

[Response Systems Panel Report Extract]

Article 32 Proceedings

RSP Recommendation 115: The Judicial Proceedings Panel assess the use of depositions in light of changes to the Article 32 proceeding, and determine whether to recommend changes to the deposition process, including whether military judges should serve as deposition officers.

- Civilian jurisdictions have differing approaches to victim testimony before trial. In Philadelphia, for example, victims must testify at preliminary hearings with limited exceptions; in Washington State, either party may request to interview material witnesses under oath before trial.
- In Section 1702 of the FY14 NDAA, Congress enacted substantial changes to the Article 32 pretrial investigation, transforming it into a preliminary hearing and establishing that crime victims may not be compelled to testify at the proceeding. This may result in additional requests to depose victims and other witnesses.

RSP Recommendation 116: The Secretary of Defense direct the Military Justice Review Group or Joint Service Committee to evaluate if there are circumstances when a general court-martial convening authority should not have authority to override an Article 32 investigating officer's recommendation against referral of an investigated charge for trial by court-martial.

- Convening authorities should generally retain referral discretion and should not be bound in all circumstances by the recommendations of an Article 32 investigating officer.

*[Response Systems Panel--Comparative Systems Subcommittee
Report Extract]*

4. Article 32 Preliminary Hearing

Recommendation 43-E: The Secretary of Defense propose amendments to the MCM and UCMJ to increase the authority of the military judge over the Article 32 preliminary hearing to the President and Congress, accordingly. Military judges should preside over preliminary hearings in their capacity as military judges, not as hearing officers. The military judge's finding that the government failed to establish probable cause should be binding and result in dismissal of charges without prejudice. A finding that the government established probable cause should be forwarded to the appropriate convening authority for his or her decision on an appropriate disposition of the charges.

Finding 43-7: In Section 1702 of the FY14 NDAA, Congress enacted substantial changes to the Article 32 pretrial investigation, transforming it, in some respects, into a preliminary hearing, and establishing that crime victims may not be compelled to testify at the proceeding. This may result in additional requests to depose victims and other witnesses.

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- 843 For discussion, see *Transcript of RSP Public Meeting 373* (Dec. 12, 2013) (testimony of Mr. Porter, Training Director for the State of New Mexico Public Defender Department). Mr. Porter stated,
I've learned from military counsel here they don't have the subpoena power and in order to actually get a subpoena you have to go seek it through the government. That's not the case in I think most states and in New Mexico an individual attorney has the subpoena power. They don't even have to go to the court to issue a subpoena.
- 844 See MCM, *supra* note 97, R.C.M. 703(e). For discussion, see *Transcript of RSP Public Meeting 327-28* (Dec. 12, 2013) (testimony of Captain Scott (Russ) Shinn, Officer-in-Charge, Defense Counsel Assistance Program, Marine Corps Defense Services Organization, U.S. Marine Corps).
- 845 *Transcript of RSP Public Meeting 297* (Nov. 8, 2013) (testimony of COL Peter Cullen, U.S. Army, Chief, U.S. Army Trial Defense Service).
- 846 *Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Marine Corps Base Quantico* (Mar. 5, 2014); (on file at RSP); *Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Naval Base Kitsap* (Feb. 5, 2014) (same); see Navy's Response to Request for Information 137 (Apr. 11, 2014).
- 847 See *Transcript of RSP Comparative Systems Subcommittee Meeting 234-35* (Mar. 11, 2014) (comments of Colonel (Ret.) Lawrence Morris and Brigadier General (Ret.) Malinda Dunn, Subcommittee Members, regarding military judges serving as "check" on subpoena authority).
- 848 Current practice allows a subpoena to be signed by a summary court-martial officer, a trial counsel of a special or general court-martial, the president of a court of inquiry, or a deposition officer. See MCM, *supra* note 97, R.C.M. 703(e).

Discussion

There are similarities between the military's traditional Article 32 pretrial investigation and a civilian preliminary hearing. "In both a civilian preliminary hearing and an Article 32 hearing, the accused is present, represented by counsel, and may cross-examine government witnesses and call witnesses on his [or her] own behalf. The government, in both settings, must put on enough evidence to establish probable cause to believe that the defendant committed the alleged crimes."⁸⁴⁹

There are two major differences between the military's Article 32 hearing and the civilian preliminary hearing. First, the military's Article 32 hearing, prior to the FY14 NDAA, served as a discovery tool for defense.⁸⁵⁰ Second, unlike a civilian preliminary hearing, the investigating officer's decision is not binding; instead, it is only a recommendation to the convening authority.

