

SUBCOMMITTEE OF
THE JUDICIAL PROCEEDINGS PANEL

REPORT ON
BARRIERS TO THE FAIR
ADMINISTRATION OF
MILITARY JUSTICE IN
SEXUAL ASSAULT CASES



May 2017

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MEMORANDUM FOR MEMBERS OF THE JUDICIAL PROCEEDINGS PANEL

SUBJECT: Report of the Subcommittee

On April 9, 2015, the Secretary of Defense established this Subcommittee to support the Judicial Proceedings Panel in its duties under Section 576(d) of the National Defense Authorization Act for Fiscal Year 2013. Following the Secretary's objectives and at the request of the Judicial Proceedings Panel, the Subcommittee conducted military installation site visits throughout the United States and Asia. Based upon information received during these site visits, the Subcommittee undertook additional research of several topics. The Subcommittee has completed its review on the topic of barriers to the fair administration of military justice in sexual assault cases and submits to the Judicial Proceedings Panel its report with our assessment, conclusions, and recommendations.


Barbara S. Jones
Subcommittee Chair

Executive Summary

SUBCOMMITTEE REPORT TO THE JUDICIAL PROCEEDINGS PANEL ON BARRIERS TO THE FAIR ADMINISTRATION OF MILITARY JUSTICE IN SEXUAL ASSAULT CASES

From July through September 2016, members of the Judicial Proceedings Panel (JPP) Subcommittee, at the request of the JPP, spoke to more than 280 individuals—all involved in the military justice process, from 25 military installations in the United States and Asia—about the investigation, prosecution, and defense of sexual assault offenses.

On the basis of information received at the site visits, the Subcommittee identified several topics to present to the JPP, some of which required additional research. Therefore, the Subcommittee decided to issue separate reports on each of the identified subjects. The Subcommittee issued its first report in December 2016 on the subject of military defense counsel resources and experience in sexual assault cases, its second report in February 2017 on sexual assault investigations in the military, and three short reports in March 2017 on the topics of the Department of Defense (DoD) initial disposition withholding policy, Military Rules of Evidence 412 and 513, and the training and experience of trial counsel and special victims' counsel/victims' legal counsel.

This final Subcommittee report focuses on some large-scale issues in the military's handling of sexual assault cases that came to light during the site visits and subsequent research. In the past several years, there has been a huge public outcry about the problem of sexual assault in the military. Media reports, the documentary film *Invisible War*, and the work of a number of women members of the U.S. House and Senate have fostered a public perception that sexual assault is rampant in the military and that the military has swept the problem under the rug both by failing to effectively prosecute the accused and by failing to treat the victims with dignity and compassion. To address these concerns, Congress, the Department of Defense, and the White House have all worked to change the military system so that victims of sexual assault are treated with respect and are not further victimized by the criminal justice process. Other changes have been put in place to counter the perception that sexual assault predators were being protected from prosecution by military commanders.

Many of these changes have been valuable. One possible sign that they are having an effect is the increase in the past few years of the number of sexual assault cases being reported. While its cause cannot be identified with certainty, many believe that it indicates greater confidence that the criminal justice system will help the victim and vigorously prosecute the accused.

As constructive and important as these changes have been, they have also produced an unintended negative consequence: they have, as the Subcommittee was repeatedly told on its site visits, raised serious questions about the fundamental fairness of the military justice process when it comes to the treatment of the accused.

It is vital for the military justice system to strike the right balance between the needs of the victim and the needs of the defendant. Both must be properly addressed if the system is to be seen as fair and just. The failure to create the perception and the reality of a just system can undermine morale,

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.

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.

Barriers to the Fair Administration of Military Justice in Sexual Assault Cases

From July through September 2016, members of the Judicial Proceedings Panel (JPP) Subcommittee, at the request of the JPP, spoke to more than 280 individuals from 25 military installations in the United States and Asia involved in the military justice process; these conversations focused on the investigation, prosecution, and defense of sexual assault offenses.¹ Discussions were held without attribution so that Subcommittee members could hear candid perceptions of the military's handling of sexual assault cases from the men and women who are investigating and litigating those cases. The Subcommittee spoke to groups of military prosecutors, defense counsel, special victims' counsel/victims' legal counsel, paralegals, and investigators, as well as commanders, sexual assault response coordinators, victim advocates, and victim-witness liaisons from all military Services.

During the site visits, the Subcommittee identified a number of possible barriers to the fair administration of military justice in sexual assault cases. The Subcommittee determined that it would have to analyze, discuss, and develop the information gathered and conduct further research into some of the issues identified. Therefore, the Subcommittee held 13 meetings or teleconferences from September 2016 through May 2017. Drawing on the site visit data and the Subcommittee's additional discussion and research—including information regarding ethics rules and prosecutorial discretion, provided by representatives of the Services at a Subcommittee meeting held in January 2017—the Subcommittee made recommendations on several of these points in two previous reports to the JPP: one on military defense counsel resources and experience in sexual assault cases, issued in December 2016, and one on sexual assault investigations in the military, issued in February 2017.² In addition, the Subcommittee provided brief reports to the JPP in March 2017 on the topics of the Department of Defense (DoD) initial disposition withholding policy, Military Rules of Evidence 412 and 513, and training and experience of trial counsel and special victims' counsel/victims' legal counsel.³ This final report summarizes site visit comments and the Subcommittee's research into additional barriers to the fair administration of military justice in sexual assault cases.

I. BACKGROUND

Historically, sexual assault in the military has at times garnered the public's attention. In recent years, however, public demands for accountability and justice have grown louder and more persistent, following complaints by sexual assault victims about the military's handling of their allegations and how they are treated. As a result, the procedures for dealing with such cases have been changed.

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- 1 A list of the installations visited and Subcommittee members participating in each site visit is enclosed with this report.
 - 2 See SUBCOMMITTEE OF THE JUDICIAL PROCEEDINGS PANEL REPORT ON MILITARY DEFENSE COUNSEL RESOURCES AND EXPERIENCE IN SEXUAL ASSAULT CASES (Dec. 2016), *available at* http://jpp.whs.mil/Public/docs/08-Panel_Reports/JPP_SubcommReport_DefResources_Final_20161208.pdf; SUBCOMMITTEE OF THE JUDICIAL PROCEEDINGS PANEL REPORT ON SEXUAL ASSAULT INVESTIGATIONS IN THE MILITARY (Feb. 2017), *available at* http://jpp.whs.mil/Public/docs/08-Panel_Reports/JPP_SubcommReport_Investigations_Final_20170224.pdf.
 - 3 See Subcommittee Papers on INITIAL DISPOSITION WITHHOLDING AUTHORITY; MILITARY RULES OF EVIDENCE 412 AND 513; and TRAINING AND EXPERIENCE OF TRIAL COUNSEL AND SPECIAL VICTIMS' COUNSEL/VICTIMS' LEGAL COUNSEL (Mar. 2017), *available at* http://jpp.whs.mil/Public/docs/08-Panel_Reports/JPP_Subcomm_ShortReports_20170302_Final.pdf.

Many victims complained that commanders dismissed their sexual assault allegations without further investigation or action. In response, several DoD or congressionally appointed panels reviewed the state of sexual assault prevention, victim care, investigation, and prosecution in the military and issued reports and recommendations on those topics.⁴ Congress and DoD responded to these recommendations and to military sexual assault victims' complaints by adopting more than 100 statutory reforms and numerous policy changes in the area of military sexual assault. The majority of these statutory reforms and policy changes have been instituted since 2012, and many have sought to address the treatment of sexual assault victims.

Statutes creating the Special Victims' Counsel Program and expanding victims' rights have profoundly changed the treatment of sexual assault victims. The statute creating the Special Victims' Counsel Program provides that every military member who reports being sexually assaulted is entitled to have a military attorney appointed to advise him or her of legal issues surrounding the case and other matters. This attorney is authorized to represent the victim, including at the Article 32 hearing and court-martial, at all pretrial stages of the case, and at trial. Since its inception as an Air Force pilot program in 2013, the Special Victims' Counsel/Victims' Legal Counsel⁵ (SVC/VLC) Program has evolved to the point that an SVC/VLC right to argue victim privacy issues in court is now recognized.⁶ The ability to have an SVC/VLC present during investigative interviews has also helped increase victims' comfort level with the investigative and military justice processes.

The recent passage of legislation allowing victims to decline to testify at Article 32 preliminary hearings has also been perceived positively by sexual assault victims.

These military justice reforms were prompted by past failures to properly address sexual assault allegations. They have empowered sexual assault victims and provided them a voice in how their sexual assault allegations are handled. Yet these reforms have also had unintended and, at times, negative consequences. In the view of trial counsel, defense counsel, investigators, and other military personnel involved in the military criminal justice system who were interviewed by the Subcommittee members during installation site visits, the military justice system is placing the rights and preferences of sexual assault victims over the due process rights of those accused of these offenses. Many of those interviewed sense that in an effort to respond to public criticism and right past wrongs, commanders now feel pressure to resolve greater numbers of sexual assault allegations at courts-martial, regardless of the relative merits of the case or the likelihood of conviction. The result, counsel asserted, has been a dramatic increase in acquittals in these cases. Several counsel went so far as to state that these changes in the military justice system have placed justice and the perception of a fair system at risk.

