

**DEFENSE ADVISORY COMMITTEE ON
INVESTIGATION, PROSECUTION, AND DEFENSE
OF SEXUAL ASSAULT IN THE ARMED FORCES**



**REPORT ON REFORMING PRETRIAL PROCEDURES AND
ESTABLISHING UNIFORM PROSECUTION STANDARDS:**

**RECOMMENDATIONS FOR ARTICLE 32,
UCMJ, AND THE SECRETARY OF DEFENSE'S
DISPOSITION GUIDANCE IN APPENDIX 2.1,
MANUAL FOR COURTS-MARTIAL**

June 2023

Defense Advisory Committee

CHAIR

The Honorable Karla N. Smith

MEMBERS

Major General Marcia M. Anderson, U.S. Army, Retired

Ms. Martha S. Bashford

Mr. William S. Cassara

Ms. Margaret A. Garvin

Ms. Suzanne B. Goldberg

The Honorable Paul W. Grimm

Mr. A. J. Kramer

Ms. Jennifer Gentile Long

Dr. Jenifer Markowitz

The Honorable Jennifer M. O'Connor

Brigadier General James R. Schwenk, U.S. Marine Corps, Retired

Dr. Cassia C. Spohn

Ms. Meghan A. Tokash

The Honorable Reggie B. Walton

STAFF DIRECTOR

Colonel Jeff A. Bovarnick, Judge Advocate General's Corps, U.S. Army

DEPUTY STAFF DIRECTOR

Ms. Julie K. Carson

CHIEF OF STAFF

Mr. Dale L. Trexler

DESIGNATED FEDERAL OFFICER

Mr. Dwight H. Sullivan

Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces



**REPORT ON REFORMING PRETRIAL PROCEDURES AND
ESTABLISHING UNIFORM PROSECUTION STANDARDS:
RECOMMENDATIONS FOR ARTICLE 32, UCMJ, AND THE
SECRETARY OF DEFENSE'S DISPOSITION GUIDANCE IN
APPENDIX 2.1, MANUAL FOR COURTS-MARTIAL**

June 2023



THE DEFENSE ADVISORY COMMITTEE ON
INVESTIGATION, PROSECUTION, AND DEFENSE OF
SEXUAL ASSAULT IN THE ARMED FORCES

June 9, 2023

The Honorable Jack Reed
Chairman
Committee on Armed Services
United States Senate
Washington, DC 20510

The Honorable Roger Wicker
Ranking Member
Committee on Armed Services
United States Senate
Washington, DC 20510

The Honorable Mike Rogers
Chairman
Committee on Armed Services
U.S. House of Representatives
Washington, DC 20515

The Honorable Adam Smith
Ranking Member
Committee on Armed Services
U.S. House of Representatives
Washington, DC 20515

The Honorable Lloyd J. Austin III
Secretary of Defense
1000 Defense Pentagon
Washington, DC 20301

Dear Chairs, Ranking Members, and Mr. Secretary:

We are pleased to provide you with our report *Reforming Pretrial Procedures and Establishing Uniform Prosecution Standards: Recommendations for Article 32, UCMJ, and the Secretary of Defense's Disposition Guidance in Appendix 2.1, MCM* in accordance with section 546 of the National Defense Authorization Act for Fiscal Year 2015 (Public Law 113-291), as amended. This report and our recommendations are the culmination of a five-year study of military sexual assault cases. The DAC-IPAD finds that serious problems persist in the screening, charging, and pretrial phases of the court-martial process. As highlighted below, an immediate, targeted policy action (revising Appendix 2.1 of the MCM) and one legislative remedy (amending Article 32, UCMJ) will ameliorate these problems and contribute to increased trust in the military justice process.

Drawing on its collective expertise, the DAC-IPAD concludes that the investigation, prosecution, and defense of sexual assault cases would be improved with two procedural changes and one training requirement that benefit the entire military justice enterprise. The recommendations are:

- (1) Congress amend Article 32 to provide that a determination by the preliminary hearing officer that a specification lacks probable cause precludes referral of that specification to a general court-martial, subject to the government's limited opportunity for reconsideration. The Article 32 preliminary hearing officer's no-probable-cause determination is without prejudice to the government to bring new charges;

(2) The Secretary of Defense revise Appendix 2.1, Manual for Courts-Martial, to establish uniform prosecution standards aligned with the prosecution principles contained in the United States Justice Manual. The prosecution standards should provide that special trial counsel refer charges to a court-martial, and judge advocates recommend that a convening authority refer charges to a court-martial, only if they believe that the Service member's conduct constitutes an offense under the Uniform Code of Military Justice (UCMJ), and that the admissible evidence will probably be sufficient to obtain and sustain a conviction when viewed objectively by an unbiased factfinder; and

(3) The Secretary of Defense require all special trial counsel and judge advocates who advise convening authorities to receive training on the newly established prosecution standards in Appendix 2.1 of the Manual for Courts-Martial. The training shall emphasize the principle that referral is appropriate only if these special trial counsel and advisors believe that the Service member's conduct constitutes an offense under the UCMJ, and that the admissible evidence will probably be sufficient to obtain and sustain a conviction when viewed objectively by an unbiased factfinder.

These are not radical ideas. Rather, they are principles familiar to every prosecutor—both military and civilian—practicing across the United States and its territories. These targeted reforms are necessary to enhance uniformity, reliability, and consistency in military pretrial procedures, and to establish more rigorous and uniform prosecution standards. Moreover, these recommendations achieve parity with the United States Justice Manual as contemplated by Article 36, UCMJ.¹ The DAC-IPAD's recommendations, which reflect years of data-driven work on these issues, are critical not only for the independent prosecutorial Offices of the Special Trial Counsel (OSTCs) which will be fully operational on July 1, 2023, but also for the military justice system overall. We recently shared our findings and recommendations with the Military Justice Review Panel during their April meeting to avoid creating two separate systems of justice — one system for covered and related offenses that fall under the jurisdiction of the new OSTCs and another system for all other offenses, which remain under the authority of military commanders. Adopting these recommendations across the entire military justice system will restore the broken trust identified by the Independent Review Commission's July 1, 2021, report.

While we know there has been much change in the military justice landscape over the last decade, these recommendations are designed for minimal impact on the workforce, restoring trust in justice-seeking processes, and are specifically designed to enhance the success of the OSTCs at the rollout of the first-ever independent military prosecutorial offices. The members of the DAC-IPAD would like to express our sincere gratitude and appreciation for the opportunity to make use of our collective experience and expertise in this field to develop recommendations for improving the military's response to sexual misconduct within its ranks.

¹ Article 36, UCMJ, provides in relevant part: "Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial . . . may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts[.]"

Respectfully submitted,



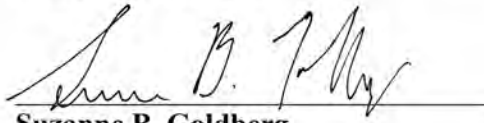
Karla N. Smith, Chair



Marcia M. Anderson



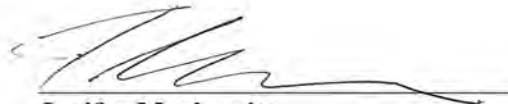
William S. Cassara



Suzanne B. Goldberg



A. J. Kramer



Jenifer Markowitz



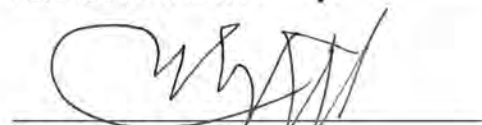
James R. Schwenk



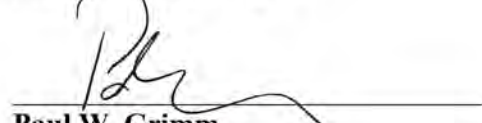
Meghan A. Tokash



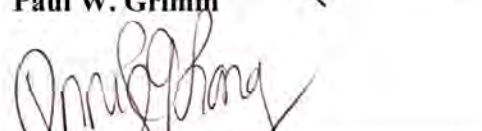
Martha S. Bashford



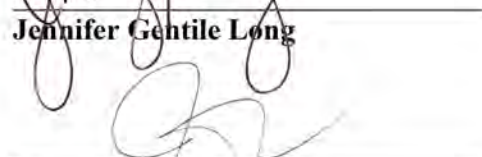
Margaret A. Garvin



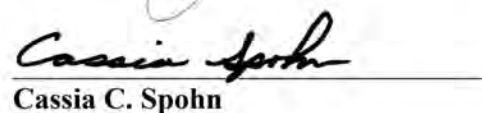
Paul W. Grimm



Jennifer Gentile Long



Jennifer M. O'Connor



Cassia C. Spohn



Reggie B. Walton

CONTENTS

<i>Executive Summary</i>	<i>i</i>
<i>Recommendations</i>	<i>iii</i>
<i>I. Introduction, Recommendations, and Methodology</i>	<i>1</i>
<i>II. Background and Recent Developments.</i>	<i>6</i>
<i>III. Reforming Article 32 Preliminary Hearings</i>	<i>14</i>
<i>IV. Establishing Uniform Prosecution Standards in Appendix 2.1, Manual for Courts-Martial, and Training the Services</i>	<i>22</i>
<i>Conclusion</i>	<i>27</i>
<i>Appendixes</i>	
A. DoD General Counsel Tasking Memo to Evaluate OSTC	A-1
B. Independent Review Commission Recommendations 1.7 a-f (IRC Report Excerpt)	B-1
C. National Defense Authorization Act for Fiscal Year 2022, Excerpt with Joint Explanatory Statement	C-1
D. Request for Information and Service Narrative Responses	D-1
E. Comprehensive Courts-Martial Pretrial Processing Data for Fiscal Years 2014 through 2021	E-1
F. DAC-IPAD Proposed Amendment for Article 32, UCMJ	F-1
G. DAC-IPAD Proposal for Appendix 2.1, MCM	G-1
H. DAC-IPAD Proposal for Training	H-1
I. History of Articles 32, 33, and 34, UCMJ	I-1
J. Excerpt from Principles of Federal Prosecution, Justice Manual 9-27.001–9-27.300	J-1
K. DAC-IPAD Professional Staff	K-1
L. Acronyms and Abbreviations	L-1
M. Sources Consulted	M-1

EXECUTIVE SUMMARY

The Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces' (DAC-IPAD's) multiyear study of military sexual assault cases found serious problems in the screening, charging, and referral phases of the court-martial process. Drawing on its collective expertise, this Committee concludes that the investigation, prosecution, and defense of sexual misconduct would be improved with two procedural changes and one training requirement that benefit the entire military justice enterprise. The DAC-IPAD recommends:

(1) Congress amend Article 32 to provide that a determination by the preliminary hearing officer that a specification lacks probable cause precludes referral of that specification to a general court-martial, subject to the government's limited opportunity for reconsideration. The Article 32 preliminary hearing officer's no-probable-cause determination is without prejudice to the government to bring new charges.

(2) The Secretary of Defense revise Appendix 2.1, Manual for Courts-Martial, to establish uniform prosecution standards aligned with the prosecution principles contained in the United States Justice Manual. The prosecution standards should provide that special trial counsel refer charges to a court-martial, and judge advocates recommend that a convening authority refer charges to a court-martial, only if they believe that the Service member's conduct constitutes an offense under the Uniform Code of Military Justice (UCMJ), and that the admissible evidence will probably be sufficient to obtain and sustain a conviction when viewed objectively by an unbiased factfinder.

(3) The Secretary of Defense require all special trial counsel and judge advocates who advise convening authorities to receive training on the newly established prosecution standards in Appendix 2.1 of the Manual for Courts-Martial. The training shall emphasize the principle that referral is appropriate only if these special trial counsel and advisors believe that the Service member's conduct constitutes an offense under the UCMJ, and that the admissible evidence will probably be sufficient to obtain and sustain a conviction when viewed objectively by an unbiased factfinder.

These are not radical ideas. Rather, they are principles familiar to every prosecutor—both military and civilian—practicing across the United States and its territories. These targeted reforms are necessary to enhance uniformity, reliability, and consistency in military pretrial procedures, and to establish more rigorous and uniform prosecution standards. The DAC-IPAD's recommendations, which reflect years of data-driven work on these issues, are critical not only for the independent prosecutorial Offices of the Special Trial Counsel (OSTCs) but also for the military justice system overall.

Beginning in December 2023, special trial counsel within each OSTC will wield profound prosecutorial authority once held by military commanders for certain covered and related offenses.¹ Data gathered from the past several years indicate that special trial counsel will prosecute the majority of cases tried at general courts-martial.² Accordingly, the DAC-IPAD's recommendations should apply uniformly across the military justice system to avoid creating two separate systems

1 10 U.S.C. § 824a (Art. 24a, UCMJ). The covered offenses over which special trial counsel will exercise authority fall under the following punitive articles in the UCMJ: Art. 117a (wrongful broadcast or distribution of intimate visual images), Art. 118 (murder), Art. 119 (manslaughter), Art. 119a (death or injury of an unborn child), Art. 120 (rape and sexual assault generally), Art. 120a (mails: deposit of obscene matter), Art. 120b (rape and sexual assault of a child), Art. 120c (other sexual misconduct), Art. 125 (kidnapping), Art. 125b (domestic violence), Art. 130 (stalking), Art. 132 (retaliation), Art. 134 (child pornography), Art. 134 (sexual harassment).

2 See Appendix E, Comprehensive Courts-Martial Pretrial Processing Data for Fiscal Years 2014 through 2021 [Pretrial Processing Data] for data indicating that the majority of preferred (or arraigned) cases will involve one or more of the 14 covered offenses.

of military justice—one system for covered and related offenses that fall under the jurisdiction of the new OSTCs and another system for all other offenses, which remain under the authority of military commanders.

Section I of this report summarizes the DAC-IPAD's multiyear study of penetrative adult sexual assault cases and highlights the problems in the screening, charging, and referral phases of sexual assault prosecutions in the military. Section II explains the statutory and regulatory authorities governing pretrial processes in the military, with a focus on the interplay of Articles 32, 33, and 34, UCMJ. Section II also addresses how civilian practice and independent advisory groups have informed the DAC-IPAD's recommendations. Section III describes the need to strengthen Article 32 preliminary hearing procedures to prevent referral of charges for which the evidence does not establish probable cause. Section IV concludes that uniform prosecution standards should be established in Appendix 2.1 of the Manual for Courts-Martial. Proposed new text for Appendix 2.1 is included at Appendix G of this report. Prosecutors and convening authorities should receive training on the uniform prosecution standard. A proposed training guide is included at Appendix H of this report. Taken together, these changes should promote the reasoned exercise of prosecutorial authority and contribute to the fair, evenhanded administration of the UCMJ.

RECOMMENDATIONS

DAC-IPAD Recommendation 48a: Amend Article 32 to provide that a preliminary hearing officer's determination of no probable cause precludes referral of the affected specification(s) to a general court-martial—subject to reconsideration as described in Recommendation 48b—without prejudice to the government to prefer new charges.

DAC-IPAD Recommendation 48b: Amend Article 32 and Rule for Courts-Martial 405 to permit reconsideration of a preliminary hearing officer's no-probable-cause determination upon the presentation of newly discovered evidence, or evidence that, in the exercise of due diligence, could not reasonably have been obtained before the original hearing, subject to the following:

1. Trial counsel, within 10 days of receiving the preliminary hearing officer's report, petitions the preliminary hearing officer to reopen the Article 32 preliminary hearing stating the nature of the newly discovered evidence and the reason it was not previously presented. After 10 days, a petition may be made only for good cause.
2. The preliminary hearing officer shall reconsider their previous no-probable-cause determination one time upon reopening the Article 32 preliminary hearing to receive the evidence as described above. After reconsideration, the preliminary hearing officer's determination as to whether probable cause exists is final, but is without prejudice to the government to prefer new charges.

DAC-IPAD Recommendation 49: The Secretary of Defense revise Appendix 2.1, Manual for Courts-Martial, to align with the prosecution principles contained in official guidance of the United States Attorney General with respect to disposition of federal criminal cases. These revisions should provide that special trial counsel refer charges to a court-martial, and judge advocates recommend that a convening authority refer charges to a court-martial, only if they believe that the Service member's conduct constitutes an offense under the UCMJ, and that the admissible evidence will probably be sufficient to obtain and sustain a conviction when viewed objectively by an unbiased factfinder.

DAC-IPAD Recommendation 50: The Secretary of Defense require all special trial counsel and judge advocates who advise convening authorities to receive training on the newly established prosecution standards in Appendix 2.1 of the Manual for Courts-Martial. The training shall emphasize the principle that referral is appropriate only if these special trial counsel and advisors believe that the Service member's conduct constitutes an offense under the UCMJ, and that the admissible evidence will probably be sufficient to obtain and sustain a conviction when viewed objectively by an unbiased factfinder.

I. INTRODUCTION, RECOMMENDATIONS, AND METHODOLOGY

Introduction

The purpose of military law is to promote justice, to assist in maintaining good order and discipline in the Armed Forces, to promote efficiency and effectiveness in the military establishment, and to thereby strengthen the national security of the United States.³ Sexual assault cases in the military often amplify possible tension between a lawyer's responsibility to safeguard procedural justice and a commander's need to swiftly instill good order and discipline. To address these and other issues, Congress has amended the Uniform Code of Military Justice multiple times over the past 10 years. Many of these changes sought to improve the military's response to rape, sexual assault, and other interpersonal violent crime.

The 2021 study by the Independent Review Commission on Sexual Assault in the Military (IRC) expressed concern that despite these statutory changes, Service members do not trust the military justice system.⁴ This mistrust is due in part to the manner in which sexual assault cases are handled prior to trial—including that many military commanders, on the advice of their staff judge advocates, send cases to trial without regard for the judicial result.⁵ In response, the IRC recommended a thorough evaluation of the military's pretrial procedures laid out in Articles 32 and 34, UCMJ, with a view toward reforms that would increase uniformity, reliability, and consistency in the military justice system.⁶

On the basis of its multiyear study of military sexual assault cases, the DAC-IPAD finds serious problems in the screening, charging, and referral phases of sexual assault prosecutions that may contribute to the lack of trust noted by the IRC.⁷ With the advent of independent special trial counsel, both judge advocates and commanders will possess authority to make disposition decisions. Across this new military justice landscape, the pretrial process needs to be enhanced so that these decision makers can ensure that the interests of justice have equal footing with the maintenance of good order and discipline.

3 MANUAL FOR COURTS-MARTIAL, UNITED STATES (2019 ed.) [2019 MCM], available at https://loc.gov/rr/frd/Military_Law/pdf/MCM-2019.pdf; see also Memorandum from Chairman of the Joint Chiefs of Staff, General Martin E. Dempsey, to Secretary of Defense Chuck Hagel, Requesting a Review of the Uniform Code of Military Justice (Aug. 5, 2013); REPORT OF THE MILITARY JUSTICE REVIEW GROUP, PART I: UCMJ RECOMMENDATIONS APPENDIX A 126I [MJRG REPORT], available at <https://jsc.defense.gov/Portals/99/MJRG%20Part%201.pdf>.

4 On February 26, 2021, Secretary of Defense Lloyd James Austin III established the 90-Day Independent Review Commission (IRC) on Sexual Assault in the Military. The IRC, chaired by Lynn Rosenthal, was charged with conducting “an independent, impartial assessment” of the military's current treatment of sexual assault and sexual harassment.” HARD TRUTHS AND THE DUTY TO CHANGE: RECOMMENDATIONS FROM THE INDEPENDENT REVIEW COMMISSION ON SEXUAL ASSAULT IN THE MILITARY 52 (July 2021) [IRC REPORT], available at <https://media.defense.gov/2021/Jul/02/2002755437/-1/-1/0/IRC-FULL-REPORT-FINAL-1923-7-1-21.PDF/IRC-FULL-REPORT-FINAL-1923-7-1-21.PDF>; see also Appendix B, Independent Review Commission Recommendations 1.7a–f [IRC Report Excerpt].

5 IRC REPORT, *supra* note 4, at 52.

6 On this issue, the IRC concluded: “Many commanders sincerely seek to ‘send a message’ of zero tolerance for sexual assault and sexual harassment but do so in reverse: rather than taking preventive measures to stop these corrosive behaviors from happening in the first place, they have misguidedly used their disposition authority to send cases to courts-martial that a specialized prosecutor knows have little chance of obtaining and sustaining a conviction. In support of this, the IRC heard from individuals and groups of commanders of all levels who believe forwarding cases with insufficient evidence to obtain and sustain a conviction—regardless of outcome—sends a strong discipline message. However, the IRC also heard that the practice of referring a case to trial to ‘send a message,’ but ends in an acquittal harms both victims and accused. Moreover, this philosophy and the associated disappointing trial outcomes are anathema to American concepts of justice and erode public confidence in military justice.” *Id.* at 11.

7 The DAC-IPAD began its study of pretrial issues in 2018 and, after its reconstitution in April 2022, completed the data collection and analysis that culminated in this comprehensive report. See Memorandum from Secretary of Defense to Senior Pentagon Leadership Regarding Department of Defense Advisory Committees – Zero-Based Review (Jan. 30, 2021). The Secretary directed this review to align Department of Defense (DoD) advisory committee efforts with the Department's most pressing strategic priorities.

Recommendations

Our collective expertise leads us to conclude that the investigation, prosecution, and defense of sexual misconduct offenses will improve with two procedural changes and a training requirement that benefit the entire military justice system. Accordingly, the DAC-IPAD recommends:

(1) Congress amend Article 32 to provide that a determination by the preliminary hearing officer that a specification lacks probable cause precludes referral of that specification to a general court-martial, subject to the government's limited opportunity for reconsideration. The Article 32 preliminary hearing officer's no-probable-cause determination is without prejudice to the government to bring new charges.

(2) The Secretary of Defense revise Appendix 2.1, Manual for Courts-Martial, to establish uniform prosecution standards aligned with the prosecution principles contained in the United States Justice Manual. The prosecution standards should provide that special trial counsel refer charges to a court-martial, and judge advocates recommend that a convening authority refer charges to a court-martial, only if they believe that the Service member's conduct constitutes an offense under the Uniform Code of Military Justice (UCMJ), and that the admissible evidence will probably be sufficient to obtain and sustain a conviction when viewed objectively by an unbiased factfinder.

(3) The Secretary of Defense require all special trial counsel and judge advocates who advise convening authorities to receive training on the newly established prosecution standards in Appendix 2.1 of the Manual for Courts-Martial. The training shall emphasize the principle that referral is appropriate only if these special trial counsel and advisors believe that the Service member's conduct constitutes an offense under the UCMJ, and that the admissible evidence will probably be sufficient to obtain and sustain a conviction when viewed objectively by an unbiased factfinder.

Methodology

From 2018 to 2023, the DAC-IPAD studied the pretrial processing of military sexual assault cases. The DAC-IPAD engaged with stakeholders both inside and outside the Department of Defense to discuss the potential impacts of reforming pretrial procedures and establishing uniform prosecution standards on victims, defendants, commands, and the military justice system. This report reflects the DAC-IPAD's analysis of information received from the following groups:

- The Judge Advocates General and the Staff Judge Advocate to the Commandant of the Marine Corps
- General Counsels for each Military Department within the Department of Defense
- Lead special trial counsel within each Military Department
- Criminal law/military justice policy chiefs
- Trial defense services organization chiefs
- Special victims' counsel and victims' legal counsel program managers
- Staff judge advocates
- Former military judges
- Military justice practitioners who have served as preliminary hearing officers
- Advocacy groups: Protect Our Defenders, Survivors United, and Save Our Heroes

Committee members also considered pretrial practice and prosecution standards in the federal district courts and state courts. Members consulted with civilian practitioners with significant experience as prosecutors, defense counsel, or victim's counsel (or advocates) in federal and state criminal proceedings involving sexual offense charges.⁸ Federal civilian criminal procedure and practice are influential in the DAC-IPAD's analysis because Article 36, UCMJ, provides in relevant part: "Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial . . . may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts[.]"⁹ Finally, the DAC-IPAD reviewed reports from other independent advisory groups that have studied similar issues.¹⁰

In addition, the DAC-IPAD conducted extensive data analyses: (1) the DAC-IPAD reviewed source documents for thousands of adult-victim penetrative sexual offense prosecutions from all Military Services and published detailed case adjudication data in November 2019,¹¹ and (2) the DAC-IPAD staff reviewed more than 3,000 pretrial documents for penetrative sex offense cases involving adult victims completed in fiscal years (FYs) 2014 to 2021.¹² The DAC-IPAD's analyses from these studies produced annual conviction, acquittal, and dismissal rates for adult-victim penetrative sexual offense charges, and also explained how these sexual offense charges were screened and sent to a general court-martial or other disposition.

The purpose of the second study, noted above, was to evaluate the efficacy of the Article 32 preliminary hearing. The DAC-IPAD observed the pretrial process for screening charges by collecting information directly from preliminary hearing officers' reports, the pretrial advice, and the statement of trial results for cases resolved from FY14 through FY21. The DAC-IPAD ascertained whether the preliminary hearing officer found that one or more adult-victim penetrative sexual offenses lacked probable cause and identified the resolution of the charge(s): for example, whether the charges found lacking probable cause at the Article 32 were dismissed prior to trial or tried to verdict. Notably, in the process of determining how often preliminary hearing officers found that a distinct offense was not supported by probable cause, cases in which the preliminary hearing officer found probable cause under one legal theory but not another were disregarded. For example, if the accused was charged with the same offense under two or more alternative theories of liability (such as sexual assault by causing bodily harm and sexual assault when the alleged victim was incapable of consent), and the preliminary hearing officer found probable cause for just one theory of liability but not the other(s), the methodology counted that offense as one supported by probable cause.

In FY21, the DAC-IPAD undertook an expanded review of all cases involving any offense under the UCMJ—that is, not just sexual offenses—in which a preliminary hearing was held or waived.¹³ The FY21 case review enabled the staff to compare trends in penetrative sexual offense cases with trends in all other types of cases tried under the UCMJ. Moreover,

8 The DAC-IPAD members and staff conducted more than 20 interviews with civilian practitioners. Interview summaries are on file with the DAC-IPAD staff.

9 10 U.S.C. § 836 (Art. 36, UCMJ).

10 Those DoD advisory committees are the Response Systems to Adult Sexual Assault Crimes Panel (RSP), the Judicial Proceedings Since Fiscal Year 2012 Amendments Panel (JPP), and the Independent Review Commission on Sexual Assault in the Military (IRC). Information on these groups can be found at <https://dacipad.whs.mil/reading>.

11 DEFENSE ADVISORY COMMITTEE ON INVESTIGATION, PROSECUTION, AND DEFENSE OF SEXUAL ASSAULT IN THE ARMED FORCES, COURT-MARTIAL ADJUDICATION DATA REPORT (Nov. 2019); *all DAC-IPAD reports cited in this report are available at* <https://dacipad.whs.mil>.

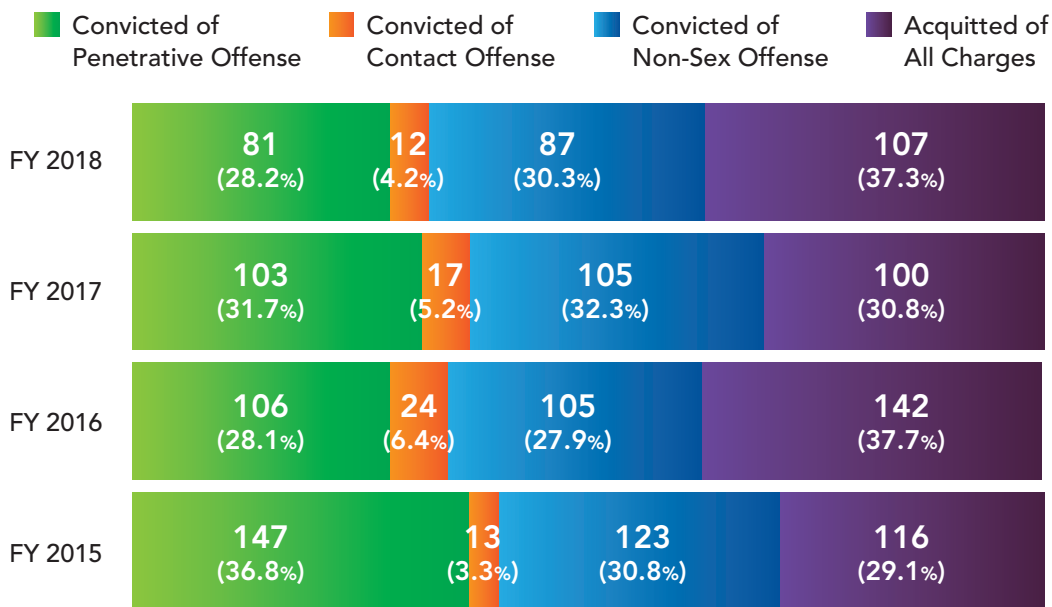
12 See Appendix E, Pretrial Processing Data. The DAC-IPAD published a subset of this comprehensive review of Article 32 documents covering data from FY17 to FY18 in the Fourth Annual Report, released in March 2020.

13 The Committee received trial documents for 1,797 cases completed in FY21.

the expanded review provided context for two additional aspects of Article 32 preliminary hearings: (1) the sufficiency of the evidence presented at the hearing and (2) the depth of analysis conveyed in preliminary hearing officer reports.

The following statistics highlight the most significant findings in the DAC-IPAD’s comprehensive study of these pretrial issues. Figure 1 illustrates the outcomes for penetrative sexual offense charges referred to a general court-martial. The outcomes show persistently low rates of conviction for these offenses and reveal problems with the current pretrial process.

FIGURE 1. OUTCOMES FOR PENETRATIVE OFFENSE CHARGES REFERRED TO COURT-MARTIAL (FY15 – FY18)



[Source: *DAC-IPAD Court-Martial Adjudication Data Report* (November 2019), p. 25, Figure 23.]

The percentage of cases in FY14 to FY21 involving an adult-victim penetrative sexual offense in which the preliminary hearing officer found no probable cause but the convening authority nonetheless referred the case to a general court-martial varied across the Military Services:¹⁴

Army	Navy	Marine Corps	Air Force	Coast Guard
66%	35%	32%	28%	44%

Of such cases in which the convening authority referred the offense to a general court-martial despite the preliminary hearing officer’s finding of no probable cause, the overwhelming majority resulted in a dismissal or a finding of not guilty on the penetrative sexual offense charge:¹⁵

Military Services Overall:	dismissed	not guilty	guilty	mixed findings	unknown
	103	90	15	7	1

¹⁴ See Appendix E, Pretrial Processing Data, at Table 4.

¹⁵ See *id.* at Table 5. These 216 results reflect only those adult-victim penetrative sexual offense cases from FY14–FY21 with an Article 32 preliminary hearing or investigation.

On average, 41% of sexual offense cases in the military are sent to trial after a preliminary hearing officer has found no probable cause.¹⁶ Yet from FY19 to FY21, only 1 Service member—of 13 whose cases were tried to verdict—was convicted of a penetrative sexual offense against an adult victim after a no-probable-cause determination by a preliminary hearing officer.¹⁷

In 2020, the DAC-IPAD concluded its three-year review of almost 2,000 investigative case files involving reports of adult-victim penetrative sexual offenses that reached a final disposition in FY17.¹⁸ Members of the DAC-IPAD's Case Review Subcommittee made qualitative assessments as to whether the evidence contained in the investigative file and associated courts-martial records established probable cause and whether they believed there was sufficient admissible evidence for a conviction.

The Committee's study concluded that there is a systemic problem with the referral of penetrative sexual offense charges to court-martial when there is not sufficient admissible evidence to obtain and sustain a conviction on the charged offense. In 31% of cases that were tried to verdict on a penetrative sexual offense charge, the evidence in the materials reviewed did not meet the sufficiency of the evidence threshold. The government obtained a conviction on the penetrative sexual offense in only 3% (2 out of 73) of these cases, one of which was later overturned on appeal because the evidence was factually insufficient.¹⁹ On the basis of its analysis, the DAC-IPAD determined that probable cause was not an adequate standard for referring a case to trial.²⁰ The DAC-IPAD observed that sending a case to court-martial in the absence of sufficient admissible evidence to obtain and sustain a conviction has significant negative implications for the accused, the victim, and the military justice process. Accordingly, the DAC-IPAD recommended that Congress amend Article 34 so that a convening authority may not refer a charge to court-martial unless the staff judge advocate advises them in writing that there is sufficient admissible evidence to obtain and sustain a conviction on the charged offenses.²¹

In summary, the DAC-IPAD's data analysis and exhaustive review of source documents for sexual assault offenses prosecuted by the military contextualize the observations of judge advocates shared with the DAC-IPAD, as well as the concerns of other independent advisory groups. These data illuminate patterns across the entire military justice system, including the inflection points that help explain case attrition and case outcomes. Importantly, the DAC-IPAD's data and case reviews confirm the IRC's perception that more often than not, courts-martial involving the most serious sexual offense charges end in dismissal or acquittal, a pattern that erodes trust in the military justice system.

16 *See id.* at Table 4.

17 *See id.* at Table 5.

18 DEFENSE ADVISORY COMMITTEE ON INVESTIGATION, PROSECUTION, AND DEFENSE OF SEXUAL ASSAULT IN THE ARMED FORCES, REPORT ON INVESTIGATIVE CASE FILE REVIEWS FOR MILITARY ADULT PENETRATIVE SEXUAL OFFENSE CASES CLOSED IN FISCAL YEAR 2017 I (Oct. 2020) [DAC-IPAD REPORT ON INVESTIGATIVE CASE FILE REVIEWS].

19 *Id.* at 13. The government obtained a conviction on the penetrative sexual offense in 2 out of 73 of these cases, one of which was later overturned on appeal because the evidence was factually insufficient.

20 *Id.* at 14. Finding 101: "The requirements and practical application of Articles 32 and 34, UCMJ, and their associated Rules for Courts-Martial did not prevent referral and trial by general court-martial of adult penetrative sexual offense charges in the absence of sufficient admissible evidence to obtain and sustain a conviction, to the great detriment of the accused, the victim, and the military justice system."

21 *Id.* at 16 (DAC-IPAD Recommendation 32).

II. BACKGROUND AND RECENT DEVELOPMENTS

This report focuses on the current operation of the military justice system and the role of the military commander in the prosecution of criminal offenses. However, beginning this year, each Military Department will establish an independent office of special prosecutors—known as special trial counsel—with authority to prosecute courts-martial involving sexual offenses. Therefore, to avoid creating separate systems of justice for cases referred by convening authorities (military commanders) and cases referred by special trial counsel (military lawyers), the DAC-IPAD recommends applying these proposed reforms across the entire military justice system. This report and recommendations serve two critical, timely functions: (1) to inform the Offices of Special Trial Counsel on best practices for the reasoned exercise of prosecutorial discretion and (2) to promote system-wide consistency of prosecutorial principles.

In support of these goals, the DAC-IPAD has shared the background, supporting data, and recommendations contained in this report with the Military Justice Review Panel (MJRP). The MJRP's statutory mission is to conduct independent, periodic reviews and assessments of the operation of the UCMJ.²² The DAC-IPAD is confident the MJRP will consider the DAC-IPAD's findings and recommendations when making similar or additional recommendations that affect the entire military justice system.

Current Pretrial Practices and Disposition Guidance in the Military Justice System

In the military justice system, any Service member subject to the UCMJ may accuse another of a criminal violation. Charges must be forwarded to the accused's commander—and soon, in the case of a “covered offense,” to the special trial counsel—for review and decision as to disposition.²³ A preliminary hearing under Article 32, UCMJ, must be held before offenses may be tried at a general court-martial, unless it is waived by an accused.²⁴ Under previous iterations of the law, an Article 32 hearing was a “thorough and impartial investigation.”²⁵ However, after public outcry over alleged injustices that took place during an Article 32 hearing at the U.S. Naval Academy,²⁶ Congress completely revised Article 32, limiting the hearing's focus to

- (1) Determining whether there is probable cause to believe an offense has been committed and the accused committed the offense.
- (2) Determining whether the convening authority has court-martial jurisdiction over the offense and the accused.
- (3) Considering the form of charges.
- (4) Recommending the disposition that should be made of the case.²⁷

22 10 U.S.C. § 946 (Article 146, UCMJ).

23 For preferred charges involving “covered offenses,” the special trial counsel—rather than the convening authority—will have exclusive authority to dispose of those charges with a right of first refusal as to jurisdiction over the offense.

24 The convening authority, or special trial counsel, as applicable, may determine a preliminary hearing should be held despite a waiver by the accused of the right to be present at the preliminary hearing. Art. 32(a)(1)(B).

25 10 U.S.C. § 832 (2012) (Article 32, UCMJ); *see also United States v. Henry*, 76 M.J. 595, 603 (A.F. Ct. Crim. App. 2017).

26 Jennifer Steinhauer, *Navy Hearing in Rape Case Raises Alarm*, N.Y. TIMES, Sept. 20, 2013, *available at* <https://www.nytimes.com/2013/09/21/us/intrusive-grilling-in-rape-case-raises-alarm-on-military-hearings.html?searchResultPosition=1>.

27 National Defense Authorization Act for Fiscal Year 2014 [FY14 NDAA], Pub. L. No. 113-66, § 1702, 127 Stat. 672 (2013). Other major reforms include the significant curtailment of convening authorities' authority to disapprove the findings or sentence of a court-martial, as well as a drastic

While the term *probable cause* is not defined in Article 32 or its implementing rule—Rule for Courts-Martial (R.C.M.) 405—military law provides that probable cause requires more than bare suspicion, but something less than a preponderance of the evidence (i.e., more likely than not).²⁸ In American civilian jurisprudence, probable cause at a preliminary hearing is considered a threshold determination without which a prosecution cannot proceed.²⁹

In the military, the Article 32 preliminary hearing officer provides a written analysis of the evidence and recommends whether the charges warrant trial by a general court-martial.³⁰ Their report is forwarded through the chain of command and staff judge advocate to the general court-martial convening authority.³¹ The preliminary hearing officer's findings are merely advisory, rather than binding, on commanders (and soon on the special trial counsel).³²

Next, Article 34, UCMJ, requires that the staff judge advocate provide a written determination that parallels the requirements of Article 32: affirmation that there is probable cause, the court-martial has jurisdiction, and the charges state an offense.³³ Staff judge advocates base their conclusions on an independent review of the evidence and on discussions with prosecutors.³⁴ Staff judge advocates may rely on incompetent or inadmissible evidence. The convening authority may refer the case to trial only if the staff judge advocate concludes that all three elements are met—thus, the staff judge advocate's Article 34 conclusions are binding on the convening authority.

This statutory scheme, which renders the Article 32 preliminary hearing officer's decision advisory, and the staff judge advocate's Article 34 determination a precondition of referral, permits the staff judge advocate to, in effect, overrule—without explanation to the accused or the public—the preliminary hearing officer's probable cause determination. The staff judge advocate's advice also serves as an independent check on the authority of the general court-martial convening authority.³⁵ Notably, following the creation of special trial counsel, Congress safeguarded their prosecutorial independence by having the lead special trial counsel report directly to their respective Military Department's Secretary without intervening authority.³⁶ Thus, the staff judge advocate will not provide Article 34 advice to the special trial counsel and will not serve as a check on their authority to refer a case to a general court-martial.

reduction in clemency authority. In addition, the FY14 NDAA created Article 6b of the UCMJ, the military's analogue to the federal Crime Victims' Rights Act (18 U.S.C. § 3771), and directed the Military Services to establish special victims' counsel programs and provide legal advice and representation to military victims of sexual assault. This revision applied to Article 32 hearings conducted on or after Dec. 26, 2014.

28 *United States v. Darnall*, 76 M.J. 326, 330 (C.A.A.F. 2017) (citing *United States v. Leedy*, 65 M.J. 208, 213 (C.A.A.F. 2007)). “Preponderance of the evidence” is defined as “proof that an issue is more likely true than not.” THE WOLTERS KLUWER BOUVIER LAW DICTIONARY DESK EDITION (2012).

29 See Offices of the United States Attorneys, U.S. Department of Justice, *Preliminary Hearing*, JUSTICE 101, <https://www.justice.gov/usao/justice-101/preliminary-hearing>.

30 2019 MCM, *supra* note 3, R.C.M. 405(l).

31 Section 537 of the FY22 NDAA provides that in cases in which a special trial counsel exercises authority, the report of the preliminary hearing officer shall be provided to the special trial counsel. National Defense Authorization Act for Fiscal Year 2022 [FY22 NDAA], Pub. L. No. 117–81, div. A, title V, § 537, 135 Stat. 1692 (2021).

32 Art. 32(c), UCMJ; 2019 MCM, *supra* note 3, R.C.M. 405(a), Discussion (“Determinations and recommendations of the preliminary hearing officer are advisory.”). See Appendix I, History of Articles 32, 33, and 34, UCMJ.

33 10 U.S.C. § 834 (2021) (Art. 34, UCMJ).

34 See *Transcript of DAC-IPAD Policy Subcommittee Meeting* 78–80 (Dec. 3, 2020), on file with the DAC-IPAD staff.

35 *United States v. Meador*, 75 M.J. 682, 683 (C.G. Ct. Crim. App. 2016) (“There is nothing in this statutory scheme that makes a determination of probable cause by the PHO [‘preliminary hearing officer’] a precondition of referral to a general court-martial, nor is there any language making the PHO’s determination binding on the staff judge advocate or the [convening authority]. By contrast, the staff judge advocate’s advice is a clear precondition of referral to a general court-martial. The statutory language consequently provides no support for the proposition that the PHO’s determination of probable cause is dispositive.”). Cf. THE 2021 ARMY CRIMINAL LAW DESKBOOK, 14-1, which calls the Article 34 pretrial advice a “substantial pretrial right of the accused,” because it “protects accused against trial on baseless charges.”

