RESTORING DUE PROCESS AND STRENGTHENING PROSECUTIONS: MAKING THE ARTICLE 32, UCMJ, HEARING BINDING

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I. Introduction

The military justice system affords Service members a plethora of rights, usually exceeding those in the civilian criminal justice system.[1] One such right is the right to be present with an attorney during the military equivalent of a grand jury hearing before a commander can refer charges to a general court-martial.[2] This process is governed by Article 32, Uniform

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[1] For example, the Supreme Court held in *Miranda v. Arizona* that when a person is subject to a custodial interrogation, the Fifth Amendment requires law enforcement to inform that person of their constitutional rights to remain silent, to not make any self-incriminating statements, and to an attorney. Miranda v. Arizona, 384 U.S. 436, 444 (1966). Conversely, the military uses Article 31(b), Uniform Code of Military Justice (UCMJ), which requires anyone subject to the code acting in an official capacity to apprise an accused as to the nature of the accusation, their right to remain silent, and their freedom from having to make any statements. UCMJ art. 31(b) (1950). The questioner need not be a member of law enforcement, and the rights-warning requirement attaches irrespective of whether there is a custodial interrogation. *E.g.*, United States v. Jones, 73 M.J. 357, 360–63 (C.A.A.F. 2014) (explaining the rubric used to determine whether a questioner needs to warn an accused).

[2] United States v. Nickerson, 27 M.J. 30 (C.M.A. 1988) (commenting that the Article 32, UCMJ, investigation is the military's version of a grand jury); 1 MIL. JUST. REV. GRP., REPORT OF THE MILITARY JUSTICE REVIEW GROUP 296–97 (2015) (explaining that when a

Code of Military Justice (UCMJ),[3] and was historically conducted as an investigation during which the accused could request evidence, examine witnesses, and conduct discovery.[4] The process changed in fiscal year (FY) 2014,[5] regressing from an evidence-rich inquiry rife with witness testimony and production of evidence to a mere paper drill. The Article 32, UCMJ, hearing no longer has investigative value or develops the facts for the referral authority, and the independent legal recommendation carries no weight. In turn, it has essentially become an ode to a process that used to serve as a bulwark against baseless charges in a system dominated by commanders.[6]

But to argue that the Article 32, UCMJ, hearing is toothless and needs reform out of fundamental fairness misses the bigger picture. The Article 32, UCMJ, hearing needs to change because cases are being sent to court-martial that lack probable cause and cannot sustain a conviction. Lieutenant

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person is charged in the Federal civilian system, either a magistrate will review the criminal complaint at a pretrial preliminary hearing or prosecutors will secure an indictment from a grand jury; military prosecutors, however, cannot bypass the Article 32, UCMJ, preliminary hearing for felony offenses because there is no grand jury system); FED. R. CRIM. P. 6(d) (omitting any requirement that the accused or the accused's counsel be present during the proceedings); *see* Parker v. Levy, 417 U.S. 733 (1974) (finding that military jurisprudence is its own body of law that exists separate and apart from the Federal civilian system).

[3] UCMJ art. 32 (2019).

[4] An Article 32, UCMJ, preliminary hearing is required only for cases referred to a general court-martial, at which felony-grade offenses are typically tried. *Id.* art. 32(a)(1)(A); MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 601 (2019) [hereinafter MCM]. There are also special courts-martial and summary courts-martial, both of which are limited in terms of potential punishments adjudged. *See id.* arts. 18–20. Special courts-martial are sometimes referred to a military judge-only proceeding or one with a military judge and four-member jury. *Id.* art. 16. A commissioned officer, not necessarily an attorney, presides over summary courts-martial, which are considered a non-criminal forum at which a finding of guilty does not constitute a criminal conviction. *Id.* art. 20. Congress has barred some offenses, such as those in Article 120, UCMJ, from referral to any court lower than a general court-martial. *Id.* art. 18(c).

[5] National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1702(a)(1), 127 Stat. 672, 954–55 (2013) (codified as amended at 10 U.S.C. § 832).

[6] The Article 32, UCMJ, hearing was also amended in fiscal years 2015 and 2016. *See* National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 5203(a)–(d), 130 Stat. 2000, 2905–06 (2016) (codified as amended at 10 U.S.C. § 832); David A. Schlueter, *Reforming Military Justice: An Analysis of the Military Justice Act of 2016*, 49 ST. MARY'S L.J. 1, 49–50 (2017) (outlining briefly how the Article 32, UCMJ, hearing has changed from year to year).

General Charles Pede, the fortieth Judge Advocate General of the Army, has stated that, "as good as our justice system is, we can never take for granted its health or its fairness. It requires constant care."[7] Congress needs to change the military justice system to make the Article 32, UCMJ, hearing determination binding, meaning that the general court martial convening authority (GCMCA) cannot refer any charge to trial if the preliminary hearing officer (PHO) determines there is no probable cause to support it. This change will bring a threshold requirement for the quantum of evidence to proceed to a criminal trial.

This opinion emanates from the empirical data that the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (DAC-IPAD) collected, analyzed, and reported in October 2020.[8] The DAC-IPAD formed a "case review subcommittee" (CRSC) comprised of seven members of diverse backgrounds.[9] One was a civilian district attorney with nearly four decades of experience, another was a civilian defense attorney with thirty years' experience, and others were former judge advocates with extensive experience at courts-martial.[10] The CRSC analyzed 1,904 cases of "penetrative sexual offenses"[11] from across the Armed Forces.[12] Of these 1,904 cases, 517 resulted in at least 1 preferred penetrative sexual offense against the accused.[13] The report revealed that more than 13% of adult penetrative sexual offense cases preferred across the Armed Forces failed to establish probable cause.[14] Equally disconcerting, 41.2% of the cases preferred were determined to lack sufficient evidence to obtain and sustain a conviction.[15] For the 235 cases that went to verdict, the

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[7] Terri Moon Cronk, *Top Legal Officers Address Racial Disparity in Military Justice*, DOD NEWS (June 16, 2020), https://www.defense.gov/Explore/News/Article/Article/2222417/top-legal-officers-address-racial-disparity-in-military-justice.

[8] DEF. ADVISORY COMM. ON INVESTIGATION, PROSECUTION, & DEF. OF SEXUAL ASSAULT IN THE ARMED FORCES, REPORT ON INVESTIGATIVE CASE FILE REVIEWS FOR MILITARY ADULT PENETRATIVE SEXUAL OFFENSE CASES CLOSED IN FISCAL YEAR 2017 (2020) [hereinafter DAC-IPAD REPORT].

[9] *Id.* at 25–26, apps. C–D.

[10] *Id.*

[11] The DAC-IPAD's report uses the term "penetrative sexual offenses" to refer to the offenses of rape, sexual assault, and forcible sodomy. *Id.* at 1. This article also uses that term.

[12] *Id.*

[13] *Id.* at 54.

[14] *Id.* at 55.

[15] *Id.*

CRSC determined that 89.4% had enough evidence to establish probable cause for the penetrative sexual offense, but only 68.9% had sufficient evidence to obtain and sustain a conviction.[16] The overall acquittal rate for just the penetrative sexual offense charges in those 235 cases was 61.3%; yet the acquittal rate dropped to 45.1% when the evidence available at preferral was sufficient to obtain and sustain a conviction.[17] Evidence matters and so does legal scrutiny. The military justice system should not be immutable to change in the wake of empirical data when it affects the rule of law and its application.[18]

The data shows that the system is allowing cases to reach trial that never should.[19] It is undesirable (and unjust) for cases that are factually insufficient to reach trial because it inhibits professionalism, fairness, and efficiency in military justice. Changing the Article 32, UCMJ, hearing as a determinative safeguard will help to correct this negative trend. However, there are arguments to the contrary. This article will discuss the three most prominent: (1) that the Article 32 hearing is too limited in scope and function for the PHO's decision to be binding; (2) that the Staff Judge Advocate (SJA) who currently makes the probable cause determination in his or her Article 34, UCMJ,[20] advice is the most experienced and best suited person to render such advice; and (3) that PHOs are too inexperienced to make such an important determination. These arguments are faulty considering the data from the DAC-IPAD study; the second part of this article will discuss specifically why. Lastly, this article will examine what other changes should occur if the Article 32, UCMJ, hearing does in fact become binding.

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[16] *Id.* at 58.
[17] *Id.*
[18] *How to Confront Bias in the Criminal Justice System*, AM. BAR ASS'N, https://www.americanbar.org/news/abanews/publications/youraba/2019/december-2019/how-to-confront-bias-in-the-criminal-justice-system (last visited Nov. 19, 2021).
[19] While the data from the DAC-IPAD study focused specifically on penetrative sexual offenses, the argument for amending the Article 32, UCMJ, hearing applies to all general courts-martial.
[20] UCMJ art. 34 (2019).

II. The Committee and Its Report

A. Mission and Focus

The DAC-IPAD conducted an in-depth review of 1,904 cases across the Armed Forces involving "a penetrative sexual offense against an adult victim."[21] It was the byproduct of Federal legislation trained on the issue of sexual assault in the military with an eye towards making recommendations through the Department of Defense to Congress on how to improve the investigation, prosecution, and defense of such cases.[22] Focused on a narrow and distinct category of courts-martial, the DAC-IPAD collected, reviewed, and analyzed raw data about adult penetrative sexual offenses.[23] Of those 1,904 cases, 517 resulted in a commander preferring charges.[24] To further evaluate this subgroup of cases, the CRSC[25] analyzed these cases using pretrial documentation such as the military criminal investigative organizations' (MCIO) reports, Article 32, UCMJ, reports, and Article 34, UCMJ, advice related to each case.[26]

The CRSC qualitatively reviewed these cases to determine whether the commander's initial disposition of charges was reasonable and whether the evidence was sufficient to advance the case to trial.[27] The latter assessment was further subdivided. First, the CRSC sought to understand if there was probable cause to believe the accused committed the alleged penetrative offense. The second determination was whether the pretrial evidence was sufficient to "obtain and sustain" a conviction at court-martial.[28] The CRSC

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[21] DAC-IPAD REPORT, *supra* note 8, at 2.
[22] *Id.* at 1; *see generally* Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 531, 128 Stat. 3292, 3362–66 (2014) (codified as amended at 10 U.S.C. § 830a).
[23] DAC-IPAD REPORT, *supra* note 8, at 3, 26, 28. The DAC-IPAD requested information from all the services, focusing only on cases that involved the penetrative offenses of rape, sexual assault, or sodomy (i.e., Articles 120 and 125, UCMJ, and attempts thereof under Article 80, UCMJ), were closed in FY 2017, involved an adult victim, and were committed by a military member on active duty at the time of the alleged offense.
[24] *Id.* at 5–6.
[25] *Id.* at 25.
[26] *Id.* at 1, 34.
[27] *Id.* at 25–27.
[28] *Id.* at 2, 53.