4 Among these reports are the DEFENSE TASK FORCE REPORT ON CARE FOR VICTIMS OF SEXUAL ASSAULT (Apr. 2004), *available at* <http://www.sapr.mil/public/docs/reports/task-force-report-for-care-of-victims-of-sa-2004.pdf>; REPORT OF THE DEFENSE TASK FORCE ON SEXUAL HARASSMENT AND VIOLENCE AT THE MILITARY SERVICE ACADEMIES (Jun. 2005), *available at* http://www.dtic.mil/dtfs/doc_recd/High_GPO_RRC_tx.pdf; REPORT OF THE DEFENSE TASK FORCE ON SEXUAL ASSAULT IN THE MILITARY SERVICES (Dec. 2009), *available at* http://www.sapr.mil/public/docs/research/DTFsAMS-Rept_Dec09.pdf; REPORT OF THE RESPONSE SYSTEMS TO ADULT SEXUAL ASSAULT CRIMES PANEL (Jun. 2014), *available at* http://responsesystemspanel.whs.mil/Public/docs/Reports/00_Final/RSP_Report_Final_20140627.pdf; and numerous reports of the Judicial Proceedings Panel, *available at* <http://jpp.whs.mil/>.

5 The Navy and Marine Corps refers to victims' lawyers as victims' legal counsel, while the other Services refer to them as special victims' counsel.

6 See JUDICIAL PROCEEDINGS PANEL INITIAL REPORT (Feb. 2015) [hereinafter JPP INITIAL REPORT], Section III, for a full discussion of the SVC/VLC programs. This report is *available at* http://jpp.whs.mil/Public/docs/08-Panel_Reports/01_JPP_InitialReport_Final_20150204.pdf.

This report discusses some of the changes made to the military justice process in recent years, as well as the perceived pressure on convening authorities and judge advocates to refer sexual assault cases to trial, regardless of the likelihood of conviction. Further, this report highlights some of the long-term negative consequences identified as resulting from the recent reforms. It builds on the observations and conclusions found in two earlier and related Subcommittee reports written following the installation site visits: the *Subcommittee Report to the Judicial Proceedings Panel on Military Defense Counsel Resources and Experience in Sexual Assault Cases*, the *Subcommittee Report to the Judicial Proceedings Panel on Sexual Assault Investigations in the Military*, and the Subcommittee papers on *Initial Disposition Withholding Authority*, *Military Rules of Evidence 412 and 513*, and *Training and Experience of Trial Counsel and Special Victims' Counsel/Victims' Legal Counsel*.⁷

II. REFERRING SEXUAL ASSAULT CASES TO COURT-MARTIAL

A. Early Stages of Case Processing

Before the convening authority can refer charges to a court-martial, several events must take place. While there are some important differences in the treatment of sexual assault offenses, many of the steps in the military justice process are the same regardless of the offense.

If a victim reports a sexual assault to certain identified personnel, he or she has the ability to file either a restricted or unrestricted report.⁸ If the victim chooses to file an unrestricted report of a sexual assault offense, the Services' military criminal investigative organizations (MCIOs) investigate the offense.⁹ When the investigation is completed or near completion, military prosecutors discuss the case with the appropriate commander, who determines whether to prefer charges or take some other disciplinary action against the alleged perpetrator.¹⁰

Rule for Court-Martial (R.C.M.) 306(b) provides guidance for judge advocates and convening authorities on this decision, stating that “[a]llegations of offenses should be disposed of in a timely manner at the lowest appropriate level.”¹¹ Further guidance is contained in nonbinding discussion accompanying R.C.M. 306(b):

The disposition decision is one of the most important and difficult decisions facing a commander. Many factors must be taken into consideration and balanced, including,

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- 7 The JPP adopted the Subcommittee's report on defense counsel resources and experience and its recommendations, with some modifications. The Subcommittee's report on sexual assault investigations is still pending before the JPP. The three Subcommittee papers were presented to the JPP for informational purposes.
 - 8 Restricted reports of adult sexual assault may be only made to sexual assault response coordinators, SAPR victim advocates, and healthcare personnel. U.S. DEP'T OF DEF. INSTR. [hereinafter DoDI] 6495.02, SEXUAL ASSAULT PREVENTION AND RESPONSE (SAPR) PROGRAM PROCEDURES, Encl. 4 (Mar. 28, 2013, incorporating Change 2, effective Jul. 7, 2015).
 - 9 The Subcommittee discussed problems associated with MCIO investigations of sexual assault offenses more fully in the SUBCOMMITTEE OF THE JUDICIAL PROCEEDINGS PANEL REPORT ON SEXUAL ASSAULT INVESTIGATIONS IN THE MILITARY, *supra* note 2.
 - 10 Only commanders who hold at least special court-martial convening authority and who are in the grade of O-6 (*i.e.*, colonel or Navy captain) or higher can hold initial disposition authority in sexual assault cases. *See* U.S. DEP'T OF DEFENSE, MEMORANDUM FROM THE SECRETARY OF DEFENSE ON WITHHOLDING INITIAL DISPOSITION AUTHORITY UNDER THE UNIFORM CODE OF MILITARY JUSTICE IN CERTAIN SEXUAL ASSAULT CASES (Apr. 20, 2012).
 - 11 MANUAL FOR COURTS-MARTIAL, UNITED STATES (2016 ed.) [hereinafter 2016 MCM], Rule for Court-Martial [hereinafter R.C.M.] 306(b). R.C.M. 306(c) discusses potential dispositions of allegations: no punishment, administrative action, nonjudicial punishment, or disposition through courts-martial.

to the extent practicable, the nature of the offenses, any mitigating or extenuating circumstances, the views of the victim as to disposition, any recommendations made by subordinate commanders, the interest of justice, military exigencies, and the effect of the decision on the accused and the command. The goal should be a disposition that is warranted, appropriate, and fair.

In deciding how an offense should be disposed of, factors the commander should consider, to the extent they are known, include:

- (A) the nature of and circumstances surrounding the offense and the extent of the harm caused by the offense, including the offense's effect on morale, health, safety, welfare, and discipline;
- (B) when applicable, the views of the victim as to disposition;
- (C) existence of jurisdiction over the accused and the offense;
- (D) availability and admissibility of evidence;
- (E) the willingness of the victim or others to testify;
- (F) cooperation of the accused in the apprehension or prosecution of another accused;
- (G) possible improper motives or biases of the person(s) making the allegation(s);
- (H) availability and likelihood of prosecution of the same or similar and related charges against the accused by another jurisdiction; and
- (I) appropriateness of the authorized punishment to the particular accused or offense.¹²

For sex-related offenses committed in the United States, R.C.M. 306 provides for the victim to express his or her views as to whether the offense should be prosecuted by court-martial or in a civilian court with jurisdiction over the offense. The convening authority must consider the victim's views as to disposition, if available, before making a decision to prefer charges or take some other disciplinary action.¹³

If charges are preferred and the special court-martial convening authority (SPCMCA) deems a general court-martial appropriate, he or she must direct the case to a preliminary hearing under Article 32 of the UCMJ.¹⁴

12 2016 MCM, *supra* note 11, R.C.M. 306(b) discussion.

13 2016 MCM, *supra* note 11, R.C.M. 306(e)(2). R.C.M. 306(e)(1) defines "sex-related" offense as any alleged violation of Article 120—Rape and sexual assault generally, 120a—Stalking, 120b—Rape and sexual assault of a child, 120c—Other sexual misconduct, 125—Forcible sodomy; bestiality, or any attempt thereof under Article 80, Uniform Code of Military Justice.

14 2016 MCM, *supra* note 11, R.C.M. 404(b)(5).

B. The Evolution of the Article 32 Process

1. Statutory Changes. Before charges may be referred to a general court-martial, Article 32 of the UCMJ requires a preliminary hearing, unless the accused waives the hearing.¹⁵ In the National Defense Authorization Act for Fiscal Year 2014 (FY14 NDAA), Congress made substantial changes to Article 32. The impetus for these changes was a widely reported Article 32 investigation at the U.S. Naval Academy in which counsel questioned a Naval Academy midshipman who had reported being sexually assaulted for “more than 30 hours” and subjected her to “humiliating and abusive questions.”¹⁶ The legislative changes to Article 32 were also intended to align the procedures with civilian preliminary hearing proceedings, which are used to determine if there is probable cause and if a case should go to trial; during them, victims are often not called to testify.¹⁷

Prior to these statutory changes, the Article 32 hearing was intended to be a “thorough and impartial investigation” by an investigating officer into the truth and form of the charges.¹⁸ The Article 32 hearing also served as a mechanism for pretrial discovery for the defense.¹⁹ Military witnesses, including sexual assault victims, could be compelled to appear and testify at the Article 32 hearing.²⁰

The FY14 NDAA changes to Article 32 applied to Article 32 hearings conducted on or after December 26, 2014.²¹ These changes, which restyled the Article 32 from a pretrial investigation into a preliminary hearing, limited the purpose of the hearing to determining whether probable cause exists to believe an offense was committed and whether the accused in the case committed the offense.²² Under the December 2014 Article 32 format, preliminary hearing officers (PHOs) are still required to determine whether the convening authority has court-martial jurisdiction over the accused and the offense, to consider the form of the charges, and to make recommendations to the convening authority as to disposition.²³ In an effort to limit the scope of Article 32, these statutory changes also removed the ability of a PHO to compel a military victim to appear and testify at the hearing if the victim was found “reasonably available,” but allowed the PHO to consider alternatives to testimony for the victim and any other witnesses, regardless of their availability.²⁴

15 10 U.S.C. § 832 (UCMJ, Art. 32).

