Policy Subcommittee Article 32, UCMJ, Preliminary Hearing Assessments

1. Should an Article 32 preliminary hearing officer's determination of no probable cause prohibit referral of a specification to court-martial?

A. Current Practice.

- Determinations of no probable cause by the Article 32 preliminary hearing officer are advisory.
  - Rules for Courts-Martial (R.C.M.) 405, explicitly states that the preliminary hearing officer's report to the convening authority is "advisory and does not bind the staff judge advocate or convening authority." (R.C.M. 405(l)(1), p. II-46)
- Determinations of no probable cause by the staff judge advocate pursuant to Article 34, pretrial advice, are binding on the convening authority.
  - Article 34, UCMJ, states that the convening authority may not refer a specification to a general court-martial unless the staff judge advocate advises the convening authority in writing that there is probable cause to believe the accused committed the offense. (Article 34(a)(1), UCMJ, p. A2-13)

B. History and Purpose.

- Historically, the U.S. Supreme Court interpreted the requirement for a pretrial investigation to serve the following purposes: "to insure adequate preparation of cases, to guard against hasty, ill-considered charges, to save innocent persons from the stigma of unfounded charges, and to prevent trivial cases from going before general courts-martial." *Humphrey v. Smith*, 336 U.S. 695, 698 (1949).
- According to the Court of Military Appeals [the predecessor of the Court of Appeals for the Armed Forces]—the military's highest court, the Article 32 investigation served as a means of discovery for the accused and as a bulwark against baseless charges. *United States v. Samuels*, 10 U.S.C.M.A. 206, 212, 27 C.M.R. 280 (1959).
- The law and procedures applicable to pretrial investigations required prior to referral did not fundamentally change from the time of the UCMJ's adoption in 1949 until Congress amended Article 32, UCMJ, in the National Defense Authorization Act for Fiscal Year 2014 (FY 14 NDAA). These amendments substantially reduced the scope of the proceeding from a searching investigation to a probable cause hearing conducted by a preliminary hearing officer, somewhat similar to federal preliminary hearings.
  - The overall goals of FY 14 NDAA changes were to:
    - Ensure that no victim, military or civilian, of a sexual assault could be compelled to testify against her will;
    - Ensure an individual with the right training was in charge of the hearing;
    - Guarantee that the primary purpose of the hearing was a probable cause determination and not to serve as a discovery tool for the accused.[1]

[1] Kiel, John L., Lieutenant Colonel, U.S. Army, *Not Your Momma's 32: Explaining the Impetus for Change Behind Key Provisions of the Article 32 Preliminary Hearing*, 2016 Army Law. 8, 9 (2016).

  - After conducing military installation site visits in 2016, the Judicial Proceedings Panel expressed concerns about the usefulness of the preliminary hearing format, and recommended the DAC-IPAD examine ways to give the hearing more weight
  - The PSC interviewed a civilian defense counsel with more than twenty years of experience litigating cases in the military justice system who expressed that the FY 14 NDAA reforms, as implemented, rendered the Article 32 proceedings meaningless. He believes the now-perfunctory Article 32 hearings do not provide due process and have contributed to the high acquittal rate for sexual assault offenses in the military.

- Military Justice Review Group's (MJRG) assessment of the UCMJ in 2015, and the FY 17 NDAA changes effective Jan. 1, 2019, related to Article 32, UCMJ
  - The goal of the MJRG proposals was to focus the preliminary hearing officer more on providing an analysis of the evidence that would be useful to the SJA and convening authority, underscoring that the SJA and convening authority have statutory responsibilities in disposing of the charges and specifications "in the interest of justice and discipline" under Article 30.
  - The FY 17 NDAA enacted most of the MJRG's proposals. The purpose preliminary hearing remains the same—determine whether each specification states an offense; whether probable cause exists; whether a court-martial would have jurisdiction; and finally, what disposition should be made of the case in the interests of justice and discipline.
  - [*Staff question: To what extent should Article 32 proceedings assist the SJA and convening authority with the disposition decision? How does that goal accord with the need to provide a check against the referral of baseless charges?*]

C. DAC-IPAD Recommendation Concerning Article 34, UCMJ. In its forthcoming Case Review Report, the DAC-IPAD makes the following recommendation: Congress amend Article 34, UCMJ, to require the staff judge advocate to advise the convening authority in writing that there is sufficient admissible 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. [DAC-IPAD Recommendation 32].