did not answer the question of whether a guilty verdict was likely or probable, just "whether sufficient admissible evidence . . . was *present* in the investigative files, such that if the evidence was admitted at trial, proof beyond a reasonable doubt was an achievable result."[29]

The CRSC took this approach to understand the prosecutorial decisions and the attrition of sexual assault cases in the military.[30] Bifurcating its focus between probable cause and the Government's ability to obtain and sustain a conviction was derived from the evidentiary measures used in civilian criminal justice systems.[31] The military justice system assigns a PHO (rather than a grand jury or magistrate) to make a formal probable cause determination before a case may proceed to a general court-martial.[32]

As for making the latter assessment on ability to sustain a conviction, Article 34, UCMJ, only requires advice on whether there is "probable cause to believe that the accused committed the offense charged,"[33] and the SJA is not bound by the PHO's recommendation on probable cause.[34] If the SJA determines no probable cause exists for a charge, the GCMCA may not refer it to trial.[35] While the responsibilities of a PHO and an SJA overlap in terms of assessing probable cause, the DAC-IPAD report showed that a significant number of charges lacking probable cause proceeded to trial, and even more lacked sufficient evidence to sustain a conviction. The DAC-IPAD spent considerable time endeavoring to understand the systemic breakdown, ultimately concluding that the military justice process would best be served revising the Article 32, UCMJ, hearing and Article 34, UCMJ, advice.[36]

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[29] *Id.* at 59.
[30] *Id.* at 53.
[31] *Id.*
[32] MCM, *supra* note 4, R.C.M. 405 (2019).
[33] UCMJ art. 34(a)(1)(B) (2019).
[34] MCM, *supra* note 4, R.C.M. 406 discussion (explaining that the Article 34, UCMJ, advice does not require that Staff Judge Advocates (SJAs) give convening authorities "the underlying analysis or rationale" of their conclusions and that, while the Article 32, UCMJ, hearing report and other documents normally accompany the advice, "there is no legal requirement to include such information, and failure to do so is not error").
[35] UCMJ art. 34(a).
[36] DAC-IPAD REPORT, *supra* note 8, at 58 ("Finding 101: The requirements and practical application of Articles 32 and 34, UCMJ, and their associated Rules for Courts-Martial did not prevent referral and trial by general court-martial of adult penetrative sexual offense charges in the absence of sufficient admissible evidence to obtain and sustain a conviction,

B. Probable Cause and the Preliminary Hearing

The DAC-IPAD data revealed that most cases contained sufficient evidence on the threshold question of probable cause. In 446 of 517 cases (86.3%), the criminal investigation surmounted the probable cause hurdle with relative ease.[37] Put differently, the CRSC found that sixty-eight cases (13.2%) lacked sufficient evidence to meet the probable cause standard.[38] The *Manual for Courts-Martial* provides that, before relying on reports of others in determining whether probable cause for pretrial confinement exists, the commander must have a "reasonable belief" that the information is both "believable and has a factual basis."[39]

This standard is flexible and cannot be quantitatively calculated. In *Brinegar v. United States*, the Supreme Court defined probable cause as practically applied based on "factual and practical considerations of everyday life on which reasonable and prudent men . . . act."[40] Reasonable minds may differ on what constitutes a reasonable belief based on how one prioritizes the factual and practical considerations before them.

To demonstrate how reasonable minds may differ regarding whether evidence reaches the threshold of probable cause, consider the following

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to the great detriment of the accused, the victim, and the military justice system. Finding 102: The data clearly indicate that no adult penetrative sexual offense charge should be referred to trial by general court-martial without sufficient admissible evidence to obtain and sustain a conviction on the charged offense, and Article 34, UCMJ, should incorporate this requirement.").

[37] *Id.* at 54.

[38] Of the sixty-eight cases that the CRSC determined lacked probable cause, fourteen were Army cases, twelve were Marine Corps cases, twelve were Navy cases, twenty were Air Force cases, and two were Coast Guard cases. *Id.*

[39] MCM, *supra* note 4, R.C.M. 305(h)(2) discussion.

[40] Brinegar v. United States, 338 U.S. 160, 174 (1949); *see* United States v. Leedy, 65 M.J. 208, 213 (C.A.A.F. 2007) ("The threshold for probable cause is subject to evolving case-law adjustments, but at its core it requires a factual demonstration or reason to believe that a crime has or will be committed. As the term implies, probable cause deals with probabilities. It is not a 'technical' standard, but rather is based on 'the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.' Probable cause requires more than bare suspicion, but something less than a preponderance of the evidence. Thus, the evidence presented in support of a search need not be sufficient to support a conviction, nor even to demonstrate that an investigator's belief is more likely true than false; there is no specific probability required, nor must the evidence lead one to believe that it is more probable than not that contraband will be present." (citations omitted) (quoting *Brinegar*, 338 U.S. at 175)).

hypothetical. Imagine that a Service member has been accused of committing a sexual assault outside of a nightclub near post, a popular weekend destination for hundreds of club-goers. The victim recounted the Service member making several vulgar statements throughout the night about his wanting to record having sex with the victim in a public place. The victim rebuffed all the Service member's crass sexual overtures and told him it would never happen. The Service member cut his usual late night socializing short at 2330, telling his friends that he would walk the mile from the club to his apartment. Coincidentally, just minutes later, the victim also left and walked about a block from the club to wait for a taxi away from the masses of people. Suddenly and without warning, the victim was grabbed from behind, pulled into some nearby bushes, and sexually assaulted. The victim never saw her attacker's face and was only able to relay to the police, who she called immediately after the attack, that the assailant was between 5'8" and 5'10"; had short, dark hair; and was an average build. The Service member is 5'11" with short, dark hair and a medium build. The victim told the police officers about his lewd comments in the club and said that he could be her attacker. The victim stated that it seemed the attacker recorded the event on a phone or a pocket-sized device. Satisfied with the preliminary investigation, the police raced to the Service member's apartment, where they knocked on the door and announced themselves. They heard someone inside exclaim and then the sound of a glass-like object smashed on the floor. The Service member answered the door in a towel after having just showered. On the entryway table was a smart phone with a smashed screen seemingly beyond repair. Security cameras showed him arriving home a few minutes before midnight, enough time for him to have committed the assault and made the short walk home.

This scenario presents a conundrum of sorts as it relates to probable cause. The Service member made multiple sexually suggestive comments to the victim and the victim never reciprocated. The sexual assault was in public and recorded, matching two of the Service member's self-professed sexual proclivities. He was in the vicinity of the attack, matched the victim's description of her attacker, and appeared to be covering his tracks. However, this was a popular club, he left before the victim did, and he showered after returning to his home, as is common following interactions in crowded places. The police may have startled him with their knock, causing him to drop his phone, but one may see this as both an attempt to destroy evidence and as consciousness of guilt. Making a probable cause determination as to whether the Service member was the alleged attacker may come down to

how one values the evidence presented, possibly leaving reasonable minds to differ. The Court of Appeals for the Armed Forces has acknowledged this, noting that "probable cause determinations are inherently contextual, dependent upon the specific circumstances presented as well as on the evidence itself."[41]

The CRSC compared its review of the sixty-eight cases it believed lacked probable cause for the penetrative offense charged with the decisions of the PHOs who presided over the preliminary hearings in those cases. Only forty cases (58.8%) proceeded to an Article 32, UCMJ, hearing.[42] Preliminary hearing officers issued written recommendations in thirty-four cases, finding probable cause in twelve cases but no probable cause in twenty-two others.[43] Overall, PHOs recommended referral to courts-martial in only ten of the thirty-four cases; nine cases resulted in acquittal and the lone exception that resulted in conviction was overturned on appeal for factual insufficiency.[44] The CRSC noted in the DAC-IPAD report that its assessment of these cases was not always an easy decision and that differing minds could assess the evidence differently.[45]

While determining probable cause is not an exact science, the PHOs and CRSC were more consistent with each other than not. The CRSC was comprised of well-practiced and experienced military justice attorneys, presumably with years more trial and military justice experience than the PHOs in the thirty-four cases considered. The PHOs were more liberal in finding probable cause than the sagely hands of CRSC. Put differently, PHOs leaned towards finding probable cause if the evidence was close, meaning that had their respective recommendations been binding on GCMCAs, the prosecution received the benefit of the doubt to advance the case. One could also interpret these numbers, albeit statistically quaint in size, to mean that had the GCMCAs heeded the PHOs' respective recommendations, military prosecutors would have suffered fewer acquittals, and more victims would arguably have been spared the heartache of a trial.

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[41] *Leedy*, 65 M.J. at 213.
[42] DAC-IPAD REPORT, *supra* note 8, at 55.
[43] *Id.*
[44] *Id.*
[45] *Id.* (failing to cite specific instances).

III. Objections

The DAC-IPAD study asked each military service's respective Judge Advocate General's Corps whether PHO determinations should be binding. All objected to this idea for three general reasons: (1) the Article 32, UCMJ, hearing has a limited evidentiary scope; (2) the Government continues to develop evidence after the Article 32, UCMJ, hearing; and (3) the SJA's military justice experience and expertise is far and away superior to that of the PHO.[46] These reasons appear mostly anecdotal and perhaps logically self-defeating.

A. Limited in Scope

Military justice representatives of each service harbor the view that the Article 32, UCMJ, hearing is too "limited," in that it does not consider the panoply of evidence available at referral, thereby making it an inappropriate venue for a binding probable cause determination.[47] The services seem resigned to the idea that the PHOs do not receive enough evidence because evidence is constantly being developed throughout the process; because the victim cannot be enjoined to testify and therefore the PHO may never assess his or her credibility; because there is no discovery or fact finding component to it anymore; and because "it reflects as much evidence, frequently in documentary form, that the government believes necessary to demonstrate probable cause . . . ."[48] These arguments are problematic for several reasons.

First, an Article 32, UCMJ, hearing need not be a "comprehensive evaluation of all the available evidence"[49] for the purposes of a probable cause determination. As the American Bar Association and the Department of Justice (DoJ) explain, probable cause is the jumping off point that allows

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[46] *RFI Set 11, Narrative Questions—Topics: Prosecution Decisions, Victim Participation, and Conviction/Acquittal Rates*, DEF. ADVISORY COMM. ON INVESTIGATION, PROSECUTION, & DEF. OF SEXUAL ASSAULT IN THE ARMED FORCES 1–5, https://dacipad.whs.mil/images/Public/07-RFIs/DACIPAD_RFI_Set11_20190515_Questions_Answers_20191204.pdf (last visited Dec. 1, 2021).
[47] *Id.*
[48] *Id.* at 5.
[49] *Id.* at 1.

an attorney to advance a case to trial ethically and legally.[50] In Federal cases, the prosecutor uses witnesses and other evidence to present an outline of the Government's case to the grand jury, which decides if sufficient evidence exists to establish probable cause.[51] The amount and type of evidence the grand jury hears is the Government's prerogative. Moreover, prosecutors at a grand jury are not conducting discovery or developing their case. Federal prosecutors are encouraged when they believe there is probable cause in a case to first consider whether additional investigation is necessary before making a charging decision.