16 See 159 Cong. Rec. H7059 (Congresswoman Speier (D-CA) introduced the reforms to Article 32), *available at* <https://www.gpo.gov/fdsys/pkg/CREC-2013-11-14/pdf/CREC-2013-11-14-pt1-PgH7059.pdf>.

17 *Id.* But see *infra* notes 26-28 and accompanying text.

18 10 U.S.C. § 832 (UCMJ, Art. 32); 2016 MCM, *supra* note 11, R.C.M. 405.

19 MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.) [hereinafter 2012 MCM], R.C.M. 405 discussion.

20 *Id.*

21 National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66 [hereinafter FY14 NDAA], § 1702(a), 127 Stat. 672 (2013); National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291 [hereinafter FY15 NDAA], § 531(g), 128 Stat. 3292 (2014).

22 Another change to the Article 32 process requires that judge advocates be used as preliminary hearing officers “whenever practicable.” 2016 MCM, *supra* note 11, R.C.M. 405(d)(1). While this had previously been the practice in the Navy, Marine Corps, and Air Force, the Army traditionally used line officers in this role, with a judge advocate appointed to advise the Article 32 investigating officer on legal matters. In addition, the updated R.C.M. 405 requires the preliminary hearing officer to be equal to or senior in grade to the military prosecutor and military defense counsel representing the accused, “when practicable.” 2016 MCM, *supra* note 11, R.C.M. 405(d)(1). Navy and Air Force counsel stated that they often use active duty and reserve military judges as Article 32 preliminary hearing officers in sexual assault cases.

23 2016 MCM, *supra* note 11, R.C.M. 405(a).

24 *Id.*; see also Major Christopher J. Goewert and Captain Nichole M. Torres, *Old Wine into New Bottles: The Article 32 Process after the National Defense Authorization Act of 2014*, 232 A.F. L. Rev. Vol. 72 (2015).

As observed above, while the Article 32 hearing had previously served as a means of discovery for the defense, the new R.C.M. 405, reflecting the statutory changes to Article 32, specifically states that the Article 32 hearing is “not intended to serve as a means of discovery.”²⁵ This change is significant, as the U.S. Court of Military Appeals (now the U.S. Court of Appeals for the Armed Forces, or CAAF) previously emphasized the value of the Article 32 investigation as a discovery tool. In the case of *Hutson v. United States*, CAAF even relied on the Article 32 hearing to uphold a judge’s refusal to grant the defense’s request for appointment of an investigator.²⁶ While acknowledging that investigative assistance is provided for indigent defendants in federal courts, CAAF held that the federal statute used to grant such assistance in federal court was not available to military defendants, stating: “[I]t should be noted that the pretrial investigation to which these charges have been referred is the accused’s only practicable means of discovering the case against him.”²⁷ In light of the changes to the Article 32 process, this CAAF decision provides further support for the Subcommittee’s recent recommendation, which the JPP adopted, that independent investigators be provided to the defense.²⁸

A provision in the National Defense Authorization Act for Fiscal Year 2017 (FY17 NDAA) removes the provision in Article 32 permitting the accused to present additional evidence at the Article 32 hearing “in defense and mitigation, relevant to the limited purposes of the hearing,” and replaces it with language stating that the accused may present additional evidence “that is relevant to the issues [of whether there is probable cause to believe the accused committed the offense and the PHO’s recommendation as to disposition of the case].”²⁹ It is too early to determine how PHOs will interpret this change and what effect, if any, it will have on the defense’s ability to present additional evidence in defense and mitigation at the Article 32 hearing.

2. Site Visit Information. During installation site visits the Subcommittee spoke with trial counsel, defense counsel, and SVCs/VLCs, most of whom were familiar with both the pre-December 2014 and the new Article 32 proceedings. The consensus among them was that unlike the pre-December 2014 Article 32 investigation, the new Article 32 preliminary hearing is not a meaningful process for evaluating the strength of the case or for any other purpose. Sexual assault victims are no longer required to testify at Article 32 hearings, and frequently do not. Trial counsel stated that often the first time a victim provides testimony and is subject to cross-examination by defense counsel is at the court-martial. Beyond Article 32 issues, several trial counsel told Subcommittee members that some SVCs/VLCs limit trial counsel access to the victim, thereby preventing trial counsel from building sufficient rapport with the victim and having the repeated interviews that they feel are necessary to prepare for trial. Several counsel stated that this combination of factors has led to victims being unprepared for trial and testifying poorly on the stand.

Frequently, no witnesses appear at the Article 32 preliminary hearing, which simply involves trial counsel submitting documentary evidence for consideration. Many trial and defense counsel with whom the Subcommittee spoke referred to the Article 32 preliminary hearing as a “paper drill” or “rubber stamp.” While many defense counsel noted that they have begun waiving the hearing, some stated that they have continued to assert the accused’s right to an Article 32 hearing even if they no longer get a chance to question the victim or receive additional information about the government’s case.

25 *Id.*

26 *Hutson v. United States*, 42 C.M.R. 39, 40 (1970).

27 *Id.*

28 See JUDICIAL PROCEEDINGS PANEL REPORT ON MILITARY DEFENSE COUNSEL RESOURCES AND EXPERIENCE IN SEXUAL ASSAULT CASES 3 (Mar. 2017).

29 National Defense Authorization Act for Fiscal Year 2017, Pub. L. 114-328 [hereinafter FY17 NDAA], § 5203(b).

Counsel universally observed that pre-December 2014 Article 32 investigations were used to identify weak cases and prevent them from going to court-martial, but the new Article 32 hearing no longer serves this function. The pre-December 2014 Article 32 investigation and investigating officer's recommendation as to whether the evidence supported the charges and whether the charges should be sent forward to court-martial (and to what type of court-martial) helped test the strength of the prosecution's case. According to many trial and defense counsel who spoke with the Subcommittee, the limited scope of the present preliminary hearing and the removal of the requirement for victim testimony are the primary reasons why counsel do not believe the current Article 32 format is a useful tool for vetting cases. Several trial counsel acknowledged that prosecutors should be confident that probable cause exists and that they have sufficient evidence to prevail at trial before charges are even preferred.

Article 32 PHOs' recommendations on whether the case should proceed to trial remain nonbinding, and some trial and defense counsel noted that often staff judge advocates and convening authorities do not abide by the recommendations.³⁰ Such disregard occurs even when the PHO finds no probable cause to support a charge or an extremely low likelihood of conviction, recommending that the case should be dismissed outright or resolved through disciplinary action at some lower level. Counsel complained that because of the changes to the Article 32 process and because the PHO's recommendations are nonbinding, too many cases are referred to court-martial in which there is little chance of securing a conviction.

3. JPP Public Meeting Commentary on the Effects of the Changes to the Article 32 Hearing. Senior trial and defense counsel and former military judges, speaking to the JPP at a public meeting in January 2017, reinforced the comments of counsel on site visits that Article 32 hearings in sexual assault cases have become "paper drills" at which neither the victim nor other witnesses testify.³¹ A senior trial counsel told the JPP that since Article 32 and R.C.M. 405 were modified, the trial counsel has "a lot more control over the presentation of evidence" at the Article 32 preliminary hearing, and can often establish probable cause with only a copy of the victim's statement and portions of the investigation report.³²

Some counsel and former judges noted that they are seeing more Article 32 waivers from defense counsel since the new Article 32 preliminary hearing took effect, though some defense counsel said that they continue to go forward with these hearings to obtain what information they can.³³ A former judge told the JPP that in pre-December 2014 Article 32 proceedings, it was rare for the defense to submit an Article 32 waiver in a sexual assault case.³⁴ According to a senior trial counsel, the pre-December 2014 Article 32 investigation was used as a "litmus test" to determine the strength of the case and to see how the victim comes across while testifying. He further stated that given the limited scope of the new Article 32 preliminary hearing, he believes more cases are now being referred to court-martial than would have been under the more robust pre-December 2014 Article 32 investigation.³⁵ Another senior trial counsel elaborated that some convening authorities who still want to use the Article 32

30 Article 32 investigating officers' recommendations under the pre-December Article 32 process were also nonbinding.

31 *Transcript of JPP Public Meeting* 22 (Jan. 6, 2017) (testimony of Lt Col (ret.) Wendy Sherman, U.S. Air Force, former military trial judge); 104 (testimony of Maj Adam Workman, U.S. Marine Corps, Legal Services Support Team); 233 (testimony of Maj James Argentina, Jr., U.S. Marine Corps, Senior Defense Counsel); 278 (testimony of Maj Aran Walsh, Regional Victims' Legal Counsel).

32 *Transcript of JPP Public Meeting* 104 (Jan. 6, 2017) (testimony of Maj Workman).

33 *Transcript of JPP Public Meeting* 31 (Jan. 6, 2017) (testimony of LTC (ret.) Wade Faulkner, U.S. Army, former military trial judge); 114 (testimony of CPT Brad Dixon, U.S. Army, Trial Counsel Assistance Program Training Officer).

34 *Transcript of JPP Public Meeting* 31 (Jan. 6, 2017) (testimony of LTC (ret.) Faulkner).

