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

Meeting Materials

May 30, 2023

DRAFT 30 May 2023

Reforming Pretrial Procedures and Establishing Uniform Prosecution Standards: Recommendations for Article 32, UCMJ, and the Secretary of Defense's Disposition Guidance in Appendix 2.1, MCM

CONTENTS

Executive Summary

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

> (1) Congress amend Article 32 to provide that a determination by the preliminary hearing officer that a specification lacks probable cause precludes referral of that specification to a general court-martial, subject to the government's limited opportunity for reconsideration. The Article 32 preliminary hearing officer's no-probable-cause determination is without prejudice to the government to bring new charges.
>
> (2) The Secretary of Defense revise Appendix 2.1, Manual for Courts-Martial, to establish uniform prosecution standards aligned with the prosecution principles contained in the United States Justice Manual. The prosecution standards should provide that special trial counsel refer charges to a general court-martial, and judge advocates recommend that a convening authority refer charges to a general court-martial, only if they believe that the Service member's conduct constitutes an offense under the Uniform Code of Military Justice (UCMJ), and that the admissible evidence will probably be sufficient to obtain and sustain a conviction when viewed objectively by an unbiased factfinder.
>
> (3) The Secretary of Defense require all special trial counsel and judge advocates who advise convening authorities to receive training on the newly established prosecution standards in Appendix 2.1 of the Manual for Courts-Martial. The training shall emphasize the principle that referral is appropriate only if these special trial counsel and advisors believe that the Service member's conduct constitutes an offense under the UCMJ, and that the admissible evidence will probably be sufficient to obtain and sustain a conviction when viewed objectively by an unbiased factfinder.

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

Commented [PETERS, Meghan]: Member observation:

This Recommendation bars referral to a general court-martial after a preliminary hearing officer's no-probable-cause determination. It does not bar referral to a special or summary court-martial following a no-probable-cause determination.

Staff note: The UCMJ does not require a preliminary hearing, or a finding of probable cause, before referring a case to a special or summary court-martial.

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

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

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

[2] *See* Appendix E, Comprehensive Courts-Martial Pretrial Processing Data FY14–FY21[Pretrial Processing Data] for data indicating that the majority of preferred (or arraigned) cases will involve one or more of the 14 covered offenses.

Draft DAC-IPAD Report on Reforming Pretrial Procedures and Establishing Uniform Prosecution Standards provided for the May 30, 2023, DAC-IPAD public meeting

I. Introduction, Methodology, and Data Analysis

Introduction

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

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

[3] MANUAL FOR COURTS-MARTIAL, UNITED STATES (2019 ed.) [2019 MCM], *available at* https://loc.gov/rr/frd/Military_Law/pdf/MCM-2019.pdf; *see also* Memorandum from Chairman of the Joint Chiefs of Staff, General Martin E. Dempsey, to Secretary of Defense Chuck Hagel, Requesting a Review of the Uniform Code of Military Justice (Aug. 5, 2013); REPORT OF THE MILITARY JUSTICE REVIEW GROUP, PART I: UCMJ RECOMMENDATIONS APPENDIX A 1261 [MJRG REPORT], *available at* https://jsc.defense.gov/Portals/99/MJRG%20Part%201.pdf.

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

[5] *Id*.

[6] On this issue, the IRC concluded: "Many commanders sincerely seek to 'send a message' of zero tolerance for sexual assault and sexual harassment but do so in reverse: rather than taking preventive measures to stop these corrosive behaviors from happening in the first place, they have misguidedly used their disposition authority to send cases to courts-martial that a specialized prosecutor knows have little chance of obtaining and sustaining a conviction. In support of this, the IRC heard from individuals and groups of commanders of all levels who believe forwarding cases with insufficient evidence to obtain and sustain a conviction—regardless of outcome—sends a strong discipline message. However, the IRC also heard that the practice of referring a case to trial to 'send a message,' but ends in an acquittal harms both victims and accused. Moreover, this philosophy and the associated disappointing trial outcomes are anathema to American concepts of justice and erode public confidence in military justice." IRC REPORT, *supra* note 4, at 11.

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

Recommendations

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

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

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

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

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

Methodology

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

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

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

In addition, the DAC-IPAD conducted extensive data analyses: (1) the DAC-IPAD reviewed source documents for thousands of adult-victim penetrative sexual offense prosecutions from all

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

[9] 10 U.S.C. § 836 (Art. 36, UCMJ).

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

Military Services and published detailed case adjudication data in November 2019,[11] and (2) the DAC-IPAD staff reviewed more than 3,000 pretrial documents for penetrative sex offense cases involving adult victims completed in fiscal years (FYs) 2014 to 2021.[12] The DAC-IPAD's analyses from these studies produced annual conviction, acquittal, and dismissal rates for adult-victim penetrative sexual offense charges, and also explained how these sexual offense charges were screened and sent to a general court-martial or other disposition.