36 FY22 NDAA, *supra* note 31, at § 532(a)(2)(C).

The staff judge advocate also makes an advisory recommendation to the general court-martial convening authority as to whether trial by general court-martial, or some other disposition, is appropriate.³⁷ Under current law, Article 33, UCMJ, says that when commanders, convening authorities, staff judge advocates, and judge advocates exercise their duties with respect to disposition of criminal charges and specifications, they should consider the non-binding guidance issued by the Secretary of Defense. The Secretary of Defense promulgated in Appendix 2.1 of the Manual for Courts-Martial a list 14 factors that these individuals should take into account when exercising these responsibilities. Article 33 also requires the Secretary of Defense, in developing this disposition guidance, to consider the principles of prosecution set forth in the Justice Manual of the U.S. Attorney General for disposition of federal criminal cases, with appropriate consideration of military requirements.³⁸ Significantly, statutory authority and case law guard each commander's independent authority to make decisions in criminal cases free from critique or reprisal from higher command echelons.³⁹ Beginning in December 2023, the charging and referral decisions in 14 felony-equivalent offenses,⁴⁰ along with related offenses, will shift to independent, experienced military prosecutors.⁴¹

Comparisons with Civilian Practice

In contrast to the military justice system, in which a preliminary hearing officer's no-probable-cause determination is advisory, American federal and state civilian systems empower magistrates to dismiss charges that do not meet the constitutional threshold requirement of probable cause. A no-bill decision from a grand jury has a similar effect.⁴² Significantly, a dismissal or no bill in the civilian system does not preclude the government from perfecting its case and charging anew; however, a finding of no probable cause is a bar to prosecution of the current charges before the magistrate or grand jury.⁴³

In civilian practice, the gap between the lower standard of "probable cause" required to recommend prosecution and the "beyond a reasonable doubt" standard for conviction at trial has been filled with structured decisional principles and charging standards to guide prosecutors in the prudent and effective exercise of prosecutorial discretion.⁴⁴ In the federal system, the Principles of Federal Prosecution contained in the Justice Manual provide that a prosecutor may

37 *Id.* R.C.M. 701 requires that the defense receive a copy of the Article 34 advice and any document that memorializes the referral decision. Beginning in December 2023, Article 34 requires that the special trial counsel make the probable cause finding for offenses over which they have authority. The staff judge advocate will not have a role advising the special trial counsel on the referral decision.

38 U.S. DEPT. OF JUSTICE, JUSTICE MANUAL [JUSTICE MANUAL], § 9-27.000 (Principles of Federal Prosecution), *available at* <https://www.justice.gov/jm/justice-manual>.

39 10 U.S.C. § 837 (2021) (Art. 37, UCMJ).

40 The covered offenses over which special trial counsel will exercise authority fall under the following punitive articles in the UCMJ: Art. 117a (wrongful broadcast or distribution of intimate visual images), Art. 118 (murder), Art. 119 (manslaughter), Art. 119a (death or injury of an unborn child), Art. 120 (rape and sexual assault generally), Art. 120a (mails: deposit of obscene matter), Art. 120b (rape and sexual assault of a child), Art. 120c (other sexual misconduct), Art. 125 (kidnapping), Art. 125b (domestic violence), Art. 130 (stalking), Art. 132 (retaliation), Art. 134 (child pornography), Art. 134 (sexual harassment).

41 See Appendix C, FY22 NDAA Excerpt; *see also* IRC REPORT, *supra* note 4, App. B at 8, Recommendation 1.1, Creation of the Office of the Special Victim Prosecutor ("[D]esignated independent judge advocates should replace commanders in deciding . . . whether [a] charge should be tried at court-martial"). The military does not classify offenses as misdemeanors or felonies. Punishments for each offense are prescribed by the President through executive orders published in the MCM. The broad range of potential punishment for an offense is limited by the jurisdictional authority of courts-martial. *See generally* Arts. 16–21, UCMJ.

42 JUSTICE MANUAL, *supra* note 38, at § 9-11.120 ("Once a grand jury returns a no-bill or otherwise acts on the merits in declining to return an indictment, the same matter (i.e., the same transaction or event and the same putative defendant) should not be presented to another grand jury or resubmitted to the same grand jury without first securing the approval of the responsible United States Attorney.")

43 *Id.*

44 MJRG REPORT, *supra* note 3, at 338.

commence prosecution only after determining that probable cause exists to believe that a suspect has committed a federal offense.⁴⁵ The Justice Manual further states that the attorney for the government should commence or recommend federal prosecution if they believe that the person's conduct constitutes a federal offense, that the admissible evidence will probably be sufficient to obtain and sustain a conviction, and that the prosecution serves a substantial federal interest.⁴⁶ These prosecution standards serve a critical function for crime victims, the criminally accused, and the American public: they strengthen consistency and uniformity of case disposition and confidence in the criminal justice system.⁴⁷

While Article 33 requires the Secretary of Defense's disposition guidance to "take into account, with appropriate consideration of military requirements, the principles contained in official guidance of the Attorney General to attorneys for the Government with respect to disposition of Federal criminal cases,"⁴⁸ the current version of Appendix 2.1 of the Manual for Courts-Martial stops short of complete parity with federal prosecution standards. Specifically, Appendix 2.1 does not adopt the Department of Justice's Principles of Federal Prosecution. The Principles of Federal Prosecution establish, as a threshold matter—prior to a charging decision—that a case should not be prosecuted unless the admissible evidence will probably be sufficient to obtain and sustain a conviction.⁴⁹ In contrast, the disposition guidance in Appendix 2.1 lists sufficiency of the evidence as only one of the 14 factors to consider when deciding whether a general court-martial is appropriate.⁵⁰ As a result, military prosecutorial decision making does not mirror the federal practice of prioritizing the sufficiency of the evidence when commencing or declining prosecution.⁵¹

45 JUSTICE MANUAL, *supra* note 38, § 9-27.200 (Initiating and Declining Prosecution—Probable Cause Requirement).

46 *Id.* at § 9-27.220 (Grounds for Commencing or Declining Prosecution).

47 *Id.* at § 9-27.001 (Preface).

48 Art. 33, UCMJ.

49 JUSTICE MANUAL, *supra* note 38, § 9-27.220 (Grounds for Commencing or Declining Prosecution).

50 Appendix 2.1, MCM 2019, *supra* note 3, at para. 2.1(h). The 14 factors (a non-exclusive list) are

- a. The mission-related responsibilities of the command;
- b. Whether the offense occurred during wartime, combat, or contingency operations;
- c. The effect of the offense on the morale, health, safety, welfare, and good order and discipline of the command;
- d. The nature, seriousness, and circumstances of the offense and the accused's culpability in connection with the offense;
- e. In cases involving an individual who is a victim under Article 6b, the views of the victim as to disposition;
- f. The extent of the harm caused to any victim of the offense;
- g. The availability and willingness of the victim and other witnesses to testify;
- h. Whether admissible evidence will likely be sufficient to obtain and sustain a conviction in a trial by court-martial;
- i. Input, if any, from law enforcement agencies involved in or having an interest in the specific case;
- j. The truth-seeking function of trial by court-martial;
- k. The accused's willingness to cooperate in the investigation or prosecution of others;
- l. The accused's criminal history or history of misconduct, whether military or civilian, if any;
- m. The probable sentence or other consequences to the accused of a conviction;
- n. The impact and appropriateness of alternative disposition options—including nonjudicial punishment or administrative action—with respect to the accused's potential for continued service and the responsibilities of the command with respect to justice and good order and discipline.

51 *See* STANDARDS FOR CRIMINAL JUSTICE: FUNCTIONS AND DUTIES OF THE PROSECUTOR (AM. BAR ASS'N 2017) [ABA STANDARDS FOR CRIMINAL JUSTICE]; American Bar Association Standard 3-4.3, Minimum Requirements for Filing and Maintaining Criminal Charges.

Prosecution Standards for Civilian Prosecutors

In 2020, the DAC-IPAD Policy Subcommittee interviewed civilian career prosecutors from regionally diverse state and federal jurisdictions.⁵² When discussing a prosecutor's decision to charge a case, all agreed that the evidentiary standard used must be more than probable cause; and all but one agreed that the attorney should believe that there is sufficient evidence to prove the charge beyond a reasonable doubt or that there was a reasonable likelihood of a successful prosecution.⁵³ A separate review of state rules of professional conduct or similar guidance on charging found that the quantum of evidence is often more than probable cause, and a sufficiency of the evidence review is either required or recommended before charging a case at trial.⁵⁴

American Bar Association (ABA)

The American Bar Association's Criminal Justice Standards provide guidance to prosecutors on a variety of subjects and are intended for attorneys who investigate, prosecute, or provide legal advice to agents regarding criminal matters.⁵⁵ The standards are relied on by judges, prosecutors, defense attorneys, legislatures, and scholars, who recognize that they are the product of careful consideration and drafting by experienced and fair-minded experts drawn from all parts of the criminal justice system.⁵⁶ The ABA's minimum requirements to file criminal charges are set forth, in part, below:

- A prosecutor should seek or file criminal charges only if the prosecutor reasonably believes that the charges are supported by probable cause, that admissible evidence will be sufficient to support conviction beyond a reasonable doubt, and that the decision to charge is in the interests of justice.
- After criminal charges are filed, a prosecutor should maintain them only if the prosecutor continues to reasonably believe that probable cause exists and that admissible evidence will be sufficient to support conviction beyond a reasonable doubt.⁵⁷

The ABA sets out additional factors that may be weighed before filing criminal charges; however, those factors are analyzed only after the threshold evidentiary standards of probable cause and the sufficiency of the admissible evidence to support a finding of guilt beyond a reasonable doubt have been met.⁵⁸ Thus, if the prosecutor does not have sufficient admissible evidence to meet the higher standard of proof at trial, other factors—such as the victim's interest in going to trial—are not relevant.

52 See DAC-IPAD Staff Summary of Interviews with Civilian Prosecutors (May 2020–Jan. 2021), on file with staff.

53 *Id.*

54 The states reviewed represented a diverse area: Florida, South Carolina, North Carolina, Alabama, Louisiana, New Jersey, New York, Connecticut, Virginia, California, Oregon, Illinois, Missouri, and Washington State.

55 ABA STANDARDS FOR CRIMINAL JUSTICE, *supra* note 51.

56 Martin Marcus, *The Making of the ABA Criminal Justice Standards: Forty Years of Excellence*, CRIM. JUST., Winter 2009, 10–15, available at https://www.americanbar.org/content/dam/aba/publications/criminal_justice_magazine/makingofstandards_marcus.pdf.

57 ABA STANDARDS FOR CRIMINAL JUSTICE, *supra* at note 51, at § 3-4.3, Minimum Requirements for Filing and Maintaining Criminal Charges.

58 *Id.* at § 3-4.4, Discretion in Filing, Declining, Maintaining, and Dismissing Criminal Charges (additional factors a prosecutor may consider when deciding whether to file or decline charges include the views of the victim, the background and characteristics of the offender, and any improper conduct by law enforcement.).

National Prosecution Standards Published by the National District Attorneys Association (NDAA)

At the state and local level, district attorney's offices consult the National Prosecution Standards for guidance in the daily operations of the prosecution function, which includes screening charges. The NDAA standards parallel the federal guidance:

While commencing a prosecution is permitted by most ethical standards upon a determination that probable cause exists to believe that a crime has been committed and that the defendant has committed it, the standard prescribes a higher standard for filing a criminal charge. To suggest that the charging standard should be the prosecutor's reasonable belief that the charges can be substantiated by admissible evidence at trial is recognition of the powerful effects of the initiation of criminal charges. Pursuant to the prosecution's duty to seek justice, the protection of the rights of all (even the prospective defendant) is required.⁵⁹

Comparable Rules of Professional Conduct for the Military

The Services' individual regulations governing professional responsibility for military attorneys are adapted from the ABA Model Rules of Professional Conduct, with some adjustments necessitated by the unique nature of military practice.⁶⁰ Army, Navy, and Marine Corps trial counsel all have the same guidance under their respective Military Departments' Rule 3.8, Special Responsibilities of a Trial Counsel, in connection with a referral, including a requirement to "recommend to the convening authority that any charge or specification not supported by probable cause be withdrawn."⁶¹

Rule 3.8 is supplemented by instructional commentary noting that a trial counsel has a "responsibility" to administer justice and "is not simply an advocate." Attorneys "may have the duty, in certain circumstances, to bring to the court's attention any charge that lacks sufficient evidence to support a conviction."⁶²

The Air Force prescribes a different professional standard for trial counsel within that Military Service:

It is unprofessional conduct for a trial counsel to institute, or cause to be instituted, or to permit the continued pendency of criminal charges when it is known that the charges are not supported by

59 NATIONAL DISTRICT ATTORNEYS ASSOCIATION, NATIONAL PROSECUTION STANDARDS 56 (4th ed. Jan. 2023), Part IV, Pretrial Considerations. (These standards are intended to supplement rather than replace the existing rules of ethical conduct that apply in a jurisdiction. Generally, these standards should be construed in such a way that they are consistent with existing law and applicable rules of ethical conduct.)

60 U.S. DEP'T OF ARMY, ARMY REGULATION 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS [AR 27-26] (June 28, 2018); U.S. DEP'T OF NAVY, NAVY JAG INSTRUCTION 5803.1E, PROFESSIONAL CONDUCT OF ATTORNEY PRACTICING UNDER THE COGNIZANCE AND SUPERVISION OF THE JUDGE ADVOCATE GENERAL [NAVY JAG INSTRUCTION 5803.1E] (Jan. 20, 2015); U.S. DEP'T AIR FORCE, AIR FORCE INSTRUCTION 51-110 [AFI 51-110], PROFESSIONAL RESPONSIBILITY PROGRAM (Dec. 11, 2018); COMMANDANT INSTRUCTION M5800.1, COAST GUARD LEGAL PROFESSIONAL RESPONSIBILITY PROGRAM (June 1, 2005). The Services adopted the ABA's Model Rules of Professional Conduct but not the ABA Standards of Criminal Justice Relating to the Prosecution Function. The former require that a prosecutor refrain from charging a case not supported by probable cause, while the latter require not just probable cause but also that admissible evidence will be sufficient to support conviction beyond a reasonable doubt. See ABA STANDARDS FOR CRIMINAL JUSTICE, *supra* note 51; see also MODEL RULES OF PROF' CONDUCT R. 3.8 (ABA 2020) [ABA MODEL RULES].

61 See AR 27-26, *supra* note 60, at Rule 3.8; NAVY JAG INSTRUCTION 5803.1E, *supra* note 60, at Rule 3.8. Both Navy and Marine Corps trial counsel practice under the same Professional Rules of Conduct. Cf. ABA MODEL RULES, *supra* note 60, 3.8(a).

62 AR 27-26, *supra* note 60, at Rule 3.8, comment section. See also *United States v. Howe*, 37 M.J. 1062 (N-M.C.M.R. 1993) (Government's prosecutorial duty requires that it not permit the continued pendency of criminal charges in the absence of sufficient evidence to support a conviction). This case is cited in both the Army's and Navy's Rules of Professional Conduct.

probable cause. A trial counsel should not institute or permit the continued pendency of criminal charges in the absence of admissible evidence to support a conviction.⁶³

The Coast Guard's standard requires the trial counsel to recommend that the convening authority withdraw any charge or specification not warranted by the evidence.⁶⁴

Given the high standard of proof required for a conviction—proof beyond a reasonable doubt—it is logical to analyze the strength of the evidence to support a conviction at trial. Reasonable doubt is defined as an honest misgiving generated by insufficient proof; thus, proof *beyond* a reasonable doubt is equivalent to an evidentiary certainty about guilt, although not necessarily an absolute or mathematical certainty.⁶⁵ Civilian prosecutors assess the sufficiency of the admissible evidence to bridge the gap between probable cause and the burden of proof needed to establish guilt at trial. Military prosecutors and disposition authorities would benefit from an approach similar to the civilian model because both military and civilian criminal courts require proof beyond a reasonable doubt to obtain a criminal conviction.

Observations by Independent Advisory Groups

Two advisory groups—in addition to this Committee—have recommended ways to strengthen pretrial procedures in the military, including ways to emphasize the justice-seeking purpose of military law as well as the command-driven focus on good order and discipline. On multiple occasions, these groups have observed a connection between the advisory nature of Article 32 hearings and deleterious case outcomes.⁶⁶ These groups have also noted systemic benefits in elevating the prosecution standard above the probable cause threshold as a matter of sound practice and of fundamental fairness.⁶⁷

In 2016, the Judicial Proceedings Panel (JPP), another federal advisory committee reviewing sexual assault in the military,⁶⁸ visited numerous military installations and interviewed more than 280 individuals involved in the military justice system.⁶⁹ These military justice practitioners often expressed concern that the Article 32 hearing was no longer a meaningful process for determining the strength of the evidence and therefore the case; they described these hearings as “paper drills,” as it was common for no witnesses to testify. Many judge advocates also expressed the view that convening authorities feel external pressure to prosecute sexual offense cases and, as a result, will refer a case without sufficient evidence to convict at trial rather than deal with possible media scrutiny and damage to their career.⁷⁰

63 AFI 51-110, *supra* note 60, at Standard 3-3.9, “Discretion in the Charging Decision” (Dec. 11, 2018).

64 U.S. COAST GUARD, COMMANDANT INSTRUCTION M5800.1, *supra* note 60.

65 U.S. DEP’T OF ARMY, PAMPHLET 27-9, MILITARY JUDGE’S BENCHBOOK 2-5-12 (Feb. 29, 2020) (Provides the standard panel instructions on reasonable doubt for each Military Service).

66 The RSP, JPP, DAC-IPAD, and IRC all reviewed this issue. The DAC-IPAD’s review of pretrial process issues was halted when the Committee was suspended in January 2021 as part of DoD’s zero-based review of all DoD advisory committees.

67 The JPP and DAC-IPAD recommended elevating the referral standard. While the IRC strongly suggested that the Department of Justice’s standard be adopted, it formally recommended further study by the DAC-IPAD.

68 National Defense Authorization Act for Fiscal Year 2013 [FY13 NDAA], Pub. L. No. 112-239, § 576, 126 Stat. 1632 (Jan. 2, 2013), as amended by FY14 NDAA, *supra* note 27, at § 1731, as further amended by Carl Levin and Howard P. “Buck” McKeon National Defense Authorization Act for Fiscal Year 2015 [FY15 NDAA], Pub. L. No. 113-291, § 545, 128 Stat. 3292 (Dec. 19, 2014). Between February 2014 and October 2017, the JPP released 11 reports on varying topics.

69 JUDICIAL PROCEEDINGS PANEL REPORT ON PANEL CONCERNS REGARDING THE FAIR ADMINISTRATION OF MILITARY JUSTICE IN SEXUAL ASSAULT CASES (Sept. 2017) [JPP REPORT], *available at* https://dacipad.whs.mil/images/Public/10-Reading_Room/04_Reports/01_JPP_Reports/10_JPP_Concerns_Fair_MJ_Report_Final_20170915.pdf.

70 *Id.* at 10.

Echoing the JPP's concerns, the DAC-IPAD also found systemic problems with the referral of penetrative sexual offense charges to court-martial when there is not sufficient admissible evidence to obtain and sustain a conviction on the charged offense.⁷¹ In our review of almost 2,000 investigative case files, we concluded that weak pretrial procedures and a lack of prosecutorial policy guidance contributed directly to frequent acquittals in sexual offense cases, and that probable cause was not an adequate standard for referring a case to trial.⁷² The DAC-IPAD observed that sending a case to court-martial in the absence of sufficient admissible evidence to obtain and sustain a conviction has significant negative implications for the accused and the victim, and erodes trust in the military justice process.

In 2021, at the President's direction, the Secretary of Defense established the Independent Review Commission on Sexual Assault in the Military.⁷³ The IRC held extensive listening sessions with hundreds of stakeholders, including general court-martial convening authorities. These commanders expanded on the same troubling issue of referring a case with deficient evidence merely to "send a message." The IRC heard that this practice harms both victims and accused and erodes public confidence in military justice.⁷⁴ The IRC found that the decision to forward charges to court-martial is one of the most consequential decisions in the military justice process, and thus consideration of the sufficiency of the evidence both is a matter of fundamental fairness and serves the interest of the efficient administration of justice.⁷⁵

While emphasizing the need for more robust procedures for selecting cases, the IRC recommended that independent and specialized prosecutors be solely responsible for the disposition of sexual offenses and other serious felony cases, such as domestic violence and stalking. On the basis of the IRC's recommendation, Congress established the authority of new special trial counsel in Article 24a, UCMJ. Both the IRC and Congress envisioned that special trial counsel will possess the expertise needed to foster long-term institutional competence and to properly assess the sufficiency of the evidence before sending a case to court-martial. Congress stressed this point in its Joint Explanatory Statement accompanying the annual defense bill that established special trial counsel:

We emphasize that when determining whether to refer charges and specifications to a court-martial for trial, the convening authority, or, when applicable, the special trial counsel, should first evaluate whether admissible evidence will likely be sufficient to obtain and sustain a conviction in a trial by court-martial.⁷⁶

This foundational concept supports more stringent pretrial procedures for the military that achieve parity with the Department of Justice Federal Principles of Prosecution and aligns with bedrock principles of American jurisprudence.

71 DAC-IPAD REPORT ON INVESTIGATIVE CASE FILE REVIEWS, *supra* note 18, at 16 (Finding 111) (the DAC-IPAD's three-year review of almost 2,000 investigative case files involving reports of adult-victim penetrative sexual offenses that reached a final disposition in FY17).

72 *Id.* at 12 (Finding 101).

73 See IRC REPORT, *supra* note 4, App. B at 8.

74 *Id.* at 11.

75 *Id.*

76 See Joint Explanatory Statement accompanying the FY22 NDAA, comment on amendments contained in § 537. An excerpt from the Joint Explanatory Statement is provided at Appendix C of this report.

III. REFORMING ARTICLE 32 PRELIMINARY HEARINGS

DAC-IPAD Recommendation 48a: Amend Article 32 to provide that a preliminary hearing officer's determination of no probable cause precludes referral of the affected specification(s) to a general court-martial—subject to reconsideration as described in Recommendation 48b—without prejudice to the government to prefer new charges.

DAC-IPAD Recommendation 48b: Amend Article 32 and Rule for Courts-Martial 405 to permit reconsideration of a preliminary hearing officer's no-probable-cause determination upon the presentation of newly discovered evidence, or evidence that, in the exercise of due diligence, could not reasonably have been obtained before the original hearing, subject to the following:

1. Trial counsel, within 10 days of receiving the preliminary hearing officer's report, petitions the preliminary hearing officer to reopen the Article 32 preliminary hearing stating the nature of the newly discovered evidence and the reason it was not previously presented. After 10 days, a petition may be made only for good cause.
2. The preliminary hearing officer shall reconsider their previous no-probable-cause determination one time upon reopening the Article 32 preliminary hearing to receive the evidence as described above. After reconsideration, the preliminary hearing officer's determination as to whether probable cause exists is final, but is without prejudice to the government to prefer new charges.

It has been almost 10 years since Congress transformed Article 32, UCMJ, into a preliminary hearing with two primary purposes: (1) to determine whether there is probable cause to believe that the accused committed the offenses charged, and (2) to recommend the disposition that should be made of the case.⁷⁷ Sufficient time has passed to observe the effect of this significant change in military practice: Article 32 preliminary hearings today are not functioning as a meaningful screening mechanism for preferred charges and are failing to effectively inform the referral decision.⁷⁸ The advisory nature of Article 32 undermines its own purposes and creates systemic problems with the pretrial processing of criminal misconduct.

The DAC-IPAD therefore recommends that Congress amend Article 32 so that a no-probable-cause finding bars prosecution of the affected charges and specifications by a general court-martial, subject to reconsideration upon the presentation of newly discovered evidence.⁷⁹ This reform does not empower preliminary hearing officers to dismiss the affected charges; rather, a preliminary hearing officer's no-probable-cause determination would require trial counsel to dismiss the affected charge(s) at or before referral to a general court-martial. In any case, the Article 32 preliminary hearing officer's decision would be without prejudice and the government would be free to prefer new charges, which has been the practice of state and federal civilian prosecutors for centuries.⁸⁰ This recommendation fully accords with the

⁷⁷ FY14 NDAA, *supra* note 27, at § 1702.

⁷⁸ Frank E. Kostik, Lieutenant Colonel, U.S. Army, and Elizabeth L. Lippy, *Consequence of Change: An Argument to Increase Litigation Experience to Fill the Void Left by the Changes to the Preliminary Hearing in the Military Justice System*, 43 AM. J. TRIAL ADVOC. 109, 121 (Fall 2019).

⁷⁹ See *infra* pp. xx–xx for a discussion of this recommendation. While this report examines whether to make a preliminary hearing officer's no-probable-cause determination binding, a determination that the evidence *did* establish probable cause does not—and should not—bind subsequent authorities to try the case at a general court-martial. Such a notion is contrary to Article 32 reform: Article 32 is intended to uniformly and reliably screen out unsupported charges and to assist, but not direct, consistency in referral decisions. In cases supported by probable cause, the disposition decision should remain with the special trial counsel or convening authority.

⁸⁰ 10 U.S.C. § 844 (Art. 44, UCMJ).

IRC's goal that Article 32 proceedings should "promote fairness, justice, and efficiency."⁸¹ The following sections describe in detail the problems caused by an advisory Article 32 no-probable-cause determination, the cost to the system, and the value of reform.

Problems with the Advisory Nature of Article 32, UCMJ, Preliminary Hearings

Data from the DAC-IPAD's multiyear studies described in the methodology section of this report illuminate the problems caused by the advisory nature of Article 32 hearings. Most penetrative sexual offense charges referred to a general court-martial after a preliminary hearing officer found no probable cause for that offense ended in an acquittal or dismissal.⁸² For adult-victim penetrative sexual offenses evaluated between FY14 and FY21 in which the preliminary hearing officer found no probable cause for the penetrative sexual offense, but the convening authority referred those charges nonetheless, 103 cases ended with a dismissal of the penetrative sexual offense, 90 cases resulted in a finding of not guilty on that offense, 15 cases resulted in a finding of guilty on that offense, and 7 cases had mixed findings.⁸³

Court-martial records reviewed annually by the DAC-IPAD showed that more than 30% of the adult-victim penetrative sexual offense cases tried in FY16 through FY18 ended in a *full* acquittal.⁸⁴ Of the 235 adult-victim penetrative sexual offense charges tried to verdict in FY17, 144 (61.3%) of the cases resulted in an acquittal on the penetrative sexual offense, and 91 (38.7%) of the cases resulted in a conviction on the penetrative sexual offense (DAC-IPAD Finding 90).⁸⁵ The DAC-IPAD attributes these extremely low conviction rates (and high rates of acquittal) to the frequency with which penetrative sexual offense cases that do not meet the standard of proof required at trial are systematically referred to a court-martial.⁸⁶

Some of these convictions were reversed on appeal. Notably, in several cases in which adult-victim sexual offenses were tried at general courts-martial after the Article 32 preliminary hearing officer found no probable cause, the appellate courts overturned the convictions for lack of factual sufficiency and urged prosecutors to heed ethical guidelines.⁸⁷ One appellate judge reminded government counsel of their ethical obligations at the preliminary hearing stage of the process after the court overturned a case that did not meet the probable cause requirement:

This Preliminary Hearing, at least with respect to these specifications, provided no meaningful protection for Appellant and no check on the Government's ability to expose him to felony-level

81 IRC REPORT, *supra* note 4, App. B at 53.

82 See Appendix E, Pretrial Processing Data, at Table 5: 193 out of 216 cases (89%) resulted in either a finding of not guilty on, or a dismissal of, the penetrative sexual offense charge.

83 The outcome in one of those cases was unknown. Note that the statistics cited here include FY14 and FY15, when the old Article 32 investigation—before the new preliminary hearing procedures were created by Congress—was in force.

84 DEFENSE ADVISORY COMMITTEE ON INVESTIGATION, PROSECUTION, AND DEFENSE OF SEXUAL ASSAULT IN THE ARMED FORCES, COURT-MARTIAL ADJUDICATION DATA REPORT 25 (Nov. 2019).

85 DAC-IPAD REPORT ON INVESTIGATIVE CASE FILE REVIEWS, *supra* note 18, at 41 (DAC-IPAD statistics for the outcome of the charged adult-victim penetrative sexual offense).

86 *Id.* at 4.

87 See *United States v. Hanabarger*, No. 201900031, 2020 CCA LEXIS 252 (N-M. Ct. Crim. App. July 30, 2020); *United States v. Lewis*, No. 201900049, 2020 CCA LEXIS 199 (N-M. Ct. Crim. App. June 8, 2020) (Stephens, Senior Judge, concurring) (Unpub. Op.). Cf. *United States v. Hyppolite*, No. ACM 39358, 2018 CCA LEXIS 517 (A.F. Ct. Crim. App. Oct. 25, 2018) (Huygen, Judge, dissenting) (Unpub. Op.) (expressing disagreement with the majority's finding that the evidence supporting a specification, which the preliminary hearing officer found unsupported by probable cause, was factually sufficient), *aff'd*, 79 M.J. 161 (C.A.A.F. 2019).

punishment. . . Specifications lacking probable cause should not find a home on referred charge sheets for general courts-martial.⁸⁸

Although convictions and acquittals are not always the best metrics to measure the success of criminal prosecutions, the high percentages of dismissals and acquittals in the military's data are striking. In too many military felony sexual offense cases over the past eight years, both victims and accused have been harmed by an approach that seeks to send a message to the force or is the product of political pressure to address sexual assault—a very real problem within the force. With the advent of special trial counsel and implementation of these recommendations, the DAC-IPAD believes its proposed prosecutor-focused reforms will better balance the dual purposes of military law: fostering the interests of justice and good order and discipline.

Because the advisory nature of the Article 32 hearing does not incentivize counsel for the government to establish probable cause,⁸⁹ one of its primary purposes is undercut. The DAC-IPAD's review of Article 32 reports produced in FY16 through FY21 showed that in 17% of cases across the Services involving an adult penetrative sexual offense charge, the preliminary hearing officer determined that one or more penetrative sexual offense charges lacked probable cause.⁹⁰ In order to understand system-wide patterns, the DAC-IPAD also examined all preferred cases—involving any UCMJ offense—that were completed in FY21. The DAC-IPAD's review of all preferred cases in which an Article 32 preliminary hearing was held revealed that in 26% of all preliminary hearings, the preliminary hearing officer found that one or more offenses lacked probable cause.⁹¹ These findings are especially concerning because at the Article 32 stage, the government has already charged a Service member with a crime; therefore, probable cause is a low evidentiary threshold that the government should easily meet by the time a case reaches a preliminary hearing.

88 *United States v. Lewis*, No. 201900049, 2020 CCA LEXIS 199, 42 (Stephens, Senior Judge, concurring) (Unpub. Op.).

89 *See, generally, Transcript, DAC-IPAD Public Meeting 72*, 101, 251–52 (Aug. 23, 2019).

90 Appendix E, Pretrial Processing Data, at Table 3. The DAC-IPAD's review of these preliminary hearings focused on FY16–FY21 because FY16 was the first year in which the new preliminary hearing format was applicable. If the case-processing documents indicated that the preliminary hearing officer determined that probable cause was not established for any UCMJ offense, the staff then recorded the ultimate disposition of the no-probable-cause specification(s). If the no-probable-cause offense was charged in the alternative and the preliminary hearing officer determined that probable cause was established under a different legal theory, the staff did not count that case as involving a no-probable-cause determination.

91 *See* Appendix E, Pretrial Processing Data, at Table 10A-1. The no-probable-cause (no-PC) determinations in FY21 data were often accompanied by the following observations from PHOs:

- The offense alleged likely did not occur.
- The determination was made without the benefit of sworn, live witness testimony, subject to cross-examination, and the documents provided were insufficient to establish one or more elements of a charged offense.
- Other evidence likely existed and was simply not provided.
- In a small number of these no-PC cases, the PHO determined that there was no PC for the charged offense, but PC existed for a lesser included offense or an alternate charge. For example, a PHO may find that there is not PC for aggravated assault under Article 128, UCMJ, but there is probable cause for assault consummated by a battery under the same article. Or a PHO may find that there is no PC for a sexual contact offense under Article 120, UCMJ, but there is PC for an assault consummated by a battery under Article 128, UCMJ.

FIGURE 2. NUMBER OF CASES IN WHICH AN ARTICLE 32 PHO FOUND NO PC FOR A PSO

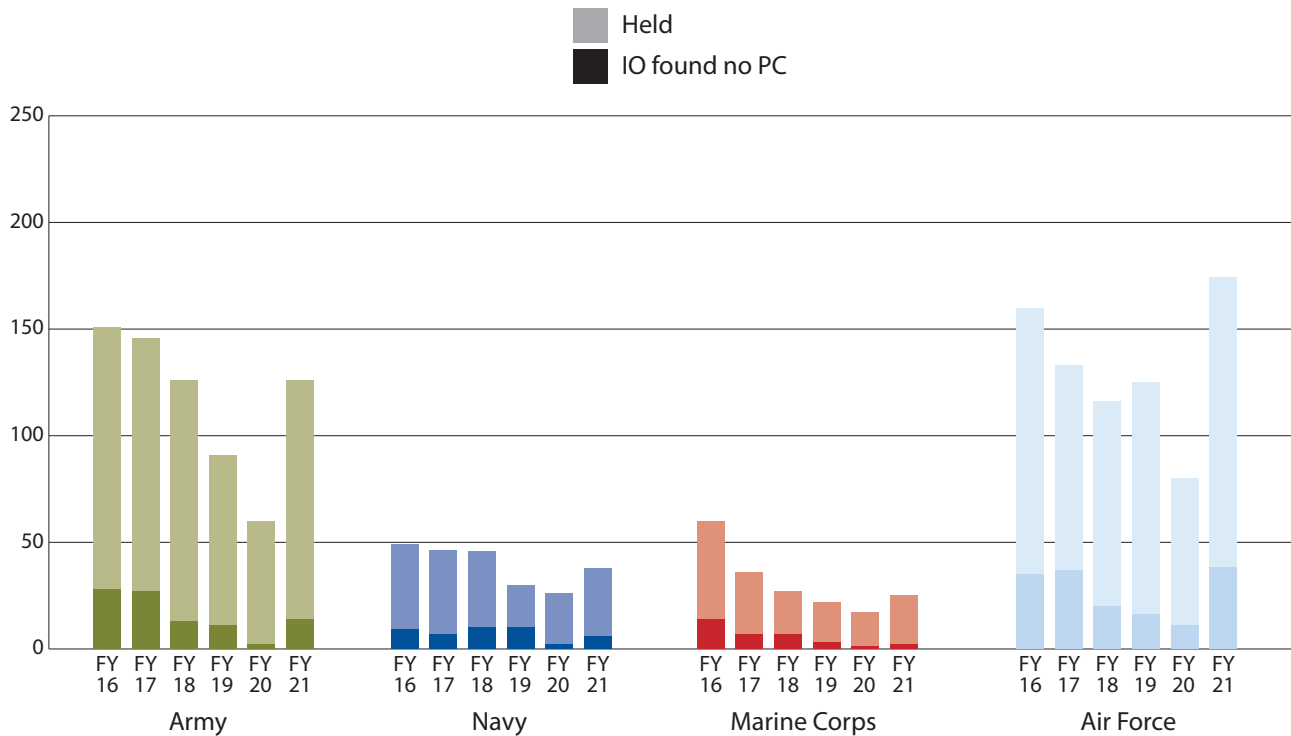


TABLE 1. FY21: NUMBER OF CASES IN WHICH AN ARTICLE 32 PHO FOUND NO PC (ALL OFFENSES)

	Army	Navy	Marine Corps	Air Force	Coast Guard	Total
Art 32 hearings (all)	306	88	63	270	13	740
PHO found no PC (all)	90 (29%)	16 (18%)	16 (25%)	71 (26%)	0 (0%)	193 (26%)

Statistics show that because the Article 32 preliminary hearing is advisory, too many prosecutors treat the preliminary hearing in a perfunctory manner at the expense of the accused and victims. In current practice, trial counsel may, without consequence, submit as their only exhibit an entire report of investigation (ROI) from the military criminal investigative organization (MCIO), or may elect to provide investigative summaries in lieu of more reliable evidence. That less than 20% of all preliminary hearings held in FY21 involved live testimony from any witness indicates that even military investigators rarely testify to establish probable cause.⁹² This “paper drill”-style preliminary hearing further incentivizes legal gamesmanship on both sides, in the form of delayed discovery and extended pretrial litigation. All the while, the

92 See Appendix E, Pretrial Processing Data, at Table 8A.

accused's reputational, professional, and liberty interests hang in the balance, while victims are left with unrealistic expectations regarding the likelihood of success at trial.

When the Article 32 proceeding is advisory, as opposed to binding, the government is free to pursue cases virtually unchecked, because a staff judge advocate can overrule a preliminary hearing officer's no-probable-cause determination without explanation. The DAC-IPAD heard commentary suggesting that perhaps preliminary hearing officers do not understand probable cause.⁹³ However, the data do not support this premise. The DAC-IPAD's extensive case document review indicates that Article 32 preliminary hearing officers—mostly field-grade judge advocates—consistently provide in-depth analyses of how the case file evidence aligns with the elements of each offense.⁹⁴ Indeed, several military justice experts observed that the preliminary hearing officer's analysis in the Article 32 report is of great value to the referral authority.⁹⁵ These observations indicate that persons with sufficient expertise are serving as preliminary hearing officers and are qualified to render a binding no-probable-cause determination.

Some of the Article 32 reports reviewed by the DAC-IPAD revealed the preliminary hearing officer's frustration that cases they considered lacking in evidence would progress through the military justice process. This will be of particular concern in cases prosecuted by the new special trial counsel, because pretrial decision making will be consolidated in one office. Although a staff judge advocate's independent, binding no-probable-cause determination under Article 34 serves as a restraint on the convening authority's ability to refer cases to a general court-martial,⁹⁶ a special trial counsel will possess exclusive authority to refer cases to trial, without any independent check on prosecutorial discretion.⁹⁷

Value of a Binding No-Probable-Cause Determination

A preliminary hearing process that precludes prosecution by a general court-martial after a no-probable-cause determination would remedy weaknesses in the current system.⁹⁸ One of the most important benefits is protection for Service members against prosecution on charges unsupported by probable cause. Another benefit of weeding out unsupported charges is a more effective and efficient military justice system. Although career judge advocates cautioned

93 DAC-IPAD Request for Information Set 11 (May 15, 2019) (Responses to A.Q1a, from the Special Victim's Counsel, or Victim's Legal Counsel, Organizations for the Army, Navy, Marine Corps, and Air Force.).

94 *Transcript of DAC-IPAD Policy Subcommittee Meeting* 11–14 (Dec. 3, 2020); *see also Transcript of DAC-IPAD Public Meeting* 220–21 (Nov. 11, 2020) (The DAC-IPAD Policy Subcommittee made a preliminary assessment that the recommendation for a binding Article 32 presumes that a military judge or magistrate should serve as the preliminary hearing officer, or under exceptional circumstances another judge advocate with extensive military justice experience.).

95 *Id.* (discussing Art. 32(c) Report to Convening authority, which requires “[f]or each specification, a statement of the reasoning and conclusions of the hearing officer . . . including a summary of relevant witness testimony and documentary evidence presented at the hearing and any observations of the hearing officer concerning the testimony of witnesses and the availability and admissibility of evidence at trial”).

96 Art. 34(a)(1), UCMJ (2021).

97 Importantly, judge advocates, including military justice division chiefs, who testified before the DAC-IPAD against changes to the Article 32 did not account for the new OSTC system in which independent prosecutors—not commanders—lead military justice decision making. Special trial counsel will exercise authority over cases involving 14 covered offenses, and “known” or “related” offenses. The Department of Defense submitted a legislative proposal to Congress in March 2023 that, if enacted into law, would expand the jurisdiction of special trial counsel to include authority over such offenses occurring before Dec. 28, 2023.

98 *See supra* section II, Background and Recent Developments, at p. ____; *see also* JPP REPORT, *supra* note 69, at 5 (“[T]hese views . . . were brought to the Subcommittee’s attention during every installation site visit, were supported by specific examples, and were also contextualized by the Subcommittee’s subsequent research into related policies and statutes, as well as testimony before the JPP and the Subcommittee. Taken together, these considerations suggest that the issues could be systemic and should be addressed.”); DAC-IPAD FOURTH ANNUAL REPORT, *supra* note 12, at 6–7 (The DAC-IPAD, after an exhaustive review of sexual assault case files, observed a systemic problem in that Articles 32 and 34 permit weak cases to proceed to trial—with damaging consequences for the [military justice system.]; IRC REPORT, *supra* note 4, App. B at 52 (The IRC spoke with military justice experts who agreed the issue is one of fundamental fairness to the victim and the accused.).

that the Article 32 hearing has always been advisory, in the vast majority of FY21 cases in which a preliminary hearing officer found no probable cause for one or more charged offenses, the charge was either dismissed or the accused was found not guilty—indications that preliminary hearing officers' assessments are reasonably predictive of the appropriate disposition of the charge(s).⁹⁹ Giving due weight to a no-probable-cause finding would avoid needless litigation, would more quickly relieve Service members from the stigma of felony charges that lack evidentiary support, and would halt the practice of sending cases to trial despite insufficient evidence.

In sum, while the 2014 transformation of the Article 32 proceeding into a preliminary hearing was a significant change for military practice, enhancing the effect of a no-probable-cause finding is not a radical idea. If this recommendation is implemented, the preliminary hearing's purpose, scope, and function will remain the same. Barring prosecution by a general court-martial after a preliminary hearing finding of no probable cause would align military practice with foundational principles of federal civilian practice. The failure of the government to meet the minimal requirement of probable cause is an absolute bar to initiating a federal prosecution, and in some circumstances such failure may preclude reference to other prosecuting authorities or recourse to noncriminal measures.¹⁰⁰

Some special victim's counsel and trial counsel have voiced concern that the requirement for a binding probable cause determination might erode the victim's statutory right to refuse to testify at the Article 32 preliminary hearing.¹⁰¹ However, victims' rights are not diminished by this change. Article 32 and Rule for Courts-Martial 405 permit alternatives to live testimony, such as recorded statements to law enforcement. A prosecutor must have the victim's agreement to testify or may present the testimony of other witnesses, such as investigators, to establish probable cause. Similarly, the victim's right to confer with counsel for the government, the convening authority, or the special trial counsel regarding their preference as to disposition is unaffected by the requirement for a binding probable cause determination.

