

**Defense Advisory Committee on
Investigation, Prosecution, and Defense of
Sexual Assault in the Armed Forces**

Meeting Materials

March 30, 2023

**Defense Advisory Committee on Investigation, Prosecution, and Defense of
Sexual Assault in the Armed Forces (DAC-IPAD)
28th Public Meeting**

**March 30, 2023
Public Meeting Read-Ahead Materials**

Table of Contents

Tab 1	Agenda: March 30, 2023	<i>(1 page)</i>
Tab 2	SPSC Recommendations Regarding Pretrial Procedures and Prosecution Standards Presented to the DAC-IPAD on March 30, 2023, for Deliberations and Vote	<i>(6 pages)</i>
Tab 3	Proposed revisions to Appendix 2.1 of the Manual for Courts-Martial for the March 30 DACIPAD Public Meeting	<i>(8 pages)</i>
Tab 4	Excerpt: Justice Manual Principles of Federal Prosecution	<i>(1 pages)</i>

**Defense Advisory Committee on Investigation, Prosecution, and Defense
of Sexual Assault in the Armed Forces (DAC-IPAD)**

PUBLIC MEETING AGENDA

**March 30, 2023
Arlington, Virginia (Virtual)**

Thursday, March 30, 2023

- 12:30 p.m. – 12:35 p.m. Welcome and Introduction to Public Meeting**
- 12:35 p.m. – 1:30 p.m. Discussion, Deliberations, and Voting on
Special Projects Subcommittee (SPSC) Recommendations 2 and 3
for Adoption and Approval by the DAC-IPAD**
- SPSC Recommendation 2 (Revise Appendix 2.1, MCM)*
SPSC Recommendation 3 (Training)
- 1:30 p.m. Public Meeting Adjourned**

**SPSC Recommendations Regarding Pretrial Procedures and Prosecution Standards
Presented to the DAC-IPAD on March 30, 2023, for Deliberations and Vote**

I. *Create a binding no-probable cause determination by the Article 32 preliminary hearing officer with a limited opportunity for reconsideration.*

SPSC Recommendation 1a: Amend Article 32 to provide that a preliminary hearing officer's determination of no-probable cause is an absolute bar to referral of the affected specification(s) to court-martial, subject to reconsideration as described in Recommendation 1b.

SPSC Recommendation 1b: Amend Article 32 and Rule for Courts-Martial 405 to permit reconsideration of a preliminary hearing officer's no-probable cause determination upon the presentation of newly discovered evidence, or evidence that, in the exercise of due diligence, could not reasonably have been obtained before the original hearing, subject to the following:

1. Trial counsel, within 10 days of receiving the preliminary hearing officer's report, petitions the preliminary hearing officer to reopen the Article 32 preliminary hearing stating the nature of the newly discovered evidence and the reason it was not previously presented.
2. The preliminary hearing officer shall reconsider their previous no-probable cause determination one time upon re-opening the Article 32 preliminary hearing to receive the evidence as described above. After reconsideration, the preliminary hearing officer's determination as to whether probable cause exists is final.

Findings and Rationale:

1. The Purposes of Article 32: Congress transformed Article 32, UCMJ, into a preliminary hearing with two primary purposes: (1) to determine whether there is probable cause to believe that the accused committed the offense(s) charged; and (2) to recommend the disposition that should be made of the case.

2. The Problem with Article 32: The advisory nature of Article 32 undermines the purposes of Article 32 and creates systemic problems with the pretrial processing of criminal misconduct.

- The advisory nature of the Article 32 probable cause determination does not incentivize counsel for the Government to establish probable cause, thus failing to fulfill a primary purpose of Article 32.
 - In 17% of the penetrative sexual offense cases completed in FY16 through FY21 with an Article 32 preliminary hearing, the preliminary hearing officer determined one or more distinct penetrative sexual offense charges lacked probable cause.
- Statistics show that the advisory nature of Article 32 permits prosecutors to treat the proceeding in a perfunctory manner.

