

69. (Services) What are the requirements for military investigators, JAG officers, or commanders to provide written justifications when declining to pursue a sexual assault case in the military? In order to specifically indicate if any written opinion or declination is required at any time in the military justice process, please describe the process and communication requirements between the investigator, prosecutor, and commander when declining to proceed with a sexual assault case:

USA	<p>U.S. Army Criminal Investigations Command (CID) cannot decline to investigate a report of sexual assault. Any unrestricted report of a sexual assault, for which CID has the authority and responsibility to investigate, will be investigated and reported in a formal Report of Investigation (ROI). An ROI will be assigned even if a referral to a non-CID agency occurs or is anticipated; the offense(s) are unfounded; or the complainant provides a false or inaccurate allegation.</p> <p>Generally, as a service-wide policy, there is no requirement to provide written justifications when declining to prosecute a sexual assault case or any other criminal case in the U.S. Army. However, the military justice process requires thorough review of the evidence and entrusts commanders with multiple tools to effectively manage good order and discipline within the ranks. Congress provided commanders with a range of options so that they could utilize military law “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, Preamble, Paragraph 3 (2012).</p> <p>Prior to referral: The Special Court-Martial Convening Authority (O6) must determine the initial disposition of all sexual assault offenses, a requirement that does not specifically require written justifications for declination of prosecution.</p> <p>Procedurally, all sexual assault investigations must be referred to CID (and may not be handled by a lower level investigation such as a commander’s inquiry or by Military Police Investigators (MPI)). Prior to closing an investigation, CID must seek a legal opinion from a judge advocate serving as a prosecutor. If a judge advocate determines that there is insufficient evidence, CID may determine that the criminal case is unfounded. Therefore, even if CID determines that a case is “unfounded” a commander may still pursue criminal or administrative action against a Soldier. The process as it stands allows the commander to pursue alternate disposition where he, on the advice of his judge advocate, believes the government can satisfy a lower burden of proof (such as administrative separation).</p> <p>Within this framework, the Secretary of Defense withheld the initial disposition authority for sexual assault cases from all commanders who do not possess at least special court-martial convening authority (SPCMCA) and who are not in the grade of O6 or higher. The Army has not elevated this above the required O6 level. That means that for any sexual assault accusation, a SPCMCA must review the evidence and determine, on advice of his judge advocate, if there is sufficient evidence to</p>
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	<p>support a charge. At this point, the O6 may dispose of a case at an alternate disposition (for example, pursuing administrative separation) or by pursuing a court-martial. Pursuing a court-martial would require preferral of charges and appointing an Investigating Officer (assuming a general court-martial) under Article 32, UCMJ.</p> <p>Before the Article 32: After preferral, the SPCMCA could withdraw the charges without written justification. For example, charges could be withdrawn if new evidence is discovered after preferral (<i>i.e.</i>, misidentification of the accused), it is determined that the statutes of limitations have run, or that there is a jurisdictional defect in the charging.</p> <p>After the Article 32: After the Article 32 hearing, the SPCMCA must consider the Investigating Officer's report and recommendations. If the SPCMCA elects to forward the case to the general court-martial convening authority (GCMCA), then the SPCMCA would no longer have jurisdiction to act on the charges. Upon the pretrial advice of his servicing staff judge advocate, the GCMCA would determine whether or not it is appropriate to refer the charge to court-martial. A declination of prosecution would not require written justification.</p> <p>After Referral: The GCMCA (or a superior competent authority) maintains the ability to withdraw the charges or specifications "at any time before findings are announced." Rule for Courts-Martial 604. Withdrawal does not automatically require written justification; however, in the event that the charges are later referred to another court-martial, the discussion to Rule for Court-Martial 604 suggests that the reasons for the withdrawal and later referral should be included in the record of the later court-martial.</p>
USAF	<p>Currently, there is no statutory or policy requirement for military investigators, JAG officers, or commanders to provide written justification when declining to pursue a sexual assault case in the Air Force. Per AFI 51-201, Administration of Military Justice, 6 June 2013, SJAs and JAG officers are advised to conduct appropriate consultations with Senior Trial Counsel prior to preferral or disposition of any allegation in sexual assault cases. Additionally, further consultation with senior trial counsel is normally made after an Article 32 hearing and prior to referral. In AFI 36-6001, paragraph 6.4.1.1, authority to dispose of cases resulting from an allegation of sexual assault is withheld from squadron section commanders and is reserved for commanders of squadrons and above. Further, to ensure consistent and appropriate level of command attention, group commanders or higher will sign the commander's report of disposition to the investigating agency detailing the action taken. Any commander authorized to dispose of cases involving an allegation of sexual assault may do so only after receiving the advice of the servicing SJA. While it is not required that SJAs reduce advice to writing, it is common practice in virtually every SJA office in the Air Force, to document, in a sexual assault legal review, the justification and reasons for declining to prosecute an allegation of sexual assault, if circumstances require.</p>

