

Case Review Subcommittee Findings, Observations, and Directives to Policy Subcommittee

Case Review Subcommittee observations referred to the Policy Subcommittee:

[From DAC-IPAD Fourth Annual Report, March 2020]

The Convening Authority's Disposition of Charges and Specifications "in the Interest of Justice and Discipline"

Observation 1: 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."

The DAC-IPAD tasked the Policy Working Group to examine the standard "in the interest of justice and discipline" and its relation to disposition decisions in cases involving allegations of penetrative sexual assault.

Disposition Guidance

Observation 2: 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.

Observation 3: While judge advocates often provided investigators advice on probable cause for submission of fingerprints and DNA to federal databases, it is unclear what, if any, advice on appropriate disposition factors, including advice on probable cause, judge advocates provided to the initial disposition authority.

The DAC-IPAD determined the Policy Working Group should explore these issues to ensure the initial disposition authority is receiving appropriate advice as to whether there is probable cause to support adverse action against the subject of a penetrative sexual assault investigation and on disposition factors under the new non-binding guidance prior to making a disposition decision. The Policy Working Group will also examine whether and how to document such advice.

Observation 4: 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.

Preliminary Hearing Determination of Probable Cause

Observation 5: Detailed Article 32 preliminary hearing reports containing a summary of the facts supporting the elements and the preliminary hearing officer's analysis and conclusions are useful both to special victims' counsel or victims' legal counsel and to defense counsel in advising their clients, as well as to staff judge advocates and convening authorities in rendering advice and making decisions on the charges, probable cause, jurisdiction, and dispositions.

Observation 6: On the basis of its reviews of investigative files and Article 32 preliminary hearing reports, the Case Review Working Group noted that sufficient evidence for a probable

cause determination is not always presented at the Article 32 hearing. The Article 32 preliminary hearing officer should be presented with sufficient evidence to support a probable cause determination at that hearing, where it is subject to challenge by the defense.

Observation 7: The lack of a binding probable cause determination by the preliminary hearing officer, which allows the staff judge advocate—without explanation—to come to a different conclusion on probable cause, reduces the usefulness of the Article 32 hearing.

Staff Judge Advocate Pretrial Advice

Observation 8: Many sexual assault cases are being referred to courts-martial when there is insufficient evidence to support and sustain a conviction.

a. 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).

b. 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. (See Observation 9.)

c. Article 34 requires SJAs to provide convening authorities a binding determination of probable cause as the standard for referring a case to trial. However, probable cause may not be the appropriate standard for referring a case to trial.

d. 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).

Observation 9: Currently Article 34, UCMJ, prohibits convening authorities from referring charges to a general court-martial unless the staff judge advocate provides written advice that the specification alleges an offense, there is probable cause to believe that the accused committed the offense, and jurisdiction exists. In addition, the staff judge advocate must provide a written recommendation as to the disposition to be made in the interest of justice and discipline. 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 advocate’s conclusions.

Findings and Proposed Directives to Policy Subcommittee

[from Draft Case Review Report, August 2020]

Reasonableness of Initial Disposition Authority Decisions in Adult Penetrative Sexual Offense Cases Closed in FY17

Proposed Finding 4: The initial disposition authority’s decision to take no administrative, nonjudicial, or judicial action against a Service member for an alleged penetrative sexual offense was reasonable in 1,316 (98.5%) of 1,336 of the adult-victim cases closed in FY17.

Proposed Finding 5: The decision to prefer a penetrative sexual offense charge was reasonable in 486 (94.0%) of the 517 adult-victim cases closed in FY17.

Proposed Directive 1 to Policy Subcommittee: The Policy Subcommittee review and assess how the Military Services have implemented the Article 33, UCMJ, Disposition Guidance with regard to penetrative sexual offense allegations. In particular, the Policy Subcommittee examine the uniformity of training on the Article 33 guidance across the Military Services, the content and quality of judge advocates' advice to commanders regarding the sufficiency of admissible evidence to obtain and sustain a conviction, and the documentation of disposition decisions by commanders and convening authorities. The Policy Subcommittee consider policy changes to require mandatory consideration of the sufficiency of admissible evidence to obtain and sustain a conviction on the charged offense as part of the initial disposition decision.

Assessment of Whether there are Systemic Problems with Initial Disposition Authority and Referral Decisions Regarding Adult Penetrative Sexual Offense Cases Closed in FY17

Proposed Finding 23: The review of 1,904 adult penetrative sexual offense investigative case files closed in FY17 reveal that there is not a systemic problem with the initial disposition authority's decision either to prefer an adult penetrative sexual offense charge or to take no action against the subject for that offense.

Proposed Finding 24: The review of 1,904 penetrative sexual offense investigative cases files closed in FY17 reveal, however, that there is 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 on the charged offense.

Proposed Directive 6 to Policy Subcommittee: The Policy Subcommittee develop proposals, as part of their findings and recommendations regarding Articles 30, 32, 33, and 34, UCMJ, to require the staff judge advocate to advise the convening authority in writing that there is sufficient admissible evidence to obtain and sustain a conviction on the charged offenses before a convening authority may refer a charge and specification to trial by general court-martial.