Similarly, trial counsel and commanders control which charges to prefer and when to prefer them, with the statute of limitations being one of the few bars to these considerations.[52] Because the Article 32, UCMJ, hearing is no longer a discovery tool,[53] trial counsel neither can nor should rely on it to produce more evidence to refine the Government's case.[54] Trial counsel have wide latitude over what the defense receives in discovery before referral.[55] In addition, with military law enforcement investigators as a

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[50] *See Criminal Justice Standards for the Prosecution Function*, AM. BAR ASS'N, https://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition (last visited Dec. 1, 2021) ("Minimum Requirements for Filing and Maintaining Criminal Charges—(a) A prosecutor should seek or file criminal charges only if the prosecutor reasonably believes that the charges are supported by probable cause, that admissible evidence will be sufficient to support conviction beyond a reasonable doubt, and that the decision to charge is in the interests of justice. (b) After criminal charges are filed, a prosecutor should maintain them only if the prosecutor continues to reasonably believe that probable cause exists and that admissible evidence will be sufficient to support conviction beyond a reasonable doubt. . . .").

[51] U.S. Dep't of Just., Just. Manual § 9-11.101 (2017) [hereinafter Justice Manual].

[52] UCMJ art. 43 (2019).

[53] 159 Cong. Rec. 18296 (2013) (statement of Senator Levin) ("The bill will do the following that will be hopefully coming here next week: Make the Article 32 process more like a grand jury proceeding. . . . [C]urrently the proceeding that is taken under Article 32 is more like a discovery proceeding rather than a grand jury proceeding, and it has created all kinds of problems, including for victims of sexual assault who would have to appear and be subject to cross-examination by the defense.").

[54] *E.g.*, *Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (DAC-IPAD): 13th Public Meeting*, U.S. DEP'T OF DEF. 71 (Aug. 23, 2019), https://dacipad.whs.mil/images/Public/05-Transcripts/20190823_DACIPAD_Transcript_Final.pdf [hereinafter *13th Public Meeting*] (quoting Captain Vasilios Tasikas, U.S. Coast Guard, Chief, Office of Military Justice).

[55] MCM, *supra* note 4, R.C.M. 404A (directing only that the trial counsel furnish statements and evidence the Government controls, intends to use at the Article 32, UCMJ, hearing, and

resource, trial counsel have carte blanche to seek out evidence, interview witnesses, and confer with the chief of justice and expert consultants, unencumbered by judicial or procedural deadlines. All this is to say that trial counsel have time to prepare, outline, and develop their cases in anticipation of the preliminary hearing, much like civilian prosecutors.

Indeed, the CRSC found that reviewing only MCIO investigative files and other pretrial documents established probable cause in 86.3% of the 517 cases preferred.[56] That number jumped slightly, to 89.4%, amongst the 235 cases that went to verdict.[57] The CRSC only found twenty-five of the cases tried lacking enough evidence to establish probable cause.[58] All of those cases eventually resulted in an acquittal for the penetrative offense.[59] Based on the near-perfect acquittal rate, one can extrapolate that these cases never benefited from late-arriving evidence that would have made the evidentiary assessment at referral any different from at the preliminary hearing. If anything, it highlights potentially defective Article 34, UCMJ, advice.

There is no rule barring trial counsel from presenting evidence at the Article 32, UCMJ, hearing. The service representatives noted that victims cannot be forced to testify and that neither defense nor trial counsel are required to present evidence. The same can be said for a Federal prosecutor; the Federal rules of criminal procedure do not enjoin them to present evidence. Trial counsel notifies the PHO and defense counsel about the evidence they intend to introduce at the Article 32, UCMJ, hearing. The trial counsel can produce witnesses, documentary evidence, reports, video evidence, and so on, yet trial counsel tend not to do this.[60] The PHO may

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any matters provided to the convening authority directing the hearing); *id.* R.C.M. 701(a) (directing dissemination of documents, reports, and papers accompanying the charges being served on the defense after referral).

[56] DAC-IPAD REPORT, *supra* note 8, at 54.

[57] *Id.* at 56.

[58] *Id.*

[59] *Id.*

[60] Before the DAC-IPAD, Retired U.S. Navy Captain Payton-O'Brien testified that in her experience that

> the problem with the preliminary hearing currently is it's almost a foregone conclusion, because the government's obligation is to walk in—and while I agree with the probable cause standard, how they are meeting it generally in the Navy is to walk in with an investigation and give it to the preliminary hearing officer and say, here you go. No cross-

reject evidence that is irrelevant or violates a privilege or some other Military Rule of Evidence.

The preliminary hearing has essentially been whittled to a paper drill in recent years, usually doing little to explain the minimal evidence presented or to give the SJA and GCMCA greater context about the facts than what is in the MCIO report.[61] The MCIO report is a law enforcement product that, even in its final form, is merely one interpretation of evidence collected by one specific source. The Article 32, UCMJ, hearing is not too limited in scope that there cannot be at least some testimony to better contextualize the documentary evidence and perhaps "present some . . . defense evidence that might go to that determination of probable cause."[62] In a sense, trial counsel who try to present the most barebones case possible are encumbering the SJA and GCMCA in the later determination as to whether the case should go forward. The Article 32, UCMJ, hearing is not so limited in scope that trial counsel cannot present some testimony, even if from only an investigator. To fix this, the military simply needs to change trial counsels' orientation to the hearing, not necessarily create or change any of the rules.

The alleged victim not having to testify at the Article 32, UCMJ, hearing has a limited effect on meeting the probable cause standard. The trial counsel can meet the legal standard by introducing the alleged victim's written or video statement. In FY 2017, of the 517 preferred cases, the victim

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> examination of witnesses. No testimony. They just drop a paper case on the preliminary hearing officer. . . . Most witnesses aren't testifying, because the government's position . . . in most cases is we don't have to bring in testimony because it's cumulative with that report. Despite defense counsel asking for witnesses to come, in many cases the witnesses aren't because either they are civilians and they decline or the government's position is that their testimony is cumulative with the paper. So are you really vetting a case out based on paper? I would submit that maybe not.

Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (DAC-IPAD): 16th Public Meeting, U.S. DEP'T OF DEF. 54–55 (Feb. 14, 2020), https://dacipad.whs.mil/images/Public/05-Transcripts/20200214_DACIPAD_Transcript_Final.pdf [hereinafter *Judges' Testimony*] (quoting Captain (Retired) Bethany Payton-O'Brien, U.S. Navy).

[61] *13th Public Meeting*, *supra* note 54, at 72.

[62] *Judges' Testimony*, *supra* note 60, at 67 (quoting Captain (Retired) Bethany Payton-O'Brien, U.S. Navy).

made a statement to law enforcement 99.6% (515 of 517) of the time.[63] The alleged victim's statement alone was sufficient to establish probable cause in 428 of 515 (83.1%) cases.[64] Conversely, the alleged victim's statement was insufficient on its own in 81 (15.7%) of cases.[65] It might behoove trial counsel to encourage alleged victims to testify more often for the benefit of trial, but the absence of a victim's testimony does not, for the most part, hinder the Government from establishing probable cause.[66] Moreover, if the alleged victim does testify, the PHO, not the SJA, would have the real time benefit of judging the witness's demeanor.[67] That said, when witnesses do not testify, they cannot be cross-examined, which alleviates the risk of weakening the Government's evidence. This remains a key difference between the Article 32, UCMJ, and Federal grand jury in that the latter does not allow the accused or defense counsel to attend.[68]

B. Staff Judge Advocate's Legal Experience and Expertise

Representatives of all services agree that the Article 32, UCMJ, hearing should not be binding because, in part, the SJA has more experience and expertise than any PHO.[69] While true that SJAs are virtually always senior in rank to the PHO and have more time in service, that does not automatically impute to their criminal law expertise. The breadth of legal practice in the military ranges from national security to environmental law.[70] Some SJAs have a wealth of military justice experience, but it is not

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[63] DAC-IPAD REPORT, *supra* note 8, at 50.
[64] *Id.* at 51.
[65] *Id.*
[66] *Judges' Testimony*, *supra* note 60, at 13 ("[The Article 32] was a good opportunity as a prosecutor to see how that individual would fare under cross-examination. They don't have that opportunity anymore. Most victims will assert their rights to not come to an Article 32. Thus, they come into court, it seems sometimes, unprepared for what is going to happen and how the questions will come at them.").
[67] *13th Public Meeting*, *supra* note 54, at 79 (quoting Colonel Julie Pitvorec, Chief, Government Trial and Appellate Counsel Division, U.S. Air Force).
[68] FED. R. CRIM. P. 6.
[69] *RFI Set 11, Narrative Questions—Topics: Prosecution Decisions, Victim Participation, and Conviction/Acquittal Rates*, *supra* note 46, at 1.
[70] David Roza, *The Major Flaws in the Air Force Justice System that Let Generals Go Unpunished*, TASK & PURPOSE (Nov. 24, 2020, 8:26 PM), https://taskandpurpose.com/news/william-cooley-air-force-sexual-assault (discussing the relative inexperience of judge advocates at courts-martial); Cully Stimson, *Army and Air Force JAG Corps Need*

a prerequisite to becoming an SJA.[71] Regardless, the Committee's data suggests that having the SJA make an objective probable cause determination and then advocate to the GCMCA about disposition is not ideal.

Some argued that the SJA has the benefit of getting advice from not just the PHO, but a litany of senior legal advisers. Theoretically, the trial counsel advises the senior trial counsel, special victim prosecutor,[72] and the chief of justice. The chief of justice then advises the SJA, either directly or through the Deputy Staff Judge Advocate. The commonality amongst all these people is that they advocate for the Government and its interests. Because these actors are not neutral and detached, the Government runs the risk of creating an echo chamber effect in which probable cause is evaluated through rose-colored glasses. The United States Marine Corps wrote, "If all of those more experienced attorneys are advising that there is probable cause, there is no reason to believe the PHOs[']' opinion to the contrary is more likely correct."[73] The data from the DAC-IPAD does not bear this out.

