

16. (ALL) If a potential conflict of interest exists for commanders in these cases, what mechanisms can and do the Services employ to ensure appropriate response to sexual assault allegations?

DOD	<p>DOD OGC: Typically, under Rule for Courts-Martial 306, charges may be disposed of by dismissing them, forwarding them to another commander for disposition, or referring them to court-martial. R.C.M. 306 discussion. Under Article 22 of the UCMJ, if any such commanding officer is an accuser, he or she may not serve as a convening authority and the court shall be convened by a superior competent authority. Even absent such a conflict, a superior competent authority may choose to withhold disposition authority from a subordinate and instead exercise it himself or herself. Except in the unusual situation where charges are dismissed after a court-martial has begun, neither dismissal of charges nor nonjudicial punishment for a serious offense bars the same or another convening authority from later referring charges for the same misconduct to a court-martial. See Manual for Courts-Martial, Analysis, App. 21, R.C.M. 306. A convening authority will be disqualified if he or she is an accuser, has a personal interest in the outcome of the case, or has a personal bias towards the accused. United States v. Davis, 58 M.J. 100 (C.A.A.F. 2003), or when the convening authority has an inelastic attitude in the performance of his or her post-trial responsibilities. Id. citing United States v. Fernandez, 24 M.J. 77 (C.M.A. 1987). Please refer to Service specific regulations for Service-specific procedures to transfer a case to a different convening authority when it is impracticable for a convening authority to act on a case.</p> <p>DOD SAPRO: See response to question 15. The Department is continuing to make the command structure even more robust to prevent and respond to sexual assault.</p> <ul style="list-style-type: none"> • Independent Investigations. Investigations are conducted independently and outside the influence of the chain of command. Commanders do not conduct investigations of sexual assault cases. By DoD policy, all sexual assault complaints must be referred to a Military Criminal Investigative Organization (Army Criminal Investigations Division, Naval Criminal Investigative Service, Air Force Office of Special Investigations) for an independent investigation. A commander has no discretion as to whether to refer a sexual assault complaint to criminal investigators; they must. • Elevated Disposition. The results of sexual assault investigations are provided to senior commanders in the grade of O-6 or above, who then are responsible for taking appropriate actions. • Sexual Assault Oversight Reports. The best practices of the Services are being standardized into a common practice across the Department wherein the first General or Flag Officer in the chain of command will provide oversight of the system response within 30 days of a report of sexual assault. The commander of the victim and/or the subject will be responsible for making
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	<p>these reports.</p> <ul style="list-style-type: none"> • Case Management for Unrestricted Reports of Sexual Assault. Once an Unrestricted Report is filed, the installation commander is responsible for the monthly case management of that case. The installation commander or deputy installation commander chair the Case Management Group on a monthly basis to review individual cases, facilitate monthly victim updates, and direct system coordination, accountability, entry of disposition and victim access to quality services. This responsibility may not be delegated. The installation or lead Sexual Assault Response Coordinator serves as the co-chair of the CMG. • Special Victims Advocacy Program: Establishment of a special victim’s advocacy program to provide legal advice and representation to victims throughout the justice process will provide further support to victims and serve as another mechanism for ensuring proper response to reports of sexual assault. This program has been piloted
CJCS	<p>If there is a conflict of interest in a case, the UCMJ directs that the commander absolve him or herself from the case. It automatically goes up the chain to the next commander for disposition. If a conflict of interest comes to light, and the commander does not recuse him or herself, then that issue will be subject to litigation by the prosecution or defense at trial.</p>
USA	<p>The Army has consolidated the response to questions 16 and 19:</p> <p>In general, conflicts of interest can be either actual or perceived. Commanders at all levels of command deal with both issues as they arise. Certainly a commander can be faced with a “perceived” conflict of interest.</p> <p>In the cases of actual conflict of interest, for example the commander is a witness to an offense, the Manual for Courts-Martial (MCM) and military jurisprudence sets out limitations and disqualifications for how that commander may act within the overall court-martial process. See, e.g., Rule for Courts-Martial 504. It is very common for a commander to be the victim of an offense or principle witness to an allegation such as failure to obey a lawful order or disrespect, in such a case, that commander may function as an “accuser” within the meaning of the MCM, but would be disqualified from acting as a convening authority and would have to forward the case to a superior commander for disposition without recommendation. As allegations move up the chain of command to more senior commanders, in general, the greater the degree of separation between the accused and the commander acting on the case, or alternatively the commander and the victim in a case.</p> <p>In cases of sexual assault, the initial disposition authority has been reserved to at least the brigade (O6) level commander with approximately 3,000 to 5,000 Soldiers in the command. It is likely that commander has little or no personal knowledge of either the accused Soldier or the victim of an offense. Even then, the final disposition authority will likely be a division level commander (O8 or two star general) with the authority to refer a case to a general court-martial authority. A division commander has approximately 10,000 to 15,000 Soldiers in the command and is generally even more removed from personal knowledge of either the accused Soldier or the victim of an offense. The movement of a case up a chain of command is accompanied by legal</p>

