

**Defense Advisory Committee on Investigation, Prosecution, and  
Defense of Sexual Assault in the Armed Forces (DAC-IPAD)**

**Request for Information and Request for Presenters**

**RFI Set 11, Narrative Questions**

**Topics: Prosecution Decisions, Victim Participation, and Conviction/Acquittal Rates**

**Date of Request: May 15, 2019**

**I. Purpose**

- A. The DAC-IPAD is a federal advisory committee established by the Secretary of Defense pursuant to section 546 of the National Defense Authorization Act for Fiscal Year 2015 (Public Law 113-291), as amended.
- B. The mission of the Committee is to advise the Secretary of Defense on the investigation, prosecution, and defense of allegations of rape, forcible sodomy, sexual assault, and other sexual misconduct involving members of the Armed Forces.
- C. The DAC-IPAD requests the below information to facilitate its required review of cases involving allegations of sexual misconduct on an ongoing basis for purposes of providing advice to the Secretary of Defense.

**II. Summary of Requested Response Dates**

<b>Suspense</b>	<b>Question(s)</b>	<b>Proponent</b>
<b>21 Jun 19</b>	Speakers Section III	Services provide names and contact information for nominated speakers for each panel.
<b>21 Jun 19</b>	Narrative Questions Section IV	Services – The identified group provide narrative responses to the identified questions in Section IV of this RFI.

**III. Request for Speakers at the August 23, 2019 DAC-IPAD Public Meeting**

The DAC-IPAD requests each of the Military Services make available the following speakers within their respective organizations to answer questions from Committee members at the DAC-IPAD public meeting scheduled for August 23, 2019 in Arlington, Virginia, regarding the topics addressed in Section IV of this RFI:

**Panel 1:** Chief, Criminal Law/Military Justice Division

**Panel 2:** Program Manager, Special Victims' Counsel and Victims' Legal Counsel Program

**Panel 3:** Chief, Trial Defense Services Organization

#### **IV. Narrative Questions**

**Purpose:** The Judicial Proceedings Panel (JPP or Panel) recommended the DAC-IPAD explore a number of issues raised throughout the course of the Panel’s military installation site visits in 2016.<sup>1</sup> Further, the DoD General Counsel has requested the DAC-IPAD examine these issues. To this end, the Committee begins its review by requesting written responses from stakeholders involved in the process on these as well as additional issues of interest to the Committee. Please consider each issue separately, and not as it relates to any of the other policy issues.

Responses to the questions in section A are requested from all RFI recipients. Responses to the questions in section B are requested only from the criminal law/military justice organizations. Responses to the section C questions are requested only from the SVC/VLC Program Managers. Responses to the section D questions are requested only from the defense service organizations.

##### **A. Policy Questions for Service Criminal Law/Military Justice Divisions, Special Victims’ Counsel Program Managers, and Trial Defense Service Organizations**

#### **Policy Question 1: Article 32 Preliminary Hearing.**

JPP recommendation 55<sup>2</sup> requested the DAC-IPAD continue to review the usefulness of the Article 32 preliminary hearing process including the weight given to preliminary hearing officers’ (PHOs) recommendations. DAC-IPAD members reviewing penetrative sexual assault investigative case files have found instances in which a PHO indicated, typically in a very thorough report, that no probable cause existed for a penetrative sexual assault offense, the staff judge advocate disagreed, the case was referred to court-martial and an acquittal resulted. To begin its evaluation of the Article 32, UCMJ, process, the Committee requests narrative responses to the following questions:

- a. Should the recommendations of PHOs against referral of sexual assault charges to court-martial, based on a lack of probable cause, be binding on convening authorities?

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<sup>1</sup> The Judicial Proceedings Panel Report on Panel Concerns Regarding the Fair Administration of Military Justice in Sexual Assault Cases (Sept. 2017) can be found at: [https://dacipad.whs.mil/images/Public/10-Reading\\_Room/04\\_Reports/01\\_JPP\\_Reports/10\\_JPP\\_Concerns\\_Fair\\_MJ\\_Report\\_Final\\_20170915.pdf](https://dacipad.whs.mil/images/Public/10-Reading_Room/04_Reports/01_JPP_Reports/10_JPP_Concerns_Fair_MJ_Report_Final_20170915.pdf)

<sup>2</sup> JPP recommendation 55: The Secretary of Defense and the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (DAC-IPAD) continue the review of the new Article 32 preliminary hearing process, which, in the view of many counsel interviewed during military installation site visits and according to information presented to the JPP, no longer serves a useful discovery purpose. This review should look at whether preliminary hearing officers in sexual assault cases should be military judges or other senior judge advocates with military justice experience and whether a recommendation of such a preliminary hearing officer against referral, based on lack of probable cause, should be given more weight by the convening authority. This review should evaluate data on how often the recommendations of preliminary hearing officers regarding case disposition are followed by convening authorities and determine whether further analysis of, or changes to, the process are required.

In addition, because the Article 32 hearing no longer serves as a discovery mechanism for the defense, the JPP reiterates its recommendation—presented in its report on military defense counsel resources and experience in sexual assault cases—that the military Services provide the defense with independent investigators.

- What are the most compelling arguments for and against this proposition from your organization's perspective?
  - Does your organization support or oppose the proposition? Why or why not?
- b. Alternatively, should Article 34, UCMJ, and/or R.C.M. 406 be amended to require additional written explanation when a staff judge advocate's Article 34 advice disagrees with a PHO's finding of no probable cause?
- What are the most compelling arguments for and against this proposition from your organization's perspective?
  - Does your organization agree or disagree with instituting such a requirement? Why or why not?
- c. Could there be a benefit in having a preliminary hearing akin to the function of a federal grand jury proceeding PRIOR to the preferral of charges?
- What are the most compelling arguments for and against this proposition from your organization's perspective?
  - Does your organization agree or disagree with this proposition? Why or why not?

## **Policy Question 2: Non-Disclosure of Article 34 Pretrial Advice.**

In JPP Recommendation 58,<sup>3</sup> the Panel requested that the DAC-IPAD review whether Article 34 of the UCMJ and R.C.M. 406 should be amended to remove the requirement that the SJA's pretrial advice to the convening authority be released to the defense upon referral of charges to court-martial. The Panel was concerned that this requirement inhibited the convening authority's legal staff from providing a fully developed, candid analysis of the evidence in the case. To begin its evaluation of Article 34, UCMJ, the Committee requests narrative responses to the following questions:

Should the UCMJ and/or Manual for Courts-Martial be amended to protect a staff judge advocate's Article 34 pretrial advice, and any written proof analysis by a trial counsel

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<sup>3</sup> JPP recommendation 58: The Secretary of Defense and the DAC-IPAD review whether Article 34 of the UCMJ and Rule for Court-Martial 406 should be amended to remove the requirement that the staff judge advocate's pretrial advice to the convening authority (except for exculpatory information contained in that advice) be released to the defense upon referral of charges to court-martial. This review should determine whether any memo from trial counsel that is appended should also be shielded from disclosure to the defense. This review should also consider whether such a change would encourage the staff judge advocate to provide more fully developed and candid written advice to the convening authority regarding the strengths and weaknesses of the charges so that the convening authority can make a better-informed disposition decision.

(sometimes referred to as a “prosecution merits memorandum”), from disclosure to the defense in order to provide more fully developed and candid written advice to the convening authority regarding the strengths and weaknesses of the charges?

- a. What are the most compelling arguments for and against this proposition from your organization’s perspective?
- b. Does your organization support or oppose the proposition? Why or why not?

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**A. Policy Questions for Service Criminal Law/Military Justice Divisions**

**Policy Question 1: Article 32 Preliminary Hearing.**

JPP recommendation 55 requested the DAC-IPAD continue to review the usefulness of the Article 32 preliminary hearing process including the weight given to preliminary hearing officers' (PHOs) recommendations. DAC-IPAD members reviewing penetrative sexual assault investigative case files have found instances in which a PHO indicated, typically in a very thorough report, that no probable cause existed for a penetrative sexual assault offense, the staff judge advocate disagreed, the case was referred to court-martial and an acquittal resulted. To begin its evaluation of the Article 32, UCMJ, process, the Committee requests narrative responses to the following questions:

- a. Should the recommendations of PHOs against referral of sexual assault charges to court-martial, based on a lack of probable cause, be binding on convening authorities?**
- **What are the most compelling arguments for and against this proposition from your organization's perspective?**
  - **Does your organization support or oppose the proposition? Why or why not?**

**USA MJ (A.Q1a.):** No. The PHO's finding of a lack of probable cause should not be binding on convening authorities. The Office of The Judge Advocate General does not support the proposition for the reasons identified above.

A PHO finding that there is no probable cause for a charge should not be binding because of the inherent limitations of the Article 32 hearing, and the experience, expertise, and unique role that a Staff Judge Advocate plays in the military justice system.

Today's preliminary hearing is not a comprehensive evaluation of all the available evidence. First, Article 32 itself imposes significant limitations on the scope of the hearing: it is "limited" to its four statutory purposes, and the victim has a right to decline to testify. Second, as any trial practitioner knows, evidence continues to develop in complex cases up until and through the trial itself. Any recommendation based on an incomplete examination of the facts and a lack of opportunity to assess the credibility of central witnesses, particularly the victim, cannot provide the convening authority with the same comprehensive advice provided by the Staff Judge Advocate.

In addition, a Staff Judge Advocate typically brings more than 20 years of experience, and the SJA is supported by the expertise and experience of other senior judge advocates, including the Chief of Justice and Special Victim Prosecutor. Although PHOs are Judge Advocates who are certified under Article 27(b) and while a Staff Judge Advocate typically recommends the most experienced Judge Advocates available as PHOs, the typical PHO simply does not match a Staff

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Judge Advocate's experience and expertise. Indeed, these years of experience allow the Staff Judge Advocate to provide more comprehensive advice on probable cause to convening authorities than a PHO can.

Finally, it is true that in many civilian jurisdictions, a judge at a preliminary hearing is empowered to dismiss a charge for which the judge determines there is a lack of probable cause. In such jurisdictions, however, the ruling is typically not "final" in the sense that, for instance, the Federal Rules of Criminal Procedure specifically allow a prosecutor to re-charge the defendant. Indeed, there have been cases in which a PHO found no probable cause, the Staff Judge Advocate disagreed, and the accused was subsequently convicted.

The combination of the PHO's thorough report and the Staff Judge Advocate's review – based on that officer's years of practice and expertise – ensures that the convening authority is provided the best possible disposition advice.

**USN MJ (A.Q1a.):** We do not support the proposition that a PHO's determination of probable cause be binding on the convening authority. Given the role of experienced trial counsel combined with the SJA's statutory obligation under Article 34 to provide written advice to convening authorities concerning probable cause in sexual assault cases, the PHO's opinion concerning probable cause should not be binding on the general court-martial convening authority (GCMCA).

The proposal places too much authority in the hands of a single judge advocate (the PHO) who may lack the necessary experience, information, and perspective to make binding, weighty decisions concerning the determination of probable cause.

For the proposition: The military justice system needs a procedural process to act as a check against the charging of offenses for which probable cause does not exist. All federal and civilian criminal jurisdictions provide at least one procedural avenue that screens felony-level charges to ensure that probable cause exists. Nearly two-thirds of the states provide for an adversarial preliminary hearing conducted by a magistrate or judge. In these cases, a determination that a charge is not supported by probable cause results in the dismissal of the charge. In the remaining states, charges may only be brought following an indictment by a grand jury that has determined probable cause exists to support the charges. The purpose of these proceedings is to provide an accused a procedural protection against baseless charges early in the life cycle of a case.

Pursuant to Article 32, UCMJ, a preliminary hearing officer (PHO) is required, in part, to determine whether probable cause to believe the accused committed the offense charged exists. Despite the Art. 32 hearing resembling some aspects of civilian preliminary hearings, the PHO's determination of lack of probable cause is not binding upon the convening authority and does not result in the dismissal of a charge, as would be the case in civilian jurisdictions. Rather, Article 34, UCMJ requires that before a charge and specification are referred to a general court-martial, a staff judge advocate (SJA) must advise a convening authority in writing, among other things, that there is probable cause to believe that the accused committed the offense under the UCMJ.

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Against the proposition: In current practice, many Article 32 hearings do not affect the traditional fact-finding and evaluation function. Many Art. 32s are waived or when they do occur, few non-servicemembers and few victims testify. Often the only information reviewed by a PHO is the NCIS investigative report. Essentially, the PHO is evaluating the same reports that were reviewed by the trial counsel. Additionally, in the Navy, trial counsel assigned to handle sexual assault cases are often Military Justice Litigation Qualified (MJLQ) or closely supervised by senior MJLQ judge advocates, while many PHOs may not have significant military justice experience, especially dealing with sexual assault cases.

**USMC MJ (A.Q1a):** No. A PHOs recommendation should not be binding on a convening authority because attempts to further erode or limit the authority of convening authorities harm the pursuit of justice and maintenance of discipline in the military. Cases where a PHO and SJA disagree about whether there is probable cause are the most difficult referral decisions to make. There is often contradictory evidence and support for either decision. The convening authority is best situated to make those difficult decisions.

The most compelling argument in favor of this proposal is that it protects an accused's due process rights by not subjecting them to trial when probable cause is lacking. However, there is no support for the claim that a PHO's decision in these difficult cases would be more consistently fair and just than a convening authority's. As your 2019 annual report noted, commanders' disposition decisions are reasonable in an "overwhelming majority of cases." There is no reason commanders should abdicate that decision to a PHO, who often has much less experience than the SJA. The recommendations by the PHO, described in Rule for Courts-Martial 405(a) as "limited," are not equivalent to the comprehensive advice provided to the convening authority before referral. A convening authority relies on the advice of the staff judge advocate, who benefits from the case analysis memo prepared by a trial counsel and signed by a Regional Trial Counsel, with input from the litigation attorney advisor—an attorney with significant civilian prosecution experience. If all of those more experienced attorneys are advising that there is probable cause, there is no reason to believe the PHOs opinion to the contrary is more likely correct.

**USAF MJ (A.Q1a):** No. The recommendations of Preliminary Hearing Officers (PHOs) against referral of sexual assault charges should not be binding on convening authorities. Such a change in law would serve to weaken the commander's important role in the military justice process, would erode victim rights, and would create procedural differences when the accused waives the preliminary hearing.

The commander, acting as the convening authority with the advice of their staff judge advocate (SJA), must retain adequate flexibility to make appropriate decisions within the military justice process in order to facilitate and maintain good order and discipline. Making the PHO recommendation binding on the commander is contrary to command discretion and would undermine the ability of the commander to ensure a disciplined fighting force consistent with

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military standards, American values, and established expectations. Discipline is inextricably woven into the fabric of command and even entertaining possible changes lessening command authority could do irreparable damage to the strength of our military and our Nation's security. While the PHO's assessment is valuable, it serves as only one of several avenues to inform a commander on the strength or weakness of the evidence. Ultimately, commanders must remain responsible for their Airmen, the assets assigned to support the mission, and the environment in which both are employed. They alone control the full complement of tools and resources to instill the proper culture and, armed with the advice of their staff judge advocate, are best positioned to oversee discipline and dispose of all offenses under the Uniform Code of Military Justice (UCMJ). This includes making independent referral decisions on sexual assault charges with the advice of the SJA. Any efforts to limit a commander's role in our justice system in the current environment would adversely impact victims, reduce readiness, and degrade military discipline.

Convening authorities consider the recommendation of their SJA, who reviews the preliminary hearing report and evidence prior to making a recommendation. The SJA is in the best position to discuss the findings of the preliminary hearing with the convening authority, who can then balance the interests of the government and the rights of the accused, while maintaining the proper respect and dignity for the victim. By making the recommendations of the PHO binding, it would further preclude the government from any curative measures from errors of law committed by the PHO upon preliminary hearing.

By law, the scope of information available to the convening authority prior to making a referral decision is actually broader than the information available to the PHO during the hearing. The previous changes to the preliminary hearing process have altered the nature of the hearing. The hearing no longer serves as a method to provide defense discovery, prepare a victim for trial, or a forum for the hearing officer to assess a victim's credibility. Now, pursuant to Article 32, UCMJ, and Rule for Courts-Martial 405(e), the PHO may only consider information relevant to determining: whether the specification alleges an offense; whether there is probable cause to believe that the accused committed the offense charged; whether the convening authority has court-martial jurisdiction over the accused and the offense; and a recommendation as to the disposition that should be made of the case. Moreover, because the PHO's report is narrowly scoped, neither government nor defense counsel are required to provide evidence that is outside the scope of the hearing. Finally, neither the government nor defense counsel are required to produce evidence for consideration by the PHO that may exceed the burden necessary to sustain the probable cause standard that is required at a preliminary hearing.

Additionally, the proposed change would erode victim rights and potentially force convening authorities to act contrary to the law by not considering victim input prior to making a referral decision. Under Article 32(d)(3), a victim may not be required to testify at the preliminary hearing. Similarly, there is no requirement for a victim to provide the PHO any information regarding their preference as to disposition. As such, it is entirely possible the PHO will lack



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input from the victim regarding their preferences as to prosecution or disposition of the alleged offense, before making a recommendation whether or not to refer a charge. It is also not uncommon for a victim's preferences to change following completion of the Article 32 preliminary hearing. Therefore, the PHO's recommendation as to disposition may be made in the absence of victim input. This is problematic as RCM 306 still mandates the convening authority to consider the victim's views on disposition. Thus, the proposed change will likely create situations where a convening authority would not be able to consider a victim's input because the convening authority would be bound by the PHO's recommendation.

Finally, the proposed change would create a difference in procedure in cases where the accused waives the preliminary hearing. In such cases, there would be no PHO recommendation; thus the convening authority, with the advice of the SJA, would make the recommendation, thereby creating a different standard than that which applies to cases with a preliminary hearing.

**USCG MJ (A.Q1a.):** No. PHO recommendations against referral of sexual assault charges to court-martial, based on a lack of probable cause, should not be binding on convening authorities. The Office of Military Justice does not support the proposition to make the PHO recommendation against referral binding on the convening authority. It would make a recommendation that is inherently based on incomplete information binding on other participants in the military justice process who are in possession of more complete information.

At present, the preliminary hearing is not a comprehensive evaluation of all the available evidence. Rather, it reflects as much evidence, frequently in documentary form, that the government believes necessary to demonstrate probable cause on all of the offenses. The government typically does not call all relevant witnesses. As PHO recommendations are not based a complete review of the facts and evidence they do not provide the convening authority with the same thorough assessment provided by the Staff Judge Advocate.

**b. Alternatively, should Article 34, UCMJ, and/or R.C.M. 406 be amended to require additional written explanation when a staff judge advocate's Article 34 advice disagrees with a PHO's finding of no probable cause?**

- **What are the most compelling arguments for and against this proposition from your organization's perspective?**
- **Does your organization agree or disagree with instituting such a requirement? Why or why not?**

**USA MJ (A.Q1b.):** No, Article 34 should not be amended to require additional written explanation when a Staff Judge Advocate's advice disagrees with a PHO's finding of no probable cause. The Office of The Judge Advocate General does not support instituting such a requirement for the reasons described.

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The purpose and utility of this proposition is not clear. The fact that a Staff Judge Advocate disagrees with a PHO – and the specific reasons for that disagreement – creates no legal right for the accused upon which an accused could seek relief. Lawyers can and do disagree on the application of the probable-cause standard. If such a probable-cause determination is later reviewed, the specific reasons for that disagreement would not be legally relevant: instead, the issue on review would be whether there was, objectively, probable cause in light of the totality of the circumstances or whether the officer abused her discretion in concluding that there was, not why the one officer disagreed with another.

Further, the Convening Authority is provided the PHO report, and the Convening Authority can discuss in detail with the Staff Judge Advocate any disagreement on probable cause. For the reasons described above, the PHO's recommendation is limited, and it is not the equivalent of the Staff Judge Advocate's Article 34 advice. Indeed, the interactive, comprehensive nature of the advice of the Staff Judge Advocate to the Convening Authority and a full discussion of the evidence and additional factors does not lend itself easily to a short, written format.

To be sure, identifying the reasons for a disagreement between the PHO and the Staff Judge Advocate could identify the evidence the Staff Judge Advocate found compelling, which could, in turn, provide the defense insight into the government's theory. But there is no requirement now for the government to disclose its theory to the defense (outside of the charges themselves). Moreover, such a discovery right would appear to be unique to the military, and to impose this requirement on the military justice system would be inconsistent with accepted practice.

**USN MJ (A.Q1b.):** For the reasons explained below, we do not support the proposition that Article 34 and/or R.C.M. 406 should be amended to require additional explanation if the SJA's Art. 34 advice disagrees with a PHO's finding of no probable cause.

For the proposition: The proposition would increase transparency in the military justice system allowing servicemembers and the public to better understand the charging decision and whether offenses should be referred to general courts-martial. Transparency helps to explain the resolution of disagreements between PHOs and SJAs concerning whether probable cause exists and could enhance the confidence of servicemembers and the public in the fairness of the military justice system.

Against the proposition: Article 34 requires that an SJA provide legal conclusions to a GCMCA concerning whether each specification alleges an offense under the UCMJ; whether probable cause exists to believe the accused committed the charged offense, whether a court-martial has jurisdiction over the accused and the offense; and a recommendation of the action to be taken by the convening authority. The three conclusions are binding on the GCMCA. For instance, if the SJA finds there is no probable cause to believe an accused committed the offense charged, the specification cannot be referred. Consequently, the SJA plays a significant role in the military justice system to protect an accused against trial on baseless charges, and to protect against referral of charges to an inappropriate level of court-martial.

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While there is no prohibition against a full discussion of the evidence in the Art. 34 advice, any discussion of the facts must be accurate and complete or risk a later determination that the advice was defective. Additionally, a written discussion of the facts of the case may have the potential to weaken the prosecution by revealing the trial counsel's case strategy.

Currently, an SJA is expected to provide a convening authority with a candid assessment of the case at the pre-referral stage via in-person briefings. The SJA must make an independent and informed appraisal of the charges and evidence in order to meet the statutory requirements of Art. 34. Any defects in the pretrial advice are subject to judicial review at court-martial under R.C.M. 906 (b)(3) and could constitute reversible error under certain circumstances.

**USMC MJ (A.Q1b):** No. The detailed and comprehensive advice of an SJA may include evidence and additional factors not considered by the PHO and this advice does not lend itself to a short written format. The requirement is unnecessary because the convening authority is already provided the PHO report and can discuss any disagreements with the SJA. The most compelling argument in favor of this proposal is that it creates a historical record that allows better statistical analysis and review of reasons why convening authorities are referring cases to trial. The most compelling argument against this proposition is that it is unnecessary and imposes additional requirements on SJAs.

**USAF MJ (A.Q1b.):** No. Amending Article 34 and/or RCM 406 to require additional explanation from the SJA would limit the SJA's ability to provide candid legal advice to a convening authority. Further, SJAs are generally very experienced attorneys with significant military justice backgrounds. They often bring a different perspective and intricate knowledge of the case when providing advice to the convening authority. In cases where the PHO finds probable cause, the SJA may still have valid reasons to recommend not going forward in a case (e.g., victim does not want to participate; evidentiary hurdles re: privilege; etc.). Conversely, in cases where the PHO does not find probable cause, the convening authority, after reviewing matters outside the limited scope of the hearing, such as supplemental matters provided by the parties for the convening authority's consideration under R.C.M. 405(k), may have valid reason to find probable cause exists in consultation with the SJA.

There are many compelling arguments against adopting this proposition, including that it adds unnecessary administrative burdens on SJAs and creates inconsistency in the military justice process.

An argument for adopting this proposition is transparency. This proposition would document the rationale used by the SJA, explaining the differences between the recommendations of the PHO and SJA. While this change is unnecessary, as a practical matter, it would simply memorialize a discussion which should already be occurring between convening authority and their SJA. The administrative burden for the SJA to document such advice would be minimal.

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We oppose this proposition because there are valid reasons why the recommendations of an SJA and PHO may differ. Further, such a change would create additional, inconsistent processes depending upon the type of court-martial forum and the nature of the preferred offenses.

**USCG MJ (A.Q1b.):** No. The Office of Military Justice does not support a requirement to amend Article 34 to require additional written explanation when a Staff Judge Advocate's advice disagrees with a PHO's finding of no probable cause.

The most compelling argument for such a proposal is that it gives the accused more information about the government's case.

The most compelling argument against is that the interaction between the Staff Judge Advocate and convening authority is direct and interactive. A requirement to provide additional written justification would tend to formalize and reduce to writing a process that is now both written and verbal and allows for discussion and review. It would also have the potential to produce additional litigation that might make prosecuting cases more difficult. For example, if a Staff Judge Advocate discussed additional issues with the convening authority than those reflected in the written explanation, would that require the written explanation to be redone? Would the Staff Judge Advocate and convening authority then be subject to routine questioning as to whether they had discussed or reviewed any additional matters related to probable cause than those reflected in the written justification? Would that questioning, regardless of the answers, then serve as a routine basis to disqualify Staff Judge Advocates and convening authorities?