The data indicates that the Article 34, UCMJ, advice is perhaps too liberal in construing probable cause. The CRSC found that 10.6% of the 235 cases reaching verdict lacked sufficient evidence to establish probable

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Career Litigators Now, DAILYSIGNAL (May 2, 2016), http://dailysignal.com/2016/05/02/army-and-air-force-jag-corps-need-career-litigators-now.

[71] *Judges' Testimony*, *supra* note 60, at 33. In discussing the relative lack of military justice expertise in the Judge Advocate General's Corps, U.S. Army Colonel (Retired) Andrew Glass said, "We need people with military justice experience as SJAs. You don't need that much experience. I've been an SJA. I can tell you in an hour what you need to know to be an SJA and advise people." *Id.*

[72] In the Army, special victim prosecutors are assigned to the Trial Counsel Assistance Program as part of the United States Army Legal Services Agency, with duty at a specific installation. The Trial Counsel Assistance Program has three highly qualified experts, who are civilian attorneys with significant civilian prosecutorial experience. OFF. OF THE JUDGE ADVOC. GEN., U.S. ARMY, U.S. ARMY, REPORT ON MILITARY JUSTICE FOR FISCAL YEAR 2019, *in* REPORTS OF THE SERVICES ON MILITARY JUSTICE FOR FISCAL YEAR 2019 1, 3 (2020), https://jsc.defense.gov/Portals/99/Documents/Article%20146a%20Report%20-%20FY19%20-%20All%20Services.pdf?ver=2020-07-22-091702-650. Special victim prosecutors have the benefit of being able to consult with these experts on cases, drawing even greater legal insight from learned counsel on special victim and high-profile prosecutions. *Id.*

[73] *RFI Set 11, Narrative Questions—Topics: Prosecution Decisions, Victim Participation, and Conviction/Acquittal Rates*, *supra* note 46, at 3.

cause.[74] Nearly every single one of those cases resulted in an outright acquittal on the penetrative sexual offense charge.[75] The one case that did result in a conviction was overturned on appeal for factual insufficiency.[76] The DAC-IPAD study explored a very parochial subset of military justice cases. One service representative touted at least one occasion where a PHO found no probable cause, the SJA disagreed, and the case ultimately proceeded to a conviction.[77] While notable, anecdotal examples are not proof of legal sufficiency.

By design, the SJA is generally ill suited to make the probable cause determination. This is because the SJA, as the command's primary legal adviser, is not impartial. The PHO, on the other hand, views a case only through the charges brought and the evidence adduced at the preliminary hearing. Reasons for a PHO's disqualification include having played a role in the prosecution or defense of the accused, serving as the Deputy Staff Judge Advocate, and any time the PHO's objectivity can reasonably be questioned.[78] The SJA, however, has a statutory duty to make a recommendation as to disposition to the GCMCA after working with the chief of justice and a cadre of attorneys who have been helping the trial counsel perfect the case against the accused and to offer advice to subordinate commanders on disposition.[79]

It cannot be ignored that the legal adviser to a GCMCA is evaluated by a general officer whose military justice philosophy may be impacted by ulterior considerations. Lieutenant General Susan Helms granted clemency to an Airman convicted of a sex offense in accordance with the rules.[80]

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[74] DAC-IPAD REPORT, *supra* note 8, at 56.
[75] *Id.*
[76] *Id.*
[77] *13th Public Meeting*, *supra* note 54.
[78] United States v. Lopez, 42 C.M.R. 268 (C.M.A. 1970); United States v. Parker, 19 C.M.R. 201 (C.M.A. 1955); United States v. Castleman, 11 M.J. 562 (A.F.C.M.R. 1981) (investigating officer was close friend of accuser and vacationed with accuser two days prior to the preliminary hearing); *United States v. Davis*, 20 M.J. 61 (C.M.A. 1985) (investigating officer was defense counsel's supervisor).
[79] UCMJ art. 34(a)(2) (2019).
[80] Craig Whitlock, *General's Promotion Blocked over Her Dismissal of Sex-Assault Verdict*, WASH. POST (May 6, 2013), https://www.washingtonpost.com/world/national-security/generals-promotion-blocked-over-her-dismissal-of-sex-assault-verdict/2013/05/06/

When she was subsequently considered for promotion, she found herself under congressional scrutiny for her decision.[81] Her promotion never came to pass, and she retired shortly thereafter.[82] Some GCMCAs might be inclined to advance a case because of persistent congressional efforts to remove commanders from the military justice process.[83] Speaking candidly about how an SJA's advice can be motivated by optics, one service representative recognized that "convening authorities are not going to be second guessed if they send a case to court-martial. They will be if they don't, especially if you have a willing participant in a court-martial case."[84] A retired military judge and former SJA more starkly asserted, "[T]he problem is . . . little generals want to be bigger generals, generally. They want to get promoted."[85]

The DAC-IPAD inquiry showed that even seasoned legal advisers sometimes scrutinize non-evidentiary factors in favor of others. One former SJA said,

> I know the Air Force is the outlier on this because we work at the probable cause standard, and the referral standard, and take into consideration the wants of the victim . . . .
>
> . . . .

ef853f8c-b64c-11e2-bd07-b6e0e6152528_story.html. Lieutenant General Helms granted clemency contrary to her legal adviser's recommendation. *Id.*

[81] *Id.*

[82] David Alexander, *Female U.S. General Who Overturned Sex-Assault Ruling to Retire*, REUTERS (Nov. 8, 2013), https://www.reuters.com/article/us-usa-defense-sexualassault/female-u-s-general-who-overturned-sex-assault-ruling-to-retire-idUSBRE9A800A20131109.

[83] *See* S. 4049, 116th Cong. § 539 (2020) (proposing to give judge advocates authority to decide what cases are brought to trial through an Office of the Chief Prosecutor instead of through commanders); Leo Shane III, *Plan to Remove Handling of Military Sexual Misconduct from Chain of Command Sees New Momentum*, MIL. TIMES (Feb. 24, 2021), https://www.militarytimes.com/news/pentagon-congress/2021/02/24/plan-to-remove-handling-of-military-sexual-misconduct-from-chain-of-command-sees-new-momentum; Lolita C. Baldor, *End Commanders' Power to Block Military Sexual Assault Cases, Pentagon Panel Says*, MIL. TIMES (Apr. 22, 2021), https://www.militarytimes.com/news/pentagon-congress/2021/04/22/end-commanders-power-to-block-military-sex-cases-pentagon-panel-says.

[84] *13th Public Meeting*, *supra* note 54, at 109.

[85] *Judges' Testimony*, *supra* note 60, at 37.

> . . . And so, if . . . you have a credible, reliable victim that wants to participate, we feel strongly that the probable cause standard allows us to go forward in that case . . . .[86]

Her point, while compassionate, demonstrated how Article 34, UCMJ, advice can be contorted into a self-granting permission slip to achieve policy ends.

One need only consider the Air Force's numbers from the DAC-IPAD study to see how pervasive the mindset is. Of the 235 cases that were tried to verdict across the services, the Air Force contributed 68.[87] The CRSC found that thirteen of sixty-eight cases (19.2%) in the Air Force lacked sufficient evidence to establish probable cause, compared with five of ninety-four cases (5.3%) in the Army, two of twenty-six cases (7.7%) in the Marine Corps, five of forty cases (12.5%) in the Navy, and zero of seven cases (0%) in the Coast Guard.[88] The CRSC calculated that thirty-nine of sixty-eight (57.4%) cases the Air Force tried to verdict had sufficient evidence to sustain a conviction at trial. Unsurprisingly, the acquittal rate was fifty of sixty-eight cases (73.5%), outpacing every other service by at least ten percentage points. Assuming *arguendo* that a PHO with a binding probable cause determination had blocked those thirteen cases from being referred, the acquittal rate would have dropped to 67% (i.e., thirty-seven of fifty-five cases).

C. Inexperienced Preliminary Hearing Officers

The other concern the services put forth was the perceived inexperience of the PHO. The sentiment was that more junior judge advocates are too inexperienced to make a probable cause determination as compared to their "litigation qualified" and senior counterparts, despite the fact that junior judge advocates have already made probable cause determinations for the purposes of FBI fingerprinting, DNA indexing, pretrial confinement legal reviews, search authorizations, etc.[89] The convening authority is responsible

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[86] *13th Public Meeting*, *supra* note 54, at 105.
[87] DAC-IPAD REPORT, *supra* note 8, at 56.
[88] *Id.*
[89] *RFI Set 11, Narrative Questions—Topics: Prosecution Decisions, Victim Participation, and Conviction/Acquittal Rates*, *supra* note 46, at 3.

for picking the PHO,[90] almost always with the help of the SJA, meaning that through training and legal mentorship, the GCMCA and SJA can offset the lack of experience and expertise to ensure the PHO can competently execute the duties assigned.

A tenable solution that would both assuage concerns about inexperienced PHOs and build expertise in the respective services is to grow fulltime magistrates.[91] As Colonel (Retired) Jeffery Nance has suggested, these magistrates would be senior majors who would do "nothing but magistrate duties and do [Article] 32s. They would supervise part-time magistrates, and they could help the actual military judges with important rulings on controversial motions."[92] Colonel (Retired) J. Wesley Moore explained that military judges in the Air Force "do almost all the Article 32 hearings for sexual assault cases"[93] and that they have overcome the logistical imposition of excessive travel from base to base by conducting these hearings via video teleconference.[94] It is unclear how long the Air Force has been using military judges in this capacity, how it has affected the number of cases referred to trial that lack probable cause, and how it has overcome likely defense objections to PHOs not conducting hearings in person.[95]

The idea of creating full-time magistrates whose primary duty would be presiding over Article 32, UCMJ, hearings would accomplish several things. First, assuming members of the judiciary evaluated full-time magistrates who are untethered from the victim's or accused's chain of command, the PHO would become truly impartial—more so than they currently are. Second, convening authorities and their legal advisers would be assured that the probable cause determination came from a PHO who was handpicked

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[90] UCMJ art. 32(a) (2019).
[91] UCMJ art. 26a (2019) (detailing the qualifications and duties of magistrates); Schlueter, *supra* note 5, at 39–40 (explaining that the change was meant to bring the military closer paralleling the Federal magistrates' program).
[92] *Judges' Testimony*, *supra* note 60, at 49–50.
[93] *Id.* at 53.
[94] *Id.*
[95] Pol'y Memorandum, Headquarters, Dep't of Air Force, subject: Department of the Air Force Guidance Memorandum to AFI 51-201, *Administration of Military Justice* para. 7.2.1.2 (15 Apr. 2021) (stating, without further requirement or advice only that the PHO "may be a military judge"); MCM, *supra* note 4, R.C.M. 405(f), (j)(4) (referencing the accused and counsel having the right to be present during the presentation of evidence).

based on their experience and expertise in military justice. Third, charging the judiciary with this responsibility alleviates commanders of shouldering public, congressional, or victim backlash for failing to advance a weak case. Lastly, under the tutelage of military judges, PHOs would receive training and mentorship that will make for consistent opinions, provide a pool for future judges, and ultimately create a stronger judiciary.[96]

IV. Ripple Effects

If the Committee's recommendation to make the Article 32, UCMJ, hearing binding comes to fruition, other changes will be necessary. This section explores some of those required changes and potential effects on the services in practice.