- In current practice, trial counsel may, without consequence, submit as their only exhibit an entire report of investigation (ROI) from the MCIO, or elect to provide investigative summaries in lieu of more reliable evidence.
- Less than 20% of all preliminary hearings held in FY21 involved live testimony from any witness, indicating that investigators rarely testify to establish probable cause.
- When an Article 32 proceeding is advisory, as opposed to binding, the Government is free to pursue cases virtually unchecked. This is of particular concern in cases prosecuted by the new special trial counsel because pretrial decision-making will be consolidated in one office. Although a staff judge advocate's independent, binding, no-probable cause determination under Article 34 serves as a check on the convening authority's ability to refer cases to trial,¹ a special trial counsel will possess exclusive authority to refer cases to trial,² without any independent check on prosecutorial discretion.
- The advisory nature of Article 32 contributes to the systematic referral of weak cases that do not meet the standard of proof required at trial.
 - For adult-victim penetrative sexual offense cases tried in FY16–18, more than 30% ended in a full acquittal.³
 - Of the 235 adult-victim penetrative sexual offense charges tried to verdict in FY17, 144 (61.3%) of the cases resulted in an acquittal on the penetrative sexual offense; and 91 (38.7%) of the cases resulted in a conviction on the penetrative sexual offense [DAC-IPAD Finding 90].⁴
 - In several recent cases in which adult-victim sexual offenses were tried at general courts-martial after the Article 32 preliminary hearing officer found no probable cause, the appellate courts overturned the convictions for lack of factual sufficiency and urged prosecutors to heed ethical guidelines.⁵ One judge observed:

¹ Article 34, UCMJ (2021).

² Special trial counsel may exercise authority over cases involving 14 covered offenses, and any UCMJ offense if related and known, occurring on or after Dec. 28, 2023.

³ DAC-IPAD COURT-MARTIAL ADJUDICATION DATA REPORT 25 (2019).

⁴ DAC-IPAD REPORT ON INVESTIGATIVE CASE FILE REVIEWS 58 (2020) (indicating the outcome of the charged penetrative sexual offense).

⁵ See *United States v. Hanabarger*, No. 201900031, 2020 CCA LEXIS 252 (N-M. Ct. Crim. App. July 30, 2020); *United States v. Lewis*, No. 201900049, 2020 CCA LEXIS 199 (N-M. Ct. Crim. App. June 8, 2020) (Stephens, Senior Judge, concurring) (Unpub. Op.). Cf. *United States v. Hyppolite*, No. ACM 39358, 2018 CCA LEXIS 517 (A.F. Ct. Crim. App. Oct. 25, 2018) (Huygen, Judge, dissenting) (Unpub. Op.) (Expressing disagreement with the majority's finding that the evidence supporting a specification, which the preliminary hearing officer found unsupported by probable cause, was factually sufficient.), *aff'd*, 79 M.J. 161 (C.A.A.F. 2019).

“This Preliminary Hearing, at least with respect to these specifications, provided no meaningful protection for Appellant and no check on the Government’s ability to expose him to felony-level punishment. . . . Specifications lacking probable cause should not find a home on referred charge sheets for general courts-martial.”⁶

3. The Value of Reforming Article 32: A binding no-probable cause determination would produce systemic benefits to the pretrial processing of criminal misconduct.

- Servicemembers would be protected against prosecution on charges unsupported by probable cause.
- An Article 32 preliminary hearing that weeds out unsupported charges will lead to a more effective and efficient military justice system.
- The penalty of dismissal would incentivize counsel to present evidence in a manner that clearly establishes probable cause at the preliminary hearing. A more thoughtful presentation of evidence will enhance the Article 32 preliminary hearing officer’s report and disposition recommendation.
- The military would better align with federal civilian practice, where the failure of the Government to meet the minimal requirement of probable cause is an absolute bar to initiating a federal prosecution, and in some circumstances may preclude reference to other prosecuting authorities or recourse to non-criminal measures.
- The victim’s statutory right to refuse to testify at the Article 32 is not diminished by the requirement for a binding probable cause determination. Article 32 and Rule for Courts-Martial 405 also permit alternatives to live testimony such as recorded statements to law enforcement. A prosecutor must have the victim’s agreement to testify or may present the testimony of other witnesses, such as investigators, to establish probable cause.
- The victim’s right to confer with counsel for the Government, the convening authority, or the special trial counsel regarding their preference as to disposition is not diminished by the requirement for a binding probable cause determination. The victim’s non-binding preference as to disposition is one of several considerations in the disposition guidance in Appendix 2.1 of the Manual for Courts-Martial.
- Article 32 preliminary hearing officers—mostly field grade judge advocates—consistently provide in-depth analyses of how the case file evidence aligns with the elements of each offense.⁷ These Article 32 reports indicate that persons with sufficient legal expertise are serving as preliminary hearing officers and are qualified to render a binding no-probable cause determination.