In a civilian preliminary hearing, a judge rules on whether the government has met the probable cause standard and, if it has, binds the case over for trial. In an Article 32 hearing, an Investigating Officer (IO) hears the evidence and then prepares a written recommendation to the Convening Authority as to whether probable cause exists to believe that the accused committed crimes with which he is charged and, if such cause exists, opines on the charges. Investigating Officers are Judge Advocates, but not necessarily military trial judges. The Convening Authority may act on the IO's recommendations, but is not required to do so.⁸⁵¹

Section 1702(a) of the FY14 NDAA changed the Article 32 investigation to a preliminary hearing with the narrower objectives of determining whether probable cause exists to believe an offense has been committed and that the accused committed the offense; determining whether the convening authority has court-martial jurisdiction over the offense and the accused; considering the form of the charges; and recommending the disposition that should be made in the case. An alleged victim may not be compelled to testify and the investigating officer will declare him or her unavailable at the hearing if he or she declines to participate.

The practical effect of this change is that, when the victim declines to testify, the investigating officer will consider other evidence, such as statements or, perhaps, hearsay in lieu of testimony and will not be able to assess the victim's credibility. "The accused is still allowed to submit evidence and cross-examine witnesses, but the victim does not have to testify. If the victim does elect to testify, the cross-examination is restricted to the limited purpose of the hearing."⁸⁵²

The amendments to Article 32 will not take effect until December 26, 2014; the Subcommittee is unable to assess the full impact of those changes.⁸⁵³ However, it is clear that the changes narrow investigative and discovery opportunities for military defense counsel.⁸⁵⁴

849 Stimson, *supra* note 777, at 3.

850 "The investigation also serves as a means of discovery." MCM, *supra* note 97, R.C.M. 405(a) disc.; see also 10 U.S.C. § 832(b) (UCMJ art. 32); *United States v. Garcia*, 59 M.J. 447, 451 (C.A.A.F. 2004).

851 Stimson, *supra* note 777, at 3.

852 *Id.* (citing FY14 NDAA, Pub. L. No. 113-66, § 1702, 127 Stat. 672 (2013)).

853 FY14 NDAA, Pub. L. No. 113-66, § 1702, 127 Stat. 672 (2013).

854 *Transcript of RSP Public Meeting* 309 (Nov. 8, 2013) (testimony of Captain Charles N. Purnell, Commanding Officer, Defense Service Office Southeast, U.S. Navy) ("[T]he Article 32, as a thorough investigation with the right of discovery, should be maintained. I believe that a preliminary hearing under Rule 5.1 of the Federal Rules of Criminal Procedure is an inadequate substitute. I think it's

A majority of the Subcommittee’s assessment is that military judges should preside as judges, not as hearing officers, at all Article 32 hearings. Moreover, the military judge’s determination that probable cause is lacking should be binding, resulting in dismissal of the charges without prejudice. This is logical considering that a judge examined the evidence and found it is insufficient to conclude there is a reasonable belief a crime occurred and that the accused committed it. In cases where the judge finds probable cause, the convening authority retains discretion on how to dispose of the allegation.

5. Depositions as a Substitute for the Victim's Article 32 Testimony

Recommendation 43-F: The Judicial Proceedings Panel assess the use of depositions in light of changes to the Article 32 proceeding, and determine whether to recommend changes to the deposition process, including whether military judges should serve as deposition officers.

Finding 43-8: Subcommittee site visits revealed varying approaches to victim testimony before trial in civilian jurisdictions. In Philadelphia, for example, victims must testify at preliminary hearings with limited exceptions; in Washington State, either party may request to interview material witnesses under oath before trial.

Some defense counsel told the Subcommittee they intended to request depositions of victims. Under current practice, “[a] convening authority who has the charges for disposition, or after referral, the convening authority or the military judge may order that a deposition be taken on request of a party.”⁸⁵⁵ Depositions may be ordered where witnesses are unavailable at the Article 32 proceeding.⁸⁵⁶ The Subcommittee recommends the Judicial Proceedings Panel assess the impact of the changes to the Article 32 process on deposition practice.

ill advised to pick and choose between the Federal Rules of Criminal Procedure, selecting only those rules that put the defense at a disadvantage and that advantage the government.”).

855 MCM, *supra* note 97, R.C.M. 702(b).

856 See *id.*, R.C.M. 702(a) disc.