35 *Transcript of JPP Public Meeting* 150 (Jan. 6, 2017) (testimony of CPT Dixon).

preliminary hearing to “test the evidence” in a sexual assault case are frustrated that they can no longer do that effectively under the new Article 32 process.³⁶ A senior defense counsel also questioned whether the new Article 32 preliminary hearing serves any meaningful purpose.³⁷

A number of counsel expressed the concern that the more superficial process mandated by the current Article 32 is leading convening authorities to make court-martial referral decisions with less information than was available to them in the past. These counsel corroborated the perception of counsel interviewed by the Subcommittee during site visits that the reforms to Article 32 have made the hearings less meaningful, and as a result more sexual assault cases are referred despite weak evidence and little chance of conviction at trial.³⁸ One senior trial counsel expressed the opinion that an experienced trial counsel should be able to distill the evidence, research case law, and provide a well-supported recommendation to the convening authority. In his view, the Article 32 should become more like the civilian grand jury system.³⁹ A Marine Corps VLC concurred, stating that the Marine Corps has implemented a prosecution merits memo in which the trial counsel “writes a complete and informed opinion” of the evidence in the case and the likelihood of achieving a conviction at trial.⁴⁰ Prosecutors from the other Services indicated that they draft similar memos or have similar procedures for informing staff judge advocates and convening authorities about the evidence in such cases. Conversely, the Marine Corps VLC stated his view that it is not necessary for victims to testify in the Article 32 hearing. He added that it is traumatic for them and slows the process down.⁴¹

Several counsel pointed out that the recommendation of the Article 32 PHO is nonbinding on the convening authority, and the Article 32 hearing is now less effective at identifying cases that are likely to result in a conviction at court-martial. Practitioners who testified before the JPP in January 2017 stated they were aware of cases in which Article 32 PHOs either found no probable cause for a charge or recommended against sending the charge to trial, but their advice was not followed by the staff judge advocate and convening authority.⁴² In addition, a senior defense counsel told the JPP that as a prosecutor, he has seen situations in which there was almost no probability of winning at trial, and when this information was presented to the convening authority, the convening authority still elected to refer the charges to court-martial.⁴³ He added that sending fatally weak cases on to court-martial was very demoralizing to the trial counsel.⁴⁴

4. Data on Article 32 Recommendations and Convening Authority Referral Decisions. The Services provided case information and documents showing that out of 416 sexual assault cases that went to general court-martial in fiscal year 2015, 54 cases involved an Article 32 investigating officer or PHO

36 *Transcript of JPP Public Meeting* 151 (Jan. 6, 2017) (testimony of Maj Workman).

37 *Transcript of JPP Public Meeting* 186 (Jan. 6, 2017) (testimony of Maj Marcia Reyes-Steward, U.S. Army, Senior Defense Counsel).

38 *Transcript of JPP Public Meeting* 174 (Jan. 6, 2017) (testimony of Maj Benjamin Henley, U.S. Air Force, Senior Defense Counsel); 210 (testimony of LCDR Rachel Trest, U.S. Navy, Senior Defense Counsel); 239 (testimony of Maj Argentina).

39 *Transcript of JPP Public Meeting* 153 (Jan. 6, 2017) (testimony of LCDR Ben Robertson, U.S. Navy, Senior Trial Counsel).

40 *Transcript of JPP Public Meeting* 290 (Jan. 6, 2017) (testimony of Maj Walsh).

41 *Id.* at 291.

42 *Transcript of JPP Public Meeting* 155 (Jan. 6, 2017) (testimony of LCDR Geralyn Van De Krol, U.S. Coast Guard, Branch Chief, Trial Services); 222 (testimony of LCDR Trest); 224 (testimony of Maj Argentina).

43 *Transcript of JPP Public Meeting* (Jan. 6, 2017) 224 (testimony of Maj Argentina).

44 *Id.*

recommending against referring one or more sexual offense charges to court-martial and the convening authority electing to refer the charge(s) to a general court-martial despite that recommendation.⁴⁵ In all these cases, the staff judge advocate's pretrial advice to the convening authority was to refer these charges to general court-martial.⁴⁶

In 45 of the 54 cases in which the Article 32 investigating officer or PHO recommended against referring one or more sexual offenses to trial, the accused was ultimately acquitted of those offenses, though the accused may have been convicted of other offenses.⁴⁷

C. Referral and Prosecutorial Discretion

Following the Article 32 preliminary hearing, the PHO's report, along with the case file and SPCMCA disposition recommendation, is forwarded to the general court-martial convening authority (GCMCA) for disposition.⁴⁸ The staff judge advocate then provides written pretrial advice to the convening authority, 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 of what action should be taken by the convening authority.⁴⁹ A copy of the pretrial advice must be provided to the defense if the convening authority refers the case to court-martial; this is not a document covered by attorney-client privilege.⁵⁰ The GCMCA must then decide whether to refer some or all of the charges to a general court-martial.⁵¹

1. Rules Governing Referral of Charges. R.C.M. 601 sets forth the basis for the referral of charges to court-martial:

If the convening authority finds or is advised by a judge advocate that there are reasonable grounds to believe that an offense triable by a court-martial has been committed and that the accused committed it, and that the specification alleges an offense, the convening authority may refer it. The finding may be based on hearsay in whole or in part. The convening authority or judge advocate may consider information from any source[.]⁵²

45 While all of the cases went to trial in fiscal year 2015, some went to Article 32 hearings prior to the Dec. 26, 2014, change to the Article 32 preliminary hearing and some took place after. These numbers do not reflect the total number of sexual assault cases from all of the Services that went to general court-martial in fiscal year 2015: those cases for which the JPP staff did not receive all case file documents were not included in the total.

46 The pretrial advice in 5 of the 54 case files was not available.

47 The reasons the Article 32 investigating officer or PHO stated they recommended against referral of a sexual offense specification to trial were because he or she determined there were no reasonable grounds to believe the accused committed the offenses/there was no probable cause, or because the prosecution was unlikely to prevail at trial. Under the pre-December 2014 Article 32, the investigating officer's conclusion regarding whether reasonable grounds exist to believe that the accused committed the offenses alleged must be included in his or her report. 2012 MCM, *supra* note 19, R.C.M. 405(j)(2)(H). The new Article 32 process requires the PHO to determine whether there is probable cause to believe that the accused committed the offenses alleged. 10 U.S.C. § 832 (UCMJ, Art. 32).

48 2016 MCM, *supra* note 11, R.C.M. 404(e).

49 2016 MCM, *supra* note 11, R.C.M. 406(a)–(b).

50 2016 MCM, *supra* note 11, R.C.M. 406(c).

51 2016 MCM, *supra* note 11, R.C.M. 407.

52 2016 MCM, *supra* note 11, R.C.M. 601(d)(1).

“Information from any source” may include hearsay and information not previously presented at the Article 32 hearing or to the SPCMCA. This rule states that the convening authority or judge advocate is not required to resolve legal issues, “including objections to evidence,” prior to referral.⁵³ The written discussion for R.C.M. 601(d)(1) refers back to disposition factors from R.C.M. 306, previously discussed in the “Early Stages of Case Processing” section of this report, that the convening authority should consider in deciding whether to refer the case to court-martial.⁵⁴

2. Legislation and U.S. Attorneys’ Manual. The FY17 NDAA created a new Article 33 under the UCMJ, which directs the Secretary of Defense to issue nonbinding guidance to be considered by convening authorities and judge advocates when exercising their duties with respect to the disposition of charges.⁵⁵ 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.”⁵⁶

The official guidance of the Attorney General mentioned in the new Article 33 refers to the U.S. Attorneys’ Manual, which specifies a probable cause standard for prosecutors in determining whether to commence or recommend prosecution or some other disposition.⁵⁷ Within this section, however, probable cause is only a threshold consideration that, if met, does not automatically warrant prosecution.⁵⁸ The manual further provides that the attorney should commence prosecution if he or she believes that the conduct constitutes a federal offense and “that the admissible evidence will probably be sufficient to obtain and sustain a conviction”; nevertheless, prosecution should be declined when there is no substantial federal interest in prosecution, the person is subject to prosecution in another state, or there is an adequate non-criminal alternative.⁵⁹ The discussion to this section states that “both as a matter of fundamental fairness and in the interest of efficient administration of justice, no prosecution should be initiated against any person unless the government believes that the person probably will be found guilty by an unbiased trier of fact.”⁶⁰

3. The American Bar Association’s Criminal Justice Standards. Similarly, according to the American Bar Association’s (ABA) Criminal Justice Standards for the Prosecution Function, 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.”⁶¹ These standards also state that a prosecutor may file and maintain charges “even if juries in the jurisdiction have tended to acquit persons accused of the particular kind of criminal act in question.”⁶²

53 2016 MCM, *supra* note 11, R.C.M. 601(d)(1).

54 2016 MCM, *supra* note 11, R.C.M. 601(d)(1) discussion.

