JPP Recommendations on Panel Concerns Regarding the Fair Administration of Military Justice in Sexual Assault Cases*

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.

- The Fiscal Year 2014 National Defense Authorization Act (NDAA) made substantial changes to Article 32 of the Uniform Code of Military Justice (UCMJ), narrowing the scope of the pretrial hearing to a determination of whether probable cause exists to believe an offense was committed and the accused committed the offense. These changes also removed the ability of the Article 32 hearing officer to compel a victim to appear and testify at the hearing. The Article 32 hearing is no longer a discovery mechanism for the defense.

- According to site visit information from trial and defense counsel provided to the JPP Subcommittee, the new Article 32 preliminary hearing is not a meaningful process for evaluating the strength of the case.

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* JPP Recommendations 1–11 are included in the Judicial Proceedings Panel Initial Report 11 (Feb. 2015), *available at* http://jpp.whs.mil/public/docs/08-Panel_Reports/JPP_InitialReport_Final_20150204.pdf. JPP Recommendations 12–17 are included in the Judicial Proceedings Panel Report on Restitution and Compensation for Military Adult Sexual Assault Crimes 5 (Feb. 2016), *available at* jpp.whs.mil/Public/docs/08-Panel_Reports/JPP_Rest_Comp_Report_Final_20160201_Web.pdf. JPP Recommendations 18–23 are included in the Judicial Proceedings Panel Report on Article 120 of the Uniform Code of Military Justice 5–7 (Feb. 2016), *available at* jpp.whs.mil/Public/docs/08-Panel_Reports/JPP_Art120_Report_Final_20160204_Web.pdf. JPP Recommendations 24–36 are included in the Judicial Proceedings Panel Report on Retaliation Related to Sexual Assault Offenses 5–10 (Feb. 2016), *available at* jpp.whs.mil/Public/docs/08-Panel_Reports/04_JPP_Retaliation_Report_Final_20160211.pdf. JPP Recommendations 37–38 are included in the Judicial Proceedings Panel Report on Statistical Data Regarding Military Adjudication of Sexual Assault Offenses 5–6 (Apr. 2016), *available at* http://jpp.whs.mil/Public/docs/08-Panel_Reports/05_JPP_StatData_MilAdjud_SexAsslt_Report_Final_20160419.pdf. JPP Recommendations 39–42 are included in the Judicial Proceedings Panel Report on Military Defense Counsel Resources and Experience in Sexual Assault Cases 5–6 (Feb. 2017), *available at* http://jpp.whs.mil/Public/docs/08-Panel_Reports/06_JPP_Defense_Resources_Experience_Report_Final_20170424.pdf. JPP Recommendations 43–46 are included in the Judicial Proceedings Panel Report on Victims' Appellate Rights 3–4 (June 2017), *available at* http://jpp.whs.mil. JPP Recommendations 47–51 are included in the Judicial Proceedings Panel Report On Sexual Assault Investigations in the Military 3–4 (Sep. 2017), *available at* http://jpp.whs.mil. JPP Recommendations 52–54 are included in the Judicial Proceedings Panel Report on Statistical Data Regarding Military Adjudication of Sexual Assault Offenses for Fiscal Year 2015 3–4 (Sep. 2017), *available at* http://jpp.whs.mil.

- According to information presented to the JPP by former military judges, trial counsel, and defense counsel, Article 32 hearings are now "paper drills," often with no witnesses testifying and only documentary evidence submitted.

- Counsel who spoke to the Subcommittee during site visits, as well as counsel who provided information to the JPP, stated that convening authorities sometimes refer charges in sexual assault cases even when the Article 32 preliminary hearing officers recommend charges not be referred.

- The JPP believes that Article 32 data should be examined to determine whether the seniority or experience level of the Article 32 preliminary hearing officer is a factor in the frequency with which convening authorities follow his or her advice.

- Because the statutory changes to Article 32, UCMJ, have only recently been included in the court-martial case data reviewed by the JPP, the Secretary of Defense and the DAC-IPAD should continue monitoring court-martial data to evaluate the effect of the statutory changes.