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	<p>Since 12 April 2012, the initial disposition authority was withheld from all commanders within the Department of defense who do not possess at least a special court-martial convening authority and who are not in the grade of O-6 or higher, with respect to sexual assault offenses. Pursuant to that withholding, the Air Force instructs subordinate commanders (usually squadron level commanders) to review any allegations or reports of investigation of any allegations of sexual assault, and make a written recommendation to the initial disposition authority. The initial disposition authority will review all the available evidence, consult with the SJA; who in turn, will consult with the victim, and then take whatever initial disposition action is deemed appropriate. This may include the preferral of charges, administrative action, returning the case to the subordinate commander, or no action. The initial disposition authority would then document the initial disposition decision and the SJA should ensure the written decision is forwarded to the SARC for entry into the Defense Sexual Assault Incident Database (DSAID).</p>
USN	<p>There are no formal requirements for military investigators, JAG officers, or commanders to provide written opinions or justifications when declining to pursue criminal cases in the military, including allegations of sexual assault, at any stage in the trial process. However, NAVADMIN 272/12, issued 7 Sep 12, modifying OPNAVINST F3100.6J (Special Incident Reporting Requirements), requires commanders to include the name, command, and contact information of the judge advocate consulted, and the disposition resolution category as provided by the judge advocate and NCIS Disposition Report, when submitting the final situation report (SITREP) following any unrestricted report of sexual assault. Although this Sexual Assault Disposition Report does not require Convening Authorities or their SJAs to provide a formal written opinion or justification for cases they decline to pursue, it does include fillable boxes which describe the disposition, including “Probable Cause for Only Non-Sexual Assault Offense,” “Victim Declined to Participate in the Military Justice Action,” “Insufficient Evidence of any Offense,” “Unfounded,” “Commander Declined Action Pursuant to RCM 306(c)(1)” (“No action”), and alternative dispositions. Thus, the Sexual Assault Disposition Report requirement in NAVADMIN 272/12 indirectly requires Convening Authorities to provide the bases (albeit in abbreviated form) of their disposition decisions.</p> <p>Further, it is a mandated practice for commanding officers of Region Legal Service Offices (supervisors of the trial counsel) to document (usually in memoranda form) a recommendation not to prosecute allegations of sexual assault. This memorandum is provided to the SA-IDA for consideration.</p> <p>Although there is no formal requirement for NCIS to provide written justification when declining to pursue criminal cases, NCIS’ interpretation of DoD Instruction 5505.18, “Investigation of Adult Sexual Assault in the DoD” is that MCIOs must initiate investigations of all adult sexual assault offenses of which they become aware, that occur within their jurisdiction, regardless of severity. In short, NCIS cannot decline to pursue a sexual assault investigation. For sexual assaults that occur outside NCIS’ jurisdiction, the DoDI 5505.18 establishes procedures for referring an allegation to the appropriate law enforcement agency.</p>