55 FY17 NDAA, *supra* note 29, § 5204.

56 *Id.*

57 U.S. DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL, Section 9-27.200 (1997, updated Jan. 2017).

58 *Id.*

59 U.S. DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL, Section 9-27.220 (1997, updated Jan. 2017).

60 *Id.*

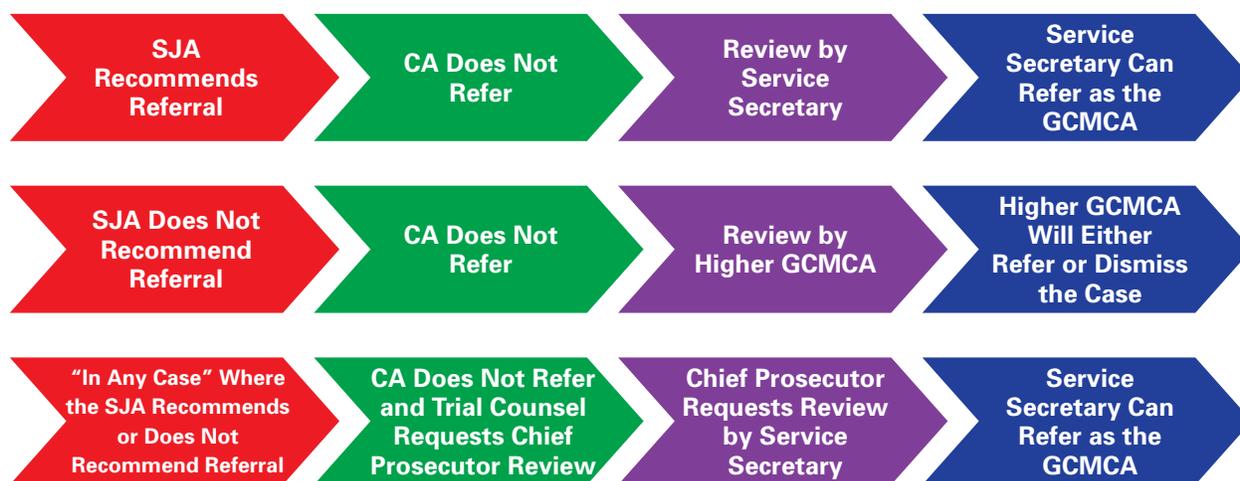
61 CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION, Standard 3-4.3 (AM. BAR ASS’N, Fourth Ed.).

62 *Id.*

The Air Force has implemented, in modified form, the ABA Criminal Justice Standards. In its standard for charging decisions, the Air Force rule states that charges must be supported by probable cause and that 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 other Services have not implemented the ABA standard, though representatives from the Coast Guard and Navy noted they informally use a version of it.⁶⁴

4. Review of Disposition Decisions. The National Defense Authorization Act for Fiscal Year 2014 (FY14 NDAA) contained a provision requiring that a convening authority’s decision not to refer certain sexual assault cases be reviewed, either by a higher general court-martial convening authority or by the Service Secretary, depending on the circumstances.⁶⁵ This provision, which applies only to cases in which charges have been preferred and for which the staff judge advocate has provided the convening authority with pretrial advice under Article 34 of the UCMJ, was further modified in the FY15 NDAA to require that a convening authority’s decision not to refer certain sexual assault cases be reviewed by the Service Secretary when the chief prosecutor of the Service requests such review.⁶⁶

Figure. Elevated Review of Convening Authority Decisions at Referral



63 U.S. DEP’T OF THE AIR FORCE, AIR FORCE GUIDANCE MEMO. TO AIR FORCE INSTRUCTION 51-110, PROFESSIONAL RESPONSIBILITY PROGRAM (Jul. 7, 2016), Standard for Criminal Justice 3-3.9. Discretion in the Charging Decision.

64 *Transcript of JPP Public Meeting* 263 (Jan. 6, 2017) (testimony of CDR Cassie Kitchen, U.S. Coast Guard, former military trial judge); 212, 264 (testimony of CDR Mike Luken, U.S. Navy, former military trial judge).

65 FY14 NDAA, *supra* note 21, § 1744 requires review of decisions not to refer cases involving charges of rape, sexual assault, forcible sodomy, or attempts to commit such acts.

66 FY15 NDAA, *supra* note 21, § 541.

Responding to the JPP Subcommittee’s request for information on the number of times that these elevated review provisions have been invoked, the Services provided the following:⁶⁷

- All of the Services reported that since December 26, 2013,⁶⁸ there have been zero instances in which a Service Secretary reviewed a convening authority’s decision not to refer a qualifying sex-related offense to court-martial.
- All of the Services reported that since December 19, 2014,⁶⁹ there have been zero instances in which their chief prosecutor requested that the Service Secretary review a convening authority’s decision not to refer a qualifying sex-related offense to court-martial.
- Since December 26, 2013, the Services reported the following instances in which a case involving a qualifying sex-related offense was forwarded for review to the next superior commander after the general court-martial convening authority decided not to refer the case to court-martial.
 - » Army: 8 cases. Of these 8 cases, there was one instance in which the next superior commander decided to refer the charge(s) to court-martial.
 - » Air Force: 21 cases.⁷⁰ Of these 21 cases, there were zero instances in which the next superior commander decided to refer the charge(s) to court-martial.
 - » Navy: 11 cases. Of these 11 cases, there were zero instances in which the next superior commander decided to refer the charge(s) to court-martial.
 - » Marine Corps: 11 cases. Of these 11 cases, there were zero instances in which the next superior commander decided to refer the charge(s) to court-martial.
 - » Coast Guard: 8 cases. Of these 8 cases, there were zero instances in which the next superior commander decided to refer the charge(s) to court-martial.

5. Possible Pressure on Convening Authorities to Refer Sexual Assault Cases to Courts-Martial. As noted, many trial and defense counsel interviewed by the Subcommittee during site visits mentioned their perception that convening authorities feel pressure to refer sexual assault cases to courts-martial, in part owing to public and congressional interest in this issue. Several examples illustrate this pressure.

In late 2013, in a well-publicized case involving sexual assault allegations, a U.S. Air Force convening authority, Lieutenant General Craig Franklin, following a pretrial hearing, agreed with legal advisors that the evidence was not sufficient to proceed to court-martial and dismissed the charges.⁷¹ The acting Secretary of the Air Force then transferred the case for action to a different convening authority,

67 See Services’ Responses to JPP Subcommittee Request for Information 166 (Apr. 5, 2017).

68 This was the effective date of § 1744 of the FY14 NDAA, *supra* note 21.

69 This was the effective date of § 541 of the FY15 NDAA, *supra* note 21.

70 The Secretary of the Air Force served as the superior GCMCA in one of the 21 cases. The Secretary reviewed the case not because it met criteria for secretarial review under the provisions of FY14 NDAA § 1744 or FY15 NDAA § 541, but because she was the next superior GCMCA.

71 David Alexander, *Rape case removed from U.S. Air Force general who made controversial ruling*, CHIC. TRIB., Dec. 19, 2013, available at http://articles.chicagotribune.com/2013-12-19/news/sns-rt-usa-militarysexassault-20131219_1_general-craig-franklin-u-s-air-force-wright-case. The convening authority, Lieutenant General Craig Franklin, had earlier that year overturned an officer’s sexual assault conviction, an act that angered many and led to legislation severely limiting a convening authority’s ability to grant post-trial clemency relief in sexual assault cases.

who referred the case to a general court-martial.⁷² Senator Claire McCaskill (D-MO) then called for Lieutenant General Franklin's removal from command, declaring: "Lieutenant General Franklin should not be allowed to fulfill the responsibilities of military command because he has repeatedly shown he lacks sound judgment."⁷³ The case eventually went to trial, and the accused was acquitted of all charges.⁷⁴ During the trial, the defense raised an unlawful command influence motion and introduced evidence that following Lieutenant General Franklin's dismissal of charges, the Air Force Judge Advocate General told Lieutenant General Franklin's staff judge advocate that failure to refer the case to trial would "place the Air Force in a difficult position with Congress" and that "absent a 'smoking gun,' victims are to be believed and their cases referred to trial."⁷⁵ Shortly thereafter, Lieutenant General Franklin announced that he would retire from the Air Force.

Also in 2013, Senator McCaskill blocked the confirmation of an Air Force convening authority, Lieutenant General Susan Helms, to the position of Air Force Space Command vice commander because she had overturned the sexual assault conviction of a member of her command.⁷⁶ Senator McCaskill expressed concerns about Lieutenant General Helms' decision, noting that it was against the advice of the staff judge advocate, who recommended that Lieutenant General Helms affirm the conviction. Senator McCaskill stated, "At a time when the military is facing a crisis of sexual assault, making a decision that sends a message which dissuades reporting of sexual assaults, supplants the finding of a jury, contradicts the advice of counsel, and further victimizes a survivor of sexual assault is unacceptable."⁷⁷

Another source of perceived pressure came from the military's commander in chief, President Barack Obama. In May 2013, during a press conference, President Obama told reporters that those who commit sexual assault in the military should be "prosecuted, stripped of their positions, court-martialed, fired, dishonorably discharged."⁷⁸ These remarks led to defense counsel filing unlawful command influence motions in numerous courts-martial, on the grounds that the President's remarks could be interpreted by panel members as an attempt to influence the outcomes of courts-martial in sexual assault cases.⁷⁹ Lawyers argued that the President's comments could be considered unlawful command influence because they directed specific outcomes in sexual assault cases and were in conflict with the expectation that commanders exercise discretion in making disposition decisions. In an effort to blunt the negative effects of the President's remarks, the Secretary of Defense issued a memorandum reiterating his and the President's expectations that those involved in the military justice process base their decisions on their independent judgment of the facts of each case, and not consider "personal

72 Jeff Schogol, *Airman acquitted of sexual assault charge*, USA TODAY, Oct. 29, 2015, available at <https://www.usatoday.com/story/military/2015/10/29/airman-acquitted-sexual-assault-charges/74792760/>.