The Office of Military Justice does not support a requirement to amend Article 34 to require additional written explanation when a Staff Judge Advocate's advice disagrees with a PHO's finding of no probable cause.

**c. Could there be a benefit in having a preliminary hearing akin to the function of a federal grand jury proceeding PRIOR to the preferral of charges?**

- **What are the most compelling arguments for and against this proposition from your organization's perspective?**
- **Does your organization agree or disagree with this proposition? Why or why not?**

**USA MJ (A.Q1c.):** No. The Office of The Judge Advocate General does not support this proposition.

An additional level of review may help identify earlier some arguably less meritorious cases, but the current process is already quite similar to the federal process. Many federal criminal cases begin not with an indictment but with a criminal complaint, which is the start of the adversarial

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process. Like a complaint, preferral requires a person to swear to the truth of the charges to the best of his or her knowledge. For cases that will be tried as a felony, Article 32 requires a preliminary hearing before referral. Taken together, the military process is the functional equivalent of a complaint (preferral) that is followed by an indictment (Article 32 and referral).

Moreover, it is not clear the practical effect that this will have. There are already multiple levels of review before a charge is preferred. Most felony-level cases begin with a Military Criminal Investigative Organization investigation, and by regulation, a Judge Advocate must review such investigations and find probable cause to believe an offense was committed and the subject committed it. Second, as noted, the accuser must swear that the charge is true to the best of his or her knowledge and belief before preferring it. It is also not clear how this would work in an expeditionary environment. The Army tried more than 790 courts-martial in Afghanistan and Iraq, and any procedural requirement must be as deployable as the system's practitioners.

Importantly, an additional layer of review would increase the time from allegation to initial disposition, which would exacerbate one of the primary concern of victims, accused Soldiers, and commanders—the time the system already takes.

Finally, a grand jury proceeding, without representation by defense counsel and a right to attendance by the accused, would not support the military's long tradition of the protection of accused rights and would not increase transparency in a system already accused of non-transparency.

**USN MJ (A.Q1c):** The proposition is not explicit as to whether the preliminary hearing akin to a federal grand jury prior to preferral would be a replacement for the preliminary hearing required by Article 32, or whether both hearings would be required. It is also unclear what type and quantity of evidence would be required, or is likely to be presented to a grand jury-style hearing, including whether a victim of sexual assault could decline to testify at the proceeding.

We disagree with the proposition. It is unlikely that a grand jury-style proceeding will result in the development of additional facts that aid in the probable cause determination beyond that in the current Article 32 preliminary hearing followed by the SJA's Article 34 pretrial advice. Consequently, there appears to be little added benefit to the military justice system in adopting such a process, particularly if it were in addition to the existing Article 32 preliminary hearing. Merely shifting the SJA's binding probable cause determination under Article 34 to a grand jury-style proceeding is unlikely to result in a more sound determination of probable cause than occurs now.

For the proposition: We see no compelling argument in favor of adding a grand jury-style hearing prior to preferral in the military unless the new proceeding would entirely replace the current Article 32 preliminary hearing. Conducting two preliminary proceedings would unnecessarily tax limited resources and further delay the adjudication of sexual assault cases, which is already a common criticism of the system.

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Against the proposition: The threshold for preferring charges is extremely low. Article 30 allows any person subject to the UCMJ to prefer charges. Preferral of charges can occur prior to the involvement of a judge advocate in a case. However, currently in most cases, investigative reports are forwarded for review by a judge advocate prior to preferral. A trial counsel reviews the reports and makes a recommendation as to whether or not charges should be preferred in a prosecution merits memorandum. To require a grand jury-style proceeding would require not only the involvement of trial counsel, but also the appointment of military personnel to serve as grand jurors, prior to preferral. The additional personnel, time and resources required for these hearings could affect military preparedness and operations.

Unlike Article 32 hearings, a civilian grand jury is non-adversarial, and does not include judges and defense counsel. The standard of proof at a grand jury is low- that probable cause exists to believe a crime has been committed- and civilian prosecutors often present the bare minimum of evidence in order to obtain an indictment. Supplanting the review of the charges by experienced prosecutors with the collective view of the evidence by non-lawyer, inexperienced grand jurors would add little benefit to our system. In addition, the proposed grand jury-style hearing would obviate the SJA's gatekeeper function under Article 34 to make an independent conclusion concerning probable cause for the offenses.

**USMC MJ (A.Q1c.):** Yes, there could be benefit in having a preliminary hearing before preferral, but this proposal would require further study to analyze potential advantages or disadvantages.

If a preliminary hearing was a closed hearing, similar to a grand jury, and was conducted by a judge or magistrate, that procedure might be valuable in determining probable cause and helping a commander decide whether charges should be preferred. The preliminary hearing should be similar to the civilian practice of a grand jury in that the defense is not present and there is no cross-examination of witnesses, although the witnesses could be questioned by the judge or magistrate. With a guarantee of judicial oversight at a closed hearing, victims might be more inclined to testify at the hearing. This would allow a more informed probable cause determination.

Any proposition for a preliminary hearing conducted by members, akin to a grand jury, is contrary to the fundamental component of command authority. Commanders must be able to initiate disciplinary proceedings swiftly, and should not have to seek permission from a group of subordinates to do so. Additionally, commands would have too much of a burden supplying officers to serve as members, which would result in more cases being handled administratively or would unnecessarily lengthen the case — already a primary concern of victims. If the hearing was required before preferral, there would be no way to prefer charges intended to be adjudicated at special or summary courts-martial without imposing the extra burden of a preliminary hearing. In summary, while there might be some benefit to this proposal it has not been studied sufficiently at this point to either support or oppose it.

**USAF MJ (A.Q1c.):** No, we do not find any benefit in adding an additional hearing to the current process which is more transparent and includes representation of counsel. The military



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justice system is designed to be mobile and operate efficiently in every possible environment. An Article 32 preliminary hearing is an open proceeding and a right of all Airmen facing a general court-martial as opposed to a grand jury, which is a closed, secret hearing afforded to individuals charged with a capital offense or one those offenses carrying a potential sentence punishable by imprisonment for greater than a year. See the United States Constitution, Fifth Amendment; Federal Rules of Criminal Procedure, Rule 7; and 18 U.S.C. 4083. Moreover, the Fifth Amendment specifically exempts the grand jury requirement in cases “arising in the land or naval forces” and the “Militia, when in actual service in time of War or public danger.” While this does not specifically include the Air Force, the language clearly exempts military forces from the requirement. Given the efficiencies of our system and the protections provided military members early in the process, there is no utility to creating a grand jury type process within the current system.

The Article 32 preliminary hearing open and transparent, providing visibility to the process and satisfying the role intended by a federal grand jury. The military simply affords far greater due process rights than the analogous civilian process and is far more transparent to the accused because the accused is: (1) afforded the right to attend the Article 32 preliminary hearing; and (2) formally notified, via preferral, of the nature of the charges being investigated at the preliminary hearing. Moreover, many civilian offenders do not even know the grand jury proceeding is ongoing due to the secret, sealed nature of the proceeding and derivative evidence. See Federal Rules of Criminal Procedure, Rule 6. Our system is designed to be transparent and incorporating an additional preliminary hearing with only bogged down the system and serve as an unnecessary duplication of effort.

Compelling arguments against this proposition include that it is an unnecessary duplication of effort and would potentially erode due process rights currently afforded to a military accused.

We find no compelling arguments for this proposition.

**USCG MJ (A.Q1c.):** No response provided.

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**Policy Question 2: Non-Disclosure of Article 34 Pretrial Advice.**

In JPP Recommendation 58, the Panel requested that the DAC-IPAD review whether Article 34 of the UCMJ and R.C.M. 406 should be amended to remove the requirement that the SJA's pretrial advice to the convening authority be released to the defense upon referral of charges to court-martial. The Panel was concerned that this requirement inhibited the convening authority's legal staff from providing a fully developed, candid analysis of the evidence in the case. To begin its evaluation of Article 34, UCMJ, the Committee requests narrative responses to the following questions:

**Should the UCMJ and/or Manual for Courts-Martial be amended to protect a staff judge advocate's Article 34 pretrial advice, and any written proof analysis by a trial counsel (sometimes referred to as a "prosecution merits memorandum"), from disclosure to the defense in order to provide more fully developed and candid written advice to the convening authority regarding the strengths and weaknesses of the charges?**

- a. What are the most compelling arguments for and against this proposition from your organization's perspective?**
- b. Does your organization support or oppose the proposition? Why or why not?**

**USA MJ (A.Q2):** No, the Office of The Judge Advocate General does not support the proposition for the reasons described.

The former will make no significant change, and the latter is unnecessary. Under a longstanding Army practice, the Staff Judge Advocate's Article 34 conclusions are presented without extensive written analysis. Consequently, disclosing the memorandum informs the defense what it already knows – the Staff Judge Advocate made the three required statutory findings. The prosecution merits memorandum is quintessential work product, and like most such documents, they are rarely, if ever, provided to the convening authority although the Staff Judge Advocate can inform the convening authority of the case's strength and the Staff Judge Advocate's assessment of the result.

As noted in the introductory notes, the argument in favor of this proposition is the possibility that the Staff Judge Advocate's candid advice will be chilled. For the reasons noted above, that is not likely to happen.

**USN MJ (A.Q2):** The proposition is premised upon a concern that the recommendations for referral are based upon inadequately developed and non-candid advice given by a convening authority's legal staff. The premise appears unsupported by the DAC-IPAD's own conclusion from its 2019 Annual Report that a commander's disposition of sexual assault complaints was reasonable in 95% of the cases the Committee reviewed across all the Services.



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We do not support the proposition that the Article 34 pretrial advice be protected from non-disclosure as that would not advance the transparency or promote the confidence of servicemembers or the public in the military justice system.

For the proposition: Since the proposition is based upon an inaccurate premise, we believe there are no compelling reasons to shield the Article 34 advice from disclosure. The prosecution merits memorandum is attorney work product and not currently subject to disclosure even under our current system.

Against the proposition: The military justice system has often been criticized for lack of transparency and openness. Protecting the Article 34 advice from disclosure would further contribute to this notion of lack of transparency. The proposition is also based upon the mistaken belief that disposition decisions are being made upon inadequately developed and non-candid advice given by an SJA to a convening authority. Rather, a convening authority has the benefit of advice from the SJA who renders this advice following a detailed case analysis done by the trial counsel in a prosecution merits memorandum, and the Article 32 preliminary hearing report, if the hearing is not waived. In addition, an SJA must conduct an independent assessment of the evidence in the case under Article 34. While most often the SJA's advice to a convening authority is provided during oral briefings, and not in writing, the soundness of that advice appears supported by the DAC-IPAD's 2019 Annual Report conclusion based upon the Committee's thorough review of Fiscal Year 2017 cases.

**USMC MJ (A.Q2):** Yes. Protecting case analysis memorandums (CAMs - formerly referred to as prosecution merits memorandum) from disclosure will result in a more informed referral decision. CAMs are detailed and outline strengths and potential weaknesses of a case, as well as assessments on the likelihood of success at trial. They are provided to SJAs, to inform the SJA's analysis and recommendations, but are not provided to convening authorities in order to protect the work product of the trial counsel from disclosure. However, these memos could be an important source of information to a convening authority if they were protected from disclosure. The most compelling argument against this proposal is that the defense has a right to challenge the legality of the referral decision if the convening authority considered impermissible evidence or was improperly influenced. In order to protect the rights of the accused, this provision should also specify that if the defense made any colorable showing that the convening authority considered improper evidence, a military judge should be able to review the Article 34 advice and written proof analysis in camera, and/or order them disclosed to the defense.

**USAF MJ (A.Q2):** No. A modification of the UCMJ and/or Manual for Courts-Martial is not required. Additionally, proof analyses are currently considered attorney work-product and, absent order of the court or constitutional necessity, are protected from disclosure to the defense. Such a modification is, therefore, unnecessary.

We do not support this proposition because it is an unnecessary amendment to existing procedure.

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Compelling arguments against this proposition are that it would not provide any meaningful change to the existing military justice process.

We find no compelling arguments for this proposition.

**USCG MJ (A.Q2):** No. The arguments against doing so outlined above are far more compelling than the reasons to provide it, most particularly because convening authorities will still rely on their SJA to advise them on whether to proceed and why.

Arguments for: Would provide the convening authority with more written information on which to base a referral decision.

Arguments against: Regardless of any written legal analyses of a case provided to a convening authority, the convening authority will still likely rely on personal communication with the SJA for advice on whether to proceed. So practically speaking, including this requirement will achieve little. Although the current form of Article 34 advice is short on details, it at least provides the defense an opportunity to know what the SJA recommended in terms of whether to proceed. Turning the process into one in which the defense is unaware of what the SJA recommends is problematic.

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**A. Policy Questions for Service Special Victims' Counsel Program Managers**

**Policy Question 1: Article 32 Preliminary Hearing.**

JPP recommendation 55 requested the DAC-IPAD continue to review the usefulness of the Article 32 preliminary hearing process including the weight given to preliminary hearing officers' (PHOs) recommendations. DAC-IPAD members reviewing penetrative sexual assault investigative case files have found instances in which a PHO indicated, typically in a very thorough report, that no probable cause existed for a penetrative sexual assault offense, the staff judge advocate disagreed, the case was referred to court-martial and an acquittal resulted. To begin its evaluation of the Article 32, UCMJ, process, the Committee requests narrative responses to the following questions:

- a. Should the recommendations of PHOs against referral of sexual assault charges to court-martial, based on a lack of probable cause, be binding on convening authorities?**
- What are the most compelling arguments for and against this proposition from your organization's perspective?**
  - Does your organization support or oppose the proposition? Why or why not?**

**USA SVC (A.Q1a.):** The recommendations of the PHOs against referral of sexual assault charges to court-martial based on a lack of probable cause should NOT be binding on convening authorities. For the reasons listed below, the Army SVC Program Office (SVCOPM) does not support this proposition.

The rank and legal background of the PHO is largely dependent upon the available officer population within each General Court-martial Convening Authority's jurisdiction. Every jurisdiction will not have available judge advocates with military justice training and experience to serve as PHOs. As a result, the understanding of the legal requirements for probable cause determinations will vary among cases. Where a PHO misapplies legal requirements, the Article 34 advice of the SJA, a judge advocate with extensive legal experience and military justice subject matter experts available to assist, serves to counter misunderstandings of the law and probable cause requirements. Every case is unique and the ability of the convening authority to consider both the PHO recommendation and the SJA advice prior to making a referral decision is paramount to ensuring every case disposition decision is made based on a clear understanding of the case facts and appropriate legal standards.

**USN SVC (A.Q1a.):** VLCP does not intend to answer this question from the perspective of the wider military justice process. VLCP will instead share perspectives from the field VLC. There is not one answer to this question that will serve all victims. All victims are different, their cases are different, and a change like the one proposed here would help some victims, and harm others.

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Regardless, this question seems narrow and does not consider other changes that could be made to the preliminary hearing process in order to alter the effectiveness of the hearing.

A concern VLC have noted is that PHOs tend not to have sufficient military justice litigation expertise and therefore inconsistently or even incorrectly apply the probable cause standard. This may contribute to some SJAs advising CAs against the PHO's recommendation in some instances. VLCP supports PHOs being required to have sufficient military justice litigation experience in order to act as PHO.

If the process is changed in order to improve the reliability of the outcomes of preliminary hearings, making the PHO's recommendations binding on CAs could help some victims, harm others, but in either case, is inconsistent with all other American civilian systems of criminal justice. This would be detrimental to the military justice system as a whole. If the PHO's recommendation is binding, it would lead to a "one bite at the apple" approach that could preclude the government from referring charges in the event that (a) something simply went wrong at the Art. 32 or (b) the government found additional evidence after the initial Art. 32 (DNA evidence, for example, is frequently not available in time for a preliminary hearing).

For the reasons outlined above, VLCP leans toward not supporting PHO recommendations being binding on the CA. However, VLCP supports all PHOs or counsel involved in any type of preliminary probable cause determination being required to be experienced military justice litigation specialists to ensure appropriate and consistent application of the probable cause standard.

**USMC SVC (A.Q1a.):** No. Although PHOs are now considerably more experienced on average than they were in the past due to changes in rules and policy, they are still not generally experienced to the level of a military judge. While their analysis and opinions are overwhelmingly well thought out and reasonable, they are not fully reliable enough to be absolutely binding on a CA in those small minority of cases where a PHO does not analyze the evidence, facts, and charges correctly. Discretion should remain for the CA to refer the case to court-martial after receiving a recommendation from the PHO and advice from a senior SJA.

Oppose. For the reasons stated above, discretion should remain with the CA. If this proposal were to be enacted, then movement away from the current Article 32 process to one more akin to a civilian grand jury should occur. This grand just process, however, would add additional complexities and resource constraints to an already stressed system. The key is to ensure that prosecutors are only preferring charges for which they believe probable cause exists based on admissible evidence, and that these charging decisions are reviewed internally by a well-resourced and experienced prosecution team and supervisors.

**USAF SVC (A.Q1a.):** No. These recommendations should continue to be a factor for convening authority consideration, but should not be the dispositive factor.

PRO: The PHO is an unbiased judge advocate who possesses sufficient experience and expertise to evaluate the case evidence, and provide the convening authority with an analysis for the limited scope and purpose of the preliminary hearing. If the PHO's determination of insufficient probable cause to refer the charge and/or specification were binding on the convening authority,

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the charge and/or specification would have to be dismissed. This procedure has the potential to eliminate other administrative requirements, such as the Staff Judge Advocate's Pretrial Advice, which could result in a streamlined disposition process for allegations deemed to have a lack of sufficient evidence. As such, victims would potentially be informed of the final disposition decision in a timelier manner.

CONS: This proposal would limit the convening authority's ability to refer charges when the PHO does not find sufficient probable cause for a charge and/or a specification. The PHO is making a probable cause determination based upon evidence properly provided to the PHO. Given the limited scope and purpose of the preliminary hearing, the PHO is unable to review the case evidence in the same manner as a court-martial procedure. For example, many victims choose not to testify at an Article 32 hearing, and therefore, the PHO is limited to evaluating the victim's statement to law enforcement. In many cases, the PHO is providing a probable cause determination and disposition recommendation based solely on an analysis of the law enforcement report of investigation.

Additionally, not all PHOs have the same background, training and experience. Even in cases using a military judge as a PHO, there is no guarantee the PHO is an expert in sexual assault. SVCs have found the majority of preliminary hearings are not presided over by military judges, because the military judges are often not available. As such, the quality and depth of analysis varies between PHOs.

Currently, there are two trained legal professionals, the PHO and Staff Judge Advocate (SJA), who make recommendations to the convening authority regarding the disposition of charges. These judge advocates may look at the same facts, but arrive at differing conclusions about probable cause. In contrast to the PHO, the SJA will typically have more access to evidence (such as speaking with the victim), to develop a feel for the quality of available evidence. In this way, the SJA serves as a quality control for the PHO.

Finally, SVCs have found convening authorities often appreciate the victim's views as a part of the disposition decision. If the PHO's recommendation were to become binding on the convening authority, it may have the consequence of rendering the victim's disposition views meaningless.

For reasons stated above, CLSV opposes this proposal.

**USCG SVC (A.Q1a.):** No. The convening authority should consider the PHO's recommendations but the recommendation should not be dispositive.

PRO: The PHO can provide an unbiased evaluation of the evidence to the convening authority.

CON: Because, historically, the Coast Guard has prosecuted fewer cases, not all PHOs have the same level of military justice experience. Accordingly, the quality of the recommendation contained in a PHO's report may suffer due to inexperience of the attorney. Additionally, PHOs do not receive all of the information that will be submitted into evidence at a court-martial and,

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instead, must rely on a paper review or, on occasion, taped interviews, which makes it difficult to adequately assess witness credibility which can be especially relevant in a sexual assault prosecution.

Also, from an advocacy standpoint, if the PHO's recommendations are binding, the victim's input to the convening authority would be meaningless.

For the reasons previously noted, the SVC program opposes. However, the SVC program does support requiring PHOs attend training that covers counter-intuitive sexual assault victim-witness behavior and the impact trauma has on memory so that PHOs would be better versed in the particulars of Article 120 offenses.

**b. Alternatively, should Article 34, UCMJ, and/or R.C.M. 406 be amended to require additional written explanation when a staff judge advocate's Article 34 advice disagrees with a PHO's finding of no probable cause?**

- **What are the most compelling arguments for and against this proposition from your organization's perspective?**
- **Does your organization agree or disagree with instituting such a requirement? Why or why not?**

**USA SVC (A.Q1b.):** Article 34 and/or R.C.M. 406 should NOT be amended to require additional written explanation when a staff judge advocate's Article 34 advice disagrees with a PHO's finding of no probable cause. For the reasons listed below, the SVCOPM disagrees with this proposition.

Convening authorities should continue to benefit from confidential legal advice from their staff judge advocates. Any written documents put before convening authorities would likely be found by a judge to be discoverable and available for review by accused Service members and their attorneys. A mandate that SJAs certify in their Article 34 advice that they have provided additional legal advice and counsel to convening authorities where the SJAs' legal conclusions differ from the PHOs' recommendations may be an alternative to additional written explanation.

**USN SVC (A.Q1b.):** Once again, VLCP does not intend to answer this question from the perspective of the wider military justice process. Similar to the above, there is not one answer to this question that will serve all victims. All victims are different, their cases are different, and a change like the one proposed here would help some victims, and harm others.

The VLCP generally favors transparency of process and therefore concurs that where a SJA disagrees with a PHO's recommendation and intends to advise the CA accordingly, a written justification should be required. A concern is that SJAs are often not military justice litigation specialists. Written justification of a disagreement with the PHO's recommendation may be helpful in illuminating the reasoning behind the difference in analysis.



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If the only choice is between PHO's recommendation being binding on the CA and a SJA being required to justify in writing advice to the CA that goes against the PHO's recommendation, then VLCP would support the latter for the reasons previously stated.

**USMC SVC (A.Q1b.):** A proposed rule change requiring the SJA to state a conclusion when the PHO finds no probable cause, but the SJA believes probable cause does in fact exist, is not necessary to ultimately convey the SJA's conclusion to the convening authority (CA). The SJA, as the senior legal advisor to the CA, provides an invaluable review and analysis of what has occurred at the Article 32 stage.

What this proposed rule change would likely do is create a written "battle of written reports" that will sew more confusion, delay, and second guessing.

Disagree for the above mentioned reasons.

**USAF SVC (A.Q1b.):** PRO: It is essential to the convening authority's decision that he or she understand the nature of any disagreement between the SJA's pretrial advice and the PHO's recommendation. Requiring an in-depth analysis of the SJAs' opinions strengthens accountability and analysis within the process. The SJA's written analysis may assist with the convening authority's decision regarding the decision to refer or dismiss a charge and specification. We note, many SJAs currently do something like this, so codification would merely make it universal.

CONs: This document could be discoverable, unless the proposal language explicitly says otherwise.

With the caveat about release of the document to the defense, CLSV supports this proposal.

**USCG SVC (A.Q1b.):** Yes. PRO: Additional written explanation benefits the convening authority and provides more information with which to make a decision while strengthening accountability overall. It can provide transparency and justification for the convening authority's decision to refer or withdraw charges and would help protect the integrity and fairness of that decision.

CON: The document would be discoverable unless the enacting statute provides otherwise.

Agree, because it provides more transparency in the decision-making process which, regardless of whether charges are referred, is helpful to victims in understanding why certain decisions were made. It also protects against perceptions of bias or unlawful command influence. While, potentially, this provides defense counsel a preview of the government's case, the SVC program believes the requirement would have more benefits than negative consequences.

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**c. Could there be a benefit in having a preliminary hearing akin to the function of a federal grand jury proceeding PRIOR to the preferral of charges?**

- **What are the most compelling arguments for and against this proposition from your organization's perspective?**
- **Does your organization agree or disagree with this proposition? Why or why not?**

**USA SVC (A.Q1c.):** There is NO benefit to have a preliminary hearing akin to the function of a federal grand jury proceeding prior to the preferral of charges. For the reasons provided below, the SVCOPM does NOT agree with this proposition.

To the extent that the preliminary hearing prior to preferral would be an additional step in the military justice process, such may serve to further discourage sexual assault victims from reporting offenses and/or participating in investigations and adjudications. One of the key issues victims often raise to explain their frustration with the military justice system and/or their decisions not to participate concern the substantial length of time a case takes to investigate and adjudicate. Mandating a preliminary hearing before preferral of charges would serve to increase the time a sexual assault case is pending resolution. Greater time lengths may serve to provide some victims with additional time to consider their participation and become comfortable with the process. However, for a majority of the victims, such increased time will serve to frustrate them and discourage confidence that justice will be done.