A. Article 34, UCMJ, Reform

Putting the probable cause determination in the hands of a full-time magistrate or judge is not by itself the panacea. The Committee recommends changing the Article 34, UCMJ, advice to include whether, in the SJA's opinion, there is sufficient admissible evidence to obtain and sustain a conviction.[97] Their recommendation makes sense if working smarter trumps simply working harder.

Consider the acquittal rates detailed in the DAC-IPAD study. Of the 235 cases that went to verdict, 144 (61.3%) cases resulted in acquittal of the penetrative offenses. The CRSC determined that 24 of 144 (16.7%) cases resulting in acquittal lacked probable cause.[98] If the military had not

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[96] *Judges' Testimony*, *supra* note 60, at 51.

[97] DAC-IPAD REPORT, *supra* note 8, at 16 ("Finding 111: The review of 1,904 adult penetrative sexual offense investigative cases files closed in FY17 reveals, however, that there is a systemic problem with the referral of penetrative sexual offense charges to trial by general court-martial when there is not sufficient admissible evidence to obtain and sustain a conviction on the charged offense. . . . DAC-IPAD Recommendation 32: Congress amend Article 34, UCMJ, to require the staff judge advocate to advise the convening authority in writing that there is sufficient admissible evidence to obtain and sustain a conviction on the charged offenses before a convening authority may refer a charge and specification to trial by general court-martial.").

[98] *Id.* at 58 tbl.V.3.

tried those 24 cases, only 120 of 211 (56.8%) cases would have ended in acquittal. Going one step further, 71 of 144 (49.3%) cases ending in acquittal lacked sufficient evidence in the investigative file to sustain a conviction.[99] If the SJAs and GCMCAs only advanced cases in FY 2017 that had enough evidence to sustain a conviction, the acquittal rate would have fallen to approximately 44% (73 of 164 cases) from 61.3%. "The purpose of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby strengthen the national security of the United States."[100] It is difficult to argue that such a high acquittal rate achieves these ends.

Changing Article 34, UCMJ, as the DAC-IPAD recommended would obligate the SJA to make an assessment about whether a case can prevail to conviction, inviting consideration about whether bringing it to trial is in the military's interest. Moreover, because the PHO would determine probable cause, it would alleviate the due process implications of the Article 34, UCMJ, advice.[101] Currently, failure to render proper advice does not jurisdictionally preclude referral of a case, but it can be defective and possibly cause prejudice to the accused.[102] In a system where the SJA does not make the probable cause determination, the extent to which their advice could be defective and infringe upon an accused's due process rights would be even more limited.

The DoJ prioritizes success at trial in its prosecutorial analysis as a preliminary step, even before deciding whether a Federal interest compels prosecution.[103] This is partly because of Federal Rule of Criminal Procedure

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[99] *Id.*

[100] MCM, *supra* note 4, pt. I-1.

[101] United States v. Henderson, 23 M.J. 860, 861 (A.C.M.R. 1987).

[102] United States v. Murray, 25 M.J. 445, 449 (1988). In *United States v. Meador*, the military judge found the SJA's Article 34, UCMJ, advice defective because the PHO found no probable cause, and the Government was successful in reversing the judge on an interlocutory appeal; the appellate court agreed that the PHO's determination was not binding. United States v. Meador, 75 M.J. 682 (2016).

[103] Justice Manual, *supra* note 51, § 9-27.230.

> In determining whether a prosecution would serve a substantial federal interest, the attorney for the government should weigh all relevant considerations, including:

29(a).[104] In a motion for judgment of acquittal, the judge "must" grant it if "the evidence is insufficient to sustain a conviction."[105] Federal courts not only evaluate the evidence in a light most favorable to the Government but go a step further and, in examining the totality of the evidence, determine if the evidence presented at trial "gives equal or nearly equal support to a theory of guilt and a theory of innocence, because in that event, a reasonable trier of fact must necessarily entertain reasonable doubt."[106]

The DoJ's evidence-based approach is reflected in its results. In FY 2015, there were 925 felony sexual abuse cases adjudicated in Federal district courts, of which 812 were guilty or nolo contendere pleas and 47 were dismissed without a verdict.[107] There were sixty-six contested trials with fifty-seven (86.3%) ending in conviction and only nine acquittals.[108] Overall, the DoJ had a 93.9% conviction rate for felony sexual abuse cases.[109] During that period, the DoJ declined to prosecute 26,624 cases: 19 (0.1%) declinations were due to grand juries returning "no bills," whereas

1. Federal law enforcement priorities, including any federal law enforcement initiatives or operations aimed at accomplishing those priorities;
2. The nature and seriousness of the offense;
3. The deterrent effect of prosecution;
4. The person's culpability in connection with the offense;
5. The person's history with respect to criminal activity;
6. The person's willingness to cooperate in the investigation or prosecution of others;
7. The person's personal circumstances;
8. The interests of any victims; and
9. The probable sentence or other consequences if the person is convicted.

Id.

[104] FED. R. CRIM. P. 29(a).

[105] *Id.*

[106] United States v. Santillana, 604 F.3d 192, 195 (5th Cir. 2010) (citations omitted); *but see* MCM, *supra* note 4, R.C.M. 917(d) ("A motion for a finding of not guilty shall be granted only in the absence of some evidence which, together with all reasonable inferences and applicable presumptions, could reasonably tend to establish every essential element of an offense charged. The evidence shall be viewed in the light most favorable to the prosecution, without an evaluation of the credibility of witnesses.").

[107] MARK MOTIVANS, BUREAU OF JUST. STAT., NCJ 251771, FEDERAL JUSTICE STATISTICS, 2015 – STATISTICAL TABLES, 20 tbl.4.2 (2020).

[108] *Id.*

[109] *Id.*

16,626 (62.4%) declinations were due to prosecutors' determination that there was insufficient evidence to prevail at trial.[110] While it is difficult to compare these numbers with courts-martial given all the variables that separate the two, Federal prosecutors tend to have more success at trial, which appears, at least anecdotally, on their prosecutorial philosophy of putting forward stronger cases versus weaker ones.

The UCMJ already beseeches commanders because of the Military Justice Act of 2016[111] to consider certain non-binding disposition guidance, including "whether admissible evidence is likely to be sufficient to obtain and sustain a conviction in a trial by court-martial."[112] This guidance was imposed through congressional will, but is simply one of many factors to consider. Others relate to the seriousness of the offense, whether the offense happened in wartime, the harm caused, the willingness of witnesses to testify, and the truth-seeking function of a court-martial, among others.[113] The ability to prevail at court-martial with admissible evidence carries no greater weight than any other factor and may be non-binding so as not to impede the ease of referral.

Amending Article 34, UCMJ, could have a trickledown effect that alters the current mindset of some judge advocates (i.e., that if there is a "credible, reliable victim that wants to participate . . . the probable cause standard allows us to go forward in that case and give the victim the opportunity to say what they want to say in court before the military judge and members, and whoever else happens to be present.").[114] The discussion between legal advisers and commanders would be reset to more strongly consider success at trial, not dissimilar to assessing risk when attacking a military target: there is a difference between having enough resources to

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[110] *Id.* at 12 tbl.2.3.

[111] National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, §§ 5001–5542, 130 Stat. 2000, 2894–968 (2016) (codified as amended at 10 U.S.C. §§ 801–946a). The changes did not take effect until 1 January 2019. *See* Exec. Order. No. 13825, 83 Fed. Reg. 9889 (Mar. 1, 2018).

[112] UCMJ art. 33 (2019) (requiring that commanders dispose of cases in accordance with the Attorney General's guidance to Government attorneys so that Federal criminal cases result in "fair and evenhanded administration of Federal criminal law"); MCM, *supra* note 4, app. 2.1(h).

[113] MCM, *supra* note 4, app. 2.1.

[114] *13th Public Meeting*, *supra* note 54, at 106.

mount an offensive—that being probable cause—versus winning the battle and the war—that being a conviction.

B. Diminished Waiver

The Article 32, UCMJ, hearing changed in form and function with the passage of the National Defense Authorization Acts for Fiscal Years 2014[115] and 2015.[116] Notably, it changed from a truth-seeking "investigation" about the underlying factual basis of the charges to a preliminary hearing narrowly focused in large part on probable cause.[117] The hearing was indispensably valuable to defense attorneys because it allowed for liberal access to discovery, which otherwise was restricted until referral.[118] Accused and their counsel had fairly liberal access to witnesses, with Rule for Courts-Martial (R.C.M.) 405(g)(1)(A) providing that "any witness whose testimony would be relevant to the investigation . . . shall be produced if reasonably available."[119] "Any witness" included alleged victims, which allowed defense attorneys to challenge the credibility of accusers under oath. Testimony was generally limited when the alleged victim was unavailable or in the case of special arrangements made for children. The rules gave the accused the right to "[p]resent anything in defense, extenuation, or

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[115] National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1702, 127 Stat. 672, 954–55 (2013).

[116] Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 531, 128 Stat. 3292, 3362–66 (2014).

[117] MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 405(g) discussion (2012) [hereinafter 2012 MCM] ("The primary purpose of the investigation required by Article 32 and this rule is to inquire into the truth of the matters set forth in the charges, the form of the charges, and to secure information on which to determine what disposition should be made of the case."); Humphrey v. Smith, 336 U.S. 695 (1949) (explaining that the precursor to the Article 32, UCMJ, hearing afforded the accused an opportunity to prepare for trial, guarded against ill-conceived charges, and prevented trivial cases from reaching a general court-martial).

[118] United States v. Chestnut, 4 M.J. 642 (A.F.C.M.R. 1977); *see generally* MCM, *supra* note 4, R.C.M. 701.