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

In FY21, the DAC-IPAD undertook an expanded review of all cases involving any offense under the UCMJ—that is, not just sexual offenses—in which a preliminary hearing was held or waived.[13] The FY21 case review enabled the staff to compare trends in penetrative sexual offense cases with trends in all other types of cases tried under the UCMJ. Moreover, the expanded review provided context for two additional aspects of Article 32 preliminary hearings: (1) the sufficiency of the evidence presented at the hearing and (2) the depth of analysis conveyed in preliminary hearing officer reports.

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

Figure 1. Outcomes for Penetrative Offense Charges Referred to Court-Martial (FY15 – FY18)

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

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

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

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

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

- Army – 66%
- Navy – 35%
- Marines – 32%
- Air Force – 28%
- Coast Guard – 44%

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

- 103 dismissed
- 90 not guilty
- 15 guilty
- 7 mixed findings
- 1 unknown

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

In 2020, the DAC-IPAD concluded its three-year review of almost 2,000 investigative case files involving reports of adult-victim penetrative sexual offenses that reached a final disposition in

[14] *See* Table 4 of Appendix E.

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

[16] *See* Table 4 of Appendix E.

[17] See Table 5 of Appendix E.

FY17.[18] Members of the DAC-IPAD's Case Review Subcommittee made qualitative assessments as to whether the evidence contained in the investigative file and associated courts-martial records established probable cause and whether they believed there was sufficient admissible evidence for a conviction.

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

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

[18] DEFENSE ADVISORY COMMITTEE ON INVESTIGATION, PROSECUTION, AND DEFENSE OF SEXUAL ASSAULT IN THE ARMED FORCES, REPORT ON INVESTIGATIVE CASE FILE REVIEWS FOR MILITARY ADULT PENETRATIVE SEXUAL OFFENSE CASES CLOSED IN FISCAL YEAR 2017 1 (Oct. 2020) [REPORT ON INVESTIGATIVE CASE FILE REVIEWS].

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

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

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

II. Background and Recent Developments

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

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

Commented [PETERS, Meghan]: Member comment: The report should recognize the mission of the MJRP and explain that the DAC-IPAD has provided this important Panel with the DAC-IPAD's research and rationale for the recommendations in this report.

Current Pretrial Practices and Disposition Guidance in the Military Justice System

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

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

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

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

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

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

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

(2) Determining whether the convening authority has court-martial jurisdiction over the offense and the accused.

(3) Considering the form of charges.

(4) Recommending the disposition that should be made of the case.[27]

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

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

Next, Article 34, UCMJ, requires that the staff judge advocate provide a written determination that parallels the requirements of Article 32: affirmation that there is probable cause, the court-martial has jurisdiction, and the charges state an offense.[33] Staff judge advocates base their conclusions on an independent review of the evidence and on discussions with prosecutors.[34] Staff judge advocates may rely on incompetent or inadmissible evidence. The convening

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

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

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

[30] 2019 MCM, *supra* note 4, R.C.M. 405(l).

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

[32] Art. 32(c), UCMJ; 2019 M.C.M., R.C.M. 405(a), Discussion ("Determinations and recommendations of the preliminary hearing officer are advisory."). See Appendix I, History of Articles 32, 33, and 34, UCMJ.

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

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

authority may refer the case to trial only if the staff judge advocate concludes that all three elements are met—thus, the staff judge advocate's Article 34 conclusions are binding on the convening authority.

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

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

[35] *United States v. Meador*, 75 M.J. 682, 683 (C.G. Ct. Crim. App. 2016) ("There is nothing in this statutory scheme that makes a determination of probable cause by the PHO ["preliminary hearing officer"] a precondition of referral to a general court-martial, nor is there any language making the PHO's determination binding on the staff judge advocate or the [convening authority]. By contrast, the staff judge advocate's advice is a clear precondition of referral to a general court-martial. The statutory language consequently provides no support for the proposition that the PHO's determination of probable cause is dispositive."). *Cf.* THE2021 ARMY CRIMINAL LAW DESKBOOK, 14-1, which calls the Article 34 pretrial advice a "substantial pretrial right of the accused," because it "protects accused against trial on baseless charges."

[36] FY22 NDAA, *supra* note 30, at § 532(a)(2)(C).

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

[38] U.S. DEP'T. OF JUSTICE, JUSTICE MANUAL [JUSTICE MANUAL], § 9-27.000 (Principles of Federal Prosecution), *available at* https://www.justice.gov/jm/justice-manual.