73 Press release, *McCaskill Calls for Removal of Lt. Gen. Craig Franklin from Command* (Dec. 18, 2013), available at <https://www.mccaskill.senate.gov/media-center/news-releases/mccaskill-calls-for-removal-of-lt-gen-craig-franklin-from-command>.

74 Jeff Schogol, *Airman acquitted of sexual assault charge*, USA TODAY, *supra* note 79.

75 See *Wright v. United States*, __M.J. __ (A.F.C.C.A. Jan. 13, 2015) (The language in quotations is quoted from the appellate opinion and is not intended to reflect the verbatim words used by the Air Force Judge Advocate General.).

76 See 159 Cong. Rec. S4020 (Jun. 7, 2013) available at <https://www.gpo.gov/fdsys/pkg/CREC-2013-06-07/pdf/CREC-2013-06-07-pt1-PgS4020-3.pdf#page=1>.

77 *Id.*

78 Jennifer Steinhauer, *Remark by Obama Complicates Military Sexual Assault Trials*, N.Y. TIMES, Jul. 13, 2013, available at <http://www.nytimes.com/2013/07/14/us/obama-remark-is-complicating-military-trials.html>.

79 *Id.*

interests, career advancement, or an effort to produce what is thought to be the outcome desired by senior officials, military or civilian.”⁸⁰

6. Site Visit Information. Counsel discussed the standard to refer a case to court-martial, which is probable cause—lower than the standard typically applied in state and federal prosecutions. Trial and defense counsel alike believe that the probable cause standard is too low and that convening authorities should be allowed to take into account other factors, such as the credibility of the victim and the likelihood of obtaining a conviction at trial. Judge advocates must hold a license with a state bar to practice law. Because the codes of ethics required by many state bars include standards for prosecution comparable to the United States Attorney’s Manual and ABA Standards discussed above, several counsel expressed concern that they may be violating their state bar ethical rules by prosecuting cases in which they feel the charges are not supported by probable cause or in which there is no reasonable likelihood of proving the charges at trial.

Judge advocates overwhelmingly reported a perception of pressure on convening authorities to refer sexual assault cases to court-martial, regardless of merit. According to many of the judge advocates interviewed on site visits, this pressure extends to weak cases that civilian jurisdictions would not prosecute and, in some cases, have already declined to prosecute. The vast majority of prosecutors and defense counsel who spoke with the Subcommittee have the impression that this pressure causes convening authorities to favor referral to court-martial rather than deal with the potential adverse ramifications of not referring a sexual assault case, such as career setbacks, media scrutiny, the possibility of their non-referral decisions being subjected to elevated review, or questions about why the case was not referred. These lawyers suspect that commanders may feel that the act of sending a case to trial, regardless of merit, is perceived as “safe” and harmless with respect to the parties involved and the justice system as a whole.

A commander (O-6) interviewed on a site visit told the Subcommittee that he forwards every sexual assault case to the next general officer in the chain of command for disposition decision, “because I would not want to get it wrong and have someone get away, so I send it forward to let the system sort it out.” When asked what, if any, pressure is on commanders to handle sexual assault cases a certain way, one commander replied that he felt the need to “do something immediately” or face harm to his career. Another commander felt that there was pressure to be transparent throughout the process, rather than pressure to send every case to court-martial.

The discussion to R.C.M. 306(b) states that one of the factors a commander should consider when disposing of a case is the views of the victim regarding disposition.⁸¹ Many counsel conveyed their perception that the merits of the case have become less important than the victim’s preference regarding disposition. The rationale for referring some cases to court-martial provided by some prosecutors and commanders is that the court-martial process allows the victim to have his or her “day in court,” which was described as a laudable end in itself, regardless of outcome. One commander acknowledged that there is pressure to go to trial if the victim wants to go to trial, regardless of the case’s merits.

In addition, trial and defense counsel explained that in their experience guilty plea agreements, in which the defendant agrees to plead guilty to some or all charges in exchange for a lesser sentence, will not be approved by commanders if the victim does not support it. Likewise, the common perception among judge advocates is that a victim has veto power over whether the commander prefers to dispose

80 U.S. DEP’T OF DEFENSE, MEMORANDUM FROM THE SECRETARY OF DEFENSE ON INTEGRITY OF THE MILITARY JUSTICE PROCESS (Aug. 6, 2013).

81 2016 MCM, *supra* note 11, R.C.M. 306(b) discussion.

of a case in an alternate forum, such as through administrative separation proceedings or nonjudicial punishment.

7. Information Presented to the JPP and Subcommittee. Reflecting the same view that the Subcommittee members heard during site visits, counsel speaking at a JPP public hearing also expressed concern about the low threshold of probable cause required to refer a case to court-martial. In the view of a senior defense counsel, the changes to the Article 32, combined with this low threshold to refer cases, result in sexual assault cases being referred when there is no chance for conviction, an outcome that causes both the accused and victim to suffer needlessly.⁸² He further compared the military justice system to the civilian justice system, in which experienced prosecutors have the discretion to bring a case to trial, or not, based on the state of the evidence.⁸³ Another senior defense counsel similarly suggested that prosecutors and convening authorities in the military should exercise more discretion in referring cases to trial, much as state and federal prosecutors do, and refer cases to trial only when the evidence is sufficient to secure a conviction.⁸⁴

A senior defense counsel told the JPP that the pressure on convening authorities to refer sexual assault cases to courts-martial is very high. No convening authority wants to fail to refer a sexual assault case to court only to have it determined later that there was additional evidence and the case should have been tried by court-martial.⁸⁵

In January 2017, the JPP Subcommittee held a hearing on the standards currently applied by military prosecutors and heard from ethics officials and senior prosecutors from the Services. Participants highlighted the differences between the military and civilian justice systems, noting that the goal of the military system is not only to promote justice but also to maintain good order and discipline. In the military justice system, prosecutorial discretion is vested in convening authorities, rather than prosecutors.⁸⁶ However, all the Services have adopted some version of ABA Model Rule of Professional Conduct 3.8, which states that prosecutors have an ethical obligation to ensure that all charges are supported by probable cause.⁸⁷ If the situation arises in which a prosecutor believes a charge is not supported by probable cause, but his or her supervising attorney disagrees, ethical rules allow the junior attorney to rely on the supervising attorney's "reasonable resolution of an arguable question of professional duty."⁸⁸ One presenter noted that in the previous seven years, his Service's ethics office had yet to have a trial counsel call with concerns about prosecuting a case without probable cause—an indication, he believes, that the counsel are working this out with their supervisors.⁸⁹

One counsel described a dilemma in which prosecutors can find themselves when dealing with some sexual assault cases, giving the example of a sexual assault that occurs when the victim is too intoxicated to consent to sexual activity. If the offense is charged under the theory that the victim is

82 *Transcript of JPP Public Meeting* 235 (Jan. 6, 2017) (testimony of Maj Argentina).

83 *Id.* at 237.

84 *Transcript of JPP Public Meeting* 262 (Jan. 6, 2017) (testimony of LCDR Trest).

85 *Transcript of JPP Public Meeting* 225 (Jan. 6, 2017) (testimony of Maj Argentina).

86 *Transcript of JPP Subcommittee Meeting* 183 (Jan. 5, 2017) (testimony of Col Kate Oler, U.S. Air Force, Chief, Government Trial and Appellate Counsel Division).

87 MODEL RULES OF PROFESSIONAL CONDUCT, r. 3.8 (AM. BAR ASS'N 2016).

88 MODEL RULES OF PROFESSIONAL CONDUCT, r. 5.2 (AM. BAR ASS'N 2016).

89 *Transcript of JPP Subcommittee Meeting* 259 (Jan. 5, 2017) (testimony of COL William Kern, U.S. Army, Professional Responsibility Branch).

incapable of consenting due to intoxication, guilt may be difficult to prove when there is evidence that the victim was walking, talking, texting, and performing other activities close in time to when the alleged assault occurred. On the other hand, if the offense is charged under the “bodily harm” theory of sexual assault, prosecutors will have problems when the victim does not recall what happened because of his or her intoxication, making it difficult to prove that the touching was offensive. In this situation, it can be difficult to establish probable cause.⁹⁰ In such cases, he explained, sometimes the prosecutor cannot establish probable cause, but the victim believes she was sexually assaulted and tells the convening authority that she wants the case to go to trial.⁹¹ In these situations, they rely on the prosecution merit review of the case, using the R.C.M. 306 factors listed above, to persuade the convening authority that the evidence is not supported by probable cause.⁹² In addition, Article 34, UCMJ, states that the convening authority cannot refer a charge to a general court-martial if advised in writing by the staff judge advocate that the specification is not warranted by the evidence.⁹³ According to the counsel, Navy prosecutors look not only at whether there is probable cause but at whether there is a reasonable probability of success at trial.⁹⁴ He told the Subcommittee that they have been successful in convincing convening authorities to use this higher standard in deciding whether to refer cases.⁹⁵

Another counsel told the Subcommittee that once probable cause is established, counsel are compelled to go forward with a case even when they do not believe there is reasonable likelihood of success at trial.⁹⁶ Several counsel emphasized that there are cases in which conviction at trial seems unlikely, but they go forward to trial because “it is the right thing to do.”⁹⁷

8. Data on Referral Decisions. The JPP staff collected sexual assault courts-martial information and case documents from fiscal year 2015 from the Services and entered this information into an electronic database. The data from fiscal year 2015 encompassed 738 cases, all of which involved at least one preferred charge of a sexual offense. Dr. Cassia Spohn, Foundation Professor and Director, School of Criminology and Criminal Justice, Arizona State University, then analyzed these data, producing the following statistical information.⁹⁸

According to the FY 2015 data, for sexual assault cases that went to courts-martial, 79% were referred to a general court-martial, 13% were referred to a special court-martial, and 7% were referred to a summary court-martial. In 52% of the cases referred to courts-martial, a military judge was the factfinder; 40% went to a panel of members; and 7% went to a summary court-martial officer.⁹⁹

90 *Transcript of JPP Subcommittee Meeting 206* (Jan. 5, 2017) (testimony of CDR Mike Luken).