⁶ *United States v. Lewis*, No. 201900049, 2020 CCA LEXIS 199, 42 (N-M. Ct. Crim. App. June 8, 2020) (Stephens, Senior Judge, concurring) (Unpub. Op.).

⁷ *Transcript of DAC-IPAD Policy Subcommittee Meeting* 11–14 (Dec. 3, 2020).

- In the vast majority of FY21 cases in which a preliminary hearing officer found no-probable cause for one or more charged offenses, the charge was either dismissed or the accused was found not guilty, indicating that preliminary hearing officers' assessments are reasonably predictive of the appropriate disposition of the charge(s).
- A binding no-probable cause determination will ensure that appointment of qualified preliminary hearing officers continues to be a priority.
- The Services have voiced concerns about an anticipated increase in the number of Article 32 hearings. Unlike the old Article 32 rules that resembled a contested trial, the more limited scope of the current Article 32 preliminary hearing mitigates against the concern of an undue burden for prosecutors caused by a binding no-probable cause determination.
 - In FY14, when Article 32 required a thorough investigation of the charges, the defense rarely waived the Article 32 investigation in penetrative sexual offense cases (19 waivers in 445 cases (4%)).
 - In FY16 through FY21, the percentage of Article 32 preliminary hearings waived in penetrative sexual offense cases ranged from 21% to 26%.
 - The percentage of Article 32 preliminary hearings waived in FY21 penetrative sexual offense cases (23%) is somewhat lower than in FY21 cases involving all offenses (31%).
- If a no-probable cause determination is binding, there should be an opportunity for reconsideration upon presentation of newly discovered evidence or evidence that, in the exercise of due diligence, could not reasonably have been obtained before the hearing. Military pretrial procedures should provide opportunity for trial counsel, upon receipt of the preliminary hearing officer's report, to petition the preliminary hearing officer to reopen the Article 32 preliminary hearing clearly stating the nature of the newly discovered evidence and the reason it was not previously presented. The prosecution also retains the ability to re-prefer charges following dismissal.

II. *Create Uniform Disposition Guidance for Special Trial Counsel and Convening Authorities*

SPSC Recommendation 2: Revise Appendix 2.1, Manual for Courts-Martial to align with the prosecution principles contained in official guidance of the Attorney General to attorneys for the Government with respect to disposition of Federal criminal cases and to provide that special trial counsel should only refer charges to a general court-martial, and judge advocates should only recommend that a convening authority refer charges to a general court-martial, if they believe that the Servicemember's conduct constitutes an offense under the UCMJ, and that the admissible evidence will probably be sufficient to obtain and sustain a conviction when viewed objectively by an unbiased factfinder.

SPSC Recommendation 3: Require training of all special trial counsel and judge advocates advising convening authorities on the disposition guidance in Appendix 2.1 of the Manual for Courts-Martial. The training shall emphasize the principle that referral is only appropriate if they believe that the servicemember's conduct constitutes an offense under the UCMJ, and that the admissible evidence will probably be sufficient to obtain and sustain a conviction.

Findings and Rationale:

- The DAC-IPAD concluded that weak pretrial procedures contributed directly to frequent acquittals in sexual offense cases based on a Case Review Subcommittee study of all investigations involving allegations of penetrative sexual offenses closed in FY17.⁸
 - While the DAC-IPAD found convening authorities' decisions to refer sexual assault cases to court-martial were reasonable in almost all cases, that finding was grounded in Article 34's minimal legal standard of probable cause for referral. In some cases, the DAC-IPAD reviewers did not believe probable cause was established.
 - These FY17 cases were prosecuted prior to the enactment of Article 33 and Appendix 2.1, and prior to the creation of the Office of the Special Trial Counsel.
 - From 2015 until 2018, the Services' conviction rates for penetrative sexual offenses ranged from 28.2% to 36.8%.⁹

⁸ See DAC-IPAD REPORT ON INVESTIGATIVE CASE FILE REVIEWS, *supra* note 20. (DAC-IPAD Finding 98: 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. In 31.1% of cases reviewed that were tried to verdict on a penetrative sexual offense charge, the evidence in the materials reviewed did not meet that threshold.)