[119] 2012 MCM, *supra* note 117 ("A witness is 'reasonably available' when the witness is located within 100 miles of the situs of the investigation and the significance of the testimony and personal appearance of the witness outweighs the difficulty, expense, delay, and effect on military operations of obtaining the witness' appearance.").

mitigation for consideration by the investigating officer," even if it exceeded the question of probable cause.[120]

When the Article 32, UMCJ, hearing changed, access to the alleged victim, evidence, and wide latitude to investigate the truth of the charges dissipated, and the number of accused Service members who waived the hearing increased.[121] In FY 2015, the DAC-IPAD calculated that for sexual assault offenses, both penetrative and contact, the accused only waived the Article 32, UCMJ, hearing in 9.7% of cases.[122] In FY 2016, that rate shifted to 21.1%.[123] Fiscal years 2017 and 2018 saw an increased number of waivers, but only marginally.[124] Because waivers are sometimes a condition of a plea agreement, it is worth noting that from FY 2015 to 2016, the percentage of accused who waived their right to an Article 32, UCMJ, hearing jumped from about 52% to nearly 70%, rebounding back towards 57% in FY 2017 and then trending to 61% in 2018.[125] The DAC-IPAD's findings show that an accused is more likely to waive the hearing if the allegation is for a penetrative offense rather than a contact offense.[126]

The reasons to waive the hearing depend on the circumstances and cannot be captured in the limited statistical data above. "[T]he overall consensus is that there is still little or no incentive to [submit post-hearing matters] since the PHO's probable cause determination is not binding. Defense counsel are more apt to hold on to favorable evidence until trial rather than give the government an opportunity to undermine this evidence."[127] For example, the defense may know about a cooperative

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[120] *Id.* R.C.M. 405(f)(11).

[121] UCMJ art. 32(a)(1)(B) (2019) (allowing accused to waive the preliminary hearing).

[122] DEF. ADVISORY COMM. ON INVESTIGATION, PROSECUTION, & DEF. OF SEXUAL ASSAULT IN THE ARMED FORCES, COURT-MARTIAL ADJUDICATION DATA REPORT 2019, at 16 (2019).

[123] *Id.*

[124] *Id.* at 16–18.

[125] *Id.* at 17.

[126] *Id.* at 16–18.

[127] *RFI Set 11, Narrative Questions—Topics: Prosecution Decisions, Victim Participation, and Conviction/Acquittal Rates*, *supra* note 46, at 13; UCMJ art. 32(g) (2019) (explaining that the hearing is required, that failure to follow the requirements does not constitute jurisdictional error, and that a defect in the PHO's report to the convening authority is not a basis for relief as long as it is in substantial compliance with the rules); 2012 MCM, *supra* note 117, R.C.M. 405(a) ("[N]o charge or specification may be referred to a general court-martial for trial until a thorough and impartial investigation of all the matters set forth therein has been made in substantial compliance with this rule."); United States v. Frederick, 7 M.J.

witness who military law enforcement and trial counsel never interviewed who could testify as to the complaining witness's character for truthfulness as well as what they witnessed of the alleged offense. In that scenario, waiving the hearing and requesting speedy trial may limit the Government's ability to mollify such exculpatory evidence. Stated differently, the defense may be disinclined to reveal its possible trial strategy when the PHO's determination cannot cause the charges to be dismissed. Still there are other reasons to waive the hearing, including where the evidence is overwhelming or where the Government under-charged its case.

C. Newly Discovered Evidence

The biggest concern among some is that a binding Article 32, UCMJ, hearing would potentially obstruct the Government from proceeding on cases where the PHO's conclusions are incorrect, the trial counsel failed to present enough evidence, or that more evidence was discovered after the hearing. Others have expressed concern making the case binding could nullify the alleged victim's right not to testify at the hearing. These concerns are more an issue of advocacy than procedure.

If the Article 32, UCMJ, hearing transforms into a binding proceeding akin to a Federal grand jury, a remaining procedural question is whether the Government can re-prefer charges a PHO dismisses. One suggestion has been to allow re-preferral in the event of newly discovered evidence.[128] The standard for what constitutes "newly discovered evidence" should follow the standard established in R.C.M. 1210.[129] It should require that re-presenting evidence at a preliminary hearing that originally found no probable cause shall not be granted on the grounds of newly discovered

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791, 796–97 (N.C.M.R. 1979) ("We would be remiss at this point in not laying to rest certain misconceptions regarding the proper procedural role of the Article 32 investigation in those cases where an original conviction has been overturned by any reviewing entity. While it is true that the pretrial investigation is 'not a mere formality,' but rather a substantial right afforded a military accused ultimately facing trial by general court-martial, and as such has come to be regarded as 'an integral part of the court-martial proceedings,' its inherent procedures should effect a substantial, meaningful benefit to the parties and not be invoked as an empty legalistic ritual." (citations omitted)).

[128] *Judges' Testimony*, *supra* note 60.

[129] MCM, *supra* note 4, R.C.M. 1210 (establishing a standard to petition for a new trial based on newly discovered evidence or fraud).

evidence unless, the trial counsel can show that: (1) the evidence was discovered after the preliminary hearing determination was made; (2) the evidence is not such that it would have been discovered by the Government at the time of the preliminary hearing in the exercise of due diligence; and (3) the newly discovered evidence, if considered, by the preliminary hearing officer, would probably meet the probable cause threshold.[130] The trial counsel would also need to seek approval from the Office of The Judge Advocate General for permission to re-present the same charge or a similar one at a second hearing.[131]

Federal prosecutors are not enjoined from presenting the same case and same facts to a second grand jury after the first votes "no bill."[132] The DoJ's *Justice Manual* does, however, instruct Federal attorneys that a second attempt at the grand jury should only come with concurrence from the overseeing U.S. Attorney.[133] Whether it be a resource, overzealous, or policy concern that spurred this directive, Federal prosecutors are not stuck after a failed attempt. The grand jury process has its own challenges for Federal prosecutors. For example, Federal prosecutors need to convince at least twelve grand jurors of potentially twenty-three to indict.[134] Also, it can be time consuming to represent a case at a different grand jury. Grand juries sit until discharged (for up to eighteen months or more, if warranted),[135] making re-presentment with the same evidence on the same charge a

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[130] *See id.* R.C.M. 1210(f)(2).

[131] Because a preliminary hearing does not adjudicate whether an accused is guilty, double jeopardy issues would not arise should the Government re-present a charge to a PHO. However, it would be advisable to include an admonishment in the new rule prohibiting reconsideration of any offense if it stems from the same conduct as the previously charged offense. *See id.* R.C.M. 307(c)(4) ("What is substantially one transaction should not be made the basis for an unreasonable multiplication of charges against one person."); Akhil Reed Amar, *Double Jeopardy Law Made Simple*, 106 YALE L.J. 1807, 1813 (1997) (explaining that under *Blockburger v. United States*, 284 U.S. 299, 304 (1932), a greater offense "is treated as the same as any logically lesser-included offense with some but not all of the formal 'elements' of the greater offense—in other words, *Blockburger* treats two offenses as different if and only if each requires an element the other does not.").

[132] Justice Manual, *supra* note 51.

[133] *Id.* The policy is most likely a prophylactic against an overzealous prosecution to ensure that there is a factual basis that will serve a Federal interest. Federal attorneys, Assistant U.S. Attorneys included, may file charges in accordance with their statutory duty with such specific oversight.

[134] FED. R. CRIM. P. 6.

[135] *Id.*

potentially flat strategy. It is better to over-advocate at the grand jury than get a flawed indictment or a "no bill."

In the military, the preliminary hearing does not involve as many people and there is not the same volume of potential cases. However, unlike the military, the DoJ does not deploy to fight the Nation's wars, nor does an Assistant U.S. Attorney typically work in the same organization as a defendant, something that happens routinely with trial counsel and the convening authorities. If the cornerstone of military law is the promotion of good order, discipline, efficiency, and effectiveness, multiple attempts at an Article 32, UCMJ, hearing does nothing to afford the military or accused the finality necessary for the organization or individual to succeed in an effective fighting force.

Ultimately, the issue is not a procedural one. There will be arguments about whether something qualifies as "newly discovered evidence," but this misses the renewed importance of competent trial advocates at all stages of a case. Like Federal prosecutors who call witnesses, present documentary evidence, and have limited subpoena power to compel both, the trial counsel does much the same.[136] Moreover, the purpose of both hearings is to determine probable cause, not to investigate for the truth.[137] The Federal prosecutor needs to espouse a theory and demonstrate how the evidence presented supports the charges submitted well enough for laymen to agree that the defendant committed a specific offense.[138] Conversely, the PHO is a single person who will presumably have some, if not much, trial experience, something that can be advantageous in more complex or counterintuitive fact patterns. Even so, the trial counsel will

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[136] Justice Manual, *supra* note 51, § 9-11.000.

[137] *Id.* § 9-11.101 ("While grand juries are sometimes described as performing accusatory and investigatory functions, the grand jury's principal function is to determine whether or not there is probable cause to believe that one or more persons committed a certain Federal offense within the venue of the district court. Thus, it has been said that a grand jury has but two functions—to indict or, in the alternative, to return a 'no-bill.' . . . At common law, a grand jury enjoyed a certain power to issue reports alleging non-criminal misconduct. A special grand jury impaneled under Title 18 U.S.C. § 3331 is authorized, on the basis of a criminal investigation (but not otherwise), to fashion a report, potentially for public release, concerning either organized crime conditions in the district or the non-criminal misconduct in office of appointed public officers or employees.").

[138] FED. R. CRIM. P. 7.

need to be especially focused on the type and amount of evidence they present to the PHO.

D. Facts and Theory

The Article 32, UCMJ, hearing has devolved from a robust investigation to a shell of its former self. The hearing does not have a truth-seeking function, but rather focuses narrowly on probable cause. Still, like a grand jury, the prosecution at a preliminary hearing must connect the evidentiary dots for the PHO. Failure to present a cogent theory and explain how the facts satisfy the elements could prove fatal; the same applies to presenting (or having) too little evidence or misunderstanding the elemental standards.

On this point, one need only consider the growing infrequency with which witnesses testify at preliminary hearings. In FY 2014, at least one witness testified in 418 of 425 preliminary hearings (98%), whereas witness testimony occurred in only 116 of 318 hearings (36%) in FY 2018.[139] Senior judge advocates need to employ a new set of best practices with trial counsel and invite genuine, complete feedback from the PHO.[140] Considering the extremely low number of trials that each trial counsel has the opportunity to prosecute, supervisory judge advocates should see the preliminary hearing as an opportunity for trial counsel to practice advocacy skills in a low-threat environment.

A binding Article 32, UCMJ, hearing will inculcate professionalism and force both defense and trial counsel to advocate to a truly independent and impartial arbiter. The preliminary hearing and the Federal grand jury are

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[139] DEF. ADVISORY COMM. ON INVESTIGATION, PROSECUTION, & DEF. OF SEXUAL ASSAULT IN THE ARMED FORCES, POLICY SUBCOMMITTEE ARTICLE 32, UCMJ, PRELIMINARY HEARING ASSESSMENTS 10 (2020) [hereinafter PRELIMINARY HEARING ASSESSMENTS].

