



THE MILITARY JUSTICE REVIEW PANEL  
ARTICLE 146, UNIFORM CODE OF MILITARY JUSTICE

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December 8, 2023

MEMORANDUM FOR General Counsel of the Department of Defense

SUBJECT: Assessment of Article 32, UCMJ, Preliminary Hearings

On behalf of the Military Justice Review Panel (MJRP), I respectfully submit this response to your May 11, 2022, request to assess the Defense Legal Services Agency report on pretrial processes, and recommend improvements to Article 32, UCMJ. In our June 21, 2023, interim response, attached, we concluded that the current Article 32 process is of limited utility. We now offer recommendations to improve the process and enhance its value.

Congress transformed the Article 32 process in the National Defense Authorization Act of Fiscal Year 2014, driven in part by public accounts of a Naval Academy sexual assault case and the nature of the examination of the complaining witness at the Article 32 hearing. Among the most significant changes were those intended to eliminate discovery as an authorized purpose of the hearing and focus the preliminary hearing officer on the probable cause determination. Many deficiencies in the current Article 32 process may have developed as unintended consequences of those Fiscal Year 2014 revisions.

In our June 21, 2023, assessment, we concluded that the parties' inability to conduct discovery and the advisory nature of the probable cause determination have rendered the Article 32 process of little use to the government, defense, and referral authorities. Few preliminary hearings involve live witness testimony, thereby forcing preliminary hearing officers to rely on little more than recorded statements and investigative summaries. Moreover, the government may refer charges to court-martial regardless of whether the preliminary hearing officer finds probable cause. As a result, the preliminary hearing no longer fulfills its fundamental screening purpose and is of minimal benefit.

Accordingly, this Panel provides the following unanimous recommendations which, when adopted and implemented together, would improve Article 32 preliminary hearings. First, Congress should amend Article 32 to add the following as purposes to the preliminary hearing: to inform referral authorities in fulfilling their disposition responsibilities, to protect against referral of unfounded criminal charges to trial by general courts-martial, and, in the interest of fundamental fairness, to afford an opportunity for meaningful discovery.

We understand that our recommendation to reinstitute discovery as a purpose for the Article 32 process may be controversial. Most of the Panel Members have been military justice

practitioners. We took pride in a system that often provided military defendants with greater rights than those available in civilian systems. Among those greater rights were the more significant levels of discovery afforded at the pretrial stage of the adversarial process. We believe the Article 32 hearing process can be retooled in a way that allows for a reasonable level of discovery, while at the same time protecting victims.

Making discovery a purpose of Article 32 would allow the preliminary hearing officer and ultimately the referral authority to make better informed findings, recommendations, and decisions. Restoring this purpose would not reduce victims' rights; a complaining witness retains the statutory right to refuse to testify at the preliminary hearing. Indeed, restoring the discovery function of Article 32 preliminary hearings should allow for broader witness and evidence production and the questioning of non-victim witnesses by both the government, defense, and the preliminary hearing officer. This change would provide an opportunity to evaluate witness credibility and the strength of the government's case at an earlier stage in the pretrial process. Exchange of discovery also enables earlier disposition of charged offenses and reduces docketing delays due to last-minute motions to compel.

Second, Congress should amend Article 32 to require that the preliminary hearing officer, whenever practicable, should be a judge advocate certified by the respective Service's Judge Advocate General or Staff Judge Advocate to the Commandant of the Marine Corps as having the requisite training and experience to conduct a preliminary hearing. One requirement for certification as a preliminary hearing officer should be successful completion of a training course with a curriculum that is uniform across the Military Services. Certification as a military judge or magistrate judge would meet this requirement.

Third, Congress should amend Article 32 and the President should revise Rule for Courts-Martial 405 to provide that a preliminary hearing officer's determination that a charged offense lacks probable cause precludes referral of that charge to trial by general court-martial, subject to a right of appeal to a military judge pursuant to Article 30a, UCMJ, and without prejudice to the government to re-prefer the charge. This is largely consistent with the DAC-IPAD's recommendation to amend Article 32 to make a no-probable-cause determination binding, subject to reconsideration and without prejudice to bring new charges. Our recommendation differs, however, in that we believe this proposed change should only be implemented as part of broader and more comprehensive reforms that restore the discovery purpose of Article 32 and elevate the experience and knowledge level of the preliminary hearing officer. We understand that this and the elevated qualification requirements for a preliminary hearing officer will increase the burden on the military judiciary, almost certainly requiring additional resources. We would be glad to work with the Joint Service Committee to develop an appropriate appeal process.