⁹ See DAC-IPAD Court-martial Adjudication Data Report (2019).

- While the Army, Marine Corps, and Navy acknowledge the importance of assessing the sufficiency of the evidence, they also expressed that the victim’s preference is a highly influential factor in referral decisions. Air Force representatives explained that if a victim expresses a desire for a court-martial and probable cause is met, the convening authority will most likely refer the case to trial, regardless of the sufficiency of the evidence.
- Pursuant to Article 36, UCMJ, pretrial, trial, and post-trial procedures for courts-martial are prescribed by the President and shall apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts and be uniform, insofar as practicable.
- Pursuant to Article 33, UCMJ, the Secretary of Defense must issue guidance regarding factors that judge advocates and convening authorities should take into account when exercising their duties as to disposition of charges. The statute further requires that this guidance must take into account the principles contained in official guidance of the Attorney General to attorneys for the Government with respect to disposition of Federal criminal cases in accordance with the principle of fair and evenhanded administration of Federal criminal law.
- Well-established legal ethics rules and guidelines, including the Federal Principles of Prosecution contained in Title 9, Chapter 27 of the Justice Manual, require civilian prosecutors throughout the United States to believe that the admissible evidence will probably be sufficient to obtain and sustain a conviction before taking a case to trial.
- Guidance promulgated pursuant to Article 33 and Appendix 2.1 would be substantially improved by including a uniform statement of prosecutorial policies and practices aligned with the U.S. Justice Manual’s “Principles of Federal Prosecution,” and by providing more nuanced commentary on the reasoned exercise of prosecutorial discretion.
 - Adopting prosecution principles and explaining how to apply them in Appendix 2.1 can safeguard against impermissible considerations influencing referral decisions, such as the possible biases of a factfinder or the effect of any such biases on the likelihood of conviction.
 - Promulgation of a uniform statement of prosecutorial policies and practices promotes confidence on the part of the public, crime victims, and individual defendants that important prosecutorial decisions will be made rationally and objectively on the merits of each case
- Referral decisions should be grounded in a technical analysis of the admissibility of evidence and quantum of proof needed to convict in a criminal trial, while giving special trial counsel and judge advocates advising a convening authority a wide berth for exercising prosecutorial discretion. This evidentiary analysis reflects overarching ethical considerations, concerns about the fundamental fairness of the system, and the recognition of how significantly the initiation of criminal charges affects a Servicemember.

*Prepared by the DAC-IPAD Special Projects Subcommittee
Proposed revisions to Appendix 2.1 of the Manual for Courts-Martial
for the March 30 DACIPAD Public Meeting*

APPENDIX 2.1

NON-BINDING DISPOSITION GUIDANCE

This Appendix provides non-binding disposition guidance issued by the Secretary of Defense, in consultation with the Secretary of Homeland Security, pursuant to Article 33 (Disposition Guidance) of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 833.

SECTION 1: IN GENERAL

- 1.1. Policy
- 1.2. Purpose
- 1.3. Scope
- 1.4. Non-Litigability

SECTION 2: CONSIDERATIONS IN ALL CASES

- 2.1. Interests of Justice and Good Order and Discipline
- 2.2. **Initial Disposition and** Consultation with a Judge Advocate
- 2.3. Referral
- ~~2.4. Determining the Charges and Specifications to Refer.~~
- 2.4.** Determining the Appropriate Type of Court-Martial.
- 2.5.** Alternatives to Referral
- 2.6.** **In**appropriate Considerations

SECTION 3: SPECIAL CONSIDERATIONS

- 4.1. Prosecution in Another Jurisdiction
- 4.2. Plea Agreements
- 4.3. Agreements Concerning Disposition of Charges and Specifications
- 4.4. Agreement Concerning Sentence Limitations

SECTION 1: IN GENERAL

- 1.1. Policy.