[140] *13th Public Meeting*, *supra* note 54, at 101 ("And there's nothing wrong with adding more evidence and letting people consider more evidence in an Article 32 investigation. And we really should be beefing that up I think internally making those requirements."); *id.* at 72 ("Talking to some SJAs in the field, they are frustrated, as some of it is just a paper review and they do last as little as 15 minutes, where they just hand in, literally, the record of investigation. So from that standpoint, I don't think it's very helpful. . . . I don't want to not highlight that there is some level of a paper shuffle. And I don't know how much more informed the convening authority and SJA are because of it because they can read the [report of investigation] as well.").

similar in that neither fall within the purview of the prosecution.[141] The latter belongs to the courts and the former, assuming the PHO works for the trial judiciary, will not be beholden in any capacity to either side. This will impact advocacy because the PHO is required to be impartial and to avoid becoming an advocate for either side.[142] Pursuant to R.C.M. 405(j), "[t]he preliminary hearing officer shall not call witnesses sua sponte."[143] In fact, the role is limited to determining whether the evidence or testimony offered by either side is relevant, not cumulative, or unnecessary to the purposes of the hearing.[144]

Either side's failure to bring evidence to the PHO's attention could affect the outcome. For trial counsel, an alleged victim's statement may omit details germane to establishing a key element of the gravamen offense. The PHO may not be inclined, like a judge during a suppression motion, to ask if the trial counsel intends to introduce specific evidence. For defense counsel, it may be an error not to ask for production of evidence obtainable via a pre-referral subpoena that the PHO may agree would capture relevant evidence.[145]

E. Victims' Rights

A looming question about a binding preliminary hearing is certainly the potential impact on a victim's right not to testify. In the DAC-IPAD's study, an Air Force representative argued that R.C.M. 306(e) requires the convening authority to consider the alleged victim's preference and,

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[141] Justice Manual, *supra* note 51, § 9-11.120 ("The grand jury's power, although expansive, is limited by its function toward possible return of an indictment. Accordingly, the grand jury cannot be used solely to obtain additional evidence against a defendant who has already been indicted. Nor can the grand jury be used solely for pre-trial discovery or trial preparation." (citations omitted)).

[142] MCM, *supra* note 4, R.C.M. 405(d)(1)(D).

[143] *Id.* R.C.M. 405(j)(1)

[144] *Id.* R.C.M. 405(h)(2)(A)(iii), (h)(2)(B)(iii), (h)(3)(A)(ii), (h)(3)(B)(iii).

[145] Currently, the closest a PHO may get to ordering production of evidence or witnesses is upon the determination that the trial counsel should issue a pre-referral investigative subpoena for documents, data, electronically stored information, and so on. The trial counsel cannot be forced to issue said subpoena. *Id.* R.C.M. 405(h)(3)(B)(iii) discussion. The PHO, however, can make a notation in their report that the "Government refused to issue a pre-referral subpoena that was directed by the preliminary hearing officer and the counsel's statement of the reasons for such refusal . . . ." *Id.* R.C.M. 405(l)(2)(F).

therefore, a binding preliminary hearing potentially conflicted with this right.[146] That rule is about initial disposition of an offense and an alleged victim's preference as to whether the military or civilian authorities should prosecute the case; the preliminary hearing comes later in the process, and R.C.M. 306 does nothing to restrict the referral authority. It is legally incorrect to argue that it conflicts with Article 32, UCMJ. It is correct that the UCMJ recognizes the rights of all victims to be reasonably protected from the accused, to receive notice about certain actions and decisions, to be heard on certain matters during different procedural steps in the military justice process, and to assert their rights with limited standing in the court-martial process.[147]

Nothing in the preliminary hearing, if changed as argued, would impinge upon those rights. The disconnect is the belief that prosecuting courts-martial will positively impact the military culture and curb criminal behavior.[148] To increase the number of successful victim-based prosecutions, prosecutors need more alleged victims willing to testify at trial, which means, as some may believe, expanding procedural protections for victims. The truth of this proposition is immaterial. What is true is that since the implementation of the right to refuse to testify at the preliminary hearing, the number of testifying alleged victims has plummeted. In FY 2014, alleged victims testified at Article 32, UCMJ, hearings in 392 of 425 (92%) cases; it dropped to 62% in FY 2015, precipitously fell to 78 of 430

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[146] *RFI Set 11, Narrative Questions—Topics: Prosecution Decisions, Victim Participation, and Conviction/Acquittal Rates*, *supra* note 46, at 5; MCM, *supra* note 4, R.C.M. 306(e)(2) (explaining that, where at least one sex-related charge has been preferred, the convening authority shall provide the victim of that offense "an opportunity to express views as to whether the offense should be prosecuted by court-martial or in a civilian court.").

[147] UCMJ art. 6b (2019).

[148] Brian W. Everstine, *Military Sexual Assault Review Aims to Change Culture*, AIR FORCE MAG. (Mar. 24, 2021), https://www.airforcemag.com/military-sexual-assault-review-aims-to-change-culture; *Pending Legislation Regarding Sexual Assaults in the Military: Hearing Before the S. Comm. on Armed Services* 113th Cong. 17 (2013) (statement of General Raymond Odierno) ("Sexual assault and harassment are unacceptable problems within our military and our society. We cannot, however, simply prosecute our way out of this problem. Sexual assault and harassment are issues of discipline that require a change in our culture. I need our commanders to instill that culture change as they continue to train our soldiers to prevent and to respond to issues of sexual assault and harassment.").

(18%) cases in FY 2016, steadily waned to 28 of 368 (8%) cases in FY 2017, and finally bottomed out at 9 of 318 (3%) cases in FY 2018.[149]

The salient focus for the practitioner should be how best to present one's case. The preliminary hearing can accept hearsay evidence, meaning that an investigator can testify about the alleged victim's statement; the trial counsel can introduce a video-recorded statement from the alleged victim; or the alleged victim could reduce their account to writing.[150] The alleged victim need not testify in those instances, assuming their statement includes all the evidence the trial counsel needs for the charged offenses.

The issue truly manifests in cases in which the alleged victim's testimony is the only evidence substantiating the charged offense(s). The alleged victim's credibility may drive or sink the Government's case. In her job as a Federal prosecutor, one CRSC member noted that she prefers getting an alleged victim's testimony at the grand jury hearing, as jurors find that evidence important.[151] Others disagree, believing it is not necessary to advance the case beyond the grand jury.[152] An obvious distinction between the Federal grand jury and Article 32, UCMJ, hearing is that the former is usually conducted without the defendant or defense counsel present.[153]

Regardless, whether an alleged victim testifies is an immersive decision that cross-pollinates the trial counsel's strategy at the hearing with the alleged victim's personal elections. The trial counsel must determine if a witness's testimony helps to advance the Government's theory and the evidence to satisfy the probable cause standard. That decision is inherently strategic; it could be a means to boost credibility or even with a forward-leaning view that the experience would inure to the witness's confidence at trial. Military justice practitioners with experience at pre-FY 2014 Article 32, UCMJ, hearings can attest that there are times when victim testimony is beneficial because cross-examination can be difficult to simulate.[154] It could be necessary due to the facts of the case and the need to assure that the

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[149] PRELIMINARY HEARING ASSESSMENTS, *supra* note 139.
[150] MCM, *supra* note 4, R.C.M. (i) (providing that only certain Military Rules of Evidence apply to preliminary hearings).
[151] PRELIMINARY HEARING ASSESSMENTS, *supra* note 139, at 9.
[152] *Id.*
[153] FED. R. CRIM. P. 7.
[154] *Judges' Testimony*, *supra* note 60, 13–14.

probable cause standard is met. Alternatively, there are times when defense counsel is ill prepared for a truly effective cross-examination because of the limited time they have had with the case material.

The other part is the alleged victim's decision of whether to exercise the rights the UCMJ affords. All of the services have some variation of a special victims' counsel available in certain cases.[155] If a victim retains counsel, they have someone who can explain the process and help their client make a decision that accords with their goals and priorities.[156] The interplay between a trial counsel, who believes the alleged victim should testify at the hearing, and the alleged victim and counsel forces all parties to discuss the strength of the Government's case earlier in the process, setting expectations for both sides going forward. If anything, these situations may prove cathartic and rife with differences of opinion, but the reality is that the alleged victim still retains the right of refusal.

A change in the determinative outcome of the Article 32, UCMJ, hearing is unlikely to usher in a deluge of alleged victim testimony. The preliminary hearing is an evidence-friendly proceeding with few restrictions.[157] While the only person allowed to offer unsworn testimony is the accused,[158] this does not restrict a law enforcement officer who interviewed a witness from testifying about that person's sworn statement (i.e., via hearsay). Likewise, the alleged victim could submit a supplemental

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[155] 10 U.S.C. §1044e; U.S. DEP'T OF DEF., DTM 14-003, DOD IMPLEMENTATION OF SPECIAL VICTIM CAPABILITY (SVC) PROSECUTION AND LEGAL SUPPORT (USD(P&R), 12 Feb. 2014) (C3, 15 Dec. 2016).

[156] Joseph Lacdan, *Army to Widen Scope of Legal Counsel Program for Victims of Sexual Assault*, WASH. HEADQUARTERS SERV. (Dec. 28, 2020), https://www.whs.mil/DesktopModules/ArticleCS/Print.aspx?PortalId=75&ModuleId=14820&Article=2457833 (citing the explanation of victim benefits provided by Lieutenant Colonel Elliott Johnson, Special Victim Counsel Deputy Program Manager: "It's almost like a foreign language. For you to be sitting in a courtroom and you hear a judge, defense attorney, a prosecutor speaking this legal language that is unfamiliar to you, and you kind of want to know what they're talking about or thinking about your case."). The Special Victim Counsel Program now extends its services to victims of domestic violence who are otherwise eligible for military legal assistance under 10 U.S.C. § 1044. National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, § 548, 133 Stat. 1198, 1378–79.

[157] MCM, *supra* note 4, R.C.M. 405(i) (specifying the narrow list of evidentiary rules that apply); *e.g.*, Costello v. United States, 350 U.S. 359 (1956) (holding that an indictment can be sustained where only hearsay evidence is presented to a grand jury).

[158] MCM, *supra* note 4, R.C.M. 404a, 405(c).

sworn statement in anticipation of the hearing or offer a sworn videotaped statement. As identified in the DAC-IPAD report, case materials failed to establish probable cause in 68 of 517 (13.2%) cases.[159] Witness testimony could have bridged the evidentiary divide in the distinct minority of cases that are likely to raise the issue of whether the alleged victim should testify at the Article 32, UCMJ, hearing.

