Service Criminal Law/Military Justice Division Combined Responses to RFI 11
Prosecution Decisions, Victim Participation, and Conviction/Acquittal Rates

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

Policy Question 1: Article 32 Preliminary Hearing.

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

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

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

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

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

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

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

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

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

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

USN MJ (A.Q1a.): We do not support the proposition that a PHO's determination of probable cause be binding on the convening authority. Given the role of experienced trial counsel combined with the SJA's statutory obligation under Article 34 to provide written advice to convening authorities concerning probable cause in sexual assault cases, the PHO's opinion concerning probable cause should not be binding on the general court-martial convening authority (GCMCA).
The proposal places too much authority in the hands of a single judge advocate (the PHO) who may lack the necessary experience, information, and perspective to make binding, weighty decisions concerning the determination of probable cause.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

USMC MJ (A.Q1c.): Yes, there could be benefit in having a preliminary hearing before preferral, but this proposal would require further study to analyze potential advantages or disadvantages.
If a preliminary hearing was a closed hearing, similar to a grand jury, and was conducted by a judge or magistrate, that procedure might be valuable in determining probable cause and helping a commander decide whether charges should be preferred. The preliminary hearing should be similar to the civilian practice of a grand jury in that the defense is not present and there is no cross-examination of witnesses, although the witnesses could be questioned by the judge or magistrate. With a guarantee of judicial oversight at a closed hearing, victims might be more inclined to testify at the hearing. This would allow a more informed probable cause determination.

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

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

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

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

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

We find no compelling arguments for this proposition.

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

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

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

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

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

b. **Does your organization support or oppose the proposition? Why or why not?**

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

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

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

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

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

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

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

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

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

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

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

We find no compelling arguments for this proposition.

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

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

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

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

Question 1: Prosecution Initiation/Declination.

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

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

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

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

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

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

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

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

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

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

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

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

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

USMC MJ (B.Q1b.): No. Trial counsel would not recommend that a sexual assault prosecution be declined simply because the accused is subject to prosecution in another jurisdiction. They would recommend military prosecution, unless the victim has expressed a preference for civilian prosecution and the other jurisdiction has shown an ability and willingness to prosecute the case effectively.
Cases in which concurrent jurisdiction exists are governed by Department of Defense Instruction 5525.07 and Marine Corps Policy and practice advisory 1-17 "Determining Prosecutorial Jurisdiction," which requires consultation and engagement with the civilian prosecutors as early as possible. A victim or VLC provides a victim's preferences for military or civilian prosecution to the trial counsel, who document that preference on the CAM and inform the SJA of the preference. If the victim has expressed a preference for civilian prosecution, then Marine Corps policy requires the cognizant commander to ensure the civilian jurisdiction is notified of the preference. If the civilian jurisdiction has expressed interest in prosecuting the case, then the SJA would normally recommend the commander to decline military prosecution in deference to the pending civilian prosecution, unless the Marine Corps has a compelling interest in maintaining the prosecution.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Question 2: Article 32 Preliminary Hearing Practice.

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

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

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

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

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

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

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

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

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

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

USCG MJ (B.Q2a.): Yes.

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

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

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

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

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

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

USCG MJ (B.Q2b.): No.

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

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

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

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

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

USCG MJ (B.Q2c.): Yes.

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

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

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

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

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

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

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

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

Question 4: Article 33 Disposition Guidance, in Practice.

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

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

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

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

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

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

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

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

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

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

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

important are the victims' preferences and whether admissible evidence will likely be sufficient to obtain and sustain a conviction. This process is the same, regardless of the PHOs recommendation.
These considerations are being communicated orally to the convening authority by the SJA. The SJA's written advice merely parrots the language in Article 34(a)(1)(A)-(C), UCMJ. The trial counsel's written analysis is not provided to the convening authority to protect it from disclosure. Having the SJA orally brief the convening authority does not provide a historical record and allow future statistical analysis of the actual reasons why a case was not referred to trial.

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

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

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

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

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

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

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

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

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

USMC MJ (B.Q4c.): The SJA may advise the convening authority to refer the case when doing so is in the interests of justice and is supported by consideration of the non-binding disposition factors. Based on those factors, an SJA should usually not recommend prosecution unless a conviction is likely. But predicting whether a conviction is "likely" is a very subjective and difficult determination.
Because of the proof beyond a reasonable doubt standard, convictions in sexual assault cases are usually not likely unless there is independent corroboration of the victim's allegation such as a confession, DNA evidence, false denials by the accused, or independent witnesses of a victim's incapacity to consent. But that does not mean that we should not prosecute cases without such evidence. Prosecution may sometimes be warranted by consideration of all the non-binding disposition factors. But prosecution is usually not warranted simply because the low threshold of probable cause is met.

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

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

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

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

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

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

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

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

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

Question 5: Conviction and Acquittal Rates for Sexual Assault Offenses

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Question 6: Prosecutor and Defense Counsel Training.

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

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

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

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

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

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

Each trial (prosecution) office is headed by an MJLQ officer who is an 0-4 select or higher. These officers were hand-selected for their positions by the Judge Advocate General due to their experience, knowledge, and aptitude in military justice. Every STC serves as a supervisory attorney over the prosecutors and paralegals in the office. The STC provides regular training and mentorship to the core attorneys. The STC details cases to individuals considering many factors, but most importantly competence, experience, and case load.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

with prosecution was the victim's declination. In other words, the victim must have first participated enough to allow the command to conclude there was sufficient evidence to otherwise prosecute the case.
It is much more common for victims to decline to participate earlier in the process in the following two scenarios: (1) a victim intends to either make a restricted report, or does not intend to report at all, but a third party report or disclosure alerts the command or law enforcement; or (2) a victim must make an unrestricted report to request limited services, such as an expedited transfer or a military protective order, but does not intend to participate in the justice process. In both of those situations, it is common for a victim to consult with a VLC, make an unrestricted report, and then inform NCIS — who must investigate — that they do not desire to make a statement or participate in the investigation in any way. In those cases, the NCIS investigation would be closed, and the SADR would indicate that the subject was unknown or there was insufficient evidence to prosecute. In FY18, the Marine Corps had 268 cases closed due to an unknown subject or insufficient evidence.
But those numbers do not reflect the significant number of those cases where the reason the subject remained unknown or that there was insufficient evidence was because the victim declined to provide a statement or participate in the investigation.
For a more complete answer to this question, the DAC-IPAD might consider submitting an RFI to MCIO's requesting the number of cases where the investigation was terminated because of the victim's declination to participate.

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

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

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

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

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

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

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

USMC MJ (B.Q7b.): Victims are neither required nor expected to provide any justification to a trial counsel or SJA for what is often a very personal decision. The VLCO would be better able to answer this question.
However, as discussed in the last question, the majority of victim declinations occur early in the process when the military is required to investigate an offense the victim never wanted criminally investigated in the first place. After that, based on anecdotal evidence the remaining declinations generally occur when a victim consults with a VLC and believes an acquittal is likely or after unexpected case developments or lengthy delays in a case. Examples of unexpected case developments include a last-minute continuance delaying the trial, an adverse ruling on a 412 or 513 motion, or granting a discovery request for personal information a victim thought would remain private. Declinations are also very common in retrials if a case was remanded by an appellate court.

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

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