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a. This Appendix provides ~~non-binding~~ guidance regarding factors that convening authorities, commanders, staff judge advocates, **special trial counsel**, and judge advocates should consider when exercising their duties with respect to the disposition of charges and specifications under the UCMJ, and to further promote the purpose of military law.¹

b. This Appendix supplements the Manual for Courts-Martial. The guidance in this Appendix does not require a particular disposition decision or other action in any given case. Accordingly, the disposition factors set forth in this Appendix are cast in general terms, with a view to providing guidance rather than mandating results. The intent is to promote regularity without regimentation; encourage consistency without sacrificing necessary flexibility; and provide the flexibility to apply these factors in the manner that facilitates the fair and effective response to local conditions in the interest of justice and good order and discipline.

c. **The disposition guidance contained in this Appendix aligns with the purposes of Articles 33 and 36, UCMJ, in that it includes principles of law generally recognized in official guidance of the Attorney General with respect to disposition of federal criminal cases, and in the trial of criminal cases in the United States district courts. Given that Article 36 also requires all rules and regulations to be uniform insofar as practicable, this Appendix guides all military justice practitioners who exercise prosecutorial authority or advise commanders who make disposition decisions.**

1.2. Purpose. This ~~non-binding~~ disposition guidance is intended to:

a. Set forth factors for consideration by those assigned responsibility under the UCMJ for disposing of alleged violations of the UCMJ on how best to exercise their authority in a reasoned and structured manner, consistent with the principle of fair and evenhanded administration of the law;

b. **Ensure the fair and effective exercise of prosecutorial discretion and responsibility by convening authorities, commanders, staff judge advocates, special trial counsel, and judge advocates and promote confidence on the part of the public and individual accused servicemembers that disposition decisions will be made rationally and objectively on the merits of each case;**

c. Serve as a training tool for convening authorities, commanders, staff judge advocates, **special trial counsel**, and judge advocates in the proper discharge of their duties;

d. Contribute to the effective utilization of the Government's law enforcement and prosecutorial resources; and

¹ "The purpose of military law is to promote justice, to assist in maintaining good order and discipline on the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States.

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e. Enhance the relationship between military commanders, judge advocates, **special trial counsel**, and law enforcement agencies, including military criminal investigative organizations (MCIOs), with respect to investigations and charging decisions.

1.3. Scope. This Appendix is designed to **promote the reasoned exercise** of discretion with respect to the following disposition decisions:

- a. Initiating and declining action (**to include deferral**) under the UCMJ;
- b. Disposition of covered offenses by special trial counsel;**
- c. Selecting appropriate charges and specifications;
- d. Selecting the appropriate type of court-martial or alternative mode of disposition, if any; and
- e. Considering the appropriateness of a plea agreement.

1.4. Non-Litigability. **This Appendix** ~~non-binding guidance~~ was developed solely as a matter of internal Departmental policy in accordance with Article 33. This Appendix is not intended to, does not, and may not be relied upon to create a **substantive or procedural** right, benefit, or defense ~~substantive or procedural~~, enforceable at law or in equity by any person and may not be relied upon by a party to litigation under the UCMJ.

SECTION 2: CONSIDERATIONS IN ALL CASES

2.1. Interests of Justice and Good Order and Discipline. The military justice system is a powerful tool that **promotes justice and assists in maintaining** 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 interests of justice and good order and discipline are served by trial by court-martial or **some** other disposition ~~in a case~~, **the special trial counsel, or** commander or convening authority **in consultation with a judge advocate, as appropriate**, should consider the following:

- a. The mission-related responsibilities of the command;
- b. Whether the offense occurred during wartime, combat, or contingency operations;
- c. The effect of the offense on the morale, health, safety, welfare, and good order and discipline of the command;
- d. The nature, seriousness, and circumstances of the offense and the accused's culpability in connection with the offense;
- e. In cases involving an individual who is a victim under Article 6b, the views of the victim as to disposition;
- f. The extent of the harm caused to any victim of the offense;

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Proposed revisions to Appendix 2.1 of the Manual for Courts-Martial
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- g. The availability and willingness of the victim and other witnesses to testify;
- h. Whether admissible evidence will **probably** ~~likely~~ be sufficient to obtain and sustain a conviction in a trial by court-martial;
- i. Input, if any, from law enforcement agencies involved in or having an interest in the specific case;
- j. The truth-seeking function of trial by court-martial;
- k. The accused's willingness to cooperate in the investigation or prosecution of others;
- l. The accused's criminal history or history of misconduct, whether military or civilian, if any;
- m. The probable sentence or other consequences to the accused of a conviction; and
- 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.