Additionally, instituting a federal grand jury mandate would remove from commanders their responsibility within the military justice system. Commanders are responsible for the good order and discipline within their ranks. The military justice system is one tool available to commanders to maintain order. The junior commanders who typically make preferral decisions would be removed from the process and denied the opportunity to understand and participate in the system. This experience is not only necessary for their immediate command responsibilities, but also to help them develop as future court-martial panel members responsible for determining guilt and innocence and appropriate sentences when necessary.

**USN SVC (A.Q1c.):** Once again, VLCP is not in a position to offer definitive input on the wider military justice process. This idea bears more study and discussion. VLCP supports a preliminary hearing where military justice litigation specialists are part of the probable cause determination. A preliminary hearing akin to a federal grand jury proceeding is unlikely to have this effect. Rather, a standing panel or panels of military justice litigation specialists receiving evidence and reviewing cases for probable cause may be a more effective alternative. VLCP cannot however provide any input on the logistic possibility of implementing such a process.

VLCP does not generally support a preliminary hearing akin to a federal grand jury because such a process is unlikely to alter preliminary recommendation outcomes. However, VLCP recognizes



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that this proposal or any similar change in preliminary hearing procedure bears further study and discussion.

**USMC SVC (A.Q1c.):** Yes. Although it would be somewhat manpower intensive, having a “military grand jury” of members meeting general Article 25, UCMJ criteria in normal peacetime and non-forward deployed environments would add credibility, overall efficiency, and accountability to the charging process and ultimate consideration by the convening authority (CA) whether to refer charges to court-martial. While there is no current defect to a PHO conducting this function, there are some benefits to a panel of members - applying common sense and judgment to analyze whether charges survive first contact – to conduct this function.

Agree, but it is not a critical area for a rule change. The key at present is to ensure that PHOs have the requisite knowledge and experience to conduct their duties. However, there is merit to placing this function before more than one person (the PHO) and in the hands of a panel where multiple highly qualified individuals can weigh the evidence. More analysis in this area should occur.

**USAF SVC (A.Q1c.):** No. There is no benefit to having an additional preliminary proceeding. As written, the proposal adds an additional hearing in which a victim will have to decide whether or not to participate. The proposal would, in most cases, simply be redundant with the Article 32 hearing. If the grand jury proceeding takes the place of an Article 32 hearing, however, then there are possible benefits for sexual assault victims.

PROs: If a grand jury type hearing replaces an Article 32 preliminary, this type of proceeding has the potential benefit of protecting the victim’s grand jury testimony. A hearing that is closed to the public maximizes the privacy most victims deeply desire. Additionally, the victim’s testimony would be protected from disclosure to the defense. This would be similar to the federal grand jury system. An additional possible benefit is prosecutors will receive a determination of probable cause from jurors who are similar to trial court members. This is a valuable tool for prosecutors to use in explaining the disposition of charges to victims.

CONs: Having a grand jury hearing and a preliminary hearing in order to determine probable cause is redundant. Redundancy has no positive consequence for a sexual assault victim. Additionally, a closed hearing prevents victims from having access to testimony or other evidence presented during the grand jury hearing. Under the current Article 32 hearing process, the victim is provided a copy of the hearing’s audio record and may attend the proceedings. The victim also has the choice to testify at the Article 32 hearing or remain silent during the hearing. A grand jury risks removing this choice from victims. The victim may also provide his or her stance on the case disposition and other relevant matters to the convening authority and this input must be considered. The Article 32 preliminary hearing provides transparency for the victim and the accused at a critical stage of the process. A grand jury will have the potential consequence of losing that transparency and limit the victim’s ability to interact with convening authorities in a meaningful way.

CLSV does not support the proposal to create an additional hearing.

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**USCG SVC (A.Q1c.):** No. It would be redundant and time-consuming. However, if the grand jury proceeding takes the place of an Article 32 hearing, there would be benefits to sexual assault victims.

PRO: If a grand jury type proceeding replaced the current Article 32, it would be closed to the public and provide the victim with the privacy they frequently desire. Additionally, it would provide the legal office a probable cause determination from panel members in advance of the court-martial and could be a valuable tool in assessing how to move forward, or not, with charges. It would provide victim's a chance to tell their version of events and receive "feedback" on their testimony and the strength of the prosecution's evidence.

CON: An additional hearing would create a burden on trial counsel, is duplicative of the Article 32 process, and would further slowdown an already lengthy process. Article 32 preliminary hearings provide sufficient protections to the accused and far surpass what a pre-preferral hearing would offer; for example, detailed defense counsel, discovery and production, and the start of the speedy trial clock. Introducing a separate proceeding would only lengthen an already-long process (a main component of victim dissatisfaction) and eliminates, to a large extent, prosecutorial discretion. It would also force the victim to testify and weaken the value of the input victim's currently provide to the disposition authority.

Disagree for the reasons previously noted. Also, victims overall have been satisfied with the current process.

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**Policy Question 2: Non-Disclosure of Article 34 Pretrial Advice.**

In JPP Recommendation 58, the Panel requested that the DAC-IPAD review whether Article 34 of the UCMJ and R.C.M. 406 should be amended to remove the requirement that the SJA's pretrial advice to the convening authority be released to the defense upon referral of charges to court-martial. The Panel was concerned that this requirement inhibited the convening authority's legal staff from providing a fully developed, candid analysis of the evidence in the case. To begin its evaluation of Article 34, UCMJ, the Committee requests narrative responses to the following questions:

**Should the UCMJ and/or Manual for Courts-Martial be amended to protect a staff judge advocate's Article 34 pretrial advice, and any written proof analysis by a trial counsel (sometimes referred to as a "prosecution merits memorandum"), from disclosure to the defense in order to provide more fully developed and candid written advice to the convening authority regarding the strengths and weaknesses of the charges?**

- a. What are the most compelling arguments for and against this proposition from your organization's perspective?**
- b. Does your organization support or oppose the proposition? Why or why not?**

**USA SVC (A.Q2):** The UCMJ/Manual for Courts-Martial should NOT be amended to protect the staff judge advocate's Article 34 pretrial advice, and any written proof analysis by a trial counsel, from disclosure to the defense in order to provide more fully developed and candid written advice to the convening authority regarding the strengths and weaknesses of the charges. For the reasons provided below, the SVCOPM does NOT support the proposition.

Article 34 does not mandate the SJA advice contain extensive underlying analysis or rationale for the advice. This information is typically discussed verbally between the SJAs and convening authorities. The information contained in the advice is the basic information necessary for convening authorities to understand what offense was committed, who committed the offense, and assurances that there is a legal basis to hold the named individual accountable via referral to court-martial and there is jurisdiction over the named individual to do so. Mandating that the Article 34 pretrial advice contain the underlying rationale would potentially hinder open, candid communication between the convening authorities and their SJAs as there would still be concerns that the written advice may ultimately become discoverable based on military judges' constitutional determinations. With respect to the written proof analysis by trial counsel, there is no requirement that this be produced for discovery. This document is typically not provided to convening authorities for their consideration and as such, efforts to produce them are routinely unsuccessful as they are protected as attorney work product.

**USN SVC (A.Q2):** Again, VLCP is not in a position to offer definitive input on the wider military justice process. In support of this proposal, VLCP generally favors transparency in order to promote trust in the military justice system, and reduce discovery litigation and appellate

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issues. This proposal also creates a concern that the protection of this type of advice from the accused will make it inaccessible to the victim, as well, even after trial.

**USMC SVC (A.Q2):** Protect from disclosure the TC's prosecution merits memo as it can contain analysis and theories of the case (strengths and weaknesses) which are intended to be attorney work-product and necessarily confidential. Disclose the SJA's Article 34, UCMJ written advice which presently requires mere conclusions to be stated and is more akin to a public record of the decision making process.

Enact rules consistent with the above analysis.

**USAF SVC (A.Q2):** Currently, there is no procedural requirement that the government provide a prosecution merits memorandum or proof analysis to the convening authority. R.C.M. 406 requires that a statement with the SJA's conclusions and recommendations be provided to the convening authority before a case may be referred to a general court-martial. R.C.M. 701(a)(1)(A) requires the government provide the SJA's pre-trial advice to the defense as part of discovery.

PROs: The convening authority's SJA must prepare written pretrial advice for every GCM in accordance with R.C.M. 406. The required contents for pretrial advice are prescribed in R.C.M. 406(b):

- (1) Conclusion with respect to whether each specification alleges an offense under the UCMJ;
- (2) Conclusion with respect to whether there is probable cause to believe that the accused committed the offense charged in the specification;
- (3) Conclusion with respect to whether a court-martial would have jurisdiction over the accused and the offense; and
- (4) Recommendation as to the disposition that should be made of the charges and specifications by the convening authority in the interest of justice and discipline.

Currently, pretrial advice does not need to contain any underlying analysis or rationale for the conclusions contained in it. If the SJA pretrial advice were changed to require an in-depth analysis of the evidence and charges this would provide convening authorities additional written advice. Furthermore, it would create a record of the SJA's rationale and legal analysis for the conclusions contained within the pretrial advice. This type of document may assist the convening authority in making a fully informed decision regarding referral of charges. However, such information is normally discussed by the SJA with the convening authority, but is not put into written form. If such a statement is protected from disclosure, the SJA is more likely to produce this type of written advice to the convening authority. This could have the consequence of providing the SJA and convening authority with a more productive discussion of the merits of a case.

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CONS: The current system of providing the SJA's pretrial advice to the convening authority adequately identifies the basic information necessary for a convening authority's decision regarding referral of charges and specifications. SJAs routinely discuss the evidence and disposition options with convening authorities. A requirement that SJAs provide a prosecution merits memorandum or proof analysis may be redundant with current practice. Additionally, if the pre-trial advice were to become a protected document it would remove an element of transparency from the current system.

CLSV supports the proposal to enhance candid discussion of case evidence and disposition options between a convening authority and his or her SJA. However, CLSV only supports the proposal if the requirement for convening authorities to consider victim disposition views remains the same.

**USCG SVC (A.Q2):** The SJA's Article 34 advice should not be withheld from defense and the prosecution merits memorandum that trial counsel frequently provide the SJA should be protected from disclosure.

PRO: The prosecution memo is trial counsel's opportunity to provide candid communication about a case's strengths and weaknesses to the SJA. It should be protected so that the trial counsel can articulate evidentiary issues as well as their personal opinions about the case's likelihood of success. SJAs, while not providing all the information in prosecution memos, are able to synthesize the information to provide their best recommendation to the convening authority. If the prosecution memo were to take the place of the SJA's Article 34 advice and it was withheld from defense, it would eliminate an element of transparency that currently exists in the process.

CON: Maintaining the status quo means that some of the written information prosecutors provide their SJAs stays within legal channels and, potentially, convening authorities are not as well-informed of the possible legal hurdles to successful prosecution.

Oppose for the reasons previously noted.

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**A. Policy Questions for Trial Defense Service Organizations**

**Policy Question 1: Article 32 Preliminary Hearing.**

JPP recommendation 55 requested the DAC-IPAD continue to review the usefulness of the Article 32 preliminary hearing process including the weight given to preliminary hearing officers' (PHOs) recommendations. DAC-IPAD members reviewing penetrative sexual assault investigative case files have found instances in which a PHO indicated, typically in a very thorough report, that no probable cause existed for a penetrative sexual assault offense, the staff judge advocate disagreed, the case was referred to court-martial and an acquittal resulted. To begin its evaluation of the Article 32, UCMJ, process, the Committee requests narrative responses to the following questions:

- a. Should the recommendations of PHOs against referral of sexual assault charges to court-martial, based on a lack of probable cause, be binding on convening authorities?**
  - What are the most compelling arguments for and against this proposition from your organization's perspective?**
  - Does your organization support or oppose the proposition? Why or why not?**

**USA TDS (A.Q1a):** Yes. The PHO's decision as to probable cause on a preferred charge or specification should be binding on the convening authority with respect to every charge, not just sexual assault charges. When a PHO does not find probable cause for an offense, that offense should be dismissed without prejudice.

In the event charges are dismissed without prejudice, the government should be able to prefer new charges only when additional evidence that was not available to the government at the time of the Article 32 Preliminary Hearing becomes available and that evidence clearly establishes probable cause. Further, the government should have recourse to "appeal" the PHO's findings if they are clearly erroneous which would allow them to seek a new Article 32 Preliminary Hearing but not allow them to proceed with referral absent a probable cause finding by a PHO. The appeal authority could be a military judge.

The stated purpose for the Art 32 under the new law is for the PHO to determine if there is sufficient evidence to establish probable cause. We require that the PHO be an attorney so that the officer considering the evidence can provide a legal analysis. Under the current system, there is little, if any, utility to the Article 32 when the government can simply ignore the PHO's recommendation. Further, allowing a charge to go forward that has not met even the relatively low bar of probable cause results in more acquittals at trial.

Making the PHO's probable cause finding binding will motivate counsel for the government to better investigate the allegations and fully develop and prepare the case earlier in the process. The government will likely present more evidence and witnesses at the hearing to prove up the allegations and the defense may be motivated to reveal evidence early in hopes of prevailing at



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the Article 32. In short, making the PHO's legal conclusion on PC binding will make the hearing more meaningful for both the government and defense.

USATDS supports this proposition, as this proposition will greatly enhance the efficiencies of the Article 32 for both sides and increase the efficiencies within the military justice system.

**USN TDS (A.Q1a.):** Yes. Similar to a "no true bill" concept that is found in the grand jury context, the Government should be required to present at least the minimum evidence necessary to reach a probable cause threshold in order to proceed. The PHO is in a significantly better position than a convening authority to make this probable cause assessment given the 27(b)(2) certification requirements associated with service as an impartial preliminary hearing officer or, in exceptional circumstances, as the preliminary hearing officer's advisor. By making the finding of the PHO binding in this regard, the Government is incentivized to ensure necessary evidence is provided at this stage of the proceeding. The benefit is not limited to the probable cause determination, but also enables a more complete assessment of the evidence in support of the other recommendations required at this stage of the court-martial process. Finally, this proposal is in alignment with 10 U.S.C. § 836 regarding the application of the principles of law and the rules of evidence that are generally recognized in the United States District Court, as appropriate.

The Navy Defense organization supports this proposal for the reasons stated above. In addition, we believe that reducing the number of penetrative sexual assault cases that proceed to trial and result in acquittals is of benefit to the enterprise as a whole. Conviction rates in these cases will increase as there is a means to properly dispose of cases that should never reach court-martial in the first place. Likewise, a process that includes protections such as these will increase confidence in the military justice system by service members, thereby enhancing good order and discipline and refuting the perception that prosecutions are often politically motivated in sexual assault cases. Our organization has experienced, on a number of occasions, the disposition model that desires to "play it safe" and allow the process to likely acquit the accused rather than end the proceeding at an early stage due to a lack of evidence. While there is some argument that new evidence may come to light that would bolster the decision to move forward, this analysis and investigation should be occurring before preferral. Drafting of this new proposition can certainly include an avenue for newly discovered evidence to be incorporated into a subsequent review to meet the probable cause standard if warranted.

**USMC TDS (A.Q1a.):** Yes, in part. A finding of no probable cause should be binding on the convening authority, because preliminary hearings are – whenever practicable – conducted by “an impartial judge advocate, not the accused, who is certified under Article 27(b)(2)” (R.C.M. 405(d)(1)(A), MCM (2019 ed.)), and who “shall not depart from an impartial rule and become an advocate for either side,” ((R.C.M. 405(d)(1)(D), MCM (2019 ed.)). Accordingly, a finding of no probable cause is an independent determination made by a neutral and detached officer after review of the evidence (and without the limitations of the rules of evidence) and should carry great weight. A finding of the existence of probable cause, however, should not bind the convening authority because of other factors (such as victim preference and military exigency) that might warrant dismissal or an alternative disposition despite the existence of probable cause.

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Finally, where a preliminary hearing officer determines that there is no probable cause, a convening authority should have the power to order a second or subsequent preliminary hearing if the Government discovers significant additional evidence of guilt.

**USAF TDS (A.Q1a.):** Yes. When the PHO finds that there is no probable cause to believe that the accused committed the offense alleged (whether a sexual assault or any other offense under the UCMJ), that finding should prohibit the convening authority from referring the deficient specification(s) to court-martial.

The changes made to Article 32 have reduced its utility as a vehicle for investigating the allegations. Today, the Article 32 hearing is a legal analysis regarding whether the evidence made available to the PHO establishes probable cause. If the legal conclusions from that review are not binding, then there is little utility to the Article 32 hearing, i.e., if the government is going to proceed regardless of the findings of the PHO, the hearing does not further its purposes and provides no meaningful protection for an accused against warrantless charges.

Making the PHO's lack of probable cause finding binding will incentivize government counsel to better investigate the allegations and prepare the case. The government will likely present more evidence and witnesses at the hearing to prove up the allegations and the defense will likewise be more likely to reveal evidence early in hopes of prevailing at the Article 32. In short, making the PHO's legal conclusion on probable cause binding will make the hearing more meaningful for both the government and defense, which in turn may expedite the resolution of meritorious cases through plea agreements.

Moreover, allowing a case to go forward when the government cannot even establish probable cause undermines good order and discipline and is unfair to the accused, the complaining witness, and the command. It forces a drawn out court-martial process, which can be burdensome on the command and extremely stressful to both the complaining witness and the accused. When the accused is subsequently acquitted, (1) the complaining witness may feel betrayed by the system, (2) the accused, despite the acquittal, may be unable to overcome the taint of the allegation and the impacts of having been on administrative hold for months or years, (3) the military community may lose faith in the system due to a sense that even unfounded allegations result in courts-martial, and (4) those outside the military may sense that military members sanction sexual assaults based on the acquittal.

The argument against making the PHO's legal conclusion on probable cause binding on the convening authority is the risk that the PHO's conclusion will be erroneous or, subsequent to the hearing, new evidence is discovered that would have supported a finding of probable cause. To counter this concern, we propose that a specification that is deemed deficient due to a PHO's finding of lack of probable cause may be re-preferred on the accused with the permission of a superior convening authority. Specifically, before "re-preferred" can occur for any specification stricken as a result of the finding of no probable cause, the convening authority who ordered the Article 32 must submit a justification request to the next higher convening authority and provide defense counsel five days to respond to the justification/request. That convening authority will consider the submissions, together with advice from his or her SJA, and may only authorize prefferal of the specification(s) upon a finding that: (1) the original PHO's legal conclusion



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regarding probable cause was “clearly erroneous;” or (2) additional evidence that was not reasonably available to the government at the time of the hearing clearly establishes probable cause to believe the accused committed the offense. If the offense is again found deficient for want of probable cause at a subsequent Article 32 hearing, the offense may not be preferred again.

AFLOA/JAJD supports this proposition. This proposition would be a substantial step toward a more informed court-martial process for all involved. We believe, however, that commands need a route to re-prefer a specification where the PHO's finding was clearly erroneous or if additional evidence becomes available.

Also, we strongly suggest additional training for those who serve as PHOs to improve the consistency among the PHOs. To qualify as a PHO, the judge advocate should have a certain level of experience in military justice (i.e., MJET 3), have accomplished the PHO training, and be designated by TJAG as a qualified PHO. (Perhaps the military magistrates would be appropriate for this function. RCM 502(c)(2).)

**USCG TDS (A.Q1a.):** Yes. Similar to a “no true bill” concept that is found in the grand jury context, the Government should be required to present at least the minimum evidence necessary to reach a probable cause threshold in order to proceed. The PHO is in a significantly better position than a convening authority to make this probable cause assessment given the 27(b)(2) certification requirements associated with service as an impartial preliminary hearing officer or, in exceptional circumstances, as the preliminary hearing officer’s advisor. By making the finding of the PHO binding in this regard, the Government is incentivized to ensure necessary evidence is provided at this stage of the proceeding. The benefit is not limited to the probable cause determination, but also enables a more complete assessment of the evidence in support of the other recommendations required at this stage of the court-martial process. Finally, this proposal is in alignment with 10 U.S.C. § 836 regarding the application of the principles of law and the rules of evidence that are generally recognized in the United States District Court, as appropriate.

The Coast Guard Defense organization supports this proposal for the reasons stated above. In addition, we believe that reducing the number of penetrative sexual assault cases that proceed to trial and result in acquittals is of benefit to the enterprise as a whole. Conviction rates in these cases will increase as there is a means to properly dispose of cases that should never reach court-martial in the first place. Likewise, a process that includes protections such as these will increase confidence in the military justice system by service members, thereby enhancing good order and discipline and refuting the perception that prosecutions are politically motivated in sexual assault cases. While there is some argument that new evidence may come to light that would bolster the decision to move forward, this analysis and investigation should be occurring before referral. Drafting of this new proposition can certainly include an avenue for newly discovered evidence to be incorporated into a subsequent review to meet the probable cause standard if warranted.

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**b. Alternatively, should Article 34, UCMJ, and/or R.C.M. 406 be amended to require additional written explanation when a staff judge advocate's Article 34 advice disagrees with a PHO's finding of no probable cause?**

- **What are the most compelling arguments for and against this proposition from your organization's perspective?**
- **Does your organization agree or disagree with instituting such a requirement? Why or why not?**

**USA TDS (A.Q1b.):** Yes, but only if the above proposal is rejected.

Requiring the staff judge advocate to explain, in writing, why the PHO's legal conclusion is erroneous will add transparency to the process, ensure convening authorities are better informed about the case, and thus better empower convening authorities to decide on the proper disposition of the charges. Presently, staff judge advocates are ethically bound to advise convening authorities against referring cases where the evidence is insufficient to support a conviction. This proposal will align with already existing ethical responsibilities.

USATDS agrees with instituting this requirement, though it is preferable that the PHO's probable cause determination is binding on the Convening Authority.

**USN TDS (A.Q1b.):** Yes. In the absence of a modification to the binding nature of probable cause recommendations, the SJA should be required to specifically detail why the preliminary bearing officer was incorrect in their assessment through the application of the law to the facts of the case. This is an important safeguard to justify the time, expense, and administrative and punitive exposures to an accused service member. Furthermore, it provides assurances to the public and the individual service member that the case reached the referral stage with an appropriate level of due process and was not the result of a Staff Judge Advocate advising his or her client to take the politically "safest" solution. As non-lawyer convening authorities are making referral decisions, the legal foundation for these decisions should be clear to all parties. Our organization notes no compelling argument against including this additional written explanation. Additionally, this process supports the the independence of the Staff Judge Advocate as required by 10 U.S.C. § 834 and prevents the rubber stamping of the prosecution's position.

The Navy Defense organization agrees with this proposition for the reasons stated above.

**USMC TDS (A.Q1b.):** Yes. If a staff judge advocate finds probable cause after a preliminary hearing finds no probable cause, then the staff judge advocate should be required to explain how that finding was reached. The single most compelling reason for this is the most logical.

When a qualified and certified judge advocate, who presumably had the requisite training/experience to be selected by the government to serve as a PHO for a particular case, is

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expected to be able to make an effective probable cause determination in a case. To allow a staff judge advocate to overturn that recommendation undermines the process and smacks of forum shopping.

**USAF TDS (A.Q1b.):** Yes, but we prefer making the PHO's legal conclusion binding, as discussed above. If it is not binding, the SJA should be required to explain why the PHO's legal conclusion was clearly erroneous or why the SJA recommends proceeding despite a lack of probable cause.

What are the most compelling arguments for and against this proposition from your organization's perspective?

Requiring the SJA to provide additional analysis (for example, explaining why it did not provide available evidence to the PHO) to a superior legal office will incentivize better proof analyses prior to referral. Presently, legal offices rely heavily on templates that do not include the substantive basis for legal conclusions. Our experience is that the convening authority will follow his or her SJA's advice in the vast majority of cases. Requiring robust advice, particularly where the PHO found no probable cause, helps ensure the convening authority is fully advised regarding the strengths and weaknesses of the case.

Requiring the SJA to explain, in writing, why the PHO's legal conclusion is erroneous will add transparency to the process, ensure convening authorities are better informed about the case, and thus better empower convening authorities to decide on the proper disposition of the charges.

Presently, SJAs are ethically bound to advise convening authorities against referring cases where the evidence is insufficient to support a conviction. Thus, this proposal will align with already existing ethical responsibilities.

We see no downside to the requirement that the government adequately explain why it disagrees with the findings of the PHO.

We agree with instituting this requirement. However, we strongly prefer making the PHO's finding of no probable cause binding (as more fully explained above). If the PHO's legal conclusion regarding probable cause is not binding, we agree with instituting this requirement. The SJA should be required to document his or her legal analysis and recommendation as to why the case should be referred to court-martial despite the finding that no probable cause exists to believe the accused committed the offense.