Finally, it is important to consider the effects of this reform, which may increase the number of Article 32 preliminary hearings. The following data support the assumption that a slightly increased caseload is likely at the Article 32 stage:¹⁰²

- In FY14, when Article 32 required a thorough investigation of the charges, the defense rarely waived the Article 32 investigation in penetrative sexual offense cases (19 waivers in 445 cases [4%]).
- In FY16 through FY21, in penetrative sexual offense cases the percentage of Article 32 preliminary hearings waived ranged from 21% to 26%.
- In FY21, in cases involving all UCMJ offenses 31% of Article 32 preliminary hearings were waived.

Unlike the old Article 32 hearing, which resembled a contested trial, the more limited scope of the current Article 32 preliminary hearing mitigates the concern that a binding no-probable-cause determination would unduly burden prosecutors. On balance, it is more efficient to resolve charges earlier in the court-martial process and refer fewer cases that have no reasonable probability of evidence sufficient to support a conviction and that likely will result in a dismissal or acquittal.

99 See Appendix E, Pretrial Processing Data, at Table 5.

100 JUSTICE MANUAL, *supra* note 38.

101 See Appendix D, Request for Information and Service Narrative Responses, Responses to Q1.

102 See Appendix E, Pretrial Processing Data, at Table 1.

Reconsideration of an Article 32 No-Probable-Cause Determination

In every judicial system in the United States, pretrial rulings are subject to reconsideration or review. The standards and procedures for resubmission vary widely among jurisdictions, but most systems provide the prosecution with additional, or alternative, means to pursue charges despite an adverse pretrial ruling.¹⁰³ In the federal system and 18 states, prosecutors may revive a prosecution by obtaining an indictment on charges that did not survive a preliminary hearing screening.¹⁰⁴ In other states, a prosecutor may petition a magistrate for reconsideration by showing additional competent evidence to overcome the prior dismissal. In jurisdictions with a right to grand jury indictment, a grand jury’s “no bill” does not inherently preclude resubmission; however, most jurisdictions restrict resubmission to the grand jury to protect against prosecutorial abuses.¹⁰⁵

If Article 32 is amended to make a no-probable-cause determination binding, there must be an opportunity for reconsideration upon the presentation of newly discovered evidence or evidence that, in the exercise of due diligence, could not reasonably have been obtained before the hearing.¹⁰⁶ Military pretrial procedures should provide opportunity for trial counsel, upon receipt of the preliminary hearing officer’s report, to petition the preliminary hearing officer to reopen the Article 32 preliminary hearing, clearly stating the nature of the newly discovered evidence and the reason it was not previously presented, in order to perfect the specifications at hand. The prosecution would also retain the ability to re-prefer charges following dismissal, because the preliminary hearing officer’s findings would be without prejudice. These findings regarding probable cause also would be without prejudice to the government’s ability to address the misconduct in another forum.

The existing rules for military preliminary hearings provide a means to reopen the Article 32 hearing in limited circumstances: “If the preliminary hearing officer determines that additional evidence is necessary [to determine probable cause], the preliminary hearing officer may provide the parties an opportunity to present additional testimony or evidence.”¹⁰⁷ The convening authority also may reopen the preliminary hearing.¹⁰⁸ Similarly, in the context of pretrial confinement, the Manual for Courts-Martial provides a means to reconsider decisions regarding continued confinement “upon any significant information not previously considered.”¹⁰⁹ Both rules provide an opportunity to reopen or extend the proceeding before the same presiding officer to give the government another opportunity to establish probable cause.¹¹⁰

The Judge Advocates General (TJAGs) of the Military Departments, and the Staff Judge Advocate to the Commandant of the Marine Corps, formally advised the DAC-IPAD of their continued opposition to this Article 32 recommendation.¹¹¹

103 WAYNE LAFAVE, JEROLD ISRAEL, NANCY KING & ORIN KERR, *CRIMINAL PROCEDURE*, Vol. 4, §§ 14.1(a), 14.2(b), 15.2(h) (4th ed. 2015). Jeopardy does not attach until a defendant is put to trial. See *Serfass v. United States*, 420 U.S. 377, 388 (1975). Therefore, the double jeopardy clause of the Fifth Amendment does not bar resubmission after a grand jury decides not to indict, or following a pretrial dismissal, and it does not preclude refile of charges after a magistrate’s dismissal at a preliminary hearing. These pretrial proceedings do not adjudicate offenses in a way that reflects a genuine risk of conviction so as to trigger the protections of the double jeopardy clause. *United States v. Dionisio*, 503 F.3d 78, 89 (2d Cir. 2007). Jeopardy attaches in a bench trial when the judge begins to hear evidence, and it attaches in a jury trial after the jury has been empaneled and sworn. *Id.* at 82.

104 LAFAVE et al., *supra* note 103, at §§ 14.1(a), 14.2(b), 15.2(h).

105 See, e.g., N.Y. CRIM. PRO. LAW § 190.75 (Consol. 2021).

106 The DACI-PAD recognizes that the Article 32 hearing takes place at a stage in the proceedings when the case continues to develop with some evidence—e.g., digital communications and lab results that may be subject to delays. Therefore, the government should schedule the hearing when it has sufficient evidence to meet the probable cause standard.

107 2019 MCM, *supra* note 3, R.C.M. 405(j)(1).

108 *Id.*, R.C.M. 405(m), discussion.

109 *Id.*, R.C.M. 305(i)(2)(E).

110 Since 2019, the MCM has authorized military judges to rule on matters prior to referral. This report does not recommend allowing the government to appeal a preliminary hearing officer’s no-probable-cause determination to a military judge or magistrate acting pursuant to Article 30a.

111 See generally *Transcript, DAC-IPAD Policy Subcommittee Meeting* 120, 125–27 (Dec. 3, 2020); Request for Information and Service Narrative Responses

If, however, Congress were to amend Article 32 to make a no-probable-cause determination binding, the Services unanimously favor a process for reconsideration, so long as it does not unduly delay pretrial processing.¹¹² The Services have offered several suggestions regarding reconsideration:¹¹³

- Give a commander—as opposed to the preliminary hearing officer—the authority to reopen or start the Article 32 process to consider additional relevant evidence.
- Model the process for reconsidering pretrial confinement, which requires the government to base the reconsideration on “any significant evidence not previously considered” by the presiding officer.
- Permit the government to seek de novo review before a military judge.
- Allow staff judge advocates or special trial counsel to overrule the preliminary hearing officer’s no-probable-cause determination “to prevent injustice.”
- Bear in mind that any reconsideration should accord with a pending expansion of victims’ ability to challenge preliminary hearing officer decisions.¹¹⁴

The DAC-IPAD’s proposal for reconsideration strikes the appropriate balance of holding the government to its evidentiary burden of probable cause while providing trial counsel ample opportunity to pursue charges on behalf of the United States. In all cases, trial counsel can mitigate problems by ensuring that probable cause exists *prior* to preferral of charges. Carefully developed charging decisions should reduce the need for post–Article 32 hearing requests for reconsideration. The requirement for newly discovered evidence, rather than simply new evidence, is consistent with the notion that the law should encourage a competent presentation of evidence. The government should not be able to seek reconsideration based on evidence in its possession that it chose not to present at the preliminary hearing. However, evidence not known despite the exercise of due diligence could justify reopening the Article 32 hearing. The implementing rules could allow a preliminary hearing officer to grant additional time beyond 10 days for good cause.

A binding no-probable-cause determination at the Article 32 hearing, with opportunity for reconsideration and re-preferral, is one piece of the package of reforms recommended by the DAC-IPAD in this report. The Committee’s companion recommendation, which aligns with and supports the need for better screening of charges at the Article 32 preliminary hearing, is to establish uniform prosecution standards in Appendix 2.1 of the Manual for Courts-Martial. Section IV of this report explains why the military should apply the same threshold for prosecution as that used in federal civilian criminal cases—admissible evidence that is sufficient to obtain and sustain a conviction.

at Appendix D.

112 Request for Information and Service Narrative Responses at Appendix D.

113 *Id.*

114 See Annex to the Draft Executive Order, 2023 Amendments to the Manual for Courts-Martial, United States, 87 Fed. Reg. 63,484 (Oct. 19, 2022):

R.C.M. 309: (10) *Victim’s petition for relief.*

(A) A victim of an offense under the UCMJ, as defined in Article 6b(b), may file a motion pre-referral requesting that a military judge require a preliminary hearing officer conducting a preliminary hearing under R.C.M. 405 to comply with:

- (i) Articles 6b or 32, UCMJ;
- (ii) R.C.M. 405; or
- (iii) Mil. R. Evid. 412, 513, 514, or 615.

(B) The military judge may grant or deny such a motion. The ruling is subject to further review pursuant to Article 6b(e), UCMJ.

IV. ESTABLISHING UNIFORM PROSECUTION STANDARDS IN APPENDIX 2.1, MANUAL FOR COURTS-MARTIAL, AND TRAINING THE SERVICES

DAC-IPAD Recommendation 49: The Secretary of Defense revise Appendix 2.1, Manual for Courts-Martial, to align with the prosecution principles contained in official guidance of the United States Attorney General with respect to disposition of federal criminal cases. These revisions should provide that special trial counsel refer charges to a court-martial, and judge advocates recommend that a convening authority refer charges to a court-martial, only if they believe that the Service member's conduct constitutes an offense under the UCMJ, and that the admissible evidence will probably be sufficient to obtain and sustain a conviction when viewed objectively by an unbiased factfinder.

DAC-IPAD Recommendation 50: The Secretary of Defense require all special trial counsel and judge advocates who advise convening authorities to receive training on the newly established prosecution standards in Appendix 2.1 of the Manual for Courts-Martial. The training shall emphasize the principle that referral is appropriate only if these special trial counsel and advisors believe that the Service member's conduct constitutes an offense under the UCMJ, and that the admissible evidence will probably be sufficient to obtain and sustain a conviction when viewed objectively by an unbiased factfinder.

A decision to prosecute represents a determination that the fundamental interests of society require the application of the law to a particular set of circumstances. It is a recognition that serious criminal violations must be prosecuted, and that prosecution entails profound consequences for the accused, crime victims, and their families whether or not a conviction ultimately results.¹¹⁵ Whether to prosecute an accused is arguably one of the most consequential decisions for both the accused and the victim in the criminal justice process.¹¹⁶ Charging decisions in most civilian jurisdictions reflect subjective judgment rooted in evidentiary and ethical standards on which prosecutors rely to promote the reasoned exercise of prosecutorial authority and contribute to the fair, evenhanded administration of criminal law.¹¹⁷

The written standards promulgated by government prosecutorial agencies and attorneys' legal organizations, as well as commentary from state and federal prosecutors, indicate that to commence prosecution, jurisdictions overwhelmingly require a finding of sufficiency of the evidence to secure a conviction in addition to probable cause. Two independent studies by military justice and criminal law experts extensively reviewed the military's referral process and concluded that a finding of probable cause alone is not sufficient to expose a Service member to criminal trial at a general court-martial. These groups have urged that the Department of Justice's standard—the admissible evidence will probably be sufficient to obtain and sustain a conviction—should apply uniformly across the Services for the referral of cases to courts-martial.¹¹⁸

115 JUSTICE MANUAL, *supra* note 38, at § 9-27.001.

116 *See generally* NATIONAL DISTRICT ATTORNEYS ASSOCIATION, NATIONAL PROSECUTION STANDARDS 52 (4th ed. Jan. 2023), Part IV, Pretrial Considerations (“Commentary: It could be argued that screening decisions are the most important made by prosecutors in the exercise of their discretion in the search for justice. The screening decision determines whether or not a matter will be absorbed into the criminal justice system.”).

117 JUSTICE MANUAL, *supra* note 38, at § 9-27.001.

118 JPP REPORT, *supra* note 69, at 8 (The JPP Subcommittee recommends that Article 33, UCMJ, case disposition guidance for convening authorities and staff judge advocates require the following standard for referral to court-martial: the charges are supported by probable cause and there is a reasonable likelihood of proving the elements of each offense beyond a reasonable doubt using only evidence likely to be found admissible at trial.); DAC-IPAD REPORT ON INVESTIGATIVE CASE FILE REVIEWS, *supra* note 18, at 16 (DAC-IPAD Recommendation 32: Congress amend Article 34, UCMJ, to require

Recently, the Joint Explanatory Statement accompanying the FY22 NDAA emphasized that referral authorities should, as a threshold matter, evaluate whether the evidence will likely be sufficient to obtain and sustain a conviction in a trial by court-martial.¹¹⁹ In its 2021 report, the IRC supported the recommendation to replace convening authorities with experienced judge advocates by emphasizing that prosecutors, as opposed to convening authorities who are not lawyers, “abide by their ethical guidelines for initiating and declining prosecution.”¹²⁰ The IRC further reasoned that the principles of federal prosecution—which include an assessment of the sufficiency of the evidence before prosecution begins—are necessary as a matter of fundamental fairness.¹²¹ Citing no benefit to either victims or defendants when the military pursues a case that has no reasonable probability of evidence sufficient to support a conviction, the IRC cautioned—as does the DAC-IPAD—that the result of such pursuit is an erosion of confidence and trust in the military justice system.¹²²

The DAC-IPAD’s recommendation to establish uniform prosecution standards in Appendix 2.1 of the Manual for Courts-Martial is the result of several years of gathering data, engaging with stakeholders, studying the pretrial processing of military sexual assault cases, participating in robust discourse on the dual purpose of military law in current times, and anticipating the historic implementation of the Offices of Special Trial Counsel. The DAC-IPAD resoundingly concludes that weak pretrial procedures and a lack of uniform prosecution standards directly contribute to dismissals and acquittals in sexual offense cases.

This targeted recommendation to establish prosecution standards will cause minimal disruption to a system repeatedly subjected to recent reforms. Moreover, this change is necessary for the overall health of the military justice system. These reforms are especially critical to the success of a new system under which prosecutors—not commanders—will often be decision makers. At Appendix G of this report, the DAC-IPAD proposes uniform prosecution standards with new language for Appendix 2.1 that promotes the reasoned exercise of prosecutorial authority to align with the standards for federal civilian prosecutors referenced in Articles 33 and 36, UCMJ.

Systemic Problems Caused by a Lack of Prosecution Standards

Problems for the Accused. The IRC concluded that there is a problem with trust in the military justice system, owing in part to the manner in which sexual assault cases are referred to trial.¹²³ Some military commanders seek to “send a message” that they are tough on crime by sending procedurally deficient cases to trial, without regard for the negative impact on both victims and accused, and resulting in high acquittal rates and significant numbers of dismissals.¹²⁴ This practice can result in wrongful convictions or convictions that do not survive appellate review. Moreover, Service members accused in such cases may experience severe, lifelong consequences owing to the stigma and collateral effects of felony charging decisions and a criminal trial. While a victim’s interest in prosecution is a factor to be considered, it should not outweigh the government’s ethical obligation to refer charges only if there is evidence sufficient to obtain and

the staff judge advocate to advise the convening authority in writing that there is sufficient evidence to obtain and sustain a conviction on the charged offenses before a convening authority may refer a charge and specification to trial by general court-martial.); see also MJRG REPORT, *supra* note 3, at 338 (Recommendation 33.2: Create a new statutory provision requiring the establishment of non-binding guidance taking into account the Principles of Federal Prosecution in the U.S. Attorney’s Manual[.]).

119 Joint Explanatory Statement to the FY22 NDAA, *supra* note 76, at 88.

120 IRC REPORT, *supra* note 4, at 21.

121 *Id.*

122 *Id.*

123 *Id.* at 11.

124 *Id.*

sustain a conviction. The current probable cause standard for referral in Article 34, UCMJ, is a low barrier to prosecution that jeopardizes the concept of fair and evenhanded administration of justice and risks exposing innocent Service members to felony criminal liability.

Problems for Victims. Victims also are strongly affected, sometimes in negative ways, by prosecutorial decisions. Victims benefit from a system that delivers justice in the form of a conviction. However, trying cases without sufficient evidence can raise false expectations in those who bravely and openly testify at a public trial.¹²⁵ Trial preparation often requires victims to recite many times the details of their assault. Trial dates often change, thus delaying resolution for victims. And at trial, victims may find the process itself daunting. The experience of an acquittal may cause a victim to regret reporting, may cause emotional devastation, and may discourage them and others from reporting other crimes.¹²⁶ Some victims may reasonably prefer to pursue a non-judicial disposition in lieu of trial. Therefore, amending the preliminary hearing process, and establishing prosecution standards, would mitigate the unintended harms caused by prosecuting cases without sufficient evidence to obtain a conviction.

Problems for the System Overall. A lack of uniform prosecution standards also generates unwarranted disparities among the Services, leading to an appearance of bias in favor of victims over the accused. In testimony before the DAC-IPAD, the Army, Marine Corps, and Navy acknowledged the importance of assessing the sufficiency of the evidence, but stated that in practice, the victim's preference is a highly influential factor in referral decisions. Air Force representatives explained that if a victim expresses a desire for a court-martial and the probable cause standard is met, the convening authority will most likely refer the case to trial, regardless of the sufficiency of the evidence.¹²⁷

The DAC-IPAD's extensive data analysis of adult-victim penetrative sexual offenses demonstrates that prosecuting cases with insufficient evidence to obtain and sustain a conviction more often than not ends in dismissal or acquittal. Although low conviction rates are not the only metric for evaluating prosecutions, these statistics erode public trust in the process of military justice. In 2020, the DAC-IPAD published data for convictions and acquittals in adult-victim penetrative sexual offense cases with a final disposition in FY17. The study found that in 31.1% of cases that were tried to verdict on a penetrative sexual offense charge, the evidence in the case materials reviewed did not meet the sufficiency of the evidence threshold.¹²⁸ The data highlight what military justice practitioners have been telling the DAC-IPAD and other federal advisory committees and independent review commissions for years: in the military justice system, commanders will send cases to trial without sufficient evidence in the interests of good order and discipline—but to the detriment of procedural justice. On the basis of its study, the DAC-IPAD determined that probable cause was not an adequate standard for referring a case to trial. These groundbreaking data led the DAC-IPAD to conclude that sending a case to court-martial in the absence of sufficient admissible evidence to obtain and sustain a conviction has significant negative implications for the accused, the victim, and the military justice process.¹²⁹

125 *Id.*, App. B at B-53.

126 SVC/VLC Responses to DAC-IPAD RFI Set 11 (May 15, 2019) (Responses to A.Q1a, from the Special Victim's Counsel, or Victim's Legal Counsel, Organizations for the Army, Navy, Marine Corps, and Air Force.). See DAC-IPAD Summary of Interviews with Victims' Counsel (May 2020–Jan. 2021). On file with staff.

127 *Transcript, DAC-IPAD Public Meeting* 105–6 (Aug. 23, 2019).

128 DAC-IPAD REPORT ON INVESTIGATIVE CASE FILE REVIEWS, *supra* note 18, at 13. The government obtained a conviction on the penetrative sexual offense in 2 out of 73 cases, one of which was later overturned on appeal because the evidence was factually insufficient.

129 *Id.*

Benefits of Establishing Uniform Prosecution Standards in Appendix 2.1

The DAC-IPAD's recommendation to establish uniform prosecution standards in Appendix 2.1 sends a strong policy message that special trial counsel and judge advocates who advise convening authorities should use these standards to promote the reasoned exercise of prosecutorial discretion. The proposed standards contemplate language for Appendix 2.1 that achieves parity with the sufficiency of the evidence standard from the Department of Justice's Federal Principles of Prosecution. This fundamental guiding principle requires that a prosecutor believe *that the admissible evidence will probably be sufficient to obtain and sustain a conviction* before a case should be referred to a court-martial. Finally, as a matter of policy and emphasis, the DAC-IPAD finds it unnecessary to repeat the phrase "non-binding" in the title. Article 33 of the UCMJ itself is simply called "Disposition Guidance," and the first sentence in Appendix 2.1 states that the guidance is non-binding.

The DAC-IPAD's proposed draft for uniform prosecution standards in Appendix 2.1, found at Appendix G, would enhance the referral standard before a case is sent to a court-martial and would assist judge advocates and commanders in applying the new prosecution standards. These uniform prosecution standards offer more nuanced guidance for the reasoned exercise of prosecutorial discretion and achieve the intent of Articles 33 and 36, UCMJ, to conform to the practice of the United States District Courts. Referral decisions should be grounded in a technical analysis of the admissibility of evidence and quantum of proof needed to convict in a criminal trial. This focused evidentiary analysis reflects overarching ethical considerations, concerns about the fundamental fairness of the system, and the recognition of how significantly the initiation of criminal charges affects a Service member.

Critically, the new language safeguards against impermissible considerations influencing referral decisions, such as the possible biases of a factfinder or the effect of any such biases on the likelihood of conviction. For example, the decision to charge and try a sexual assault should be based on the prosecutors' evaluation of the evidence and an estimation of whether an unbiased jury should convict.

The decision to prosecute must be based on the intrinsic value of the case and evaluated independently of the actual trial result. The question "Can the government win this case?" differs greatly from "Can the admissible evidence possessed by the government convince an unbiased factfinder to convict?" In any event, the next question for evaluation is "Should the government try this case?" Thus, after assessing the sufficiency of the evidence, the referral authority should then consider the other 13 factors listed in paragraph 2.1, as applicable, when deciding whether to expose a Service member to a court-martial. For the Office of Special Trial Counsel, Congress specified that commanders of the victim and accused should have the opportunity to provide their candid thoughts to the special trial counsel prior to case disposition; however, the advice is not binding on the special trial counsel.¹³⁰ And in cases in which the convening authority still exercises discretion, the staff judge advocate offers advice on how those 13 factors inform the decision whether to refer a case to a court-martial. Ultimately, the promulgation of uniform prosecution standards enhances confidence on the part of the public, of crime victims, and of individual defendants that important prosecutorial decisions will be made rationally and objectively on the merits of each case.¹³¹

130 FY22 NDAA, *supra* note 31, at § 532(a)(5) (Policies applicable to each OSTC shall "provide that commanders of the victim and the accused in a case involving a covered offense shall have the opportunity to provide input to the special trial counsel regarding case disposition, but that the input is not binding on the special trial counsel.").

131 JUSTICE MANUAL, *supra* note 38, at § 9-27.001.

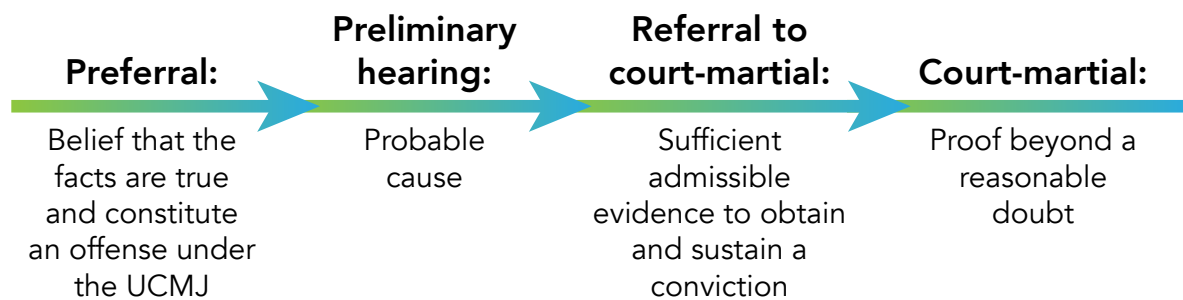
Recommended Training on Uniform Prosecution Standards

The DAC-IPAD's recommendation for uniform prosecution standards in Appendix 2.1 of the Manual for Courts-Martial should be accompanied by training for every person involved in the military justice system, including convening authorities. This training must emphasize the principle that referral to court-martial is appropriate only if judge advocates and convening authorities believe that the Service member's conduct constitutes an offense under the UCMJ, and that the admissible evidence will probably be sufficient to obtain and sustain a conviction when viewed objectively by an unbiased factfinder. The training guidance attached to this report at Appendix H offers an outline of topics and themes for use in training modules.

CONCLUSION

The investigation, prosecution, and defense of sexual misconduct in the military will improve with the DAC-IPAD's recommended changes to Article 32, with the establishment of uniform prosecution standards, and with enhanced training requirements. The DAC-IPAD's data-driven recommendations are critical both for the new special trial counsel and for the military justice system overall.

These reforms do not require radical change. The purpose, scope, and function of the Article 32 preliminary hearing will remain the same under these proposals. Barring continued prosecution after a preliminary hearing finding of no probable cause will align military practice with foundational principles of federal civilian practice. It also aligns with the recommendation to adopt uniform prosecution standards. If sufficient evidence to convict is needed before referral to court-martial, then the system will benefit from a preliminary hearing that effectively screens out cases that cannot pass the low evidentiary threshold of probable cause. These targeted reforms will enhance uniformity, reliability, and consistency in military pretrial procedures. The following graphic depicts the different evidentiary standards that should apply at the different stages of the military justice system:



The time is right for the Department of Defense to establish uniform prosecution standards. These changes will provide special trial counsel with an effective set of rules for the prosecution of serious crimes in the military. They are designed to ensure fairness and justice, thus enhancing good order and discipline in the Armed Forces. The DAC-IPAD anticipates that these recommendations, once implemented, will instill confidence and trust that the military justice system is governed by principled decision making that achieves the objectives of military law.

APPENDIXES

APPENDIX A. DOD GENERAL COUNSEL TASKING MEMO TO EVALUATE OSTC



GENERAL COUNSEL

GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
1600 DEFENSE PENTAGON
WASHINGTON, D.C. 20301-1600

MAY 10 1022

MEMORANDUM FOR CHAIR, DEFENSE ADVISORY COMMITTEE ON INVESTIGATION, PROSECUTION, AND DEFENSE OF SEXUAL ASSAULT IN THE ARMED FORCES (DAC-IPAD)

SUBJECT: DAC-IPAD Advice on Policy Development, Workforce Structure, and
Implementation of Best Practices for the Military Departments' Offices of Special
Trial Counsel

As requested in your letter of April 27, 2022, I task the DAC-IPAD with advising the Secretary of Defense and me on policy development, workforce structure, and implementation of best practices for the Military Departments' Offices of Special Trial Counsel. The Department of Defense would benefit greatly from the advice of the DAC-IPAD, whose members possess extraordinary expertise regarding the organization and operation of offices devoted to complex prosecutions, concerning the Offices of Special Trial Counsel. Advising the Department regarding the Offices of Special Trial Counsel is a core function of the DAC-IPAD. Please provide such advice on an ongoing basis.

Consistent with your request, I have asked the Secretaries of the Military Departments to provide the appropriate civilian officials, supported by uniformed subject matter experts, to appear at the DAC-IPAD's next public meeting.

I reiterate my thanks to you and to all of the DAC-IPAD's members for assisting the Department of Defense in improving our sexual assault response systems.

A handwritten signature in black ink, appearing to read "Caroline Krass".

Caroline Krass
General Counsel

APPENDIX B. INDEPENDENT REVIEW COMMISSION RECOMMENDATIONS 1.7 A-F (IRC REPORT EXCERPT)

HARD TRUTHS AND THE DUTY TO CHANGE: RECOMMENDATIONS FROM THE INDEPENDENT REVIEW COMMISSION ON SEXUAL ASSAULT IN THE MILITARY, APPENDIX B, pp. 52–53

IRC Recommendation 1.7: Modify the UCMJ

The UCMJ should be modified in several key areas to increase uniformity, reliability and consistency of the military justice system, thus benefiting the victim, the alleged offender, and the command. Because sexual assault victims can experience re-victimization and trauma in the processing of their cases, and because a significant number of these victims have lost their trust in the military justice system, these recommended changes are uniquely important in sexual assault cases.

- 1.7 a: The Secretary of Defense should direct the DAC-IPAD to study Article 32 Preliminary Hearings;**
- 1.7 b: The Secretary of Defense should direct the DAC-IPAD to study Article 34, Advice to Convening Authority Before Referral to Trial;**
- 1.7 c: The UCMJ should be amended to establish a preponderance of the evidence standard for non-judicial punishment;**
- 1.7 d: Article 25 of the UCMJ should be amended to establish random selection of panel members;**
- 1.7 e: The Secretary of Defense should direct the Services to establish funding appropriate for defense counsel control of their own resources; and**
- 1.7 f: Article 128b of the UCMJ should be amended to include dating violence.**

Rationale for these Changes: Increase Uniformity, Reliability, and Consistency of the Military Justice System

The IRC is recommending two studies and several amendments to the UCMJ in order to increase uniformity, reliability, and consistency of the military justice system, thus benefiting the victim, the accused, and the command.

IRC Recommendation 1.7 a:**The Secretary of Defense Should Direct the DAC-IPAD to Study Article 32 Preliminary Hearings**

Before a General Court-Martial can proceed, 10 U.S. Code § 832, requires that unless the accused waives this right, an Article 32 Preliminary Hearing must be held before referral of charges for trial by General Court-Martial. The Article 32 hearing is conducted by a hearing officer who determines whether or not there is probable cause to believe that the accused committed the charged offense. Currently, the decision of this Article 32 hearing is not binding on the GCMCA. The GCMCA can refer a case to a General Court-Martial even if the hearing officer at the Article 32 Preliminary Hearing determined that there was no probable cause to believe that the accused committed the charged offense(s) if the Staff Judge Advocate advises that there is probable cause.

Numerous stakeholders with significant military justice experience including defense counsel, trial counsel, and military judges agreed that it is not fair to the administration of justice for a GCMCA to proceed with a court-martial despite a no probable cause finding. This can be damaging to sexual assault victims, who often suffer through the process unaware that there is no chance of winning a conviction in their cases. At the same time, the IRC wants to ensure that provable, but difficult, cases are not prevented from proceeding due to the opinion of a solitary preliminary hearing officer, who may not have the military justice experience necessary to make such findings and credibility determinations.

To accommodate both of these concerns, the IRC is recommending that a study be conducted to determine if making the Article 32 hearing officer's no probable cause decision binding would promote justice, fairness, and efficiency. The IRC assumes that this will have some effect on the level of military justice experience expected of a preliminary hearing officer, and the study should include an assessment of whether military judges and military magistrates should be the Article 32 preliminary hearing officers.

IRC Recommendation 1.7 b:**The Secretary of Defense Should Direct the DAC-IPAD to Study Article 34, Advice to Convening Authority Before Referral to Trial**

After the Article 32 Preliminary hearing is held, but before the GCMCA formally refers the case, the GCMCA must comply with the guidance outlined in Article 34. This Article requires the staff judge advocate to certify the presence of several elements, including whether there is probable cause to believe that the accused committed the charged offense, before the convening authority can proceed with the referral of charges. Currently, Article 34 does not contain the standard language that governs other federal prosecutors. Specifically, the principles of federal prosecution require that in order to pursue a case, the prosecutor must believe that the admissible evidence will probably be sufficient to obtain and sustain a conviction ([U.S. Dept. of Justice, Justice Manual] 9-27.220). This same threshold requirement should be included in Article 34 both as a matter of fundamental fairness and in the interest of the efficient administration of justice. Neither the victim nor the defendant benefits when the military pursues a case when there is no reasonable probability that the evidence will be sufficient to obtain or sustain a conviction. Furthermore, confidence and trust in the military justice system is undermined when cases are pursued when there is not reasonable chance of success.

It is important to emphasize that the proposed Article 34 language regarding the sufficiency of the evidence would be determined by the staff judge advocate, *not* by the preliminary hearing officer, judge, or any other party. Furthermore, the inclusion of this requirement should *not* inhibit prosecutors from pursuing difficult cases or prevent them from trying cases which do not have the benefit of corroborating evidence. A single witness who can testify to all the elements of the case, and who the trier of fact believes is credible, is sufficient to obtain and sustain a conviction. Lastly, it is important to note that at the time of the Article 34 decision, the prosecutor does *not* need to have in their possession all the evidence upon which they will rely at trial. Rather, the prosecutor must only have a reasonable and good faith belief that the needed evidence will be available and admissible at the time of trial.

APPENDIX C. NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2022, EXCERPT WITH JOINT EXPLANATORY STATEMENT

Provision creating the position of special trial counsel

S.1605, SEC. 531, 117th Congress – SPECIAL TRIAL COUNSEL.

SEC. 531. SPECIAL TRIAL COUNSEL.

(a) IN GENERAL. —Subchapter V of chapter 47 of title 10, United States Code, is amended by inserting after section 824 (article 24 of the Uniform Code of Military Justice) the following new section:

“§ 824a. Art 24a. Special trial counsel

“(a) DETAIL OF SPECIAL TRIAL COUNSEL. —Each Secretary concerned shall promulgate regulations for the detail of commissioned officers to serve as special trial counsel.

“(b) QUALIFICATIONS. —A special trial counsel shall be a commissioned officer who—

“(1)(A) is a member of the bar of a Federal court or a member of the bar of the highest court of a State; and

“(B) is certified to be qualified, by reason of education, training, experience, and temperament, for duty as a special trial counsel by—

“(i) the Judge Advocate General of the armed force of which the officer is a member;

or

“(ii) in the case of the Marine Corps, the Staff Judge Advocate to the Commandant of the Marine Corps; and

“(2) in the case of a lead special trial counsel appointed pursuant to section 1044f(a)(2) of this title, is in a grade no lower than O-7.

“(c) DUTIES AND AUTHORITIES. —

“(1) IN GENERAL. —Special trial counsel shall carry out the duties described in this chapter and any other duties prescribed by the Secretary concerned, by regulation.

“(2) DETERMINATION OF COVERED OFFENSE; RELATED CHARGES. —

“(A) AUTHORITY. —A special trial counsel shall have exclusive authority to determine if a reported offense is a covered offense and shall exercise authority over any such offense in accordance with this chapter. Any determination to prefer or refer charges shall not act to disqualify the special trial counsel as an accuser.

“(B) KNOWN AND RELATED OFFENSES. —If a special trial counsel determines that a reported offense is a covered offense, the special trial counsel may also exercise authority over any offense that the special trial counsel determines to be related to the covered offense and any other offense alleged to have been committed by a person alleged to have committed the covered offense.

“(3) DISMISSAL; REFERRAL; PLEA BARGAINS. —Subject to paragraph (4), with respect to charges and specifications alleging any offense over which a special trial counsel exercises authority, a special trial counsel shall have exclusive authority to, in accordance with this chapter—

“(A) on behalf of the Government, withdraw or dismiss the charges and specifications or make a motion to withdraw or dismiss the charges and specifications;

“(B) refer the charges a specification for trial by a special or general court-martial;

“(C) enter into a plea agreement; and

“(D) determine if an ordered rehearing is impracticable.

“(4) BINDING DETERMINATION. —The determination of a special trial counsel to refer charges and specifications to a court-martial for trial shall be binding on any applicable convening authority for the referral of such charges and specifications.

“(5) DEFERRAL TO COMMANDER OR CONVENING AUTHORITY.— If a special trial counsel exercises authority over an offense and elects not to prefer charges and specifications for such offense or, with respect to charges and specifications for such offense preferred by a person other than a special trial counsel, elects not to refer such charges and specifications, a commander or convening authority may exercise any of the authorities of such commander or convening authority under this chapter with respect to such offense, except that such commander or convening authority may not refer charges and specifications for a covered offense for trial by special or general court-martial.’’.

(b) TABLE OF SECTIONS AMENDMENT. —The table of sections at the beginning of subchapter V of chapter 47 of title 10, United States Code (the Uniform Code of Military Justice), is amended by inserting after the item relating to section 824 (article 24) the following new item:

“824a. Art 24a. Special trial counsel.’’.

(c) REPORT REQUIRED. —

(1) IN GENERAL. —Not later than one year after the date of the enactment of this Act, each Secretary concerned shall submit to the Committees on Armed Services of the Senate and the House of Representatives a report setting forth the plan of the Secretary for detailing officers to serve as special trial counsel pursuant to section 824a of title 10, United States Code (article 24a of the Uniform Code of Military Justice) (as added by subsection (a) of this section).

(2) ELEMENTS. —Each report under paragraph (1) shall include the following—

(A) The plan of the Secretary concerned—

(i) for staffing billets for—

(I) special trial counsel who meet the requirements set forth in section 824a of title 10, United States Code (article 24a of the Uniform Code of Military Justice) (as added by subsection (a) of this section); and

(II) defense counsel for cases involving covered offenses; and

(ii) for supporting and ensuring the continuing professional development of military justice practitioners.

(B) An estimate of the resources needed to implement such section 824a (article 24a).

(C) An explanation of other staffing required to implement such section 824a (article 24a), including staffing levels required for military judges, military magistrates, military defense attorneys, and paralegals and other support staff.

(D) A description of how the use of special trial counsel will affect the military justice system as a whole.

(E) A description of how the Secretary concerned plans to place appropriate emphasis and value on litigation experience for judge advocates in order to ensure judge advocates are experienced, prepared, and qualified to handle covered offenses, both as special trial counsel and as defense counsel. Such a description shall address promotion considerations and explain how the Secretary concerned plans to instruct promotion boards to value litigation experience.

(F) Any additional resources, authorities, or information that each Secretary concerned deems relevant or important to the implementation of the requirements of this title.

(3) DEFINITIONS. —In this subsection—

(A) The term “Secretary concerned” has the meaning given that term in section 101(a) of title 10, United States Code.

(B) The term “covered offense” has the meaning given that term in section 801(17) of title 10, United States Code (as added by section 533 of this part).

Joint Explanatory Statement

Accompanying the National Defense Authorization Act for FY 2022 [Excerpt]

Advice to convening authority before referral for trial (sec. 537)

The House bill contained a provision (sec. 538) that would amend Article 34 of the Uniform Code of Military Justice (10 U.S.C 834) to permit referral of charges and specifications over which a special victim prosecutor exercises authority by only the special victim prosecutor or by the convening authority where the charges and specifications do not allege a special victim offense or where a special victim declines to refer charges.

The Senate amendment contained a similar provision (sec. 541) that would further amend Article 34 to require that referral to a general court-martial may only be made when a staff judge advocate, or a special victim prosecutor with respect to charges and specifications over which the special victim prosecutor may exercise authority, determines that there is sufficient admissible evidence to obtain and sustain a conviction on the charged offense.

The agreement includes the Senate provision with an amendment that would strike the language requiring sufficient admissible evidence, and that would make other technical changes. We emphasize that when determining whether to refer charges and specifications to a court-martial for trial, the convening authority, or, when applicable, the special trial counsel, should first evaluate whether admissible evidence will likely be sufficient to obtain and sustain a conviction in a trial by court-martial.

APPENDIX D. REQUEST FOR INFORMATION AND SERVICE NARRATIVE RESPONSES

Request for Information

Articles 32 & 34 Policy Questions

1	<p>Should the determination of an Article 32 preliminary hearing officer that a preferred specification under a charge lacks probable cause prohibit referral of that specification to court-martial pending reconsideration of any new evidence?</p> <p>Why or why not?</p>
2	<p>If the Article 32 preliminary hearing officer's determination posed a legal bar to referral of the affected specification and/or charge because it lacks probable cause, what are your Service's recommendations or recommended requirements for a reconsideration system?</p> <p>Please address the effect a reconsideration process may have on military speedy trial considerations.</p>
3	<p>Please provide your Service's position on whether military judges or military magistrates should be required to serve as preliminary hearing officers in all Article 32 hearings.</p>
4	<p>Please provide your Service's position on whether military judges or military magistrates should be required to serve as preliminary hearing officers only for Article 32 hearings involving certain specified offenses.</p> <p>Please identify recommended qualifying offenses for this requirement.</p>
5	<p>Does your Service currently have a military magistrate program?</p> <p>Why or why not?</p> <p>If so, what are the requirements (duties and qualifications) for a military magistrate and would you recommend changing the requirements if military magistrates were used for preliminary hearings?</p>
6	<p>Absent a requirement that the Article 32 preliminary hearing officer's determination of no probable cause for a specification is binding on the convening authority pending reconsideration of any new evidence, what changes, if any, should be made to Article 32 or R.C.M. 405 to address the common viewpoint that the hearings today do not serve a sufficiently useful purpose to outweigh the delay they impose on the processing of cases?</p>
7	<p>What is your Service's position on whether referral of charges to a general court-martial should be precluded absent a determination by the staff judge advocate that the admissible evidence would likely be sufficient to obtain and sustain a conviction?</p>

In addition to any general comments in response to this study, we request narrative responses to the following questions, including whether and how the answers may change depending on who makes the preferral and referral decisions: lawyers or commanders.

Question 1. Should the determination of an Article 32 preliminary hearing officer that a preferred specification under a charge lacks probable cause prohibit referral of that specification to court-martial pending reconsideration of any new evidence? Why or why not?

Army:

The Army provided the following comment [applicable to Questions 1-7] in addition to the answers below:

The questions and response below presuppose no mandated legislative changes to the UCMJ and specifically Article 32 and Article 34 in the current FY22 National Defense Authorization Act. Both the Senate and House versions of the NDAA contain provisions that would require a military magistrate or judge to serve as a preliminary hearing officer. The current legislation will also remove commanders from some subset of military criminal offenses and place the decision authority in an independent judge advocate. The final details of changes to the UCMJ will have a substantial impact on the value of the Article 32 and potential changes or improvements.

[Questions 1 answer] No. The Preliminary hearing officer's (PHO) finding of a lack of probable cause should not be binding on convening authorities. 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.

Based on the clear intent of Congress, today's preliminary hearing is not a comprehensive evaluation of all the available evidence, nor a tool to identify cases in which a conviction may not be assured. 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, 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, supported by the expertise and experience of other senior judge advocates, including the Chief of Justice and Special Victim Prosecutor. Preliminary hearing officers, however, rarely have the experience of the Staff Judge Advocate. Consequently, the Staff Judge Advocate is in the best position to provide a fair, reasoned, and experienced recommendation based on all the facts and evidence in a case. Indeed, the study by the Defense Advisory Committee on the Investigation, Prosecution and Defense of Sexual Assault in the Military (DAC-IPAD) identified cases in which a PHO found no probable cause, the Staff Judge Advocate disagreed, and the accused was subsequently convicted.

The stated purpose of the "new" Article 32 preliminary hearing is to gather sufficient information on probable cause to transmit to the Staff Judge Advocate, who then makes the binding determination of whether there is probable cause prior to referral. This process is similar to the presentation of evidence to a grand jury and a grand jury's probable cause determination.