2.2. **Initial Disposition and Consultation with a Judge Advocate.** If a member of a command is accused or suspected of committing an offense punishable under the UCMJ, the commander should seek advice from a judge advocate regarding all possible dispositions of the allegation. The judge advocate's advice should include a discussion of the advantages and disadvantages of each of the available dispositions. The cognizant commander should consider all available options. **If a commander receives a report of a covered offense, they shall promptly forward the report to a Special Trial Counsel (STC).**

2.3. **Referral.** Probable cause must exist for each charge and specification referred to a court-martial. **Special trial counsel should [only] refer, and judge advocates should [only] recommend that a convening authority refer charges to a general court-martial if they believe that the servicemember's conduct constitutes an offense under the UCMJ, and that the admissible evidence will probably be sufficient to obtain and sustain a conviction.**

In all cases, the special trial counsel or judge advocate advising a convening authority, should consider the other factors in paragraph 2.1 of this Appendix before deciding whether to refer or recommend referral to a court-martial, and, in their discretion, make a reasoned determination, given the profound consequences for the accused, crime victims, and their families.

Evidence sufficient to obtain and sustain a conviction is required under Rule 29(a) of the Federal Rules of Criminal Procedure, to avoid judgment of acquittal. Because Article 36 encourages the application of uniform principles of law generally applicable in United States district court, as both a matter of fundamental fairness and in the interest of the efficient administration of justice, no charge should be referred to a general court-martial unless the special trial counsel, or judge

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Proposed revisions to Appendix 2.1 of the Manual for Courts-Martial
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advocate advising the convening authority, believes that the admissible evidence will probably be sufficient to obtain and sustain a guilty verdict by an unbiased trier of fact.

When deciding whether to refer or recommend referral, the special trial counsel or judge advocate need not have in hand, at that time, all the evidence upon which they intend to rely at trial, if they have a reasonable and good faith belief that such evidence will be available and admissible at the time of trial. For example, it would be proper to refer a case to court-martial even though a key witness may be out of the country, so long as there is a good faith basis to believe that the witness's presence at trial could reasonably be expected.

Where the law and the facts create a sound, prosecutable case, the likelihood of an acquittal due to impermissible biases a factfinder may harbor is not an appropriate factor for consideration in the referral decision. Instead, the referral decision should be based on an evaluation of the evidence as viewed objectively by an unbiased factfinder.

This guidance promotes the reasoned exercise of prosecutorial discretion and contributes to the fair, evenhanded administration of the UCMJ. Following this guidance will safeguard responsibility by special trial counsel in referral decisions and by judge advocates who advise convening authorities regarding referral decisions and ultimately promote confidence on the part of the public, the military community, and accused servicemembers that important prosecutorial decisions will be made rationally and objectively on the merits of each case.

~~2.4 — Determining the Charges and Specifications to Refer. Ordinarily, the convening authority should refer charges and specifications for all known offenses to a single court-martial. However, the convening authority should avoid referring multiple charges when they would:~~

- ~~a. — Unnecessarily complicate the prosecution of the most serious, readily provable offense or offenses;~~
- ~~b. — Unnecessarily exaggerate the nature and extent of the accused's criminal conduct or add unnecessary confusion to the issues at court-martial;~~
- ~~c. — Unnecessarily expose the accused to a harsher potential sentence or range of punishments than the circumstances of the case justify; or~~
- ~~d. — Be disposed of more appropriately through an alternative disposition.~~

2.4. Determining the Appropriate Type of Court-Martial. In determining the appropriate type of court-martial, a convening authority should consider the advice of a judge advocate. Additionally, a convening authority or special trial counsel should consider:

- a. The interests of justice and good order and discipline and factors set forth in paragraph 2.1 of this Appendix;
- b. The authorized maximum and minimum punishments for the offenses charged;
- c. Any unique circumstances in the case requiring immediate disposition of the charges;

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- d. Whether the type of court-martial would unnecessarily expose the accused to a harsher potential sentence or range of punishments than the circumstances of the case justify; and
- e. Whether the potential of the accused for rehabilitation and continued service would be better addressed in a specific type of court-martial.