**USCG TDS (A.Q1b.):** Yes. In the absence of a modification to the binding nature of probable cause recommendations, the SJA should be required to specifically detail why the PHO was incorrect in their assessment through the application of the law to the facts of the case. This is an important safeguard to justify the time, expense, and administrative and punitive exposures faced by an accused service member. Furthermore, it provides assurances to the public and the individual service member that the case reached the referral stage with an appropriate level of due process and was not the result of a Staff Judge Advocate advising his or her client to take the politically "safest" solution. As non-lawyer convening authorities are making referral decisions,

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the legal foundation for these decisions should be clear to all parties. Our organization notes no compelling argument against including this additional written explanation. Additionally, this process supports the independence of the Staff Judge Advocate as required by 10 U.S.C. § 834.

The Coast Guard Defense organization agrees with this proposition for the reasons stated above.

**c. Could there be a benefit in having a preliminary hearing akin to the function of a federal grand jury proceeding PRIOR to the preferral of charges?**

- **What are the most compelling arguments for and against this proposition from your organization's perspective?**
- **Does your organization agree or disagree with this proposition? Why or why not?**

**USA TDS (A.Q1c.):** This proposition could have some merit in that it would dispose of weak cases prior to the preferral of charges. However, it is difficult to envision exactly how such a system would work in the military justice system and its expeditionary character. Who would be in charge of the preliminary hearing? How would the system work in a deployed environment or at smaller installations? Would it increase the amount of time the government takes in preferring charges?

The most compelling argument for this proposition would be to protect accused Soldiers from having charges preferred against them when the evidence is not sufficient to meet the very low threshold of probable cause. While the remedy of making the PHO's probable cause determination binding will add some protection for the Soldier, the Article 32 hearing takes place weeks and sometimes months after the preferral of charges. As stated above, it is difficult to conceptualize how this proposition could be instituted in the military system without greatly affecting its efficiency. It would be burdensome to small installations or in a division conducting combat operations and will likely increase the amount of time necessary to take a case to trial. There is also an argument that this proposition could make the system less transparent than it is now.

USATDS is generally not opposed to adding another layer of protection for Soldiers especially if it will protect Soldier from preferral of charges when probable cause is not met. However, until the proposition is more developed, it is difficult to take a firm stance.

**USN TDS (A.Q1c.):** No. The Navy Defense organization does not see any benefit to a grand jury process in addition to existing Article 32 proceedings. The matters that would be addressed at a grand jury are already provided for at the preliminary hearing.

We disagree with this proposal as there is no identifiable benefit given the current structure of preliminary hearings and the recommendations to make the PHO's recommendation binding

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and/or to require the staff judge advocate to provide additional written explanation in the Article 34 advice when he/she disagrees with a PHO's finding of no probable cause.

**USMC TDS (A.Q1c.):** Maybe, but significant additional studies/considerations are necessary in order to determine if it is supportable.

The bureaucratic and administrative costs of such a process would outweigh any benefits. The current process – whereby charges are preferred based on a report of offense (R.C.M. 301) and preliminary inquiry (R.C.M. 303) – provides an appropriate initial screening tool for allegations of misconduct. The preliminary hearing process should not become a substitute for those longstanding procedures, but rather should remain a check on the unwarranted referral of charges to a general court-martial.

**USAF TDS (A.Q1c.):** Maybe. The most compelling argument for this proposition is the same as it is in the civil arena: the grand jury serves as a “buffer or referee between the Government and the people.” United States v. Williams, 504 U.S. 36, 47 (1992). (In military justice, everyone is “the Government,” but it would still allow the regulated community to referee the prosecution of one of its members.)

The most compelling arguments against the proposition is that it is contrary to how military justice has operated for over 240 years. Since time immemorial, any person subject to the code has been empowered to prefer charges on any other person subject to the code. Because an accuser may not have the authority to convene a “grand jury,” the requirement could make it easier to “bury” an allegation by simply not taking the charge to the “grand jury.” Additionally, a “grand jury” will likely add additional time and expense to the military justice process and the demand for additional members will have operational impacts as well.

AFLOA/JAJD is not opposed to this proposition but believes it is less desirable than making the Article 32 hearing more meaningful as set out above.

**USCG TDS (A.Q1c.):** No. The Coast Guard Defense organization does not see any benefit to a grand jury process in addition to existing Article 32 proceedings. The matters that would be addressed at a grand jury are already provided for at the preliminary hearing.

We disagree with this proposal as there is no identifiable benefit given the current structure of preliminary hearings and the recommendations to make the PHO's recommendation binding and/or to require the staff judge advocate to provide additional written explanation in the Article 34 advice when he/she disagrees with a PHO's finding of no probable cause.

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**Policy Question 2: Non-Disclosure of Article 34 Pretrial Advice.**

In JPP Recommendation 58, the Panel requested that the DAC-IPAD review whether Article 34 of the UCMJ and R.C.M. 406 should be amended to remove the requirement that the SJA's pretrial advice to the convening authority be released to the defense upon referral of charges to court-martial. The Panel was concerned that this requirement inhibited the convening authority's legal staff from providing a fully developed, candid analysis of the evidence in the case. To begin its evaluation of Article 34, UCMJ, the Committee requests narrative responses to the following questions:

**Should the UCMJ and/or Manual for Courts-Martial be amended to protect a staff judge advocate's Article 34 pretrial advice, and any written proof analysis by a trial counsel (sometimes referred to as a "prosecution merits memorandum"), from disclosure to the defense in order to provide more fully developed and candid written advice to the convening authority regarding the strengths and weaknesses of the charges?**

- a. What are the most compelling arguments for and against this proposition from your organization's perspective?**
- b. Does your organization support or oppose the proposition? Why or why not?**

**USA TDS (A.Q2.):** No, in regards to the Article 34 advice. The written proof analysis by a trial counsel is generally protected under attorney-client work product.

The Article 34 advice is a critical step in the military justice system and should be disclosed to defense counsel in order to promote the fairness and transparency that is essential to our military justice system. To do otherwise would decrease the transparency of our system and would potentially prevent defense counsel from knowing when the convening authority made decisions contrary to the advice of the staff judge advocate or from knowing when the staff judge advocate gave improper legal advice.

USATDS opposes this recommendation. Permitting the SJA to have secret written communications with the convening authority who acts with almost complete discretion within the military justice system makes the system less fair and transparent.

**USN TDS (A.Q2.):** No. The Navy Defense organization does not believe that there is any compelling argument for shielding candid or fully developed written advice concerning the strengths and/or weaknesses of the charges. This process provides at least some assurances that the staff judge advocate and convening authority are maintaining a neutral role and not simply parroting the trial counsel's position. The government is required to disclose the basis of any favorable evidence to the accused and disclosing the reasoning on why a case should or should not go forward merely serves to support the fair administration of justice. Because of the nature of military justice - the military commander having prosecutorial discretion-transparency is important and critical to good order and discipline and public faith in the military.



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The Navy Defense organization opposes this proposition as it creates an additional barrier to transparency in the military justice system. The proposal is more likely to reduce public confidence that the individual service member's case reached the referral stage with an appropriate level of due process.

**USMC TDS (A.Q2.):** No. In the military justice system, the convening authority performs a quasi-judicial role. *United States v. Nealy*, 71 M.J. 73, 78 (C.A.A.F. 2012) (Baker, C.J., concurring); see *United States v. Wiechmann*, 67 M.J. 456, 461 (C.A.A.F. 2009) (describing responsibilities that the convening authority has which, in the civilian system, would be the responsibility of a judge). For example, the convening authority cannot have a personal interest in the outcome of a case, have a personal bias toward the accused, or have inelastic attitudes toward the performance of their post-trial responsibilities. *United States v. Davis*, 58 M.J. 100, 102 (C.A.A.F. 2003). The military justice system must be fair, and must also appear to be fair in order to effectively further good order and discipline in the armed forces. *United States v. Berry*, 34 M.J. 83, 88 (C.M.A. 1992) (citations omitted). Transparency is necessary to ensure fairness in the military justice system and to ensure that the system appears to be fair. Allowing a prosecutor to confidentially communicate with the convening authority about a case undermines the appearance of fairness in the military justice system. Decreasing transparency in the system is especially troubling where, as here, the current process of providing a copy of the written pretrial advice to the defense has worked fine and, as discussed below, there is little potential benefit from exempting the pretrial advice from disclosure.

Mandating non-disclosure of the pretrial advice or case analysis memorandum (CAM) would not affect the facts that the SJA or trial counsel address in those documents because the underlying facts in a case must otherwise already be disclosed to the defense. Under Rule for Courts-Martial 701, the government is obligated to provide discovery to the defense. Further, under *Brady*, *Giglio*, and their progeny, the government has a duty to disclose exculpatory evidence to the defense. Because of this, the defense either has been or will be provided with any facts that are contained in the pretrial advice or CAM. None of the underlying facts about a case contained in the pretrial advice or CAM are privileged or not otherwise already subject to disclosure to the defense. Therefore, protecting the pretrial advice or CAM from disclosure will not foster a more fully developed discussion of the relevant facts in the case.

Because the defense is entitled to discovery and disclosure of exculpatory evidence, the strengths and weaknesses of a case are likely already known by the defense and mandating non-disclosure of the pretrial advice or CAM would not foster more candid advice or a more fully developed analysis of the strengths and weaknesses of the case. Because the defense is entitled to discovery, the defense is operating with the same set of evidence in evaluating the strengths and weaknesses of a case as the SJA or trial counsel. Given this, it is unlikely that the SJA would be identifying strengths or weaknesses in the case that the defense counsel are not also independently identifying. The chances of this are even lower given that, prior to the pretrial advice or a CAM, an Article 32 Preliminary Hearing has already been conducted and the Preliminary Hearing Officer has reviewed the evidence and commented on the strengths and weaknesses of the case.

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Furthermore, it should be expected that non-disclosure will cause the advice to be less developed/candid – not more – because undisclosed advice cannot be challenged as incomplete, incompetent, or untruthful. It has long been recognized that “human nature being what it is, the very fact of being called upon to condemn or countenance one's own workmanship cannot create a healthy outcome and less so when the outcome concerns the accused's denial of substantial rights.” *United States v. Renton*, 25 C.M.R. 201, 205 (C.M.A. 1958). Accordingly, pretrial advice (including CAM) must remain subject to scrutiny by the person whose Constitutional rights and liberty are at stake.

Finally, we should also assume that SJAs, as licensed attorneys and commissioned officers, have the courage and integrity to do their job, be candid in providing pretrial advice to their convening authorities, and provide fully developed advice regardless of whether it is subject to disclosure. Thus, it should not be expected that, by protecting the pretrial advice from disclosure that it would provide more in-depth or candid advice than it already does.

**USAF TDS (A.Q2.):** No. The validity of the military justice system – and the underpinning of good order and discipline – demand that the system be fair and transparent. The convening authority performs a quasi-judicial function and creating a rule that allows for secret communications between the prosecutor’s office and the convening authority undermines the perceived fairness of the military justice system. Moreover, it is the job of the SJA to seek justice, not merely convictions. At this point in the proceeding, the government should have provided, or be ready to provide, the defense with full discovery. The trial counsel will retain his or her work product (i.e., proof analysis) insofar as how the evidence will be presented at trial, arguments on the evidence, and strategies to exclude evidence proffered by the accused, etc.

The most compelling argument for this proposition is to free the SJA from the repercussions of making frank observations (e.g., the lack of veracity of a complaining witness) or inaccurate statements (e.g., bolstering a weak case or misapplying the law). However, the SJA should only include facts that are supported by the evidence and if that means conveying tough truths, the SJA should do so.

The most compelling arguments against this proposition are (1) the lack of need, (2) the lack of transparency, and (3) the damage it would cause to the perceived fairness of the military justice system. If the SJA’s legal analysis is flawed, the defense should have an opportunity to point out those flaws to the SJA and the convening authority. Moreover, if there are weaknesses in the case that tend to negate the guilt or culpability of the accused, that information must be provided to the defense regardless of whether it is included in the pretrial advice to the convening authority.

JAJD opposes this proposition for the reasons stated above. There is no real benefit to allowing secret communications between the prosecutor’s office and the convening authority and allowing those communications will undermine confidence in the military justice system and have a deleterious effect on good order and discipline.



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**USCG TDS (A.Q2.):** No. The Coast Guard Defense organization does not believe that there is any compelling argument for shielding candid or fully developed written advice concerning the strengths and/or weaknesses of the charges. This process provides at least some assurances that the staff judge advocate and convening authority are maintaining a neutral role. The government is required to disclose the basis of any favorable evidence to the accused and disclosing the reasoning on why a case should or should not go forward merely serves to support the fair administration of justice. Because of the nature of military justice - -the military commander having prosecutorial discretion—transparency is important and critical to good order and discipline and public faith in the military.

The Coast Guard Defense organization opposes this proposition as it creates an additional barrier to transparency in the military justice system. The proposal is more likely to reduce public confidence that the individual service member's case reached the referral stage with an appropriate level of due process.

## **B. Operational Questions for Service Criminal Law/Military Justice Divisions**

### **Question 1: Prosecution Initiation/Declination.**

- a. Is the ability to obtain and sustain a conviction being considered in decisions to prefer charges in sexual assault cases? If so, what weight is it given? What weight is given to the victim's preferences at this stage?
- b. Do your prosecutors recommend that certain sexual assault prosecutions should be declined because the accused is subject to effective prosecution in another jurisdiction? If so, what factors do they consider?
- c. How do you ensure there is appropriate consistency across jurisdictions (GCMCAs) within your Service with regard to the decision whether to prefer charges or decline prosecution, in order to prevent unwarranted disparity in prosecution initiation or declination decisions?

### **Question 2: Article 32 Preliminary Hearing Practice.**

- a. Do the judge advocates available to serve as PHOs in sexual assault cases possess sufficient training and experience?
- b. In Article 32 preliminary hearings in which a sexual assault victim does not testify, does the prosecution realize a benefit from the hearing? Does the defense realize a benefit?
- c. Have the Military Justice Act of 2016 requirements for a more detailed analysis of the evidence by the PHO, and the post-hearing submission of supplementary information relevant to disposition pursuant to R.C.M. 405(k) assisted SJAs and convening authorities in making a referral decision?

### **Question 3: Effect of the New Article 33 Disposition Guidance.**

JPP Recommendation 57<sup>4</sup> requests that the DAC-IPAD determine what effect, if any, the Article 33 disposition guidance has on the number of sexual assault cases being referred to courts-martial.

In practice, since the non-binding disposition guidance codified in Article 33 and Appendix 2.1 of the Manual for Courts-Martial went into effect on January 1, 2019, what effect, if any, has this guidance had on the number of sexual assault cases referred to courts-martial?

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<sup>4</sup> JPP Recommendation 57: After case disposition guidance under Article 33, UCMJ, is promulgated, the Secretary of Defense and DAC-IPAD conduct both military installation site visits and further research to determine whether convening authorities and staff judge advocates are making effective use of this guidance in deciding case dispositions. They should also determine what effect, if any, this guidance has had on the number of sexual assault cases being referred to courts-martial and on the acquittal rate in such cases.

#### **Question 4: Article 33 Disposition Guidance, in Practice.**

- a. How important is the ability to obtain and sustain a conviction to the decision to refer a sexual assault charge to trial?
- b. What considerations are SJAs incorporating into their recommendation as to disposition of the charges and specifications “in the interest of justice and discipline?” How are these considerations used in cases in which the SJA recommends referral contrary to the recommendation of the Article 32 PHO? Are these other considerations discussed in writing in the Article 34 advice or being briefed orally (and by whom), or both?<sup>5</sup>
- c. In a sexual assault case pending referral, if the SJA determines there is probable cause to believe that the accused committed a sexual assault offense, but conviction is not likely, under what circumstances should the SJA advise the convening authority to refer the case to court-martial?
- d. In such cases, do acquittals help or hinder the maintenance of good order and discipline, and why?

#### **Question 5: Conviction and Acquittal Rates for Sexual Assault Offenses**

The DAC-IPAD’s Third Annual Report (March 2019),<sup>6</sup> contains an analysis of penetrative sexual assault court-martial documents from all Military Services indicating the following statistics for reference in the questions that follow:

- 20% of preferred cases result in a conviction for a penetrative sexual assault offense
- 31% of referred cases result in a conviction for a penetrative sexual assault offense
- 31% of referred cases result in a full acquittal
- 25% of contested cases result in a conviction for a penetrative sexual assault offense
- 35% of contested cases result in a full acquittal

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<sup>5</sup> Rule for Court-Martial (R.C.M.) 601 provides, “If the convening authority finds or is advised by a judge advocate that there is probable cause to believe that an offense triable by a court-martial has been committed and that the accused committed it, and that the specification alleges an offense, the convening authority may refer it.”

Article 34, UCMJ, and R.C.M. 406 prohibit the convening authority from referring a case to court-martial unless the staff judge advocate advises that there is probable cause to believe the accused committed the offense charged; in addition, Article 34, UCMJ, and R.C.M. 406 require the staff judge advocate to provide a recommendation as to the disposition that should be made of the charges in the interest of justice and discipline.

Appendix 2.1, which implements Article 33, UCMJ, provides additional guidance regarding factors the convening authorities and staff judge advocates should consider when exercising their duties with respect to the disposition of charges, including “[w]hether admissible evidence will likely be sufficient to obtain and sustain a conviction in a trial by court-martial . . .”

<sup>6</sup> See DAC-IPAD Report Appx. I, p.8, 12-13 (Table 1C, *Case Characteristics (FY2017)*; Table 2C, *Case Dispositions and Case Outcomes (FY 2017)*). available at [https://dacipad.whs.mil/images/Public/08-Reports/DACIPAD\\_Report\\_03\\_Final\\_20190326\\_Web.pdf](https://dacipad.whs.mil/images/Public/08-Reports/DACIPAD_Report_03_Final_20190326_Web.pdf).

The Committee plans to undertake an in-depth analysis to better understand and evaluate the military's sexual assault conviction and acquittal rates. To begin its evaluation, the Committee requests narrative responses to the following questions:

- a. Are conviction and acquittal rates useful metrics for assessing the health and effectiveness of the military justice system? Why or why not?
- b. Can you identify factors that contribute to the conviction rate for sexual assault offenses within each Military Service? Please describe.
- c. In your Service, are the conviction and acquittal rates for other offenses similar to those for sexual assault? Is this information routinely tracked by your Service?

**Question 6: Prosecutor and Defense Counsel Training.**

Do military prosecutors and defense counsel in your Service have sufficient training to ensure just convictions and acquittals in sexual assault cases?

**Question 7: Victim Participation in the Reporting, Investigation, and Prosecution of Sexual Assault Crimes.**

The DAC-IPAD's Third Annual Report (March 2019), indicates that in a random sample of 164 penetrative sexual assault investigations reviewed by Committee members, 34% of the cases contained a record of the victim declining to participate at some stage in the process.

- a. Does your organization collect or track any information regarding victim participation/declination in sexual assault cases? If so, please explain.
- b. What, either anecdotally or based on your organization's analysis, are the most frequent reasons victims give for declining to participate? Do these reasons differ when comparing civilian and military victims?

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**B. Operational Questions for Service Criminal Law/Military Justice Divisions**

**Question 1: Prosecution Initiation/Declination.**

- a. Is the ability to obtain and sustain a conviction being considered in decisions to prefer charges in sexual assault cases? If so, what weight is it given? What weight is given to the victim's preferences at this stage?**

**USA MJ (B.Q1a.):** As set forth in the non-binding disposition guidance, the likelihood of conviction and the victim's preference are both considered in developing a recommendation to prefer a charge. The weight of those two factors is not prescribed and depends on the case's facts and the other factors. In addition, preparing a case for trial continues the development of the evidence, and an early call on a case, for which there is probable cause, that appears too difficult to obtain a conviction initially may not reflect the case's strength at trial.

Specifically, in some cases for which there is probable cause, it is appropriate to pursue a charge even when the likelihood of conviction may appear to be lower than in other cases or when a victim may not be as committed to the prosecution. For example, the community's safety may require action in a multiple-victim case even if a victim may not be as committed to the prosecution.

Ultimately, convening authorities must weigh all the relevant factors in light of the case's strength and the victim's preference to arrive at the best possible decision to further the interests of justice for the community and good order and discipline within the unit.

**USN MJ (B.Q1a.):** Historically, many factors, including the likelihood to obtain and sustain a conviction, and the victim's preference, have been considered in deciding whether to prefer charges in sexual assault cases. Since each case is different, the weight accorded to any particular factor is case and fact dependent. Clearly, the ability to obtain and sustain a conviction is a significant factor considered by military prosecutors. It should be noted that DoD policy favors that a sexual assault victim's preference not to participate in the prosecution precludes continued prosecution of the case.

**USMC MJ (B.Q1a.):** Yes, both factors are considered. A trial counsel prepares a case analysis memo (CAM) in sexual assault cases in accordance with practice directive 2-18, requiring the use of CAMs. That directive states that the primary focus for trial counsel in preparing the CAM "are factors regarding the availability of victims and witnesses, victim preferences regarding disposition, the admissibility of evidence and likelihood of obtaining a sustainable conviction, and criminal history of the accused—particularly in those cases where the government has reason to believe that prior misconduct is relevant and admissible in the present case." Of those factors, victim preferences and the likelihood of obtaining a sustainable conviction are the most important factors. Trial counsel will generally only recommend that charges be preferred if the victim is willing to participate in the prosecution and the available evidence is likely strong enough to obtain a sustainable conviction at trial. Per the practice directive, trial

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counsel will not recommend preferral of charges when doing so is “inadvisable based on one or more of the factors indicated in Appendix 2.1 [of the MCM].” Since most of those factors generally support preferral of charges in any sexual assault case, the overwhelming majority of cases when preferral is not recommended will cite factor (g) or (h): “the availability and willingness of the victim or other witnesses to testify; or “admissible evidence will likely be sufficient to obtain and sustain a conviction in a trial by court-martial.”

**USAF MJ (B.Q1a):** The “ability to obtain and sustain a conviction” is not the legal standard applied in the Air Force. This practice reflects our victim-centric approach to the court-martial process and allows victims who elect to participate in a court-martial a voice to seek a resolution and justice.

In cases with a participating victim where the appropriate standard of proof is met, the Air Force typically prefers and refers charges to a general court-martial. The standard for preferral of charges under RCM 307 is that the person preferring charges (1) has personal knowledge of, or has investigated, the matters set forth in the charges and specifications, and (2) the matters set forth in the charges and specifications are true to the best of the knowledge and belief of the signer. Further, the standard for referral of charges under R.C.M. 601(d) is probable cause. In the Air Force, the credible testimony of a victim is viewed as sufficient evidence. If such a victim is willing to go forward and the standard of probable cause is met, these cases are typically referred to trial by court-martial.

**USCG MJ (B.Q1a):** Both factors are considered. Victim preferences and the likelihood of obtaining a sustainable conviction are the most important factors in making a recommendation as to whether to proceed. Trial counsel will generally only recommend that charges be preferred if the victim is willing to participate in the prosecution and the available evidence is likely strong enough to obtain a conviction. The analysis they engage in is consistent with the ABA Standards for the Prosecution Function and the DoJ Principles of Federal Prosecution.

**b. Do your prosecutors recommend that certain sexual assault prosecutions should be declined because the accused is subject to effective prosecution in another jurisdiction? If so, what factors do they consider?**

**USA MJ (B.Q1b.):** No, as a general matter, the importance of maintaining good order and discipline leads the Army to seek to exercise jurisdiction over all criminal offenses. That said, military prosecutors work closely with their civilian counterparts, and like most general rules, there are exceptions. In determining when to seek jurisdiction over an offense, commanders and military prosecutors consider: the elements of the crime, both the maximum and expected penalties, any procedural differences among the system, the ability of one jurisdiction to try and punish all known offenses, and resourcing considerations – all while engaging their counterparts at local, state, and federal prosecution agencies.

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**USN MJ (B.Q1b.):** It is rare that military prosecutors recommend sexual assault cases be prosecuted by civilian authorities. This is in large part because civilian authorities will rarely agree to prosecute a case that civilian law enforcement did not investigate.

**USMC MJ (B.Q1b.):** No. Trial counsel would not recommend that a sexual assault prosecution be declined simply because the accused is subject to prosecution in another jurisdiction. They would recommend military prosecution, unless the victim has expressed a preference for civilian prosecution and the other jurisdiction has shown an ability and willingness to prosecute the case effectively.