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

charging and referral decisions in 14 felony-equivalent offenses,[40] along with related offenses, will shift to independent, experienced military prosecutors.[41]

Comparisons with Civilian Practice

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

In civilian practice, the gap between the lower standard of "probable cause" required to recommend prosecution and the "beyond a reasonable doubt" standard for conviction at trial has been filled with structured decisional principles and charging standards to guide prosecutors in the prudent and effective exercise of prosecutorial discretion.[44] In the federal system, the Principles of Federal Prosecution contained in the Justice Manual provide that a prosecutor may commence prosecution only after determining that probable cause exists to believe that a suspect has committed a federal offense.[45] The Justice Manual further states that the attorney for the government should commence or recommend federal prosecution if they believe that the person's conduct constitutes a federal offense, that the admissible evidence will probably be sufficient to obtain and sustain a conviction, and that the prosecution serves a substantial federal interest.[46] These prosecution standards serve a critical function for crime victims, the criminally

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

[41] See Appendix C, FY22 NDAA Excerpt; *see also* IRC REPORT, *supra* note 5, App. B at 8, Recommendation 1.1, Creation of the Office of the Special Victim Prosecutor ("[D]esignated independent judge advocates should replace commanders in deciding . . . whether [a] charge should be tried at court-martial"). The military does not classify offenses as misdemeanors or felonies. Punishments for each offense are prescribed by the President through executive orders published in the MCM. The broad range of potential punishment for an offense is limited by the jurisdictional authority of courts-martial. *See generally* Arts. 16–21, UCMJ.

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

[43] *Id.*

[44] MJRG REPORT, *supra* note 4, at 338.

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

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

accused, and the American public: they strengthen consistency and uniformity of case disposition and confidence in the criminal justice system.[47]

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

Prosecution Standards for Civilian Prosecutors

In 2020, the DAC-IPAD Policy Subcommittee interviewed civilian career prosecutors from regionally diverse state and federal jurisdictions.[52] When discussing a prosecutor's decision to charge a case, all agreed that the evidentiary standard used must be more than probable cause; and all but one agreed that the attorney should believe that there is sufficient evidence to prove

[47] *Id*. at § 9-27.001 (Preface).

[48] Art. 33, UCMJ.

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

[50] Appendix 2.1, MCM 2019, *supra* note 4, at para. 2.1(h). The 14 factors (a non-exclusive list) are
a. The mission-related responsibilities of the command;
b. Whether the offense occurred during wartime, combat, or contingency operations;
c. The effect of the offense on the morale, health, safety, welfare, and good order and discipline of the command;
d. The nature, seriousness, and circumstances of the offense and the accused's culpability in connection with the offense;
e. In cases involving an individual who is a victim under Article 6b, the views of the victim as to disposition;
f. The extent of the harm caused to any victim of the offense;
g. The availability and willingness of the victim and other witnesses to testify;
h. Whether admissible evidence will likely be sufficient to obtain and sustain a conviction in a trial by court-martial;
i. Input, if any, from law enforcement agencies involved in or having an interest in the specific case;
j. The truth-seeking function of trial by court-martial;
k. The accused's willingness to cooperate in the investigation or prosecution of others;
l. The accused's criminal history or history of misconduct, whether military or civilian, if any;
m. The probable sentence or other consequences to the accused of a conviction;
n. The impact and appropriateness of alternative disposition options—including nonjudicial punishment or administrative action—with respect to the accused's potential for continued service and the responsibilities of the command with respect to justice and good order and discipline.

[51] *See* American Bar Association Standard 3-4.3, Minimum Requirements for Filing and Maintaining Criminal Charges.

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

the charge beyond a reasonable doubt or that there was a reasonable likelihood of a successful prosecution.[53] A separate review of state rules of professional conduct or similar guidance on charging found that the quantum of evidence is often more than probable cause, and a sufficiency of the evidence review is either required or recommended before charging a case at trial.[54]

American Bar Association (ABA)

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

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

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

---

[53] *Id.*

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

[55] STANDARDS FOR CRIMINAL JUSTICE: FUNCTIONS AND DUTIES OF THE PROSECUTOR (AM. BAR ASS'N 2017) [ABA STANDARDS FOR CRIMINAL JUSTICE].

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

[57] ABA STANDARDS FOR CRIMINAL JUSTICE, *supra* at note 55, at § 3-4.3, Minimum Requirements for Filing and Maintaining Criminal Charges.

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

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

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

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

Comparable Rules of Professional Conduct for the Military

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

Rule 3.8 is supplemented by instructional commentary noting that a trial counsel has a "responsibility" to administer justice and "is not simply an advocate." Attorneys "may have the

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

[60] U.S. DEP'T OF ARMY, ARMY REGULATION 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS [AR 27-26] (June 28, 2018); U.S. DEP'T OF NAVY, NAVY JAG INSTRUCTION 5803.1E, PROFESSIONAL CONDUCT OF ATTORNEY PRACTICING UNDER THE COGNIZANCE AND SUPERVISION OF THE JUDGE ADVOCATE GENERAL [NAVY JAG INSTRUCTION 5803.1E] (Jan. 20, 2015); U.S. DEP'T AIR FORCE, AIR FORCE INSTRUCTION 51-110 [AFI 51-110], PROFESSIONAL RESPONSIBILITY PROGRAM (Dec. 11, 2018); COMMANDANT INSTRUCTION M5800.1, COAST GUARD LEGAL PROFESSIONAL RESPONSIBILITY PROGRAM (June 1, 2005).The Services adopted the ABA's Model Rules of Professional Conduct but not the ABA Standards of Criminal Justice Relating to the Prosecution Function. The former require that a prosecutor refrain from charging a case not supported by probable cause, while the latter require not just probable cause but also that admissible evidence will be sufficient to support conviction beyond a reasonable doubt. *See* ABA STANDARDS FOR CRIMINAL JUSTICE, *supra* note 54; *see also* MODEL RULES OF PROF' CONDUCT R. 3.8 (ABA 2020) [ABA MODEL RULES].

