



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

---

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