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	<p>advice all along the way. Generally, charges are not preferred, let alone forwarded up the chain of command, without legal analysis and input from varying levels of judge advocates. It is very likely that an actual conflict of interest would be identified by all of the parties before the case reaches the final disposition authority.</p> <p>One of the very first “mechanisms” which comes into play in the resolution of an actual conflict of interest is the integrity of the commander involved. Commanders are selected for the few and cherished command billets, not only because of their demonstrated skills and successes, but also for the moral character and leadership they have demonstrated. Integrity is a personal characteristic considered in the selection of a Soldier for a command billet. It is likely that in a discussion with a legal adviser, the commander will self-identify an actual conflict of interest in the case and ultimately will forward the case to a superior commander for disposition. Also, should an actual conflict of interest be disclosed at any time throughout the court-martial process up to the time of initial action post-trial by the convening authority, there are numerous mechanisms built into the MCM – including Article 60, UCMJ – to allow resolution of that conflict, these include supplemental discovery, motions at any time during the process, writ appeals, recusal of specific commanders from certain actions or authority, or post-trial hearings.</p> <p>The issues of “perceived” conflicts of interest are largely fact specific. While within the military justice system as a whole, the perception of a conflict of interest is usually raised by the defense or the accused alleging some conflict (personally bias, unlawful command influence, which would prevent a specific commander from taking action (referral, assignment of resources, production of witnesses, etc.) in a case. In those cases, the defense is able to litigate the issue of perceived conflicts and seek specific relief (withdrawal of the referral, change of venue, disqualification of a convening authority, etc.) from a court.</p> <p>When a perceived conflict of interest is raised by a witness or victim in a case, the judicial recourse is generally not available, but redress must be sought directly from the commander in question, from a superior commander within the chain of command, through the trial counsel, through the Staff Judge Advocate, through the Victim Advocate, through the Victim Witness Liaison, now through the Special Victim Counsel, through the Inspector General’s office, by filing an Article 138 complaint, by contacting any number of civilian representatives in either the Legislative or Executive branches, or by alleging the criminal offense of maltreatment of a subordinate by a commanding officer. Commanders are acutely aware that both either superior commanders, members of their units, and the American people hold individual commanders accountable for the decisions they make, including those related to military justice and victim support.</p>
USAF	<p>There are several safeguards built into the military justice system to prevent commanders from responding inappropriately to sexual assault allegations:</p> <ol style="list-style-type: none"> i. SecDef initial disposition authority withhold for sexual assault allegations – On 28 June 2012, Secretary Panetta instituted a policy that all allegations of rape, sexual assault, forcible sodomy, and attempts thereof must be referred to the first O-6 or higher in the chain of command who is also a special court-martial convening