[61] *See* AR 27-26, *supra* note 60, at Rule 3.8; NAVY JAG INSTRUCTION 5803.1E, *supra* note 59, at Rule 3.8. Both Navy and Marine Corps trial counsel practice under the same Professional Rules of Conduct. *Cf.* ABA MODEL RULES, *supra* note 59, 3.8(a).

duty, in certain circumstances, to bring to the court's attention any charge that lacks sufficient evidence to support a conviction."[62]

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

> It is unprofessional conduct for a trial counsel to institute, or cause to be instituted, or to permit the continued pendency of criminal charges when it is known that the charges are not supported by probable cause. A trial counsel should not institute or permit the continued pendency of criminal charges in the absence of admissible evidence to support a conviction.[63]

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

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

Observations by Independent Advisory Groups

Two advisory groups—in addition to this Committee—have recommended ways to strengthen pretrial procedures in the military, including ways to emphasize the justice-seeking purpose of military law as well as the command-driven focus on good order and discipline. On multiple occasions, these groups have observed a connection between the advisory nature of Article 32 hearings and deleterious case outcomes.[66] These groups have also noted systemic benefits in

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

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

[64] U.S. COAST GUARD, COMMANDANT INSTRUCTION M5800.1, *supra* note 59.

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

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

elevating the prosecution standard above the probable cause threshold as a matter of sound practice and of fundamental fairness.[67]

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

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

In 2021, at the President's direction, the Secretary of Defense established the Independent Review Commission on Sexual Assault in the Military.[73] The IRC held extensive listening sessions with hundreds of stakeholders, including general court-martial convening authorities. These commanders expanded on the same troubling issue of referring a case with deficient evidence merely to "send a message." The IRC heard that this practice harms both victims and

[67] The JPP and DAC-IPAD recommended elevating the referral standard. While the IRC strongly suggested that the DOJ's standard be adopted, it formally recommended further study by the DAC-IPAD.

[68] National Defense Authorization Act for Fiscal Year 2013 [FY13 NDAA], Pub. L. No. 112-239, § 576, 126 Stat. 1632 (Jan. 2, 2013), as amended by FY14 NDAA, *supra* note 26, at § 1731, as further amended by Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015 [FY15 NDAA], Pub. L. No. 113-291, § 545, 128 Stat. 3292 (Dec. 19, 2014). Between February 2014 and October 2017, the JPP released 11 reports on varying topics.

[69] JUDICIAL PROCEEDINGS PANEL REPORT ON PANEL CONCERNS REGARDING THE FAIR ADMINISTRATION OF MILITARY JUSTICE IN SEXUAL ASSAULT CASES (Sept. 2017) [JPP REPORT], *available at* https://dacipad.whs.mil/images/Public/10-Reading_Room/04_Reports/01_JPP_Reports/10_JPP_Concerns_Fair_MJ_Report_Final_ 20170915.pdf.

[70] *Id*. at 10.

[71] DAC-IPAD REPORT ON INVESTIGATIVE CASE FILE REVIEWS, *supra* note 20, at 16 (Finding 111) (the DAC-IPAD's three-year review of almost 2,000 investigative case files involving reports of adult-victim penetrative sexual offenses that reached a final disposition in FY17).

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

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

accused and erodes public confidence in military justice.[74] The IRC found that the decision to forward charges to court-martial is one of the most consequential decisions in the military justice process, and thus consideration of the sufficiency of the evidence both is a matter of fundamental fairness and serves the interest of the efficient administration of justice.[75]

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

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

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

[74] *Id.* at 11.

[75] *Id.*

[76] *See* Joint Explanatory Statement accompanying the FY22 NDAA, comment on amendments contained in § 537.

III. Reforming Article 32 Preliminary Hearings

DAC-IPAD Recommendation 48a: Amend Article 32 to provide that a preliminary hearing officer's determination of no probable cause precludes referral of the affected specification(s) to court-martial, subject to reconsideration as described in Recommendation 48b.

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

1. Trial counsel, within 10 days of receiving the preliminary hearing officer's report, petitions the preliminary hearing officer to reopen the Article 32 preliminary hearing stating the nature of the newly discovered evidence and the reason it was not previously presented.
2. The preliminary hearing officer shall reconsider their previous no-probable-cause determination one time upon reopening the Article 32 preliminary hearing to receive the evidence as described above. After reconsideration, the preliminary hearing officer's determination as to whether probable cause exists is final.