Recommendation 56: **Article 33, UCMJ, nonbinding case disposition guidance for convening authorities and staff judge advocates should require that the following standard be considered 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.**

The nonbinding disposition guidance should require the staff judge advocate and convening authority to consider all the prescribed guideline factors in making a disposition determination, though they should retain discretion regarding the weight they assign each factor.

- The Fiscal Year 2017 NDAA created a new Article 33 of the UCMJ that directed the Secretary of Defense to issue nonbinding guidance regarding factors that convening authorities and staff judge advocates should consider when exercising their duties with respect to the disposition of charges. The new Article 33 states that this guidance should take into account the "principles contained in official guidance of the Attorney General to attorneys for the Government with respect to disposition of Federal criminal cases."[2]

- On July 11, 2017, the Joint Service Committee on Military Justice published for public comment proposed disposition guidance under Article 33, UCMJ. The JPP reviewed Sections 2.1 and 2.3 of the proposed guidance and notes that Section 2.1(h) is generally consistent with the JPP proposed standard.

- The "official guidance of the Attorney General" mentioned in Article 33 refers to the U.S. Attorneys' Manual. This manual specifies that probable cause is a threshold consideration that, if met, does not automatically warrant prosecution. The manual provides that an attorney should commence prosecution if "the admissible evidence will probably be sufficient to obtain and sustain a conviction."

- The American Bar Association's Criminal Justice Standards for the Prosecution Function state that a prosecutor should file and maintain criminal charges only when the charges are supported by probable cause, when "admissible evidence will be sufficient to support conviction beyond a reasonable doubt, and [when] the decision to charge is in the interests of justice."

2 National Defense Authorization Act for Fiscal Year 2017, Pub. L. 114-328, § 5204.

- Counsel interviewed by the JPP Subcommittee on site visits believe that the standard in the military for referral of charges, which is probable cause, is too low and that convening authorities should take into account other factors in making disposition decisions, such as the likelihood of obtaining a conviction at trial.

Recommendation 57: **After case disposition guidance under Article 33, UCMJ, is promulgated, the Secretary of Defense and DAC-IPAD conduct both military installation site visits and further research to determine whether convening authorities and staff judge advocates are making effective use of this guidance in deciding case dispositions. They should also determine what effect, if any, this guidance has had on the number of sexual assault cases being referred to courts-martial and on the acquittal rate in such cases.**

- Counsel who spoke to the Subcommittee during site visits, as well as counsel who provided information to the JPP, perceived considerable pressure on convening authorities to refer sexual assault allegations to court-martial, even when based on weak evidence. The result, they believe, is a high acquittal rate in sexual assault cases.

- Case documents provided by the Services for sexual assault cases tried by court-martial in fiscal year 2015 show that for cases in which the most serious offense tried was a penetrative offense, 39% resulted in convictions for a sexual assault offense, 31% resulted in convictions for a non-sex offense only, and 30% resulted in acquittal of all charges. For cases in which the most serious sex offense tried was a sexual contact offense, 25% resulted in convictions for a sexual contact offense, 57% resulted in convictions for a non-sex offense only, and 18% resulted in acquittal of all charges.[3]

Recommendation 58: **The Secretary of Defense and the DAC-IPAD review whether Article 34 of the UCMJ and Rule for Court-Martial 406 should be amended to remove the requirement that the staff judge advocate's pretrial advice to the convening authority (except for exculpatory information contained in that advice) be released to the defense upon referral of charges to court-martial. This review should determine whether any memo from trial counsel that is appended should also be shielded from disclosure to the defense. This review should also consider whether such a change would encourage the staff judge advocate to provide more fully developed and candid written advice to the convening authority regarding the strengths and weaknesses of the charges so that the convening authority can make a better-informed disposition decision.**

- Rule for Court-Martial 404 states that the staff judge advocate must provide written pretrial advice to the convening authority prior to referral of charges to a general court-martial, including a conclusion as to whether each specification states an offense under the UCMJ, whether the allegations are warranted by the evidence in the Article 32 preliminary hearing report, and whether a court-martial would have jurisdiction over the accused and offense, as well as a recommendation for action by the convening authority. A copy of the pretrial advice must be provided to the defense if the convening authority refers the case to court-martial.