Unfortunately, the rebranding of the Article 32 proceedings from an “investigation” to a “preliminary hearing” has created confusion on this point.

There is now a misconception that the Article 32 proceedings are a judicial hearing similar to the “Preliminary Hearing” under Rule 5.1 of the Federal Rules of Criminal Procedure. This is not an accurate comparison of the two systems, as Rule 5.1 preliminary hearings are for cases where an arrest is effectuated before an indictment, to ensure judicial oversight where a grand jury’s probable cause determination is bypassed before an arrest.

Making the preliminary hearing officer’s determination of probable cause binding on the convening authority asks too much of a procedure that performs a very limited statutory function. Reaching, or not reaching, a probable cause threshold early in a case’s development should never be dispositive as to the viability of the case. Furthermore, such a change may have the unintended consequence of a coercive effect on victims who would otherwise exercise a right to not testify at the preliminary hearing, directly undermining the intent of Congress.

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.

Should the referral authority change from commander to an experienced senior judge advocate, substituting the judge advocate referral authority for staff judge advocate leads to the same conclusion—PHO determinations should not be binding on any subsequent referral authority.

Navy:

We do not support the proposition that a preliminary hearing officer’s (PHO) determination of probable cause be binding on the referral disposition authority. In current practice, prior to a case reaching a preliminary hearing, the case is reviewed by at least one experienced trial counsel who is supervised by one or more senior judge advocates who are often Military Justice Litigation Qualified (MJLQ). In addition, Article 34, UCMJ, requires that, prior to referral of a charge and specification to a general court-martial, a staff judge advocate (SJA) must advise a convening authority in writing, that there is probable cause to believe that the accused committed the offense under the UCMJ. 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, the PHO’s opinion concerning probable cause should not be binding on the general court-martial convening authority (GCMCA). The PHO’s advice provides valuable insight into the charges and the evidence from the perspective of a third, non-interested party. The proposal places too much authority in the hands of a single judge advocate (the PHO) who may lack the necessary information and perspective to make binding decisions concerning the determination of probable cause.

Marine Corps:

No. Probable cause determinations by Article 32 Preliminary Hearing Officers (PHO) should continue to be non-binding upon referral authorities (regardless of whether convening authorities (CA) or senior judge advocates (JA)).

The current adversarial process for an Article 32 preliminary hearing by an impartial judge advocate, preceded in many cases by a comprehensive case analysis memorandum (CAM) with multiple layers of review, and followed by review and advice by the cognizant staff judge advocate (SJA), serves as adequate protection against unwarranted prosecutions.

The current model contemplates the referral decision, at least for the most serious cases, to be informed by the recommendations of several military justice professionals: the trial counsel, regional trial counsel, litigation attorney advisor, and ultimately, the SJA. It is counterintuitive to vest in the PHO the authority to prevent referral of a charge to a court-martial over the advice of others with more significant knowledge and involvement in a case and often more military justice experience. The referral authority—whether commanders in the current model or senior JAs in possible future models—are better positioned to make the final determination with all of the available information and evidence at their immediate disposal.

Should the probable cause determination by the PHO become binding, it would be incumbent to ensure that only the most trained, experienced, and qualified JAs serve as PHOs with this expanded, binding authority. The Marine Corps would be required to consider implementing a policy that only military judges—trained and accustomed to making essential findings of fact and conclusions of law binding upon the parties, subject to appeal—may be detailed as a PHO, straining current manpower and resourcing.

Additionally, if the PHO's probable cause determination is binding, there must be an avenue of recourse for the government, but not just for reconsideration of new evidence as posed in the question. This is further discussed in response to the next question.

Air Force:

A determination by a preliminary hearing officer that a specification lacks probable cause should not prohibit referral of that specification to court-martial. Unlike grand juries in the civilian system, the determination of whether to refer a case to trial is made by a single, albeit neutral, legal officer. Because reasonable minds may disagree on whether evidence meets a probable cause standard, limiting the convening authority's discretion would preclude the Air Force's ability to base referral decisions on a holistic view of each case with input from various perspectives, including the Convening Authority's Staff Judge Advocate, judge advocates prosecuting the case, and inputs from victims and the accused—inputs that may come before or after the preliminary hearing has closed. Should the determination of the preliminary hearing officer that the probable cause standard has not been met be made binding, sufficient safeguards must be implemented to prevent injustice. Those safeguards must allow the convening authority to overrule the preliminary hearing officer in certain circumstances. This answer is applicable if either commanders or judge advocates make preferral and referral decisions.

Coast Guard:

No. The determination of the Article 32 Preliminary Hearing Officer (PHO) should remain a recommendation and not be binding on the referral authority. In many contexts, the most consequential witness, the victim, defined broadly in accordance with Article 32(h), UCMJ, has a statutory right to refuse to testify before the PHO. Additionally, if the testimony of a civilian witness is crucial to a particular charge, that civilian witness is not subject to compulsory process

for purposes of an Article 32 preliminary hearing. Accordingly, the Article 32 preliminary hearing, as currently designed through statute and regulation, is not intended to be a comprehensive evaluation of all available evidence.

Question 2. If the Article 32 preliminary hearing officer's determination posed a legal bar to referral of the affected specification and/or charge because it lacks probable cause, what are your Service's recommendations or recommended requirements for a reconsideration system? Please address the effect a reconsideration process may have on military speedy trial considerations.

Army:

If the Article 32 PHO's determination precludes referral, a commander should have the authority to re-open or start the Article 32 process to present any additional relevant evidence to establish probable cause.

In addition to all the reasons discussed above, the Army does not support this procedural change as the requirement to re-open a preliminary hearing will unnecessarily delay the progression of a case. One of the primary victim complaints about the military justice system is the length of time it takes to proceed to trial. Adding another time-consuming hurdle to the process would further frustrate the process, and the impact on good order and discipline.

Navy:

We do not support the proposition that a preliminary hearing officer's (PHO) determination of probable cause be binding on the referral disposition authority. That said, if that were to become policy, we would strongly recommend adopting a reconsideration process and new rules governing excludable delay.

Procedural rules permitting reconsideration exist in most federal and civilian jurisdictions, providing trial counsel with a limited opportunity to overcome a finding of no probable cause and a similar process should be considered for military determinations if the PHO determinations become binding. The reconsideration process will delay proceedings and take time and resources. As a result, new rules governing excludable delay will be required.

Additionally, planned revisions to RCM 309 under consideration by the President in Prospective Executive Order 21-1 provide victims the power to appeal decisions made by the preliminary hearing officer to a military judge.

Marine Corps:

If a PHO's finding of no probable cause is binding upon the referral authority (regardless of whether a CA or JA), there should be avenues of recourse, but not just for reconsideration as posed in the question.

A reconsideration process should be implemented by amending R.C.M. 405, generally in line with the process for reconsideration of continued pretrial confinement in R.C.M. 305(i)(2)(E). If the PHO finds there is not probable cause to believe that the accused committed the offense charged, the PHO shall reconsider that determination upon request of the government based upon any significant evidence not previously considered by the PHO. This would require reconvening the hearing, and the accused would enjoy the same rights during reconsideration as during the initial hearing.

In the event that the government believes the PHO made an erroneous determination despite considering all of the evidence, a military judge shall review the PHO's probable cause determination for an abuse of discretion, upon motion for appropriate relief. Additionally, given that evidence may continue to develop in complex cases with each passing day, the military judge shall conduct a de novo review of probable cause upon motion by the government. Implementing this review process would require amendment of Article 30a and R.C.M. 309 to broaden the scope of permitted pre-referral proceedings.

Any effect this process has on military speedy trial considerations is minimal. R.C.M. 707 permits convening authorities and military judges to grant excludable delay for good cause. Additionally, R.C.M. 707 may be amended to specifically account for the time to seek review of a PHO's adverse probable cause determination, in the nature that the Rule currently accounts for Government appeals. For 6th Amendment and Article 10 purposes, delay while seeking review of the PHO's probable cause determination—made in good faith and not solely for the purpose of delay—should be viewed neutrally in most cases when conducting a *Barker* analysis. An accused eager to get the process moving may waive the preliminary hearing pursuant to R.C.M. 405(m).

Air Force:

Should a decision by the preliminary hearing officer that probable cause does not exist be made binding, the government should be allowed to seek reconsideration from the preliminary hearing officer when new or additional evidence becomes available. Additionally, the Staff Judge Advocate for the convening authority, or the senior special victims' prosecutor (under the construct proposed in the FY22 NDAA), should also possess independent authority to exercise their legal judgment to overrule the preliminary hearing officer when necessary to prevent injustice.

Coast Guard:

Assuming the PHO's determination of lack of probable cause operates as a bar to referral, there are several options available. Currently, the discussion portion of R.C.M. 405(m) authorizes the convening authority to reopen the Article 32. The convening authority can direct that the Article 32 be reopened to provide additional evidence/testimony to meet the evidentiary deficiencies articulated by the PHO as the basis for lack of probable cause. (Again, if the basis of the PHO's determination is, for example, that the PHO could not properly ascertain for herself the credibility of the victim, a statutory change to Article 32 would be necessary to require the victim to testify). The convening authority can direct that the Article 32 be reopened based on the advice of her staff judge advocate pursuant to R.C.M. 406(b)(4). Currently, R.C.M. 405(l)(2)(H) contains the regulatory requirement that the PHO must specifically articulate her reasoning for why there is sufficient probable cause for each charged offense. In this regard, the reverse must also be required: specific reasons for why an offense is lacking in probable cause. If there is no statutory or regulatory bar for the Government to acquire the evidence to meet the evidentiary deficiencies, the Government can request that the convening authority reopen the Article 32 hearing and request that the PHO reconsider her prior determination.

Another option could be to amend R.C.M. 405 to specifically authorize the PHO to hold her determination in abeyance for a set period of time in order to allow either party, or the special victims' counsel, to request reconsideration similar to R.C.M. 905(f). The reconsideration period would be set by the Secretary concerned.

For purposes of how a reconsideration process would affect military speedy trial considerations, again there are several options. The applicable regulatory rule, which applies in all cases, R.C.M. 707, authorizes the convening authority to exclude delay. See R.C.M. 707(c). The convening authority, within her sole discretion, may exclude delay to allow time to acquire additional evidence for the PHO's consideration. An additional option could be for the convening authority to dismiss the case without prejudice pending additional evidence. In that case, the charges would be dismissed, and if re-preferred, a new 120-day period would begin when charges "are preferred anew." R.C.M. 707(b)(3)(A)(ii)(I). If the convening authority elects to dismiss the charges pending additional evidence, in the event the accused is in confinement or subject to pretrial restraint, the accused would likely have to be released pending charges being preferred anew. See R.C.M. 707(a)(2).

The statutory speedy trial requirement in Article 10, UCMJ, should also be considered to the extent that appellate courts have held that the Article 10, UCMJ, speedy trial legal test is separate from the R.C.M. 707 speedy trial test. In this regard, Article 10, UCMJ, only applies to accused who have been placed in pretrial confinement. Assuming that -- despite the recent changes to Article 10, UCMJ, specifically directing the President to prescribe speedy trial regulations -- appellate courts still regard the "Article 10" speedy trial test as separate from R.C.M. 707 test, the Government would have to take "immediate steps" to try the accused "or dismiss the charges and release" the accused. Article 10(b)(1)(B). Presumably, if the convening authority elects to dismiss the charges pending additional evidence, the accused would have to be released from confinement.

Question 3. Please provide your Service's position on whether military judges or military magistrates should be required to serve as preliminary hearing officers in all Article 32 hearings.

Army:

The current standard of using judge advocates as preliminary hearing officers is sufficient. The requirement for a military judge or magistrate would add very little value to the system given the protections and decision making authorities in place for all cases within the military justice system. Judge advocates meet the minimum requirement for Article 27(b), UCMJ, 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 PHOs. Limiting the PHO role to military judges and magistrates will likely result in staffing shortages and conflicts of interest in referred courts-martial that will only further delay proceedings. The Army currently uses 25 military judges to adjudicate the approximately 700-800 cases arraigned per year. These military judges are not stationed at every location, but travel throughout the Army to oversee cases. Utilizing military judges at Article 32 Preliminary Hearing officers will disqualify them from further service on the case and require a second military judge in every case where a military judge serves as the preliminary hearing officer.

Navy:

The Navy does not believe it is necessary for military magistrates or military judges to serve as PHOs in all Article 32 Preliminary Hearings. The current practice using JAGs is sufficient. Multiple provisions of the UCMJ and RCM provide victims and accused service members a robust set of procedures, checks, and protections that would only be minimally improved by the involvement of the judiciary during the preliminary investigation stage. Articles 6b and 32, UCMJ, and Rule for Courts-Martial (RCM) 405 currently provide significant protections for victims, including the right to decline the invitation to testify at the hearing. Planned revisions to RCM 309 under consideration by the President in Prospective Executive Order 21-1 provide victims the power to appeal decisions made by the preliminary hearing officer to a military judge. If the decision is made to require military magistrates or judges to preside over Article 32 Preliminary Hearings, the Navy strongly recommends that Article 32 Preliminary Hearings continue to be held remotely, consistent with Proposed Executive Order 21-1. The Navy also recommends that additional billets for military magistrates or judges be authorized. The Navy would not be able to make that shift without increased end strength supporting additional judicial billets.

Marine Corps:

The Marine Corps is not in favor of requiring military judges or military magistrates—which the Marine Corps does not currently have—to serve as PHOs in all Article 32 hearings. Doing so would place an intolerable strain upon the judiciary and create avoidable conflict issues, particularly at installations with only one military judge. However, should probable cause determinations by PHOs become binding upon referral authorities, the Marine Corps would be required to consider implementing a policy that military judges serve as PHOs in order to ensure the most trained and qualified personnel are making those grave determinations. This policy may be implemented without amendment to Article 32 and R.C.M. 405.

This answer does not depend on who makes the referral decision.

Air Force:

There should not be a requirement for a military judge or military magistrate to serve as a preliminary hearing officer in all Article 32 hearings. Rather, military judges should serve as preliminary hearing officers as warranted on a case-by-case basis. As the Air Force does not utilize magistrates, providing the Services flexibility to assess which cases warrant the expertise of a military judge would ensure legal resources are being properly utilized and avoid significantly limiting the Air Force trial judiciary's ability to preside over courts-martial. This answer is applicable if either commanders or judge advocates make preferral and referral decisions.

Coast Guard:

It is unnecessary to require either a military judge or military magistrate to be required to serve as the PHO in all Article 32, UCMJ, hearings. Based on the current statutory requirement that the PHO be, absent extraordinary circumstances, a judge advocate equal or senior in grade to the detailed trial and defense counsel, this is sufficient for purposes of serving as a PHO. In certain circumstances it may be appropriate for a military judge to be detailed as the PHO, but that should be the exception, driven by unique facts, rather than the default rule.

If the question assumes the premise in Question 1 that the PHO's determination is binding, having a military judge making the determination might be prudent. However, due to certain constraints in Article 32(d)(3), UCMJ, that provides all victims with the statutory right not to testify at the preliminary hearing, detailing a military judge to every Article 32 preliminary hearing would, in most cases, not "move the evidentiary needle" and would arguably be an inappropriate use of judicial assets.

Question 4. Please provide your Service's position on whether military judges or military magistrates should be required to serve as preliminary hearing officers only for Article 32 hearings involving certain specified offenses. Please identify recommended qualifying offenses for this requirement.

Army:

The Services should have discretion to identify which cases merit a military judge or magistrate serving as a PHO. Historically, military judges or senior judge advocates serve on cases involving the death penalty or major public interest. The current rules allow the commander in coordination with the servicing SJA to determine on a case-by-case basis which cases require a higher level of expertise.

Navy:

As in the answer to Policy Issue 3, even if military judges or magistrates were only required to preside over preliminary hearing in cases involving special victim offenses, the number of military judges or military magistrates would have to be increased. Special victim offense cases represent a large proportion of military justice cases likely requiring Article 32 hearings.

Marine Corps:

As stated above, requiring military judges or military magistrates to serve as PHOs would place an intolerable strain upon the judiciary and create avoidable conflict issues, even for hearings involving limited qualifying offenses. The services should maintain flexibility to implement policies concerning the qualifications of PHOs, and can implement policies without amendment to Article 32 and R.C.M. 405. However, generally speaking, there may be a need for more experienced PHOs in special victim cases, defined by the Marine Corps as cases involving alleged violations of Articles 117a, 118, 119, 119a, 120, 120a (for stalking offenses committed prior to 1 January 2019), 120b, 120c, 125 (with a child or forcible), 128 or 128b (domestic violence involving aggravated assault or child abuse), 132 (when the retaliation was for reporting a sex-related offense), 134 (child pornography or assault with intent to commit the previously listed articles), or 80 (attempts to commit the previously listed articles) of the UCMJ.

This answer does not depend on who makes the referral decision.

Air Force:

There should not be a requirement for a military judge or military magistrates to serve as a preliminary hearing officer for Article 32 hearings involving certain specified offenses. Assuming these qualified offenses correlate to the qualifying offenses described in the House and Senate FY22 NDAA bills, such qualifying offenses will encompass the vast majority of general courts-martial for the Air Force. Military judges should serve as preliminary hearing officers as warranted on a case-by-case basis. As the Air Force does not utilize magistrates, providing the Services flexibility to assess which cases warrant the expertise of a military judge would ensure legal resources are being properly utilized and avoid significantly limiting the Air Force trial judiciary's ability to preside over courts-martial. This answer is applicable if either commanders or judge advocates make preferral and referral decisions.

Coast Guard:

Similar to the response in Question 3, the most value a military judge can bring to the Article 32 process would be within the context of highly complex cases and cases that require a nuanced assessment of the credibility of a victim or witness. Rather than coming up with a list of offenses, each Service should have the flexibility to request appointment of a military judge in appropriate cases. For example, a homicide case may not necessarily require the expertise and experience of a military judge; however, an alleged homicide that takes place as part of an alleged violation of the law of war may. See Article 18(a), UCMJ. Additionally, cases such as spying, or espionage, or offenses that embrace national security matters within the meaning of R.C.M. 401(d) and R.C.M. 407(b) may benefit from having a military judge detailed as the PHO. Again, the Secretary concerned should have the flexibility to make that determination based on the unique set of facts.

The second category of cases are cases in which the experience and expertise of a military judge could be helpful would be cases in which assessment of the credibility of a victim as a percipient witness would be crucial to the truth-seeking process. Unless Congress amends Article 32 to require victims to testify, the perceived value of having a military judge detailed as the PHO in these types of cases would likely add little value to the process at the expense of scarce judicial assets.

Question 5. Does your Service currently have a military magistrate program? Why or why not? If so, what are the requirements (duties and qualifications) for a military magistrate and would you recommend changing the requirements if military magistrates were used for preliminary hearings?

Army:

Yes, The Army currently utilizes a military magistrate program. The Army utilizes part time military magistrates as neutral officers responsible for probable cause determinations, search authorizations and pre-trial confinement hearings. These officers are generally O-3s and O-4s within the local Staff Judge Advocate's office. The part-time military magistrate program is supervised by the trial judiciary and is an additional duty. Most installations do not have a sufficient case load to staff a full-time magistrate. If the requirement for a preliminary hearing expands to require a military magistrate the Army will likely grow its part time military magistrate population to assist the trial judiciary in covering this added responsibility.

Navy:

The Navy does not currently have a military magistrate program. Recently, after contemplating the establishment of a military magistrate program as authorized by the UCMJ, the Navy decided to re-establish special court-martial judge positions in the two busiest fleet locations. The UCMJ qualifications for military magistrate and military judge are substantially similar. However, magistrates may only be utilized to resolve certain pretrial matters, to perform other duties of a nonjudicial nature with the consent of the parties, and to preside over cases referred to special court-martial. The military magistrate program was rejected in favor of additional special court-martial judges after considering the relatively limited authority of a military magistrate, compared to the more expansive authority granted to a military judge under the UCMJ.

Article 26a, UCMJ, details the qualifications of a military magistrate. As previously noted, a military judge, with the consent of the parties, may designate a military magistrate to preside over a military judge alone special court-martial under Article 16(c)(2)(A), to preside over certain pre-referral proceedings, and to be assigned to perform other duties of a nonjudicial nature.

If military magistrates were used for preliminary hearings, the requirement contained in Article 62(d), UCMJ, might be reconsidered. Currently, an appeal by the United States from an order or ruling of a military magistrate must first be considered by a military judge prior to the appeal being considered by a Court of Criminal Appeals. The additional proceeding could further delay the case and potentially impact military speedy trial considerations.

Marine Corps:

No, the Marine Corps does not have a military magistrate program. Current manpower limitations preclude implementation of a magistrate program. Furthermore, Article 26a requires the Judge Advocate General to establish qualifications for military magistrates, and the Secretary concerned to prescribe regulations governing military magistrates, neither of which have occurred within the Department of the Navy.

This answer does not depend on who makes the referral decision.

Air Force:

The Air Force does not have a military magistrate program. The Air Force JAG Corps is not currently manned or organized to carve out an independent and dedicated function of military magistrates. Our most experienced military justice practitioners are assigned as military judges, senior prosecutors, senior defense counsel, special victims' counsel, and in military justice policy roles. Additionally, the Air Force has not identified an operational need for such a program. The duties of military magistrates currently contemplated by the law are adequately otherwise performed by military judges. This answer is applicable if either commanders or judge advocates make preferral and referral decisions.

Coast Guard:

The Coast Guard does not have a military magistrate program. There is insufficient military justice throughput to justify the creation of a military magistrate program within the Coast Guard. In FY21, the Coast Guard convening authorities directed Article 32 preliminary hearings in 14 cases and the Coast Guard tried 12 general courts-martial.

Question 6. Absent a requirement that the Article 32 preliminary hearing officer's determination of no probable cause for a specification is binding on the convening authority pending reconsideration of any new evidence, what changes, if any, should be made to Article 32 or R.C.M. 405 to address the common viewpoint that the hearings today do not serve a sufficiently useful purpose to outweigh the delay they impose on the processing of cases?

Army:

The preliminary hearing in its current form clearly reflects congressional intent and the plain language of the statute. Any changes made through policy, such as allowing the PHO to call witnesses, should be minor. The premise that there is a "common viewpoint" that the hearings do not serve a sufficiently useful purpose is contradicted by the record developed by DAC-IPAD. All testimony before the DAC-IPAD established that all parties, including the prosecution and defense, found value in the current process and believed that the current process satisfied the statutory language. The data collected by DAC-IPAD further supported the testimony of Service representatives, as the preliminary hearing is waived in only a small portion of cases. Any anecdotal discussions that would support a finding of a "common viewpoint" that the preliminary hearing is not serving the purpose set forth of the statute are not part of the current record, so are difficult to address. While many practitioners may recall the benefits of the former Article 32 hearing with victim testimony, cross-examination and other substantive requirements, Congress has made clear their intent for the purpose of a preliminary, limited hearing with a low legal standard and additional rights for victims.

Navy:

The Navy recommends additional study into the advisability of revising Articles 32 and 34 once current legislative reform efforts have been resolved.

Marine Corps:

Since the rules of evidence largely do not apply at preliminary hearings, a PHO may consider hearsay and other evidence that may not be admissible at trial in determining whether there is probable cause. This may inform the SJA and CA's assessment of whether the bar for referral is met, but is minimally helpful in assessing the prospects for conviction at trial. Accordingly, the utility of preliminary hearings would be increased with a requirement that PHOs make a non-binding assessment of whether the admissible evidence would likely be sufficient to obtain and sustain a conviction.

Three primary benefits may be achieved with this change: First, the evidence would be more closely scrutinized, which inures to the benefit of both sides. Second, SJAs and CAs would receive a more exacting assessment from an impartial judge advocate of whether referral is advisable. Third, the parties and the PHO may all be incentivized to *do more* with respect to calling witnesses and presenting evidence.

Further, in order to inject more rigor into the PHO's analysis, thus creating a more useful product for SJAs and CAs, R.C.M. 405 should be amended to require PHOs to articulate the factors, from MCM Appendix 2.1 or elsewhere, that support the recommended disposition and that weigh in favor of or against referral.

This answer does not depend on who makes the referral decision, though these changes may be less useful in a model in which a JA makes the referral decision.

Air Force:

Preliminary hearings allow a neutral and detached legal officer to review a case and permit the accused to present evidence before a case is referred to trial. There is no indication in the Air Force that preliminary hearing requirements cause any significant delays in the overall processing of cases. This answer is applicable if either commanders or judge advocates make preferral and referral decisions.

Coast Guard:

Pending legislation proposes the transfer of the authority to make disposition decisions in military justice cases from the convening authority (i.e. commander) to an independent judge advocate. The extent and scope of these prosecutorial authorities are yet to be determined. Pending the outcome of this year's NDAA, any recommended policy changes would be premature.

Question 7. What is your Service's position on whether referral of charges to a general court-martial should be precluded absent a determination by the staff judge advocate that the admissible evidence would likely be sufficient to obtain and sustain a conviction?

Army:

The Army opposes a change that would preclude referral to courts-martial absent a determination by the staff judge advocate that the admissible evidence would be sufficient to sustain a conviction. The non-binding disposition guidance is now part of the Manual for Courts-Martial, and provides a useful, consistent framework for discussions with convening authorities. This guidance ensures that commanders and judge advocates are considering a uniform set of factors in reaching their disposition decisions.

At the outset, the source of the “sufficient to obtain and sustain a conviction” proposal, Section 9-27.220 of the Department of Justice, Justice Manual, is a non-statutory, non-legally binding factor. The legal standard for initiating a prosecution remains probable cause. Similarly, the Secretary of Defense, pursuant to Article 33, UCMJ, promulgated non-binding disposition guidance. 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.

Making the likelihood of conviction the determinative factor in every case would appear to eschew the truth-seeking function of a public criminal trial. Trials are not, and should not, be treated as a formality on the road to a conviction. In order to maintain good order and discipline, it is the public process, not the result, that drives the utility of a court-martial.

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.

Advocacy organizations concur. A recent New York Times article, “Nobody Believed Me: How Rape Cases Get Dropped” dated July 18, 2021, refers to a study commissioned by the Manhattan District Attorney of the sex crime bureau by Aequitas, a non-profit that provides prosecutors with resources on violence against women. Aequitas specifically found that Manhattan sex crimes prosecutors *improperly* based decisions on the possibility of winning cases, and stated that “likelihood of conviction should not be a determining factor.”

An adoption of the “sufficient evidence to sustain a conviction” would seem to contradict the expert advice provided by organizations like Aequitas, and would of course have the practical result of sending fewer cases to trial, which will further undermine public confidence in the military justice system.

Navy:

The Navy supports the addition to the referral standard of "evidence sufficient to obtain and sustain a conviction," in order to align with the standard in federal prosecutions and other non-military jurisdictions.

The Navy does not believe that the standard should be binding on the convening authority, but instead should be advisory in the same manner as the other Article 34 advice requirements.

Marine Corps:

The SJA should not be required to determine that the admissible evidence would likely be sufficient to obtain and sustain a conviction as a requisite for referral. Probable cause should remain the minimum bar for referral with the heightened standard being one of many factors to consider when making a disposition decision, consistent with MCM Appendix 2.1.

Although not a requisite for referral, whether the admissible evidence would likely be sufficient to obtain and sustain a conviction is a weighty factor. Pursuant to MCO 5800.16, Volume 16, Paragraph 050304, in special victim cases, the trial counsel, regional trial counsel, and litigation attorney advisor assess in writing "the admissibility of evidence and likelihood of obtaining a sustainable conviction," and they generally recommend against referral if that standard is not met. Trial counsel are the most knowledgeable of the state of the evidence in a case and are best positioned to scrutinize the weight of it in assessing this heightened standard. Trial counsel's assessment in this regard ultimately informs the SJA's advice to the convening authority. The SJA independently assesses probable cause, but is not well positioned in all cases to independently assess the heightened standard to the degree necessary as a gatekeeping function for referral. Further, many SJAs throughout the Marine Corps are lacking the level of current military justice experience required to make this binding assessment.

This answer does depend on who makes the referral decision. Article 34 in general would seem not to apply in a model in which a JA makes the referral decision.

Air Force:

While the Air Force does not believe the assessment of the staff judge advocate that the admissible evidence would likely be sufficient to obtain and sustain a conviction should be binding, we concur that Article 34, UCMJ, should be amended as follows: (1) to require the convening authority's staff judge advocate to make a recommendation as to whether there is admissible evidence sufficient to obtain and sustain a conviction; and (2) to require the convening authority to consider that recommendation, separate and apart from the determinations required by Article 34(a)(1)(A)-(C).

These recommended changes ensure the convening authority receives the experienced assessment of legal counsel, but retains flexibility. Such flexibility is necessary for a number of reasons. Pre-trial advice is accomplished, in general court-martial cases, after the receipt of the preliminary hearing officer's Article 32 report; it is, by law, an assessment fixed in time and takes into account the information available. As such, only minimal evidence may be known to the parties (the government – the convening authority and prosecutor – and the defense).

This is for a number of reasons: (1) The defense is not obligated to present a case at an Article 32 preliminary hearing and may elect not to do so; (2) discovery obligations are not triggered pursuant to R.C.M. 701 and 703 until *after* referral of charges; and (3) victim input for referral, alternate dispositions, and plea agreements are not often or required to be obtained until after the preliminary hearing (see, e.g., Article 6b, UCMJ). Further, a victim may decide to participate after an Article 32 preliminary hearing or may decide *not* to participate at such time. Moreover, additional matters, such as discovery of new evidence by law enforcement, the government, or the defense, may further bolster the evidence in a case or may undermine it in such a manner that the recommendation is no longer accurate. Preserving flexibility ensures the convening authority has the ability to make the appropriate referral decision in a case, which may include victim input and consideration of evidence not presented as part of the preliminary hearing officer's report.

Coast Guard:

The recommendation of the SJA as to whether -- at the time of referral -- there is admissible evidence to obtain and sustain a conviction is certainly a factor that is considered, consistent with the discussion section to R.C.M. 406(a). Similarly, the discussion portion to R.C.M. 601(d)(1) requires the convening authority to make the same determination as part of making her referral decision. Within the context of sex-related offenses, the two most important factors of whether to proceed is first the willingness of the victim to participate in the military justice process, and second whether there is sufficient evidence to obtain and sustain a conviction. These factors are subject to change during the process. For example, the Government receives additional admissible evidence or victims may change their minds about participating in the military justice process as the trial date approaches.

Accordingly, and provided there is sufficient probable cause to refer the charged offenses, the determination of the staff judge advocate that the admissible evidence is likely sufficient to obtain and sustain a conviction should be a factor, but not be a *requirement* to refer, or to bar from referring, the charged offenses.

**APPENDIX E. COMPREHENSIVE COURTS-MARTIAL PRETRIAL
PROCESSING DATA FOR FISCAL YEARS 2014 THROUGH 2021**

Courts-Martial Pretrial Processing Data

for Fiscal Years 2014 Through 2021

CONTENTS

I.	INTRODUCTION	1
II.	METHODOLOGY	3
III.	DATA CONCERNING ADULT-VICTIM PENETRATIVE SEXUAL OFFENSES FOR WHICH AN ARTICLE 32 PRELIMINARY HEARING OFFICER FOUND NO PROBABLE CAUSE: FY14 THROUGH FY21	4
IV.	DATA CONCERNING ALL UCMJ OFFENSES FOR WHICH AN ARTICLE 32 PRELIMINARY HEARING OFFICER FOUND NO PROBABLE CAUSE: FY21	15

COURTS-MARTIAL PRETRIAL PROCESSING DATA FOR FISCAL YEARS 2014 THROUGH 2021

I. INTRODUCTION

Section I provides a summary of observations and analysis from the FY14–FY21 pretrial processing data.

Section II outlines the methodology for this supplemental report.

Section III contains 5 figures and 5 tables depicting the outcomes of FY14–FY21 cases in which an Article 32 preliminary hearing officer (PHO) determined there was no probable cause (PC) for the charged sexual assault offenses.

Section IV contains 14 figures and 14 tables depicting the outcomes of FY21 cases in which an Article 32 PHO determined there was no PC for any offense charged under the Uniform Code of Military Justice (UCMJ) (not limited to sexual assault offenses).

Summary of observations and analysis from the FY14–FY21 pretrial processing data:

Article 32 no-probable-cause determinations and case outcomes:

- Article 32 PHOs found no PC for a penetrative sexual offense (PSO) charge in a minority of cases (15% to 22%) completed in FY14–FY21 (Table 3).
- For FY21 cases, PHOs found no PC for a PSO charge at a lower rate (8%) than for other UCMJ offenses (21%) (Tables 10a-2 and 10a-3).
- On average, convening authorities dismissed PSO charges consistent with the Article 32 PHO no-PC determination(s) in a majority of the Navy (65%), Marine Corps (68%), and Air Force (72%) cases, but in a minority of Army cases (34%)³ (Table 4).

1 See STUDIES OF ARTICLE 32 PRELIMINARY HEARINGS AND ARTICLE 34 ADVICE LETTERS (Jan. 25, 2022).

2 HARD TRUTHS AND THE DUTY TO CHANGE: RECOMMENDATIONS FROM THE INDEPENDENT REVIEW COMMISSION ON SEXUAL ASSAULT IN THE MILITARY, Recommendations 1.7a–f, App. B at 52 (July 2021) [IRC REPORT], *available at*: <https://media.defense.gov/2021/Jul/02/2002755437/-1/-1/0/IRC-FULL-REPORT-FINAL-1923-7-1-21.PDF/IRC-FULL-REPORT-FINAL-1923-7-1-21.PDF>.

3 Because the Coast Guard has a low number of cases, its cases are not included in these observations or analyses.

- For FY21 cases, convening authorities dismissed charges for which the Article 32 PHO found no PC at a lower rate (45%) in cases involving any UCMJ offense than in PSO cases (62%) (Tables 11a and 11b).
- Since FY19, 13 trials on a no-PC PSO charge have resulted in a not guilty verdict (Table 5).
- Since FY19, only one military accused has been convicted of a no-PC PSO charge (Table 5).
- For FY21 cases involving a PSO offense, only one accused was convicted of a charge for which the Article 32 PHO found no PC (Table 5). By comparison, across all FY21 cases,⁴ 35 cases resulted in a conviction of a no-PC charge (Tables 12a and 12b).
- For FY21 cases involving a PSO offense, in 8⁵ of 60 cases (13%) referred after the Article 32 PHO found no PC, the accused was found not guilty. For FY21 cases involving any offense, in 27⁶ of 193 cases (14%) referred after the Article 32 PHO found no-PC, the accused was found not guilty (Tables 11a, 11b, 12a, and 12b).

Article 32 preliminary hearing waivers:

- The proportion of Article 32 preliminary hearings waived in PSO cases has stayed relatively constant for cases completed in and after FY16, ranging from 21% to 26% (Table 1).
- The percentage of Article 32 preliminary hearings waived in FY21 PSO cases (23%) is somewhat lower than in FY21 cases involving all offenses (31%) (Table 7).

Article 32 preliminary hearing officers:

- For FY21 cases, 54 of 88 (61%) of the Navy's Article 32 preliminary hearings were presided over by judge advocates in the grades of O-5 or O-6, most of whom were assigned to the Article 32 preliminary hearing unit⁷ (Table 9a).
- For FY21 cases, 34 of 174 (20%) of the Air Force Article 32 preliminary hearings involving at least one PSO had military judges serving as the PHO (Table 9b).

Article 32 preliminary hearings and witness testimony:

- Since FY16,⁸ in PSO cases, the proportion of Article 32 preliminary hearings with witness testimony has steadily declined, from 62% in FY16 to 17% in FY21 (Table 2).
- For FY21 cases, only 18% of Article 32 preliminary hearings involved witness testimony (Table 8a).

4 In 18 of the 35 cases, the accused pled guilty to the no-PC offense pursuant to a PTA.

5 In 3 of the 8 cases, the not guilty findings were pursuant to a PTA.

6 In 7 of the 27 cases, the not guilty findings were pursuant to a PTA.

7 See discussion of the Navy's preliminary hearing unit, *infra* Section IV.E.

8 By FY16, all Article 32 hearings had transitioned from investigations to preliminary hearings, which gave greater latitude for consideration of documentary evidence and eased requirements for witness testimony. See *infra* note 12.

II. METHODOLOGY

To collect and analyze sexual assault courts-martial processing data, the DAC-IPAD staff submitted requests for information (RFIs) to the Military Services asking for charging documents, pretrial allied papers, and official trial results for cases completed in FY14 to FY21 involving a preferred charge of adult-victim sexual assault,⁹ as well as for all cases involving a preferred charge of any offense—including both sex offenses and non-sex offenses—completed in FY21.¹⁰

For Section III of this supplement, the staff reviewed source documents¹¹ from cases completed—that is, tried to verdict or resolved by alternate means—in FY14 to FY21, in which:

- The most serious offense charged was a PSO,
- An Article 32 investigation or preliminary hearing¹² was either held or waived, and
- The Article 32 PHO¹³ determined that PC was not established for at least one charged PSO.

If the PHO determined that PC was not established for a PSO specification, the staff recorded the ultimate disposition of that specification. If the PHO determined that PC was established for some PSOs but not others, the staff recorded only the disposition of the no-PC offenses. When the no-PC offense was charged in the alternative and the PHO determined that PC existed under an alternate charging theory, the staff did not include the case in its analysis of no-PC offenses.

Section III provides the Military Services' FY14–FY21 data in the following areas:

- A. Article 32 hearings and waivers for PSO cases.
- B. Witness and victim testimony in Article 32 proceedings for PSO cases.
- C. Cases in which the PHO found no PC for a PSO.
- D. Disposition decisions for cases in the PHO found no PC for a PSO.
- E. Results of referred no-PC PSO specifications.

In Section IV, the staff used the same methodology to review cases involving all UCMJ offenses completed in FY21.

9 In this report, the terms “sexual assault” and “penetrative sexual offense” include the following UCMJ offenses involving adult victims: rape (Article 120(a)), sexual assault (Article 120(b)), forcible sodomy (Article 125), and attempts or conspiracies to commit these offenses (Articles 80 and 81). These offenses involve a sexual act, as defined in 10 U.S.C. § 920(g)(1) (2019), as opposed to a sexual contact, as defined in 10 U.S.C. § 920(g)(2) (2019).

10 RFI at Appendix B. Although the Military Services provided cases intended to meet the criteria specified, the DLSA staff does not assert that every responsive case was provided.

11 For each case, the staff reviewed the following documents, as applicable: the charge sheet, Article 32 report, Article 34 pretrial advice or other legal memorandum for cases not referred to trial, alternate disposition documents, and trial result documents.

12 Before December 26, 2014, Article 32 hearings consisted of a thorough investigation concerning the truth and form of the charges. During an Article 32 investigation, witnesses, including victims, often testified under oath, and counsel for both parties could question witnesses at length about any issue related to the case (*see* Appendix C for the former and current versions of Article 32).

After December 26, 2014, Article 32 hearings have consisted of a preliminary hearing narrowly focused on determining probable cause. The preliminary hearing rules limit the powers of the hearing officer and the scope of allowable defense evidence, ease previous limitations on the use of documentary evidence, and require the PHO’s report to include a thorough written analysis of the evidence.

For this report, the Article 32, UCMJ, changes are reflected as follows:

- All FY14 cases in this report had Article 32 investigations using the former format and procedures.
- In more than half of the FY15 cases, the Article 32 investigation format and procedures applied (286 of 451 hearings, or 63%).
- In all cases completed in and after FY16, the preliminary hearing format and procedures applied.

An IO served as the Article 32 hearing officer for FY14 cases and some FY15 cases; a PHO served for some FY15 cases and all FY16–FY21 cases.

13 For this report, “PHOs” refers to both investigating and preliminary hearing officers, as applicable.

III. DATA CONCERNING ADULT-VICTIM PENETRATIVE SEXUAL OFFENSES FOR WHICH AN ARTICLE 32 PRELIMINARY HEARING OFFICER FOUND NO PROBABLE CAUSE: FY14 THROUGH FY21

A. The frequency of Article 32 hearings and waivers

Figure 1 and Table 1 provide the number and proportion of Article 32 proceedings in PSO cases held and waived in FY14 through FY21, according to the Military Service of the accused.

In FY14, when Article 32 required a thorough investigation of the charges, the defense rarely waived the Article 32 investigation for PSO cases (19 waivers in 445 cases; 4%).

When Article 32 changed from a thorough investigation to a preliminary hearing, the defense waived the Article 32 preliminary hearing in PSO cases more often (for example, in FY21: 108 waivers in 477 cases; 23%).

Notably, the proportion of hearings waived in PSO cases, across all of the Military Services, has stayed relatively constant for cases completed in and after FY16, ranging from 21% to 26%. For the past five years, Article 32 hearing waivers occurred less frequently in the Air Force than in any other Military Service: from lowest to highest frequency, the percentage of waivers are Air Force, 8%; Marine Corps, 19%; Coast Guard, 22%; Navy, 27%; and Army, 32%.