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

The DAC-IPAD therefore recommends that Congress amend Article 32 so that a no-probable-cause finding bars prosecution of the affected charges and specifications, subject to reconsideration upon the presentation of newly discovered evidence.[79] This reform does not empower preliminary hearing officers to dismiss the affected charges; rather, a preliminary hearing officer's no-probable-cause determination would require trial counsel to dismiss the affected charge(s) at or before referral. In any case, the Article 32 preliminary hearing officer's

[77] FY14 NDAA, *supra* note 26, at § 1702.

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

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

decision would be without prejudice and the government would be free to prefer new charges, which has been the practice of state and federal civilian prosecutors for centuries.[80] This recommendation fully accords with the IRC's goal that Article 32 proceedings should "promote fairness, justice, and efficiency."[81] The following sections describe in detail the problems caused by an advisory Article 32 no-probable-cause determination, the cost to the system, and the value of reform.

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

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

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

Some of these convictions were reversed on appeal. Notably, in several cases in which adult-victim sexual offenses were tried at general courts-martial after the Article 32 preliminary hearing officer found no probable cause, the appellate courts overturned the convictions for lack

[80] 10 U.S.C. § 844 (Art. 44, UCMJ).

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

[82] *See* Table 5 of Appendix E, at E-14. 193 out of 216 cases (89%) resulted in either a finding of not guilty on, or a dismissal of, the penetrative sexual offense charge.

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

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

[85] DAC-IPAD REPORT ON INVESTIGATIVE CASE FILE REVIEWS, *supra* note 20, at 41 (DAC-IPAD statistics for the outcome of the charged adult-victim penetrative sexual offense).

[86] *Id.* at 4.

of factual sufficiency and urged prosecutors to heed ethical guidelines.[87] One appellate judge reminded government counsel of their ethical obligations at the preliminary hearing stage of the process after the court overturned a case that did not meet the probable cause requirement:

> This Preliminary Hearing, at least with respect to these specifications, provided no meaningful protection for Appellant and no check on the Government's ability to expose him to felony-level punishment. . . . Specifications lacking probable cause should not find a home on referred charge sheets for general courts-martial.[88]

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

Because the advisory nature of the Article 32 hearing does not incentivize counsel for the government to establish probable cause,[89] one of its primary purposes is undercut. The DAC-IPAD's review of Article 32 reports produced in FY16 through FY21 showed that in 17% of cases across the Services involving an adult penetrative sexual offense charge, the preliminary hearing officer determined that one or more penetrative sexual offense charges lacked probable cause.[90] In order to understand system-wide patterns, the DAC-IPAD also examined all preferred cases—involving any UCMJ offense—that were completed in FY21. The DAC-IPAD review of all preferred cases in which an Article 32 preliminary hearing was held revealed that in 26% of all preliminary hearings, the preliminary hearing officer found that one or more offenses lacked

---

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

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

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

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

probable cause.[91] These findings are especially concerning because at the Article 32 stage, the government has already charged a Service member with a crime; therefore, probable cause is a low evidentiary threshold that the government should easily meet by the time a case reaches a preliminary hearing.

[Insert graphic for the annual no-pc determination rate for PSO cases, FY16-FY21]

[Insert graphic showing that for all FY21 cases involving any UCMJ offense the PHO found no-PC in 26% of cases]

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

When the Article 32 proceeding is advisory, as opposed to binding, the government is free to pursue cases virtually unchecked because a staff judge advocate can overrule a preliminary hearing officer's no-probable-cause determination without explanation. The DAC-IPAD heard commentary suggesting that perhaps preliminary hearing officers do not understand probable cause.[93] However, the data do not support this premise. The DAC-IPAD's extensive case document review indicates that Article 32 preliminary hearing officers—mostly field-grade judge advocates—consistently

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

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

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

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

provide in-depth analyses of how the case file evidence aligns with the elements of each offense.[94] Indeed, several military justice experts observed that the preliminary hearing officer's analysis in the Article 32 report is of great value to the referral authority.[95] These observations indicate that persons with sufficient expertise are serving as preliminary hearing officers and are qualified to render a binding no-probable-cause determination.

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

Value of a Binding No-Probable-Cause Determination

A preliminary hearing process that precludes prosecution after a no-probable-cause determination would remedy weaknesses in the current system.[98] One of the most important benefits is protection for Service members against prosecution on charges unsupported by probable cause. Another benefit of weeding out unsupported charges is a more effective and efficient military justice system. Although career judge advocates cautioned that the Article 32 hearing has always been advisory, in the vast majority of FY21 cases in which a preliminary

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

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

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

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

[98] *See supra* section II, Background and Recent Developments, at p. ___; *see also* JPP REPORT, *supra* note 68, at 5 ("[T]hese views . . . were brought to the Subcommittee's attention during every installation site visit, were supported by specific examples, and were also contextualized by the Subcommittee's subsequent research into related policies and statutes, as well as testimony before the JPP and the Subcommittee. Taken together, these considerations suggest that the issues could be systemic and should be addressed."); DAC-IPAD FOURTH ANNUAL REPORT, *supra* note 12, at 6–7 (The DAC-IPAD, after an exhaustive review of sexual assault case files, observed a systemic problem in that Articles 32 and 34 permit weak cases to proceed to trial—with damaging consequences for the military justice system.); IRC REPORT, *supra* note 5, App. B at 52 (The IRC spoke with military justice experts who agreed the issue is one of fundamental fairness to the victim and the accused.).