- Counsel in some Services provide a prosecution merits memo with the trial counsel's opinion on the evidence and the likelihood of conviction at trial. Counsel from other Services say they have

3 Judicial Proceedings Panel Report on Statistical Data Regarding Military Adjudication of Sexual Assault Offenses for Fiscal Year 2015 (Sep. 2017), Appendix A: Adjudication of Sexual Offenses Reported to the Military Services in 2015, Cassia Spohn, PhD, School of Criminology and Criminal Justice, Arizona State University.

similar processes. Under Rule for Court-Martial 404, if appended to the staff judge advocate's pretrial advice, this memo would also have to be provided to the defense if charges are referred to court-martial.

Recommendation 59: **Congress review and consider revising provisions in the National Defense Authorization Act for Fiscal Year 2014 and Fiscal Year 2015, sections 1744 and 541 respectively, that require non-referral decisions in certain sexual assault cases to be forwarded for review and decision to a higher general court-martial convening authority or to the Service Secretary, because these provisions appear to have created a perception of undue pressure on convening authorities to refer such cases. The Secretary of Defense should develop procedures to mitigate this perception.**

- The Fiscal Year 2014 and Fiscal Year 2015 NDAAs contain provisions requiring that a convening authority's decision not to refer certain sexual assault cases be forwarded for review and decision either to a higher general court-martial convening authority or to the Service Secretary. While well-intentioned, these NDAA provisions appear to have created the perception of undue pressure on convening authorities to refer sexual assault cases to courts-martial, which negatively affects the military justice system.

- Data provided by the Services on review of disposition decisions since these NDAA provisions were enacted reflect no instances in which secretarial review of a convening authority's decision has been required. In some instances in each Service, a convening authority's decision not to refer a sexual assault case has been reviewed by a higher-level convening authority. In all but one of those instances, the higher-level convening authority also declined to refer the case to court-martial.

- Trial and defense counsel on site visits perceived there to be pressure on convening authorities to refer sexual assault cases to trial, even when based on weak evidence. They perceive that commanders would rather refer cases to trial than deal with the potential adverse effects of not referring the cases, such as career setbacks, media scrutiny, and elevated review of non-referral decisions.

- The JPP notes media coverage of two sexual assault court-martial appellate cases, both of which came to light following the Subcommittee's issuance of its report, that underscores the JPP's concerns related to perceived pressure on convening authorities.

    - In the first case, *United States v. Barry,*[4] a declaration of the convening authority was submitted to the court that states: "I perceived that if I were to disapprove the findings in the [sexual assault] case, it would adversely affect the Navy." The convening authority further stated: "Even though I was convinced then, and am convinced now, that I should have disapproved the findings, my consideration of the Navy's interest in avoiding the perception that military leaders were sweeping sexual assaults under the rug outweighed that conviction at the time."[5]

4 *United States v. Barry*, 76 M.J. 269 (Apr. 27, 2017); *remanded, United States v. Barry*, No. 2017 CAAF LEXIS 703 (C.A.A.F., June 19, 2017).

5 *Declaration of RADM Patrick J. Lorge, USN (Ret.)*, May 5, 2017.

[JPP Subcommittee Report Extracts]

affect recruiting, and create a corrosive cynicism among military personnel. For that reason, the Subcommittee believed it was important to share the information it received with the JPP.

The Subcommittee identified a number of problems with how the military justice system treats sexual assault offenses:

1. The revised Article 32 process provides less information to convening authorities and no longer serves as a discovery mechanism for the defense;

2. Because convening authorities currently lack meaningful written guidelines to help them decide whether a case warrants referral to court-martial, such as the likelihood of securing a conviction at trial, they may be referring sexual assault charges to trial on the basis of weak evidence;

3. Because the staff judge advocate's pretrial advice to the convening authority must be provided to the defense, the staff judge advocate may be unwilling to provide a complete and candid written assessment of the evidence in the case;

4. Counsel perceive that convening authorities feel public pressure to refer sexual assault cases to trial;

5. Some trial counsel complained they no longer have the access to sexual assault victims that they need in order to properly prepare those victims for trial;

6. Military members who potentially may sit on court-martial panels receive sexual assault prevention and response training that may confuse them regarding the legal standard for consent in sexual assault cases. The frequency of this training is also causing "training fatigue" among military members; and

7. The current policy on expedited transfer of sexual assault victims can make it difficult for investigators and prosecutors to adequately consult with victims prior to trial when victims have been transferred to faraway locations.