- The DAC-IPAD makes two findings in support of this recommendation:
  - There is not a systemic problem with the initial disposition authority's decision either to prefer an adult penetrative sexual offense charge or to take no action against the subject for that offense.
  - There is a systemic problem with the referral of penetrative sexual offense charges to trial by general court-martial when there is not sufficient admissible evidence to obtain and sustain a conviction on the charged offense.

D. Other DAC-IPAD Findings and Assessments. The DAC-IPAD makes a number of key findings and assessments in its upcoming Case Review Report related to the issue of whether the Article 32 preliminary hearing officer should have the authority to prevent specifications lacking probable cause from being referred to court-martial.

- Finding 92: The decision to prefer a penetrative sexual offense charge was reasonable in

486 (94.0%) of the 517 adult-victim cases closed in FY17. [*Note: The standard to prefer charges is set forth in Article 30, UCMJ: the individual swearing to the charges must attest that they have personal knowledge of, or have investigated, the matters set forth in the charges, and that the matters set forth in the charges are true to the best of their knowledge and belief.*]
    - [*Staff question: If the decision to prefer charges was reasonable in 94% of adult sexual offense cases, why did Article 32 preliminary hearing officers find no probable cause in approximately 20% of cases? Should the preferral standard be probable cause?*]

- Finding 96: Of the 517 adult-victim cases closed in FY17 resulting in a preferred penetrative sexual offense charge against a Service member,
    - In 446 (86.3%) of these cases, the evidence in the materials reviewed established probable cause to believe that the accused committed the penetrative sexual offense. In 68 (13.2%) of these cases, the evidence in the materials reviewed did not establish probable cause to believe that the accused committed the penetrative sexual offense;
    - [*Staff question: If the materials in 13.2% of preferred cases did not establish probable cause, why did the DAC-IPAD find that 94% of preferred cases were reasonable?*]

E. Civilian Practice. Federal and state practice typically requires a grand jury proceeding or a preliminary hearing to determine whether there is probable cause that the defendant committed the offense charged. A determination by the grand jury or magistrate at a preliminary hearing that there is not probable cause prohibits the prosecutor from taking the charges to trial, though there are provisions that allow the prosecutor to take the charges to another grand jury or preliminary hearing under certain circumstances.

- Federal Rules of Criminal Procedure, Rule 5.1 Preliminary Hearing, states that if a magistrate judge finds no probable cause to believe an offense has been committed or the defendant committed it, the magistrate judge must dismiss the complaint and discharge the defendant. A discharge does not preclude the government from later prosecuting the defendant for the same offense. (FRCP 5.1)
    - Many prosecutors and defense counsel interviewed by the Policy Subcommittee indicated that preliminary hearings occur much less often than grand juries. Some practitioners had only experienced one, or just a few, preliminary hearings during their entire career.
- Federal Rules of Criminal Procedure, Rule 6 The Grand Jury, provides that a grand jury may indict only if at least 12 jurors concur. (FRCP Rule 6)
- State prosecutors interviewed by the Policy Subcommittee detailed their jurisdictional requirements for a grand jury, preliminary hearing, or similar process, which require a finding of probable cause before the charges may proceed.
- According to the U.S. Department of Justice Bureau of Justice Statistics, federal grand juries rarely fail to indict.
    - In fiscal year 2014, of 28,285 prosecution declinations, 14 were as a result of a grand jury "no bill." (Federal Justice Statistics 2014 Tables, Table 2.3) *[this is the most recent statistical table containing the grand jury "no bill" statistic]*

- In fiscal year 2013, of 31,451 prosecution declinations, 5 were as a result of a grand jury "no bill." (Federal Justice Statistics 2013 Tables, Table 2.3)
- In fiscal year 2012, of 29,770 prosecution declinations, 14 were as a result of a grand jury "no bill." (Federal Justice Statistics 2012 Tables, Table 2.3)
- In fiscal year 2011, of 30,412 prosecution declinations, 22 were as a result of a grand jury "no bill." (Federal Justice Statistics 2011 Tables, Table 2.3)
- In fiscal year 2010, of 30,670 prosecution declinations, 11 were as a result of a grand jury "no bill." (Federal Justice Statistics 2010 Tables, Table 2.3)

F. Military Practitioners' Views from August 23, 2019, DAC-IPAD Public Meeting and Request for Information 11 Responses. [RFI Set 11 Responses; DAC-IPAD Aug. 23, 2019 public meeting transcript]