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	<p>authority. The accused's unit commander may not make the initial disposition decision.</p> <p>ii. Mandatory consultation with SJA – Commanders must consult their SJAs before disposing of sexual assault allegations. Furthermore, under Article 34, UCMJ, a case may not be referred to a GCM without first receiving written advice from the servicing SJA that a) the specification alleges an offense, b) the specification is warranted by the evidence, and c) the court-martial would have jurisdiction over the offense.</p> <p>iii. Complaints against commanders under Article 138, UCMJ – Any military member who a) believes he/she has been wronged by his/her commander, b) seeks redress by that commander, and c) is refused redress, may complain to any superior officer. That superior officer must then forward the complaint to the GCMCA over the subject of the complaint. The general officer in receipt of the complaint must then investigate the complaint and, as soon as possible, report the findings to the Service secretary.</p> <p>iv. Inspector General – Airmen who feel they have been negatively affected by their commander's violation of a rule (for example: failure to forward a sexual assault allegation to the SA-IDA) may complain to the IG office, who, upon confirmation of the complainant's standing to make the complaint and the IG's jurisdiction over the issue, will investigate the complaint.</p>
USN	<p>The Navy requires that all unrestricted reports of sexual assault be reported up the chain of command. Commanders are required by order to notify the Naval Criminal Investigative Service (NCIS) of all unrestricted reports of sexual assault so NCIS can initiate an independent investigation into the allegations. In addition to the required initial and periodic update operational reports submitted via naval message through the chain of command, commanders must personally advise the first Flag officer in their chain of command after any unrestricted report of sexual assault, ensuring senior level visibility on allegations and on case resolution. Further, in cases where victims feel uncomfortable reporting the alleged assault to their chain of command (for example, where the alleged offender is a senior person at the command) the victim has numerous other reporting options. These options include reporting the alleged sexual assault to the DoD SAFE Helpline, the Sexual Assault Response Coordinator (SARC), a victim advocate (VA), the Naval Criminal Investigative Service (NCIS), a Victims' Legal Counsel, a</p> <ul style="list-style-type: none"> • chaplain, civilian law enforcement, etc. In addition, after making a report of sexual assault, the victim can request an expedited transfer from the command. by the Air Force since January of 2013 and the Departments of the Navy and Army have reached initial operating capability on 1 November 2013. • Command Climate Assessments: Climate assessments of the human relations environment as well as sexual harassment and sexual assault standards in units are assessed by mandatory climate assessments. These are provided to the next senior commander in the unit commander's chain of command to facilitate the accountability process.

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	<ul style="list-style-type: none"> • Commander Evaluations: New policies fielded by the Services now direct supervisors to hold commanders accountable for creating appropriate command climates in their units. This direct assessment of unit commanders will provide a powerful tool to enforce standards across the military. • Expansion of SARCs and SAPR VAs: A victim of sexual assault in the military is never required to report an incident within the chain of command or directly to his/her commander. Restricted and Unrestricted Reports of sexual assault can be made to Sexual Assault Response Coordinators and Victim Advocates who are assigned at all locations or are available where our members serve. • DoD Safe Helpline: The DoD Safe Helpline is an anonymous and confidential crisis intervention helpline for members of the DoD community. Since 2011, the DoD Safe Helpline has provided a safe and secure system of support for victims of sexual assault and ensured that survivors, family members and friends have access to appropriate resources 24 hours a day, seven days a week, from anywhere in the world.
USMC	See answer to Question 15.
USCG	<p>The Coast Guard, as with all the services, has promulgated regulations and policies designed to diminish the likelihood of a conflict of interest. While designated convening authorities maintain the disposition decision of a criminal case, the decision is not conducted in a vacuum. Rather, the decision is made after involvement and consultation with other entities and expert individuals within the Coast Guard. For example, the convening authority has no discretion about whether to report an allegation of sexual assault or initiate a criminal investigation. In addition, most commanders do not have the authority to make an initial disposition of a case.</p> <p>After a unit commander receives a report of a sexual assault, the commander must notify the Coast Guard Investigative Service (CGIS) and the Sexual Assault Response Coordinator (SARC). CGIS prepares a notice of case initiation (NOCI) report, detailing the allegations made, location of the incident, status and identification of the victim and perpetrator, units assigned, and known or potential witnesses. This NOCI report is transmitted to Headquarters, where a case dossier is created for investigative tracking, data collection, and for use in notifying senior Coast Guard leaders.</p> <p>Only CGIS is authorized to conduct the formal criminal investigation. Command cadre and other parties are strictly prohibited from conducting any investigative activity into allegations of sexual assault. CGIS will notify the servicing legal office that an investigation into a sexual offense has been initiated. CGIS and the legal office work closely to ensure the various elements of the offense under investigation are thoroughly addressed and that all victim and witness rights are addressed.</p> <p>In accordance with the Commandant's service-wide order issued in June 2012, only those officers who have special court-martial convening authority, have achieved the grade of O-6 (Captain), and have a dedicated staff judge advocate assigned may</p>