In this report, the Subcommittee makes nine recommendations:

Recommendation 1: **The JPP Subcommittee recommends that 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 purpose. Such a 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 the preliminary hearing officer against referral, based on lack of probable cause, should be binding on 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 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 Subcommittee reiterates its recommendation— presented in its report on military defense counsel resources and experience in sexual assault cases, and adopted by the JPP—that the defense be provided with independent investigators.

Recommendation 2: 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.

The JPP Subcommittee further recommends that the disposition guidance require the staff judge advocate and convening authority to consider all the prescribed guideline factors in making a disposition determination, though they should retain discretion regarding the weight they assign each factor. These factors should be considered in their totality, with no single factor determining the outcome.

Recommendation 3: The JPP Subcommittee recommends that after case disposition guidance under Article 33, UCMJ, is promulgated, the DAC-IPAD conduct both military installation site visits and further research to determine whether convening authorities and staff judge advocates are making effective use of this guidance in deciding case dispositions. They should also determine what effect, if any, this guidance has had on the number of sexual assault cases being referred to courts-martial and on the acquittal rate in such cases.

Recommendation 4: The JPP Subcommittee recommends that the DAC-IPAD review whether Article 34 of the UCMJ and Rule for Court-Martial 406 should be amended to remove the requirement that the staff judge advocate's pretrial advice to the convening authority (except for exculpatory information contained in that advice) be released to the defense upon referral of charges to court-martial. The DAC-IPAD should determine whether any memo from trial counsel that is appended should also be shielded from disclosure to the defense. This review should consider whether such a change would allow the staff judge advocate to provide more fully developed, candid written advice to the convening authority regarding the strengths and weaknesses of the charges so that the convening authority can make a better-informed disposition decision.

Recommendation 5: The JPP Subcommittee recommends that Congress repeal provisions from the National Defense Authorization Act for Fiscal Year 2014 and Fiscal Year 2015, sections 1744 and 541 respectively, that require non-referral decisions in certain sexual assault cases to be forwarded to a higher general court-martial convening authority or to the Service Secretary. The perception of pressure on convening authorities to refer sexual assault cases to courts-martial created by these provisions and the consequent negative effects on the military justice system are more harmful than the problems that such provisions were originally intended to address.

Recommendation 6: The JPP Subcommittee recommends that the DAC-IPAD continue to gather data and other evidence on disposition decisions and conviction rates of sexual assault courts-martial to supplement information provided to the JPP Subcommittee during military installation site visits and to determine future recommendations for improvements to the military justice system.

B. Information Presented to the JPP. One senior defense counsel told the JPP, "The lack of a thorough pre-trial investigation and prosecutorial discretion combined with the nature of acquaintance sexual assaults and the new incentives to fabricate [allegations] are a recipe for wrongful convictions."[115] She stated that despite changes to the system that favor victims and the prosecution, defense counsel are achieving more acquittals than ever before in sexual assault cases. She further observed, however, that the high acquittal rate demonstrates that many of the cases being "pushed through the system" should not be at court-martial and that, although the accused in these cases is often found not guilty, the trial process incurs "a real cost to the accused's life, reputation, family and career."[116] In her view, "the sands have shifted in favor of the victim at the expense of the accused."[117] Another defense counsel expressed his opinion that because of the changes in the military justice system, the rights of the accused to due process and a speedy trial are being eroded.[118] He noted that cases are lingering for as long as two years from report until the case goes to trial, putting the accused's and victim's life on hold for a significant period of time.[119]