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

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

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

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

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

[99] *See* Appendix E, Comprehensive Courts-Martial Pretrial Processing Data at Table 5.

[100] JUSTICE MANUAL, *supra* note 38.

[101] *See* DAC-IPAD Request for Information and Service Narrative Responses at Appendix D, Responses to Q1.

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

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

Reconsideration of an Article 32 No-Probable-Cause Determination

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

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

---

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

[104] LAFAVE et al., supra note 102, at §§ 14.1(a), 14.2(b), 15.2(h).

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

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

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

The Judge Advocates General (TJAGs) of the Military Departments, and the Staff Judge Advocate to the Commandant of the Marine Corps, formally advised the DAC-IPAD of their continued opposition to this Article 32 recommendation.[111] If, however, Congress were to amend Article 32 to make a no-probable-cause determination binding, the Services unanimously favor a process for reconsideration, so long as it does not unduly delay pretrial processing.[112] The Services have offered several suggestions regarding reconsideration:[113]

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

---

[107] 2019 MCM, *supra* note 4, R.C.M. 405(j)(1).

[108] 2019 MCM, *supra* note 4, R.C.M. 405(m), discussion.

[109] 2019 MCM, *supra* note 4 R.C.M. 305(i)(2)(E).

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

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

[112] DAC-IPAD Request for Information and Service Narrative Responses at Appendix D.

[113] *Id*.

[114] *See* Draft Executive Order, *supra* note ___.
R.C.M. 309: (10) *Victim's petition for relief.*
(A) A victim of an offense under the UCMJ, as defined in Article 6b(b), may file a motion pre-referral requesting that a military judge require a preliminary hearing officer conducting a preliminary hearing under R.C.M. 405 to comply with:

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

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

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

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

IV. Establishing Uniform Prosecution Standards in Appendix 2.1, Manual for Courts-Martial, and Training the Services

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

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

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

The written standards promulgated by government prosecutorial agencies and attorneys' legal organizations, as well as commentary from state and federal prosecutors, indicate that to commence prosecution, jurisdictions overwhelmingly require a finding of sufficiency of the

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

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

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

evidence to secure a conviction in addition to probable cause. Two independent studies by military justice and criminal law experts extensively reviewed the military's referral process and concluded that a finding of probable cause alone is not sufficient to expose a Service member to criminal trial at a general court-martial. These groups have urged that the Department of Justice's standard—the admissible evidence will probably be sufficient to obtain and sustain a conviction—should apply uniformly across the Services for the referral of cases to general courts-martial.[118]

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

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

This targeted recommendation to establish prosecution standards, which will be accompanied by minimal disruption to a system repeatedly subjected to recent reforms, is necessary for the overall health of the military justice system. These reforms are especially critical to the success

---

[118] JPP REPORT, *supra* note 68, at 8 (The JPP Subcommittee recommends that Article 33, UCMJ, case disposition guidance for convening authorities and staff judge advocates require the following standard for referral to court-martial: the charges are supported by probable cause and there is a reasonable likelihood of proving the elements of each offense beyond a reasonable doubt using only evidence likely to be found admissible at trial.); DAC-IPAD REPORT ON INVESTIGATIVE CASE FILE REVIEWS, *supra* note 95, at 16 (DAC-IPAD Recommendation 32: Congress amend Article 34, UCMJ, to require the staff judge advocate to advise the convening authority in writing that there is sufficient evidence to obtain and sustain a conviction on the charged offenses before a convening authority may refer a charge and specification to trial by general court-martial.); *see also* MJRG REPORT, *supra* note 4, at 338 (Recommendation 33.2: Create a new statutory provision requiring the establishment of non-binding guidance taking into account the Principles of Federal Prosecution in the U.S. Attorney's Manual[.]).

[119] Joint Explanatory Statement to the FY22 NDAA, *supra* note 30, at 88.

[120] IRC REPORT, *supra* note 5, at 21.

[121] *Id.*

[122] *Id.*

of a new system under which prosecutors—not commanders—will often be decision makers. At Appendix G of this report, the DAC-IPAD proposes uniform prosecution standards with new language for Appendix 2.1 that promotes the reasoned exercise of prosecutorial authority to align with the standards for federal civilian prosecutors referenced in Articles 33 and 36, UCMJ.

