Trial Defense Service (TDS) Combined Service Responses to RFI 11
Prosecution Decisions, Victim Participation, and Conviction/Acquittal Rates

A. Policy Questions for Trial Defense Service Organizations

Policy Question 1: Article 32 Preliminary Hearing.

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

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

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

USA TDS (A.Q1a.): Yes. The PHO's decision as to probable cause on a preferred charge or specification should be binding on the convening authority with respect to every charge, not just sexual assault charges. When a PHO does not find probable cause for an offense, that offense should be dismissed without prejudice.
In the event charges are dismissed without prejudice, the government should be able to prefer new charges only when additional evidence that was not available to the government at the time of the Article 32 Preliminary Hearing becomes available and that evidence clearly establishes probable cause. Further, the government should have recourse to "appeal" the PHO's findings if they are clearly erroneous which would allow them to seek a new Article 32 Preliminary Hearing but not allow them to proceed with referral absent a probable cause finding by a PHO. The appeal authority could be a military judge.

The stated purpose for the Art 32 under the new law is for the PHO to determine if there is sufficient evidence to establish probable cause. We require that the PHO be an attorney so that the officer considering the evidence can provide a legal analysis. Under the current system, there is little, if any, utility to the Article 32 when the government can simply ignore the PHO's recommendation. Further, allowing a charge to go forward that has not met even the relatively low bar of probable cause results in more acquittals at trial.
Making the PHO's probable cause finding binding will motivate counsel for the government to better investigate the allegations and fully develop and prepare the case earlier in the process. The government will likely present more evidence and witnesses at the hearing to prove up the allegations and the defense may be motivated to reveal evidence early in hopes of prevailing at

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

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

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

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

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

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

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

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

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

Moreover, allowing a case to go forward when the government cannot even establish probable cause undermines good order and discipline and is unfair to the accused, the complaining witness, and the command. It forces a drawn out court-martial process, which can be burdensome on the command and extremely stressful to both the complaining witness and the accused. When the accused is subsequently acquitted, (1) the complaining witness may feel betrayed by the system, (2) the accused, despite the acquittal, may be unable to overcome the taint of the allegation and the impacts of having been on administrative hold for months or years, (3) the military community may lose faith in the system due to a sense that even unfounded allegations result in courts-martial, and (4) those outside the military may sense that military members sanction sexual assaults based on the acquittal.
The argument against making the PHO's legal conclusion on probable cause binding on the convening authority is the risk that the PHO's conclusion will be erroneous or, subsequent to the hearing, new evidence is discovered that would have supported a finding of probable cause. To counter the this concern, we propose that a specification that is deemed deficient due to a PHO's finding of lack of probable cause may be re-preferred on the accused with the permission of a superior convening authority. Specifically, before "re-preferral" can occur for any specification stricken as a result of the finding of no probable cause, the convening authority who ordered the Article 32 must submit a justification request to the next higher convening authority and provide defense counsel five days to respond to the justification/request. That convening authority will consider the submissions, together with advice from his or her SJA, and may only authorize preferral of the specification(s) upon a finding that: (1) the original PHO's legal conclusion

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

USAF TDS (A.Q1b.): Yes, but we prefer making the PHO's legal conclusion binding, as discussed above. If it is not binding, the SJA should be required to explain why the PHO's legal conclusion was clearly erroneous or why the SJA recommends proceeding despite a lack of probable cause.
What are the most compelling arguments for and against this proposition from your organization's perspective?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

USAF TDS (A.Q1c.): Maybe. The most compelling argument for this proposition is the same as it is in the civil arena: the grand jury serves as a "buffer or referee between the Government and the people." United States v. Williams, 504 U.S. 36, 47 (1992). (In military justice, everyone is "the Government," but it would still allow the regulated community to referee the prosecution of one of its members.)
The most compelling arguments against the proposition is that it is contrary to how military justice has operated for over 240 years. Since time immemorial, any person subject to the code has been empowered to prefer charges on any other person subject to the code. Because an accuser may not have the authority to convene a "grand jury," the requirement could make it easier to "bury" an allegation by simply not taking the charge to the "grand jury." Additionally, a "grand jury" will likely add additional time and expense to the military justice process and the demand for additional members will have operational impacts as well.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

D. Operational Questions for Trial Defense Services Organizations

Question 1: Article 32 Preliminary Hearings.

a. **Have the changes to Article 32, UCMJ, and R.C.M. 405—in particular the addition of the post-hearing submission of information relevant to the disposition of the charges—made Article 32 preliminary hearings more beneficial to the defense? Why or why not?**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Question 2: Conviction and Acquittal Rates.

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 Questions a through d that follow:

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

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

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

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

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

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

USMC TDS (D.Q2a.): No.
First, there is no frame of reference and context to them. Additionally, professed high acquittal rates and their corresponding consequences are generally the fault of system itself. Military leadership is being pressured to "crack down" on a perceived sexual assault problem in the military. As a result, "weak" cases are frequently sent to courts-martial. In fact it is highly common when allegations arising from an incident off base will be investigated and declined for prosecution by civilian courts (courts that generally have high conviction rates). Following the declination, the military will take jurisdiction and ultimately the case will go to a court-martial. These "weak" cases then frequently end in acquittals, driving the acquittal rate even higher. Unfortunately, this seems to result in further pressure and scrutiny from civilian leadership and the process simply repeats. Moreover, statutes are then modified with the apparent goal of securing more convictions, most times to the detriment of the rights of the accused.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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