

Policy Subcommittee Assessments Regarding Articles 33 and 34, UCMJ, Disposition Guidance

1. How have the Services implemented Article 33, Disposition Guidance, and the factors for consideration promulgated by the Secretary of Defense [the “non-binding disposition guidance” in Appendix 2.1 of the Manual for Courts-Martial]?

A. A comparison of the factors in R.C.M. 306(b) (Discussion) and those included in the Article 33, UCMJ, Disposition Guidance, is set forth below.

R.C.M. 306(b), Discussion, Factors (in effect before Jan. 1, 2019)	Article 33, UCMJ, Disposition Guidance Factors (in effect since Jan. 1, 2019)
<p>In deciding how an offense should be disposed of, factors the commander <u>should consider</u>, to the extent they are known, include:</p> <p>(A) the nature of and circumstances surrounding the offense and the extent of the harm caused by the offense, including the offense’s effect on morale, health, safety, welfare, and discipline;</p> <p>(B) when applicable, the views of the victim as to disposition;</p> <p>(C) existence of jurisdiction over the accused and the offense;</p> <p>(D) availability and admissibility of evidence;</p> <p>(E) the willingness of the victim and others to testify;</p> <p>(F) cooperation of the accused in the apprehension or prosecution of another accused;</p> <p>(G) possible improper motives or biases of the person(s) making the allegation(s);</p> <p>(H) availability and likelihood of prosecution of the same or similar and related charges against the accused by another jurisdiction;</p> <p>(I) appropriateness of the authorized punishment to the particular accused or offense.¹</p>	<p>The military justice system is a powerful tool that preserves good order and discipline while protecting the civil rights of Service members. It is a commander’s duty to use it appropriately. In determining whether the <u>interests of justice and good order and discipline</u> are served by trial by court-martial or other disposition in a case, a command or convening authority <u>should consider</u>, in consultation with a judge advocate, the following:</p> <p>a. The mission-related responsibilities of the command;</p> <p>b. Whether the offense occurred during wartime, combat, or contingency operations;</p> <p>c. The effect of the offense on the morale, health, safety, welfare, and good order and discipline of the command.</p> <p>d. The nature, seriousness, and circumstances of the offense and the accused’s culpability in connection with the offense;</p> <p>e. In cases involving an individual who is a victim under Article 6b, the views of the victim as to disposition;</p> <p>f. The extent of the harm caused to any victim of the offense;</p> <p>g. The availability and willingness of the victim and other witnesses to testify;</p>

¹ 2016 MCM, R.C.M. 306(b). Until 2014, the list of factors also included “the character and military service of the accused,” and “other likely issues.” MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012) [2012 MCM], R.C.M.

	<p>h. Whether admissible evidence will likely be sufficient to obtain and sustain a conviction in a trial by court-martial;</p> <p>i. Input, if any, from law enforcement agencies involved in or having an interest in the specific case;</p> <p>j. The truth-seeking function of trial by court-martial;</p> <p>k. The accused’s willingness to cooperate in the investigation or prosecution of others;</p> <p>l. The accused’s criminal history or history of misconduct, whether military or civilian, if any;</p> <p>m. The probable sentence or other consequences to the accused of a conviction;</p> <p>n. The impact and appropriateness of alternative disposition options—including nonjudicial punishment or administrative action—with respect to the accused’s potential for continued service and the responsibilities of the command with respect to justice and good order and discipline.²</p>
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B. Standards for preferral and referral established in the Manual for Courts-Martial

- Once the legal standards for preferral and referral are met, the disposition factors above guide the exercise of discretion in determining the proper disposition of a case “in the interest of justice and discipline.”
- Preferral: Article 30, UCMJ, provides that the individual who prefers charges must be subject to the UCMJ and believe the charges to be true. There is no requirement that there be sufficient admissible evidence to obtain and maintain a conviction.
 - Article 30, UCMJ provides that once charges are preferred, the proper authority shall determine what disposition should be made of the charges “in the interest of justice and discipline.”
- Referral: Article 34 and R.C.M. 601 establish a standard of probable cause.
 - Note: military case law has recognized that “this prosecutorial finding of probable cause may be premised on evidence which is incompetent, inadmissible or even tainted by illegality. See *U.S. v. Asfeld*, 30 M.J. 917 (A.C.C.A. 1990) (*Quoting Lawn v. United States*, 355 U.S. 339, 349, 2 L. Ed. 2d 321, 78 S. Ct. 311 (1958).

306(b) (Discussion). Congress directed that the Manual for Courts-Martial delete “the character and military service of the accused from the matters a commander should consider in deciding how to dispose of an offense.” National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66 [FY14 NDAA], § 1708, 127 Stat. 672 (2013).