F. White Hat

The preliminary hearing would become more consequential if it were binding. In a sense, it would move the military justice system closer in construction and efficacy to the grand jury of the Federal civilian system and create a professional magistrate's bar in the Armed Forces. Federal prosecutors have the DoJ-directed duty to introduce exculpatory evidence at the grand jury.[160] This is partly because the defendant and the defense counsel have no right to attend the grand jury, unless otherwise invited, which procedurally juxtaposes the Article 32, UCMJ, hearing, which the accused and counsel have a right to attend.[161] The question is whether that the trial counsel will incur the same duty through practice.

While many SJAs train their counsel to wear the proverbial white hat in representing the Government, the preliminary hearing is an odd pretrial enclave for the trial counsel.[162] The Army's preliminary hearing guide

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[159] DAC-IPAD REPORT, *supra* note 8, at 54.

[160] Justice Manual, *supra* note 51, § 9-11.233 ("In *United States v. Williams*, the Supreme Court held that the Federal courts' supervisory powers over the grand jury did not include the power to make a rule allowing the dismissal of an otherwise valid indictment where the prosecutor failed to introduce substantial exculpatory evidence to a grand jury. It is the policy of the Department of Justice, however, that when a prosecutor conducting a grand jury inquiry is personally aware of substantial evidence that directly negates the guilt of a subject of the investigation, the prosecutor must present or otherwise disclose such evidence to the grand jury before seeking an indictment against such a person. While a failure to follow the Department's policy should not result in dismissal of an indictment, appellate courts may refer violations of the policy to the Office of Professional Responsibility for review.").

[161] FED. R. CRIM. P. 6(d); MCM, *supra* note 4, R.C.M. 405(f).

[162] MCM, *supra* note 4, R.C.M. 701(a)(1) discussion ("Discovery in the military justice system is intended to eliminate pretrial gamesmanship, minimize pretrial litigation, and reduce the potential for surprise and delay at trial. Parties to a court-martial should consider these purposes when evaluating pretrial disclosure issues."); Kay L. Levine & Ronald F. Wright, *Images and Allusions in Prosecutors' Morality Tales*, 5 VA. J. CRIM. L. 38, 43 (2017)

explains that the PHO "must not seek legal advice from the Government counsel. The Government counsel will be allowed to present evidence, cross-examine witnesses, and argue for a disposition of the matter appropriate to the interest of the Government."[163] The inference is that trial counsel, as the Government's representative,[164] will present the case in the light most favorable to the Government. In fact, both R.C.M. 404A[165] and R.C.M. 405[166] abandon the title "trial counsel," instead using "Government counsel." The right to discovery attaches after referral, at which point the trial counsel is required to disclose evidence favorable to the defense, such as evidence that adversely affects the credibility of any prosecution witness or evidence.[167]

There is reason to question whether making the preliminary hearing binding will require Government counsel to disclose evidence that substantially negates the guilt of the accused prior to the hearing. First, even while serving as an advocate at an adversarial hearing, the rules of professional responsibility require candor to grand juries.[168] The Army Rules of Professional Responsibility require judge advocates to conduct themselves with candor to tribunals[169] and with respect to the special

(discussing how western films have historically portrayed the protagonist as a sheriff in a white hat and the antagonist as a villain in a black hat, which eventually morphed into the prosecutor being a champion for the community by choosing the side of truth over all else).

[163] U.S. DEP'T ARMY, PAM 27-17, PROCEDURAL GUIDE FOR ARTICLE 32 PRELIMINARY HEARING OFFICER para. 1-4*f* (18 June 2015).

[164] MCM, *supra* note 4, R.C.M. 405(d)(2).

[165] *Id.* R.C.M. 404A.

[166] *Id.* R.C.M. 405.

[167] *Id.* R.C.M. 701(a)(6).

[168] *See Criminal Justice Standards for the Prosecution Function*, AM. BAR ASS'N, https://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition (last visited Dec. 1, 2021) ("A prosecutor with personal knowledge of evidence that directly negates the guilt of a subject of the investigation should present or otherwise disclose that evidence to the grand jury. The prosecutor should relay to the grand jury any request by the subject or target of an investigation to testify before the grand jury, or present other non-frivolous evidence claimed to be exculpatory.").

[169] *See* U.S. DEP'T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS app. B, r. 3.3 (28 June 2018). In the Army, "'[t]ribunal' denotes a court, an Article 32, Uniform Code of Military Justice investigation, administrative separation boards or hearings, boards of inquiry, disability evaluation proceedings, an arbitrator in a binding arbitration proceeding, or a legislative body, administrative agency, or other body acting in an adjudicative capacity." *Id.* r. 1.0*(w)*.

function as a prosecutor.[170] The trial counsel has the responsibility not only to serve as an advocate but also to administer justice.[171] Second, sometimes probable cause is determined in either the affirmative or the negative based on the reliability and credibility of pivotal evidence.[172] Federal courts have dismissed indictments based on the unsworn assertions of prosecutors. In these cases, the courts took issue with the prosecutor presenting hearsay evidence as if it was a firsthand account of an eyewitness.[173] Misleading statements as to the paucity and credibility of critical evidence may veer trial counsel toward robbing the PHO of making an independent credibility determination based on the evidence. In *United States v. Provenzano*, the prosecutor presented the grand jury testimony of a witness who had made a private recantation to the prosecutor.[174] The court believed the prosecutor duped the grand jury and dismissed the indictment as a result.[175]

If the preliminary hearing becomes binding in its determination, the ethical role of the trial counsel as applied to the rules of professional responsibility may become more applicable. Given that the PHO would continue to be an impartial and more independent fact-finder, like a grand jury, the trial counsel, too, begins to function more like a Federal prosecutor.

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[170] *Id.* r. 3.8.

[171] *Id.* cmt. 1; *see also id.* cmt. 6 ("The 'ABA Standards for Criminal Justice: The Prosecution Function,' (3d ed. 1993), has been used by appellate courts in analyzing issues concerning trial counsel conduct. To the extent consistent with these Rules, the ABA standards may be used to guide Trial Counsel in the prosecution of criminal cases." (citations omitted)).

[172] United States v. Burton, No. ACM 36296, 2007 WL 2300788 (A.F. Ct. Crim. App. July 16, 2007). Following the preliminary hearing in *United States v. Burton*, the Government dismissed and re-preferred the original charges with additional charges based on its discovery of possible additional misconduct. *Id.* at *1. The Government relied upon the initial Article 32, UCMJ, hearing and rejected defense's call to reconvene it because it had discovered new evidence regarding the credibility of one of the adverse witnesses. *Id.* at *2. The court agreed the hearing should have been reopened, though it deemed the error harmless because the SJA had noted the credibility issues in the Article 34, UCMJ, advice to the convening authority. *Id.* at *3–4.

[173] *E.g.*, United States v. Estepa, 471 F.2d 1132, 1137 (2d Cir. 1972).

[174] United States v. Provenzano, 440 F. Supp. 561, 564 (S.D.N.Y. 1977).

[175] *Id.* at 566.

V. Conclusion

The Article 32, UCMJ, hearing has devolved from a robust investigatory tool to a hearing that is narrowly focused on probable cause. While the impetus for change might have emanated from a desire to protect victims from extensive cross-examination, the result has been far more drastic and expansive. The hearing is now relegated to what is essentially a paper shuffle, wherein an outsider looking in would be right to question whether the preliminary hearing serves any purpose at all.[176] The PHO is powerless to prevent the Government from referring to trial a case that lacks probable cause, an arguably unjust occurrence that the DAC-IPAD data indicates occurs fairly consistently.

While this might be the result of congressional scrutiny of the military's referral decisions and perhaps of the military justice system at large, the perils of referring felony-grade cases to trial absent a preliminary hearing conducted by an impartial party could put the accused in jeopardy with a lack of due process, provide false hope to victims, and derail prosecutors from focusing on difficult, yet winnable, cases. While conviction and acquittal rates are not a direct measure of justice, one should take notice when the acquittal rate for a particular type of offense soars past 61%. The military justice process cannot be a purveyor of good order and discipline if the system appears broken or anemic.

Congress should change the Article 32, UCMJ, hearing to help stem the tide of weak cases that advance well beyond their viability. The GCMCA should not be permitted to refer any charge a PHO has determined is not supported by probable cause. Those opposed to such a change generally argue that the hearing is too limited in scope and function, that the SJA is the most experienced and best-suited person to render such advice, and that PHOs are too inexperienced for such a change. These arguments are logically flawed and not supported by the DAC-IPAD data. The reality is that rules do not limit the amount of evidence that can the Government can present; the transmogrified paper drill has wholly been a trial counsel prerogative and one that can be easily reversed. If the Article 32, UCMJ, hearing is changed, trial counsel will likely put forth more evidence.

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[176] *Judges' Testimony*, *supra* note 60, at 72 ("What public benefit is there to a paper case? And what does it do to the presumption in society that this really isn't a justice system?").

It is untenable to continue the legal fiction that the SJA—the GCMCA's legal adviser—should be the one who makes a binding probable cause determination. The testimony and statistics that comprise the DAC-IPAD study paint SJAs as fallible humans rather than immutable experts. Their focus would be better placed on advising GCMCAs whether the evidence available can sustain a conviction. Congress should thus also amend Article 34, UCMJ, to make this the SJA's focus.

As for PHOs' lack of military justice experience, the real issue is instilling professionalism and impartiality into the process. The DAC-IPAD study suggests that PHOs have been more likely to find probable cause when the call is close than when it is not. It therefore makes sense to create a corps of full-time magistrates under the control of the judiciary. This corps would gain valuable experience, rule consistently, serve impartially, and prepare qualified candidates for future service on the bench.

The changes suggested in this article will legitimize the Article 32, UCMJ, hearing as a grand jury-equivalent wherein serious charges are scrutinized before they are able to proceed to trial. Commanders and SJAs will be insulated from congressional pressure and will together ensure that tough, viable cases are tested at trial. Trial counsel will need to become more discerning as to the amount and type of evidence to present at the hearing. Defense counsel may then elect to challenge the integrity of the Government's prima facie case, which could reveal exculpatory evidence that otherwise would have been saved for trial. Victims' rights will not be impinged, as none are implicated by the changes proposed.

Military justice is an organic system that has evolved over time. It cannot remain stagnant or else it runs the risk of becoming an unfair, unjust system. When the Article 32, UCMJ, hearing changed in FY 2014 and FY 2015, it did so to protect victims; yet, in that process, it became a toothless tiger. The DAC-IPAD study shows that the Article 32, UCMJ, hearing has become ineffective. It is again time to rejuvenate the military justice process to prevent injustice; it is time to make the Article 32, UCMJ, hearing binding.