FIGURE 1. NUMBER OF ARTICLE 32 PRELIMINARY HEARINGS AND WAIVERS IN PSO CASES

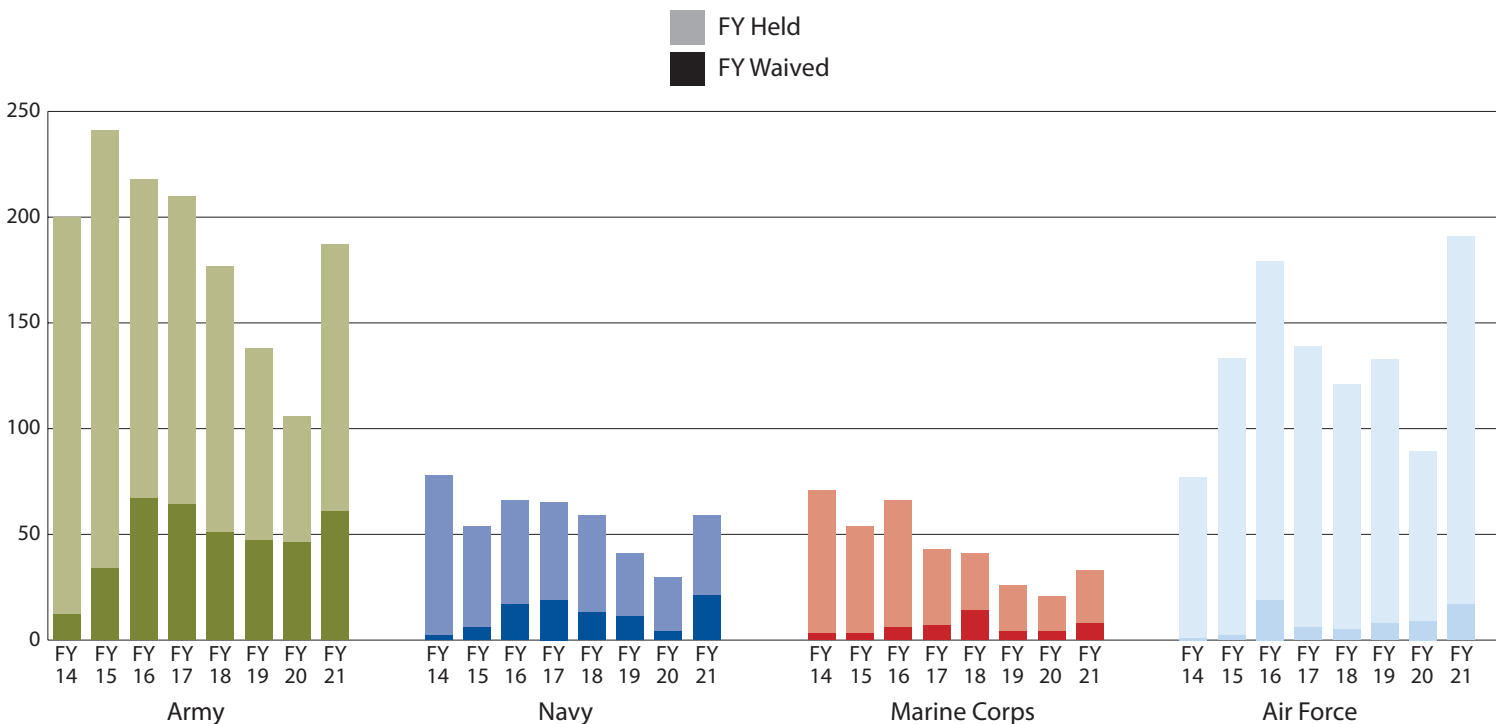


TABLE 1. NUMBER OF ARTICLE 32 PRELIMINARY HEARINGS AND WAIVERS IN PSO CASES

	Army	Navy	Marine Corps	Air Force	Coast Guard	Total
FY14: waived	12 (6%)	2 (3%)	3 (4%)	1 (1%)	1 (5%)	19 (4%)
FY14: held	188 (94%)	76 (97%)	68 (96%)	76 (99%)	18 (95%)	426 (96%)
FY15: waived	34 (14%)	6 (11%)	3 (6%)	2 (2%)	2 (13%)	47 (9%)
FY15: held	207 (86%)	48 (89%)	51 (94%)	131 (98%)	14 (87%)	451 (91%)
FY16: waived	67 (31%)	17 (26%)	6 (9%)	19 (11%)	3 (23%)	112 (21%)
FY16: held	151 (69%)	49 (74%)	60 (91%)	160 (89%)	10 (77%)	430 (79%)
FY17: waived	64 (30%)	19 (29%)	7 (16%)	6 (4%)	2 (22%)	98 (21%)
FY17: held	146 (70%)	46 (71%)	36 (84%)	133 (96%)	7 (78%)	368 (79%)
FY18: waived	51 (29%)	13 (22%)	14 (34%)	5 (4%)	1 (25%)	84 (21%)
FY18: held	126 (71%)	46 (78%)	27 (66%)	116 (96%)	3 (75%)	318 (79%)
FY19: waived	47 (34%)	11 (27%)	4 (15%)	8 (6%)	1 (33%)	71 (21%)
FY19: held	91 (66%)	30 (73%)	22 (85%)	125 (94%)	2 (67%)	270 (79%)
FY20: waived	46 (43%)	4 (13%)	4 (19%)	9 (10%)	0	63 (26%)
FY20: held	60 (57%)	26 (87%)	17 (81%)	80 (90%)	1 (100%)	184 (74%)
FY21: waived	61 (33%)	21 (36%)	8 (24%)	17 (9%)	1 (14%)	108 (23%)
FY21: held	126 (67%)	38 (64%)	25 (76%)	174 (91%)	6 (86%)	369 (77%)
Total waived	382 (26%)	93 (21%)	49 (14%)	67 (6%)	11 (15%)	602 (18%)
Total held	1,095 (74%)	359 (79%)	306 (86%)	995 (94%)	61 (85%)	2,816 (82%)
	Army	Navy	Marine Corps	Air Force	Coast Guard	Total

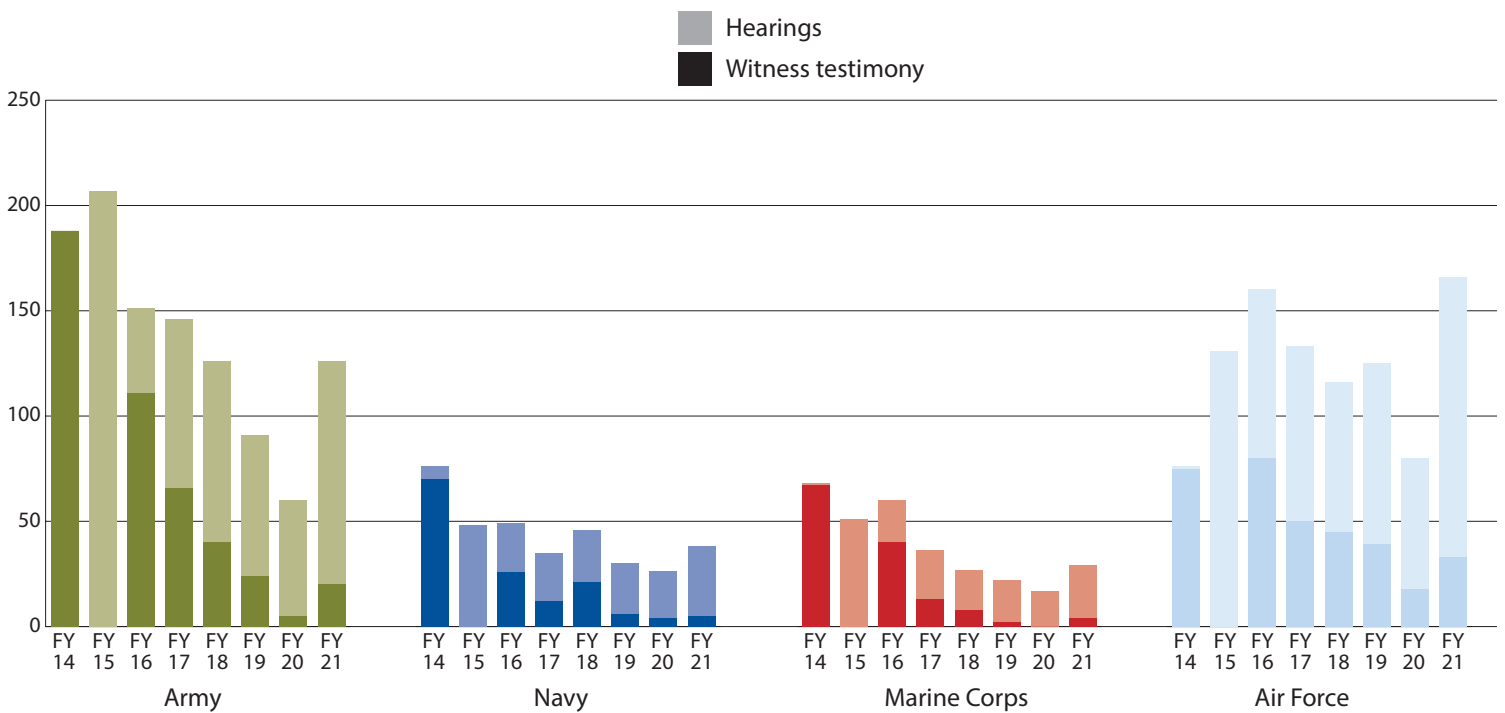
B. Witness and victim testimony in Article 32 preliminary hearings for PSO cases

Figure 2 and Table 2 present information about the frequency with which witnesses testify at Article 32 preliminary hearings.¹⁴ Witnesses may have testified about the charged penetrative sexual offense(s) and/or unrelated offenses. Except for FY21,¹⁵ Figure 2 and Table 2 also indicate whether one or more of the testifying witnesses was a named victim in a PSO charge.

Since December 27, 2014, the rules governing Article 32 hearings permit the government to submit as evidence written statements and investigative summaries in lieu of live witness testimony. Preliminary hearing officers may not compel witnesses to testify. Victims are not required to testify at preliminary hearings, and victims who decline are deemed unavailable.¹⁶

The proportion of Article 32 preliminary hearings in PSO cases that include witness testimony—whether for the government or defense, concerning any offense charged—has steadily declined over the period examined: FY14, 98%; FY16, 62%; FY17, 40%; FY18, 36%; FY19, 27%; FY20, 15%; and FY21, 17%. In FY21, only 18% of all Article 32 preliminary hearings included, as evidence, sworn testimony from any witness (Table 8a).

FIGURE 2. FREQUENCY OF WITNESS TESTIMONY IN ARTICLE 32 PRELIMINARY HEARINGS INVOLVING A PSO



14 This information was not collected for FY15 because the DAC-IPAD was suspended in January 2021—during the collection of this information—as part of the DoD zero-based review of all federal advisory committees.

15 This information was not collected for FY21 because of the volume of cases and the expedited time period to produce this supplement.

16 10 U.S.C. § 832(d)(3) (2021) (Article 32(d)(3), UCMJ): A victim may not be required to testify at the preliminary hearing. A victim who declines to testify shall be deemed to be not available for purposes of the preliminary hearing.

TABLE 2. FREQUENCY OF WITNESS AND VICTIM TESTIMONY IN ARTICLE 32 PRELIMINARY HEARINGS INVOLVING A PSO

	Army	Navy	Marine Corps	Air Force	Coast Guard	Total
FY14: Hearings	188	76	68	76	18	426
FY14: W testimony	188 (100%)	70 (92%)	67 (99%)	75 (99%)	18 (100%)	418 (98%)
FY14: V testimony	176 (94%)	66 (87%)	61 (90%)	72 (95%)	16 (89%)	391 (92%)
FY15: Hearings	207	48	51	131	14	451
FY15: W testimony	not available	not available	not available	not available	not available	not available
FY15: V testimony	141 (68%)	30 (63%)	28 (55%)	73 (56%)	9 (64%)	281 (62%)
FY16: Hearings	151	49	60	160	10	430
FY16: W testimony	111 (74%)	26 (53%)	40 (67%)	80 (50%)	9 (90%)	266 (62%)
FY16: V testimony	43 (28%)	8 (16%)	11 (18%)	19 (12%)	1 (10%)	82 (19%)
FY17: Hearings	146	46	36	133	7	368
FY17: W testimony	66 (45%)	12 (26%)	13 (36%)	50 (38%)	7 (100%)	148 (40%)
FY17: V testimony	8 (5%)	4 (9%)	8 (22%)	6 (5%)	2 (29%)	28 (8%)
FY18: Hearings	126	46	27	116	3	318
FY18: W testimony	40 (32%)	21 (46%)	8 (30%)	45 (39%)	2 (67%)	116 (36%)
FY18: V testimony	2 (2%)	1 (2%)	1 (4%)	4 (3%)	1 (33%)	9 (3%)
FY19: Hearings	91	30	22	125	2	270
FY19: W testimony	24 (26%)	6 (20%)	2 (9%)	39 (31%)	1 (50%)	72 (27%)
FY19: V testimony	2 (2%)	1 (3%)	0 (0%)	3 (2%)	0 (0%)	6 (2%)
FY20: Hearings	60	26	17	80	1	184
FY20: W testimony	5 (8%)	4 (15%)	0 (0%)	18 (23%)	0 (0%)	27 (15%)
FY20: V testimony	0 (0%)	0 (0%)	0 (0%)	4 (5%)	0 (0%)	4 (2%)
FY21: Hearings	126	38	25	174	6	369
FY21: W testimony	20 (16%)	5 (13%)	4 (16%)	33 (19%)	1 (17%)	63 (17%)
	Army	Navy	Marine Corps	Air Force	Coast Guard	Total

W: witness

V: victim

C. Cases in which an Article 32 PHO found no PC for a PSO

In 15% to 22% of the Article 32 proceedings held for cases completed in FY14 to FY21, preliminary hearing officers determined that one or more distinct, charged penetrative sexual offenses lacked probable cause.¹⁷

In FY20, the Military Services conducted fewer Article 32 preliminary hearings than in any other year from FY14 on.

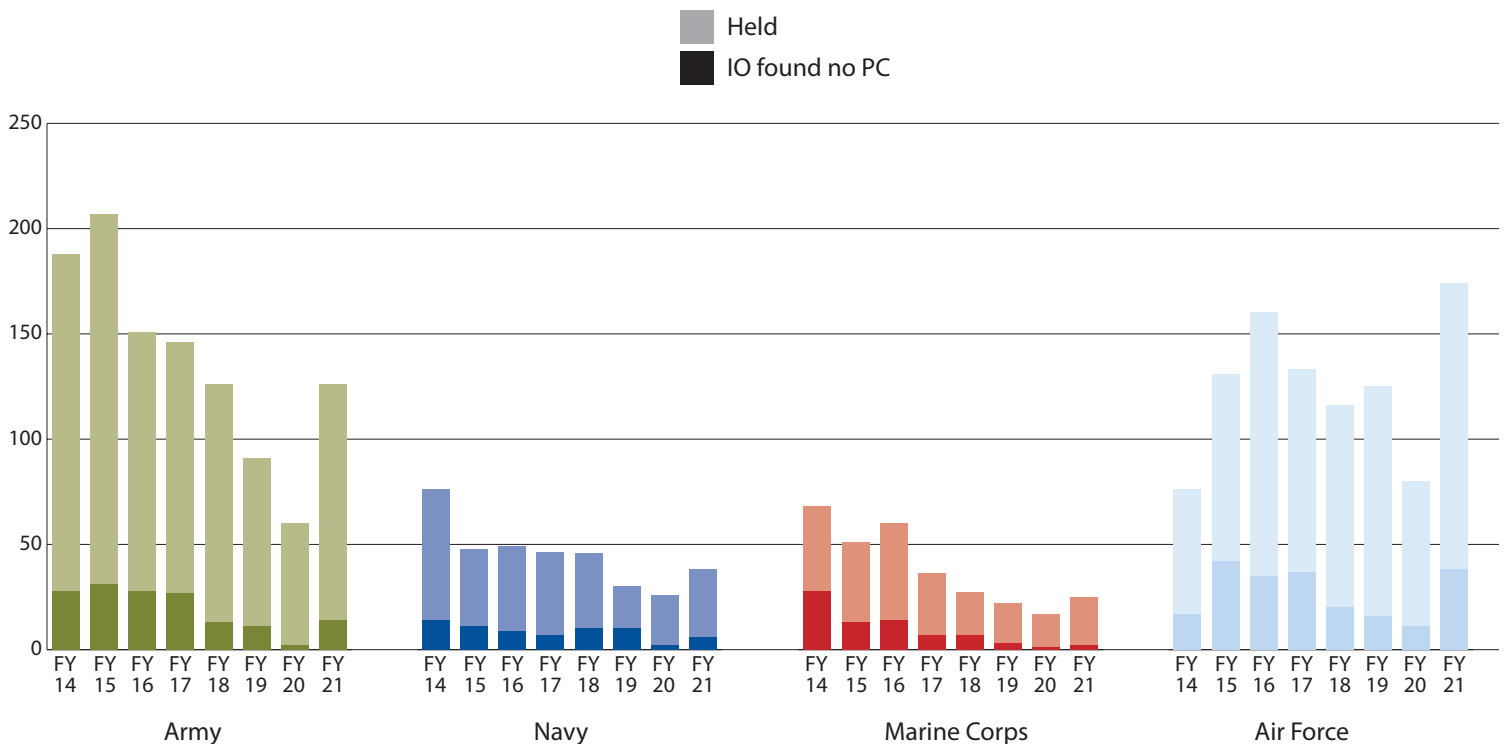
The no-PC determinations in these data were often accompanied by the following observations from PHOs:

- The offense alleged likely did not occur.
- The determination was made without sworn, live witness testimony, subject to cross-examination, and the documents provided were insufficient to establish one or more elements of a charged offense.
- Other evidence likely existed and was simply not provided.¹⁸

In some no-PC cases, the PHO determined that there was no PC for the charged offense, but PC existed for a lesser included offense or an alternate charge.

For FY19 to FY21 cases, the staff observed that even when PHOs found PC for an offense, they were more willing than in previous years to recommend the offense not proceed to trial due to insufficient evidence to obtain and sustain a conviction.

FIGURE 3. NUMBER OF CASES IN WHICH AN ARTICLE 32 PHO FOUND NO PC FOR A PSO



17 The staff observed that trial counsel occasionally requested that the PHO assess evidence of uncharged misconduct. In these instances, a PHO could determine that the uncharged misconduct lacked PC. However, these data do not encompass determinations regarding uncharged misconduct.

18 For example, in a case involving a non-sex offense, such as a violation of a general order charged under Article 92, UCMJ, if the trial counsel failed to present evidence of the general order or regulation, then the PHO would find the offense lacked PC and acknowledge that the order likely existed but was not presented.

TABLE 3. NUMBER OF CASES IN WHICH AN ARTICLE 32 PHO FOUND NO PC FOR A PSO

	Army	Navy	Marine Corps	Air Force	Coast Guard	Total
FY14: held	188	76	68	76	18	426
FY14: IO found no PC	28 (15%)	14 (18%)	28 (41%)	17 (22%)	6 (33%)	93 (22%)
FY15: held	207	48	51	131	14	451
FY15: IO/PHO found no PC	31 (15%)	11 (23%)	13 (25%)	42 (32%)	4 (29%)	101 (22%)
FY16: held	151	49	60	160	10	430
FY16: PHO found no PC	28 (19%)	9 (18%)	14 (23%)	35 (22%)	2 (20%)	88 (20%)
FY17: held	146	46	36	133	7	368
FY17: PHO found no PC	27 (18%)	7 (15%)	7 (19%)	37 (28%)	2 (29%)	80 (22%)
FY18: held	126	46	27	116	3	318
FY18: PHO found no PC	13 (10%)	10 (22%)	7 (26%)	20 (17%)	2 (67%)	52 (16%)
FY19: held	91	30	22	125	2	270
FY19: PHO found no PC	11 (12%)	10 (33%)	3 (14%)	16 (13%)	0	40 (15%)
FY20: held	60	26	17	80	1	184
FY20: PHO found no PC	2 (3%)	2 (8%)	1 (6%)	11 (14%)	0	16 (9%)
FY21: held	126	38	25	174	6	369
FY21: PHO found no PC	14 (11%)	6 (16%)	2 (8%)	38 (22%)	0 (0%)	60 (16%)
Total held	1,095	359	306	995	61	2,816
Total PHO found no PC	154 (14%)	69 (19%)	75 (25%)	216 (22%)	16 (26%)	530 (19%)
	Army	Navy	Marine Corps	Air Force	Coast Guard	Total

D. Disposition decisions when the Article 32 PHO found no PC for a PSO

Figure 4 and Table 4 provide the number and proportion of cases in which the Article 32 PHO determined that a specific PSO lacked PC and a special or general court-martial convening authority referred that distinct no-PC offense to court-martial or dismissed it.

Although the convening authority’s decision to refer a charge to a court-martial is significant, this initial decision is not always case-dispositive. Information on the ultimate disposition—or result—of referred charges is presented in Figure 5 and Table 5.

On average, convening authorities dismissed specifications consistent with the Article 32 PHO no-PC determination(s) in a majority of the Navy (65%), Marine Corps (68%), and Air Force (72%) cases. In the Army, convening authorities dismissed specifications consistent with the Article 32 PHO determination(s) in just over half of the cases in FY14 (54%), but in a minority of cases completed in FY15 to FY21 (30%).

FIGURE 4. NUMBER OF DISPOSITION DECISIONS WHEN THE ARTICLE 32 PHO FOUND NO PC

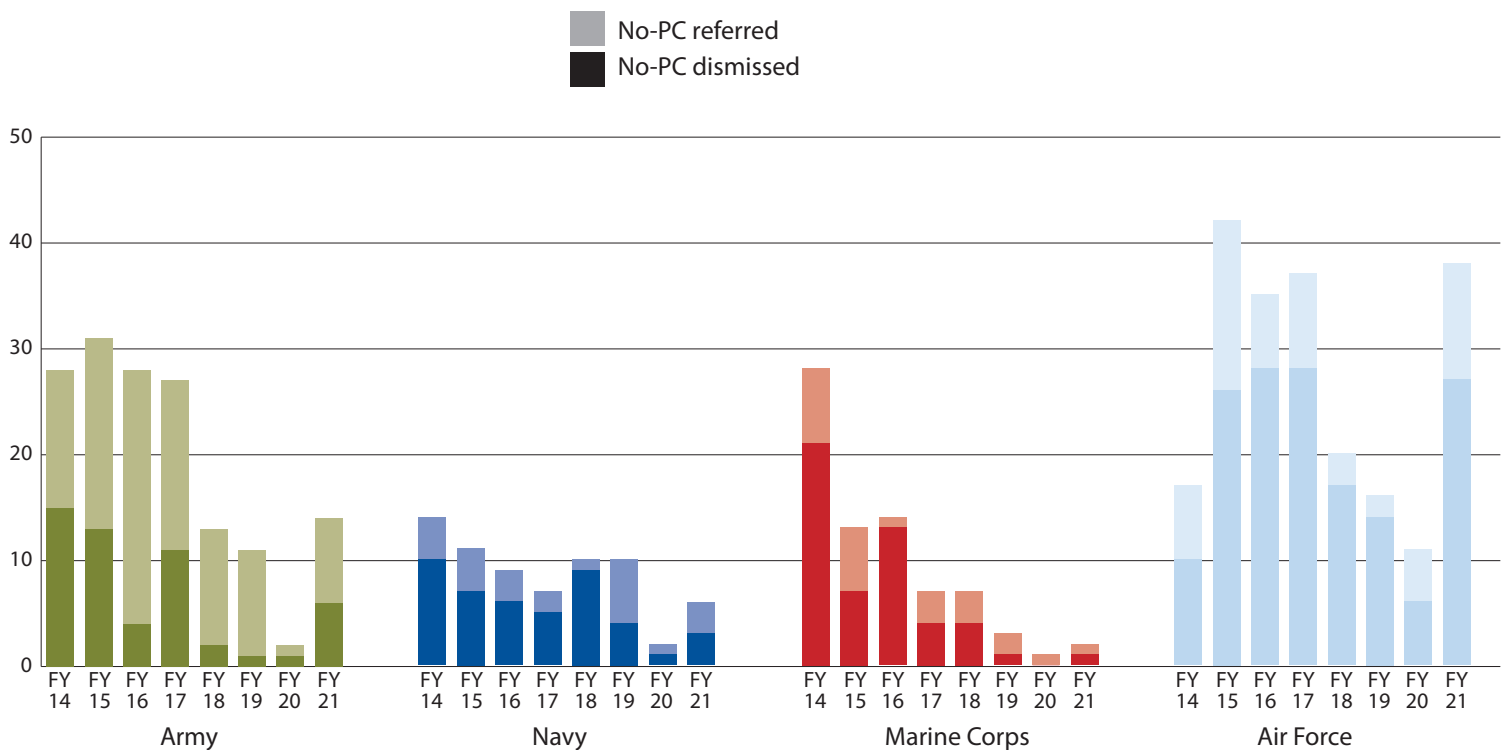


TABLE 4. NUMBER OF DISPOSITION DECISIONS WHEN THE ARTICLE 32 PHO FOUND NO PC

	Army	Navy	Marine Corps	Air Force	Coast Guard	Total
FY14 no-PC cases	28	14	28	17	6	93
No-PC, dismissed	15 (54%)	10 (71%)	21 (75%)	10 (59%)	5 (83%)	61 (66%)
No-PC, referred	13 (46%)	4 (29%)	7 (25%)	7 (41%)	1 (17%)	32 (34%)
FY15 no-PC cases	31	11	13	42	4	101
No-PC, dismissed	13 (42%)	7 (64%)	7 (54%)	26 (62%)	2 (50%)	55 (54%)
No-PC, referred	18 (58%)	4 (36%)	6 (46%)	16 (38%)	2 (50%)	46 (46%)
FY16 no-PC cases	28	9	14	35	2	88
No-PC, dismissed	4 (14%)	6 (67%)	13 (93%)	28 (80%)	0 (0%)	51 (58%)
No-PC, referred	24 (86%)	3 (33%)	1 (7%)	7 (20%)	2 (100%)	37 (42%)
FY17 no-PC cases	27	7	7	37	2	80
No-PC, dismissed	11 (41%)	5 (71%)	4 (57%)	28 (76%)	0 (0%)	48 (60%)
No-PC, referred	16 (59%)	2 (29%)	3 (43%)	9 (24%)	2 (100%)	32 (40%)
FY18 no-PC cases	13	10	7	20	2	52
No-PC, dismissed	2 (15%)	9 (90%)	4 (57%)	17 (85%)	2 (100%)	34 (65%)
No-PC, referred	11 (85%)	1 (10%)	3 (43%)	3 (15%)	0 (0%)	18 (35%)
FY19 no-PC cases	11	10	3	16	0	40
No-PC, dismissed	1 (9%)	4 (40%)	1 (33%)	14 (88%)	0 (0%)	20 (50%)
No-PC, referred	10 (91%)	6 (60%)	2 (67%)	2 (12%)	0 (0%)	20 (50%)
FY20 no-PC cases	2	2	1	11	0	16
No-PC, dismissed	1 (50%)	1 (50%)	0 (0%)	6 (55%)	0 (0%)	8 (50%)
No-PC, referred	1 (50%)	1 (50%)	1 (100%)	5 (45%)	0 (0%)	8 (50%)
FY21 no-PC cases	14	6	2	38	0	60
No-PC, dismissed	6 (43%)	3 (50%)	1 (50%)	27 (71%)	0 (0%)	37 (62%)
No-PC, referred	8 (57%)	3 (50%)	1 (50%)	11 (29%)	0 (0%)	23 (38%)
Total no-PC cases	154	69	75	216	16	530
No-PC, dismissed	53 (34%)	45 (65%)	51 (68%)	156 (72%)	9 (56%)	314 (59%)
No-PC, referred	101 (66%)	24 (35%)	24 (32%)	60 (28%)	7 (44%)	216 (41%)
	Army	Navy	Marine Corps	Air Force	Coast Guard	Total

E. Results of referred PSO specifications when the PHO found no PC

Figure 5 and Table 5 present the resolution of PSO specifications referred to a general court-martial after an Article 32 PHO determined they lacked PC. Where the data indicate that a no-PC specification was dismissed after referral, the dismissal could have been pursuant to a pretrial agreement (PTA), the convening authority's approval of a discharge or dismissal in lieu of trial, or another action.

Since FY19, only one military accused has been convicted of an adult-victim PSO charge for which an Article 32 PHO found no PC. In a majority of referred cases, the no-PC specification was dismissed after referral, either before or in lieu of a trial. Thirteen contested trials involving a no-PC specification of an adult-victim PSO resulted in a not guilty finding as to that charge or specification (another four involved PTAs).

One of the FY19 Army "not guilty" findings was the result of a PTA in which the terms provided that the government would present no evidence on the charged offense, and consequently the military judge entered a finding of not guilty. The staff observed this process in several Army cases; in the other Military Services, in contrast, the no-PC specification was typically dismissed at or before acceptance of pleas, so no findings were made as to those specifications.

FIGURE 5. RESULTS OF REFERRED NO-PC PSO SPECIFICATIONS



Key for Table 5 (nextpage):
 G: guilty
 NG: not guilty
 Mixed: no-PC specifications resulted in both guilty and not guilty findings
 Dismissed: no-PC specifications were dismissed after referral

TABLE 5. RESULTS OF REFERRED NO-PC PSO SPECIFICATIONS

	Army	Navy	Marine Corps	Air Force	Coast Guard	Total
FY14 no-PC referred	13 2: G 6: NG 2: mixed 3: dismissed	4 1: NG 2: mixed 1: dismissed	7 5: NG 2: dismissed	7 4: NG 1: unknown 2: dismissed	1 1: NG	32 2: G 17: NG 4: mixed 1: unknown 8: dismissed
FY15 no-PC referred	18 3: G 7: NG 1: mixed 7: dismissed	4 1: G 3: NG	6 3: NG 3: dismissed	16 8: NG 8: dismissed	2 1: NG 1: dismissed	46 4: G 22: NG 1: mixed 19: dismissed
FY16 no-PC referred	24 2: G 10: NG 1: mixed 11: dismissed	3 3: dismissed	1 1: dismissed	7 3: NG 4: dismissed	2 2: dismissed	37 2: G 13: NG 1: mixed 21: dismissed
FY17 no-PC referred	16 2: G 7: NG 7: dismissed	2 1: NG 1: dismissed	3 1: NG 2: dismissed	9 2: G 4: NG 3: dismissed	2 2: dismissed	32 4: G 13: NG 15: dismissed
FY18 no-PC referred	11 2: G 5: NG 4: dismissed	1 1: dismissed	3 1: G 1: NG 1: dismissed	3 2: NG 1: dismissed	0	18 3: G 8: NG 7: dismissed
FY19 no-PC referred	10 3: NG (1 PTA) 7: dismissed	6 6: dismissed	2 2: dismissed	2 2: NG	0	20 5: NG (1 PTA) 15: dismissed
FY20 no-PC referred	1 1: dismissed	1 1: dismissed	1 1: NG	5 3: NG 2: dismissed	0	8 4: NG 4: dismissed
FY21 no-PC referred	8 5: NG (3 PTA) 3: dismissed	3 1: NG 2: dismissed	1 1: dismissed	11 2: NG 1: mixed 8: dismissed	0	23 8: NG (3 PTA) 1: mixed 14: dismissed
Total no-PC referred	101 11: G 43: NG 4: mixed 43: dismissed	24 1: G 6: NG 2: mixed 15: dismissed	24 1: G 11: NG 12: dismissed	60 2: G 28: NG 1: mixed 1: unknown 28: dismissed	7 2: NG 5: dismissed	216 15: G 90: NG 7: mixed 1: unknown 103: dismissed
	Army	Navy	Marine Corps	Air Force	Coast Guard	Total

IV. DATA CONCERNING ALL UCMJ OFFENSES FOR WHICH AN ARTICLE 32 PRELIMINARY HEARING OFFICER FOUND NO PROBABLE CAUSE: FY21

A. Military Service response to RFI for all preferred cases completed in FY21

This section presents data for preferred cases involving any offense charged under the UCMJ that was tried to verdict or reached an alternate disposition in FY21.

An Article 32 preliminary hearing is a prerequisite for referral to a general court-martial; however, cases resolved in another forum do not require an Article 32 hearing. Based on this, the staff first screened out cases referred directly to a summary or special court-martial and cases resolved by alternate means. The remaining cohort—FY21 cases in which an Article 32 hearing was either held or waived—comprises the universe of cases reviewed by the staff to analyze no-PC determinations and case dispositions.

Figure 6 and Table 6 present the cases reported by each of the Military Services as complete in FY21, cases the staff received with a complete set of case documents, and the total number of cases received in which an Article 32 hearing was either held or waived.¹⁹

The staff received a total of 1,797 cases for review. An Article 32 preliminary hearing was either held or waived in 1,078 of the cases reviewed.

¹⁹ The DAC-IPAD has received 75% of the Army's total reported cases and 68% of the Marine Corps' total reported cases. The Army's self-reported data show that the majority of the Army's cases that were reported but not received (242) were cases intended for special court-martial for which a discharge in lieu of court-martial request was accepted. The Marine Corps' self-reported data show there were 105 cases in which an Article 32 hearing was held or waived, of which the staff received the majority (96 cases, or 91%). The absence of these Army and Marine Corps cases does not impact the analysis for any of the Section IV tables..

FIGURE 6. MILITARY SERVICE RESPONSE TO DLSA RFI FOR CASES COMPLETED IN FY21

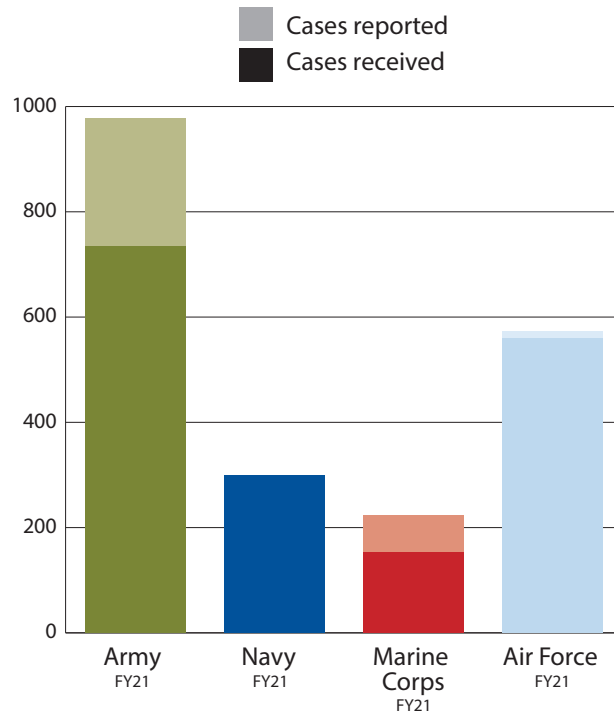


TABLE 6. MILITARY SERVICE RESPONSE TO DLSA RFI FOR CASES COMPLETED IN FY21

	Army	Navy	Marine Corps	Air Force	Coast Guard	Total
Cases reported	977	300	224	572	51	2,124
Cases received	735 (75%)	299 (100%)	152 (68%)	560 (98%)	51 (100%)	1,797 (85%)
Cases received w/ Art 32 hearing or waiver	509	146	96	309	18	1,078

B. Review process for FY21 cases in which an Article 32 hearing was held or waived

The professional staff reviewed relevant source documents for all cases completed in FY21 in which an Article 32 preliminary hearing was either held or waived.²⁰

If the case-processing documents indicated that the PHO determined PC was not established for any UCMJ offense, the staff then recorded the ultimate disposition of the no-PC specification(s). If the no-PC offense was charged in the alternative and the PHO determined that PC was established under a different legal theory, the staff did not treat that case as involving a no-PC determination.

The following tables and figures provide the dispositions for these no-PC offenses. They also offer a comparison between case-processing statistics for FY21 cases overall and the statistics for cases involving adult-victim PSO charges.

The remainder of Section IV provides the Military Services' FY21 data in the following areas:

- C. Article 32 hearings and waivers
- D. Witness testimony in Article 32 proceedings
- E. The grade of judge advocates serving as Article 32 PHOs
- F. Cases in which the PHO found no PC
- G. Disposition decisions for cases in which the PHO found no PC
- H. Results of referred no-PC specifications

²⁰ The staff reviewed the following documents, as applicable, for each case: the charge sheet, Article 32 report, Article 34 pretrial advice or other legal memorandum for cases not referred to trial, alternate disposition documents, and trial result documents.

C. The frequency of Article 32 hearings and waivers in FY21 cases

Figure 7 and Table 7 provide the frequency of Article 32 preliminary hearings and waivers in cases completed in FY21. The percentage of Article 32 hearings waived in FY21 PSO cases (23%) is similar to the percentage of hearings waived in prior years, and somewhat lower than the percentage of Article 32 hearings waived in FY21 cases overall (31%).

Though the Navy and Air Force are comparable in population size, the Air Force had more than twice as many cases in which an Article 32 hearing was held or waived (309) as the Navy (146). It is notable that the Air Force held Article 32 preliminary hearings in 91% of its PSO cases, a much higher percentage than any other Service.

FIGURE 7. FREQUENCY OF FY21 ARTICLE 32 PRELIMINARY HEARINGS AND WAIVERS

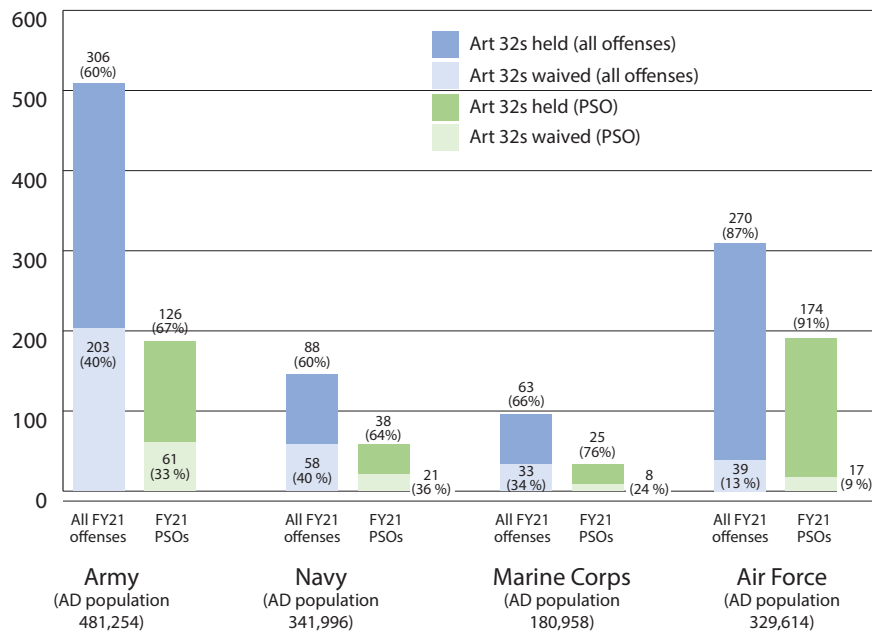


TABLE 7. FREQUENCY OF FY21 ARTICLE 32 PRELIMINARY HEARINGS AND WAIVERS

	Army	Navy	Marine Corps	Air Force	Coast Guard	Total
AD population ²¹	481,254	341,996	180,958	329,614	40,558	1,374,380
Art 32s waived or held (all offenses)	509	146	96	309	18	1,078
Art 32s waived (all)	203 (40%)	58 (40%)	33 (34%)	39 (13%)	5 (28%)	338 (31%)
Art 32s held (all)	306 (60%)	88 (60%)	63 (66%)	270 (87%)	13 (72%)	740 (69%)
Art 32s waived or held (PSO)	187 (37%)	59 (40%)	33 (34%)	191 (62%)	7 (39%)	477 (44%)
Art 32s waived (PSO)	61 (33%)	21 (36%)	8 (24%)	17 (9%)	1 (14%)	108 (23%)
Art 32s held (PSO)	126 (67%)	38 (64%)	25 (76%)	174 (91%)	6 (86%)	369 (77%)

D. Witness testimony in Article 32 hearings in FY21 cases

Figure 8a and Table 8a present information about the frequency with which witnesses testified in all Article 32 preliminary hearings in FY21 cases. Figure 8b and Table 8b present this information for PSO cases.

In FY21, only 18% of all Article 32 preliminary hearings involved witness testimony.