91 *Id.* at 207.

92 *Id.* at 207.

93 10 U.S.C. § 834 (UCMJ, Art. 34).

94 *Id.* at 212.

95 *Id.* at 244.

96 *Transcript of JPP Subcommittee Meeting 217* (Jan. 5, 2017) (testimony of LtCol Nicholas Martz, U.S. Marine Corps, Military Justice Branch Head).

97 *Transcript of JPP Subcommittee Meeting 250* (Jan. 5, 2017) (testimony of CDR Luken); 253 (testimony of Col Oler).

98 ADJUDICATION OF SEXUAL ASSAULT OFFENSES REPORTED TO THE MILITARY SERVICES IN 2015, Cassia Spohn, PhD, School of Criminology and Criminal Justice, Arizona State University (Apr. 2017), *available at* http://jpp.whs.mil/Public/docs/03_Topic-Areas/07-CM_Trends_Analysis/20170407/20170407_Spohn_NarrativeReport_FY15Cases.pdf.

99 This data was rounded to the nearest whole number and does not add up to 100 percent.

For cases in which the accused was charged with at least one penetrative offense (rape, aggravated sexual assault, sexual assault, forcible sodomy, and attempts to commit these offenses), 28% were convicted of a sexual assault offense,¹⁰⁰ 22% were convicted of a non-sex offense only, and 21% were acquitted of all charges. Another 14% of cases received an alternate disposition,¹⁰¹ and 15% had all charges dismissed prior to trial.¹⁰²

For cases in which the accused was charged with at least one sexual contact offense (aggravated sexual contact, abusive sexual contact, wrongful sexual contact, and attempts to commit these offenses), 18% were convicted of a sexual contact offense, 41% were convicted of a non-sex offense only, and 13% were acquitted of all charges. Another 22% of cases received an alternate disposition, and 6% had all charges dismissed prior to trial.

FY15 – Case Outcomes by Most Serious Sexual Assault Offense Preferred

Penetrative offense (530 cases)	Number	Percent (%)
Convicted of a sexual offense	150	28%
Convicted of a non-sex offense	114	22%
Acquitted of all charges	113	21%
Alternate disposition/dismissal	153	29%
Contact offense (208 cases)		
Convicted of a contact offense	37	18%
Convicted of a non-sex offense	85	41%
Acquitted of all charges	27	13%
Alternate disposition/dismissal	59	28%

Dr. Spohn also calculated conviction and acquittal rates for sexual assault cases that were tried at court-martial (excluding cases that went to alternate disposition or had charges dismissed prior to trial). For cases in which the most serious offense tried was a penetrative offense, 40% resulted in convictions of a sexual assault offense, 30% resulted in convictions of a non-sex offense only, and 30% resulted in acquittal of all charges.

For cases in which the most serious sex offense tried at court-martial was a sexual contact offense, 25% resulted in convictions of a sexual contact offense, 57% resulted in convictions of a non-sex offense only, and 18% resulted in acquittal of all charges.

100 The vast majority of these cases were convicted of a penetrative offense.

101 Alternate dispositions primarily consist of resignation or administrative discharge in lieu of trial by court-martial. These resignations or discharges usually include an adverse service characterization.

102 For this “all charges dismissed prior to trial” category, the JPP staff does not have information on whether these cases resulted in the accused receiving nonjudicial punishment, administrative action, or no punishment.

FY15 – Case Outcomes of Trial by Court-Martial

Penetrative offense (377 cases)	Number	Percent (%)
Convicted of a sexual offense	150	40%
Convicted of a non-sex offense	114	30%
Acquitted of all charges	113	30%
Contact offense (149 cases)		
Convicted of a contact offense	37	25%
Convicted of a non-sex offense	85	57%
Acquitted of all charges	27	18%

Annual reports from the Service Judge Advocates General to the Code Committee provide some courts-martial data, though they do not provide specific information on sexual assault courts-martial. In the Fiscal Year 2015 Annual Report, the Army and Navy indicated that while their courts-martial caseload had declined from previous years, the percentage of contested cases remained constant or increased.¹⁰³ In that report, the Marine Corps stated that between 2012 and 2014, the number of contested sexual assault cases more than tripled. Their number of contested sexual assault cases in fiscal year 2015 was below that of fiscal year 2013 and 2014, but it was more than twice that of fiscal year 2012.¹⁰⁴

III. ADDITIONAL ISSUES

A. Prosecutors’ Lack of Access to the Victim. Victims with appointed SVCs/VLCs are likely to permit fewer interviews with prosecutors (and investigators) than victims without counsel.¹⁰⁵ Furthermore, when victims do agree to meet with prosecutors, the interviews are often in the presence of a SVC/ VLC, who sometimes object to various questions and prevent those interviews from being as probing as they might otherwise be. Investigators also pointed out that few victims grant investigators access to their personal cell phones, which typically contain a wealth of evidence. SVCs/VLCs consistently reported that they do advise victims against sharing information from their phones or social media accounts with investigators. No prosecutors who acknowledged being denied access to the victim’s cell phone during interviews indicated that they had considered not prosecuting the case. Prosecutors frequently lamented the loss of rapport-building opportunities because victims now are represented by SVCs/VLCs, even though they appreciated that victims’ counsel provide valuable advice and guidance and relieve trial counsel of some of the time burden of helping victims navigate the legal system.

103 ANNUAL REPORT for Fiscal Year 2015, REPORT OF THE JUDGE ADVOCATE GENERAL OF THE ARMY, Section 3, 38; REPORT OF THE JUDGE ADVOCATE GENERAL OF THE NAVY AND THE ANNUAL MILITARY JUSTICE REPORT OF THE MARINE CORPS, Section 4, 67, available at <http://www.armfor.uscourts.gov/newcaaf/annual/FY15AnnualReport.pdf>.

104 ANNUAL REPORT for Fiscal Year 2015, REPORT OF THE JUDGE ADVOCATE GENERAL OF THE NAVY AND THE ANNUAL MILITARY JUSTICE REPORT OF THE MARINE CORPS, Section 4, 95-6.

105 Lack of access to victims by investigators is discussed in greater depth in the SUBCOMMITTEE OF THE JUDICIAL PROCEEDINGS PANEL REPORT ON SEXUAL ASSAULT INVESTIGATIONS IN THE MILITARY, *supra* note 2. Defense counsel access to victims is discussed in the SUBCOMMITTEE OF THE JUDICIAL PROCEEDINGS PANEL REPORT ON MILITARY DEFENSE COUNSEL RESOURCES AND EXPERIENCE IN SEXUAL ASSAULT CASES, *supra* note 2.

B. Sexual Assault Prevention and Response (SAPR) Training. Most sexual assault response coordinators and victim advocates who spoke with Subcommittee members acknowledged that misperceptions persist throughout the military regarding the consumption of alcohol and lack of consent, specifically that the consumption of any amount of alcohol makes a person incapable of consenting to sexual activity. Sexual assault response coordinators (SARCs) and victim advocates (VAs) stated they do not currently instruct Service members that “one beer means a person cannot consent.” Instead, they emphasize to their audiences that having sex with an intoxicated person has risks and that determining intoxication can be difficult. At some installations, judge advocates stated they review the training materials or assist with the SAPR training to ensure information on this topic is relayed correctly. The Subcommittee viewed this as a positive development.

Commanders who spoke to the Subcommittee consistently expressed concerns about the frequency of mandatory SAPR training, describing it as time-consuming and potentially counterproductive because of perceived “training fatigue.” One worried that the Sexual Harassment and Assault Response and Prevention (SHARP) classes and safety briefings are so repetitive that Service members may “tune out” the message.

In the view of some practitioners, SAPR training has become so pervasive that it affects the judgment and selection of potential panel members.¹⁰⁶ Counsel in the Army pointed out that every battalion-sized unit designates a noncommissioned officer (NCO) as the unit’s VA, a collateral responsibility that requires specialized training on the topic of sexual assault from a victim-centric perspective. These senior NCOs, along with the other officer or enlisted members on a court-martial panel, have been instructed about the behavior that constitutes sexual assault so many times in SHARP briefings that they have strong opinions about the law. Consequently, counsel find it difficult to correct misperceptions and educate members on the nuances of the law and the burden of proof required at courts-martial.