- Military Justice Policy Chiefs: Unanimously agreed that an Article 32 preliminary hearing officer's determination of no probable cause should remain advisory.
  - A binding no-probable cause determination from the preliminary hearing officer would eliminate the staff judge advocate's statutory obligation [Article 34, UCMJ] to determine and provide an opinion to the convening authority as to whether the charges are supported by probable cause.
  - This would unnecessarily constrain the convening authority's responsibility to determine the appropriate disposition of cases and interfere with the convening authority's obligation to maintain good order and discipline.
  - Several witnesses stated that Article 32 preliminary hearing officers often don't have the experience to make these determinations—only the staff judge advocate should perform this function.

- Defense Services Organization Chiefs: Unanimously agreed that an Article 32 preliminary hearing officer's determination of no probable cause should prohibit referral of the offense to a court-martial.
  - Unless the preliminary hearing officer's determination is binding, there is no meaningful protection for the accused against baseless charges.
  - If the determinations were binding, the government would put more thought, care, and preparation into the evidence presented at Article 32 hearings.
  - A binding Article 32 hearing would likely require the government to call witnesses to establish probable cause, rather than only submitting documents.
  - None of the defense counsel mentioned, or considered, how they felt about the potential loss of the PHO's disposition recommendation, which would presumably occur if the Article 32 no-probable cause determination was binding.

- Special Victims' Counsel / Victims' Legal Counsel Program Managers: Unanimously agreed that an Article 32 preliminary hearing officer's determination of no probable cause should not prohibit referral of the offense to a court-martial because they want the victim's views as to disposition considered at referral.

G. Fiscal Years 2014 to 2018 Data on Article 32 No Probable Cause Determinations. DAC-IPAD staff reviewed Article 32 data from fiscal years 2014 through 2018 collected from court-martial documents provided by the Services.

- In approximately 20% of cases involving a charge of at least one penetrative sexual offense, the Article 32 investigating officer *[for Article 32 hearings taking place prior to Dec. 26, 2014]* or preliminary hearing officer *[for Article 32 hearings taking place on or after Dec. 26, 2014]* determined there was no probable cause for one or more penetrative sexual offenses.
- On average, convening authorities took action consistent with the Article 32 investigating / preliminary hearing officer's determination(s) of no probable cause—i.e., dismissed the charges lacking probable cause—in a majority of the Navy, Marine Corps, Air Force, and Coast Guard cases.
- In the Army, convening authorities took action consistent with the Article 32 investigating / preliminary hearing officer's determination(s) of no probable cause in less than half of the cases—significantly less in fiscal years 2016 through 2018.
- Of the "no-probable cause" offenses that are referred, a significant percentage are dismissed prior to court-martial.
    - FY14: 7 of 32 cases (22%)
    - FY15: 19 of 46 cases (41%)
    - FY16: 21 of 37 cases (57%)
    - FY17: 15 of 32 cases (47%)
    - FY18: 7 of 18 cases (39%)
- Of those that proceed to court-martial, the vast majority result in acquittal.
    - FY14: 16 of 22 cases (73%)
    - FY15: 22 of 27 cases (81%)
    - FY16: 13 of 16 cases (81%)
    - FY17: 13 of 17 cases (76%)
    - FY18: 8 of 11 cases (73%)

H. Military Case Law. In some recent cases, courts have taken the opportunity to comment on the importance of the preliminary hearing officer's determinations to the overall trial process.

- In a published decision of the Navy-Marine Court of Criminal Appeals, the court overturned a sexual assault conviction as factually insufficient and observed that the preliminary hearing officer had determined that those specifications lacked probable cause. *United States v. Hanabarger*, 2020 CCA Lexis 252 (NMCCA Jul. 30, 2020). In a concurring opinion, one judge commented on whether the statutory purpose of Article 32 had been met:

> 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. A PHO's recommendation that a specification lacks probable cause should be met with serious analysis. This is perhaps especially true in an alcohol-facilitated sexual assault case where the charging theory is incapacity to consent due to impairment by intoxicant…If the Government had taken the PHO's determination seriously–or Article 32's purported *raison d'etre* of determining probable cause was taken seriously–there might be a very different outcome to this case…Congress empowered our PHOs to collect and review all relevant information and to

make a recommendation regarding probable cause. Commanders and their SJAs ignore these opinions at their peril. *Id*.