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dispose of allegations of sexual misconduct, which includes any allegation of rape, sexual assault, aggravated sexual contact, abusive sexual contact, forcible sodomy, and attempts to commit such offenses. Only these commanders, who are typically a flag officer, may make the decision to take no further action, impose non-judicial punishment, or to take adverse administrative action. The commander must consult with the assigned staff judge advocate before making any decision in the case, including the decision to take no action.

Considering the mandatory reporting requirements, involvement of individuals outside the chain of command, and withholding of initial disposition to only a select cadre of convening authorities, it would be highly unlikely for a commander to make a decision on a criminal case based on bias. Even if there were a conflict of interest, a higher level commander can take jurisdiction a lower level convening authority. In this manner, the integrity of the military justice process is protected. The Coast Guard, as with all the services, has promulgated regulations and policies designed to diminish the likelihood of a conflict of interest. While designated convening authorities maintain the disposition decision of a criminal case, the decision is not conducted in a vacuum. Rather, the decision is made after involvement and consultation with other entities and expert individuals within the Coast Guard. For example, the convening authority has no discretion about whether to report an allegation of sexual assault or initiate a criminal investigation. In addition, most commanders do not have the authority to make an initial disposition of a case.

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SUBJ/EXPEDITED TRANSFER PROCEDURES FOR SERVICE MEMBERS WHO FILE
UNRESTRICTED REPORTS OF SEXUAL ASSAULT//

REF/A/DOC/DOD/16DEC11//
REF/B/DOC/SECNAV/04APR12//
REF/C/DOC/NPC/20FEB07//
REF/D/DOC/DOD/23JAN12//

NARR/REF A IS DIRECTIVE-TYPE MEMORANDUM 11-063, EXPEDITED TRANSFER OF
MILITARY

SERVICE MEMBERS WHO FILE UNRESTRICTED REPORTS OF SEXUAL ASSAULT. REF B IS
GUIDANCE FOR EXPEDITED TRANSFER OR REASSIGNMENT OF MILITARY SERVICE MEMBERS
WHO FILE UNRESTRICTED REPORTS OF SEXUAL ASSAULT. REF C IS MILPERSMAN 1300-
1200 CH-18, SAFETY TRANSFERS. REF D IS DODD 6495.01, SEXUAL ASSAULT
PREVENTION AND RESPONSE (SAPR) PROGRAM.//

RMKS/1. THIS NAVADMIN IMPLEMENTS THE GUIDANCE AND EXPLAINS THE PROCEDURES TO
EXECUTE THE INSTRUCTIONS CONTAINED IN REFS A AND B. CIRCUMSTANCES MAY EXIST
THAT WARRANT THE TRANSFER OF A SERVICE MEMBER WHO MAKES AN UNRESTRICTED
REPORT
OF SEXUAL ASSAULT BUT MAY NOT OTHERWISE MEET ESTABLISHED CRITERIA FOR
EFFECTING THE IMMEDIATE TRANSFER OF SERVICE MEMBERS. THOSE SERVICE MEMBERS
MAY NOW REQUEST AN EXPEDITED TRANSFER PER REFS A AND B. REF C WILL BE
UPDATED
TO CONTAIN PROVISIONS REGARDING EXPEDITED TRANSFER AND SHALL BE THE GOVERNING
INSTRUCTION FOR PROCESSES OF EXPEDITED TRANSFER. ANY THREAT TO LIFE OR
SAFETY
OF A SERVICE MEMBER, HIS/HER DEPENDENTS, OR MILITARY SPOUSE SHOULD CONTINUE
TO
BE PROCESSED UNDER THE SAFETY
TRANSFER PROVISION OF REF C.

