

107. (ALL) What impact would it have to eliminate the portion of the discussion in MCM, Part II Rules for Courts-Martial, RCM 306, which permits the commander from considering the character and military service of the accused when making the initial disposition decision in sexual assault cases?

DoD	<p>The discussion accompanying Rule for Courts-Martial 306(b) provides that “[m]any factors must be taken into consideration and balanced” during the commander’s disposition decision, “including, to the extent practicable, the nature of the offenses, any mitigating or extenuating circumstances, the character and military service of the accused, the views of the victim as to disposition, any recommendations made by subordinate commanders, the interest of justice, military exigencies, and the effect of the decision on the accused and the command. The goal should be a disposition that is warranted, appropriate, and fair.” The character and military service of an accused are obvious factors that a commander should consider in deciding the correct disposition of many UCMJ offenses. Consider, for example, a service member who reports late for duty and thus violates Article 86. That service member’s record and military character may be a significant factor in determining the correct disposition. If that service member has never been in trouble before, counseling may be the appropriate resolution. If, on the other hand, the service member’s record includes three counseling entries for failure to report to duty, nonjudicial punishment or even a summary court-martial may be appropriate. Commanders clearly will and should consider a service member’s record when considering the appropriate level of disposition of many minor offenses. Additionally, commanders should consider the military record of those subordinates who engage in a pattern of misconduct. The discussion accompanying R.C.M. 306(b) neither states nor implies that commanders should consider only favorable character or military records; commanders do and should consider an accused’s pattern of misconduct when deciding whether referring charges to a court-martial is appropriate and, if so, the appropriate level of court-martial.</p> <p>With more serious offenses, however, the accused’s character and military record will play little or no role in the disposition decision. If there is probable cause to believe that a service member committed a murder, no disposition decision other than referral to a general court-martial would be appropriate, regardless of the service member’s character or record.</p> <p>Eliminating the portion of the discussion accompanying R.C.M. 306(b) that refers to the service member’s character and military service as two of many factors to consider and balance when making a disposition decision would have no legal consequence. The discussion accompanying Rules for Courts- Martial is not binding. As the discussion accompanying the Preamble to the Manual for Courts-Martial explains, the Manual’s supplementary materials, including discussion accompanying the Rules for Courts-Martial, “do not create rights or responsibilities that are binding on any person, party, or other entity (including any authority of the Government of the United States whether or not included in the definition of ‘agency’ in 5 U.S.C. §551(1)). Failure to comply with matter set forth in the supplementary materials does not, of itself,</p>
-----	---

Narrative responses have been consolidated by the Response Systems Panel (RSP). Please forgive formatting errors in text and data. Source documents for narrative responses can be obtained by contacting the RSP.

	<p>constitute error” Preamble discussion, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.). Appendix 21 to the Manual further explains, “The Discussion is intended by the drafters to serve as a treatise. To the extent that the Discussion uses terms such as ‘must’ or ‘will’, it is solely for the purpose of alerting the user to important legal consequences that may result from binding requirements in the Executive Order, judicial decisions, or other sources of binding law. The Discussion itself, however, does not have the force of law, even though it may describe legal requirements derived from other sources. It is in the nature of treatise, and may be used as secondary authority. The inclusion of both the President’s rules and the drafters’ informal discussion in the basic text of the Manual provides flexibility not available in previous editions of the Manual, and should eliminate questions as to whether an item is a requirement or only guidance. See e.g., United States v. Baker, 14 M.J. 361, 373 (C.M.A. 1973).” App. 21, at A21-3, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.).</p> <p>Because the discussion is not binding, it cannot authorize a convening authority to consider anything that the convening authority could not otherwise consider. Thus, eliminating any reference to consideration of an accused’s character or military service in the discussion accompanying R.C.M. 306(b) would have no practical effect. Doing so would not prevent a convening authority from considering those matters and a convening authority would likely do so in appropriate cases, such as when deciding the appropriate disposition of minor military offenses.</p>
USA	Eliminating the portion of the discussion in MCM, Part II Rules for Courts-Martial, RCM 306, which lists “the character and military service of the accused” as one of the factors that a convening authority should consider in deciding how to dispose of an offense will have little to no impact on dispositions. Language found in the discussion section, as opposed to the rule itself, is non-binding and largely intended for guidance. The list of factors provided in the discussion is broadly written to allow commanders to consider all facts and circumstances of the allegation with the direction that “the goal should be a disposition that is warranted, appropriate and fair.” The binding guidance that convening authorities must consider comes from Article 30, UCMJ, which states that the convening authority “shall take immediate steps to determine what disposition should be made thereof in the interest of justice and discipline.”
USAF	DoD is collecting and consolidating the answer to this question from all of the services and will provide a single response.
Navy	Responses are to be provided by OSD.
USMC	<i>DoD Office of General Counsel will provide this answer.</i>
USCG	<p>Commanders’ disposition decisions consider factors like those considered by civilian prosecutors, such as the seriousness of the offense, the credibility and admissibility of evidence, and cooperation of victims. Commanders should also consider factors manifestly military in nature, such as the impact on morale, health, safety, welfare, and discipline, all of which are relevant to mission execution, and the character and military service of the accused which may be relevant to these matters, as well as to credibility.</p> <p>The character and military service of the accused may have bearing in disposition of</p>

Narrative responses have been consolidated by the Response Systems Panel (RSP). Please forgive formatting errors in text and data. Source documents for narrative responses can be obtained by contacting the RSP.

	<p>military offenses, such as absence without leave, disobeying a lawful order, and disrespect to superiors. For example, a commander's disposition of a charge of missing movement may be affected if the accused has a long, meritorious career, involving multiple combat deployments and combat decorations. Character and military service in that case may go to the sufficiency of the charge as well as to the level of disposition. Character and military service are less likely to affect disposition of violent offenses and sexual crimes.</p> <p>While making a commander aware of this factor in the context of a military offense is likely of benefit in deciding disposition, and may have some benefit in other cases, eliminating the reference would likely have little practical impact. The current language in the discussion of RCM 306 are guidelines only, and removing military character as a factor would not prohibit commanders from considering it, nor could any rule prevent a commander from thinking about it, if he or she were so disposed.</p>
--	---

Narrative responses have been consolidated by the Response Systems Panel (RSP). Please forgive formatting errors in text and data. Source documents for narrative responses can be obtained by contacting the RSP.