- However, courts have continued to find that staff judge advocates and convening authorities may act independent of the preliminary hearing officer's assessment. In a 2018 case, *United States v. Hyppolite*, 2018 CCA 517 (AFCCA, Oct. 25, 2018), the appellant renewed a challenge made at trial to the referral process, arguing that the preliminary hearing officer's determination of no probable cause as to three specifications of sexual assault rendered invalid the Article 34 pretrial advice which stated the charges were "warranted by the evidence." The Air Force Court of Criminal Appeals concluded that "appellant's substantial rights were not prejudiced by the manner in which Specification 5 was referred to trial by court-martial." Note that of the three no-probable cause specifications that were referred and tried, one resulted in an acquittal, one resulted in conviction that was later overturned for factual insufficiency, and the third specification of conviction was found factually sufficient albeit with one judge dissenting, finding the specification was not proven at trial beyond a reasonable doubt.

I. Findings and Recommendations of other Panels or Committees.

- **Response Systems Panel (RSP)**. In its June 2014 report to Congress, the Response Systems to Adult Sexual Assault Crimes Panel, made the following recommendation: *The Secretary of Defense direct the Military Justice Review Group or Joint Service Committee to evaluate if there are circumstances when a general court-martial convening authority should not have authority to override an Article 32 investigating officer's recommendation against referral of an investigated charge for trial by court-martial.* [RSP Recommendation 116, p. 49; 129-30].
    - The RSP stated further: "For example, if a military judge is appointed the Article 32 preliminary hearing officer, the convening authority should, perhaps, be bound by the determination that there is no probable cause, but further study is required." [RSP Report, p. 130].
- **Military Justice Review Group (MJRG)**. In October 2013 the Secretary of Defense directed the General Counsel to conduct a comprehensive review of the Uniform Code of Military Justice and its implementation through the Manual for Courts-Martial. Pursuant to this directive, the General Counsel convened the Military Justice Review Group (MJRG) to review the military justice system holistically and report to the General Counsel on its recommendations for changes to the military justice system by March 2015. Given the timing of the MJRG's review, comprehensive changes to Article 32 had recently been enacted in the FY 2014 National Defense Authorization Act as the MJRG began its assessment. As such, the MJRG approached its review of Article 32 with deference to these recent statutory changes. The MJRG ultimately left the Article 32's advisory nature unchanged, and instead explained how Article 32 could better facilitate the primary role of the staff judge advocate and convening authority in deciding the appropriate disposition of charges. [Report of the Military Justice Review Group, Part I: UCMJ Recommendations, p. 315-330].
    - Primary change proposed by the MJRG: Adding a requirement that the PHO's report would have to include a written analysis of the facts and evidence

supporting his conclusions and recommendation, a practice already observed in many jurisdictions.
    - MJRG rationale: "Under the proposed amendments, the hearing officer would . . . assist and inform the staff judge advocate's recommendation and the convening authority's ultimate disposition decision."
- **Judicial Proceedings Panel (JPP).** The JPP made the following recommendation in its September 2017 Report on Panel Concerns Regarding the Fair Administration of Military Justice:

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

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

2. If Article 32 is amended to make a preliminary hearing officer's determination of no probable cause binding on the convening authority, should the preliminary hearing officer be a military judge or magistrate?

A. Current Practice.

- Article 32, UCMJ, provides that a preliminary hearing shall be conducted by an impartial hearing officer who is a judge advocate equal or senior in grade to the military counsel representing the accused and the government at the hearing, whenever practicable. (Article 32, UCMJ, p. A2-12)
- Article 32 preliminary hearing officers typically range in grade from O-3 to O-6.
- The Air Force frequently assigns their military judges to serve as Article 32 preliminary hearing officers in sexual offense cases.

B. Comparative Civilian Practice. In the federal system, magistrates conduct preliminary hearings. Federal Rules of Criminal Procedure 5.1. In state jurisdictions that utilize preliminary hearing, civilian prosecutors that we interviewed stated they are presided over by judges or magistrates. (FRCP 5.1)

C. Military Practitioners' Views from August 23, 2019, DAC-IPAD Public Meeting and Request for Information 11 Responses. [RFI Set 11 Responses; DAC-IPAD Aug. 23, 2019 public meeting transcript]