Cases in which concurrent jurisdiction exists are governed by Department of Defense Instruction 5525.07 and Marine Corps Policy and practice advisory 1-17 “Determining Prosecutorial Jurisdiction,” which requires consultation and engagement with the civilian prosecutors as early as possible. A victim or VLC provides a victim’s preferences for military or civilian prosecution to the trial counsel, who document that preference on the CAM and inform the SJA of the preference. If the victim has expressed a preference for civilian prosecution, then Marine Corps policy requires the cognizant commander to ensure the civilian jurisdiction is notified of the preference. If the civilian jurisdiction has expressed interest in prosecuting the case, then the SJA would normally recommend the commander to decline military prosecution in deference to the pending civilian prosecution, unless the Marine Corps has a compelling interest in maintaining the prosecution.

**USAF MJ (B.Q1b.):** Air Force Instruction 51-201, paragraph 4.17.1 states that convening authorities and staff judge advocates foster relationships with local civilian authorities with a view toward maximizing Air Force jurisdiction. Accordingly, the Air Force routinely seeks jurisdiction from the local authorities during the initial stages of an investigation. Of course, this approach is tempered by a victim’s preference. The Air Force does not decline prosecution, and our prosecutors (Trial Counsel) do not make recommendations to decline prosecution. If we have jurisdiction and the admissible evidence satisfies the standard for preferral, the Air Force will move forward, factoring in the victim’s right in the process.

In other words, the Air Force does not consider the outcome in doing so. We are neither burdened by answering to a constituency on our conviction rate nor tethered to results to secure reelection. We consider the quality and quantity of the evidence after seeking jurisdiction. Only in a case where a civilian jurisdiction has not ceded jurisdiction would the Air Force not consider pursuing otherwise appropriate judicial action in a case. If a civilian jurisdiction has not ceded jurisdiction to the Air Force, as a matter of policy, we would not typically prosecute the offender or issue nonjudicial punishment for the same offense. The Air Force may, however, proceed with administrative action.

**USCG MJ (B.Q1b.):** No. Trial counsel would not recommend that a sexual assault prosecution be declined simply because the accused is subject to prosecution in another jurisdiction. If charges were in fact pending in another jurisdiction, there is a process outlined in the Coast Guard Military Justice Manual, COMDTINST M5810.1G, Section 4.D.1, to seek permission to pursue court-martial charges. A trial counsel would recommend military prosecution, unless the



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victim expressed a preference for civilian prosecution and the other jurisdiction indicated the ability and willingness to prosecute the case.

If the victim expressed a preference for civilian prosecution, Section 16.B.6 of the Coast Guard Military Justice Manual, COMDTINST M5810.1G, requires the appropriate commander to ensure the civilian jurisdiction is notified of the preference. If the civilian jurisdiction expressed interest in prosecuting the case, then the SJA would normally recommend the commander decline military prosecution in deference to the pending civilian prosecution, unless the Coast Guard had a compelling interest in proceeding forward.

**c. How do you ensure there is appropriate consistency across jurisdictions (GCMCAs) within your Service with regard to the decision whether to prefer charges or decline prosecution, in order to prevent unwarranted disparity in prosecution initiation or declination decisions?**

**USA MJ (B.Q1c.):** As an initial matter, empirical data and observations from senior military justice practitioners do not support an assertion that unwarranted disparities in the decision to prefer charges exist. This is a consequence of effective withholding policies, comprehensive training and mentorship, the non-binding disposition guidance, and regionalized Special Victim Prosecutors.

As an initial matter, and of note, like any other community, units differ in the type – and amount – of criminal activity. And just like any community and its prosecutors, a surge in one type of crime may warrant additional efforts to prosecute that particular crime to re-establish deterrence.

Further, disposition of penetrative sexual assault offenses is withheld to the Special Court-Martial Convening Authority with an advising Judge Advocate. Disposition of contact sexual assault offenses is withheld to the Battalion Commander. These policies ensure that allegations are considered by senior officers, with specialized legal training. In addition, Commanders are trained on their legal responsibilities, including disposition decisions, throughout their professional military education, specifically, at the Senior Officer Legal Orientation and General Officer Legal Orientation.

Judge Advocates are also trained on providing disposition advice throughout their professional military education, including courses focused on sexual assault. Less experienced Judge Advocates do not provide disposition advice to commanders without the guidance and approval of Senior Trial Counsel and Chiefs of Military Justice. Staff Judge Advocates, who advise the Convening Authority, discuss disposition strategies at both the Staff Judge Advocate Course and the Military Justice Best Practices Course. The Judge Advocate General's Corps senior leaders also provide mentorship to new Staff Judge Advocates.

The new non-binding disposition guidance has become a focus of training for trial counsel, Chiefs of Military Justice, Special Victim Prosecutors, and Staff Judge Advocates, and it provides a useful, consistent framework for discussions with commanders. This guidance

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ensures that commanders and lawyers are considering a uniform set of factors in reaching their disposition decisions.

Finally, Special Victim Prosecutors, with regional responsibilities but centralized management and training, provide continuity and consistency in their understanding of sexual assault offenses and appropriate dispositions. Disposition of offenses, including evaluating the strength of evidence and the prosecution preferences of the victim are a focus in Special Victim Prosecutor training and conferences. These attorneys provide guidance and support on every alleged sexual assault.

**USN MJ (B.Q1c.):** There are nine independent regional GCMCAs in the Navy. While each SJA or GCMCA may have their own views regarding an individual sexual assault case, the recent adoption of disposition guidance required by Article 33 and contained in Appendix 2.1 of the Manual for Courts-Martial (MCM) should promote the consideration of consistent standards for case disposition.

**USMC MJ (B.Q1c.):** The Marine Corps ensures consistency through a uniform process that ensures convening authorities are provided with the same relevant information in every case. As stated in practice directive 2-18, the purpose of standardizing the use of and practice surrounding CAMs was to ensure a more uniform standard of practice, facilitate sound legal advice to convening authorities, and promote justice. SJAs for all GCMCAs receive a CAM that is produced through the same process, with input from experienced Regional Trial Counsel in the rank of Lieutenant Colonel and Litigation Attorney Advisors, who often have years or decades of civilian prosecution experience. This process ensures that the recommendations of SJAs always take into account similar factors, such as the victim's willingness to participate and the strength of the evidence. When this process is combined with the non-binding disposition guidance in Appendix 2.1 of the MCM, it produces decisions that for the most part are consistent across jurisdictions. As stated earlier, this committee has noted that commanders' decisions are reasonable in the overwhelming majority of cases. Anecdotally, military justice practitioners see ample support for this committee's finding. We do not see noticeable disparity between commands in prosecution decisions.

If disparity did exist, there are existing remedies to address it. Service regulations (JAGMAN para. 0128(e)(3)) provide procedures for a detailed trial counsel to seek Secretary of the Navy review of the case file if the convening authority and next higher GCMCA have both decided not to refer charges to trial that the trial counsel thinks should be referred. So far, Marine Corps prosecutors have not found convening authorities' decisions unreasonable or sought review under that provision.

**USAF MJ (B.Q1c.):** In all cases, the Air Force obtains consistency through its multiple levels of review through the command and JA channels (see attached chart "Oversight, Involvement, and Review of Military Justice Actions in the U.S. Air Force), detailed publications, training of military justice practitioners and commanders, and discussion at status of discipline meetings. The Air Force has prescribed specific criteria in our regulations detailing how cases are

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processed through courts-martial, non-judicial punishment, and alternative dispositions. Moreover, the Air Force trains and equips its attorneys to provide appropriate advice with regard to each individual allegation and case. Through our Article 137 briefings, senior leader courses, and local training, the Air Force JAG Corps educates commanders on the military justice system. Before taking command, all squadron, group, vice and wing commanders receive extensive legal training so they fully understand their responsibilities under the Uniform Code of Military Justice and Manual for Courts-Martial. All officers receive similar training at all levels of their professional military education, as do all senior enlisted and junior enlisted members. Finally, our commanders and JAGs at the local level brief the status of discipline at each installation, numbered air force and major command on a quarterly basis. This represents our “cradle to grave” approach with cases – we educate our military justice practitioners and commanders on the process, our attorneys advise commanders on appropriate action throughout the investigative and disposition processes, and then review each case and disposition after the fact. Our system contains multiple layers of oversight.

The servicing legal office for each installation is tasked with prosecuting cases. However, charges alleging penetrative sexual offenses may only be referred to a general court-martial, in accordance with RCM 201. The general court-martial convening authority is the commander that is responsible for referral of rape and sexual assault charges to courts-martial. The general court-martial convening authority is the commander superior to the installation commander/special court-martial convening authority and is generally the commander of a numbered air force. Moreover, the general court-martial convening authority is responsible for making a decision not to refer any such allegation to a court-martial.

Commanders have discretion as to whether to prefer charges and specifications, but that discretion is “checked” by a series of reviews. A commander may only prefer charges if he or she asserts that he or she has personal knowledge of, or has investigated, the matters set forth in the charges and specifications, and (2) the matters set forth in the charges and specifications are true to the best of the knowledge and belief of the signer. If a commander wishes to prefer charges, he may do so, regardless of rank or position. However, the only commander authorized to not prefer charges of adult penetrative sexual assault to a court-martial is a special court-martial convening authority in the rank of O-6 or higher. In other words, if a subordinate commander (e.g., a commander who is not a special court-martial convening authority in the rank of O-6 or higher) intends not to prefer such charges, he or she must make a written recommendation to the special court-martial convening authority in the rank of O-6 or higher. This special court-martial convening authority, who is typically the commander of a Wing, then makes a decision as to whether preferral of charges in such a case is appropriate. The special court-martial convening authority must then notify the general court-martial convening authority of the subordinate commander’s intent not to pursue judicial action on the rape or sexual assault allegation and the special court-martial convening authority’s concurrence. Such notification must be made, in writing, within 30 days of the special court-martial convening authority’s decision. If the special court-martial convening authority and general court-martial convening authority both agree with the lower level commander’s recommendation not to prefer charges, then the case is pushed back down to the lower level commander. That lower level commander may then pursue the action consistent with their proposed course of action.

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With regard to referral, a general court-martial convening authority retains discretion as to whether to proceed to trial by court-martial after a preliminary hearing or waiver of preliminary hearing under Article 32, UCMJ. However, the decision not to refer charges to a general court-martial is subject to review. If the SJA recommends not referring the charges to a court-martial and the general court-martial convening authority agrees, the general court-martial convening authority must forward the case and a notification that he or she does not intend to proceed to a court-martial to the next superior general court-martial convening authority, typically the commander of a major command. If the SJA recommends referring the charges to a general court-martial and the general court-martial convening authority disagrees, then the case file must be forwarded to the Secretary of the Air Force for review. Thus, while some discretion is retained, that discretion is checked by a series of higher-level reviews that prevent unwarranted disparity.

**USCG MJ (B.Q1c.):** The Coast Guard Legal Service Command provides trial counsel to all sexual assault cases prosecuted within the Coast Guard. The Legal Service Command requires trial counsel prepare a prosecution memo that analyzes the case and makes a recommendation regarding prosecution. That memo is reviewed by a senior trial counsel as well as the Commander (O5) Chief of the Military Justice division within the Legal Service Command before it is forwarded to the Commanding Officer of the Legal Service Command and any other SJA if the Legal Service Command is providing trial counsel support to other SJAs. This process ensures that the recommendations of SJAs always take into account similar factors, such as the victim's willingness to participate and the strength of the evidence. When this process is combined with the non-binding disposition guidance in Appendix 2.1 of the MCM, it produces decisions that for the most part are consistent across the service.

**Question 2: Article 32 Preliminary Hearing Practice.**

- a. Do the judge advocates available to serve as PHOs in sexual assault cases possess sufficient training and experience?**

**USA MJ (B.Q2a.):** Yes, all judge advocates meet the minimum requirement for Article 27(b) certification to serve as a PHO, which is satisfied by completion of the Judge Advocate Officer Basic Course. Certification ensures that the Judge Advocate has received training on the probable-cause standard and the military justice process. More specifically, whenever possible, Staff Judge Advocates generally recommend only field grade officers with prior military justice experience as a PHO. In some units, reserve-component Judge Advocates, often with extensive criminal law experience, are also available to serve as PHO.

**USN MJ (B.Q2a.):** The Navy's creation of an Article 32 PHO Unit comprised of senior reserve officers has ameliorated the difficulty of finding PHOs with sufficient training and experience. However, the Article 32 PHO Unit reserve officers are only appointed in approximately 50% of the cases. In the remainder of the cases, PHOs are judge advocates with various backgrounds

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and experience, and most are not MJLQ officers. It is not uncommon for the senior trial counsel, assistant trial counsel, and the SJA to the GCMCA to have more military justice training and experience than the PHO in any particular case.

**USMC MJ (B.Q2a.):** Yes, but the Article 32 process could be improved by requiring that the PHO be a military judge or magistrate.

In the Marine Corps, some PHOs are reservists with significant litigation experience. However, more commonly the PHO will be a deputy SJA from another GCMCA in the same geographic area. All PHOs are certified under Article 27(b), which includes training related to their duties as PHOs. Most of the PHOs will have less than five years' experience as an attorney.

Most preliminary hearings are conducted in court rooms, with the PHO stepping up to sit in the judge's chair for the first time. They will then be expected to make decisions normally regarded as judicial, such as handling objections, controlling the conduct of the hearing, or determining if a hearing should be closed or an exhibit sealed to deal with sensitive personal information. In most cases, they are able to successfully fulfill this role, but they do not have the experience of judges.

Judges have specialized judicial training, experience dealing with counsel and handling objections, and most importantly, will have more training and experience applying the probable cause standard. A requirement that PHOs be military judges or magistrates would better protect the rights of all participants at the hearing and would provide a better determination of probable cause.

**USAF MJ (B.Q2a.):** Through a rigorous pre-service selection process, we educate and train licensed attorneys to be judge advocates. After months of additional schooling, trial practice under observation by a seasoned attorney, and a recommendation from a military judge, those judge advocates are certified by the Judge Advocate General as trial counsel, the Air Force's version of a prosecutor. Experienced trial counsel are selected as PHOs. Moreover, when available, military judges often serve as PHOs in rape and sexual assault cases.

As noted above, the Article 32 process and a grand jury are distinctly different. While some may see them as similar in scope, it is important to note that the grand juries consist of a group of individuals who generally have no criminal justice experience.

**USCG MJ (B.Q2a.):** Yes.

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- b. In Article 32 preliminary hearings in which a sexual assault victim does not testify, does the prosecution realize a benefit from the hearing? Does the defense realize a benefit?**

**USA MJ (B.Q2b.):** Anecdotally, the government and the defense both realize some benefit from the preliminary hearing even if the victim elects not to testify. That said, there are indications that the hearing in its current form is losing some of its benefits to the defense.

**USN MJ (B.Q2b.):** If a sexual assault victim chooses not to testify and the evidence presented at the hearing is little more than documentary evidence there is little benefit to the prosecution. The defense has the opportunity to present to the PHO, at the hearing or within 24 of the hearing, supplementary information that it deems relevant to the convening authority's disposition of the charges. The PHO must summarize and analyze this information in the hearing report and this information may be significant to the GCMCA's disposition decision. Therefore, in certain cases the defense can realize a benefit from Article 32 preliminary hearings.

**USMC MJ (B.Q2b.):** In most cases, neither side realizes any significant benefit from the hearing. Of course, there are individual cases where the hearing might benefit either side, but that is usually not the case.

**USAF MJ (B.Q2b.):** The Article 32 preliminary hearing was originally designed to provide discovery and assess the evidence. However, the Article 32 preliminary hearing process has changed a number of times in recent years. The Fiscal Year 2014 National Defense Authorization Act changes to the Article 32 preliminary hearing eliminated much of the discovery function of the proceeding. However, the hearing still provides an additional legal review in which a PHO reviews the submitted evidence, makes recommendations as to the form and substance of the charges, and provides additional data for the convening authority to consider.

The most recent changes pursuant to the Military Justice Act of 2016, including the ability of the parties to provide supplemental material to the PHO for the convening authority's consideration under RCM 405(k), have only been in practice for six months, so there is limited data on their impact or assessment of the benefit of a hearing in which the victim does not testify. This specific change allows the parties to provide information that may be relevant to the convening authority but is outside the scope of the preliminary hearing. This process restored some of the ability of the parties to get additional information to the convening authority for consideration. One recent change, for example, is the new RCM 405(k)(2), which allows counsel to submit information directly to the PHO that such counsel believes would be relevant to the convening authority. However, this modification may have unintended consequences. For example, it may inadvertently prevent a victim from learning of personal, objectionable evidence and demanding its exclusion and/or a protective order.

**USCG MJ (B.Q2b.):** No.

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- c. Have the Military Justice Act of 2016 requirements for a more detailed analysis of the evidence by the PHO, and the post-hearing submission of supplementary information relevant to disposition pursuant to R.C.M. 405(k) assisted SJAs and convening authorities in making a referral decision?**

**USA MJ (B.Q2c.):** Yes, initial indications are that the requirements for a more detailed analysis from the PHO, which codified a best practice already in place, assist Staff Judge Advocates and convening authorities in making referral decisions. Post-hearing submissions also allow defense counsel in providing relevant information to the convening authority.

**USN MJ (B. Q2c.):** The new rules have only been in effect since January 1, 2019 so it is too early to determine the impact of R.C.M. 405(k) on referral decisions.

**USMC MJ (B. Q2c.):** Although we have not noticed any effect so far, the sample size of only a few months is not large enough to make any statistically significant conclusions. The requirements from the Military Justice Act of 2016 codified best practices that were already in place, so they will likely not have a significant impact.

**USAF MJ (B.Q2c.):** Because the changes mandated by the Military Justice Act of 2016 have been in effect for about six months, there is limited data available to assess the effects on case-processing.

**USCG MJ (B.Q2c.):** Yes.

**Question 3: Effect of the New Article 33 Disposition Guidance.**

JPP Recommendation 57 requests that the DAC-IPAD determine what effect, if any, the Article 33 disposition guidance has on the number of sexual assault cases being referred to courts-martial.

**In practice, since the non-binding disposition guidance codified in Article 33 and Appendix 2.1 of the Manual for Courts-Martial went into effect on January 1, 2019, what effect, if any, has this guidance had on the number of sexual assault cases referred to courts-martial?**

**USA MJ (B.Q3):** The number of sexual assault cases referred to courts-martial has seen a slight increase since January 1, 2019 in comparison to the same period 2018, but there is no way to correlate that increase with the implementation of the non-binding disposition guidance. Many other changes, including the Army's military justice redesign program, may contribute to this increase.



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**USN MJ (B.Q3):** Article 33 and Appendix 2.1 have only been in place since January 1, 2019 so it is too early to determine the effect, if any, this guidance has on the number of sexual assault cases referred to courts-martial. However, since many of the factors memorialized in Appendix 2.1 have historically been considered in the disposition decision, one may not anticipate that Appendix 2.1 will have much effect on the number of sexual assault charges referred to trial.

**USMC MJ (B.Q3):** Although we have not noticed any effect so far, the sample size of only a few months is not large enough to make any statistically significant conclusions. Most convening authorities were already considering all the factors in Appendix 2.1, so codifying those considerations will not have much of an impact on the number of cases referred to courts-martial.

**USAF MJ (B.Q3):** Because the changes mandated by the Military Justice Act of 2016 have been in effect for about six months, there is limited data available to assess the effects on case-processing

**USCG MJ (B.Q3):** It is too soon to tell. Given how closely the disposition guidance is modeled after existing policies, most particularly those employed by the Department of Justice, it is difficult to see why they could or should be changed regardless of any impact, direct or indirect, on sexual assault referrals.

**Question 4: Article 33 Disposition Guidance, in Practice.**

**a. How important is the ability to obtain and sustain a conviction to the decision to refer a sexual assault charge to trial?**

**USA MJ (B.Q4a.):** As discussed in the response to policy question 1, the ability to obtain and sustain a conviction does not have a prescribed weight in the decision to refer a sexual assault charge to trial. Convening authorities and their Staff Judge Advocates consider the likelihood of a conviction along with a number of other considerations, including the strength of the admissible evidence and the victim's preference, with the understanding that in some situations, the interests of good order and discipline will weigh more heavily than these specific factors. While the ability to obtain a conviction is important, it is not, and cannot be, determinative.

**USN MJ (B.Q4a.):** In the Navy, the ability to obtain and sustain a conviction has been considered and discussed for some time in prosecution merits memoranda, so memorializing this factor in the disposition guidance contained in Appendix 2.1 may not have much effect on disposition decisions. However, considering the low probable cause threshold for referral, this factor is significant because it addresses the higher threshold of proof beyond a reasonable doubt and evidentiary issues that may affect the likelihood of conviction at trial.

**USMC MJ (B.Q4a.):** It is very important and along with victim preferences, it is often the primary factor in distinguishing between decisions to refer or not refer. The answer to question

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1a, outlining the case analysis process and how the advice of experienced prosecutors is communicated to the SJA who advises the convening authority, applies equally to this question.

**USAF MJ (B.Q4a.):** In cases where the standard of proof is met and the evidence supports the charges, the Air Force typically prefers and refers charges to a general court-martial. The standard for preferral of charges under RCM 307 is merely that the person preferring charges (1) has personal knowledge of, or has investigated, the matters set forth in the charges and specifications, and (2) the matters set forth in the charges and specifications are true to the best of the knowledge and belief of the signer. Further, the standard for referral of charges under RCM 601(d) is probable cause. While not part of the standard for referral, in fashioning pretrial advice, an SJA must consider the Air Force Standards for Criminal Justice, which deem it unprofessional conduct for a trial counsel to proceed on criminal charges that lack sufficient evidence to support a conviction.

**USCG MJ (B.Q4a.):** It is important, particularly given the link to similar language in the ABA Criminal Justice Standards for the Prosecution Function and the Principles of Federal Prosecution, but not, on its own, dispositive.

- b. What considerations are SJAs incorporating into their recommendation as to disposition of the charges and specifications “in the interest of justice and discipline?” How are these considerations used in cases in which the SJA recommends referral contrary to the recommendation of the Article 32 PHO? Are these other considerations discussed in writing in the Article 34 advice or being briefed orally (and by whom), or both?**

**USA MJ (B.Q4b.):** Staff Judge Advocates consider both general and specific deterrence and the safety of the community when evaluating whether referral is “in the interest of justice and discipline.” The weight of the interest of justice and discipline will vary depending on the facts of the case and the environment of the unit.

**USN MJ (B.Q4b.):** As previously discussed, the written Article 34 pretrial advice is often generic and does not contain a detailed discussion of the evidence in the case. However, despite Article 33 and Appendix 2.1 that make the disposition factors, including “in the interest of justice and discipline,” non-binding, consideration and discussion of those factors is important to the GCMCA's disposition decision. In most instances, the disposition factors will be discussed orally between the SJA and the GCMCA. In the end, commanders are in a unique position to determine the effect of prosecution of a case upon good order and discipline in their units.

**USMC MJ (B.Q4b.):** SJAs are incorporating factors (a)-(n) in Appendix 2.1 of the MCM into their recommendations as to disposition “in the interest of justice and discipline.” However, in sexual assault cases most of the factors—the seriousness of the offense, for example—warrant sending every case to trial at general courts-martial. So the two considerations that are most

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important are the victims' preferences and whether admissible evidence will likely be sufficient to obtain and sustain a conviction. This process is the same, regardless of the PHOs recommendation.

These considerations are being communicated orally to the convening authority by the SJA. The SJA's written advice merely parrots the language in Article 34(a)(1)(A)-(C), UCMJ. The trial counsel's written analysis is not provided to the convening authority to protect it from disclosure. Having the SJA orally brief the convening authority does not provide a historical record and allow future statistical analysis of the actual reasons why a case was not referred to trial.

**USAF MJ (B.Q4b.):** Because the changes mandated by the Military Justice Act of 2016 have been in effect for about six months, there is limited data available to assess the effects on case-processing. Moreover, the Air Force does not collect this data.

Air Force Instruction 51-201, as noted below, has included the non-binding disposition guidance that may be included in the advice.

**9.1.4. Non-Binding Disposition Guidance.** In addition to the pretrial advice, the Secretary of Defense Non-Binding Disposition Guidance at Appendix 2.1 of the 2019 MCM provides guidance the convening authority may consider before referring charges. There is no requirement to address the Non-Binding Disposition Guidance in pretrial advice in order for it to be considered by the convening authority.

**USCG MJ (B.Q4b.):** SJAs put in the written Article 34 advice what the statute and R.C.M. 406 require and generally nothing more. Only SJAs, or the acting SJA, brief convening authorities on disposition; trial counsel do not participate.

- c. In a sexual assault case pending referral, if the SJA determines there is probable cause to believe that the accused committed a sexual assault offense, but conviction is not likely, under what circumstances should the SJA advise the convening authority to refer the case to court-martial?**

**USA MJ (B.Q4c.):** In a case in which there is probable cause but a conviction is not likely, the weight of the interests of justice and discipline, the safety of the community, and victim's preference, as well as the fact that the evidence continues to develop after a case is referred for trial, could all be factors that would cause the Staff Judge Advocate to advise the convening authority to refer the case to court-martial.

