prosecutor—both military and civilian—practicing across the United States and its territories. The Military Justice Review Panel joined the DAC-IPAD’s recommendation. As a result, in October 2023 the Secretary of Defense revised Appendix 2.1, thus creating military prosecution standards on par with the Federal Principles of Prosecution contained in the U.S. Department of Justice’s *Justice Manual*. The new referral language provides, in relevant part:

2.3. Referral.

b. A special trial counsel should not refer, and a staff judge advocate or other judge advocate involved in the disposition process should not recommend that a convening authority refer, a charge to a court-martial unless the special trial counsel, staff judge advocate, or other judge advocate believes that . . . the admissible evidence will probably be sufficient to obtain and sustain a finding of guilty when viewed objectively by an unbiased factfinder.

In addition, the President amended Rule for Courts-Martial 601(d)(2) in Executive Order 14103. The new language provides, in relevant part: “Referral authorities shall consider whether the admissible evidence will probably be sufficient to obtain and sustain a conviction.”

The DAC-IPAD therefore recommends that Congress amend Article 34, UCMJ to align the statutory language with the new referral guidance that all judge advocates are presently using as outlined in Appendix 2.1, MCM and Rule for Courts-Martial 601(d)(2). We have enclosed a draft amendment for your consideration.

The members of the DAC-IPAD would like to express our sincere gratitude and appreciation for the opportunity to make use of our collective experience and expertise in this field to develop recommendations for improving the military’s response to sexual misconduct within its ranks.

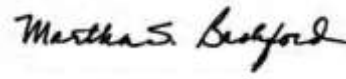
Respectfully submitted,



Karla N. Smith, Chair



Marcia M. Anderson



Martha S. Bashford



William E. Cassara



Margaret A. Garvin



Suzanne B. Goldberg



Paul W. Grimm



A. J. Kramer



Jennifer Gentile Long



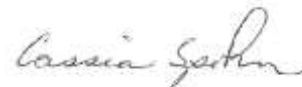
Jenifer Markowitz



Jennifer M. O'Connor



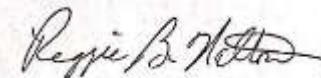
James R. Schwenk



Cassia C. Spohn



Meghan A. Tokash



Reggie B. Walton

Enclosure:
As stated

DAC-IPAD Proposed Legislative Changes to Article 34, UCMJ

§834. Art. 34. Advice to convening authority before referral for trial

(a) GENERAL COURT-MARTIAL.

(1) STAFF JUDGE ADVOCATE ADVICE REQUIRED BEFORE REFERRAL.

—Subject to subsection (c), before referral of charges and specifications to a general court-martial for trial, the convening authority shall submit the matter to the staff judge advocate for advice, which the staff judge advocate shall provide to the convening authority in writing. The convening authority may not refer a specification under a charge to a general court-martial unless the staff judge advocate advises the convening authority in writing that—

(A) the specification alleges an offense under this chapter;

(B) there is probable cause to believe that the accused committed the offense charged;

and

(C) a court-martial would have jurisdiction over the accused and the offense.

(2) STAFF JUDGE ADVOCATE RECOMMENDATION AS TO DISPOSITION.

—Together with the written advice provided under paragraph (1), the staff judge advocate shall provide a written recommendation to the convening authority as to **whether the admissible evidence will probably be sufficient to obtain and sustain a conviction, and as to** the disposition that should be made of the specification in the interest of justice and discipline.

(3) STAFF JUDGE ADVOCATE ADVICE AND RECOMMENDATION TO ACCOMPANY REFERRAL.

—When a convening authority makes a referral for trial by general court-martial, the written advice of the staff judge advocate under paragraph (1) and the written recommendation of the staff judge advocate under paragraph (2) with respect to each specification shall accompany the referral.

(b) SPECIAL COURT-MARTIAL; CONVENING AUTHORITY CONSULTATION WITH JUDGE ADVOCATE.

—Subject to subsection (c), before referral of charges and specifications to a special court-martial for trial, the convening authority shall consult a judge advocate on relevant legal issues, **including whether the admissible evidence will probably be sufficient to obtain and sustain a conviction.**

(c) COVERED OFFENSES.

A referral to a general or special court-martial for trial of charges and specifications over which a special trial counsel exercises authority may only be made—

(1) by a special trial counsel, subject to a special trial counsel's written determination accompanying the referral that—

(A) each specification under a charge alleges an offense under this chapter;

(B) there is probable cause to believe that the accused committed the offense charged;

and

(C) a court-martial would have jurisdiction over the accused and the offense; **and**

(D) the special trial counsel believes that the admissible evidence will probably be sufficient to obtain and sustain a conviction;

or

(2) in the case of charges and specifications that do not allege a covered offense and as to which a special trial counsel declines to prefer or, in the case of charges and specifications preferred by a person other than a special trial counsel, refer charges, by the convening authority in accordance with this section.