- Military Justice Policy Chiefs: several stated they while their PHOs meet the requisite level of experience, they often don't have as much experience as the senior trial or defense counsel or the staff judge advocate.
- Marine Corps Military Justice Chief: The Article 32 process could be improved by requiring that the PHO be a military judge or magistrate. Judges have specialized judicial training, experience dealing with counsel and handling objections, and most importantly, will have more training and experience applying the probable cause standard. A requirement that PHOs be military judges or magistrates would better protect the rights of all participants at the hearing and would provide a better determination of probable cause.
- Defense Services Organization Chiefs: stated PHOs currently often don't have as much military justice experience as is necessary to serve as a PHO. PHOs are often assigned based on availability, rather than experience. Several suggested using military judges or magistrates would be an improvement.
    - Army defense counsel: A system that uses specialized judge advocates who do not work for the SJA (magistrates, perhaps) may be a solution.
    - Navy defense counsel: This is an area where due consideration should be made to making this a magistrate level position or identify minimum experience requirements above Art 27(b)(2) certification to serve as a PHO.
    - Air Force defense counsel: suggest additional training for PHOs to improve consistency. To qualify as a PHO, the judge advocate should have a certain level of experience in military justice, have PHO training, and be designated by TJAG as a qualified PHO. Perhaps military magistrates under R.C.M. 502(c)(2) would be appropriate for this. [RFI 11 response]

3. Should the Article 32 preliminary hearing officer have the ability to call witnesses or request relevant documents for the preliminary hearing? Should hearsay evidence be allowed?

A. Current Practice.

- Under Rule for Court-Martial 405(j), the preliminary hearing officer "shall not consider evidence not presented at the preliminary hearing" in making determinations regarding probable cause and "shall not call witnesses sua sponte." (R.C.M. 405(j)(1), 2019 MCM, p. II-44)
- The government counsel may submit alternate forms of evidence—such as recorded or written statements to law enforcement—in lieu of live testimony. The victim is not required to testify.
- The defense may present evidence relevant to the determination of probable cause, but the PHO cannot compel the production of defense-requested witnesses over government's objection.
- Hearsay has always been permitted under Article 32; however, since Article 32 became a preliminary hearing, the R.C.M. have been interpreted to allow the government to present only written or recorded statements, and other documents to the PHO, in lieu of presenting any witness testimony.
- If a military victim elects to testify, the PHO must follow trial procedures applicable to M.R.E. 412 and M.R.E 513 issues, including conducting closed hearings, sealing Art. 32 testimony and evidence, etc.
- If a military victim elects not to testify, she and/or her SVC may still attend the preliminary hearing (it's a public proceeding, with exceptions noted above).

B. Past Practice.

- Prior to the FY 2014 NDAA changes to Article 32, UCMJ, and accompanying R.C.M. 405 changes, the Article 32 investigating officer was authorized to compel the production of evidence and witnesses. (R.C.M. 405 (g), 2012 MCM, p. II-36)
- The Article 32 investigating officer could consider witness statements to law enforcement over the objection of defense only if the witness who made the statement was unavailable to testify at the hearing. If a military victim was deemed available, she could be compelled to testify.
- The procedures for identifying, admitting, and safeguarding evidence under M.R.E. 412 and 513 were loosely observed, if at all, depending on the expertise of the investigating officer.

C. Civilian Practice.

- In Federal preliminary hearings and grand juries, hearsay evidence is allowed—a victim is not required to testify. Ms. Tokash stated she often wants victims to testify in front of grand juries, as victim credibility is important to grand juries and she wants to lock down the victim's testimony while under oath. The AUSA from South Dakota says she avoids putting the victim on the stand to testify and prefers to have the investigative agent testify.
- All of the civilian prosecutors we interviewed, with the exception of Ms. Bashford speaking for New York County, stated that hearsay was allowed at the grand jury or

preliminary hearing in their jurisdiction. Most of the prosecutors stated that typically they would not put the victim on the stand, and would instead have the investigative agent testify. Two of the prosecutors (from Alameda County, CA, and Essex County, NJ) said it is common for them to put the victim on the stand at the preliminary hearing / grand jury, respectively. Ms. Bashford said that hearsay evidence is not admissible at the grand jury in New York County, NY.

- None of the civilian prosecutors interviewed indicated that the applicable law or policies in their respective jurisdiction provided victims with a statutory right to refuse to testify at a preliminary hearing or at a grand jury. Article 32, UCMJ, gives victims this right.
- Consider *Commonwealth of Pennsylvania v. McClelland*, 2020 WL 4092109 (July 21, 2020), in which the Pennsylvania Supreme Court held that hearsay evidence alone is insufficient to establish a *prima facie* case at a preliminary hearing.