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	<p>In most criminal cases, there is a constant flow of communication between the criminal investigator, the trial counsel, the SJA, and the commander at all stages of the trial process. Article 6(b), UCMJ, mandates this communication between the Convening Authority and his or her SJA (“Convening authorities shall at all times communicate directly with their staff judge advocates in matters relating to the administration of military justice.”). If the charges are investigated at an Article 32 hearing, the Article 32 Convening Authority receives additional advice from the judge advocate who served as the Investigating Officer (IO) at the hearing. This advice is in the form of a detailed, written report under Rule for Court-Martial 405. If the case is forwarded to the General Court-Martial Convening Authority (GCMCA) for consideration, then the GCMCA receives additional formal, written advice from his or her SJA under Article 34, UCMJ. The SJA is typically the primary advisor to the Convening Authority. In addition, the Convening Authority may consult NCIS, the trial counsel, the Senior Trial Counsel and/or the commanding officer of the RLSO to attempt to better understand the prosecutorial merit of the case, any evidentiary issues, the trial process, and what additional investigative steps might be taken to assist in making the final disposition determination. In practice, commanders and Convening Authorities rarely, if ever, make a disposition decision without thorough advice and input from their SJA and trial counsel.</p> <p>After referral of charges, the discussion section to RCM 604 indicates that a withdrawal of charges in contemplation of further prosecution at a later time should include the reasons for the withdrawal, and those reasons should be attached to the record of the earlier proceeding. The responsibility for creating this record is not assigned to a specific individual. Ideally, a written document would be generated by the SJA and signed by the Convening Authority, so that it could be easily included in the record of the proceeding and could be referenced at any future proceedings. However, a document including the reasons for withdrawal is not required by the Rule, and the discussion section does not appear to apply in cases in which the Convening Authority withdraws charges without contemplating re-referral at a later time.</p>
USMC	<p>In the Marine Corps written opinions and decisions are provided in sexual assault cases at different points by the convening authority, the Staff Judge Advocate, and the Special Victim Qualified Trial Counsel (SVTC). Both prior to referral and prior to the Article 32, NCIS provides a brief to the O-6 or above convening authority on the status and evidence of the case and works closely with the SVTC to ensure a complete investigation is conducted and all appropriate witnesses are interviewed. Upon completion of the investigation, the SVTC speaks to the victim to determine the victim’s preferences for how the case should proceed and explains the trial process to the victim. The SVTC counsel then usually provides a memorandum to the staff judge advocate describing the strengths and weaknesses of the case, the victim’s desired outcome, and a recommended course of action. The staff judge advocate consults with the convening authority, as required in Marine Corps Order 5800.14, and if the convening authority decides not to prefer charges or to dismiss charges prior to an Article 32, the convening authority must</p>