**USN MJ (B.Q4c.):** There is no easy answer to this question. Both ABA and DoJ standards provide guidance to civilian federal and state prosecutors concerning charging decisions. The ABA standard provides that a prosecutor should seek or file criminal charges only if the prosecutor reasonably believes that the charges are supported by probable cause, that the admissible evidence will be sufficient to support conviction beyond a reasonable doubt, and the

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decision to charge is in the interest of justice. The DoJ Justice Manual similarly states that government counsel should commence or recommend federal prosecution "if he/she believes that ... the admissible evidence will probably be sufficient to obtain and sustain a conviction... "

There is no valid reason not to apply these standards to the prosecution of sexual assault in the military. An SJA should not recommend referral when a conviction is not likely. Nonetheless, the UCMJ does not prevent a GCMCA from referring a case where the requirements of Article 34 (a valid offense, probable cause, and jurisdiction) have been met. Victim input, the existence of similar allegations against the accused, aggravating circumstances surrounding the offense, or a differential in rank are among the factors to consider.

**USMC MJ (B.Q4c.):** The SJA may advise the convening authority to refer the case when doing so is in the interests of justice and is supported by consideration of the non-binding disposition factors. Based on those factors, an SJA should usually not recommend prosecution unless a conviction is likely. But predicting whether a conviction is "likely" is a very subjective and difficult determination.

Because of the proof beyond a reasonable doubt standard, convictions in sexual assault cases are usually not likely unless there is independent corroboration of the victim's allegation such as a confession, DNA evidence, false denials by the accused, or independent witnesses of a victim's incapacity to consent. But that does not mean that we should not prosecute cases without such evidence. Prosecution may sometimes be warranted by consideration of all the non-binding disposition factors. But prosecution is usually not warranted simply because the low threshold of probable cause is met.

**USAF MJ (B.Q4c.):** The standard for referral of charges under R.C.M. 601(d) is probable cause. "Conviction is not likely" is not the legal standard applied. Appropriate evidence and victim participation are taken into account. In the Air Force, in cases there is a participating victim and the standard of probable cause is met, cases are typically referred to trial by court-martial. This practice reflects the Air Force's victim-centric approach to the court-martial process and allows victims who elect to participate in a court-martial to have their desired day in court.

**USCG MJ (B.Q4c.):** There are a range of reasons why the circumstances of a particular case may merit going to trial even though trial counsel and the SJA evaluate the likelihood of success as low. For example, trial may be appropriate in charges involving a credible victim who desires to provide evidence in the case. Trial may also be appropriate where the accused is a senior officer, a senior enlisted member, or somebody who holds a position of special trust. In those circumstances the benefits to good order and discipline of resolving allegations in a public setting may outweigh concerns over the likelihood of conviction.

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**d. In such cases, do acquittals help or hinder the maintenance of good order and discipline, and why?**

**USA MJ (B.Q4d.):** An acquittal does not hinder the maintenance of good order and discipline. To be sure, an acquittal can be very difficult for some victims and witnesses, but even in those cases, the victim was heard – and the claim was fully litigated before a judge and a panel in accordance with due process of law.

More importantly, an acquittal is a demonstration of a process that is fair and just, one that Soldiers can rely upon to protect their rights and to vindicate the interests of the community—in other words, a transparent and legitimate system. Such a system is simply a pre-requisite to the establishment of good order and discipline within a unit, and an acquittal does not harm it.

**USN MJ (B.Q4d.):** The perception of timely and fair prosecution in the military justice system is important to the maintenance of good order and discipline. Excessively high acquittal rates may give the impression that the military justice system is ineffective in dealing with sexual assault or that something is "broken" in our system. Rather, it is the strength of the evidence that dictates the results of the trial.

**USMC MJ (B.Q4d.):** Acquittals often have competing and contradictory effects on good order and discipline that are difficult to measure. To friends of the accused, an acquittal may restore faith in the fairness of the process, while it has the opposite impact on victims. Sending cases to trial with little to no chance of obtaining a conviction generally does not help maintain good order and discipline.

**USAF MJ (B.Q4d.):** No, acquittal rates neither help nor hinder good order and discipline. Good order and discipline require that Airmen trust the judgment of their commander. Preferring or referring charges to a court-martial when the commander does not believe the legal standard has been met would constitute a violation of that commander's integrity and the law. In order to prefer charges, a commander must assert that he or she has personal knowledge of, or has investigated, the matters set forth in the charges and specifications, and (2) the matters set forth in the charges and specifications are true to the best of the knowledge and belief of the signer. Likewise, in accordance with RCM 601(d), before a convening authority can refer charges to a court-martial, he or she must determine that there is probable cause to believe the accused airman committed the alleged offenses.

**USCG MJ (B.Q4d.):** As a general matter, acquittals aid in the maintenance of good order and discipline. It is important that all members of the armed forces perceive the court-martial process as fair. While successful prosecutions promote good order and discipline a very high contested case conviction rate, could potentially erode the perception of fairness that is vital to the health of the system.

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### **Question 5: Conviction and Acquittal Rates for Sexual Assault Offenses**

The DAC-IPAD's Third Annual Report (March 2019), contains an analysis of penetrative sexual assault court-martial documents from all Military Services indicating the following statistics for reference in the questions that follow:

- 20% of preferred cases result in a conviction for a penetrative sexual assault offense
- 31% of referred cases result in a conviction for a penetrative sexual assault offense
- 31% of referred cases result in a full acquittal
- 25% of contested cases result in a conviction for a penetrative sexual assault offense
- 35% of contested cases result in a full acquittal

The Committee plans to undertake an in-depth analysis to better understand and evaluate the military's sexual assault conviction and acquittal rates. To begin its evaluation, the Committee requests narrative responses to the following questions:

#### **a. Are conviction and acquittal rates useful metrics for assessing the health and effectiveness of the military justice system? Why or why not?**

**USA MJ (B.Q5a):** Conviction rates are one data point, and like any data point, it can clarify as much as it can confuse. For instance, a conviction rate can generally be increased by declining to prosecute hard cases: all other things being equal, a system that is able to devote more resources to stronger – and fewer – cases is likely to win more of them. But if the declined cases were meritorious – if those claims should have been heard in court in light of the strength of the evidence – that outcome is not just. Indeed, simply relying on a conviction rate to assess the system would harm it because it would inevitably incentivize efforts intended solely to raise those rates, which would result in fewer tough cases being tried.

Further, conviction rates do not account for the use of alternative dispositions, including Requests for Discharge/Resignation in Lieu of Courts-Martial. These alternative dispositions represent a class of cases in which the defense counsel and the accused Soldier believe that there is a significant enough likelihood of conviction not to risk a contested trial. Victims tend to support these requests for discharge, as the process requires the accused to acknowledge that there is sufficient evidence to sustain a conviction, and it almost always results in an adverse discharge characterization. Victims also do not have to testify, and the process typically moves much more quickly than a trial. Any evaluation of conviction rates or comparison with civilian conviction rates should account for this alternative disposition unique to the military-justice system.

Finally, a system should be judged against the purposes for which it is designed. In particular, the effectiveness of the military justice system should be measured against military law's purposes, which are set forth in the Preamble to the Manual for the Courts-Martial, namely: to



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promote justice, to assist in maintaining good order and discipline, to promote efficiency and effectiveness in the military establishment and to thereby strengthen the national security. To the extent that the system achieves these outcomes, the system is effective.

**USN MJ (B.Q5a.):** Conviction and acquittal rates alone are not useful for assessing the health and effectiveness of the military justice system. Myriad factors go into the charging decision. If a high conviction rate were the optimum sign of the health and effectiveness of the system, prosecutors would only take strong cases to trial and would not try difficult cases. One could argue that difficult cases are those involving genuine factual disputes. Despite the fact that courts-martial are well-suited to resolve close factual disputes, these cases would likely not be tried if the goal were to achieve high conviction rates. In the end, undue emphasis on conviction rates might supplant the purpose of military law contained in the preamble to the MCM to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote the efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States.

Conviction and acquittal rates also do not account for the use of alternative dispositions, including Requests for Discharge/Resignation in Lieu of Courts-Martial. These alternative dispositions represent a class of cases in which the defense and the accused believe that there is a significant enough likelihood of conviction not to risk a contested trial. Victims tend to support these requests for discharge, as the process requires the accused to acknowledge that there is sufficient evidence to sustain a conviction and imposes an adverse discharge characterization. Furthermore, victims avoid testifying and the process typically moves much more quickly than a trial. Any evaluation of conviction rates or comparison with civilian conviction rates should account for this alternative disposition unique to our system.

Better measures of effectiveness focus on the process instead of the outcome. Any of the following metrics would provide meaningful analysis of the health of the military justice system:

- (1) cases dismissed due to procedural errors, such as the denial of the right to speedy trial;
- (2) cases in which defense counsel were found to be ineffective;
- (3) motions to dismiss under R.C.M. 917 granted by a judge;
- (4) extraordinary writs filed by victims for violation of Article 6(b) rights, and the number of such writs granted by appellate courts;
- (5) cases in which victims were not informed of their VWAP rights;
- (6) cases that took more than a year from report to adjudication;
- (7) prosecution proof analysis memos that took more than 60 days to prepare;
- (8) cases in which a judge found a discovery violation by the prosecution;
- (9) percentage of victims who expressed preference for civilian prosecution.



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Used and tracked effectively, measures of effectiveness such as these could show whether a system is generally protecting the rights of all participants, which is the ultimate measure of effectiveness.

**USMC MJ (B.Q5a.):** No. When the focus is on acquittal rates, those rates are easily manipulated to get to the desired result. Any justice system may easily increase its conviction rate by simply being more selective in the cases it chooses to prosecute. But maintaining good order and discipline and pursuing justice might require prosecuting the hard case and not the easy one. Better measures of effectiveness are those that focus on the process instead of the outcome. The focus should be on whether the system protected the rights of all participants and allowed the pursuit of justice, not on whether it produced a particular outcome.

**USAF MJ (B.Q5a.):** No, conviction and acquittal rates are not useful metrics for assessing the health and effectiveness of the military justice system. In the Air Force, the military justice system contains many processes allowing commanders to take appropriate action, including judicial action to restore and sustain good order and discipline. Conviction and acquittal rates are one data point used in assessing the health of the military justice system and must be placed in proper context. Therefore, conviction rates alone are not the best indicator of whether justice in a fair and transparent system has been achieved. Moreover, we have learned that a conviction or acquittal is the result of a constellation of factors, so the degree of correlation between conviction/acquittal rates and health/fitness is a difficult standard to identify. It may help to know the rates witnessed in a variety of metropolitan areas to further examine how to evaluate such rates.

**USCG MJ (B.Q5a.):** Not standing alone.

**b. Can you identify factors that contribute to the conviction rate for sexual assault offenses within each Military Service? Please describe.**

**USA MJ (B.Q5b.):** Every case is unique and must be judged on its own merits. But in general, factors that contribute to the conviction rate include: the use of alcohol and its effects on the victim's and witnesses' memories; a prior relationship between the victim and the accused; delayed reporting; counter-intuitive behavior; the presence of digital evidence; and character for truthfulness evidence. In addition to these, other factors include efforts to honor the victim's preference not to continue in a prosecution even after referral and policies designed to assist the victim – many of which are unique to the military, such as expedited transfers. These policies were implemented to protect a victim and help the victim heal from this trauma, but they also give rise to a defense argument that the policies themselves can create a motive to fabricate (e.g., the allegation was made to get the benefit of an expedited transfer), which also impact convictions.

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**USN MJ (B.Q5b.):** Proving a sexual assault case is difficult. In sexual assault cases, the victim and the accused may be the only witnesses to the sexual assault. The common fact pattern involving the use of intoxicants by the victim and the accused prior to the commission of the offenses often injects the issue of consent, or the lack thereof, into a sexual assault case. Delayed reporting and lack of corroborating evidence can also contribute to the complexity and difficulty in the prosecution of sexual assault cases. The answer to the question of what factors contribute to the conviction rate for sexual assault offenses is best answered inversely--namely, it is the absence of the factors outlined above.

**USMC MJ (B.Q5b.):** There has not been enough scientific study or evidence to answer this question effectively. Based on the age and demographics of our Marines, we know that the population of much of the Marine Corps shares many demographic characteristics with college students. A study that looked at members of the military and college students and compared victimization rates, the percentage of sexual assaults reported, and of those, the percentage of reported cases prosecuted criminally that resulted in a conviction, could provide better analysis of what the conviction rate for sexual assault is in the military, and if that is different in the civilian sector.

**USAF MJ (B.Q5b.):** In the Air Force, in cases where a victim is willing to go forward and the standard of probable cause is met, cases are typically referred to trial by court-martial. This practice reflects the Air Force's victim-centric approach to the court-martial process and allows victims who elect to participate, in cases supported by probable cause, to have the case heard by a court. However, the standard of proof for conviction is beyond a reasonable doubt, a much higher standard than that which is required for preferral or referral. Thus, there are times when cases referred to trial may not result in any conviction because the trier-of-fact determined the evidence presented at trial did not meet the standard of proof for conviction. Moreover, sexual assault cases frequently require testimonial evidence by a victim who may decline to participate in the prosecution, may suffer some memory loss due to a level of intoxication, or whose testimony is matched against the testimony of an accused (as the only evidence on a case).

**USCG MJ (B.Q5b.):** Sexual assault cases are more likely to be referred even if the SJA assesses the chances of conviction are low given the serious nature of such cases. Also, sexual assault cases do not often result in plea agreements where military accused agree to plead guilty to sex offenses. Thus a high percentage of sexual assault cases that go to trial are contested.

**c. In your Service, are the conviction and acquittal rates for other offenses similar to those for sexual assault? Is this information routinely tracked by your Service?**

**USA MJ (B.Q5c.):** The Army has a higher conviction rate and lower acquittal rate for non-sexual assault offenses. OTJAG tracks this information monthly.

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**USN MJ (B.Q5c.):** It may be possible to determine the conviction and acquittal rate for all non-sexual assault cases but this information is not specifically tracked by the Navy.

**USMC MJ (B.Q5c.):** Conviction rates are not routinely tracked for other offenses. The Marine Corps is able to track sexual assault convictions because we have special forms and procedures in place for sexual assault cases, such as the sexual assault disposition report (SADR). Tracking conviction rates for other offenses is very labor intensive and requires pulling records for individual cases.

The Marine Corps recently answered a congressional RFI for the number of murder and manslaughter cases within the last five years and the conviction rates for those offenses. Seven out of eight cases resulted in a conviction for murder, manslaughter, or negligent homicide. Although this is a very small sample size, there is no doubt that conviction rates for these and other felonies are likely higher than for sexual assaults. Sexual assaults involving alcohol, where the only contested issue at trial is consent, and with no other corroborating evidence, are among the most difficult felony cases to obtain convictions in.

**USAF MJ (B.Q5c.):** In order to respond to this question, specific offenses, date ranges, and further explanation of conviction and acquittal rates would be required. The conviction and acquittal rates of all offenses are tracked by the Air Force, but the conviction or acquittal rates (as noted above) are impacted by a constellation of factors as previously noted.

**USCG MJ (B.Q5c.):** They are difficult to compare because the percentage of non-sexual assault cases that result in guilty pleas is higher than for sexual assault cases where guilty pleas, at least to sex offenses, are less common. We do track it to some degree, and, given the relatively small number of cases, are capable of breaking the information down relatively quickly, at least for more recent fiscal years.

**Question 6: Prosecutor and Defense Counsel Training.**

**Do military prosecutors and defense counsel in your Service have sufficient training to ensure just convictions and acquittals in sexual assault cases?**

**USA MJ (B.Q6):** Yes, Army prosecutors and defense counsel have sufficient training. Training begins when a judge advocate joins the Army and continues throughout the judge advocate's career. Training includes resident courses at the Army's Legal Center and School, the only American Bar Association certified Service school, which includes both a basic and academic-year long Graduate Course, as well as specialized courses for trial advocacy and military justice management at all levels. The Trial Counsel and Defense Counsel Assistance Programs (TCAP/DCAP) provide specialized functional training and on a wide array of courses annually in regional and installation-specific outreaches.

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**USN MJ (B.Q6):** The Navy focuses on ensuring qualified counsel, paralegals, and administrative support staff litigate all courts-martial, with special attention paid to special victim crimes (i.e., adult sexual assault, domestic violence, and child abuse/exploitation). Upon graduation from Naval Justice School's Basic Lawyer Course, all judge advocates are certified under Article 27(b), UCMJ to be competent to serve as trial or defense counsel at courts-martial. Next, as First Tour Judge Advocates (FTJAs) they complete two years of additional training in functional areas of practice. For half of that period, FTJAs focus exclusively on military justice and court-martial litigation. During that time, they complete additional qualifications specifically tailored to prepare them for prosecuting and defending criminal cases.

After completing their first tour, judge advocates may be assigned as "core" trial counsel at an office and be detailed as lead counsel in courts-martial. Within the first six months of assignment as a core attorney, counsel attend the Basic Trial Advocacy course, which focuses on a sexual assault fact pattern and the common themes of prosecuting/defending such cases. A core attorney will be detailed to a sexual assault case with a more experienced counsel until the core attorney demonstrates sufficient competency to represent the United States without co-counsel.

The Navy has a career track designation for Military Justice Litigation Qualification (MJLQ) judge advocates who have demonstrated abilities in the areas of military justice, knowledge, and advocacy skills. Both the defense and prosecution have MJLQ officers assigned to Defense Service Offices (DSO) and Region Legal Service Offices (RLSO), respectively.

At a RLSO, core attorneys will be detailed as lead counsel in sexual assault cases once the Senior Trial Counsel (STC) assesses that the individual is ready. The STC is responsible for ensuring all cases, especially special victim crimes, are staffed by the most qualified counsel available. If there is a gap in professional competence, the STC will coordinate with the Trial Counsel Assistance Program (TCAP) and Naval Legal Service Command leadership to make the requisite experienced counsel available, whether from another office or from TCAP.

Each trial (prosecution) office is headed by an MJLQ officer who is an O-4 select or higher. These officers were hand-selected for their positions by the Judge Advocate General due to their experience, knowledge, and aptitude in military justice. Every STC serves as a supervisory attorney over the prosecutors and paralegals in the office. The STC provides regular training and mentorship to the core attorneys. The STC details cases to individuals considering many factors, but most importantly competence, experience, and case load.

Core defense counsel may be assigned to DSOs following their initial two year FTJA experience. Orders to DSO are for a minimum of two years, but may often be for three years. Each command has an MJLQ Senior Defense Counsel and, frequently, each DSO has either an MJLQ Commanding Officer or Executive Officer. While there is no official policy mandating a certain amount of experience for lead defense counsel on penetration-type sexual assault cases, standard DSO procedure is to detail experienced counsel or supervisory counsel to complex cases.

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TCAP and Defense Counsel Assistance Program (DCAP) provide the opportunity for training with regard to litigating sexual assault cases to both trial and defense counsel. Both TCAP and DCAP have civilian Highly Qualified Expert attorneys to assist trial and defense counsel in prosecuting complex cases through training and consultation.

**USMC MJ (B.Q6):** Yes. All Marine Corps judge advocates receive trial advocacy training regardless of their billet. Once assigned to either the prosecution or defense, judge advocates receive regular specialized training suited to their role. The Marine Corps augments its training with courses developed at the Naval Justice School, The Judge Advocate General's Legal Center and School, and civilian organizations (e.g., National District Attorney Association and National Association of Criminal Defense Lawyers).

Military prosecutors (TCs) receive training from their Regional Trial Counsel (RTC) and Senior Trial Counsel (STC). Through the RTC and STC, TCs receive formal monthly training, continuous on-the-job training, trial preparation advice, and mentorship. Additionally, each LSSS employs a civilian Litigation Attorney Advisor (LAA) for the purpose of advising TCs during complex cases. The LAA are former civilian prosecutors selected for employment based on their experience in handling special victim cases.

Prior to serving as lead counsel on any case, trial counsel must complete a Trial Counsel Orientation course. Before being detailed as lead counsel on a General Court-Martial, the RTC or LSSS Officer-In-Charge (OIC) must certify that the TC meets the following requirements: (1) be certified under Article 27(b), UCMJ and sworn under Article 42(a), UCMJ; (2) have served as a TC for six months or have a combined eighteen months experience as a TC, defense counsel (DC), or military judge; (3) have prosecuted a contested special court-martial as the lead TC or a contested general court-martial as an Assistant TC; (4) have completed the Article 32 Officer Course at the Naval Justice School, and (5) have received a written recommendation from the their STC and LSST OIC.

In addition to RTC and STC, the Marine Corps maintains a Trial Counsel Assistance Program (TCAP). Established in 2012, the TCAP provides 24-hour support to assist and advise trial counsel on all aspects of prosecution. The TCAP hosts an annual week-long training event focused on disseminating best practices for the prosecution of sexual assault cases to the entire Marine Corps prosecution community. Every TC must attend this training or another intermediate-level trial advocacy training focused on the prosecution of special victims cases before they may prosecute a sexual assault case.

**USAF MJ (B.Q6):** Through a rigorous pre-service selection process, we educate and train licensed attorneys to be judge advocates. After months of additional schooling, trial practice under observation by a seasoned attorney, and a recommendation from a military judge, those judge advocates are certified by the Judge Advocate General as trial counsel, or the military's version of a prosecutor. The best prosecutors are competitively selected and deliberately developed in more senior litigation assignments including our Special Victim Unit-Circuit Trial Counsel and military judges.

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In accordance with the 2017 NDAA, we instituted a system of military justice experience designators – called MJET or Military Justice Experience Tracker. Having formally implemented MJET designations and identified the military justice positions commensurate with each MJET proficiency level, we continue to evaluate the manner in which it deliberately develops military justice experts in accordance with the NDAA’s requirements.

**USCG MJ (B.Q6):** Yes, however it is worth noting that the small Coast Guard case load impacts the experience level of our counsel. The Coast Guard has taken steps to address this concern. With defense counsel, they are assigned to Navy Defense Services Offices and gain experience working on Coast Guard, Navy and Marine Corps cases under the supervision of experienced Navy and Marine Corps counsel. For trial counsel, the Legal Service Command’s cadre of full-time trial counsel participate in almost all Coast Guard courts-martial. This enables the Coast Guard to maximize the experience those trial counsel gain from our relatively limited case load. These efforts cannot completely compensate for the smaller number of cases from which to derive experience, however.

**Question 7: Victim Participation in the Reporting, Investigation, and Prosecution of Sexual Assault Crimes.**

The DAC-IPAD’s Third Annual Report (March 2019), indicates that in a random sample of 164 penetrative sexual assault investigations reviewed by Committee members, 34% of the cases contained a record of the victim declining to participate at some stage in the process.

**a. Does your organization collect or track any information regarding victim participation/declination in sexual assault cases? If so, please explain.**

**USA MJ (B.Q7a.):** OTJAG collects data on victim participation/declination in Military Justice Online. It should be noted that victim participation/declination is not simple to categorize or track. While some victims clearly decline to participate – particularly in the initial investigative stages – by signing declination statements or refusing interviews, it is more difficult to define or track a victim’s participation when a victim chooses, for example, to support a Discharge in Lieu of Court-Martial or a plea agreement to lesser included charges in order to avoid testifying at trial.

**USN MJ (B.Q7a.):** The Navy tracks victim participation/declination through the Defense Sexual Assault Incident Database (DSAID) maintained by the DoD.

**USMC MJ (B.Q7a.):** Yes. The sexual assault initial disposition authority completes a USMC sexual assault disposition report (SADR) for every unrestricted sexual assault. Block 1b of this form tracks whether the command did not take action because the victim declined to participate in the military justice action. In FY18, the Marine Corps had 28 such cases. The problem with relying on that number is that it only tracks cases where the sole reason for not going forward



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with prosecution was the victim's declination. In other words, the victim must have first participated enough to allow the command to conclude there was sufficient evidence to otherwise prosecute the case.

It is much more common for victims to decline to participate earlier in the process in the following two scenarios: (1) a victim intends to either make a restricted report, or does not intend to report at all, but a third party report or disclosure alerts the command or law enforcement; or (2) a victim must make an unrestricted report to request limited services, such as an expedited transfer or a military protective order, but does not intend to participate in the justice process. In both of those situations, it is common for a victim to consult with a VLC, make an unrestricted report, and then inform NCIS — who must investigate — that they do not desire to make a statement or participate in the investigation in any way. In those cases, the NCIS investigation would be closed, and the SADR would indicate that the subject was unknown or there was insufficient evidence to prosecute. In FY18, the Marine Corps had 268 cases closed due to an unknown subject or insufficient evidence.

But those numbers do not reflect the significant number of those cases where the reason the subject remained unknown or that there was insufficient evidence was because the victim declined to provide a statement or participate in the investigation.

