

## APPENDIX 2.1 DISPOSITION GUIDANCE

This Appendix provides non-binding 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.

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### SECTION 1: IN GENERAL

#### 1.1. Policy.

a. This Appendix provides guidance regarding factors that convening authorities, commanders, special trial counsel, staff judge advocates, and other 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 purposes of military law.<sup>1</sup>

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 a manner that facilitates the fair and effective response to local conditions in the interest of justice and good order and discipline.

#### 1.2. Purpose. This 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. Promote the fair and effective exercise of prosecutorial discretion and foster confidence on the part of the public and Service members 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, special trial counsel, staff judge advocates, and other judge advocates involved in the disposition process;

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

e. Enhance the relationship between military commanders; special trial counsel; staff judge advocates; other judge advocates involved in the disposition process; and law enforcement agencies, including military criminal investigative organizations (MCIOs), with respect to investigations and charging decisions; and

f. Guide the significant decision whether to prosecute a matter at court-martial recognizing the profound consequences for the accused and crime victims regardless of the outcome.

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<sup>1</sup> "The purposes of military law are to promote justice, to deter misconduct, to facilitate appropriate accountability, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby

to strengthen the national security of the United States." Manual for Courts-Martial, United States, Pt. I, ¶ 3 (2024 ed.).

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

- a. Initiating and declining action under the UCMJ;
- b. Selecting appropriate charges and specifications;
- c. Special trial counsel's decisions to prefer or refer a charge or defer an alleged offense;
- d. Selecting the appropriate type of court-martial or alternative mode of disposition, if any;
- e. Preliminary hearing officers' disposition recommendations; and
- f. Entering into a plea agreement.

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

### 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 rights of Service members. In determining whether the interests of justice and good order and discipline are served by trial by court-martial or other disposition in a case, the factors listed below should be considered. The weight and priority given to each of these factors may vary depending on the facts and circumstances of the case.

- a. Whether admissible evidence will probably be sufficient to obtain and sustain a finding of guilty in a trial by court-martial when viewed objectively by an unbiased factfinder;
- b. The truth-seeking function of trial by court-martial;
- c. The nature, seriousness, and circumstances of the alleged offense and the accused's culpability in connection with the alleged offense;
- d. Input, if any, from law enforcement agencies involved in or having an interest in the specific case;
- e. The accused's willingness to cooperate in the investigation or prosecution of others;

- f. The accused's criminal history or history of misconduct, whether military or civilian, if any;
- g. The probable sentence or other consequences to the accused of a finding of guilty;
- h. 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.
- i. In cases involving an individual who is a victim of the alleged offense as defined by Article 6b(b), that individual's views as to disposition;
- j. The extent of the harm caused to any victim of the alleged offense;
- k. The availability and willingness of the victim of the alleged offense and other witnesses to testify;
- l. The effect of the alleged offense on the morale, health, safety, welfare, and good order and discipline of the command;
- m. The extent to which the conduct tends to bring discredit upon the armed forces;
- n. Whether the alleged offense occurred during wartime, combat, or contingency operations; and
- o. The mission-related responsibilities of the command.

### 2.2. Consultation with a Judge Advocate.

Commanders and convening authorities shall at all times communicate directly with their assigned judge advocates in matters relating to the administration of military justice (*see* R.C.M. 105).

### 2.3. Referral.

- a. Probable cause must exist for each charge and specification referred to a court-martial (*see* R.C.M. 601(d)(1)). In addition to the consideration required by R.C.M. 601(d)(2),<sup>2</sup> when making a referral decision, the referral authority should also consider the matters described in paragraph 2.1 of this appendix.
- 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 Service member's conduct constitutes an offense under the UCMJ and that the admissible evidence will probably

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<sup>2</sup> "Referral authorities shall consider whether the admissible evidence will probably be sufficient to obtain and sustain a conviction." Rule for Courts-Martial

601(d)(2), Manual for Courts-Martial, United States (2024 ed.).

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be sufficient to obtain and sustain a finding of guilty when viewed objectively by an unbiased factfinder.

c. A convening authority should not refer a charge to a court-martial unless the admissible evidence will probably be sufficient to obtain and sustain a finding of guilty when viewed objectively by an unbiased factfinder. In assessing whether there is sufficient admissible evidence, a convening authority should consider the advice of a staff judge advocate or other judge advocate authorized to provide pretrial advice.

**2.4. Determining the Charges and Specifications to Refer.** A referral authority should avoid referring multiple charges when they would:

- a. Unnecessarily complicate the prosecution of the most serious readily provable alleged offense or offenses;
- b. Unnecessarily exaggerate the nature and extent of the accused's alleged 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.

**2.5. Determining the Appropriate Type of Court-Martial.** In determining the appropriate type of court-martial, a convening authority should consider the advice of a staff judge advocate or other judge advocate authorized to provide pretrial advice. Additionally, a referral authority should consider:

- a. The interests of justice and good order and discipline (*see* paragraph 2.1);
- b. The authorized maximum and minimum punishments for the charged offenses;
- c. Any unique circumstances in the case requiring immediate disposition of the charges;
- 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.

**2.6. Alternatives to Referral.** In determining whether to refer charges and specifications, a referral authority should consider whether an adequate alternative to referral exists. If an adequate alternative to referral exists, in addition to the considerations in paragraph 2.1, a referral authority should consider:

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

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

- a. The accused's race; ethnicity; religion; sex; gender (including gender identity); 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 alleged offenses concerning the accused, the accused's associates, the victim of the alleged offense, or any witness;
- 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, convening authority's, or special trial counsel's military career or other professional or personal circumstances;
- e. Political pressure to take or not to take specific actions in the case; or
- f. Improper consideration of the race; ethnicity; religion; sex; gender (including gender identity); sexual orientation; national origin; or lawful political association, activities, or beliefs of the victim of an alleged offense.

## SECTION 3: SPECIAL CONSIDERATIONS

**3.1. Prosecution in Another Jurisdiction.** When the accused is subject to effective prosecution in another jurisdiction, a convening authority should consider the advice of a staff judge advocate or other judge advocate authorized to provide pretrial advice. Additionally, a referral authority should consider the following additional factors when determining disposition:

- 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;

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d. The views of the victim of the alleged offense, 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 referral authority may enter into an agreement with an accused concerning disposition of the charges and specifications and the sentence that may be imposed. A convening authority should consider the advice of a staff judge advocate or other judge advocate authorized to provide pretrial advice. Additionally, a referral authority 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 charged offense or offenses;

c. The accused's remorse or contrition and willingness to assume responsibility for the accused's 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 finding of guilty at court-martial;

h. The probable effect on victims of alleged offenses 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;

l. The views of the victim of an alleged offense 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).

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### Analysis:

This appendix implements Article 33, UCMJ, 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 those related civilian prosecution function standards. The disposition factors have been adapted with a view toward the unique nature of the military justice system.