2. FOR THE PURPOSE OF THE EXPEDITED TRANSFER POLICY, A TRANSFER OR
REASSIGNMENT INCLUDES, BUT IS NOT LIMITED TO, TEMPORARY OR PERMANENT MOVEMENT
TO A UNIT WITHIN THE SAME COMMAND, TO A UNIT ON THE SAME INSTALLATION, OR TO
A
UNIT IN A DIFFERENT GEOGRAPHIC LOCATION. A REQUEST FOR A PERMANENT CHANGE OF
STATION TRANSFER OUT OF THE AREA OF THE PERMANENT DUTY STATION IS TO BE
GRANTED ON AN EXCEPTIONAL BASIS. FOR RESERVE COMPONENT MEMBERS, THE COMMAND
SHOULD ALLOW FOR SEPARATE TRAINING ON DIFFERENT WEEKENDS OR TIMES FROM THE
ALLEGED OFFENDER OR WITH A DIFFERENT UNIT IN THE HOME DRILLING LOCATION TO
ENSURE UNDUE BURDEN IS NOT PLACED ON THE SERVICE MEMBER AND HIS OR HER FAMILY
BY THE TRANSFER.

3. PROCEDURES. PER REF D, MEMBERS WHO HAVE FILED AN UNRESTRICTED REPORT OF
SEXUAL ASSAULT MUST BE ADVISED OF THEIR OPTION TO REQUEST TRANSFER FROM THE

COMMAND TO WHICH THEY ARE ASSIGNED.

A. A REQUEST FOR AN EXPEDITED TRANSFER MUST COME FROM THE SERVICE MEMBER.

THE REQUEST MUST BE IN WRITING AND INCLUDE THE REASON(S) FOR THE REQUEST.

B. UPON RECEIPT OF THE REQUEST, AND WITHIN 72 HOURS, THE COMMANDING OFFICER (CO) MUST APPROVE OR RECOMMEND DISAPPROVAL OF AN EXPEDITED TRANSFER.

C. IN MAKING THE DECISION ON WHETHER TO RECOMMEND TRANSFER, THE CO MUST DETERMINE IF THE UNRESTRICTED REPORT IS CREDIBLE. (I.E., REASONABLE GROUNDS TO

BELIEVE THAT AN OFFENSE CONSTITUTING SEXUAL ASSAULT DID OCCUR BASED ON ALL AVAILABLE EVIDENCE AND THE ADVICE OF THE SUPPORTING JUDGE ADVOCATE OR OTHER LEGAL ADVISOR OR COUNSEL CONCERNED.)

D. A PRESUMPTION SHALL BE ESTABLISHED IN FAVOR OF TRANSFERRING A SERVICE MEMBER (WHO INITIATED THE TRANSFER REQUEST) FOLLOWING A CREDIBLE REPORT OF SEXUAL ASSAULT. THE CO SHALL CONSIDER THE FOLLOWING FACTORS WHEN MAKING THE TRANSFER DECISION:

(1) THE CREDIBLE REPORT OF SEXUAL ASSAULT;

(2) THE SERVICE MEMBER'S WRITTEN REQUEST FOR TRANSFER OR REASSIGNMENT;

(3) OPERATIONAL NECESSITY, INCLUDING SITUATIONAL UNIQUE REQUIREMENTS IN DEPLOYED AREAS;

(4) THE NATURE AND CIRCUMSTANCES OF THE OFFENSE;

(5) THE LOCATION OF THE ALLEGED OFFENDER;

(6) POTENTIAL TRANSFER OR REASSIGNMENT OF THE ALLEGED OFFENDER

INSTEAD

OF THE SERVICE MEMBER;

(7) THE ALLEGED OFFENDER'S STATUS (MILITARY OR CIVILIAN);

(8) AFTER CONSULTATION WITH THE INVESTIGATING MILITARY CRIMINAL INVESTIGATIVE ORGANIZATION AND THE SUPPORTING JUDGE ADVOCATE OR OTHER LEGAL ADVISOR OR COUNSEL CONCERNED, THE STATUS OF THE INVESTIGATION AND THE POTENTIAL IMPACT OF THE SERVICE MEMBER'S TRANSFER OR REASSIGNMENT ON THE INVESTIGATION AND FUTURE DISPOSITION OF THE ALLEGATION;

(9) TRAINING STATUS OF THE SERVICE MEMBER REQUESTING THE TRANSFER OR REASSIGNMENT; AND

(10) OTHER PERTINENT CIRCUMSTANCES OR FACTS.