FIGURE 8A. FY21: FREQUENCY OF WITNESS TESTIMONY IN ARTICLE 32 PRELIMINARY HEARINGS (ALL OFFENSES)

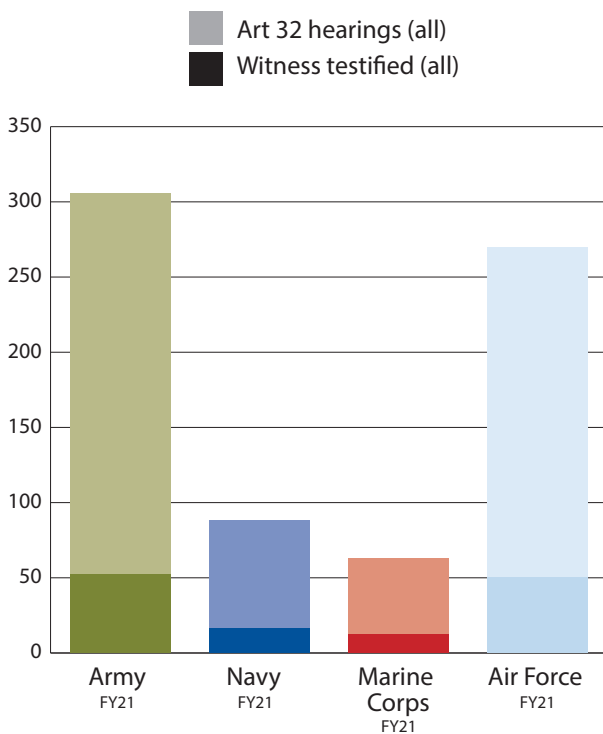


FIGURE 8B. FY21: FREQUENCY OF WITNESS TESTIMONY IN ARTICLE 32 PRELIMINARY HEARINGS (PSO CASES)

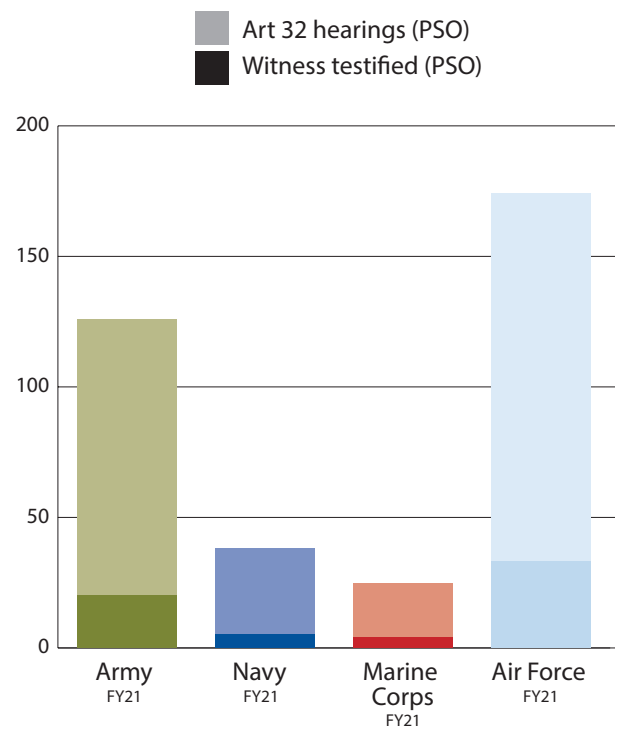


TABLE 8A. FY21: FREQUENCY OF WITNESS TESTIMONY IN ARTICLE 32 PRELIMINARY HEARINGS (ALL OFFENSES)

	Army	Navy	Marine Corps	Air Force	Coast Guard	Total
Art 32 hearings (all)	306	88	63	270	13	740
Witness testified (all)	52 (17%)	16 (18%)	12 (19%)	50 (19%)	3 (23%)	133 (18%)

TABLE 8B. FY21: FREQUENCY OF WITNESS TESTIMONY IN ARTICLE 32 PRELIMINARY HEARINGS (PSO CASES)

	Army	Navy	Marine Corps	Air Force	Coast Guard	Total
Art 32 hearings (PSO)	126	38	25	174	6	369
Witness testified (PSO)	20 (16%)	5 (13%)	4 (16%)	33 (19%)	1 (17%)	63 (17%)

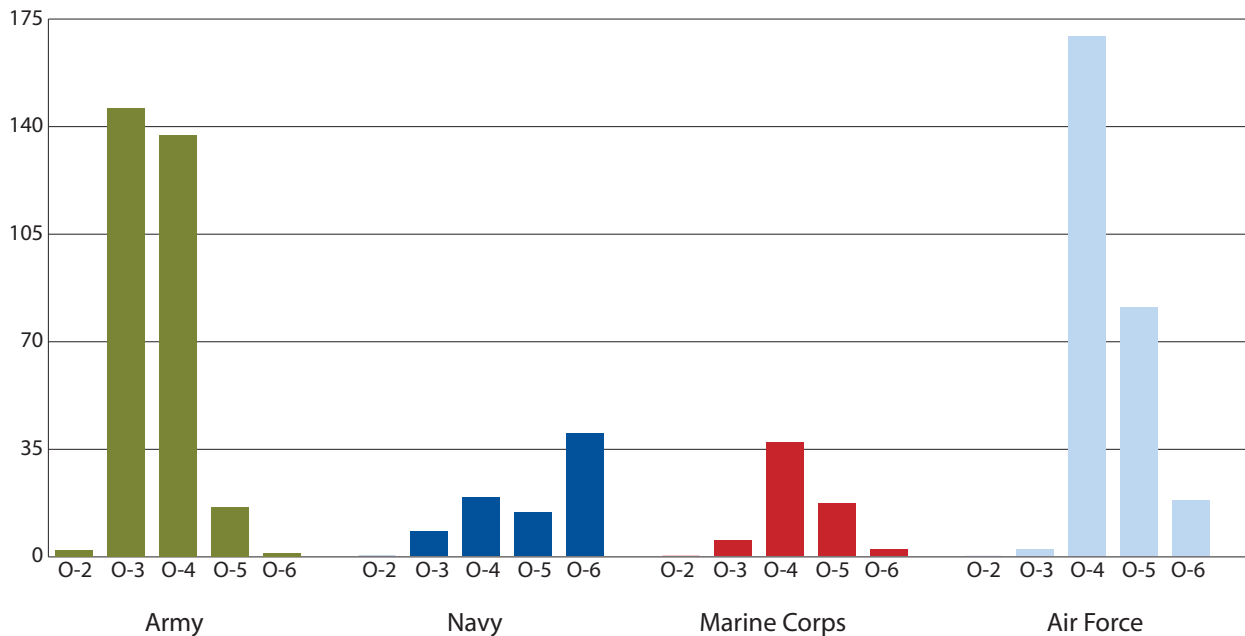
E. The grade of judge advocates serving as Article 32 PHOs

Figures 9a and 9b and Tables 9a and 9b provide a breakdown of the grade of judge advocates serving as Article 32 PHOs for all cases and for cases involving PSOs, respectively.

The Air Force often details military judges to serve as PHOs, particularly in sexual offense cases. In FY21, of the Air Force’s 270 Article 32 hearings, 174 hearings involved at least one PSO. Of the 40 (15%) total Air Force Article 32 hearings with military judge serving as the PHO, 34 (85%) of those 40 hearings were cases with at least one PSO. Overall, 20% (34 of 174) of all Air Force Article 32 hearings with at least one PSO have a military judge serving as the PHO.

To address the difficulty of finding Article 32 PHOs with sufficient training and experience, the Navy established an Article 32 preliminary hearing unit comprised of senior reserve judge advocates.²² In FY21, more than half (54 of 88) of the Navy’s Article 32 hearings were presided over by judge advocates in the grades of O-5 or O-6, most of whom were assigned to the Article 32 preliminary hearing unit.²³

FIGURE 9A. FY21: GRADE OF PHOS FOR ARTICLE 32 PRELIMINARY HEARINGS (ALL OFFENSES)



22 See Navy response to DAC-IPAD Request for Information Set 11 (May 15, 2019), available at: https://dacipad.whs.mil/images/Public/07-RFIs/DACIPAD_RFI_Set11_20190515_Questions_Answers_20191204.pdf.

23 From the documents reviewed for this study, the DLSA staff was not able to determine whether military judges served as PHOs in any Army, Marine Corps, or Coast Guard cases.

FIGURE 9B. FY21: GRADE OF PHOS FOR ARTICLE 32 PRELIMINARY HEARINGS (PSO CASES)

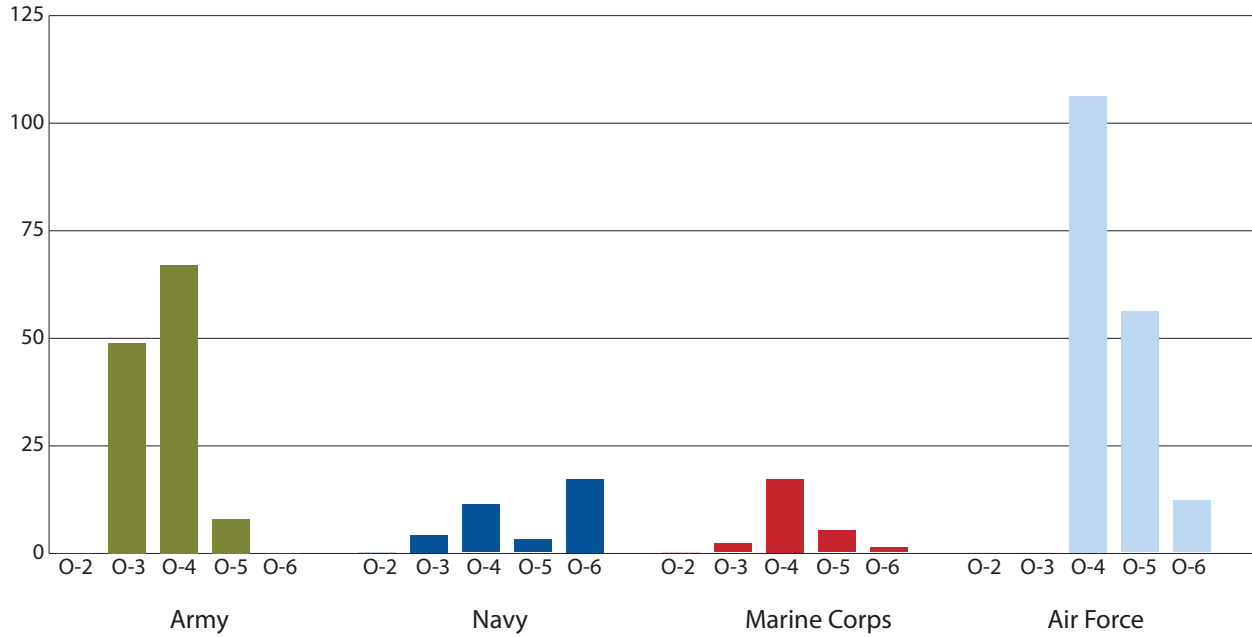


TABLE 9A. FY21: GRADE OF PHOS FOR ARTICLE 32 PRELIMINARY HEARINGS (ALL OFFENSES)

	Army	Navy	Marine Corps	Air Force	Coast Guard	Total
	306	88	63	270	13	740
O-2	2	0	0	0	0	2
O-3	146	8	5	2	0	161
O-4	137	19	37	169 (1 MJ)	4	366
O-5	16	14	17	81 (29 MJ)	8	136
O-6	1	40	2	18 (10 MJ)	1	62
Unknown	4	7	2	0	0	13

MJ: military judge

TABLE 9B. FY21: GRADE OF PHOS FOR ARTICLE 32 PRELIMINARY HEARINGS (PSO CASES)

	Army	Navy	Marine Corps	Air Force	Coast Guard	Total
	126	38	25	174	6	369
O-2	0	0	0	0	0	0
O-3	49	4	2	0	0	55
O-4	67	11	17	106 (1 MJ)	3	204
O-5	8	3	5	56 (24 MJ)	3	75
O-6	0	17	1	12 (9 MJ)	0	30
Unknown	2	3	0	0	0	5

F. Cases in which an Article 32 PHO found no PC for any UCMJ offense

Much like the Article 32 hearings held in prior years, the no-PC determinations in FY21 data were often accompanied by the following observations from PHOs:

- The offense alleged likely did not occur.
- The determination was made without the benefit of sworn, live witness testimony, subject to cross-examination, and the documents provided were insufficient to establish one or more elements of a charged offense.
- Other evidence likely existed and was simply not provided.²⁴
- In a small number of these no-PC cases, the PHO determined that there was no PC for the charged offense, but PC existed for a lesser included offense or an alternate charge.²⁵

Figure 10a-1 and Table 10a-1 provide the percentage of all Article 32 preliminary hearings in which a PHO found no PC for any UCMJ offense.

Figure 10a-2 and Table 10a-2 provide the percentage of all Article 32 preliminary hearings in which a PHO found no PC for a PSO.

Figure 10a-3 and Table 10a-3 provide the percentage of all Article 32 preliminary hearings in which a PHO found no PC for all offenses other than PSOs. There is some overlap between the no-PC numbers in Tables 10a-2 and 10a-3, as there were some cases in which the PHO found no PC for a PSO as well as other offenses.

In FY21, Article 32 PHOs found no PC at a much lower rate for PSOs (8%) than for all other offenses (21%).

Figure 10b and Table 10b provide the percentage of Article 32 preliminary hearings involving a charged PSO in which the PHO found no PC for one or more specifications of a PSO. The percentage of cases in which a PHO found no PC in these cases (16%) is lower than the overall percentage of no-PC cases for all offenses (26%).

24 For example, in an FY21 case involving a non-sex offense, such as a violation of a general order or regulation charged under Article 92, UCMJ, if the trial counsel failed to present as evidence the general order or regulation that the accused allegedly violated, then the PHO would find no PC and acknowledge that the order likely existed but was not presented.

25 For example, a PHO may find that there is not PC for aggravated assault under Article 128, UCMJ, but there is probable cause for assault consummated by a battery under the same article. Or a PHO may find that there is no PC for a sexual contact offense under Article 120, UCMJ, but there is PC for an assault consummated by a battery under Article 128, UCMJ.

FIGURE 10A-1, 10A-2, 10A-3. FY21: NUMBER OF CASES IN WHICH AN ARTICLE 32 PHO FOUND NO PC, BY OFFENSE CATEGORY

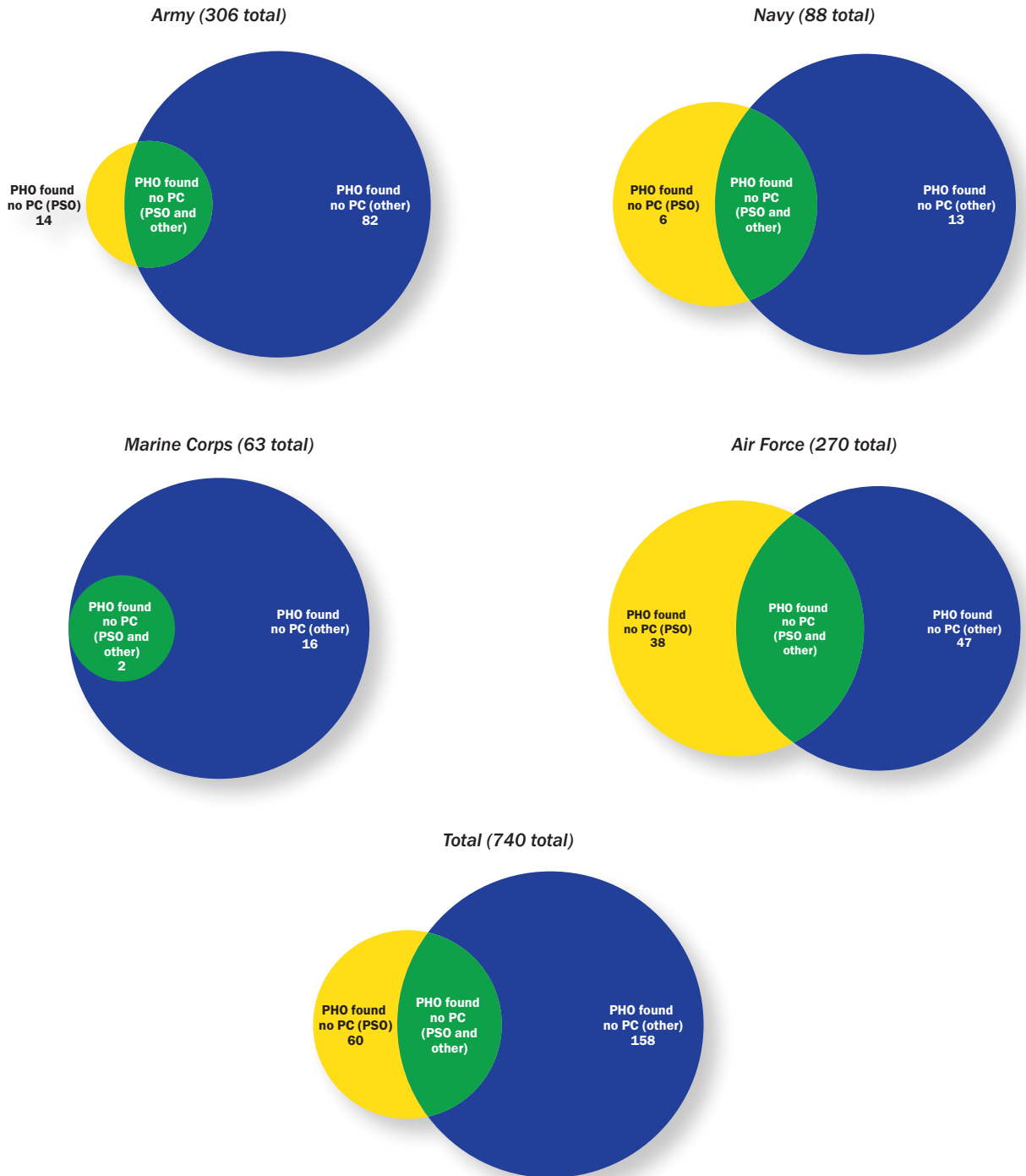


TABLE 10A-1. FY21: NUMBER OF CASES IN WHICH AN ARTICLE 32 PHO FOUND NO PC (ALL OFFENSES)

	Army	Navy	Marine Corps	Air Force	Coast Guard	Total
Art 32 hearings (all)	306	88	63	270	13	740
PHO found no PC (all)	90 (29%)	16 (18%)	16 (25%)	71 (26%)	0 (0%)	193 (26%)

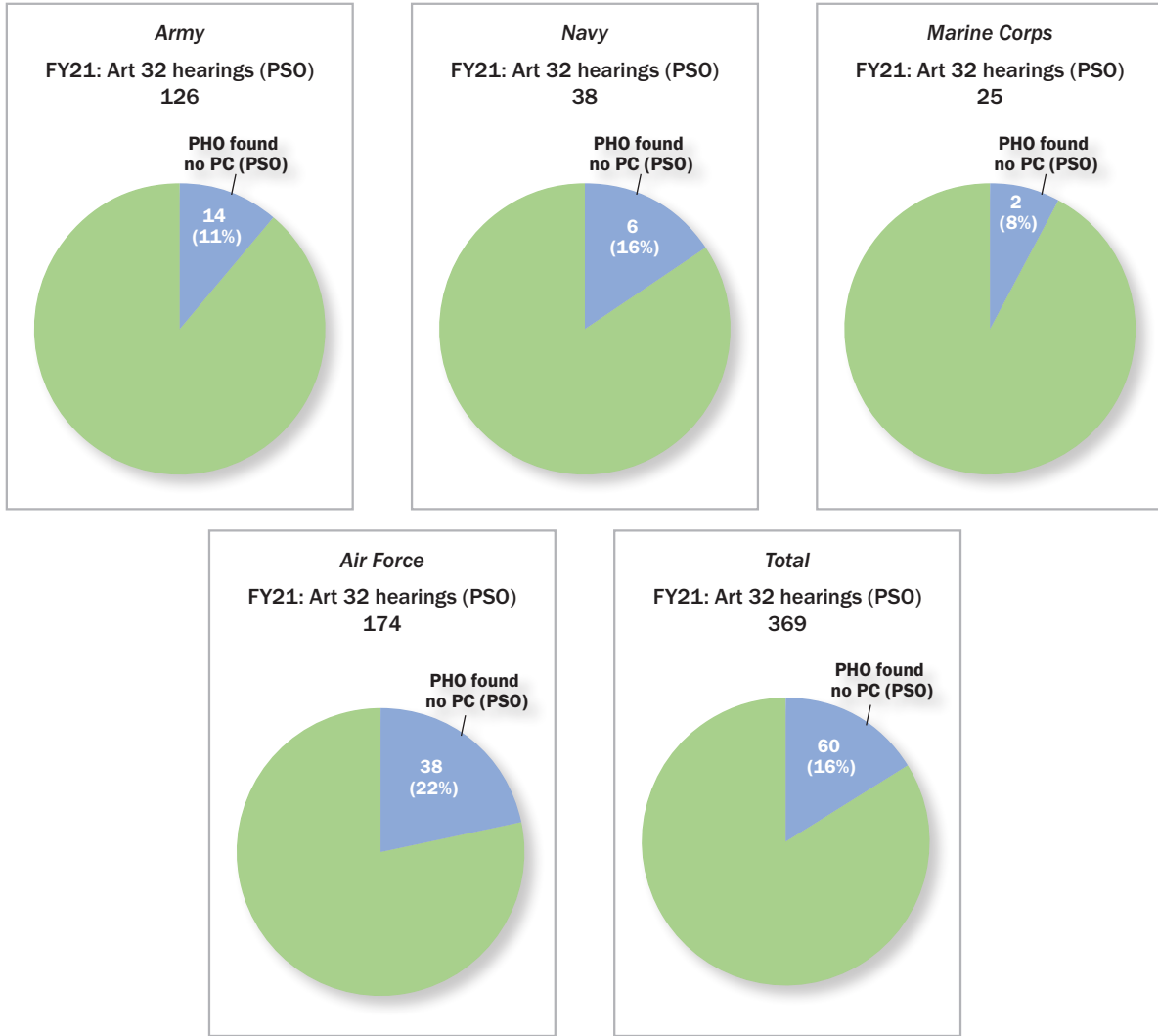
TABLE 10A-2. FY21: NUMBER OF CASES IN WHICH AN ARTICLE 32 PHO FOUND NO PC FOR A PSO (PERCENTAGE OF ALL HEARINGS)

	Army	Navy	Marine Corps	Air Force	Coast Guard	Total
Art 32 hearings (all)	306	88	63	270	13	740
PHO found no PC (PSO)	14 (5%)	6 (7%)	2 (3%)	38 (14%)	0 (0%)	60 (8%)

TABLE 10A-3. FY21: NUMBER OF CASES IN WHICH AN ARTICLE 32 PHO FOUND NO PC FOR AN OFFENSE OTHER THAN A PSO (PERCENTAGE OF ALL HEARINGS)

	Army	Navy	Marine Corps	Air Force	Coast Guard	Total
Art 32 hearings (all)	306	88	63	270	13	740
PHO found no PC (other)	82 (27%)	13 (15%)	16 (25%)	47 (17%)	0 (0%)	158 (21%)

**FIGURE 10B. FY21: NUMBER OF CASES IN WHICH AN ARTICLE 32 PHO FOUND NO PC FOR A PSO
(PERCENTAGE OF ALL HEARINGS INVOLVING A CHARGED PSO)**



**TABLE 10B. FY21: NUMBER OF CASES IN WHICH AN ARTICLE 32 PHO FOUND NO PC FOR A PSO
(PERCENTAGE OF ALL HEARINGS INVOLVING A CHARGED PSO)**

	Army	Navy	Marine Corps	Air Force	Coast Guard	Total
Art 32 hearings (PSO)	126	38	25	174	6	369
PHO found no PC (PSO)	14 (11%)	6 (16%)	2 (8%)	38 (22%)	0 (0%)	60 (16%)

G. Disposition decisions for cases in which the Article 32 PHO found no PC for an offense

Figure 11a and Table 11a provide the number and proportion of cases in which the Article 32 PHO determined that an offense lacked PC and a special or general court-martial convening authority referred that distinct no-PC offense to court-martial or dismissed it.

Figure 11b and Table 11b provide the same information for cases involving PSOs.

Convening authorities dismissed specifications for which the Article 32 PHO found no PC at a lower rate (45%) in cases involving all UCMJ offenses than in cases involving PSO no-PC specifications (62%).

FIGURE 11A. FY21: DISPOSITION DECISIONS WHEN THE PHO FOUND NO PC (ALL OFFENSES)

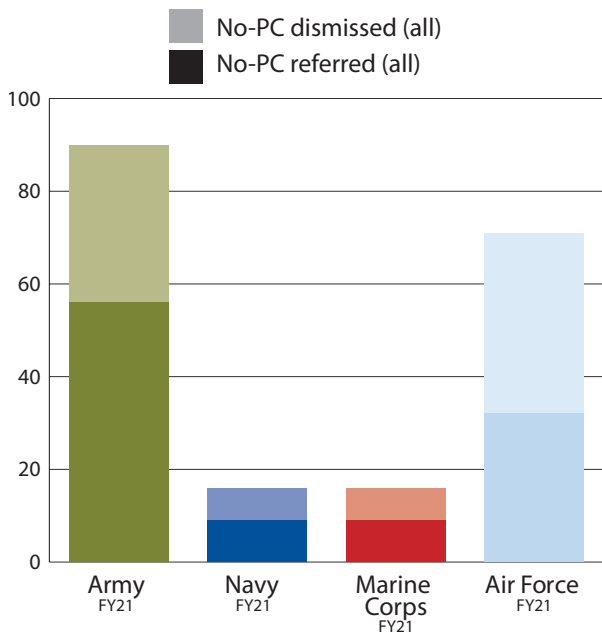


FIGURE 11B. FY21: DISPOSITION DECISIONS WHEN THE PHO FOUND NO PC (PSO CASES)

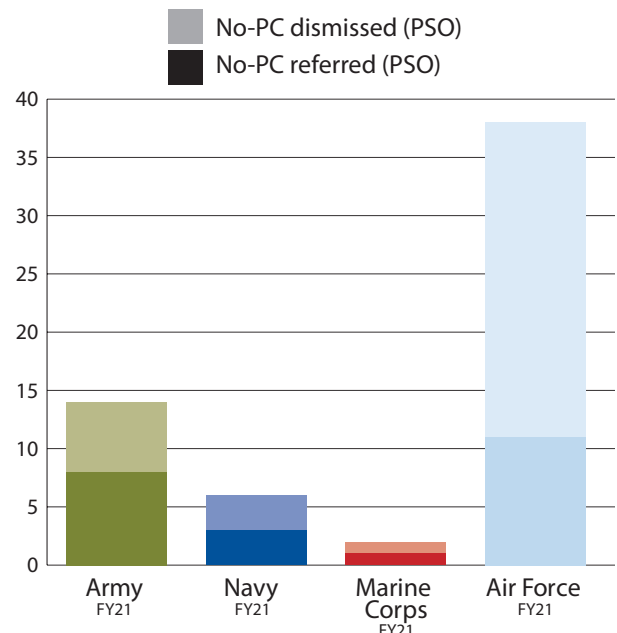


TABLE 11A. FY21: DISPOSITION DECISIONS WHEN THE ARTICLE 32 PHO FOUND NO PC (ALL OFFENSES)

	Army	Navy	Marine Corps	Air Force	Coast Guard	Total
No-PC cases	90	16	16	71	0	193
No-PC dismissed (all)	34 (38%)	7 (44%)	7 (44%)	39 (55%)	0	87 (45%)
No-PC referred ²⁶ (all)	56 (62%)	9 (56%)	9 (56%)	32 (45%)	0	106 (55%)

TABLE 11B. FY21: DISPOSITION DECISIONS WHEN THE ARTICLE 32 PHO FOUND NO PC (PSO CASES)

	Army	Navy	Marine Corps	Air Force	Coast Guard	Total
No-PC cases	14	6	2	38	0	60
No-PC dismissed (PSO)	6 (43%)	3 (50%)	1 (50%)	27 (71%)	0	37 (62%)
No-PC referred (PSO)	8 (57%)	3 (50%)	1 (50%)	11 (29%)	0	23 (38%)

26 For cases involving more than one specification that the PHO determined lacked PC, the staff categorized the case as “referred” if any of the specifications lacking PC were referred to court-martial, even if the other specifications lacking PC were not referred.

H. Results of referred specifications when the PHO found no PC

Figure 12a and Table 12a present the resolution of specifications that were referred to court-martial after an Article 32 PHO determined that the specifications lacked PC. If a no-PC specification was dismissed after referral, the dismissal could have been pursuant to a PTA, the convening authority's approval of a discharge or dismissal in lieu of trial, or other action. Figure 12b and Table 12b provide the same information for PSO cases.

Notably, in FY21 there was only one case in which an accused was found guilty of a PSO specification for which the Article 32 PHO had previously determined there was no PC (the Air Force "mixed" case noted in Table 12b).

Contrast this number with the 35 cases (31 "guilty" cases and 4 "mixed" cases in Table 12a) in which the accused was found guilty of one or more specifications of a UCMJ offense for which the Article 32 PHO had previously determined there was no PC. In 18 of the 35 cases, the accused pled guilty to the no-PC offense pursuant to a PTA.

Of the 193 referred cases involving all UCMJ offenses in which an Article 32 PHO determined one or more specifications lacked PC (see Table 11a), 27 (14%) resulted in a not guilty finding for the no-PC specifications. Seven of those not guilty findings were as a result of a PTA.

Of the 60 cases in which an Article 32 PHO determined one or more PSO specifications lacked PC (see Table 11b), 8 (13%) cases resulted in not guilty findings for the no-PC specifications, though three of the not guilty findings were as a result of a PTA.

FIGURE 12A. FY21: RESULTS OF REFERRED NO-PC SPECIFICATIONS (ALL OFFENSES)

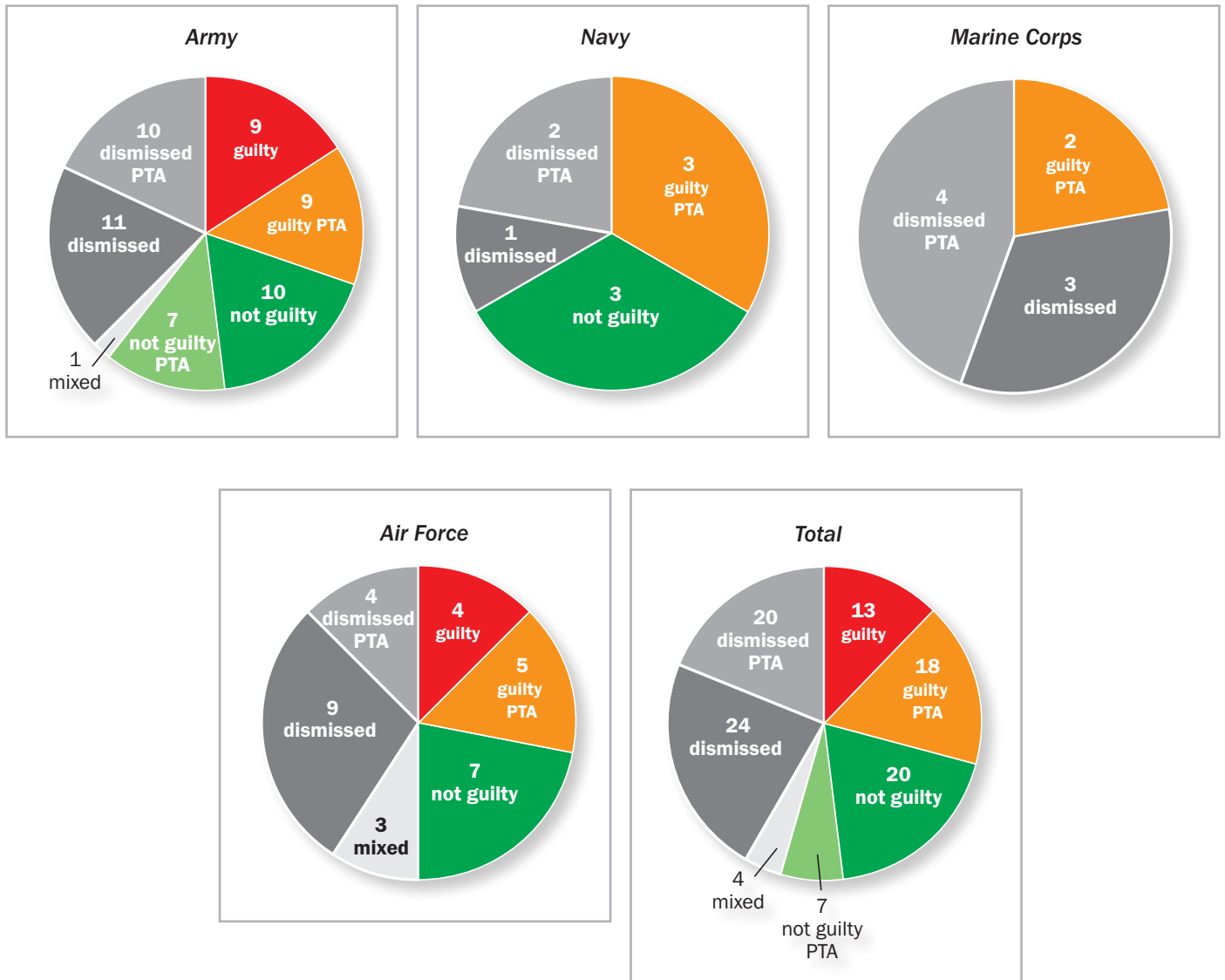


TABLE 12A. FY21: RESULTS OF REFERRED NO-PC SPECIFICATIONS (ALL OFFENSES)

	Army	Navy	Marine Corps	Air Force	Coast Guard	Total
FY21 no-PC referred (all)	56	9	9	32	0	106
	17: G (8 PTA) 17: NG (7 PTA) 1: mixed ⁷	3: G (3 PTA) 3: NG	2: G (2 PTA)	9: G (5 PTA) 7: NG 3: mixed		31: G (18 PTA) 27: NG (7 PTA) 4: mixed
	21: dismissed (10 PTA)	3: dismissed (2 PTA)	7: dismissed (4 PTA)	13: dismissed (4 PTA)		44: dismissed (20 PTA)

FIGURE 12B. FY21: RESULTS OF REFERRED NO-PC SPECIFICATIONS (PSO CASES)

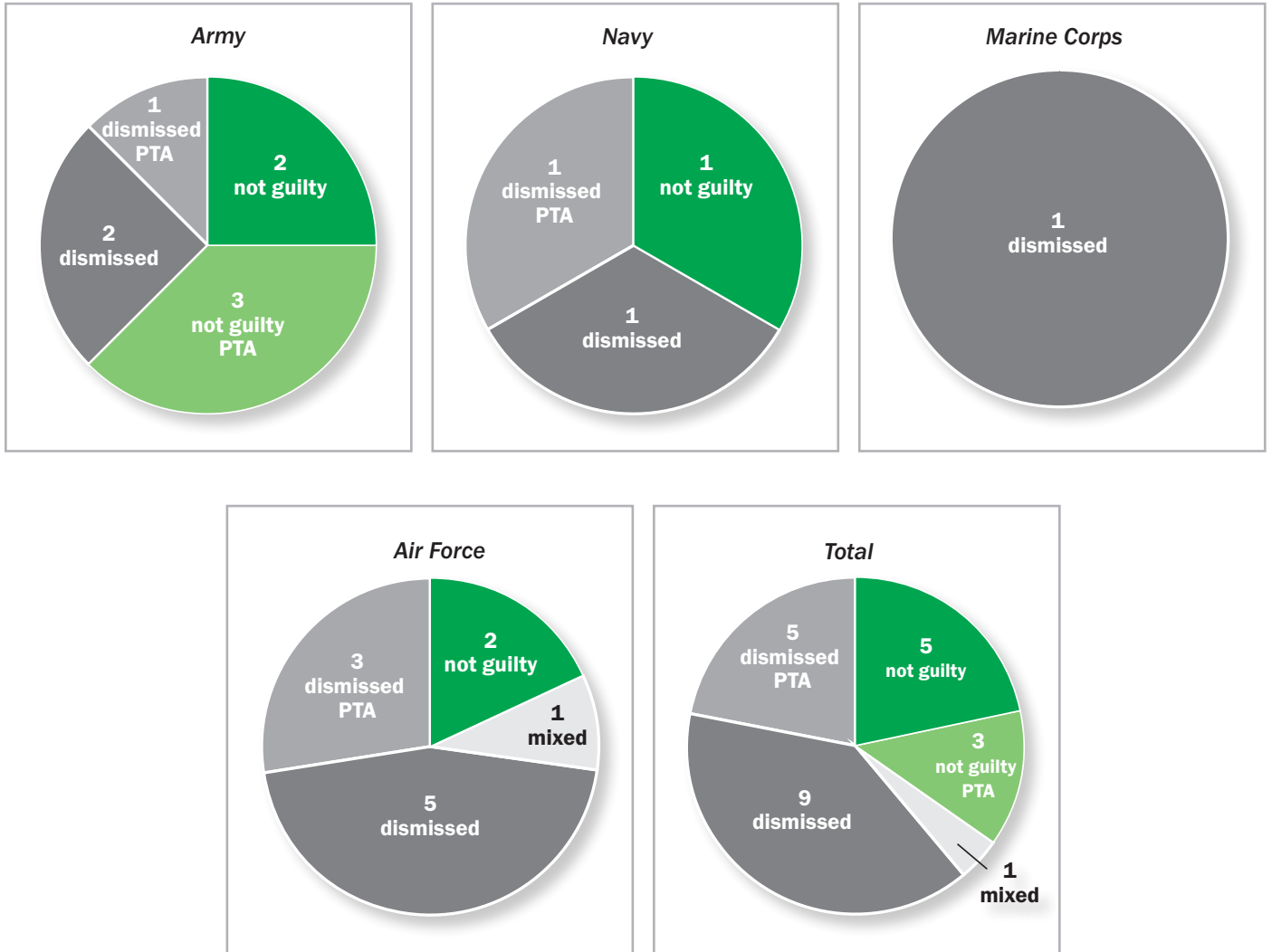


TABLE 12B. FY21: RESULTS OF REFERRED NO-PC SPECIFICATIONS (PSO CASES)

	Army	Navy	Marine Corps	Air Force	Coast Guard	Total
FY21 no-PC referred (PSO)	8	3	1	11	0	23
	5: NG (3 PTA)	1: NG		2: NG 1: mixed		8: NG (3 PTA) 1: mixed
	3: dismissed (1 PTA)	2: dismissed (1 PTA)	1: dismissed	8: dismissed (3 PTA)		14: dismissed (5 PTA)

AD	active duty
DLSA	Defense Legal Services Agency
DoD	Department of Defense
DoD GC	General Counsel of the Department of Defense
FY	fiscal year
IO	Article 32 investigating officer
PC	probable cause
PHO	preliminary hearing officer
PSO	penetrative sexual offense
PTA	pretrial agreement
RFI	Request for Information
UCMJ	Uniform Code of Military Justice

APPENDIX F. DAC-IPAD PROPOSED AMENDMENT FOR ARTICLE 32, UCMJ

Proposed Amendment for Article 32, UCMJ

Section 832 of title 10, United States Code (article 32 of the Uniform Code of Military Justice), is amended by inserting the following subsection (i):

(i) Effect of no-probable-cause determination by preliminary hearing officer.-

(1) If the preliminary hearing officer determines pursuant to subsection (a)(2)(B) that there is not probable cause to believe that the accused committed the offense charged, the affected charges and specifications cannot be referred to a general court-martial, subject to the following:

(A) A preliminary hearing officer's no-probable-cause determination under subsection (a)(2)(B) is without prejudice to the government to dismiss the affected charges and specifications and prefer new charges.

(B) Under regulations prescribed by the President, a preliminary hearing officer shall reconsider a no-probable-cause determination upon the government's presentation of newly discovered evidence, or evidence that, in the exercise of due diligence, could not have been obtained before the original hearing.

APPENDIX G. DAC-IPAD PROPOSAL FOR APPENDIX 2.1, MCM

APPENDIX 2.1

~~NON-BINDING~~ DISPOSITION GUIDANCE

This Appendix provides non-binding disposition guidance issued by the Secretary of Defense, in consultation with the Secretary of Homeland Security, pursuant to Article 33 (Disposition Guidance) of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 833.

SECTION 1: IN GENERAL

- 1.1. Policy
- 1.2. Purpose
- 1.3. Scope
- 1.4. Non-Litigability

SECTION 2: CONSIDERATIONS IN ALL CASES

- 2.1. Interests of Justice and Good Order and Discipline
- 2.2. **Initial Disposition and** Consultation with a Judge Advocate
- 2.3. Referral
- ~~2.4. Determining the Charges and Specifications to Refer.~~
- 2.4.** Determining the Appropriate Type of Court-Martial.
- 2.5.** Alternatives to Referral
- 2.6.** Inappropriate Considerations

SECTION 3: SPECIAL CONSIDERATIONS

- 4.1. Prosecution in Another Jurisdiction
- 4.2. Plea Agreements
- 4.3. Agreements Concerning Disposition of Charges and Specifications
- 4.4. Agreement Concerning Sentence Limitations

SECTION 1: IN GENERAL

- 1.1. Policy.
 - a. This Appendix provides ~~non-binding~~ guidance regarding factors that convening authorities, commanders, staff judge advocates, **special trial counsel**, and judge advocates should

consider when exercising their duties with respect to the disposition of charges and specifications under the UCMJ, and to further promote the purpose of military law.¹

b. This Appendix supplements the Manual for Courts-Martial. The guidance in this Appendix does not require a particular disposition decision or other action in any given case. Accordingly, the disposition factors set forth in this Appendix are cast in general terms, with a view to providing guidance rather than mandating results. The intent is to promote regularity without regimentation; encourage consistency without sacrificing necessary flexibility; and provide the flexibility to apply these factors in the manner that facilitates the fair and effective response to local conditions in the interest of justice and good order and discipline.

c. The disposition guidance contained in this Appendix aligns with the purposes of Articles 33 and 36, UCMJ, in that it includes principles of law generally recognized in official guidance of the Attorney General with respect to disposition of federal criminal cases, and in the trial of criminal cases in the United States district courts. Because Article 36 also requires all rules and regulations to be uniform insofar as practicable, this Appendix guides all military justice practitioners who exercise prosecutorial authority or advise commanders who make disposition decisions.

1.2. Purpose. This ~~non-binding~~ disposition guidance is intended to:

a. Set forth factors for consideration by those assigned responsibility under the UCMJ for disposing of alleged violations of the UCMJ on how best to exercise their authority in a reasoned and structured manner, consistent with the principle of fair and evenhanded administration of the law;

b. Ensure the fair and effective exercise of prosecutorial discretion and responsibility by convening authorities, commanders, staff judge advocates, special trial counsel, and judge advocates and promote confidence on the part of the public and individual accused servicemembers that disposition decisions will be made rationally and objectively on the merits of each case;

c. Serve as a training tool for convening authorities, commanders, staff judge advocates, **special trial counsel**, and judge advocates in the proper discharge of their duties;

d. Contribute to the effective utilization of the Government's law enforcement and prosecutorial resources; and

e. Enhance the relationship between military commanders, judge advocates, **special trial counsel**, and law enforcement agencies, including military criminal investigative organizations (MCIOs), with respect to investigations and charging decisions.

¹ "The purpose of military law is to promote justice, to assist in maintaining good order and discipline on the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States.

1.3. Scope. This Appendix is designed to **promote the reasoned exercise** of discretion with respect to the following disposition decisions:

- a. Initiating and declining action (**to include deferral**) under the UCMJ;
- b. Disposition of covered offenses by special trial counsel;**
- c. Selecting appropriate charges and specifications;
- d. Selecting the appropriate type of court-martial or alternative mode of disposition, if any; and
- e. Considering the appropriateness of a plea agreement.

1.4. Non-Litigability. **This Appendix** ~~non-binding guidance~~ was developed solely as a matter of internal Departmental policy in accordance with Article 33. This Appendix is not intended to, does not, and may not be relied upon to create a **substantive or procedural** right, benefit, or defense ~~substantive or procedural~~, enforceable at law or in equity by any person and may not be relied upon by a party to litigation under the UCMJ.