If adopted together, these reforms would improve the utility of Article 32 hearings by requiring the government to present sufficient and reliable evidence on each element of the charged offense—including witness testimony, when necessary—or risk dismissal of that offense. These reforms would also protect accused Service members from continued prosecution when a charge lacks probable cause and efficiently resolve the disposition of unsupported charges. By contrast, continuing to refer no-probable-cause offenses to general courts-martial is

inconsistent with principles of fundamental fairness, delays a foreseeable result (a later dismissal or acquittal), and allows inefficiencies to persist in the pretrial and trial process. Finally, this package of reforms complements the Secretary of Defense's newly revised disposition guidance in Appendix 2.1 of the Manual for Courts-Martial by screening out, before referral, charges that cannot withstand greater scrutiny using the elevated prosecution standard —belief that the admissible evidence will probably be sufficient to obtain and sustain a conviction.

While we recognize that this is a dynamic time during which the military justice system is experiencing historic change as the role of the special trial counsel in the Military Departments and Chief Prosecutor in the Coast Guard take shape, correcting the unintended consequences of earlier revisions to Article 32 should not wait. This recommended package of reforms will benefit the military justice system overall by promoting uniformity, fairness, and efficiency. As these changes develop and mature, we will continue to revisit our analysis and provide you with updates as appropriate.

We are grateful for the opportunity to assess and comment on these important issues.

Sincerely,

A handwritten signature in black ink, appearing to read "Elizabeth L. Hillman". The signature is fluid and cursive, with a prominent initial "E" and a long horizontal stroke at the end.

Dr. Elizabeth L. Hillman, Chair

Attachment:  
As stated



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June 21, 2023

MEMORANDUM FOR General Counsel of the Department of Defense

SUBJECT: Interim Assessment of Preliminary Hearings and Prosecution Standards

On behalf of the Military Justice Review Panel (MJRP), I respectfully submit this interim response to your May 11, 2022, request for an assessment of the Defense Legal Services Agency report on pretrial processes.

The MJRP notes with concern the fast pace and broad impact of recent changes to the military justice system. As you are aware, the issue of Article 32 hearings, and how those hearings were historically conducted in sexual assault and rape cases, was a driving factor in the changes Congress directed to the UCMJ in the past few years. One of the most significant changes—the stand-up of the Offices of Special Trial Counsel—will take effect in the months ahead. Any suggestions this Panel submits related to Article 32 processes and proceedings will therefore consider both the intended and actual impact of those changes across a military justice system that remains in flux.

We also note that the MJRP is not the only body examining these issues. The Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (DAC-IPAD) recently issued formal recommendations on the Article 32/34 process. Those recommendations stem from several years of review and analysis, as well as a major data compilation effort.

The MJRP invested considerable time and effort in responding to your request. One of the first working groups established by the Panel focused on Article 32/34 processes and procedures. As we developed opinions on the issues, we have also grown to appreciate the complexity of the surrounding factors and sub-issues. The MJRP reviewed numerous reports and studies and received testimony from many groups and individuals, including the Judge Advocates General of the Military Departments and the Staff Judge Advocate to the Commandant of the Marine Corps; Service Office of Special Trial Counsel leads; Service criminal law, trial defense, and victims' counsel chiefs; special and general court-martial convening authorities; members of academia; federal and state prosecutors; and a member of the DAC-IPAD.

As a starting point, this Panel concludes that the current preliminary hearing process under Article 32, UCMJ, is of limited utility to the prosecution, defense, and referral authority. The information provided to us indicates that Article 32 preliminary hearings are largely conducted as “paper only” exercises with no live witnesses presented by the prosecution or defense. After the completion of the preliminary hearing, the current system allows a convening authority—and soon the special trial counsel—to refer a case to court-martial even if the preliminary hearing officer determines there is no probable cause.

We have had considerable discussion on the threshold issue of whether the probable cause determination should be binding on court-martial convening authorities, as well as the new special trial counsels when they assume their roles at the end of this year. At this point, we do not have agreement on whether Article 32 probable cause determinations should be binding, or under what revised procedures, such as appeal processes and or higher standards for the qualifications of the hearing officers, those determinations should be made. As we assess the impact of ongoing changes, the Panel will continue to consider this issue.

In a related issue regarding the circumstances under which a convening authority or special trial counsel should refer a case to trial, the Panel recommends adopting a standard for prosecution consistent with the Attorney General's Justice Manual. We recommend the Secretary of Defense amend Appendix 2.1, Non-Binding Disposition Guidance, to the Manual for Courts-Martial, to provide that the special trial counsel should only refer charges to a court-martial, and the convening authority's staff judge advocate should only advise that authority to refer charges to a court-martial, if they believe that the accused's conduct constitutes an offense under the UCMJ and that the admissible evidence will probably be sufficient to obtain and sustain a conviction. These recommendations are consistent with the tasking in Article 33 that the Secretary of Defense issue non-binding guidance related to disposition of charges that considers not only how cases are handled in the federal court system, but also the "appropriate consideration of military requirements."

We are grateful for the opportunity to study and comment on these important issues.

Sincerely,

A handwritten signature in black ink, appearing to read "Elizabeth L. Hillman". The signature is fluid and cursive, with a long horizontal stroke at the end.

Dr. Elizabeth L. Hillman, Chair