For a more complete answer to this question, the DAC-IPAD might consider submitting an RFI to MCIO's requesting the number of cases where the investigation was terminated because of the victim's declination to participate.

**USAF MJ (B.Q7a.):** The Air Force Judiciary does not track victim participation/declination in sexual assault cases.

**USCG MJ (B.Q7a.):** Not at the Headquarters level. For example, not in our military justice database, Law Manager.

**b. What, either anecdotally or based on your organization's analysis, are the most frequent reasons victims give for declining to participate? Do these reasons differ when comparing civilian and military victims?**

**USA MJ (B.Q7b.):** The Department of Defense Sexual Assault Prevention and Response Office has implemented two surveys that included attempts to analyze victims' reasons for declining to participate and evaluate aspects of the military justice system, and it directed the Services not to conduct additional surveys on this topic. But very low response rates to the DoD survey hampered this effort.

Anecdotally, the reasons cited for military victim declinations including privacy concerns, a desire to "move on" or not be labeled a "victim", and the social repercussions some victims suffer through non-actionable social ostracism and social media bullying. Both civilian and



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military victims who have declined to further participate in a case have expressed frustration with the length of time for the investigative and judicial process. For civilian victims who are spouses, the loss of future income and benefits, even if offset by the transitional compensation program, also leads to declinations.

**USN MJ (B.Q7b.):** Specific reasons for participation/declination are not tracked by DSAID or the Navy. The best source of anecdotal information concerning frequent reasons victims give for declining to participate is contained in response to question two of the Navy Victims' Legal Counsel Program (VLCP) submission for this RFI.

**USMC MJ (B.Q7b.):** Victims are neither required nor expected to provide any justification to a trial counsel or SJA for what is often a very personal decision. The VLCO would be better able to answer this question.

However, as discussed in the last question, the majority of victim declinations occur early in the process when the military is required to investigate an offense the victim never wanted criminally investigated in the first place. After that, based on anecdotal evidence the remaining declinations generally occur when a victim consults with a VLC and believes an acquittal is likely or after unexpected case developments or lengthy delays in a case. Examples of unexpected case developments include a last-minute continuance delaying the trial, an adverse ruling on a 412 or 513 motion, or granting a discovery request for personal information a victim thought would remain private. Declinations are also very common in retrials if a case was remanded by an appellate court.

**USAF MJ (B.Q7b.):** The Air Force Judiciary does not analyze victim participation, and there is institutional reticence to ask a victim to justify their decisions. However, the Air Force provides victims with their own attorneys as authorized and, based upon anonymous victim surveys, they are extraordinarily pleased with the advice they are given. We understand that circumstances such as time to process sexual assault cases, Special Victims' Counsel assessment of a case and advice, and successful advocacy from the Defense community on options for alternative dispositions may influence a victim's decision to participate; however, the Special Victim's Counsel Program is better positioned to provide insight into this question.

**USCG MJ (B.Q7b.):** First, if the victim did not report the assault, but rather it was reported by a third party, victims are less likely to participate. That is, anecdotally, the most common reason for victims to decline to participate early on in the investigation. Some opt out as the investigation proceeds because they object to the amount of information and other actions that are asked of them, such as multiple interviews with agents, requests for medical and phone records, requests to image phones or computers, requests to turn over other personal property, etc. Finally, for those that participate in the investigation, the most common reason they decline to participate later in the prosecution process is the length of time it takes to get cases to trial.

### **C. Operational Questions for Program Managers for the Special Victims' Counsel and Victims' Legal Counsel Programs**

#### **Question 1: Managing Victim Expectations.**

- a. Do you and your SVCs/VLCs manage expectations with victims regarding court-martial results or does the trial counsel do this? Please explain.
- b. What effect does a full acquittal in a sexual assault case have on victims' perceptions of the military justice process?

#### **Question 2: Victim Participation in the Reporting, Investigation, and Prosecution of Sexual Assault Crimes.**

The DAC-IPAD's Third Annual Report (March 2019), indicates that in a random sample of 164 penetrative sexual assault investigations reviewed by Committee members, 34% of the cases had a record of the victim declining to participate or to participate further at some stage in the military justice process, meaning the victims declined to be interviewed by investigators or trial counsel or declined to testify at an Article 32 hearing or at trial.

- a. From a program management perspective, do you think it's helpful to identify and understand the reasons why victims are not willing to participate in the military justice process?
- b. At what stage of the military justice process—investigation, preferral of charges, Article 32 hearing, or up until trial—are victims most likely to decline to participate in the process? Why do you believe this is so?
- c. What are the most common reasons why victims decline to participate in the investigative or court-martial process? Do these reasons differ when comparing civilian and military victims?
- d. In reviewing investigative and court-martial case files, the DAC-IPAD has found that many cases take more than a year from the offense being reported until the court-martial takes place. Does the length of time it takes for a case to proceed to court-martial have an effect on victim participation in the military justice process?
- e. Has the SVC/VLC program had an effect on victim declinations to participate in the investigative and court-martial process?

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- a. Do you and your SVCs/VLCs manage expectations with victims regarding court-martial results or does the trial counsel do this? Please explain.**

**USA SVC (C.Q1a.):** Both the SVC and TC have a role in managing victims' expectations. The TC has access to more info with which to make an assessment of the case (Victims/SVC have no entitlement to discovery), but the SVC is a more trusted advisor whose assessment will likely carry more weight with the victim.

**USN SVC (C.Q1a.):** Yes, it is a standard practice for VLC to manage expectations with their clients regarding the potential for court-martial, the court-martial process, and possible court-martial outcomes. Trial Counsel also do this, and where there is a VLC, they work in tandem. Not all victims are eligible for or desire a VLC, so it is a critical function of Trial Counsel. Navy VLC are required to have some level of military justice litigation experience or other relevant experience in order to be selected for a VLC billet, therefore they have the expertise to analyze cases and offer potential outcomes.

**USMC SVC (C.Q1a.):** Both VLCs and TCs do this. The VLC, as the client's attorney, and the TC, as the government's representative, have a role to play in this effort. Most of the time VLCs and TCs are in general agreement on the overall complexities of a case prevailing at trial, and their management of client expectations are complimentary despite having different loyalties to different clients. However, there are some differences. VLCs have an even closer working relationship with their clients than the TC, and as that client's attorney, VLC have specific obligations under the rules of professional conduct which governs their practice. TCs, on the other hand, have access to all the evidence and reports in the possession of the government, unlike VLCs who only have limited access, and so they play a significant role as well in managing client expectations.

**USAF SVC (C.Q1a.):** Predominantly the SVCs manage victim expectations throughout the process. SVCs are their clients' confidantes and have candid discussions with their clients concerning the case. Clients want to understand the process, the quality of the evidence and the chances of a conviction should they decide to participate. Trial counsel and circuit trial counsel also provide victims with information regarding the trial process and may provide the victim information regarding any issues they may see regarding the case.

**USCG SVC (C.Q1a.):** SVCs have an imperfect understanding of the case because they are reliant on the SJA's office to provide case information. Still, SVCs make sure victims understand the probabilities of whatever outcome the victim is seeking (which is not always a court-martial). SVCs try to help the victim re-define success (having the convening authority hear the victim's version of events, getting to take the stand to tell their story, etc.) as opposed to focusing

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exclusively on a court-martial conviction. In the Coast Guard, SVCs sometimes struggle to engage with trial counsel and, frequently, the amount of trial counsel involvement with the victim depends on the experience level of the trial counsel.

However, SVCs always try to facilitate a positive relationship early in the process between trial counsel and the victim because, as prosecutorial decisions are made, it is helpful for a trial counsel to explain the “whys” behind the government’s decisions and the government’s views on the probability of success. Countering the ability of trial counsel to engage with victims early is that, in comparison to DoD, USCG does not designate which attorney will be serving as the case prosecutor until relatively late in the process.

SVCs ability to manage victim expectations would likely be enhanced if trial counsel were required to consult with victims at certain stages of the process (e.g. charging decisions or a decision not to prosecute.) This would avoid relying on the experience level and discretion of the trial counsel to obtain information and would ensure the government is made aware of victim concerns. The Coast Guard is currently evaluating this recommendation which, if merited, could be implemented by service policy rather than a change to the Manual for Courts-Martial or UCMJ.

**b. What effect does a full acquittal in a sexual assault case have on victims’ perceptions of the military justice process?**

**USA SVC (C.Q1b.):** As much as SVC are able to manage expectations of their clients with regard to courts-martial results, a full acquittal in a sexual assault case is generally very difficult for victims to process. The acquittal outcome may tend to make victims believe going through the courts-martial process was not worth the difficulties they experienced with participating. The experience of the SVC is that generally victims understand a full acquittal is possible yet they are rarely prepared for that outcome.

**USN SVC (C.Q1b.):** It is impossible to generalize all victims' perceptions. However, it is true that despite honest VLC advice and guidance, including the effort to depersonalize the court proceeding, victims are almost universally emotionally devastated by a full acquittal. Some victims do express a loss of faith in the military, the justice system, and/or justice in general. Some victims feel as if the military (via the jury members) believe they are liars, and that the military doesn't truly want to support victims. At the same time, other victims say that although the outcome is not what they wanted, they felt the system did support and respect them throughout the process and they glean some satisfaction from having participated in the process to the end.

**USMC SVC (C.Q1b.):** It entirely depends on the victim. Many clients are devastated and feel that the trier of fact did not believe them. They feel angry that their offender “got away with it” and will not be convicted, which in many of their minds, equates to not being held accountable.

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Many others are disappointed, but feel that their participation in the military justice process was the first step towards their healing and recovery. They feel that their voice was heard and taken seriously. Their reaction, in large part, will depend on whether they perceive that they were valued as a person: Was my case thoroughly investigated by law enforcement? Did the command take my accusations seriously? Did my command care about me? Did the TC treat me with respect? Was the accused charged and held “accountable? Did my VLC represent me well and to the best of his/her ability?”

**USAF SVC (C.Q1b.):** This is a victim-specific query, without a singular response. Any victim who has participated in a fully litigated trial is invested in the outcome of that proceeding. They made allegations that another person, (or other persons), has wronged them in deeply personal manner; and victims often equate a not-guilty verdict with a conclusion that the members or judge did not believe them.

Often a victim’s perceptions of the military justice process are often determined by the victim’s opinion of the government trial team. The victim’s opinion of how well the government trial team interacted with the victim, kept the victim informed and performed at trial are important factors in the victim’s opinion of the system. If the prosecution team appeared unprepared and ineffectual, the victim is often disappointed in the system. If the trial team performed well, but the verdict was still not guilty, the victim may be unhappy with the members’ decision without being disappointed in the system itself. However, each victim’s reaction is particular to that individual.

Many victims see the act of participating in a court-martial as more important to their recovery than the final result of the trial.

**USCG SVC (C.Q1b.):** It varies from victim to victim but, understandably, victims are disappointed. More likely than not, a victim who testifies at a court-martial that fully acquits an accused on a sexual assault charge walks away feeling dejected and SVCs report that victims in some cases perceive that the trial was pro forma. Despite SVCs’ best efforts to prepare a victim for trial, because court procedure and rules of evidence are focused on fairness towards the accused, victims frequently view the process as protecting the accused while allowing them (the victim) to be unfairly attacked. Additionally, if the prosecution team appeared unprepared and ineffectual, the victim is often disappointed in the system.

However, even with full acquittals, some victims feel validated in the process. Usually, this is a result of an engaged legal office and experienced trial counsel who treats the victim as someone worthy of being included in decisions and who ensures the victim knows, regardless of the outcome, that the trial counsel believes the victim. If the trial team performed well, but the verdict was still not guilty, the victim may be unhappy with the members’ decision, but feel as if their participation was not in vain.

Still, each victim’s feelings and reactions are different and individualized.

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**a. From a program management perspective, do you think it's helpful to identify and understand the reasons why victims are not willing to participate in the military justice process?**

**USA SVC (C.Q2a.):** As the SVC PM, I believe it would be good to know the reasons why victims are unwilling to participate, but that it will be extremely difficult to discern this since the reasons are so variable and dependent on the personality of the victim involved, the situation the victim is in, and the specific facts and circumstances surrounding the reported sexual assault. Also, I find it less than optimal for an SVC to provide a questionnaire or survey to their client - it seems like a more appropriate function for the SHARP Program.

**USN SVC (C.Q2a.):** Yes, it is valuable to know, understand and accept the often complex reasons why victims may not be willing to participate in the military justice process. The overarching lesson must be that victims are not all the same, their cases are not the same, and their goals are not the same. Therefore, if the aim within the military is to ensure victims feel safe reporting offenses and pursuing their cases, then victims should be offered the maximum array of options for doing so. This should include those options not only within the military justice system, but also administrative options as well.

**USMC SVC (C.Q2a.):** VLCO does not use client participation rates as a metric in overall program success or even success of the military justice system as a whole. The goal of the VLCO is twofold: 1) ensure that victims have sufficient information, expert legal advice and analysis, and emotional support to allow the victim to make the best decision for themselves (participate or not participate), and, 2) provide the highest level of competent, diligent, professional, and zealous representation to effectively advocate and represent the clients' interests. There are a multitude of reasons why a victim, even when having the highest level of the above support, may decide not to participate in the military justice system. The choice is so individual that a "one size fits all" approach or view is unworkable.

It is useful, however, to know why victims are not participating in the military justice system to the extent they choose to divulge these reasons in order to best ensure that adequate focus, policies, and resources are expended in those areas which might increase victim participation. There are societal and military justice reasons to do this so long as not infringing upon the Constitutional rights of the accused. For example, and totally hypothetical, if a clearly identifiable segment of victims did not believe that criminal investigators treated them with



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dignity and respect and caused those victims to no longer participate, and if they gave examples that were capable of being successfully addressed, then additional training of these investigators or policy changes in those areas may be warranted.

**USAF SVC (C.Q2a.):** Understanding the reasons victims choose not to participate may be helpful in shaping policy and lawmaking. It may be equally important to consider “*when*” a victim chooses to opt-out as “*why*.” Those that drop out of the process early often have very different reasons than those who drop out later in the process.

**USCG SVC (C.Q2a.):** Yes. However, these reasons differ from person to person and it may not be possible to extrapolate any trends from anecdotal data. It also may be counterproductive to try and increase victim participation if it means taking away their agency or perception of control over the process. Still, the SVC program sees value (assuming participation is voluntary), even if the question was simply recorded at the field level, for SJAs and Coast Guard Investigative Services to understand how their actions influence a victim’s willingness to participate in the process.

**b. At what stage of the military justice process—investigation, preferral of charges, Article 32 hearing, or up until trial—are victims most likely to decline to participate in the process? Why do you believe this is so?**

**USA SVC (C.Q2b.):** Generally, victims are most likely to decline at the outset of the investigation or at the conclusion of the investigation into sexual assault allegations. It is a very small percentage of clients that decline to participate close in time to court-martial proceedings. Where victims decline at the outset, typically these are cases where the report was made by a third party and not the victim him or herself. Where declinations occur after the conclusion of the investigation, they are typically the result of the amount of time investigation of the allegations took and victims are not willing to move forward for even greater amounts of time that will be taken to prosecute the matters. Finally, SVC report that circumstances where a victim declines to participate close in time to court-martial proceedings is very rare. Where this has occurred, it is typically due to a continuance granted in the case close in time.

**USN SVC (C.Q2b.):** Not all victims elect or are eligible for VLC services, therefore the following input is limited to those victims who have engaged a VLC. Field VLC report victims declining to participate in the military justice process at every stage. Anecdotally, victims tend to leave at the following stages for the following reasons:  
-A majority of victims who decline to participate in the military justice process do so during the investigation (either before or after they are interviewed by NCIS, but before the investigation is completed). This tends to be for a variety of reasons including: (1) the offender is unknown and there is no reasonable expectation of discovering his identity; (2) the victim is married to the offender and is not interested in a court-martial due to the



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financial impact on the family; (3) the victim is not emotionally prepared to discuss an assault with law enforcement or other entities; (4) the victim reported the offense not to seek justice, but instead to seek services for him/herself such as mental health services, or to feel safe and get away from the offender (via an Expedited Transfer, for example); or (5) a third party made the report and the victim never intended to report the offense. These victims generally seek to "move on" with their lives and careers and are not interested in reliving the offense in order to seek justice against an offender. In "touching" cases, victims often simply want to have a safe work environment free from harassment by the offender and once transferred, have not wish to participate in a full court-martial process. Victims in this latter category often would prefer the option for swift administrative action at the command level that would illustrate that the command supports them and confirms that the "touching" was wrong.

-The next most common time for victims to leave the military justice process is after the investigation is completed and where the case could potentially go forward but the evidence presents challenges. These challenges are explained to the victim, in order to properly manage victim expectations, and at that time victims decide to decline to participate to avoid a difficult cross-examination, for example, which may not lead to a guilty finding.

-Victims will also decline to participate later in the military justice process because it simply takes too long to get to trial. By the time a trial date is set, the victim has often transferred to another command and has moved on with his or her life and is not interested in reliving a trauma from a year or two before.

**USMC SVC (C.Q2b.):** Victims are most likely not to participate in the military justice process if unwilling to participate since prior to preferral of charges; stated another way, once charges are preferred, they are much more likely to continue to participate throughout the process. Although victims refuse to participate during all stages of the military justice process, even after the referral of charges to court-martial and on the "eve of trial," once they begin their participation and various resources are there to support them (VLC, TC, etc.) they largely feel supported and have the strength and knowledge to continue their participation.

**USAF SVC (C.Q2b.):** This information is not tracked by the SVC Division; however, SVCs have observed the majority of non-participating clients made that decision fairly early in the process. There are myriad reasons offered for why victims arrive at that decision: a need for privacy; time to recover from the incident; a sense that no one will believe them; a belief that the judicial process is not designed to help them; a distrust of people in general; a general fear of what is an unfamiliar process (i.e. the military justice process); fear about consequences of possible collateral misconduct; fear of stigmatization; and possible ostracism or reprisal. Others reasons cited for early drop-out are the allegations were reported by a third party, that a victim reported solely to access support services, or the victim wishes to be able to speak openly about their experience as a sexual assault victim without pursuing an investigation or prosecution.

The next largest number of clients decline to participate after the Article 32 hearing, but before trial. Many of the reasons victims decline to participate at this stage of the process remain the same as above. Additionally, SVCs have observed their clients opt out of the process because the Article 32 hearing left them feeling that they had lost too much privacy or the hearing was an

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unpleasant process. For many victims, the longer the process takes the more likely it is they will drop-out.

Importantly, victim participation is often dependent upon how the victim defines success. Clients discover that the value they may have placed on getting a conviction as a prerequisite for their “closure” was misplaced. The passage of time and presence of other positive life experiences give victims a sense of healing.

**USCG SVC (C.Q2b.):** Although the SVC program does not track this data, anecdotally, most victims decline to participate at some point in the investigation due to the differences between the Coast Guard and DoD policy. Specifically, unlike the military departments, in the Coast Guard, if a victim tells any member of the Coast Guard other than a SARC, VA, SVC, or chaplain that he or she was sexually assaulted, the person the victim told is required to formally report the sexual assault. DoD policy allows sexual assault victims to make an initial report of sexual assault, informally, to a service member friend who is outside of the chain of command. It is the SVC program’s experience that victims who are required to come forward because of a third party report are much less likely to participate in the investigation of the allegation they never wanted to report in the first place.

However, if charges are preferred/referred, many victims will cooperate to the extent possible. Still, reluctant victims are very likely to express a strong preference for a plea agreement or some form of alternative disposition like administrative separation as opposed to going through the lengthy and potentially demeaning process of a court-martial (particularly if the legal office has not engaged with them).

**c. What are the most common reasons why victims decline to participate in the investigative or court-martial process? Do these reasons differ when comparing civilian and military victims?**

**USA SVC (C.Q2c.):** For civilian victims who were involved in intimate partner cases, the primary basis for declining to participate is the career of the offender and their financial dependence on the offender Servicemember. For military victims, the primary reason victims fail to go forward are based on fears of retaliation and being viewed by command officials as a troublemaker. Victims engage in a cost-benefit analysis; whether the benefits of going forward with a sexual assault case outweigh the risks associated with participation (loss of financial support, ostracism, retaliation, etc).

**USN SVC (C.Q2c.):** See above for common reasons for victims to decline to participate in the military justice process. Since all victims are different, there is no consistent difference between all military and all civilian victims. However, a common factor for some military victims is how a report and resulting trial might affect their jobs (with the command being involved in the case), their careers (with future travel and work interruptions required to participate in the process) and their social lives (ostracism by peers at the command).

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Civilian victims may not have the same work-related concerns, but may be victims of domestic violence where they may recant due to financial or emotional dependence on the offender. Also, some civilian victims are able to voluntarily move away from the site of the investigation and trial, and after doing so, may not be willing or able to take time away from work and/or family to participate in a trial. These are only some examples that may have an impact on the decisions of these victims, but it is worth reiterating that all victims are different and have different reasons for declining to participate.

**USMC SVC (C.Q2c.):** Victims choose usually not to participate in the military justice process because they believe they cannot handle the stress of the process and just want to “move on with their lives,” that they will forfeit much of their privacy and be embarrassed, or they want to put the whole experience behind them so they can continue to focus on their careers.

Some victims also feel that their perpetrator will not be convicted at trial and their participation will be a “waste of time.” This last point, however, is totally dependent on the individual victim and circumstances, and many find it cathartic to know that they can go forward and let people know what happened to them and exercise their voice throughout the process.

Many more resources on average are available to victims in the military than civilian communities or jurisdictions generally speaking. Anecdotally, this likely increases military victim participation rates as compared to civilian rates. Also anecdotally, military convening authorities refer (“indict”) cases to court-martial routinely that a civilian prosecution office would not because the civilian prosecutors do not seek an indictment generally, among other reasons, unless they believe there is a high likelihood that they will secure a conviction at trial. Military commanders are not solely influenced primarily whether they will secure a conviction at trial in deciding whether to go forward to court-martial. They have many other factors that they weigh: good order and discipline, holding the alleged offender accountable, fairness to the accused, giving the victim her/his opportunity to tell their side of events, letting the “process work,” etc. In short, military commanders are less concerned with conviction rates. These factors likely increase military victim participation rates because there are comparatively more military cases that go forward to trial than under similar facts in the civilian context, and therefore, there will be more military victims participating where civilian victims never had an opportunity.

While there are commonalities to military and civilian victims in general, there are some general differences. A military victim is often a part of a small and close knit unit or military occupational specialty (MOS); often times the alleged perpetrator is also a part of this small and close knit unit or MOS (or known by others within the unit); a military victim often has at least some concerns about how she/he will be perceived by other members within the unit or MOS. On this point, that is why it is so important for commands to treat victims with dignity and respect and to have a healthy command climate so that victims will not feel ostracized. Civilian victims also have these workplace factors influence their participation decisions. More broadly speaking, however, the overall percentage is likely lower than in the military even though it routinely occurs. These above factors can all have some bearing on military victim and civilian victim participation rates, and the military has tried hard to properly address them. The major

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differences and even subtleties of these two systems, military and civilian, however, make them hard to exactly compare as they relate to victim participation rates.

**USAF SVC (C.Q2c.):** While this data is not collected, SVCs have observed their clients often decline to participate because they wish to protect their privacy, move past the incident without recounting it to multiple parties, and avoid the scrutiny of testifying or participating in an investigation. These reasons are common to both civilian and military victims participating in the military justice process. Military victims often have a high level of concern for protection of their privacy within the military community.

**USCG SVC (C.Q2c.):** The most common reason is that the victim did not intend to report a sexual assault/inadvertent unrestricted report. Other reasons are that the victim prefers to move on and put the incident behind them, fears the trial process, or other people (family/friends) have told them they are unlikely to get justice. Additionally, victims may not want to see a spouse/significant other/friend punished. Over time, some victims become fatigued if they are constantly at war with an unsupportive command, feel ostracized by co-workers once others learn of their report, or by the length of time the process takes; in these cases, victims occasionally decide they would rather “give up” than keep trying.

**d. In reviewing investigative and court-martial case files, the DAC-IPAD has found that many cases take more than a year from the offense being reported until the court-martial takes place. Does the length of time it takes for a case to proceed to court-martial have an effect on victim participation in the military justice process?**

**USA SVC (C.Q2d.):** The question will not bring a statistics based answer, just an anecdotal response we can glean from talking to our more experienced SVC in the field. The likely answer will be that the more lengthy the process, the more negative the effect on the victim.

**USN SVC (C.Q2d.):** Yes, the length of time the case takes to progress to court-martial has an effect on victim participation in several ways. At the beginning of a case, VLC educate clients of the investigation and military justice processes, including specifically on how long the process could take. It is at that early stage that many clients who have concerns about participating in a lengthy process decide to decline to participate. Those victims at that point who choose to participate in the military justice process do so with accurate information and realistic expectations, and those victims tend to stay the course, regardless of how long the process takes. Although field VLC report relatively few victims declining to participate close to the time of trial, some victims do experience "case fatigue" and lose interest in actively participating in the case so long after the event. They simply have moved on with their lives and feel it would be detrimental to their recovery to participate further.