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	<p>document the initial disposition decision in a memorandum.</p> <p>After the Article 32 investigation, if the convening authority is not a general court-martial convening authority, he or she can dismiss the charges in a written memorandum with advice of the staff judge advocate, refer the charges to a special court-martial, or provide a written memorandum forwarding the charges to a general court-martial convening authority with a recommendation as to the appropriate disposition of the charges pursuant to Article 33, UCMJ and R.C.M. 403. If the charges are forwarded to the general court-martial convening authority, the staff judge advocate must provide written advice on the legal sufficiency of the charges and a recommended disposition as to the charges pursuant to Article 34, UCMJ and R.C.M. 406. The general court-martial convening authority can then refer the charges to a court-martial or dismiss the charges and no further written documentation is required.</p> <p>NCIS' interpretation of DoD Instruction 5505.18, "Investigation of Adult Sexual Assault in the DoD" is that MCIOs must initiate investigations of all adult sexual assault offenses of which they become aware, that occur within their jurisdiction regardless of severity. In short, NCIS cannot decline to pursue a sexual assault investigation. For sexual assaults that occur outside NCIS' jurisdiction, the DoDI 5505.18 establishes procedures for referring an allegation to the appropriate law enforcement agency.</p>
USCG	<p>Prior to June 2012, the only requirements for written justification when declining to pursue a sexual assault case were those contained in R.C.M. 406 (requiring written advice from the SJA to the Convening Authority prior to making a referral decision after an Article 32 investigation). There was no Coast Guard policy requiring written justification, although (as explained below), in practice, the servicing legal office used internal prosecution memos to document the steps of the case.</p> <p>Coast Guard Investigative Service (CGIS) does not have the authority to dispose of a sexual assault case, nor do CGIS agents make a written recommendation to the Convening Authority as to the appropriate disposition of a case. Upon completion of the investigation, CGIS provides a written Report of Investigation (ROI) to the command, but it does not contain a disposition recommendation. If CGIS believes that a claim is unsubstantiated, it may notify the command of that belief, but the decision on how to dispose of the allegation remains with the command. As a matter of policy, CGIS does not make substantive recommendations on how to proceed with the cases they investigate nor do their reports contains determinations as to whether CGIS believes the allegations are substantiated or unsubstantiated.</p> <p>Although prosecutors play a critical role in the preferral and referral process, they generally consult with the SJA of the Convening Authority rather than the Convening Authority himself. In some cases, the prosecutor will accompany the SJA to speak with the Convening Authority about a specific case, or may provide an in-depth prosecution memo of the case for the Convening Authority's consideration. However, the majority of the discussion</p>

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regarding preferral and referral occurs between the SJA and the Convening Authority.

On 25 June 2012, the Commandant of the Coast Guard announced that he had withheld initial disposition authority from all commanders in cases arising under Article 120 and 125, and attempts thereof, who do not meet the following three criteria: (1) possess special court- marital convening authority; (2) are a captain (O-6); and (3) have an assigned staff judge advocate. The practical effect of this withholding is that only flag officers (O-7 and above) and a few senior captains may make initial disposition decisions on sexual assault cases within the Coast Guard. Those officers who may dispose of sexual assault offenses are referred to as Sexual Assault Initial Disposition Authorities (SA-IDA).

Under the withholding policy, only the SA-IDA may decline to pursue a case prior to preferral. If the SA-IDA makes the decision to take no action on allegations of sexual assault, that decision must be documented in writing after consultation with his SJA. The Convening Authority may also consult with CGIS or the trial counsel prior to making the decision but is not required to.

Under the withholding policy, only the SA-IDA may dismiss charges that have been preferred or send the charges to a subordinate command for disposition. If the SA-IDA is in receipt of preferred charges and makes the decision to dismiss the charges (in effect taking “no action”), he must document the decision in writing after consultation with his SJA. If the SA-IDA makes the decision to send the case to a subordinate command, he must accompany that decision with written advice from the SJA. The Convening Authority may also consult with CGIS or the trial counsel prior to making the decision but is not required to.

Pursuant to Article 34 and R.C.M. 406, the SJA must prepare written advice before charges may be referred to court-martial. If the Convening Authority declines to refer a case to court-martial after the Article 32 (either with or against the advice of the SJA), no written justification from the Convening Authority is required. The Convening Authority may also consult with CGIS or the trial counsel prior to making the decision not to refer but is not required to.

If the SA-IDA makes the decision to dismiss charges that have been referred to court-martial, no written justification is required. However, in practice, written documentation does exist for almost every case that has been referred to court-martial but is subsequently dismissed. In many situations, the Convening Authority may accept a plea to a lesser forum (such as a special or summary court-martial), in which case the pre-trial agreement is itself documentation of the decision. If the victim declines to participate in the case after referral, the trial counsel will usually document that in a prosecution memo to the SJA, who then informs the Convening Authority of the difficulties of proceeding with the case. If the case is dismissed for a legal reason (such as the exclusion of a key piece of evidence), that is typically captured in the pre-trial motions submitted by counsel, the order of the military judge, and the prosecution memo between the trial counsel and SJA, explaining why there is no longer sufficient

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	evidence to take the case to trial.
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