Systemic Problems Caused by a Lack of Prosecution Standards

Problems for the Accused. The IRC concluded that there is a problem with trust in the military justice system, owing in part to the manner in which sexual assault cases are referred to trial.[123] Some military commanders seek to "send a message" that they are tough on crime by sending procedurally deficient cases to trial, without regard for the negative impact on both victims and accused, and resulting in high acquittal rates and significant numbers of dismissals.[124] This practice can result in wrongful convictions or convictions that do not survive appellate review. Moreover, Service members accused in such cases may experience severe, lifelong consequences owing to the stigma and collateral effects of felony charging decisions and a criminal trial. While a victim's interest in prosecution is a factor to be considered, it should not outweigh the government's ethical obligation to refer charges only if there is evidence sufficient to obtain and sustain a conviction. The current probable cause standard for referral in Article 34, UCMJ, is a low barrier to prosecution that jeopardizes the concept of fair and evenhanded administration of justice and risks exposing innocent Service members to felony criminal liability.

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

Commented [PETERS, Meghan]: Note, in response to a member's suggestion, the staff has included additional context to explain the potential impact of the trial and an acquittal on victims.

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

[123] IRC REPORT, *supra* note 4, at 11.

[124] *Id.*

[125] IRC REPORT, *supra* note 4, App. B at B-53.

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

cause standard is met, the convening authority will most likely refer the case to trial, regardless of the sufficiency of the evidence.[127]

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

Benefits of Establishing Uniform Prosecution Standards in Appendix 2.1

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

The DAC-IPAD's proposed draft for uniform prosecution standards in Appendix 2.1, found at Appendix G, would enhance the referral standard before a case is sent to a general court-martial and would assist judge advocates and commanders in applying the new prosecution standards. These uniform prosecution standards offer more nuanced guidance for the reasoned exercise of prosecutorial discretion and achieve the intent of Articles 33 and 36, UCMJ, to conform to the practice of the United States District Courts. Referral decisions should be grounded in a technical analysis of the admissibility of evidence and quantum of proof needed to convict in a criminal

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

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

[129] *Id*.

trial. This focused evidentiary analysis reflects overarching ethical considerations, concerns about the fundamental fairness of the system, and the recognition of how significantly the initiation of criminal charges affects a Service member.

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

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

Recommended Training on Uniform Prosecution Standards

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

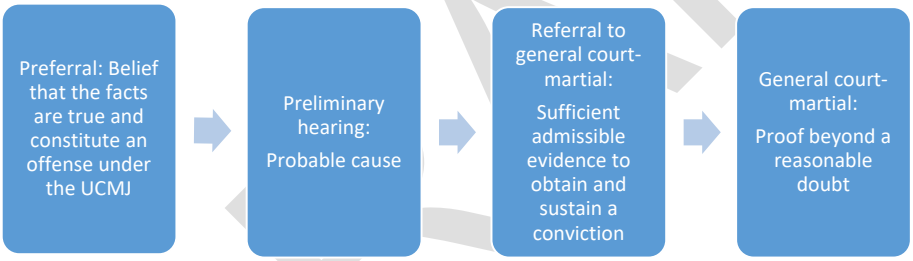
[130] FY22 NDAA, *supra* note 30, at § 532(a)(5) (Policies applicable to each OSTC shall "provide that commanders of the victim and the accused in a case involving a covered offense shall have the opportunity to provide input to the special trial counsel regarding case disposition, but that the input is not binding on the special trial counsel.").

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

CONCLUSION

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

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



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

Proposed Amendment for Article 32, UCMJ

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

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

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

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

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

APPENDIX G for Draft DAC-IPAD Report

APPENDIX 2.1

~~NON-BINDING~~ DISPOSITION GUIDANCE

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

SECTION 1: IN GENERAL

1.1. Policy.

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

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

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

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

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

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

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

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

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

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

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

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

a. Initiating and declining action (to include deferral) under the UCMJ;

b. Disposition of covered offenses by special trial counsel;

c. Selecting appropriate charges and specifications;

d. Selecting the appropriate type of court-martial or alternative mode of disposition, if any; and

e. Considering the appropriateness of a plea agreement.

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

SECTION 2: CONSIDERATIONS IN ALL CASES

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

a. The mission-related responsibilities of the command;

b. Whether the offense occurred during wartime, combat, or contingency operations;

c. The effect of the offense on the morale, health, safety, welfare, and good order and discipline of the command;

d. The nature, seriousness, and circumstances of the offense and the accused's culpability in connection with the offense;

e. In cases involving an individual who is a victim under Article 6b, the views of the victim as to disposition;

f. The extent of the harm caused to any victim of the offense;

g. The availability and willingness of the victim and other witnesses to testify;

h. Whether admissible evidence will probably ~~likely~~ be sufficient to obtain and sustain a conviction in a trial by court-martial;

i. Input, if any, from law enforcement agencies involved in or having an interest in the specific case;

j. The truth-seeking function of trial by court-martial;

k. The accused's willingness to cooperate in the investigation or prosecution of others;

l. The accused's criminal history or history of misconduct, whether military or civilian, if any;

m. The probable sentence or other consequences to the accused of a conviction; and

n. The impact and appropriateness of alternative disposition options—including nonjudicial punishment or administrative action—with respect to the accused's potential for continued service and the responsibilities of the command with respect to justice and good order and discipline.