² 2019 MCM, App. 2.1, Sec. 2.1.

C. Additional considerations for military attorneys and guiding principles for the exercise of prosecutorial discretion in state and civilian federal jurisdictions:

- The ABA Criminal Justice Standards for the Prosecution Function apply to all military attorneys:
 - (a) A prosecutor should seek or file criminal charges only if the prosecutor reasonably believes that the charges are supported by probable cause, that admissible evidence will be sufficient to support conviction beyond a reasonable doubt, and that the decision to charge is in the interests of justice.
 - (b) After criminal charges are filed, a prosecutor should maintain them only if the prosecutor continues to reasonably believe that probable cause exists and that admissible evidence will be sufficient to support conviction beyond a reasonable doubt.
- Most civilian prosecutors interviewed by the PSC stated their standard for charging a case is whether there is sufficient evidence to prove the charge beyond a reasonable doubt or whether there is a reasonable likelihood of successful prosecution.
 - State prosecutors gave various reasons for taking this approach – it is not a statutory or policy requirement:
 - Some prosecutors said they informally consult available guidance published by organizations such as the National District Attorneys Association (NDAA). The NDAA guide for prosecutors includes among its list of factors: “Insufficiency of admissible evidence to support a conviction.”
 - Others indicated they receive guidance from supervising prosecutors who weigh in on sexual assault prosecution decisions, or have themselves developed after many years of practice a strong sense of whether there is sufficient evidence to convict.
 - Federal prosecutors have to follow the Justice Manual standards when making charging decisions.
- Civilian prosecutors interviewed by the PSC indicated that prosecutors should feel good enough about their case not to have to “test” it at the grand jury or preliminary hearing; however, most prosecutors acknowledged that a case may on occasion present unique circumstances that make case-vetting at these proceedings advisable.
- Most of the prosecutors we spoke with said supervisory approval is required to decline prosecution on a sexual assault case.
- A defense counsel interviewed by the PSC who has tried cases at courts-martial indicated that on several occasions, military prosecutors have expressed to him a lack of confidence in the sexual assault cases they are prosecuting.
- A convening authority’s decision not to refer a penetrative sexual offense to trial must be reviewed by either the Service Secretary or a higher echelon of command. This secondary review of non-referral decisions only in sex offense cases was established by Congress in the FY 14 NDAA.
- In the Army, an officer’s annual evaluation report includes an assessment of his or her compliance with Army policies regarding the prevention and response to sexual

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harassment and assault. Therefore, how a commander handles a given sexual assault case may impact their annual evaluations and chances for promotion.

D. Military Practitioners' Views from August 23, 2019, DAC-IPAD Public Meeting, and RFI Set 11 Responses. [[RFI Set 11 Responses](#); [DAC-IPAD Aug. 23, 2019 public meeting transcript](#)]

- The factors promulgated pursuant to Article 33, UCMJ, are not discussed in the Article 34 pretrial advice written by the staff judge advocate. As the Air Force's written RFI response points out, there is no requirement to include the new disposition factors in the written pretrial advice.
 - The Air Force's military justice regulation explicitly states that the SJA's advice does not have to mention the Article 33, UCMJ disposition guidance factors,
- The Staff Judge Advocate's (SJA's) written pretrial advice to the convening authority at referral is formulaic, and includes only the information required by Article 34, UCMJ (proper charging, jurisdiction, probable cause, and a recommendation as to disposition).
- In most cases, the Article 33, UCMJ, disposition factors will be discussed orally between the SJA and the convening authority.
- Trial counsel in the Navy and Marine Corps analyze the Article 33, UCMJ, disposition factors in prosecution memoranda ("case analysis memoranda" in the Marine Corps).
- The Army is training counsel on the factors listed in Appendix 2.1 of the 2019 MCM.
- DoD policy provides that a victim's preference regarding participation in a case should be honored at all stages of a case. Testimony from the Military Services underscored efforts by prosecutors and victim's counsel to ensure victims have an opportunity to express their views as to disposition to the prosecutor and convening authority at referral.

E. The observations of the Case Review Subcommittee—made after reviewing cases completed in FY 2017—provide a baseline for assessing the effects of Article 33 and the Non-binding disposition guidance.

