

APPENDIX 2.1 NON-BINDING 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.

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. Consultation with a Judge Advocate
- 2.3. Referral
- 2.4. Determining the Charges and Specifications to Refer
- 2.5. Determining the Appropriate Type of Court-Martial
- 2.6. Alternatives to Referral
- 2.7. Inappropriate Considerations

SECTION 3: SPECIAL CONSIDERATIONS

- 3.1. Prosecution in Another Jurisdiction
- 3.2. Plea Agreements
- 3.3. Agreements Concerning Disposition of Charges and Specifications
- 3.4. Agreement Concerning Sentence Limitations

SECTION 1: IN GENERAL

1.1. Policy.

a. This Appendix provides non-binding guidance regarding factors that convening authorities, commanders, staff judge advocates, 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.

1.2. Purpose. This non-binding 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. Serve as a training tool for convening authorities, commanders, staff judge advocates, and judge advocates in the proper discharge of their duties;
- c. Contribute to the effective utilization of the Government's law enforcement and prosecutorial resources; and
- d. Enhance the relationship between military commanders, judge advocates, 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 support the exercise of discretion with respect to the following disposition decisions:

- a. Initiating and declining action under the UCMJ;
- b. Selecting appropriate charges and specifications;
- c. Selecting the appropriate type of court-martial or alternative mode of disposition, if any; and
- d. Considering the appropriateness of a plea agreement.

1.4. Non-Litigability. This 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

¹ "The purpose of military law is to promote justice, 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 (2016 ed.).

APPENDIX 2.1

create a right, benefit, or defense, substantive or procedural, enforceable at law or in equity by any person.

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 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 interests of justice and good order and discipline are served by trial by court-martial or other disposition in a case, the commander or convening authority should consider, in consultation with a judge advocate, 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;
- g. The availability and willingness of the victim and other witnesses to testify;
- h. Whether admissible evidence will 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.

A2.1-2

2.2. 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.

2.3. Referral. Probable cause must exist for each charge and specification referred to a court-martial. However, when making a referral decision, the convening authority should also consider the matters described in paragraph 2.1 of this appendix.

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.

2.5. Determining the Appropriate Type of Court-Martial. In determining the appropriate type of court-martial, a convening authority should consider:

- a. The advice of a judge advocate;
- b. The interests of justice and good order and discipline (*see* paragraph 2.1);
- c. The authorized maximum and minimum punishments for the offenses charged;
- d. Any unique circumstances in the case requiring immediate disposition of the charges;
- e. 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
- f. Whether the potential of the accused for rehabilitation and continued service would be better addressed in a specific type of court-martial.

NON-BINDING DISPOSITION GUIDANCE

2.6. Alternatives to Referral. In determining whether a case should not be referred to court-martial for trial because there exists an adequate alternative, a judge advocate should advise the convening authority on, and the convening authority should consider, in addition to the considerations in paragraph 2.1:

- 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.

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

- a. The accused'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 or convening authority'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, a judge advocate should advise on and the convening 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;
- 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 convening authority may enter into an agreement with an accused concerning disposition of the charges and specifications and the sentence that may be imposed. A judge advocate should advise on and the convening 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 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;
 - 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 the convening authority's disposition of charges and specifications,

APPENDIX 2.1

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 convening authority, in consultation with a judge advocate, should ensure that any sentence limitation of a plea agreement 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 (ABA), Criminal Justice Standards for the Prosecution Function; and the National District Attorneys Association (NDAA), 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 and convening authorities to exercise wide discretion to meet their responsibilities to maintain good order and discipline.