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

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

Commented [VUONO, Eleanor M]: Note the inclusion of "only" in this sentence, to emphasize the heightened referral standard for a general court-martial.

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

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

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

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

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

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

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

~~a. Unnecessarily complicate the prosecution of the most serious, readily provable offense or offenses;~~

~~b. Unnecessarily exaggerate the nature and extent of the accused's criminal conduct or add unnecessary confusion to the issues at court-martial;~~

~~c. Unnecessarily expose the accused to a harsher potential sentence or range of punishments than the circumstances of the case justify; or~~

~~d. Be disposed of more appropriately through an alternative disposition.~~

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

a. ~~The advice of a judge advocate~~The interests of justice and good order and discipline and factors set forth in paragraph 2.1 of this Appendix;

b. The authorized maximum and minimum punishments for the offenses charged;

c. Any unique circumstances in the case requiring immediate disposition of the charges;

d. Whether the type of court-martial would unnecessarily expose the accused to a harsher potential sentence or range of punishments than the circumstances of the case justify; and

e. Whether the potential of the accused for rehabilitation and continued service would be better addressed in a specific type of court-martial.

Commented [PETERS, Meghan]: Staff comment: Should this example, below, (from the DAC-IPAD discusion at the March 14th public meeting) be included in the text?

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

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

a. The effect of alternative disposition on the interests of justice and good order and discipline;

b. The options available under the alternative means of disposition;

c. The views of the victim, if any, concerning the alternative disposition of the case; and

d. The likelihood of an effective outcome.

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

a. The accused's or victim's race, ethnicity, religion, gender, sexual orientation, national origin, or lawful political association, activities, or beliefs;

b. The personal feelings of anyone authorized to recommend, advise, or make a decision as to disposition of offenses concerning the accused, the accused's associates, or any victim or witness of the offense;

c. The time and resources already expended in the investigation of the case;

d. The possible effect of the disposition determination on the commander's, or convening authority's, or judge advocate's, or special trial counsel's military career or other professional or personal circumstances; ~~or~~

e. Political pressure to take or not to take specific actions in the case.

SECTION 3: SPECIAL CONSIDERATIONS

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

a. The strength of the other jurisdiction's interest in prosecution;

b. The other jurisdiction's ability and willingness to prosecute the case effectively;

c. The probable sentence or other consequences if the accused were to be convicted in the other jurisdiction;

d. The views of the victim, if any, as to the desirability of prosecution in the other jurisdiction;

e. Applicable policies derived from agreements with the Department of Justice and foreign governments regarding the exercise of military jurisdiction; and

f. The likelihood that the nature of the proceedings in the other jurisdiction will satisfy the interests of justice and good order and discipline in the case, including any burdens on the command with respect to the need for witnesses to be absent from their military duties, and the potential for swift or delayed disposition in the other jurisdiction.

3.2. Plea Agreements. In accordance with Article 53a, the special trial counsel, or convening authority with the advice of a judge advocate, may enter into an agreement with an accused concerning disposition of the charges and specifications and the sentence that may be imposed. The special trial counsel, or the convening authority with the advice of a judge advocate, should consider the following additional factors in determining whether it would be appropriate to enter into a plea agreement in a particular case:

a. The accused's willingness to cooperate in the investigation or prosecution of others;

b. The nature and seriousness of the offense or offenses charged;

c. The accused's remorse or contrition and his or her willingness to assume responsibility for his or her conduct;

d. Restitution, if any;

e. The accused's criminal history or history of misconduct, whether military or civilian;

f. The desirability of prompt and certain disposition of the case and of related cases;

g. The likelihood of obtaining a conviction at court-martial;

h. The probable effect on victims and witnesses;

i. The probable sentence or other consequences if the accused is convicted;

j. The public and military interest in having the case tried rather than disposed of by a plea agreement;

k. The time and expense associated with trial and appeal;

l. The views of the victim with regard to prosecution, the terms of the anticipated agreement, and alternative disposition; and

m. The potential of the accused for rehabilitation and continued service.

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

a. Appropriately reflect the nature and extent of the criminal conduct;

b. Are supported by an adequate factual basis;

c. Would support the imposition of an appropriate sentence under all the circumstances of the case;

d. Do not adversely affect the investigation or prosecution of others suspected of misconduct; and

e. Appropriately serve the interests of justice and good order and discipline.

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

****

Analysis:

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

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

Recommended Training on Uniform Prosecution Standards

Recommendation 50: The DAC-IPAD's recommendation for uniform prosecution standards in Appendix 2.1 of the Manual for Courts-Martial should be accompanied by training for every person involved in the military justice system, including convening authorities.

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

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

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

[1] *See* https://www.ovcttac.gov/views/index.cfm?nm=au.