- Article 30, UCMJ, directs that commanders and convening authorities determine what disposition should be made of charges "in the interest of justice and discipline." Our review of investigative files, Article 32 reports, Article 34 advice, and the disposition action of commanders and convening authorities found that in cases in which the rationale for the disposition decision was indicated, the following factors were primary: probable cause, sufficiency of the evidence, multiple victims, victim preference, and the declination of other jurisdictions to prosecute. These factors seem to be considerations related to "the interest of justice." We did not observe separate considerations related to "the interest of discipline."
- In many cases, the victim's preference as to disposition seems to be given more weight by convening authorities than the consideration of whether admissible evidence will likely be sufficient to obtain and sustain a conviction in a trial by court-martial. The Article 33 (non-binding) Disposition Guidance may not give appropriate weight to the sufficiency-of-the-evidence factor.

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- The initial disposition authority often did not identify which factors were considered significant in the disposition decision and currently is not required to do so.
- SJAs rarely provide an evaluation of the sufficiency of the evidence to support a conviction in the Article 34 pretrial advice, and they are not required to do so. Including such an analysis as well as the SJA's conclusion as to whether there is sufficient admissible evidence to obtain and sustain a conviction in a trial by court-martial would be helpful to convening authorities.
- In many cases, consideration of "the sufficiency of evidence to obtain and sustain a conviction" did not seem to be afforded the same deference as in the Justice Manual (formerly the U.S. Attorney's Manual).
- In the files reviewed, the staff judge advocate's Article 34 pretrial advice to the general court-martial convening authority often consisted of conclusions without explanation. These unexplained conclusions are not useful in assessing factors relevant to a referral determination. The Article 34 pretrial advice could be more helpful to convening authorities if it included detailed explanations of the staff judge advocates' conclusions.

2. Has the implementation of Article 33, UCMJ, disposition guidance affected referral of sexual assault cases to courts-martial?

A. Military Practitioners' Views from August 23, 2019, DAC-IPAD Public Meeting, and RFI Set 11 Responses. [[RFI Set 11 Responses](#); [DAC-IPAD Aug. 23, 2019 public meeting transcript](#)]

- The Military Services agree that the Article 33, UCMJ, disposition guidance promotes uniformity in decision-making across jurisdictions.
- The Military Services responded to the DAC-IPAD RFI Set 11 questions in June of 2019, about six months after the implementation of the Article 33, UCMJ, disposition guidance factors.
- Most of the Military Services indicated that in mid-2019 it was too soon to know the effect, if any of the newly promulgated disposition guidance factors. Some added that because the new guidance is similar to past guidance [*read: R.C.M. 306(b) factors, above*], the Article 33, UCMJ, disposition guidance would not significantly change practice or case outcomes.
- Air Force approach to referral: The standard for referral of charges under R.C.M. 601(d) is probable cause. In the Air Force, the credible testimony of a victim is viewed as sufficient evidence. If such a victim is willing to go forward and the standard of probable cause is met, these cases are typically referred to trial by court-martial.
- Army comments: The number of sexual assault cases referred to courts-martial has seen a slight increase since January 1, 2019 in comparison to the same period 2018, but there is no way to correlate that increase with the implementation of the non-binding disposition guidance. Many other changes, including the Army's military justice redesign program, may contribute to this increase.
- Note: The Case Review's assessment of cases closed in FY 17 provides a baseline for assessing the effect of the Article 33 disposition factors on referral of penetrative sexual offense cases.

3. Should Art. 33 be amended to list factors that commanders and judge advocates must—rather than “should”—consider?

A. Case Review Subcommittee observations from penetrative sexual offense cases closed in FY 17:

- Many sexual assault cases are being referred to courts-martial when there is insufficient evidence to support and sustain a conviction. ‘
- Article 32 preliminary hearing officers do not consistently include in their reports an evaluation of whether there is sufficient admissible evidence to support a conviction. Such an evaluation would be helpful to subordinate commanders, convening authorities, and staff judge advocates (SJAs).
- SJAs rarely provide a written evaluation of the sufficiency of the evidence to support a conviction in the Article 34 pretrial advice, and they are not required to do so. Including such an analysis as well as the SJA’s conclusion as to whether there is sufficient admissible evidence to obtain and sustain a conviction in a trial by court-martial would be helpful to convening authorities.
- Probable cause is not the appropriate standard for referring a case to trial.
- In many cases, consideration of “the sufficiency of evidence to obtain and sustain a conviction” did not seem to be afforded the same deference as in the Justice Manual (formerly the U.S. Attorneys’ Manual).
- A victim’s preference as to disposition often seemed to carry as much or greater weight than the sufficiency of the evidence in case processing decisions.