2.5. Alternatives to Referral. If a determination is made that a case should not be referred to court-martial because there exists an adequate alternative to trial, a judge advocate should advise the convening authority on, and the convening authority should consider, in addition to the considerations in paragraph 2.1 the following factors:

- a. The effect of alternative disposition on the interests of justice and good order and discipline;
- b. The options available under the alternative means of disposition;
- c. The views of the victim, if any, concerning the alternative disposition of the case; and
- d. The likelihood of an effective outcome.

2.6. Inappropriate Considerations. The disposition determination must not be influenced by:

- a. The accused's or victim's race, ethnicity, religion, gender, sexual orientation, national origin, or lawful political association, activities, or beliefs;
- b. The personal feelings of anyone authorized to recommend, advise, or make a decision as to disposition of offenses concerning the accused, the accused's associates, or any victim or witness of the offense;
- c. The time and resources already expended in the investigation of the case;
- d. The possible effect of the disposition determination on the commander's, or convening authority's, or judge advocate's, or special trial counsel's military career or other professional or personal circumstances; or
- e. Political pressure to take or not to take specific actions in the case.

SECTION 3: SPECIAL CONSIDERATIONS

3.1. Prosecution in Another Jurisdiction. When the accused is subject to effective prosecution in another jurisdiction, the special trial counsel, or the convening authority with the advice of a judge advocate, should consider the following additional factors when determining disposition:

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Proposed revisions to Appendix 2.1 of the Manual for Courts-Martial
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- a. The strength of the other jurisdiction's interest in prosecution;
- b. The other jurisdiction's ability and willingness to prosecute the case effectively;
- c. The probable sentence or other consequences if the accused were to be convicted in the other jurisdiction;
- d. The views of the victim, if any, as to the desirability of prosecution in the other jurisdiction;
- e. Applicable policies derived from agreements with the Department of Justice and foreign governments regarding the exercise of military jurisdiction; and
- f. The likelihood that the nature of the proceedings in the other jurisdiction will satisfy the interests of justice and good order and discipline in the case, including any burdens on the command with respect to the need for witnesses to be absent from their military duties, and the potential for swift or delayed disposition in the other jurisdiction.

3.2. Plea Agreements. In accordance with Article 53a, **the special trial counsel**, or convening authority **with the advice of a judge advocate**, may enter into an agreement with an accused concerning disposition of the charges and specifications and the sentence that may be imposed. **The special trial counsel**, or the convening authority **with the advice of a judge advocate**, should consider the following additional factors in determining whether it would be appropriate to enter into a plea agreement in a particular case:

- a. The accused's willingness to cooperate in the investigation or prosecution of others;
- b. The nature and seriousness of the offense or offenses charged;
- c. The accused's remorse or contrition and his or her willingness to assume responsibility for his or her conduct;
- d. Restitution, if any;
- e. The accused's criminal history or history of misconduct, whether military or civilian;
- f. The desirability of prompt and certain disposition of the case and of related cases;
- g. The likelihood of obtaining a conviction at court-martial;
- h. The probable effect on victims and witnesses;
- i. The probable sentence or other consequences if the accused is convicted;
- j. The public and military interest in having the case tried rather than disposed of by a plea agreement;
- k. The time and expense associated with trial and appeal;

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Proposed revisions to Appendix 2.1 of the Manual for Courts-Martial
for the March 30 DACIPAD Public Meeting*

- l. The views of the victim with regard to prosecution, the terms of the anticipated agreement, and alternative disposition; and
- m. The potential of the accused for rehabilitation and continued service.