SECTION 2: CONSIDERATIONS IN ALL CASES

2.1. Interests of Justice and Good Order and Discipline. The military justice system is a powerful tool that **promotes justice and assists in maintaining** good order and discipline while protecting the civil rights of Service members. ~~It is a commander's duty to use it appropriately.~~ In determining whether the interests of justice and good order and discipline are served by trial by court-martial or **some** other disposition ~~in a case~~, **the special trial counsel, or** commander or convening authority **in consultation with a judge advocate, as appropriate**, should consider the following:

- a. The mission-related responsibilities of the command;
- b. Whether the offense occurred during wartime, combat, or contingency operations;
- c. The effect of the offense on the morale, health, safety, welfare, and good order and discipline of the command;
- d. The nature, seriousness, and circumstances of the offense and the accused's culpability in connection with the offense;
- e. In cases involving an individual who is a victim under Article 6b, the views of the victim as to disposition;
- f. The extent of the harm caused to any victim of the offense;
- g. The availability and willingness of the victim and other witnesses to testify;
- h. Whether admissible evidence will **probably** ~~likely~~ be sufficient to obtain and sustain a conviction in a trial by court-martial;

- i. Input, if any, from law enforcement agencies involved in or having an interest in the specific case;
- j. The truth-seeking function of trial by court-martial;
- k. The accused's willingness to cooperate in the investigation or prosecution of others;
- l. The accused's criminal history or history of misconduct, whether military or civilian, if any;
- m. The probable sentence or other consequences to the accused of a conviction; and
- n. The impact and appropriateness of alternative disposition options—including nonjudicial punishment or administrative action—with respect to the accused's potential for continued service and the responsibilities of the command with respect to justice and good order and discipline.

2.2. **Initial Disposition and Consultation with a Judge Advocate.** If a member of a command is accused or suspected of committing an offense punishable under the UCMJ, the commander should seek advice from a judge advocate regarding all possible dispositions of the allegation. The judge advocate's advice should include a discussion of the advantages and disadvantages of each of the available dispositions. The cognizant commander should consider all available options. **If a commander receives a report of a covered offense, they shall promptly forward the report to a Special Trial Counsel (STC).**

2.3. **Referral.** Probable cause must exist for each charge and specification referred to a court-martial. **Special trial counsel should refer, and judge advocates should recommend that a convening authority refer charges to a court-martial only if they believe that the servicemember's conduct constitutes an offense under the UCMJ, and that the admissible evidence will probably be sufficient to obtain and sustain a conviction.**

In all cases, the special trial counsel or judge advocate advising a convening authority, should consider the other factors in paragraph 2.1 of this Appendix before deciding whether to refer or recommend referral to a court-martial, and, in their discretion, make a reasoned determination, given the profound consequences for the accused, crime victims, and their families.

Evidence sufficient to obtain and sustain a conviction is required under Rule 29(a) of the Federal Rules of Criminal Procedure, to avoid judgment of acquittal. Because Article 36 encourages the application of uniform principles of law generally applicable in United States district court, as both a matter of fundamental fairness and in the interest of the efficient administration of justice, no charge should be referred to a court-martial unless the special trial counsel, or judge advocate advising the convening authority, believes that the admissible evidence will probably be sufficient to obtain and sustain a guilty verdict by an unbiased trier of fact.

When deciding whether to refer or recommend referral, the special trial counsel or judge advocate need not have in hand, at that time, all the evidence upon which they intend to rely at trial, if they have a reasonable and good faith belief that such evidence will be available and admissible at the time of trial. For example, it would be proper to refer a case to court-martial

even though a key witness may be out of the country, so long as there is a good faith basis to believe that the witness's presence at trial could reasonably be expected.

Where the law and the facts create a sound, prosecutable case, the likelihood of an acquittal due to impermissible biases a factfinder may harbor is not an appropriate factor for consideration in the referral decision. Instead, the referral decision should be based on an evaluation of the evidence as viewed objectively by an unbiased factfinder.

For example, in a case involving a highly decorated Service member, it might be clear that the evidence of guilt—viewed objectively by an unbiased factfinder—will probably be sufficient to obtain and sustain a conviction yet the special trial counsel or judge advocate might reasonably doubt, based on the circumstances, that the court-martial panel would convict. In such a case, despite their negative assessment of the likelihood of a guilty verdict (based on factors extraneous to an objective view of the law and the facts), the special trial counsel or judge advocate may properly conclude that it is appropriate to refer the case and allow the military justice process to operate in accordance with the principles set forth here.

This guidance promotes the reasoned exercise of prosecutorial discretion and contributes to the fair, evenhanded administration of the UCMJ. Following this guidance will safeguard responsibility by special trial counsel in referral decisions and by judge advocates who advise convening authorities regarding referral decisions and ultimately promote confidence on the part of the public, the military community, and accused servicemembers that important prosecutorial decisions will be made rationally and objectively on the merits of each case.

~~2.4—Determining the Charges and Specifications to Refer. Ordinarily, the convening authority should refer charges and specifications for all known offenses to a single court-martial. However, the convening authority should avoid referring multiple charges when they would:~~

- ~~a. Unnecessarily complicate the prosecution of the most serious, readily provable offense or offenses;~~
- ~~b. Unnecessarily exaggerate the nature and extent of the accused's criminal conduct or add unnecessary confusion to the issues at court-martial;~~
- ~~c. Unnecessarily expose the accused to a harsher potential sentence or range of punishments than the circumstances of the case justify; or~~
- ~~d. Be disposed of more appropriately through an alternative disposition.~~

2.4. Determining the Appropriate Type of Court-Martial. In determining the appropriate type of court-martial, a convening authority should consider the advice of a judge advocate. Additionally, a convening authority or special trial counsel should consider:

- a. ~~The advice of a judge advocate~~The interests of justice and good order and discipline and factors set forth in paragraph 2.1 of this Appendix;
- b. The authorized maximum and minimum punishments for the offenses charged;
- c. Any unique circumstances in the case requiring immediate disposition of the charges;

- d. Whether the type of court-martial would unnecessarily expose the accused to a harsher potential sentence or range of punishments than the circumstances of the case justify; and
- e. Whether the potential of the accused for rehabilitation and continued service would be better addressed in a specific type of court-martial.

2.5. Alternatives to Referral. If a determination is made that a case should not be referred to court-martial because there exists an adequate alternative to trial, a judge advocate should advise the convening authority on, and the convening authority should consider, in addition to the considerations in paragraph 2.1 the following factors:

- a. The effect of alternative disposition on the interests of justice and good order and discipline;
- b. The options available under the alternative means of disposition;
- c. The views of the victim, if any, concerning the alternative disposition of the case; and
- d. The likelihood of an effective outcome.

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

- a. The accused's **or victim's** race, ethnicity, religion, gender **including gender identity-**, sexual orientation, national origin, or lawful political association, activities, or beliefs;
- b. The personal feelings of anyone authorized to recommend, advise, or make a decision as to disposition of offenses concerning the accused, the accused's associates, or any victim or witness of the offense;
- c. The time and resources already expended in the investigation of the case;
- d. The possible effect of the disposition determination on the commander's, or convening authority's, or judge advocate's, or special trial counsel's military career or other professional or personal circumstances; ~~or~~
- e. Political pressure to take or not to take specific actions in the case.

SECTION 3: SPECIAL CONSIDERATIONS

3.1. Prosecution in Another Jurisdiction. When the accused is subject to effective prosecution in another jurisdiction, **the special trial counsel**, or the convening authority **with the advice of a judge advocate**, should consider the following additional factors when determining disposition:

- a. The strength of the other jurisdiction's interest in prosecution;
- b. The other jurisdiction's ability and willingness to prosecute the case effectively;

- c. The probable sentence or other consequences if the accused were to be convicted in the other jurisdiction;
 - d. The views of the victim, if any, as to the desirability of prosecution in the other jurisdiction;
 - e. Applicable policies derived from agreements with the Department of Justice and foreign governments regarding the exercise of military jurisdiction; and
 - f. The likelihood that the nature of the proceedings in the other jurisdiction will satisfy the interests of justice and good order and discipline in the case, including any burdens on the command with respect to the need for witnesses to be absent from their military duties, and the potential for swift or delayed disposition in the other jurisdiction.
- 3.2. Plea Agreements. In accordance with Article 53a, **the special trial counsel**, or convening authority **with the advice of a judge advocate**, may enter into an agreement with an accused concerning disposition of the charges and specifications and the sentence that may be imposed. **The special trial counsel**, or the convening authority **with the advice of a judge advocate**, should consider the following additional factors in determining whether it would be appropriate to enter into a plea agreement in a particular case:
- a. The accused's willingness to cooperate in the investigation or prosecution of others;
 - b. The nature and seriousness of the offense or offenses charged;
 - c. The accused's remorse or contrition and his or her willingness to assume responsibility for his or her conduct;
 - d. Restitution, if any;
 - e. The accused's criminal history or history of misconduct, whether military or civilian;
 - f. The desirability of prompt and certain disposition of the case and of related cases;
 - g. The likelihood of obtaining a conviction at court-martial;
 - h. The probable effect on victims and witnesses;
 - i. The probable sentence or other consequences if the accused is convicted;
 - j. The public and military interest in having the case tried rather than disposed of by a plea agreement;
 - k. The time and expense associated with trial and appeal;
 - l. The views of the victim with regard to prosecution, the terms of the anticipated agreement, and alternative disposition; and
 - m. The potential of the accused for rehabilitation and continued service.

3.3. Agreements Concerning Disposition of Charges and Specifications. With respect to plea agreements regarding the disposition of charges and specifications, the plea agreement should require the accused to plead guilty to charges and specifications that:

- a. Appropriately reflect the nature and extent of the criminal conduct;
- b. Are supported by an adequate factual basis;
- c. Would support the imposition of an appropriate sentence under all the circumstances of the case;
- d. Do not adversely affect the investigation or prosecution of others suspected of misconduct; and
- e. Appropriately serve the interests of justice and good order and discipline.

3.4 Agreements Concerning Sentence Limitations. A plea agreement should ensure that any sentence limitation takes into consideration the sentencing guidance set forth in Article 56(c).

Analysis:

This appendix implements Article 33, as amended by Section 5204 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), and section 12 of Executive Order 13825 of March 1, 2018. The disposition factors contained in this appendix are adapted primarily from three sources: the Principles of Federal Prosecution issued by the Department of Justice; the American Bar Association, Criminal Justice Standards for the Prosecution Function; and the National District Attorneys Association, National Prosecution Standards.

Practitioners are encouraged to familiarize themselves with the disposition factors contained in this appendix as well as these related civilian prosecution function standards. The disposition factors have been adapted with a view toward the unique nature of military justice and the need for commanders, convening authorities, **special trial counsel, and judge advocates** to exercise wide discretion to meet their responsibilities to maintain good order and discipline.

APPENDIX H. DAC-IPAD PROPOSAL FOR TRAINING

Recommended Training on Uniform Prosecution Standards

DAC-IPAD Recommendation 50: The Secretary of Defense require all special trial counsel and judge advocates who advise convening authorities to receive training on the newly established prosecution standards in Appendix 2.1 of the Manual for Courts-Martial. The training shall emphasize the principle that referral is appropriate only if these special trial counsel and advisors believe that the Service member's conduct constitutes an offense under the UCMJ, and that the admissible evidence will probably be sufficient to obtain and sustain a conviction when viewed objectively by an unbiased factfinder.

The independent exercise of prosecutorial discretion provides a new decision-making paradigm for military trial counsel. The DAC-IPAD recommends that, for at least the first five years of the establishment of the OSTC, training on the uniform prosecution standards should be conducted with the U.S. Department of Justice Office for Victims of Crime Technical Training and Assistance Center (OVC TTAC).

OVC TTAC is the preeminent federal organization providing training and technical assistance for victim service providers and allied professionals who serve crime victims.¹ Drawing upon the expertise of a network of consultants and seasoned professionals with first-hand experience in designing and delivering customized responses to satisfy a variety of training and technical assistance needs, OVC TTAC can support the Service's OSTC and JAG Corps with this important training function. OVC TTAC currently partners with the military and has delivered training for the Air Force's Special Victims' Counsel Program. OVC TTAC has a comprehensive database of prosecution experts who provide developmental support and mentoring, and could facilitate immediate training on the reasoned exercise of prosecutorial discretion. OVC TTAC also could work with the Military Services to develop future training programs, strategic planning, program management, evaluation, quality improvement, collaboration, and community coordination.

The delivered training must emphasize the principle that referral to a court-martial is appropriate only if judge advocates and convening authorities believe that the Service member's conduct constitutes an offense under the UCMJ, and that the admissible evidence will probably be sufficient to obtain and sustain a conviction when viewed objectively by an unbiased factfinder.

¹ See <https://www.ovcttac.gov/views/index.cfm?nm=au>.

APPENDIX I. HISTORY OF ARTICLES 32, 33, AND 34, UCMJ

History of Articles 32, 33, and 34, UCMJ

Since the establishment of the Articles of War in 1775, the military justice system has adapted to meet the needs of the nation. Over time, long periods of stability have been punctuated by large-scale changes reflecting developments in the military and in society. Recent changes to military charging practices, pretrial proceedings, and the role of the judge advocate—including the new special trial counsel—reflect a 21st-century shift from a commander-driven system with little involvement of lawyers to a professionalized and independent prosecutorial function which more closely resembles civilian federal and state systems.

Pretrial Procedures in the Articles of War

During World War I, complaints from soldiers and citizens about the unfairness of the military justice system led to increased public awareness and systemic reforms. In May 1919, the War Department convened a board of officers to consider improvements to the military justice process.¹ In its July 1919 report, the board made the following key criticism of pretrial processes:

due to perfunctory preliminary investigations, or to the total absence of such investigations, cases in large numbers go to trial which either present no case of misconduct at all or else one which should have been settled under article 104 by summary disciplinary action[.]²

In response, Congress amended the Articles of War in 1920.³ The changes included the following provision for a formalized pretrial investigation:

No charge will be referred for trial until after a thorough and impartial investigation thereof shall have been made. This investigation will include inquiries as to the truth of the matter set forth in said charges, form of charges, and what disposition of the case should be made in the interest of justice and discipline. At such investigation full opportunity shall be given to the accused to cross-examine witnesses against him if they are available and to present anything he may desire in his own behalf either in defense or mitigation, and the investigating officer shall examine available witnesses requested by the accused. If the charges are forwarded after such investigation, they shall be accompanied by a statement of the substance of the testimony taken on both sides[.]⁴

¹ PROCEEDINGS AND REPORT OF SPECIAL WAR DEPARTMENT BOARD ON COURTS-MARTIAL AND THEIR PROCEDURE (July 17, 1919), *available at* <https://tile.loc.gov/storage-services/service/l1/llmlp/proceedings/proceedings.pdf>

² *Id.* at 5. Article 104 was the precursor to Article 15 of the Uniform Code of Military Justice (UCMJ), Nonjudicial Punishment, and allowed commanders to impose disciplinary action against their troops for minor infractions. *See* REPORT OF THE MILITARY JUSTICE REVIEW GROUP, PART I: UCMJ RECOMMENDATIONS 212 [MJRG REPORT], *available at* <https://jsc.defense.gov/Portals/99/MJRG%20Part%201.pdf> 212, citing Articles of War (AW) 104 of 1916 and the Act of May 5, 1950 [Act of May 5, 1950], Pub. L. No. 81-506, ch. 169, 64 Stat. 108.

³ The Articles of War provided for discipline in the U.S. Army. Articles of War, 1920 amendments (June 4, 1920), [AW of 1920], *available at* <https://tile.loc.gov/storage-services/service/l1/llmlp/RAW-vol1/RAW-vol1.pdf>.

⁴ *Id.*

The object of the investigation was as much “to prevent unjust or unnecessary trials ... as to establish the existence of facts upon which the accused may properly be brought to trial.”⁵

The revisions to Article of War 70 contained the following provision, which was the precursor to the modern-day Article 34, Uniform Code of Military Justice (UCMJ), pretrial advice: “Before directing the trial of any charge by general court-martial, the appointing authority will refer it to his staff judge advocate for consideration and advice.”⁶ The legal advice, which had to be written, informed the convening authority of the following regarding the charged offenses:

(1) whether or not they are correct and complete in form, and (2) appropriate to the indicated competent evidence in the case; (3) whether or not, in his opinion, a prima facie case, justifying trial or other proceedings, exists; (4) whether each specification states an offense cognizable by court-martial; (5) whether the indicated competent evidence justifies trial on each of the several specifications and charges, and, if not on all, then on which ones; (6) whether any, and if so what part, of the evidence, contained in the summaries of the statements of the witnesses or documents or other evidence submitted is incompetent or improper to be introduced as evidence at the trial for any reason[.]⁷

Pretrial Procedures in the Uniform Code of Military Justice

When World War II brought millions of Americans into military service, public awareness—and criticism—of the military justice system prompted sweeping change.⁸ In 1948, Congress transformed military justice with the Elston Act,⁹ followed quickly by the adoption of the Uniform Code of Military Justice (UCMJ) in 1950 in response to widespread concerns about a lack of due process and individual rights in courts-martial proceedings.¹⁰ The enactment of the UCMJ began a new era in which members of the separate Military Departments were, for the first time, governed by a single criminal code.

In Article 32 of the UCMJ, Congress codified the requirement that each preferred charge was supported by an inquiry into the truth and form of that charge.¹¹ The investigating officer did not

⁵ MANUAL FOR COURTS-MARTIAL, UNITED STATES ¶76a.8 (1921 ed.) [1921 MCM], *available at* <https://tile.loc.gov/storage-services/service/l1/lmlp/manual-1921/manual-1921.pdf>.

⁶ AW 70 of 1920, *supra* note 3.

⁷ 1921 MCM, *supra* note 5, at ¶76b.

⁸ John W. Booker, Major, U.S. Army, *Improving Uniform Code of Military Justice Reform*, 222 MIL. L. REV. 1, 10 (Winter 2014).

⁹ Military Selective Service Act of 1948, Pub. L. No. 80-759, §§ 201–246, 62 Stat. 604, 627–44 (1948) (commonly known as the “Elston Act”).

¹⁰ *See* Uniform Code of Military Justice (1950) [UCMJ (1950)]. The UCMJ was enacted on May 5, 1950, with an effective date of May 31, 1951. The enactment of the UCMJ consolidated the Articles of War, the Articles for the Government of the Navy, and the disciplinary laws of the Coast Guard. MANUAL FOR COURTS-MARTIAL, UNITED STATES (1951 ed.), *available at* <https://tile.loc.gov/storage-services/service/l1/lmlp/manual-1951/manual-1951.pdf>.

¹¹ *See* Act of May 5, 1950, *supra* note 2. That an investigation was required only in cases likely going to a general court-martial, as opposed to a summary or special court-martial, was established by a 1937 amendment to Article of War 70, later codified in Article 32 of the UCMJ.

have to be a judge advocate or possess legal training. Article 33 required that the commander promptly forward charges to the officer exercising general court-martial authority. Article 34 provided a process for determining, after a thorough investigation, whether a general court-martial was the appropriate forum for disposition. Article 34 continued to require that convening authorities consult with their legal advisor on the merits of the case before ordering a trial by general court-martial.¹²

In the Military Justice Act of 1983, Congress responded to the changing nature of the military's place within modern American society by significantly amending Article 34. The amendments explicitly vest in the staff judge advocate—as opposed to the convening authority—responsibility to determine whether legal prerequisites had been met before a case could be referred to a general court-martial.¹³ The new Article 34 required a determination that each specification stated an offense under the UCMJ, that a court-martial would have jurisdiction over the offense, and that the charges were “warranted by the evidence.”¹⁴ This change gave a staff judge advocate effective veto authority over the convening authority's referral decision.

National Defense Authorization Act for Fiscal Year 2014

Beginning in 2006, Congress regularly amended the UCMJ through the annual National Defense Authorization Acts (NDAAs) in response to recurrent nationwide complaints about the military's response to sexual assault and the public's demand for accountability and change in the military justice system.¹⁵ In the fiscal year (FY) 2014 NDAA, after public outcry over alleged injustices that took place during an Article 32 hearing at the U.S. Naval Academy, including questioning the victim for about 30 hours,¹⁶ Congress almost completely revised Article 32.¹⁷ Specifically, it replaced the “thorough and impartial investigation” that was required by the previous version of Article 32¹⁸ with a probable cause hearing whose focus was limited to

- (1) Determining whether there is probable cause to believe an offense has been committed and the accused committed the offense.

¹² See UCMJ (1950), *supra* note 10.

¹³ See Article 34(a) prior to 1983 amendments. MJRG REPORT, *supra* note 2, at 343.

¹⁴ *Id.*

¹⁵ Military sexual assault became a matter of public scrutiny after the 1991 Tailhook scandal in Las Vegas, where at a military conference 83 women and 7 men were sexually assaulted by over 100 Navy and Marine Corps officers. See <https://archive.org/details/tailhookreport00offi/page/2/mode/1up?view=theater>.

¹⁶ Jennifer Steinhauer, *Navy Hearing in Rape Case Raises Alarm*, N.Y. TIMES, Sept. 20, 2013, available at <https://www.nytimes.com/2013/09/21/us/intrusive-grilling-in-rape-case-raises-alarm-on-military-hearings.html?searchResultPosition=1>.

¹⁷ National Defense Authorization Act for Fiscal Year 2014 [FY14 NDAA], Pub. L. No. 113-66, § 1702, 127 Stat. 672 (2013). Other major reforms include the significant curtailment of convening authorities' authority to disapprove the findings or sentence of a court-martial, as well as a drastic reduction in clemency authority. In addition, the FY14 NDAA created Article 6b of the UCMJ, the military's analogue to the federal Crime Victims' Rights Act (18 U.S.C. § 3771) and directed the Military Services to establish special victims' counsel programs and provide legal advice and representation to military victims of sexual assault. This revision applied to Article 32 hearings conducted on or after Dec. 26, 2014.

¹⁸ 10 U.S.C. § 832 (2012) (UCMJ, Article 32); see also *United States v. Henry*, 76 M.J. 595, 603 (A.F. Ct. Crim. App. 2017).

- (2) Determining whether the convening authority has court-martial jurisdiction over the offense and the accused.
- (3) Considering the form of charges.
- (4) Recommending the disposition that should be made of the case.¹⁹

The revised Article 32 indicated that whenever practicable, an impartial judge advocate should be appointed to conduct the preliminary hearing.²⁰ Victims were provided the statutory right to refuse to testify at the Article 32 preliminary hearing. In lieu of testimony from victims and other witnesses, a prosecutor might submit alternative forms of evidence, such as recorded or written statements to law enforcement, for the preliminary hearing officer's consideration.²¹

In 2015 the President amended Rule for Courts-Martial (R.C.M.) 405 by executive order to implement the new Article 32 preliminary hearing requirements.²² For the first time, the revised R.C.M. 405 explicitly stated that "a preliminary hearing conducted under this rule is *not* intended to serve as a means of discovery"²³ (emphasis added). The revised rule further provided that alternatives to live testimony, such as written statements to law enforcement, were admissible even if the witness or declarant was available to testify.

The revised R.C.M. 405 did not give the preliminary hearing officer the authority to summon witnesses or compel the production of documents they deem necessary to prove or disprove elements of the alleged offense(s). As a result, a preliminary hearing officer's only option, when faced with charges and evidence they deem insufficient, was to comment in a written advisory report that the charges lack probable cause. Consequently, a convening authority who received charges that the preliminary hearing officer found insufficient could either dismiss the relevant charges, ignore the preliminary hearing officer's advisory finding and press forward toward referral to a court-martial, or order another preliminary hearing.²⁴

The Military Justice Act of 2016

In October 2013, the Secretary of Defense established the Military Justice Review Group (MJRG), composed of military and civilian criminal law experts, to conduct an intensive and holistic review of the UCMJ and the entire military justice system.²⁵ In December 2015, the MJRG released its report containing recommendations for amending the UCMJ.²⁶ With some

¹⁹ FY14 NDAA, *supra* note 17, at § 1702.

²⁰ *Id.*

²¹ *Id.*

²² MANUAL FOR COURTS-MARTIAL, UNITED STATES (2016 ed.), R.C.M. 405.

²³ *Id.*

²⁴ John L. Kiel Jr., Lieutenant Colonel, U.S. Army, *Not Your Momma's 32: Explaining the Impetus for Change Behind Key Provisions of the Article 32 Preliminary Hearing*, 7 ARMY LAW. 8, 14 (2016).

²⁵ National Defense Authorization Act for Fiscal Year 2017 [FY17 NDAA], Pub. L. No. 114-328, 130 Stat. 2000 (2016).

²⁶ MJRG REPORT, *supra* note 3.

exceptions, Congress enacted the MJRG’s recommended UCMJ changes in the FY17 NDAA as the Military Justice Act of 2016.²⁷

The MJRG conducted its UCMJ review before the FY14 NDAA amendments to Article 32 took effect; thus, the MJRG did not assess the operation of the new preliminary hearings. Because of that limitation to the MJRG’s assessment, the Military Justice Act of 2016 included only relatively minor amendments to Articles 32 and 34—aligning terminology and enhancing how the preliminary hearing officer’s report informs the referral decision.²⁸ The MJRG did not collect any data to assess the cost to the military justice system when convening authorities send cases to trial after an Article 32 officer has found no probable cause.

Instead, the Military Justice Act of 2016 amended the Article 32 preliminary hearing in two respects:²⁹

- (1) It allowed the parties and the victim to submit additional information relevant to the disposition of the case to the preliminary hearing officer after the hearing and required the preliminary hearing officer to provide an analysis of such submissions;³⁰ and
- (2) It required the preliminary hearing officer to provide a more robust written analysis of the charges and the underlying evidence than previously directed.³¹

Congress also responded to the MJRG’s recommendation to create a new statutory provision requiring the establishment of non-binding guidance—taking into account the Principles of Federal Prosecution in the Justice Manual (then called the U.S. Attorney’s Manual)—by entirely revising Article 33. That revision directed the Secretary of Defense to issue guidance on factors that commanders, judge advocates, and convening authorities should consider “in the interest of justice and discipline” when deciding an appropriate disposition for an offense.³² The new disposition guidance was intended to fill the gap that exists in military practice between the probable-cause standard for referral and the more stringent standard for conviction—proof beyond a reasonable doubt.³³

Notably, the MJRG commented that in civilian practice, this gap “has been filled with structured decisional principles and charging standards to help guide prosecutors in the prudent and effective exercise of prosecutorial discretion.”³⁴ Article 33 requires the Secretary of Defense’s disposition guidance to “take into account, with appropriate consideration of military requirements, the principles contained in official guidance of the Attorney General to attorneys for the Government with respect to disposition of Federal criminal cases in accordance with the

²⁷ FY17 NDAA, *supra* note 25.

²⁸ FY17 NDAA, *supra* note 25, at §§ 5203, 5205.

²⁹ *Id.*; this amendment affected preliminary hearings conducted on or after Jan. 1, 2019.

³⁰ 10 U.S.C. § 832(c)(3).

³¹ *Id.* at ¶(c)(1).

³² 10 U.S.C. §§ 830, 833 (Arts. 30 and 33, UCMJ).

³³ MJRG REPORT, *supra* note 2, at 338.

³⁴ *Id.*

principle of fair and evenhanded administration of Federal criminal law.”³⁵ This is a reference to the Principles of Federal Prosecution contained in the Justice Manual, which guides attorneys at the U.S. Department of Justice from the decision to accept or decline prosecution through participation in sentencing.³⁶

The Principles of Federal Prosecution serve a critical function for crime victims, the criminally accused, and the American public: they strengthen consistency and uniformity of case disposition and confidence in the criminal justice system.³⁷ They provide that a prosecutor may commence or recommend prosecution only after determining that probable cause exists to believe that a suspect has committed a federal offense.³⁸ In addition, “The attorney for the government should commence or recommend federal prosecution if he/she believes that the person’s conduct constitutes a federal offense, that *the admissible evidence will probably be sufficient to obtain and sustain a conviction*,” and that the prosecution serves a substantial federal interest.³⁹ Notably, the military justice system did not adopt this critical principle of federal prosecution universally recognized by American prosecutors, and thus fell short of complete parity with the prosecution standards in the Justice Manual.

Instead, in 2019 the Secretary of Defense published the disposition guidance in Appendix 2.1 of the Manual for Courts-Martial (MCM).⁴⁰ Appendix 2.1 provides a non-exclusive list of factors that judge advocates and commanders “should” consider with respect to the disposition of charges at the referral decision stage, and to preserve good order and discipline:⁴¹

- a. The mission-related responsibilities of the command;
- b. Whether the offense occurred during wartime, combat, or contingency operations;
- c. The effect of the offense on the morale, health, safety, welfare, and good order and discipline of the command;
- d. The nature, seriousness, and circumstances of the offense and the accused’s culpability in connection with the offense;
- e. In cases involving an individual who is a victim under Article 6b, the views of the victim as to disposition;
- f. The extent of the harm caused to any victim of the offense;
- g. The availability and willingness of the victim and other witnesses to testify;
- h. Whether admissible evidence will likely be sufficient to obtain and sustain a conviction in a trial by court-martial;

³⁵ Art. 33, UCMJ.

³⁶ MJRG REPORT, *supra* note 2, at 335; U.S. DEP’T. OF JUSTICE, JUSTICE MANUAL [JUSTICE MANUAL], § 9-27.001 (Principles of Federal Prosecution), *available at* <https://www.justice.gov/jm/justice-manual>.

³⁷ JUSTICE MANUAL, *supra* note 36, § 9-27.001.

³⁸ *Id.* at § 9-27.200 (Initiating and Declining Prosecution—Probable Cause Requirement).

³⁹ *Id.* at § 9-27.220 (Grounds for Commencing or Declining Prosecution); *emphasis added*.

⁴⁰ MJRG REPORT, *supra* note 2, at 338.

⁴¹ MANUAL FOR COURTS-MARTIAL, UNITED STATES App. 2.1 (2019 ed.) *available at* <https://jsc.defense.gov/Portals/99/Documents/A-2.1%20Non-Binding%20Disposition%20Guidance%20-%20SIGNED.pdf>.

- i. Input, if any, from law enforcement agencies involved in or having an interest in the specific case;
- j. The truth-seeking function of trial by court-martial;
- k. The accused's willingness to cooperate in the investigation or prosecution of others;
- l. The accused's criminal history or history of misconduct, whether military or civilian, if any;
- m. The probable sentence or other consequences to the accused of a conviction;
- n. The impact and appropriateness of alternative disposition options—including nonjudicial punishment or administrative action—with respect to the accused's potential for continued service and the responsibilities of the command with respect to justice and good order and discipline.

Whereas the Department of Justice's Principles of Federal Prosecution establish, as a threshold matter—prior to a charging decision—that a case should not be prosecuted unless the admissible evidence will probably be sufficient to obtain and sustain a conviction, the disposition guidance in Appendix 2.1 lists sufficiency of the evidence as only one of the 14 factors to consider when deciding whether a general court-martial is appropriate; this is a moment on the military justice continuum that falls long after the prefferal of charges.⁴² In the military justice system, the decision about which charges to prefer is made *before* considering the likelihood of conviction on those charges. As a result, military prosecutorial decision making does not mirror the federal practice of prioritizing the sufficiency of the evidence when commencing or declining prosecution.⁴³

To address some of these concerns, Congress—in the Military Justice Act of 2016—amended Article 34 in several ways. First, the staff judge advocate must conclude in writing that there is probable cause that the accused committed the offense charged, a stricter criterion than the previous requirement that the staff judge advocate find that the charge is “warranted by the evidence” presented in the Article 32 hearing.⁴⁴ The amendments also expressly link the staff judge advocate's disposition recommendation at referral to the “in the interest of justice and discipline” standard specified in Article 30(c), UCMJ.⁴⁵ Finally, Article 34 now requires the convening authority to consult a judge advocate prior to referral of charges to a special court-martial.⁴⁶

Establishment of Offices of Special Trial Counsel

Following the recommendations of the IRC, on December 27, 2021, the President signed into law historic changes to the role of the military prosecutor and the prosecution of select UCMJ

⁴² *Id.* at para. 2.1(h).

⁴³ See American Bar Association Standard 3-4.3, Minimum Requirements for Filing and Maintaining Criminal Charges.

⁴⁴ Art. 34(a)(1)(B), UCMJ.

⁴⁵ Art. 34(a)(2). See also Art. 30(c), UCMJ.

⁴⁶ Art. 34(b), UCMJ. Before the Military Justice Act of 2016, Article 34 was silent as to whether legal consultation or advice was required prior to referral to a special court-martial.

offenses.⁴⁷ The new provisions grant independent authority to military prosecutors (special trial counsel) to decide the disposition of charges involving “covered,” “known,” and “related” offenses (including sexual offenses) at courts-martial.⁴⁸ Thus, for covered, known, and related offenses over which a special trial counsel has authority, the special trial counsel will exercise prosecutorial discretion, lead the prosecution effort, and exercise most discretionary authority formerly held by commanders. The special trial counsel’s prosecutorial decisions are binding on any applicable convening authority—including the decision of whether covered offenses should be tried at a general court-martial.⁴⁹ In practice, every reported allegation of a sexual or other covered offense must be promptly forwarded to a special trial counsel for disposition.⁵⁰ Thus, special trial counsel have the right of first refusal to determine whether to assert jurisdiction.

Offenses over which special trial counsel exercise authority

1	Art. 117a	Wrongful broadcast or distribution of intimate visual images
2	Art. 118	Murder
3	Art. 119	Manslaughter
4	Art. 119a	Death or injury of an unborn child
5	Art. 120	Rape and sexual assault generally
6	Art. 120a	Mails: deposit of obscene matter
7	Art. 120b	Rape and sexual assault of a child
8	Art. 120c	Other sexual misconduct
9	Art. 125	Kidnapping
10	Art. 128b	Domestic violence
11	Art. 130	Stalking
12	Art. 132	Retaliation
13	Art. 134	Child pornography
14	Art. 134	Sexual harassment

⁴⁷ See Appendix B, National Defense Authorization Act for FY 2022, Excerpt. See also “Statement by the President on S. 1605, the National Defense Authorization Act for Fiscal Year 2022,” *available at* <https://www.whitehouse.gov/briefing-room/statements-releases/2021/12/27/statement-by-the-president-on-s-1605-the-national-defense-authorization-act-for-fiscal-year-2022/>.

⁴⁸ “Known” and “related” offenses include any offense that the special trial counsel determines to be related to the covered offense and any other offense alleged to have been committed by the same person.

⁴⁹ See Appendix B.

⁵⁰ The Annex to the Draft Executive Order, 2023 Amendments to the Manual for Courts-Martial, United States, 87 Fed. Reg. 63,484 (Oct. 19, 2022).

Inchoate offenses:

Covered offenses include (1) Art. 80—attempts; (2) Art. 81—conspiracy; (3) Art. 82—soliciting commission of offenses.

Effective date:

Special trial counsel exercise authority over offenses (covered, related, or known) committed on or after December 28, 2023, except for sexual harassment offenses, which have an effective date of January 2, 2025.

In addition, the new law places special trial counsel under the direct supervision of the civilian Military Department Secretaries “without intervening authority,” so that they no longer fall under a military chain of command—including that of The Judge Advocates General.⁵¹ Corresponding changes allow special trial counsel to request that a convening authority appoint a preliminary hearing officer and create a court-martial for a specified case.⁵²

Probable cause remains the legal standard for both convening authorities and special trial counsel to refer cases to trial.⁵³ However, in the Joint Explanatory Statement accompanying the FY22 NDAA, Congress expressed its view that

when determining whether to refer charges and specifications to a court-martial for trial, the convening authority, or, when applicable, the special trial counsel, should first evaluate whether admissible evidence will likely be sufficient to obtain and sustain a conviction in a trial by court-martial.⁵⁴

This Joint Explanatory Statement acknowledges an important distinction between military and civilian prosecutorial practices: the current rules and guidance applicable to military prosecutors and commanders do not prioritize the sufficiency of the evidence above other factors relevant to the prosecutorial disposition decision.

⁵¹ National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117–81, §§ 532(a), 534, 536, 135 Stat. 1692 (2021).

⁵² *Id.* at § 536(a)(3).

⁵³ *Id.* at § 537.

⁵⁴ See Joint Explanatory Statement accompanying the FY22 NDAA.

APPENDIX J. EXCERPT FROM PRINCIPLES OF FEDERAL PROSECUTION, JUSTICE MANUAL 9-27.001–9-27.300

The U.S. Department of Justice, Justice Manual
Principles of Federal Prosecution, 9-27.001–9-27.300
<https://www.justice.gov/jm/jm-9-27000-principles-federal-prosecution>

9-27.001 - PREFACE

These principles of federal prosecution provide federal prosecutors a statement of prosecutorial policies and practices. As such, they should promote the reasoned exercise of prosecutorial authority and contribute to the fair, evenhanded administration of the federal criminal laws.

A determination to prosecute represents a policy judgment that the fundamental interests of society require the application of federal criminal law to a particular set of circumstances—recognizing both that serious violations of federal law must be prosecuted, and that prosecution entails profound consequences for the accused, crime victims, and their families whether or not a conviction ultimately results. Other prosecutorial decisions can be equally significant. Decisions, for example, regarding the specific charges to be brought, or concerning plea dispositions, effectively determine the range of sanctions that may be imposed for criminal conduct. The rare decision to consent to pleas of *nolo contendere* may affect the success of related civil suits for recovery of damages. And the government's position during the sentencing process will help ensure that the court imposes a sentence consistent with 18 U.S.C. § 3553(a).

These principles of federal prosecution have been designed to assist in structuring the decision-making process of attorneys for the government. For the most part, they have been cast in general terms with a view to providing guidance rather than to mandating results. The intent is to assure regularity without regimentation, and to prevent unwarranted disparity without sacrificing necessary flexibility.

The availability of this statement of principles to federal law enforcement officials and to the public serves two important purposes: ensuring the fair and effective exercise of prosecutorial discretion and responsibility by attorneys for the government, and promoting confidence on the part of the public and individual defendants that important prosecutorial decisions will be made rationally and objectively on the merits of each case. The principles provide convenient reference points for the process of making prosecutorial decisions; they facilitate the task of training new attorneys in the proper discharge of their duties; they contribute to more effective management of the government's limited prosecutorial resources by promoting greater consistency among the prosecutorial activities of all United States Attorney's offices and between their activities and the Department's law enforcement priorities; they make possible better coordination of investigative and prosecutorial activity by enhancing the understanding of investigating departments and agencies of the considerations underlying prosecutorial decisions by the Department; and they inform the public of the careful process by which prosecutorial decisions are made.

Important though these principles are to the proper operation of our federal prosecutorial system, the success of that system must rely ultimately on the character, integrity, sensitivity, and competence of those men and women who are selected to represent the public interest in the federal criminal justice process. It is with their help that these principles have been prepared, and it is with their efforts that the purposes of these principles will be achieved.

[updated February 2018]

9-27.110 - PURPOSE

The principles of federal prosecution set forth herein are intended to promote the reasoned exercise of prosecutorial discretion by attorneys for the government with respect to:

1. Initiating and declining prosecution;
2. Selecting charges;
3. Taking a position on detention or release pending judicial proceedings;

The U.S. Department of Justice, Justice Manual
Principles of Federal Prosecution, 9-27.001–9-27.300
<https://www.justice.gov/jm/jm-9-27000-principles-federal-prosecution>

4. Entering into plea agreements;
5. Opposing offers to plead nolo contendere;
6. Entering into non-prosecution agreements in return for cooperation; and
7. Participating in sentencing.

Comment. Under the federal criminal justice system, the prosecutor has wide latitude in determining when, whom, how, and even whether to prosecute for apparent violations of federal criminal law. The prosecutor's broad discretion in such areas as initiating or foregoing prosecutions, selecting or recommending specific charges, and terminating prosecutions by accepting guilty pleas has been recognized on numerous occasions by the courts. *See, e.g., United States v. LaBonte*, 520 U.S. 751, 762 (1997); *Oyler v. Boles*, 368 U.S. 448 (1962); *United States v. Fokker Services B.V.*, 818 F.3d 733, 741 (D.C. Cir. 2016); *Newman v. United States*, 382 F.2d 479 (D.C. Cir. 1967); *Powell v. Ratzenbach*, 359 F.2d 234 (D.C. Cir. 1965). This discretion exists by virtue of the prosecutor's status as a member of the Executive Branch, and the President's responsibility under the Constitution to ensure that the laws of the United States be "faithfully executed." U.S. Const. Art. II § 3. *See Nader v. Saxbe*, 497 F.2d 676, 679 n. 18 (D.C. Cir. 1974).

Since federal prosecutors have great latitude in making crucial decisions concerning enforcement of a nationwide system of criminal justice, it is desirable, in the interest of the fair and effective administration of justice, that all federal prosecutors be guided by a general statement of principles that summarizes appropriate considerations to be weighed, and desirable practices to be followed, in discharging their prosecutorial responsibilities.

Although these principles deal with the specific situations indicated, they should be read in the broader context of the basic responsibilities of federal attorneys: making certain that the general purposes of the criminal law—assurance of warranted punishment, deterrence of further criminal conduct, protection of the public from offenders, and rehabilitation of offenders—are adequately met, while making certain also that the rights of individuals are scrupulously protected.

[cited in [JM 9-2.031](#), [JM 9-6.100](#)]

[updated January 2023]

9-27.120 - APPLICATION

In carrying out criminal law enforcement responsibilities, each Department of Justice attorney should be guided by these principles, and each United States Attorney and each Assistant Attorney General should ensure that such principles are communicated to the attorneys who exercise prosecutorial responsibility within his/her office or under his/her direction or supervision.

Comment. It is expected that each federal prosecutor will be guided by these principles in carrying out his/her criminal law enforcement responsibilities unless a modification of, or departure from, these principles has been authorized pursuant to [JM 9-27.140](#). However, it is not intended that reference to these principles will require a particular prosecutorial decision in any given case. Rather, these principles are set forth solely for the purpose of assisting attorneys for the government in determining how best to exercise their authority in the performance of their duties.

[updated February 2018]

The U.S. Department of Justice, Justice Manual
Principles of Federal Prosecution, 9-27.001–9-27.300
<https://www.justice.gov/jm/jm-9-27000-principles-federal-prosecution>

9-27.130 - IMPLEMENTATION

Each United States Attorney and responsible Assistant Attorney General should establish internal office procedures to ensure:

1. That prosecutorial decisions are made at an appropriate level of responsibility, and are made consistent with these principles; and
2. That serious, unjustified departures from the principles set forth herein are followed by such remedial action, including the imposition of disciplinary sanctions or other measures, when warranted, as are deemed appropriate.

Comment. One purpose of such procedures should be to ensure consistency in the decisions within each office by regularizing the decision-making process so that decisions are made at the appropriate level of responsibility. A second purpose, equally important, is to provide appropriate remedies for serious, unjustified departures from sound prosecutorial principles. The United States Attorney or Assistant Attorney General may also wish to establish internal procedures for appropriate review and documentation of decisions.