B. Military Practitioners’ Views from August 23, 2019, DAC-IPAD Public Meeting, and RFI Set 11 Responses. [[RFI Set 11 Responses](#); [DAC-IPAD Aug. 23, 2019 public meeting transcript](#)]

- The Military Services indicated that in most instances, the Article 33, UCMJ, disposition factors will be discussed orally between the SJA and the convening authority. In the end, commanders are in a unique position to determine the effect of prosecution of a case upon good order and discipline in their units.
- Army comment: The ability to obtain and sustain a conviction does not have a prescribed weight in the decision to refer a sexual assault charge to trial. Convening authorities and their staff judge advocates consider the likelihood of a conviction along with a number of other considerations, including the strength of the admissible evidence and the victim’s preference, with the understanding that in some situations, the interests of good order and discipline will weigh more heavily than these specific factors. **While the ability to obtain a conviction is important, it is not, and cannot be, determinative.**

4. Should the staff judge advocate’s Article 34, UCMJ, pretrial advice, or an attached prosecution memorandum explaining the strengths and weaknesses of the case, be shielded from release to the defense upon referral of charges to trial? If so, would this be likely to result in more detailed and candid written information for the convening authority to consider?

A. Text of Article 34, UCMJ

(a) GENERAL COURT-MARTIAL.—

(1) STAFF JUDGE ADVOCATE ADVICE REQUIRED BEFORE REFERRAL.—

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 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. Rule for Courts-Martial 406

- Discussion to R.C.M. 406 states: “The staff judge advocate is personally responsible for the pretrial advice and must make an independent and informed appraisal of the charges and evidence in order to render the advice . . . **The advice need not set forth the underlying analysis or rationale for its conclusions.** Ordinarily, the charge sheet, forwarding letter, endorsements, and report of preliminary hearing are forwarded with the pretrial advice. In addition, the pretrial advice should include, when appropriate: a brief summary of the evidence; discussion of significant aggravating, extenuating, or mitigating factors; any recommendations for disposition of the case by commanders or others who have forwarded the charges; and any recommendations of the Article 32

preliminary hearing officer. **However, there is no legal requirement to include such information, and failure to do so is not error.**

Information which is incorrect or so incomplete as to be misleading may result in a determination that the advice is defective, necessitating appropriate relief. See R.C.M. 905(b)(1); 906(b)(3). Defects in the pretrial advice are not jurisdictional and are raised by pretrial motion. See R.C.M. 905(b)(1) and its Discussion.

C. Military Practitioners' Views from August 23, 2019, DAC-IPAD Public Meeting, and RFI Set 11 Responses. [[RFI Set 11 Responses](#); [DAC-IPAD Aug. 23, 2019 public meeting transcript](#)]

- Military justice practitioners' responses indicated that they that shielding the written Article 34, UCMJ, pretrial advice from disclosure would not produce more candid, fully-developed advice, because the convening authority would still rely in personal communication with the staff judge advocate in making a referral decision.
- Military justice practitioners and defense counsel agreed that prosecution memoranda are attorney work product and are not provided to convening authorities.
- Military defense counsel did not support the idea of shielding the pretrial advice from disclosure. They agreed that there was a benefit to having the staff judge advocate's conclusions and recommendation remain publicly available—primarily, it maintains some transparency in the pretrial process.
 - Explanation from Marine Corps defense counsel: Because the defense is entitled to discovery and disclosure of exculpatory evidence, the strengths and weaknesses of a case are likely already known by the defense and mandating non-disclosure of the pretrial advice or CAM would not foster more candid advice or a more fully developed analysis of the strengths and weaknesses of the case. Because the defense is entitled to discovery, the defense is operating with the same set of evidence in evaluating the strengths and weaknesses of a case as the SJA or trial counsel. Given this, it is unlikely that the SJA would be identifying strengths or weaknesses in the case that the defense counsel are not also independently identifying. The chances of this are even lower given that, prior to the pretrial advice or a CAM, an Article 32 Preliminary Hearing has already been conducted and the Preliminary Hearing Officer has reviewed the evidence and commented on the strengths and weaknesses of the case
- Most military practitioners opposed expanding the contents of the written pretrial advice, and felt that disclosure of any additional analysis unhelpful to the process. In general, military justice policy experts explained that they would not want to reveal a prosecutor's strategy, or potential weaknesses in a case, or possibly create it in the written pretrial advice that is turned over to the defense.
- The Staff Judge Advocate's (SJA's) written pretrial advice to the convening authority at referral is formulaic, and includes only the information required by Article 34, UCMJ (proper charging, jurisdiction, probable cause, and a recommendation as to disposition).
- In most cases, the Article 33, UCMJ, disposition factors will be discussed orally between the SJA and the convening authority.

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- Air Force's written RFI response: there is no requirement to include the new disposition factors in the written pretrial advice. The Air Force's military justice regulation explicitly states that the SJA's advice does not have to mention the Article 33, UCMJ disposition guidance factors.