V. CONCLUSIONS AND RECOMMENDATIONS

It appears that recent sexual assault legislation and policy changes that have benefited sexual assault victims and made the military justice system less intimidating to them have also had some negative consequences that must be addressed. These changes have affected the perceived legitimacy of the justice system. While legislative changes have substantially reduced the number of victims who testify at Article 32 hearings and have clarified that this hearing is not intended to be a discovery mechanism for the defense, there has been no corresponding new legislation or policy to provide defense counsel access to important case information.[120] In addition, changes in the military justice system, such as the addition of SVCs/VLCs, have greatly benefitted sexual assault victims and given them a much-needed voice in the system. Some defense counsel, however, feel this unfairly tips the scales of justice against the defendant. Also, when SVC/VLC limit a prosecutor's access to the victim, it may adversely affect case outcomes. SVC/VLC must understand that in spite of their laudable intentions, they may inadvertently harm a victim's goals or interests by weakening the criminal case, thereby increasing the chances of an acquittal at trial.

The consensus among counsel interviewed during the installation site visits was that the combination of a less robust Article 32 process, pressure on convening authorities to refer sexual assault cases to courts-martial, and the low standard of probable cause for referring cases to courts-martial has led to cases being referred to courts-martial in which there is little chance for a conviction. Many counsel felt that the result has been a high acquittal rate in sexual assault cases, which, in turn, has caused military

115 *Transcript of JPP Public Meeting* 211 (Jan. 6, 2017) (testimony of LCDR Trest).

116 *Id.* at 212–13.

117 *Id.* at 252.

118 *Transcript of JPP Public Meeting* 250 (Jan. 6, 2017) (testimony of Maj Argentina).

119 *Id.* at 249.

120 The Subcommittee of the Judicial Proceedings Panel Report on Military Defense Counsel Resources and Experience in Sexual Assault Cases, *supra* note 2, highlights significant due process issues regarding defense counsel and makes four recommendations, including that defense counsel be provided with independent investigators, that defense offices be appropriately staffed and resourced, and that expert witness approval and funding be vested in Service defense organizations. The Subcommittee's report and recommendations were approved, with modifications, by the JPP. The Judicial Proceedings Panel Report on Military Defense Counsel Resources and Experience in Sexual Assault Cases is *available at* http://jpp.whs.mil/Public/docs/08-Panel_Reports/06_JPP_Defense_Resources_Experience_Report_Final_20170424.pdf.

members to question the fairness of the military justice system. In addition, some counsel worried that when the word gets around that sexual assault cases are going to courts-martial supported only by weak evidence, military juries may be much more skeptical of the charges and the prosecution and thus may be more likely to acquit. Perhaps inevitably, as Service members become aware of weak cases and high acquittal rates, victims may become more reluctant to make unrestricted reports.

Even when Article 32 officers have recommended against the referral of charges, those recommendations are not always followed by convening authorities. A substantial sampling of sexual assault cases tried in fiscal year 2015 reveal 54 cases in which the convening authority referred charges despite Article 32 investigating officers or PHOs finding that there was no probable cause or advising against the referral of sexual assault charges. In 45 of those cases, the accused was acquitted of the charges at trial, a number suggesting that perhaps the staff judge advocates and convening authorities should have paid more attention to the Article 32 officers' recommendations.

While most counsel now view the Article 32 process as having little value for scrutinizing the evidence in a sexual assault case, there has yet to emerge a formal written process for ensuring that the convening authority is made fully aware of the strengths and weaknesses of a case and has guidance for deciding an appropriate disposition. There are often good reasons, such as maintaining good order and discipline and respecting a belief that the assault took place, to refer a case to court-martial even when the likelihood of acquittal is high. But a convening authority should not be forced to make the critical decision about referral, with its life-changing impact on both the victim and the defendant, without clear guidelines and a better sense of the evidence's strength. Convening authorities must be corrected if they erroneously believe that a decision to refer a case to court-martial will have few consequences for the accused, the victim, or the public's perception of the military justice system. An accused facing court-martial is exposed to numerous adverse career and personal consequences, such as loss of promotion and career advancement opportunities, ostracism by peers, and the ongoing stress of knowing that a federal conviction, confinement, and sex offender registration are possible. Even if ultimately acquitted, the accused often suffers the enduring social and professional stigma of simply having been accused of these reprehensible offenses.