D. Military Practitioners' Views from August 23, 2019, DAC-IPAD Public Meeting and Request for Information 11 Responses. [RFI Set 11 Responses; DAC-IPAD Aug. 23, 2019 public meeting transcript]

- Service military justice chiefs testified that Article 32 preliminary hearing officers should have greater authority to compel the production of evidence and witnesses. (Aug. 23, 2019 public meeting transcript)
- Service defense chiefs testified that the government should be required to call witnesses to establish probable cause, rather than rely solely on documentary evidence. They also agreed that the Article 32 preliminary hearing officer should have the authority to compel production of evidence and witnesses. (Aug. 23, 2019 public meeting transcript)
- Many of the speakers at the August 2019 public meeting commented that Article 32 preliminary hearings are not as helpful to the SJA because the PHO only reviews materials in the investigative file, often there are no witnesses, and the hearing may last only fifteen minutes as participants recite from a standard script for Article 32 preliminary hearings. Defense counsel added that since the FY 14 NDAA changes, Article 32 hearings are waived more often than in the past.

E. Fiscal Years 2014 to 2018 Data on Article 32 No Probable Cause Determinations.

- Number and percent of cases in which sexual assault victims testified in Article 32 hearings involving penetrative sexual offenses:
  - FY14: 392 of 425 cases (92%)
  - FY15: 281 of 451 cases (62%)
  - FY16: 78 of 430 cases (18%)
  - FY17: 28 of 368 cases (8%)
  - FY18: 9 of 318 cases (3%)
- Number and percent of cases in which witnesses testified in Article 32 hearings involving penetrative sexual offenses:
  - FY14: 418 of 425 cases (98%)
  - FY15: TBD
  - FY16: TBD
  - FY17: 148 of 368 cases (40%)
  - FY18: 116 of 318 cases (36%)

4. Should the Article 32 preliminary hearing officer provide an opinion, in the Article 32 report, regarding whether there is sufficient evidence to obtain and sustain a conviction?

A. Current Practice. Neither Article 32, UCMJ, nor R.C.M. 405 speak to the issue of sufficiency of the evidence to obtain and sustain a conviction. The legal standard the preliminary hearing officer is required to apply is probable cause.

- In the DAC-IPAD staff's review of Article 32 reports from FY14 through FY18, the staff noted that while not required, in some of the Military Services, the investigating / preliminary hearing officer commented sua sponte on whether the admissible evidence was sufficient to obtain and sustain a conviction.

B. Civilian Practice. The legal standard for federal preliminary hearings and grand jury indictments is probable cause. All of the state prosecutors we interviewed stated this was also the standard in the preliminary hearings and grand juries in their jurisdictions.

- All of the prosecutors we interviewed—state and federal—stated that while probable cause was the standard, they would not take a case to a preliminary hearing or grand jury unless the evidence was sufficient to meet a higher standard, such as sufficient admissible evidence to obtain and sustain a conviction or beyond a reasonable doubt. A few of the prosecutors acknowledged that they would use a standard somewhat lower than beyond a reasonable doubt.

C. DAC-IPAD Findings and Assessments from the Case Review Report.

- 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.
- Finding 102: The data clearly indicate that no adult penetrative sexual offense charge should be referred to trial by general court-martial without sufficient admissible evidence to obtain and sustain a conviction on the charged offense, and Article 34, UCMJ, should incorporate this requirement.
- Finding 103: Of the 91 cases closed in FY17 resulting in a conviction for an adult penetrative sexual offense, in 89 (97.8%) of these cases, the materials reviewed contained sufficient admissible evidence to obtain and sustain a conviction on the charged offense.
- Finding 104: Of the 144 cases closed in FY17 resulting in an acquittal for the adult penetrative sexual offense,
    - In 120 (83.3%) of these cases, the evidence in the materials reviewed was sufficient to establish probable cause to believe that the accused committed the charged offense; and
    - In 73 (50.7%) of these cases, the materials reviewed contained sufficient admissible evidence to obtain and sustain a conviction on the charged offense.
    - Finding 105: The decision to refer to trial by general court-martial an adult penetrative sexual offense charge that lacks sufficient admissible evidence to obtain and sustain a conviction directly contributes to the 61.3% acquittal rate for these offenses.