**USMC SVC (C.Q2d.):** It can have an effect on military victim participation rates as some victims, as mentioned above, just want to move on with their careers and life; however, generally, it has much less of an impact if the victim knows that there are ample services

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dedicated to their emotional/medical care, safety, legal representation, and overall professional welfare. If these factors are in place, and the victim feels valued as a person and Marine, the length of time for the completion of a court-martial process is a factor, but not a predominant one.

**USAF SVC (C.Q2d.):** Yes. As discussed above, lengthy investigations and court-martial processing have an effect on a victim's desire to participate in the military justice process. Anecdotally, many victims find with the passage of time they are less willing to participate in a trial and wish to focus on recovery. Repeated delays by the parties often have a negative impact on the victim's willingness to participate. In some cases, victims become more inclined to support an alternative disposition as time passes. For example, a discharge in lieu of court-martial or other administrative disposition may become more attractive to victims to finally put an end to the process. SVCs noted that when the trial counsel have a good relationship with the victim, because they communicate well and often, then victims are more likely to continue participating in a court-martial proceeding.

**USCG SVC (C.Q2d.):** Yes—the length of time is one of the most significant factors in a victim's decision to participate. Repeated delays by the parties often have a negative impact on the victim's willingness to participate. This can be ameliorated when the trial counsel have a good relationship with the victim because if they communicate well and often, then victims are more likely to continue participating in a court-martial proceeding.

**e. Has the SVC/VLC program had an effect on victim declinations to participate in the investigative and court-martial process?**

**USA SVC (C.Q2e.):** The only statistical data we can provide would be the number of victim's who are represented by an SVC who make a restricted report, who then convert these reports to unrestricted. During FY18, SVC assisted 241 clients who originally filed restricted sexual assault reports. Of this number, 124 clients converted their restricted reports to unrestricted reports. A review of SHARP statistics for the number of victims without SVC who filed restricted reports and later convert them to unrestricted reports may assist in evaluating the impact the SVC Program has had on victim declinations to participate in the investigative and court-martial process. Aside from these statistics, it is extremely difficult to ascertain the basis for non-participation as the reasons victims decline to participate are variable and dependent on the victims' personalities, their unique situations, and the specific facts and circumstances surrounding each report of sexual assault. The impact of the SVC Program on victim declinations can also be attributed to victims now being able to make informed decisions with regard to the investigative and court-martial processes and their willingness to participate in either or both processes.

**USN SVC (C.Q2e.):** Yes, VLC have likely had an effect on victim declinations to participate in the investigative and court martial process. However, without firm data, which is not currently available, it is difficult to assess exactly how. Regardless, it would be difficult to

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determine that early, thorough, accurate and confidential advice to victims would not affect their initial and continued choices throughout the military justice process. VLC frequently disabuse victims of false information about the process, thereby affecting their decisions early on. Overall, VLC ensure that the victims who decline to participate, do so for the right reasons for them and make fully informed decisions. And, victims who choose to participate, do so for the right reasons for them and with an attorney advising and supporting them along the way. Regardless of the numbers of victims who ultimately decline to participate, VLC ensure that victims' rights, including their right not to participate, are enforced and victims are able to choose how they move forward with their lives.

**USMC SVC (C.Q2e.):** Yes. The VLCO experienced a significant increase in the number of victims seeking its services and representation starting in approximately May 2017 and continuing to the present day. This increase and continued high number is believed to be in large part due to the belief on the part of victims that VLCO representation is in their best interest.

Other factors are likely the attention and education DoD has emphasized in the area of sexual assault prevention and response, the #MeToo movement, and Congressional attention. As stated above, VLCO does not measure success in the number of victims participating in the military justice process, but there is no doubt that once a victim has a VLC assigned to them that they feel more informed and prepared to participate in the military justice system.

**USAF SVC (C.Q2e.):** This is not a data point that is tracked. From an SVC perspective, the number of declinations by victims to participate is neither good nor bad. SVCs are committed to obtaining the outcomes their clients want, whatever those outcomes may be.

**USCG SVC (C.Q2e.):** The SVC program does not track this data point and, from a program perspective, declinations by victims are neither inherently good nor bad. Some victims have said that they would have stopped participating but for the support and legal advice from their SVC while other victims may be less willing to participate once they receive candid advice from their SVC about what the process looks like and how long it realistically takes.



## **D. Operational Questions for Trial Defense Services Organizations**

### **Question 1: Article 32 Preliminary Hearings.**

- a. Have the changes to Article 32, UCMJ, and R.C.M. 405—in particular the addition of the post-hearing submission of information relevant to the disposition of the charges—made Article 32 preliminary hearings more beneficial to the defense? Why or why not?
- b. In Article 32 preliminary hearings in which a sexual assault victim does not testify, does the defense realize a benefit from the hearing?
- c. Do the judge advocates serving as PHOs in sexual assault cases possess sufficient training and experience?
- d. Prosecutorial discretion exists by virtue of the prosecutor's status as a member of the Executive Branch, and the President's responsibility under the U.S. Constitution to ensure that the laws of the United States be "faithfully executed." Have you filed any motions to dismiss arguing the government has breached this principle (U.S. Constitution Article 2, Section 3) when charges are referred contrary to the advice of a PHO? If so, what was the outcome?

### **Question 2: Conviction and Acquittal Rates.**

The DAC-IPAD's Third Annual Report (March 2019),<sup>7</sup> contains an analysis of penetrative sexual assault court-martial documents from all Military Services indicating the following statistics for reference in Questions a through d that follow:

- 20% of preferred cases result in a conviction for a penetrative sexual assault offense
- 31% of referred cases result in a conviction for a penetrative sexual assault offense
- 31% of referred cases result in a full acquittal
- 25% of contested cases result in a conviction for a penetrative sexual assault offense
- 35% of contested cases result in a full acquittal

The Committee plans to undertake an in-depth analysis to better understand and evaluate the military's sexual assault conviction and acquittal rates. To this end, the Committee requests written responses to the following questions.

- a. Are conviction and acquittal rates useful metrics for assessing the health and effectiveness of the military justice system? Why or why not?
- b. Can you identify factors that contribute to the conviction rate for sexual assault offenses within your Service? Please describe.

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<sup>7</sup> See DAC-IPAD Report Appx. I, p.8, 12-13 (Table 1C, *Case Characteristics (FY2017)*; Table 2C, *Case Dispositions and Case Outcomes (FY 2017)*). available at [https://dacipad.whs.mil/images/Public/08-Reports/DACIPAD\\_Report\\_03\\_Final\\_20190326\\_Web.pdf](https://dacipad.whs.mil/images/Public/08-Reports/DACIPAD_Report_03_Final_20190326_Web.pdf).



- c. Are the conviction and acquittal rates for other offenses similar to those for sexual assault?
- d. Do military prosecutors and defense counsel possess sufficient training and experience to ensure just convictions and acquittals in sexual assault case?

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**USA TDS (D.Q1a.):** The overall assessment is that this change does not impact the utility of the Article 32 in any meaningful way. While the defense counsel have more latitude in submitting matters, the overall consensus is that there is still little or no incentive to do so since the PHO's probable cause determination is not binding. Defense Counsel are more apt to hold on to favorable evidence until trial rather than give the government an opportunity to undermine this evidence.

**USN TDS (D.Q1a.):** There has been no impact to the modifications of Article 32, UCMJ, and R.C.M. 405. Post- hearing submissions of relevant information has been available for some time, albeit in a more limited capacity and consideration at the discretion of the preliminary hearing officer. Given the limited time available since the change, a larger data set of cases is required to correctly identify the impact of the change.

**USMC TDS (D.Q1a.):** Yes. In general, the defense is benefitted with more evidence being presented either before the PHO or to the convening authority. The prosecution and alleged victims are typically trying to keep out information. This is mirrored by the rules which provide more protections to alleged victims and the associated evidence, which benefits the prosecution. Therefore, for both these reasons, the defense is generally benefitted by post-hearing submission of information relevant to the disposition of the charges.

**USAF TDS (D.Q1a.):** Slightly. The provision allows defense counsel more latitude in submitting matters when opposing the government's recommendations regarding disposition of the charges and specifications. Overall, however, the consensus among defense counsel is that the Article 32 hearing remains largely a futile event in that it does not aid the government in preparing its case and provides minimal due process to the accused.

**USCG TDS (D.Q1a.):** Not yet. There has been no impact to the modifications of Article 32, UCMJ, and R.C.M. 405, potentially due to the limited time available since the change. As we receive a larger dataset we will be in a better position to properly identify the impact of the change.

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**b. In Article 32 preliminary hearings in which a sexual assault victim does not testify, does the defense realize a benefit from the hearing?**

**USA MJ (D.Q1b.):** Little to none. There is limited value in a non-binding system to attempt to point out the inconsistencies between a victim's statement (if there is one) and other evidence at the Art. 32.

**USN TDS (D.Q1b.):** In most cases of this nature, the preliminary hearing has very limited benefit absent the complainant's testimony and many counsel waive the hearing as a result. Despite the limited benefit, the preliminary hearing process is an important procedural safeguard, though in these types of cases, the gatekeeping function is reduced. Furthermore, given the Navy practice of excluding Naval Criminal Investigative Service investigators because of their civilian employment, there are few, if any, witnesses available for cross-examination for the defense.

**USMC TDS (D.Q1b.):** Yes. Of course, there is always the possibility that the PHO recommends no court-martial due to a finding of no probable cause, even if the victim does not testify. Additionally, in the case of a non-penetrative sexual assault, the PHO might recommend or the convening authority might order a lower forum.

**USAF TDS (D.Q1b.):** Rarely. We have had instances where the hearing provided a forum to present evidence to a qualified neutral attorney charged with making a probable cause determination. Occasionally, the extrinsic evidence undercuts the complaining witness' veracity/credibility such that it persuaded the legal office to follow the PHO's recommendation not to refer the charges based on a lack of probable cause.

**USCG TDS (D.Q1b.):** There is little to no benefit to the Article 32 preliminary hearing when the complainant doesn't testify, as a result many counsel waive the hearing. Despite the limited benefit, the preliminary hearing process is an important procedural safeguard, though in these types of cases, the gatekeeping function is reduced.

**c. Do the judge advocates serving as PHOs in sexual assault cases possess sufficient training and experience?**

**USA MJ (D.Q1c.):** Judge advocates by merit of their legal training are capable of serving as a PHO and their use are an improvement over the use of non-legal officers in the past. However, not all PHOs have as much experience as others in military justice. Judge Advocate resources are finite and SJAs source their PHOs the best that they can. A system that utilizes specially trained JAs, who do not work for the SJA, (magistrates, perhaps) may be a solution.

**USN TDS (D.Q1c.):** No. In many cases, availability of the judge advocate serving as the PHO is the primary driver for assignment vice background and experience. This is an area where due consideration should be made to making this a magistrate level position included

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in the officer's primary job description. In the absence of creating such a position, requirements should be in place that identify minimum experience requirements above 27(b)(2) certification to serve as a preliminary hearing officer.

**USMC TDS (D.Q1c.):** Not necessarily. Even at larger bases with multiple units with SJA offices, it can be difficult to find an available PHO with the appropriate experience who is not conflicted. Even with the possibility of VTC, that diminishes the presentation of evidence and can be logistically difficult. Lastly, we have had even seemingly experienced judge advocates misquoting the legal definition of probable cause in their PHORs.

**USAF TDS (D.Q1c.):** Usually, but not always. It would improve the process if there were formal PHO training and a designated group of qualified judge advocates (magistrates?) with the experience and training necessary to sit as a PHO.

Prosecutorial discretion exists by virtue of the prosecutor's status as a member of the Executive Branch, and the President's responsibility under the U.S. Constitution to ensure that the laws of the United States be "faithfully executed."

**USCG TDS (D.Q1c.):** No. In many cases, instead of experience, availability is the primary driver for assignment. It would be beneficial to create requirements that establish minimum experience standards for judge advocates to serve as a preliminary hearing officer.

- d. Prosecutorial discretion exists by virtue of the prosecutor's status as a member of the Executive Branch, and the President's responsibility under the U.S. Constitution to ensure that the laws of the United States be "faithfully executed." Have you filed any motions to dismiss arguing the government has breached this principle (U.S. Constitution Article 2, Section 3) when charges are referred contrary to the advice of a PHO? If so, what was the outcome?**

**USA TDS (D.Q1d.):** We are not aware of any motion that has been filed under this theory.

**USN TDS (D.Q1d.):** Yes, the Navy Defense organization has filed such motions and have been denied in light of the advisory nature of the preliminary hearing officer's advice.

**USMC TDS (D.Q1d.):** No. However, when a PHO finds there is not probable cause, the SJA typically writes an Art. 34 letter saying that he independently does find probable cause if the convening authority is going to nevertheless convene a court-martial.

**USAF TDS (D.Q1d.):** No. However, we have filed motions to dismiss that argue, based on statutory construction and legislative history, that a PHO's finding of probable cause is a necessary condition precedent for referral of the specification at issue (i.e., just as an indictment is a mandatory condition precedent to bring charges in federal court).

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**USCG TDS (D.Q1d.):** Yes. These motions have been denied in light of the advisory nature of the PHO's advice.

**Question 2: Conviction and Acquittal Rates.**

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The Committee plans to undertake an in-depth analysis to better understand and evaluate the military's sexual assault conviction and acquittal rates. To this end, the Committee requests written responses to the following questions.

**a. Are conviction and acquittal rates useful metrics for assessing the health and effectiveness of the military justice system? Why or why not?**

**USA TDS (D.Q2a.):** Not alone, because there are many variables (e.g. strength of the admissible evidence; proper consideration of non-binding disposition guidance, including paragraph 2.1h of Appendix 2.1, Non-Binding Disposition Guidance; and performance of counsel at trial). These statistics are merely data points that should be taken into consideration when determining the effectiveness of the military justice system. That being said, they should not be ignored – too high of an acquittal rate or conviction rate should be a red flag that our system may not be operating as effectively as it could be. If rates are too high or too low, leaders should take a hard look at the underlying factors and determine if some course correction is necessary. That begs the question of what is the appropriate rate. The statistics indicate that just as many cases of penetrative sexual assaults result in full acquittal as conviction of a penetrative sexual assault. That conviction rate must be too low, because such a high rate of full acquittals in contested cases has a negative impact on all parties – the Accused Soldier who experienced the stress of the trial process in cases that should not have gone to trial, the government which allocated limited time and resources to trials unlikely to result in a conviction, and the alleged victim who went through the stress of the trial process when there was little to no chance of a conviction. However, relying on this data or placing too much emphasis on this data without fully understanding the context can be dangerous.

**USN TDS (D.Q2a.):** No, if the metric is used alone. Conviction and acquittal rates do not provide the context necessary to assess causal factors for the result and can mislead the observer. For example, if 69% of referred penetrative sexual assault offenses do not result in

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conviction, one may reach the conclusion on this metric alone that the prosecutors are inexperienced, untrained, or inept. However, careful examination of the individual cases may reveal that the cases referred are done so as a result of convening authorities deciding that the case moves forward, regardless of the likelihood of obtaining and sustaining a conviction, to avoid negative or burdensome administrative justification for not doing so. The conviction and acquittal rate metric does more to expose improper preferral and referral of meritless cases rather than an overall pulse on the health of the entire military justice system.

**USMC TDS (D.Q2a.):** No.

First, there is no frame of reference and context to them. Additionally, professed high acquittal rates and their corresponding consequences are generally the fault of system itself. Military leadership is being pressured to “crack down” on a perceived sexual assault problem in the military. As a result, “weak” cases are frequently sent to courts-martial. In fact it is highly common when allegations arising from an incident off base will be investigated and declined for prosecution by civilian courts (courts that generally have high conviction rates). Following the declination, the military will take jurisdiction and ultimately the case will go to a court-martial. These “weak” cases then frequently end in acquittals, driving the acquittal rate even higher. Unfortunately, this seems to result in further pressure and scrutiny from civilian leadership and the process simply repeats. Moreover, statutes are then modified with the apparent goal of securing more convictions, most times to the detriment of the rights of the accused.

**USAF TDS (D.Q2a.):** No. Conviction and acquittal rates alone lack context. Some may see a high acquittal rate as a “failure” of the court-martial process while others recognize that the high acquittal rate is evidence that the current culture pushes cases to trial even when the evidence will not support a finding of guilt beyond a reasonable doubt. Moreover, seeking results oriented “conviction rates” encourages counsel, convening authorities, and military judges to manipulate the system in ways that are improper. *See, e.g., United States v. Barry*, 78 M.J. 70 (C.A.A.F. 2018) (charge dismissed with prejudice where Deputy Judge Advocate General of the Navy committed unlawful command influence); *United States v. Vargas*, 2018 CCA LEXIS 137 (A.F. Ct. Crim. App. 2018) (appearance of court-martial’s impartiality put into doubt by conduct of legal professionals); *United States v. Boyce*, 76 M.J. 242 (C.A.A.F. 2017) (conduct of senior Air Force officials created an appearance of unlawful command influence).

**USCG TDS (D.Q2a.):** No. Conviction and acquittal rates do not provide the context necessary to assess the root cause of the final outcome. This is due in large part because many factors need to be reviewed in order to properly assess the effectiveness of the system. These factors include evaluating: a convening authority’s decision in forwarding a case; quality of the investigation; and experience of the military justice participants.

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**b. Can you identify factors that contribute to the conviction rate for sexual assault offenses within your Service? Please describe.**

**USA TDS (D.Q2b.):** The prevailing factor that contributes to the low conviction rate for sexual assault offenses is the culture that “victims must be believed”. While anyone who alleges sexual assault should be treated with dignity and respect and should be provided appropriate resources once the allegation is made, this culture discourages law enforcement and prosecutors from fully developing the legal case, which includes a thorough, objective vetting of the victim and his or her allegations. Complainants are not fully questioned even in the face of multiple inconsistent statements. This culture also seems to encourage prosecutors to take every case, no matter how weak, to trial and let the panel or military judge “figure it out.” This is deemed a much safer course of action than dismissing weak, unwinnable cases prior to trial and risk having to deal with the criticism of the complainant, Congress, and the media.

**USN TDS (D.Q2b.):** Factors that contribute to the conviction rate include, but are not limited to: (a) lack of corroborating evidence, (b) complainant credibility and motives, and (c) investigative agency reporting that appears to limit the investigation of the accuser in favor of seeking information that exclusively supports the allegation narrative.

**USMC TDS (D.Q2b.):** There are a number of factors which likely effect the rates, most of which are likely driven by the perceived pressures from civilian and military leadership. First, as explained in section (a), the process which results in sending “weak” cases to court-martial certainly decreases conviction rates. Next, government merits memorandums have helped to reduce the amount of cases sent to court-martial, which has likely increased the conviction rate. Third, improper training has likely led to some wrongful convictions, thereby increasing the conviction rate. Some examples of this from the past are “one drink and you cannot consent” and comments from convening authorities at command briefs which resulted in tainting the members pool. Finally, recent victim-focused statutory changes have likely increased conviction rates.

**USAF TDS (D.Q2b.):** The climate in the Air Force regarding sexual assault tends to err on the side of referring cases to court-martial even where significant evidentiary problems exist. In addition, increased training on sexual assault has been effective at persuading Airmen to come forward and report incidents of sexual assault. However, that training includes social (rather than legal) criteria in its definitions and discussions so that, particularly where alcohol is involved, negative sexual experiences are perceived and reported as assaults even though they were legally consensual at the time. As more fully discussed above, cases are not infrequently referred to trial despite the PHO’s finding of a lack of probable cause, or a finding that while probable cause exists, other significant evidentiary obstacles will foreclose a conviction. Presently, many legal offices and commanders would rather sustain an acquittal than explain why a case was not prosecuted.

**USCG TDS (D.Q2b.):** Factors that contribute to the conviction rate include, but are not limited to: (a) lack of corroborating evidence, (b) complainant credibility and motives, and (c)



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investigative agency reporting that appears to limit the investigation of the accuser in favor of seeking information that exclusively supports the allegation narrative.

**c. Are the conviction and acquittal rates for other offenses similar to those for sexual assault?**

**USA TDS (D.Q2c.):** OTJAG/Criminal Law Division are a better source for this information. However, anecdotally, the conviction rates and guilty plea rates on non-sexual assault cases are higher.

**USN TDS (D.Q2c.):** No. Is this information routinely tracked by your organization? No, while the Navy Defense Enterprise records results in individual cases, rates of acquittal and conviction are not collected for individual accused.

**USMC TDS (D.Q2c.):** Based only on data from Fiscal Year 2019, yes they are similar. Additionally, the conviction rates during this fiscal are very different than those listed above.

For sexual assault cases this year, we have an 83% conviction rate.

For non-sexual assault cases, the conviction rate is 91%.

**USAF TDS (D.Q2c.):** AFLOA/JAJM is the better source for this data. Input from defense counsel reveals a perception that the acquittal rates for other offenses is lower than for sexual assault allegations.

**USCG TDS (D.Q2c.):** No. The Coast Guard tracks every case that is referred and the final disposition of that case, including convictions, full acquittals, convictions for lesser included offenses, and alternative dispositions.

**d. Do military prosecutors and defense counsel possess sufficient training and experience to ensure just convictions and acquittals in sexual assault case?**

**USA TDS (D.Q2d.):** USATDS is resourced with a mix of experienced and inexperienced counsel. This is based on a shortage of experienced counsel resulting from a number of factors and not from any deliberate attempt to under resource the defense bar. USATDS has a robust training program for new defense counsel and has also been consistently resourced with experienced senior and regional defense counsel. These supervisors, along with the Defense Counsel Assistance Program, do an outstanding job of ensuring the inexperienced counsel receive the necessary training and mentorship to effectively represent their clients. The supervising attorneys also have a responsibility to assign competent counsel to each case – i.e. detailing the more experienced counsel to the more challenging case. This can be more challenging in smaller

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jurisdictions, but TDS does have the ability to detail counsel from other installations and from other regions.

**USN TDS (D.Q2d.):** Yes. Counsel have the requisite training and experience to ensure a just process in sexual assault cases. However, we do not always have experienced defense counsel at all locations, but we have not had any difficulties in convening authorities approving travel funds for appropriately trained out-of-area defense counsel. In most cases, the foundational facts, investigation, and witness credibility lead to a disproportionate number of acquittals at trial and is a baseline argument for greater discretion to avoid forwarding cases with little to no probability of success. Adjustments made in the pre-trial phases of litigation and binding Convening Authorities to disposition guidance provided by the DoJ, ABA, and NDAA will lead to more appropriate results at court-martial, reduce unnecessary prosecutions, and improve confidence in the system.

**USMC TDS (D.Q2d.):** Our Defense Counsel receive significant training in the defense of sexual assault cases. Pursuant to our training program, mandated via Chief Defense Counsel Policy Memorandum, defense counsel are generally required to attend: the Defense Counsel Orientation course, the Basic Trial Advocacy course, the Defending Sexual Assault Cases course, the Defense Services Organization Wide annual training event, and at least one of four civilian trial advocacy courses deemed core outside training pursuant to the Policy Memorandum. Every one of these courses has at least elements of sexual assault case training within them. Additionally, our counsel receive monthly Senior Defense Counsel Training and quarterly Regional Defense Counsel Training, much of which focuses on sexual assault cases training and general trial advocacy skills. Finally, our detailing policies require that the experience/training of the Defense Counsel be considered prior to detailing to a sexual assault case.

**USAF TDS (D.Q2d.):** Defense counsel possess sufficient training and experience. Defense counsel are competitively selected through a process that identifies attorneys who have a desire and aptitude for litigation. Additionally, all our defense counsel have a structured training program, a network of experienced defenders, and an independent chain of command available to provide guidance. Experienced defense counsel are detailed to all sexual assault cases.

Most prosecutors possess sufficient training and experience. Some bases have very few courts-martial and, as a result, trial counsel assigned to those bases lack the experience necessary to prosecute complex cases. This affects pre-trial matters such as discovery, motions, and pre-trial preparation but because more experienced counsel (Circuit Trial Counsel) are detailed to sexual assault cases, these shortcomings do not likely impact the actual results of the court-martial. Generally, cases are more effectively prosecuted when Circuit Trial Counsel are detailed early in the case.

**USCG TDS (D.Q2d.):** Yes. There are a large number of training opportunities available for both the defense and prosecutors. In most cases, the foundational facts, investigation, and witness credibility lead to a disproportionate number of acquittals at trial and is a baseline argument for greater discretion to avoid forwarding cases with little to no probability of success.