Recent legislation directing the Secretary of Defense to issue nonbinding guidance to be considered by convening authorities and staff judge advocates in determining an appropriate case disposition may help meet this need. Such formal case disposition guidance, in written form, should provide convening authorities with additional considerations, beyond whether the charges are supported by probable cause, as they decide whether to refer a case to court-martial or to resolve it through disposition at some lower level.

Several prosecutors discussed their practice in sexual assault cases of producing a prosecution merits memo to lay out the strengths and weaknesses of the evidence and the likelihood of a conviction at trial, thereby aiding the staff judge advocate and convening authority in making an appropriate decision on disposition. While this seems like a useful tool to fill the void left when a more robust Article 32 process was replaced, it is worth noting that under Article 34 of the UCMJ and under R.C.M. 406, the staff judge advocate's pretrial advice to the convening authority and accompanying documents must be provided to the defense if charges are referred to trial. A prosecution merits memo detailing evidentiary problems can go to the staff judge advocate without also being given to the defense, but any information provided in writing to the convening authority with the pretrial advice presumably must then be provided to the defense if charges are referred. This legal requirement may make staff judge advocates and prosecutors reluctant to write such candid memos to the convening authority for fear of disclosing a case's evidentiary problems to the defense. There is no such parallel in civilian jurisdictions, where information provided by a prosecutor to his or her superiors would not

have to be provided to the defense counsel unless it revealed potentially exculpatory evidence (as also must be done by military prosecutors). More research and thought should be devoted to enabling the convening authority in the military justice system to be given enough information to make a proper decision, since the convening authority, like prosecutors in civilian jurisdictions, are responsible for determining which cases are prosecuted and which are not.

On site visits, counsel also discussed their perception that convening authorities feel pressure to refer sexual assault cases to courts-martial regardless of their merits. Counsel are concerned that cases are being sent to courts-martial even when the evidence is weak or the allegations involve less serious conduct, such as an attempted kiss or slap on the buttocks, that could be resolved through nonjudicial punishment or administrative action. The Subcommittee notes, however, that in the fiscal year 2015 case data collected from the Services, convening authorities either dismissed charges prior to trial or disposed of cases by alternative means in almost 30% of all cases in which charges were preferred. Without knowing the facts of these cases, we cannot draw conclusions about why they were not referred to trial. But these data do reveal that while convening authorities may be experiencing pressure to refer sexual assault cases to court-martial, they are declining to do so almost 30% of the time. In addition, it may be that convening authorities are referring more sexual assault cases to courts-martial not because of outside pressure but because they now take sexual assault cases more seriously than they had done in the past and feel that disposition by courts-martial is the most appropriate way to resolve these grave allegations. So long as statutory language requires elevated review of a convening authority's decision not to refer a sexual assault case to court-martial, however, convening authorities will always feel some pressure to refer cases to trial against their better judgment.

Counsels' perceptions of a high acquittal rate for sexual assault offenses are borne out by the data. Among cases referred to courts-martial in fiscal year 2015, only 40% of the cases involving a penetrative sexual assault offense resulted in a conviction of any type of sexual assault offense. Just 25% of sexual contact cases resulted in conviction for any sexual offense. While the conviction rate is higher when convictions for non-sex offenses are included, the acquittal rate for sexual assault offenses is significant.

Although the JPP Subcommittee does not have the time to continue investigating the potential causes of this high acquittal rate, this issue must be explored further. The Subcommittee notes that the authorizing legislation for the JPP's successor panel, the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces, requires the panel to conduct an ongoing review of cases involving sexual misconduct allegations.[121]

The inherent difficulties in evaluating sexual assault case evidence, combined with the widespread perception that convening authorities are referring weak cases, have led to the belief by many of the Subcommittee's interviewees that the military justice system is weighted against the accused in sexual assault cases. Such one-sidedness is particularly serious in light of the potentially catastrophic effects of being accused of a sexual crime. The high rate of acquittal in military sexual assault cases can feed into this perception and lead to a general mistrust of the military justice system, which may lead Service members to acquit when they serve on panels in sexual assault courts-martial.