4. APPROVAL. THE CO'S APPROVAL OF AN EXPEDITED TRANSFER REQUEST, ALONG WITH THEIR RECOMMENDATION AS TO WHERE THE MEMBER SHOULD BE TRANSFERRED, SHALL BE IMMEDIATELY FORWARDED TO THE NAVY PERSONNEL COMMAND (NPC) POST SELECTION BOARD

MATTERS (PERS-833) FOR PROCESSING AND RETAINED ON FILE FOR A PERIOD OF 3 YEARS. NPC CAREER MANAGEMENT (PERS-4) WILL ADJUDICATE TRANSFER OF THE SERVICE MEMBER.

5. DISAPPROVAL. THE COMMANDING OFFICER MUST IMMEDIATELY FORWARD ANY RECOMMENDATION FOR DISAPPROVAL OF AN EXPEDITED TRANSFER REQUEST, AND THE REASON(S) FOR THE RECOMMENDATION, IN WRITING, TO THE FIRSTFLAG OFFICER IN THE CHAIN OF COMMAND, OR SENIOR EXECUTIVE SERVICE (SES) EQUIVALENT (IF APPLICABLE).

A. A MEMBER'S REQUEST MAY ONLY BE DISAPPROVED BY THE FIRST FLAG OFFICER IN THE MEMBER'S CHAIN OF COMMAND, OR AN SES EQUIVALENT (IF APPLICABLE).

B. THE FLAG OFFICER/SES MEMBER SHALL CONSIDER:

(1) FACTORS (1) THROUGH (10) WHICH ARE DELINEATED FOR COMMANDERS

ABOVE;

(2) THE WRITTEN RECOMMENDATION FROM THE COMMANDER DISAPPROVING OF THE REQUEST; AND

(3) ANY OTHER PERTINENT CIRCUMSTANCE(S) FROM THE FLAG OFFICER COMMAND PERSPECTIVE.

C. THE FLAG OFFICER/SES LEVEL DECISION MUST BE MADE WITHIN 72 HOURS OF RECEIPT OF THE COMMAND-LEVEL DISAPPROVAL RECOMMENDATION.

D. FLAG OFFICER/SES LEVEL APPROVED EXPEDITED TRANSFER REQUESTS SHALL BE IMMEDIATELY FORWARDED TO NPC PERS-833 FOR PROCESSING AND RETAINED ON FILE FOR A PERIOD OF 3 YEARS.

E. FLAG OFFICER/SES LEVEL DISAPPROVED EXPEDITED TRANSFER REQUESTS SHALL BE IMMEDIATELY FORWARDED TO NPC PERS-833 AND RETAINED ON FILE FOR A PERIOD OF 3 YEARS.

6. IF AT ANY TIME THE REQUESTING SERVICE MEMBER ELECTS NOT TO PROCEED WITH AN EXPEDITED TRANSFER REQUEST, HE OR SHE SHALL FORMALLY WITHDRAW THE REQUEST IN WRITING TO THE CO.

7. THESE PROCEDURES ARE EFFECTIVE IMMEDIATELY AND WILL REMAIN IN EFFECT UNLESS SUPERSEDED BY REVISIONS TO OPNAVINST 1752.1B AND THE MILPERSMAN. AMPLIFYING INFORMATION CAN BE FOUND IN MILPERSMAN ARTICLE 1300-1200.

8. SEXUAL ASSAULT PREVENTION AND RESPONSE IS A KEY COMPONENT OF THE READINESS FOCUS AREA OF SECNAV'S 21ST CENTURY SAILOR AND MARINE INITIATIVE, WHICH IS DESIGNED TO MAXIMIZE SAILOR AND MARINE PERSONAL READINESS, MAINTAIN THE RESILIENCY OF THE FORCE, AND TO HONE THE MOST COMBAT EFFECTIVE FORCE.

9. POINT OF CONTACT: PERS-833 AT COMM (901) 874-4412 OR DSN 882-4438.

10. RELEASED BY VICE ADMIRAL S. R. VAN BUSKIRK, N1.//

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