[updated February 2018]

9-27.140 - MODIFICATIONS OR DEPARTURES

United States Attorneys may modify or depart from the principles set forth herein as necessary in the interests of fair and effective law enforcement within the district. Any modification or departure contemplated as a matter of policy or regular practice must be approved by the appropriate Assistant Attorney General and the Deputy Attorney General. Similarly, Assistant Attorneys General overseeing prosecuting components may modify or depart from the principles set forth herein in the interests of fair and effective law enforcement, and any modification or departure contemplated by an Assistant Attorney General as a matter of policy or regular practice must be approved by the Deputy Attorney General.

Comment. Although these materials are designed to promote consistency in the application of federal criminal laws, they are not intended to produce rigid uniformity among federal prosecutors in all areas of the country at the expense of the fair administration of justice. Different offices face different conditions and have different requirements. In recognition of these realities, and in order to maintain the flexibility necessary to respond fairly and effectively to local conditions, each United States Attorney and Assistant Attorney General overseeing prosecuting components is authorized to modify or depart from these principles, as necessary in the interests of fair and effective law enforcement within the district. In situations in which a significant modification or departure is contemplated as a matter of policy or regular practice, the appropriate Assistant Attorney General and the Deputy Attorney General must approve the action before it is adopted.

[cited in [JM 9-27.120](#)]

[updated February 2018]

9-27.150 - NON-LITIGABILITY

The U.S. Department of Justice, Justice Manual
 Principles of Federal Prosecution, 9-27.001–9-27.300
<https://www.justice.gov/jm/jm-9-27000-principles-federal-prosecution>

These principles, and internal office procedures adopted pursuant to them, are intended solely for the guidance of attorneys for the government. They are not intended to create a substantive or procedural right or benefit, enforceable at law, and may not be relied upon by a party to litigation with the United States.

Comment. The Principles of Federal Prosecution have been developed purely as matter of internal Departmental policy and are being provided to federal prosecutors solely for their own guidance in performing their duties. Neither this statement of principles nor any internal procedures adopted by individual offices create any rights or benefits. By setting forth this fact explicitly, [JM 9-27.150](#) is intended to foreclose efforts to litigate the validity of prosecutorial actions alleged to be at variance with these principles or not in compliance with internal office procedures. In the event that an attempt is made to litigate any aspect of these principles, to litigate any internal office procedures, or to litigate the applicability of such principles or procedures to a particular case, the attorney for the government should oppose the attempt. The attorney for the government should also notify the Department of the litigation if there is a reasonable possibility the government may face an adverse decision on the litigation or if a court renders an adverse decision.

[updated February 2018]

9-27.200 - INITIATING AND DECLINING PROSECUTION—PROBABLE CAUSE REQUIREMENT

If the attorney for the government concludes that there is probable cause to believe that a person has committed a federal offense within his/her jurisdiction, he/she should consider whether to:

1. Request or conduct further investigation;
2. Commence or recommend prosecution;
3. Decline prosecution and refer the matter for prosecutorial consideration in another jurisdiction;
4. Decline prosecution and commence or recommend pretrial diversion or other non-criminal disposition; or
5. Decline prosecution without taking other action.

Comment. [JM 9-27.200](#) sets forth the courses of action available to the attorney for the government once he/she concludes that there is probable cause to believe that a person has committed a federal offense within his/her jurisdiction. The probable cause standard is the same standard required for the issuance of an arrest warrant or a summons upon a complaint (*see* Fed. R. Crim. P. 4(a)), and for a magistrate's decision to hold a defendant to answer in the district court (*see* Fed. R. Crim. P. 5.1(a)), and is the minimal requirement for indictment by a grand jury. *See Branzburg v. Hayes*, 408 U.S. 665, 686 (1972). This is, of course, a threshold consideration only. Merely because this requirement can be met in a given case does not automatically warrant prosecution; further investigation may instead be warranted, and the prosecutor should still take into account all relevant considerations, including those described in the following provisions, in deciding upon his/her course of action. On the other hand, failure to meet the minimal requirement of probable cause is an absolute bar to initiating a federal prosecution, and in some circumstances may preclude reference to other prosecuting authorities or recourse to non-criminal sanctions or other measures as well.

[cited in [JM 9-10.060](#); [JM 9-2.031](#)]

[updated February 2018]

The U.S. Department of Justice, Justice Manual
 Principles of Federal Prosecution, 9-27.001–9-27.300
<https://www.justice.gov/jm/jm-9-27000-principles-federal-prosecution>

9-27.220 - GROUNDS FOR COMMENCING OR DECLINING PROSECUTION

The attorney for the government should commence or recommend federal prosecution if he/she believes that the person's conduct constitutes a federal offense, and that the admissible evidence will probably be sufficient to obtain and sustain a conviction, unless (1) the prosecution would serve no substantial federal interest; (2) the person is subject to effective prosecution in another jurisdiction; or (3) there exists an adequate non-criminal alternative to prosecution.

Comment. Evidence sufficient to sustain a conviction is required under Rule 29(a) of the Federal Rules of Criminal Procedure, to avoid a judgment of acquittal. Moreover, both as a matter of fundamental fairness and in the interest of the efficient administration of justice, no prosecution should be initiated against any person unless the attorney for the government believes that the admissible evidence is sufficient to obtain and sustain a guilty verdict by an unbiased trier of fact. In this connection, it should be noted that, when deciding whether to prosecute, the government attorney need not have in hand, at that time, all of the evidence upon which he/she intends to rely at trial, if he/she has a reasonable and good faith belief that such evidence will be available and admissible at the time of trial. Thus, for example, it would be proper to commence or recommend a prosecution even though a key witness may be out of the country, so long as there is a good faith basis to believe that the witness's presence at trial could reasonably be expected.

Where the law and the facts create a sound, prosecutable case, the likelihood of an acquittal due to unpopularity of some aspect of the prosecution or because of the overwhelming popularity of the defendant or his/her cause is not a factor prohibiting prosecution. For example, in a civil rights case or a case involving an extremely popular political figure, it might be clear that the evidence of guilt—viewed objectively by an unbiased factfinder—would be sufficient to obtain and sustain a conviction, yet the prosecutor might reasonably doubt, based on the circumstances, that the jury would convict. In such a case, despite his/her negative assessment of the likelihood of a guilty verdict (based on factors extraneous to an objective view of the law and the facts), the prosecutor may properly conclude that it is necessary and appropriate to commence or recommend prosecution and allow the criminal process to operate in accordance with the principles set forth here.

However, the attorney for the government's belief that a person's conduct constitutes a federal offense and that the admissible evidence will probably be sufficient to obtain and sustain a conviction is not sufficient standing by itself to commence or recommend prosecution. The prosecution must also serve a substantial federal interest, and the prosecutor must assess whether, in his/her judgment, the person is subject to effective prosecution in another jurisdiction; and whether there exists an adequate non-criminal alternative to prosecution. It is left to the judgment of the attorney for the government to determine whether these circumstances exist. In exercising that judgment, the attorney for the government should consult JM [9-27.230](#), [9-27.240](#), [9-27.250](#), and [9-27.260](#).

[cited in [JM 6-4.210](#); [JM 9-10.060](#); [JM 9-27.200](#); [JM 9-28.300](#)]

[updated January 2023]

9-27.230 - INITIATING AND DECLINING CHARGES—SUBSTANTIAL FEDERAL INTEREST

In determining whether a prosecution would serve a substantial federal interest, the attorney for the government should weigh all relevant considerations, including:

The U.S. Department of Justice, Justice Manual
 Principles of Federal Prosecution, 9-27.001–9-27.300
<https://www.justice.gov/jm/jm-9-27000-principles-federal-prosecution>

1. Federal law enforcement priorities, including any federal law enforcement initiatives or operations aimed at accomplishing those priorities;
2. The nature and seriousness of the offense;
3. The deterrent effect of prosecution;
4. The person's culpability in connection with the offense;
5. The person's history with respect to criminal activity;
6. The person's willingness to cooperate in the investigation or prosecution of others;
7. The person's personal circumstances;
8. The interests of any victims; and
9. The probable sentence or other consequences if the person is convicted.

Comment. The list of relevant considerations is not intended to be all-inclusive. Moreover, not all of the factors will be applicable to every case, and in any particular case one factor may deserve more weight than it might in another case.

1. **Federal Law Enforcement Priorities.** Federal law enforcement resources are not sufficient to permit prosecution of every alleged offense over which federal jurisdiction exists. Accordingly, in the interest of allocating its limited resources so as to achieve an effective nationwide law enforcement program, from time to time the Attorney General may establish national investigative and prosecutorial priorities. These priorities are designed to focus federal law enforcement efforts on those matters within the federal jurisdiction that are most deserving of federal attention and are most likely to be handled effectively at the federal level, rather than state or local level. As just one example, prosecution of offenses within the exclusive territorial jurisdiction of the United States, where no other avenue of prosecution exists, serves a particular and important federal interest. In addition, individual United States Attorneys are required to establish their own priorities (in consultation with law enforcement authorities), within the national priorities, in order to concentrate their resources on problems of particular local or regional significance. The Attorney General and individual United States Attorneys may implement specific federal law enforcement initiatives and operations designed at accomplishing those priorities. In weighing the federal interest in a particular prosecution, the attorney for the government should give careful consideration to the extent to which prosecution would accord with these national and local priorities, as well as federal law enforcement initiatives or operations designed to accomplish them, whether on a national level or by important impact on local law enforcement needs. The fact that a particular prosecution is part of a larger federal law enforcement initiative that serves a substantial federal interest is an appropriate and relevant consideration in determining whether that individual prosecution also serves such a federal interest.
2. **Nature and Seriousness of Offense.** It is important that limited federal resources not be wasted in prosecuting inconsequential cases or cases in which the violation is only technical. Thus, in determining whether a substantial federal interest exists that requires prosecution, the attorney for the government should consider the nature and seriousness of the offense involved. A number of factors may be relevant to this consideration. One factor that is obviously of primary importance is the actual or potential impact of the offense on the community and on the victim(s). The nature and seriousness of the offense may also include a consideration of national security interests.

The impact of an offense on the community in which it is committed can be measured in several ways: in terms of economic harm done to community interests; in terms of physical danger to the citizens or damage to public property; and in terms of erosion of the inhabitants' peace of mind and sense of security. In assessing the seriousness of the offense in these terms, the prosecutor may properly weigh such questions as whether the violation is technical or relatively inconsequential in nature and what the public

The U.S. Department of Justice, Justice Manual
Principles of Federal Prosecution, 9-27.001–9-27.300
<https://www.justice.gov/jm/jm-9-27000-principles-federal-prosecution>

attitude may be toward prosecution under the circumstances of the case. The public may be indifferent, or even opposed, to enforcement of the controlling statute whether on substantive grounds, or because of a history of non-enforcement, or because the offense involves essentially a minor matter of private concern and the victim is not interested in having it pursued. On the other hand, the nature and circumstances of the offense, the identity of the offender or the victim, or the attendant publicity, may be such as to create strong public sentiment in favor of prosecution. While public interest, or lack thereof, deserves the prosecutor's careful attention, it should not be used to justify a decision to prosecute, or to take other action, that is not supported on other grounds. Public and professional responsibility sometimes will require the choosing of a particularly unpopular course.

3. **Deterrent Effect of Prosecution.** Deterrence of criminal conduct, whether it be criminal activity generally or a specific type of criminal conduct, is one of the primary goals of the criminal law. This purpose should be kept in mind, particularly when deciding whether a prosecution is warranted for an offense that appears to be relatively minor; some offenses, although seemingly not of great importance by themselves, if commonly committed would have a substantial cumulative impact on the community.
4. **The Person's Culpability.** Although a prosecutor may have sufficient evidence of guilt, it is nevertheless appropriate for him/her to give consideration to the degree of the person's culpability in connection with the offense, both in the abstract and in comparison with any others involved in the offense. If, for example, the person was a relatively minor participant in a criminal enterprise conducted by others, or his/her motive was non-criminal, and no other factors require prosecution, the prosecutor might reasonably conclude that some course other than prosecution would be appropriate.
5. **The Person's Criminal History.** If a person is known to have a prior conviction or is reasonably believed to have engaged in criminal activity at an earlier time, this should be considered in determining whether to commence or recommend federal prosecution. In this connection, particular attention should be given to the nature of the person's prior criminal involvement, when it occurred, its relationship, if any, to the present offense, and whether he/she previously avoided prosecution as a result of an agreement not to prosecute in return for cooperation or as a result of an order compelling his/her testimony. By the same token, a person's lack of prior criminal involvement or his/her previous cooperation with the law enforcement officials should be given due consideration in appropriate cases.
6. **The Person's Willingness to Cooperate.** A person's willingness to cooperate in the investigation or prosecution of others is another appropriate consideration in the determination whether a federal prosecution should be undertaken. Generally speaking, a willingness to cooperate should not by itself relieve a person of criminal liability. There may be some cases, however, in which the value of a person's cooperation clearly outweighs the federal interest in prosecuting him/her. These matters are discussed more fully below, in connection with plea agreements and non-prosecution agreements in return for cooperation.
7. **The Person's Personal Circumstances.** In some cases, the personal circumstances of an accused may be relevant in determining whether to prosecute or to take other action. Some circumstances particular to the accused, such as extreme youth, advanced age, or mental or physical impairment, may suggest that prosecution is not the most appropriate response to his/her offense; other circumstances, such as the fact that the accused occupied a position of trust or responsibility which he/she violated in committing the offense, might weigh in favor of prosecution.
8. **The Interests of Any Victims.** It is important to consider the economic, physical, and psychological impact of the offense, and subsequent prosecution, on any victims. It is appropriate for the prosecutor to take into account such matters as the seriousness of the harm inflicted and the victim's desire for prosecution. Prosecutors may solicit the victim's views on the filing of charges through a general conversation without reference to any particular defendant or charges. For more information regarding the Department's obligations to victims, see the Crime Victims'

The U.S. Department of Justice, Justice Manual
Principles of Federal Prosecution, 9-27.001–9-27.300
<https://www.justice.gov/jm/jm-9-27000-principles-federal-prosecution>

Rights Act, 18 U.S.C. § 3771, the Victims' Rights and Restitution Act, 34 U.S.C. § 20141, and the [Attorney General Guidelines for Victim and Witness Assistance](#). When considering whether to initiate a prosecution or pursue an alternative resolution, such as a deferred or non-prosecution agreement, prosecutors should be aware of the possible effect the decision may have on the Department's ability to compensate victims of the underlying crimes and on the Crime Victims Fund (CVF). The CVF is a statutorily created fund that is financed by fines and penalties paid by convicted federal offenders. See 34 U.S.C. § 20101. Money from the CVF is used to support federal, tribal, state, and local crime victim assistance programs and to help compensate crime victims across the country. Pursuant to statute, almost all criminal fines collected following conviction are deposited into the CVF, along with all Special Assessments. See 34 U.S.C. § 20101(b)(1). In contrast, fines collected pursuant to a deferred prosecution or non-prosecution agreement are not deposited into the CVF but rather are sent to the General Fund of the Treasury. See 31 U.S.C. 3302(b).

9. **The Probable Sentence or Other Consequence.** In assessing the strength of the federal interest in prosecution, the attorney for the government should consider the sentence, or other consequence, that is likely to be imposed if prosecution is successful, and whether such a sentence or other consequence would justify the time and effort of prosecution. If the offender is already subject to a substantial sentence, or is already incarcerated, as a result of a conviction for another offense, the prosecutor should weigh the likelihood that another conviction will result in a meaningful addition to his/her sentence, might otherwise have a deterrent effect, or is necessary to ensure that the offender's record accurately reflects the extent of his/her criminal conduct. For example, it might be desirable to commence a bail-jumping prosecution against a person who already has been convicted of another offense so that law enforcement personnel and judicial officers who encounter him/her in the future will be aware of the risk of releasing him/her on bail. On the other hand, if the person is on probation or parole as a result of an earlier conviction, the prosecutor should consider whether the public interest might better be served by instituting a proceeding for violation of probation or revocation of parole, than by commencing a new prosecution. The prosecutor should also be alert to the desirability of instituting prosecution to prevent the running of the statute of limitations and to preserve the availability of a basis for an adequate sentence if there appears to be a chance that an offender's prior conviction may be reversed on appeal or collateral attack. Finally, if a person previously has been prosecuted in another jurisdiction for the same offense or a closely related offense, the attorney for the government should consult existing departmental policy statements on the subject of "successive prosecution" or "dual prosecution," depending on whether the earlier prosecution was federal or nonfederal. See [JM 9-2.031](#) (Petite Policy).

There are also considerations that deserve no weight and should not influence the decision, such as the time and resources already expended in federal investigation of the case. No amount of investigative effort warrants commencing a federal prosecution that is not fully justified on other grounds.

[cited in [JM 9-2.031](#); [JM 9-27.220](#); [JM 9-27.250](#); [JM 9-27.620](#)]

[updated November 2022]

9-27.240 - INITIATING AND DECLINING CHARGES—PROSECUTION IN ANOTHER JURISDICTION

In determining whether prosecution should be declined because the person is subject to effective prosecution in another jurisdiction, the attorney for the government should weigh all relevant considerations, including:

The U.S. Department of Justice, Justice Manual
Principles of Federal Prosecution, 9-27.001–9-27.300
<https://www.justice.gov/jm/jm-9-27000-principles-federal-prosecution>

1. The strength of the other jurisdiction's interest in prosecution;
2. The other jurisdiction's ability and willingness to prosecute effectively; and
3. The probable sentence or other consequences if the person is convicted in the other jurisdiction.

When declining prosecution, or reviewing whether federal prosecution should be initiated, the attorney for the government should: (1) consider whether to discuss the matter under review with state, local, or tribal law enforcement authorities for further investigation or prosecution; and (2) coordinate with those authorities as appropriate. The attorney for the government should be especially aware of the need to coordinate with state, local, and tribal law enforcement authorities, and shall do so as permitted by law, when declining a matter that involves an ongoing threat or relates to acts of violence or abuse against vulnerable victims, including minors. The attorney for the government should document these coordination efforts, where undertaken, when federal prosecution is declined.

Comment. In many instances, it may be possible to prosecute criminal conduct in more than one jurisdiction. Although there may be instances in which a federal prosecutor may wish to consider deferring to prosecution in another federal district, or to another government, in most instances the choice will probably be between federal prosecution and prosecution by state or local authorities. The factors listed in [JM 9-27.240](#) are illustrative only, and the attorney for the government should also consider any others that appear relevant to his/her particular case.

1. **The Strength of the Jurisdiction's Interest.** The attorney for the government should consider the relative international, federal, state, and tribal interests with regard to the alleged criminal conduct. Some offenses, even though in violation of federal law, are of particularly strong interest to the authorities of the jurisdiction in which they occur (e.g., local, state, or foreign), either because of the nature of the offense, the identity of the offender or victim, the fact that the investigation was conducted primarily by foreign, state, or local investigators, or some other circumstance. Whatever the reason, when it appears that the federal interest in prosecution is less substantial than the interest of local, state, or foreign authorities, consideration should be given to referring the case to those authorities rather than commencing or recommending a federal prosecution.
2. **Ability and Willingness to Prosecute Effectively.** In assessing the likelihood of effective prosecution in another jurisdiction, the attorney for the government should also consider the intent of the authorities in that jurisdiction and whether that jurisdiction has the prosecutorial and judicial resources that are necessary to undertake prosecution promptly and effectively. Other relevant factors might be legal or evidentiary problems that might attend prosecution in the other jurisdiction. In addition, the federal prosecutor should be alert to any local conditions, attitudes, relationships, or other circumstances that might cast doubt on the likelihood of the other authorities conducting a thorough and successful prosecution.
3. **Probable Sentence Upon Conviction.** The ultimate measure of the potential for effective prosecution in another jurisdiction is the sentence, or other consequence, that is likely to be imposed if the person is convicted. In considering this factor, the attorney for the government should bear in mind not only the statutory penalties in the jurisdiction and sentencing patterns in similar cases, but also, the particular characteristics of the offense or of the offender that might be

The U.S. Department of Justice, Justice Manual
Principles of Federal Prosecution, 9-27.001–9-27.300
<https://www.justice.gov/jm/jm-9-27000-principles-federal-prosecution>

relevant to sentencing. He/she should also be alert to the possibility that a conviction under another jurisdiction's laws may, in some cases, result in collateral consequences for the defendant, such as disbarment, that might not follow upon a conviction under federal law.

[cited in [JM 5-11.113](#); [JM 9-27.220](#); [JM 9-28.1100](#)]

[updated October 2021]

9-27.250 - NON-CRIMINAL ALTERNATIVES TO PROSECUTION

In determining whether there exists an adequate, non-criminal alternative to prosecution, the attorney for the government should consider all relevant factors, including:

1. The sanctions or other measures available under the alternative means of disposition;
2. The likelihood that an effective sanction will be imposed;
3. The effect of non-criminal disposition on federal law enforcement interests; and
4. The interests of any victims.

Comment. When a person has committed a federal offense, it is important that the law respond promptly, fairly, and effectively. This does not mean, however, that a criminal prosecution must be commenced. In recognition of the fact that resort to the criminal process is not necessarily the only appropriate response to serious forms of antisocial activity, Congress and state legislatures have provided civil and administrative remedies for many types of conduct that may also be subject to criminal sanction. Examples of such non-criminal approaches include civil tax proceedings; civil actions under the False Claims Act or other statutory causes of action for false or fraudulent claims; civil actions under the securities, customs, antitrust, or other regulatory laws; administrative suspension and debarment or exclusion proceedings; civil judicial and administrative forfeiture; and reference of complaints to licensing authorities or to professional organizations such as bar associations. Another potentially useful alternative to prosecution in some cases is pretrial diversion. See [JM 9-22.000](#).

Attorneys for the government should familiarize themselves with these alternatives and should consider pursuing them if they are available in a particular case. Although on some occasions they should be pursued in addition to criminal prosecution, on other occasions these alternatives can be expected to provide an effective substitute for criminal prosecution. In weighing the adequacy of such an alternative in a particular case, the prosecutor should consider the nature and severity of the sanctions or other measures that could be imposed, the likelihood that an adequate sanction would in fact be imposed, and the effect of such a non-criminal disposition on federal law enforcement interests. When considering whether to pursue a non-criminal disposition, prosecutors should consider the interests of any victims and be aware that any fines collected under such agreement will *not* be deposited into the Crime Victims Fund, but will rather go to the General Treasury. See Comment to JM 9-27.230. In evaluating victim interests and determining whether to pursue a non-criminal disposition, the prosecutor should be available to confer with the victim in furtherance of the Crime Victims' Rights Act (CVRA) and in accordance with the [Attorney General Guidelines for Victim and Witness Assistance](#). For more information regarding the Department's obligations to victims, see the Crime Victims' Rights Act, 18 U.S.C. § 3771, the Victims' Rights and Restitution Act, 34 U.S.C. § 20141, and the [Attorney General Guidelines for Victim and Witness Assistance](#).

It should be noted that referrals for non-criminal disposition may not include the transfer of grand jury material unless an order under Rule 6(e) of the Federal Rules of Criminal Procedure, is obtained. See *United States v. Sells Engineering, Inc.*, 463 U.S. 418 (1983).

The U.S. Department of Justice, Justice Manual
Principles of Federal Prosecution, 9-27.001–9-27.300
<https://www.justice.gov/jm/jm-9-27000-principles-federal-prosecution>

[cited in [JM 9-27.220](#); [JM 9-28.1100](#)]

[updated November 2022]

9-27.260 - INITIATING AND DECLINING CHARGES—IMPERMISSIBLE CONSIDERATIONS

In determining whether to commence or recommend prosecution or take other action against a person, the attorney for the government may not be influenced by:

1. The person's race, religion, gender, ethnicity, national origin, sexual orientation, or political association, activities, or beliefs;
2. The attorney's own personal feelings concerning the person, the person's associates, or the victim; or
3. The possible effect of the decision on the attorney's own professional or personal circumstances.

In addition, federal prosecutors and agents may never make a decision regarding an investigation or prosecution, or select the timing of investigative steps or criminal charges, for the purpose of affecting any election, or for the purpose of giving an advantage or disadvantage to any candidate or political party. See [§ 9-85.500](#).

[updated August 2022]

9-27.270 - RECORDS OF PROSECUTIONS DECLINED

Whenever an attorney for the government declines to commence or recommend federal prosecution, he/she should ensure that his/her decision and the reasons therefore are communicated to the investigating agency involved and to any other interested agency, and are also reflected in the office files to ensure an adequate record of disposition of matters that are brought to the attention of the government attorney for possible criminal prosecution, but that do not result in federal prosecution. When prosecution is declined in serious cases on the understanding that action will be taken by other authorities, appropriate steps should be taken to ensure that the matter receives their attention.

[updated February 2018]

9-27.300 - SELECTING CHARGES—CHARGING MOST SERIOUS OFFENSES

Once the decision to prosecute has been made, the attorney for the government should charge and pursue the most serious, readily provable offenses. By definition, the most serious offenses are those that carry the most substantial guidelines sentence, including mandatory minimum sentences.

However, there will be circumstances in which good judgment would lead a prosecutor to conclude that a strict application of the above charging policy is not warranted. In that case, prosecutors should carefully consider whether an exception may be justified. Consistent with longstanding Department of Justice policy, any decision to vary from the policy must be approved by a United States Attorney or Assistant Attorney General, or a supervisor designated by the United States Attorney or Assistant Attorney General, and the reasons must be documented in the file.

The U.S. Department of Justice, Justice Manual
Principles of Federal Prosecution, 9-27.001–9-27.300
<https://www.justice.gov/jm/jm-9-27000-principles-federal-prosecution>

To ensure consistency and accountability, charging and plea agreement decisions must be reviewed by a supervisory attorney. All but the most routine indictments should be accompanied by a prosecution memorandum that identifies the charging options supported by the evidence and the law and explains the charging decision therein. Each United States Attorney's Office and litigating division of the Department is required to promulgate written guidance describing its internal indictment review process.

Comment. Once it has been determined to commence prosecution, either by filing a complaint or an information, or by seeking an indictment from the grand jury, the attorney for the government must determine what charges to file or recommend. When the conduct in question consists of a single criminal act, or when there is only one applicable statute, this is not a difficult task. Typically, however, a defendant will have committed more than one criminal act and his/her conduct may be prosecuted under more than one statute. Moreover, the selection of charges may be complicated further by the fact that different statutes have different proof requirements and provide substantially different penalties. In such cases, considerable care is required to ensure selection of the proper charge or charges. In addition to reviewing the concerns that prompted the decision to prosecute in the first instance, particular attention should be given to the need to ensure that the prosecution will be both fair and effective.

At the outset, the attorney for the government should bear in mind that he/she will have to introduce at trial admissible evidence sufficient to obtain and sustain a conviction, or else the government will suffer a dismissal, or a reversal on appeal. For this reason, he/she should not include in an information, or recommend in an indictment, charges that he/she cannot reasonably expect to prove beyond a reasonable doubt by legally sufficient and admissible evidence at trial.

In connection with the evidentiary basis for the charges selected, the prosecutor should also be particularly mindful of the different requirements of proof under different statutes covering similar conduct. For example, the bribe provisions of 18 U.S.C. § 201 require proof of "corrupt intent," while the "gratuity" provisions do not. Similarly, the "two witness" rule applies to perjury prosecutions under 18 U.S.C. § 1621 but not under 18 U.S.C. § 1623.

[JM 9-27.300](#) also expresses the principle that a defendant generally should be charged with the most serious offenses that are encompassed by his/her conduct, and that are readily provable. As noted above, this ordinarily will be the offenses that carry the most substantial guidelines sentence, including mandatory minimum sentences. Where two crimes have the same statutory maximum and the same guideline range, but only one contains a mandatory minimum penalty, the one with the mandatory minimum is the more serious. Similarly, in cases involving a theft or fraud offense that also involve an aggravated identity theft charge, 18 U.S.C. § 1028A, prosecutors should ordinarily charge the predicate offense (which likely would carry the highest guidelines sentence) and the identity theft offense (which carries a mandatory minimum). This principle provides the framework for ensuring equal justice in the prosecution of federal criminal offenders. It guarantees that every defendant will start from the same position, charged with the most serious criminal act he/she commits. Of course, he/she may also be charged with other criminal acts (as provided in [JM 9-27.320](#)), if the proof and the government's legitimate law enforcement objectives warrant additional charges. /p>

[cited in [JM 9-27.400](#); [JM 9-28.1200](#); [JM 9-100.020](#)]

[updated February 2018]

APPENDIX K. DAC-IPAD PROFESSIONAL STAFF

PROFESSIONAL STAFF

Colonel Jeff A. Bovarnick, U.S. Army, JAG Corps, Executive Director

Ms. Julie K. Carson, Deputy Director

Mr. Dale L. Trexler, Chief of Staff

Ms. Theresa Gallagher, Attorney-Advisor

Ms. Nalini Gupta, Attorney-Advisor

Ms. Amanda Hagy, Senior Paralegal

Mr. R. Chuck Mason, Attorney-Advisor

Ms. Marguerite McKinney, Management & Program Analyst

Ms. Meghan Peters, Attorney-Advisor

Ms. Stacy Powell, Senior Paralegal

Ms. Stayce Rozell, Senior Paralegal

Ms. Terri Saunders, Attorney-Advisor

Ms. Kate Tagert, Attorney-Advisor

Ms. Eleanor Magers Vuono, Attorney-Advisor

COMMITTEE CONSULTANTS

Dr. Alice Falk, Technical Writer-Editor

Ms. Laurel Prucha Moran, Graphic Designer

Dr. William “Bill” Wells, Criminologist

APPENDIX L. ACRONYMS AND ABBREVIATIONS

ABA	American Bar Association
DAC-IPAD	Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces
DoD	Department of Defense
DOJ	Department of Justice
FY	fiscal year
GCMCA	general court-martial convening authority
IRC	Independent Review Commission on Sexual Assault in the Military
JPP	Judicial Proceedings Since Fiscal Year 2012 Amendments Panel (Judicial Proceedings Panel)
MCIO	military criminal investigative organization
MCM	Manual for Courts-Martial
MJRG	Military Justice Review Group
NDAA	National Defense Authorization Act
NDAA	National District Attorneys Association
OSTC	Office of Special Trial Counsel
PC	probable cause
PHO	preliminary hearing officer
R.C.M.	Rule for Courts-Martial
RFI	request for information

ROI	entire report of investigation
TJAG	The Judge Advocate General
STC	special trial counsel
UCMJ	Uniform Code of Military Justice

APPENDIX M. SOURCES CONSULTED

1. U.S. Constitution

U.S. CONST. amend. IV

U.S. CONST. amend. V

2. Legislative Sources

a. Enacted Statutes

Articles of War, 1920 amendments (June 4, 1920)

Military Selective Service Act of 1948, Pub. L. No. 80-759, §§ 201--246, 62 Stat. 604, 627-44 (1948)

10 U.S.C. §§ 801 – 940 (Uniform Code of Military Justice) (1950)

10 U.S.C. § 824a (2023) [Effective Dec. 27, 2023]

10 U.S.C. § 832 (2012)

10 U.S.C. § 832 (2014)

10 U.S.C. §§ 826, 826a, 830, 830a, 832–834, 837 (2019 & 2021 supp.)

National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, 126 Stat. 1632 (2012)

National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, 127 Stat. 672 (2013)

Carl Levin and Howard P. “Buck” McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, 128 Stat. 3292, 3374 (2014)

National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016)

National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, 132 Stat. 1761 (2018)

National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, 133 Stat. 1198 (2019)

National Defense Authorization Act for Fiscal Year 2022, S.1605, 117th Cong. (2021)

National Defense Authorization Act for Fiscal Year 2023, Pub. L. No. 117–263, 136 Stat. 2395 (2022)

b. Congressional Records and Hearings

Congressional Record – House, 159 Cong. Rec. H7059 (Nov. 14, 2013)

A Bill to Promote the Administration of Military Justice by Amending Existing Laws Regulating Trial by Court-Martial, and for Other Purposes: Hearings Before the Committee on Military Affairs, United States Senate, S. 5320, (Feb. 13, 1919)

3. Judicial Decisions

a. U.S. Supreme Court

Illinois v. Gates, 462 U.S. 213 (1983)

Serfass v. United States, 420 U.S. 377 (1975)

Brinegar v. United States, 338 U.S. 160 (1949)

Humphrey v. Smith, 336 U.S. 695 (1949)

b. U.S. Circuit Courts of Appeals

United States v. Dionisio, 503 F.3d 78 (2d Cir. 2007)

c. U.S. Court of Appeals for the Armed Forces

United States v. Darnall, 76 M.J. 326 (C.A.A.F. 2017)

United States v. Leedy, 65 M.J. 208 (C.A.A.F. 2007)

United States v. Samuels, 27 C.M.R. 280 (1959)

United States v. Bell, 44 M.J. 403 (C.A.A.F. 1996)

U.S. v. Barry, 78 M.J. 70 (C.A.A.F. 2018)

d. Service Courts of Criminal Appeals

United States v. Meador, 75 M.J. 682 (U.S.C.G.C.C.A. 2016)

United States v. Howe, 37 M.J. 1062 (N-M. C.M.R. 1993)

United States v. Hanabarger, No. 201900031, 2020 CCA LEXIS 252 (N-M. Ct. Crim. App. July 30, 2020)

United States v. Lewis, No. 201900049, 2020 CCA LEXIS 199 (N-M. Ct. Crim. App. June 8, 2020)

United States v. Hyppolite, No. ACM 39358, 2018 CCA (A.F.C.C.A. Oct. 25, 2018)

United States v. Henry, 76 M.J. 595 (A.F. Ct. Crim. App. 2017)

4. Rules and Regulations

a. Executive Orders

Manual for Courts-Martial, United States (1921 ed.)

Manual for Courts-Martial, United States (1951 ed.)

Manual for Courts-Martial, United States (2012 ed.)

Manual for Courts-Martial, United States (2016 ed.)

Manual for Courts-Martial, United States (2019 ed.)

Draft Executive Order, 2023 Amendments to the Manual for Courts-Martial, United States,
87 Fed. Reg. 63,484 (Oct. 19, 2022)

b. Department of Defense and Military Services

Air Force Instruction 51-201, *Administration of Military Justice* (Jan. 18, 2019)

Army Regulation 27-26, *Rules of Professional Conduct for Lawyers* (June 28, 2018)

Department of the Navy, JAG Instruction 5803.1E, *Professional Conduct of Attorney Practicing
Under the Cognizance and Supervision of the Judge Advocate General* (Jan. 20, 2015)

Air Force Instruction 51-110, *Professional Responsibility Program* (Dec. 11, 2018)

Commandant Instruction M5800.1, *Coast Guard Legal Professional Responsibility Program* (June 1, 2005)

c. Other Agencies

Federal Rules of Criminal Procedure, Notes of Advisory Committee on Rules (2002)

5. Meetings and Hearings

Transcript of DAC-IPAD Public Meeting (Aug. 23, 2019)

Transcript of DAC-IPAD Public Meeting (Nov. 15, 2019)

Transcript of DAC-IPAD Public Meeting (Feb. 14, 2020)

Transcript of DAC-IPAD Public Meeting (Nov. 6, 2020)

Transcript of DAC-IPAD Case Review Working Group Meeting (Aug. 23, 2018)

Transcript of DAC-IPAD Policy Subcommittee Meeting (Dec. 3, 2020)

6. Military and Civilian Federal Policy

a. Department of Defense and Military Services

Non-binding Disposition Guidance, accompanying the Manual for Courts-Martial, Appendix 2.1 United States (2019 ed.)

Memorandum from Secretary of Defense, *DoD Advisory Committees—Zero-Based Review* (Jan. 30, 2020)

Memorandum from Secretary of Defense, *Sexual Assault Prevention and Response* (Aug. 14, 2013)

Memorandum from Secretary of Defense, *Commencing DoD Actions and Implementation to Address Sexual Assault and Sexual Harassment in the Military* (Sept. 22, 2021)

Department of the Army Pamphlet 27-17, *Procedural Guide for Article 32 Preliminary Hearing Officer* (June 18, 2015)

Department of the Navy, *The Article 32 Preliminary Hearing Officer's Guide* (Feb. 2019)

Air Force Legal Operations Agency, Military Justice Division (AFLOA/JAJM), *Article 32 Preliminary Hearing Officer's Guide* (June 24, 2019)

b. Other Agencies

U.S. Department of Justice, *Justice Manual*

United States. Office of Justice Programs. Office for Victims of Crime. *New Directions from the Field: Victim's Rights and Services for the 21st Century* (1997)

American Bar Association, *ABA Standards for Criminal Justice: Standards for the Prosecution Function* (4th ed. 2017)

National District Attorneys Association, *National Prosecution Standards* (4th ed. 2023)

King County, Washington, *Prosecuting Attorney’s Filing and Disposition Standards* (Rev. Nov. 2021)

7. Official Reports

a. DoD and DoD Agency Reports

Independent Review Commission on Sexual Assault in the Military, *Hard Truths and the Duty to Change: Recommendations from the Independent Review Commission on Sexual Assault in the Military* (July 2021)

Report of the Fort Hood Independent Review Committee (Dec. 2020)

Military Justice Review Group, *Report of the Military Justice Review Group, Part I: UCMJ Recommendations* (Dec. 22, 2015)

Special U.S. War Department Board, *Proceedings and Report of Special War Department Board on Courts-Martial and Their Procedure* (July 17, 1919)

Reports of the Military Services to Congress, *Report on Military Justice for Fiscal Year 2020* (Dec. 31, 2020)

b. Response Systems to Adult Sexual Assault Crimes Panel [Response Systems Panel] Report

Response Systems Panel, *Report of the Response Systems to Adult Sexual Assault Crimes Panel* (June 2014)

Comparative Systems Subcommittee to the Response Systems Panel, *Annex to the Report of the Response Systems to Adult Sexual Assault Crimes Panel: Report of the Comparative Systems Subcommittee* (May 2014)

c. Judicial Proceedings Since Fiscal Year 2012 Amendments Panel [Judicial Proceedings Panel] Reports

Judicial Proceedings Panel, *Report on Panel Concerns Regarding the Fair Administration of Military Justice in Sexual Assault Cases* (Sept. 2017)

Judicial Proceedings Panel, *Report on Statistical Data Regarding Military Adjudication of Sexual Assault Offenses* (Apr. 2016)

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

DAC-IPAD, *Third Annual Report* (Mar. 2019)

DAC-IPAD, *Fourth Annual Report* (Mar. 2020)

DAC-IPAD, *Court-Martial Adjudication Data Report* (Nov. 2019)

DAC-IPAD, *Report on Investigative Case File Reviews for Military Adult Penetrative Sexual Offense Cases Closed in Fiscal Year 2017* (Oct. 2020)

8. Scholarly Articles

Booker, John W., Major, U.S. Army, *Improving Uniform Code of Military Justice Reform*, 222 Mil. L. Rev. 1, 10 (Winter 2014)

- Kiel, John L. Jr., Lieutenant Colonel, U.S. Army, *Not Your Momma's 32: Explaining the Impetus for Change Behind Key Provisions of the Article 32 Preliminary Hearing*, Army Law (2016)
- David A. Schlueter, *Reforming Military Justice: An Analysis of the Military Justice Act of 2016*, St. Mary's University School of Law (2017)
- Kostik, Frank E., Lieutenant Colonel, U.S. Army, and Elizabeth L. Lippy, *Consequence of Change: An Argument to Increase Litigation Experience to Fill the Void Left by the Changes to the Preliminary Hearing in the Military Justice System*, 43 Am. J. Trial Advoc. (Fall 2019)
- Max Jesse Goldberg, *Congressional Influence on Military Justice*, 130 The Yale Law Journal 2110 (2021)
- Jennifer G. Long and Elaine Nugent-Borakove, *Beyond Conviction Rates: Measuring Success in Sexual Assault Prosecutions*, Strategies Issue 12 (Apr. 2014)
- Jeremy S. Weber, Colonel, U.S. Air Force, *Whatever Happened to Good Order and Discipline?* 125 Clev. St. L. Rev. 123 (2017)
- Mitchell M. Suliman, *Probable Cause and the Provable Case: Bridging the Ethical Gap that Exists in the Military Justice System*, 49 Hofstra Law Review 187 (Fall 2020)
- Rachel E. VanLandingham, *Acoustic Separation in Military Justice: Filling the Decision Rule Vacuum with Ethical Standards*, 11 Ohio St. J. Crim. L. 389 (2014)

9. Reference Books

- Wayne LaFare, Jerold Israel, Nancy King, & Orin Kerr, *Criminal Procedure* (4th ed. 2019 update)
- Army Criminal Law Deskbook (2021)
- The Wolters Kluwer Bouvier Law Dictionary Desk Edition (2012)
- Ballentine's Law Dictionary (3rd ed. 2010)
- Black's Law Dictionary Online

10. Requests for Information and Responses

- Military Services' Responses to DAC-IPAD Request for Information Set 11 (June 2019)
- Military Services' Responses to DLSA Request for Information (Oct. 2021)

11. News Articles and Press Releases

- Jennifer Steinhauer, "2 Face Court-Martial in Naval Academy Assault Case," New York Times (Oct. 10, 2013)
- Rebecca Boone, "Bergdahl appeals court-martial over Trump, McCain comments," Associated Press (Mar. 2, 2019)
- Thomas Spoehr, "Dismantling the military justice system will not reduce sexual assault," The Hill (July 13, 2021)
- Michel Paradis, "The Biden Administration Joins the Military Justice Reform Debate as it Heats Up in the Senate," LawFare (July 27, 2021)

Jan Ransom, “‘Nobody Believed Me’: How Rape Cases Get Dropped,”
New York Times (July 19, 2021)

Press Release, Inhofe Releases Letters from Top Military Officials Citing Serious Concerns with
Military Justice Improvement and Increasing Prevention Act (June 22, 2021)

12. Letters, Emails, and Other Media

Letter from Mr. William Castle, Acting General Counsel for the Department of Defense,
to the DAC-IPAD Chair Martha Bashford (June 7, 2018)