The public may view the high acquittal rate as a result not of the more aggressive approach to sexual offense prosecution described in the site visits but of the military's indifference to sexual assault. Public loss of confidence in the military and the military justice system has the potential to harm military enlistment and officer accession rates, as well as retention rates. In short, there must be a balance—a

121 FY15 NDAA, *supra* note 21, § 546.

system that treats sexual assault victims fairly and compassionately and that also provides defendants with procedures that are perceived to be, and are, fair. It is not the accused alone who suffers when a sexual assault case for which there is little chance of winning a conviction is referred to court-martial—the victim is also forced to endure a lengthy, difficult process at whose end the accused is very likely to be found not guilty.

RECOMMENDATIONS:

Recommendation 1: The JPP Subcommittee recommends that 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 purpose. Such a 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 the preliminary hearing officer against referral, based on lack of probable cause, should be binding on 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 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 Subcommittee reiterates its recommendation— presented in its report on military defense counsel resources and experience in sexual assault cases, and adopted by the JPP—that the defense be provided with independent investigators.

Recommendation 2: 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.

The JPP Subcommittee further recommends that the disposition guidance require the staff judge advocate and convening authority to consider all the prescribed guideline factors in making a disposition determination, though they should retain discretion regarding the weight they assign each factor. These factors should be considered in their totality, with no single factor determining the outcome.

Recommendation 3: The JPP Subcommittee recommends that after case disposition guidance under Article 33, UCMJ, is promulgated, the DAC-IPAD conduct both military installation site visits and further research to determine whether convening authorities and staff judge advocates are making effective use of this guidance in deciding case dispositions. They should also determine what effect, if any, this guidance has had on the number of sexual assault cases being referred to courts-martial and on the acquittal rate in such cases.

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Recommendation 5: The JPP Subcommittee recommends that Congress repeal provisions from the National Defense Authorization Act for Fiscal Year 2014 and Fiscal Year 2015, sections 1744 and 541 respectively, that require non-referral decisions in certain sexual assault cases to be forwarded to a higher general court-martial convening authority or to the Service Secretary. The perception of pressure on convening authorities to refer sexual assault cases to courts-martial created by these provisions and the consequent negative effects on the military justice system are more harmful than the problems that such provisions were originally intended to address.

Recommendation 6: The JPP Subcommittee recommends that the DAC-IPAD continue to gather data and other evidence on disposition decisions and conviction rates of sexual assault courts-martial to supplement information provided to the JPP Subcommittee during military installation site visits and to determine future recommendations for improvements to the military justice system.

Recommendation 7: The JPP Subcommittee recommends that the Secretary of Defense ensure that SVCs/VLCs receive the necessary training on the importance of allowing full access by prosecutors to sexual assault victims prior to courts-martial. Such training will ensure that SVCs/VLCs are considering the value of a meaningful victim-prosecutor relationship in the advice they provide their victim-clients and assist prosecutors in sufficiently developing the rapport with the victim needed to fully prepare for trial.

Recommendation 8: The JPP Subcommittee recommends that the Department of Defense Sexual Assault Prevention and Response Office ensure that sexual assault training conducted by the military Services provide accurate information to military members regarding a person's ability to consent to sexual contact after consuming alcohol and the legal definition of "impairment" in this context and that training be timed and conducted so as to avoid "training fatigue."

The JPP Subcommittee further recommends that the DAC-IPAD monitor whether misperceptions regarding alcohol consumption and consent continue to affect court-martial panel members.

Recommendation 9: The JPP Subcommittee recommends that the Secretary of Defense review the policy on expedited transfer of sexual assault victims and consider whether it should be changed to state that when possible, sexual assault victims should be transferred to another unit on the same installation or to a nearby installation. This change will help ensure that prosecutors have access to victims in preparing for courts-martial, will satisfy the need to separate the victim from the accused, and will maintain the victim's access to support systems while combating the perception that the ability to ask for these transfers has encouraged fraudulent claims of sexual assault. Commanders and SVCs/VLCs should all receive training in how relocating victims from less desirable to more desirable locations can foster the perception among military members that the expedited transfer system is being abused and in how such transfers can be used by defense counsel to cast doubt on the victim's credibility, possibly leading to more acquittals at courts-martial.

The JPP Subcommittee further recommends that the DAC-IPAD review data on expedited transfers to determine the locations from which and to which victims are requesting expedited transfers and to review their stated reasons.