3.3. Agreements Concerning Disposition of Charges and Specifications. With respect to plea agreements regarding the disposition of charges and specifications, the plea agreement should require the accused to plead guilty to charges and specifications that:

- a. Appropriately reflect the nature and extent of the criminal conduct;
- b. Are supported by an adequate factual basis;
- c. Would support the imposition of an appropriate sentence under all the circumstances of the case;
- d. Do not adversely affect the investigation or prosecution of others suspected of misconduct; and
- e. Appropriately serve the interests of justice and good order and discipline.

3.4. Agreements Concerning Sentence Limitations. A plea agreement should ensure that any sentence limitation takes into consideration the sentencing guidance set forth in Article 56(c).

Analysis:

This appendix implements Article 33, as amended by Section 5204 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), and section 12 of Executive Order 13825 of March 1, 2018. The disposition factors contained in this appendix are adapted primarily from three sources: the Principles of Federal Prosecution issued by the Department of Justice; the American Bar Association, Criminal Justice Standards for the Prosecution Function; and the National District Attorneys Association, National Prosecution Standards.

Practitioners are encouraged to familiarize themselves with the disposition factors contained in this appendix as well as these related civilian prosecution function standards. The disposition factors have been adapted with a view toward the unique nature of military justice and the need for commanders, convening authorities, **special trial counsel, and judge advocates** to exercise wide discretion to meet their responsibilities to maintain good order and discipline.

Excerpt: Justice Manual Principles of Federal Prosecution

*For reference in DAC-IPAD deliberations on proposed revisions to
Appendix 2.1, Manual for Courts-Martial*

9-27.220 - GROUNDS FOR COMMENCING OR DECLINING PROSECUTION

The attorney for the government should commence or recommend federal prosecution if he/she believes that the person's conduct constitutes a federal offense, and that the admissible evidence will probably be sufficient to obtain and sustain a conviction, unless (1) the prosecution would serve no substantial federal interest; (2) the person is subject to effective prosecution in another jurisdiction; or (3) there exists an adequate non-criminal alternative to prosecution.

Comment. Evidence sufficient to sustain a conviction is required under Rule 29(a) of the Federal Rules of Criminal Procedure, to avoid a judgment of acquittal. Moreover, both as a matter of fundamental fairness and in the interest of the efficient administration of justice, no prosecution should be initiated against any person unless the attorney for the government believes that the admissible evidence is sufficient to obtain and sustain a guilty verdict by an unbiased trier of fact. In this connection, it should be noted that, when deciding whether to prosecute, the government attorney need not have in hand, at that time, all of the evidence upon which he/she intends to rely at trial, if he/she has a reasonable and good faith belief that such evidence will be available and admissible at the time of trial. Thus, for example, it would be proper to commence or recommend a prosecution even though a key witness may be out of the country, so long as there is a good faith basis to believe that the witness's presence at trial could reasonably be expected.

Where the law and the facts create a sound, prosecutable case, the likelihood of an acquittal due to unpopularity of some aspect of the prosecution or because of the overwhelming popularity of the defendant or his/her cause is not a factor prohibiting prosecution. For example, in a civil rights case or a case involving an extremely popular political figure, it might be clear that the evidence of guilt—viewed objectively by an unbiased factfinder—would be sufficient to obtain and sustain a conviction, yet the prosecutor might reasonably doubt, based on the circumstances, that the jury would convict. In such a case, despite his/her negative assessment of the likelihood of a guilty verdict (based on factors extraneous to an objective view of the law and the facts), the prosecutor may properly conclude that it is necessary and appropriate to commence or recommend prosecution and allow the criminal process to operate in accordance with the principles set forth here.

However, the attorney for the government's belief that a person's conduct constitutes a federal offense and that the admissible evidence will probably be sufficient to obtain and sustain a conviction is not sufficient standing by itself to commence or recommend prosecution. The prosecution must also serve a substantial federal interest, and the prosecutor must assess whether, in his/her judgment, the person is subject to effective prosecution in another jurisdiction; and whether there exists an adequate non-criminal alternative to prosecution. It is left to the judgment of the attorney for the government to determine whether these circumstances exist. In exercising that judgment, the attorney for the government should consult JM [9-27.230](#), [9-27.240](#), [9-27.250](#), and [9-27.260](#).