A defense counsel providing information to the JPP at the January 2017 public meeting stated that in her experience, court-martial panel members, after years of SAPRO training, are “predisposed to believe the victims and misinterpret the legal definition of consent and mistake of fact as to consent.”¹⁰⁷ The perception persists, in her view, that if a person is drinking, he or she cannot consent to sexual contact. She further noted that the voir dire process at trial does not completely expose the biases of potential panel members.¹⁰⁸

Bolstering this point, in a September 2016 Navy-Marine Corps Court of Criminal Appeals decision involving an erroneous jury instruction on the definition of “impairment” in a sexual assault case,¹⁰⁹

106 See REPORT OF THE RESPONSE SYSTEMS TO ADULT SEXUAL ASSAULT CRIMES PANEL 37, *supra* note 4 (“Response System Panel Recommendation 80: The Secretary of Defense and Service Secretaries ensure prevention programs address concerns about unlawful command influence. In particular, commanders and leaders must ensure sexual assault prevention and response training programs and other initiatives do not create perceptions among those who may serve as panel members at courts-martial that commanders expect particular findings and/or sentences at trials or compromise an accused Service member’s presumption of innocence, right to fair investigation and disposition, and access to witnesses or evidence. Judge advocates with knowledge and expertise in criminal law should review sexual assault prevention training materials to ensure the materials neither taint potential panel members (military jurors) nor present inaccurate legal information.”).

107 *Transcript of JPP Public Meeting* 210–11 (Jan. 6, 2017) (testimony of LCDR Trest).

108 *Id.* at 251.

109 *United States v. Newlan*, No. 201400409 at 23 (N.M. Ct. Crim. App. Sep. 13, 2016). The Court set forth a definition for “impairment” in such cases: “‘Impairment’ is the state of being damaged, weakened or diminished. Impairment rendering someone ‘incapable of consenting’ is that level of impairment which is sufficient to deprive him or her of the cognitive ability to appreciate the nature of the conduct in question or the physical or mental ability to make or to communicate a

the court found that many members of the panel received training from SAPR personnel that “if someone ingested any alcohol, that individual was no longer able to legally consent.”¹¹⁰ The court stated:

We first note that the erroneous definition of “impairment” may have compounded the legally-inaccurate proposition—that “one drink means you can’t consent”—that some members received while attending mandatory SAPR training. While likely well-intentioned, these statements made during training generated a significant risk of skewing the panel’s understanding of legal consent. Though these members were generally instructed to “not use [or discuss] anything you learned during SAPR training . . . in evaluating the evidence or the credibility of the witnesses in this case,” a more tightly tailored and prompt statement of the law would have ameliorated any prejudicial impact generated by the legally-erroneous SAPR training. Since such a statement was not provided, we are not convinced that any confusion created by the SAPR training was wholly eradicated and that it did not contribute to the subsequent prejudice resulting from the incorrect definition of “impairment.”¹¹¹

C. Expedited Transfers. A Department of Defense policy familiar to all site visit participants provides sexual assault victims who file an unrestricted report of sexual assault the opportunity to receive an expedited transfer to another installation or to another unit within the same installation, on request.¹¹² One goal of this policy is to move the victim to a new location where no one knows of the sexual assault and where the victim need not confront the perpetrator on a regular basis and will have adequate support of family, friends, or counseling.¹¹³ SVCs/VLCs draft the requests on behalf of victims, and send them to commanders. The victims often are able to select the location to which they will transfer. DoD policy also allows a commander to transfer the alleged offender, rather than the victim.¹¹⁴ No participants discussed whether this option amounted to unlawful pretrial punishment in the context of a pending court-martial, but a Subcommittee member raised the issue. Commanders and a few victims’ counsel indicated that commanders approve even questionable transfer requests to avoid accusations of reprisal against or mistreatment of a victim.

Some commanders, victims’ counsel, and defense counsel believe that the expedited transfer policy is being abused by some individuals who make sexual assault allegations to obtain favorable transfers. Some participants have observed victims on very large installations of more than 50,000 Service members refuse to transfer to other units on the installation, preferring instead to request transfer to what are considered more favorable locations, such as Hawaii or San Diego. At another installation

decision regarding that conduct to another person.”

110 *Id.* at 7. The Court noted that some of the comments from the venire included the following: “If you did have any form of impairment, that [sic] you can’t have consent. You may—the person would not be in the proper frame of mind to provide that consent.”; “When a person is impaired, they are unable to give consent, regardless of what they say at the time.”; I viewed that as part of the training . . . that for someone to consent] they just should not be impaired.”; “A person impaired by alcohol use is incapable of giving sexual consent.”; “You need sober consent, per the brief.”; “If there is alcohol involved, then there is no consent.”; “if a person was under the influence of alcohol, even one drink, that person is not able to give consent to any sexual act.”; “If a person has one drink of alcohol, they may be considered impaired, therefore, they may not be able to give consent.”; “once the victim has had one drink, there is no longer a legal consent.”

111 *Id.* at 33–34.

112 See DoDI 6495.02, *supra* note 8, encl. 5 (a sexual assault victim may request a temporary or permanent expedited transfer to a different location within their assigned command or installation).

113 *Id.*

114 *Id.*

considered to be a “good” location, with an appealing climate and with metropolitan areas nearby, counsel noted that they see relatively few requests for expedited transfers. Expedited transfers by victims to more favorable locations may lead to defense counsel challenging the victim’s motives during a court-martial, arguing to the panel that the victim made a false allegation of sexual assault to receive a transfer to a more desirable location. Such cross-examination, in turn, may cause panel members to question the victim’s credibility and possibly acquit the accused.

IV. CONSEQUENCES

A. Site Visit Information. At all the site visits, most trial and defense counsel questioned whether justice is being served by the panoply of reforms in place. Many of them believe that fundamental rights of due process have been undermined. In their view, convening authorities feel pressure to refer sexual assault cases to court-martial, regardless of the likelihood of securing a conviction. Many also feel that the military’s emphasis on prosecuting sexual assault has led to criminalizing behavior that may be offensive and inappropriate, but would not be considered criminal in a civilian context. They also expressed concern that minor offenses are now being referred to court-martial that could be more appropriately resolved through nonjudicial punishment or administrative action. There is widespread consensus among prosecutors and defense counsel that the victim’s wish regarding disposition of a case is the primary factor determining whether the case will go to court, and that evidentiary concerns, including the credibility of the victim, are given less consideration. Defense counsel perceive that false accusations are now more likely to make it through the system and, as a result, innocent people face allegations that could ruin their lives. To illustrate this point, one defense counsel described how several of his clients, under the immense psychological pressure of facing court-martial for sexual assault, submitted a request for discharge in lieu of trial, even though they claimed they were innocent—and even though a request for discharge in lieu of trial requires an acknowledgment of guilt and stigmatizing notations in their discharge paperwork.

Site visit participants identified a number of negative consequences of what they perceive as too many sexual assault allegations being referred to trial:

1. Practitioners universally described the acquittal rate in their jurisdiction as “high,” in part due to the referral to court-martial of cases that lack merit. The acquittal percentages offered at one installation ranged from about 50% to 100%, significantly higher than the sexual offense acquittal rates seen in civilian jurisdictions.
2. Prosecutors and investigators must devote significant time to prosecuting less meritorious cases, which divert resources away from more serious and well-supported allegations.
3. Some prosecutors feel that they face a potential ethical quandary in trying cases in which they see no reasonable likelihood of conviction.
4. The low conviction rate tends to discredit the entire military justice system in the eyes of Service members and the general public.
5. As more cases flood the system, the time needed to take each case to trial increases.
6. When weak cases linger in the system pending trial, the accused’s and the victim’s careers and lives remain on hold until the case is resolved.

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.

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.

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.

ENCLOSURE

Installation Site Visits Attended by Members of the JPP Subcommittee

Dates	Installations Represented	Subcommittee Members
July 11–12, 2016	Naval Station Norfolk, VA ¹²² Joint Base Langley-Eustis, VA	Hon. Elizabeth Holtzman Dean Lisa Schenck BGen (R) James Schwenk
July 27–28, 2016	Fort Carson, CO Peterson Air Force Base, CO Schriever Air Force Base, CO U.S. Air Force Academy, CO	Ms. Lisa Friel Ms. Laurie Kepros Professor Lee Schinasi Ms. Jill Wine-Banks
August 1–2, 2016	Fort Bragg, NC Camp Lejeune, NC	Ms. Laurie Kepros Professor Lee Schinasi BGen (R) James Schwenk
August 8–9, 2016	Naval Station San Diego, CA Marine Corps Recruiting Depot San Diego, CA Marine Corps Air Station Miramar, CA Camp Pendleton, CA	Hon. Barbara Jones Ms. Laurie Kepros Ms. Jill Wine-Banks
August 22–23, 2016	Marine Corps Base Quantico, VA Joint Base Andrews, MD U.S. Naval Academy, MD Navy Yard, Washington, DC	Dean Lisa Schenck BGen (R) James Schwenk Ms. Jill Wine-Banks
September 12–14, 2016	Osan Air Base, South Korea Camp Humphreys, South Korea Camp Red Cloud, South Korea Camp Casey, South Korea U.S. Army Garrison Yongsan, South Korea Camp Butler, Japan Camp Zama, Japan Kadena Air Base, Japan Yokota Air Base, Japan	Hon. Elizabeth Holtzman Ms. Jill Wine-Banks

¹²² Installations in bold type are the actual meeting locations for the site visits.

