

A COMPREHENSIVE GUIDE TO THE MILITARY PRETRIAL INVESTIGATION.

Winter, 1986

Reporter

111 Mil. L. Rev. 49 *

Length: 22520 words

Author: Major Larry A. Gaydos *

* Judge Advocate General's Corps, United States Army. Instructor, Criminal Law Division, The Judge Advocate General's School, U.S. Army, 1983 to present. Formerly assigned as Senior Defense Counsel, Hanau, Federal Republic of Germany, 1979 to 1981, and as Trial Counsel, 3d Armored Division, Hanau, 1978 to 1979. B.A., United States Military Academy, 1973; J.D., University of Virginia Law School, 1978. Completed 31st Judge Advocate Officer Graduate Course, 1983. Author of *The SJA as the Commander's Lawyer: A Realistic Proposal*, *The Army Lawyer*, Aug. 1983, at 14; *Client Perjury: A Guide for Military Defense Counsel*, *The Army Lawyer*, Sept. 1983, at 13; *The Randolph-Sheppard Act: A Trap for the Unwary Judge Advocate*, *The Army Lawyer*, Feb. 1984, at 21. Member of the bars of the Commonwealth of Virginia, the United States Court of Appeals for the Fourth Circuit, and the Supreme Court of the United States. This **article** will appear as a chapter in DA Pam 27-173, Trial Procedure, scheduled to be printed in September 1986.

Text

[*49] I. INTRODUCTION

No specification or charge may be referred to a general court-martial unless there has been a thorough and impartial pretrial **investigation** conducted in substantial compliance with **Article 32** of the Uniform Code of Military Justice (UCMJ). ¹ The UCMJ specifically states that failure to comply with **Article 32** is not jurisdictional error; ² a defective **Article 32 investigation**, however, may deprive the accused of a substantial pretrial right ³ and warrant appropriate relief at trial. ⁴

¹ Uniform Code of Military Justice **art. 32**(a), [10 U.S.C. § 832](#)(a) (hereinafter cited as UCMJ); Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 405(a) (hereinafter cited as R.C.M.).

² UCMJ **art. 32**(d) provides that "[t]he requirements of this **article** are binding on all persons administering this chapter but failure to follow them does not constitute jurisdictional error."

³ The Court of Military Appeals, following dicta in the case of [Humphrey v. Smith, 336 U.S. 695 \(1949\)](#), has consistently accorded special significance to the pretrial hearing. In [United States v. Parker, 6 C.M.A. 75, 19 C.M.R. 201, 207 \(1955\)](#) the court held that "an impartial pretrial hearing is a substantial right which should be accorded an accused. . . . We frown on attempts to whittle it away. We, therefore, start with the premise that a record discloses error when it shows that a perfunctory and superficial pretrial hearing was accorded an accused."

In [United States v. Mickel, 9 C.M.A. 324, 26 C.M.R. 104 \(1958\)](#), the court expanded the concept of enforcement of pretrial hearing rights: "If an accused is deprived of a substantial pretrial right on timely objection, he is entitled to judicial enforcement of his right, without regard to whether such enforcement will benefit him at the trial."

⁴ R.C.M. 405(a) discussion; R.C.M. 906(b)(3).

Commentators and courts frequently compare the **Article 32 investigation** to the federal preliminary examination and the federal grand [*50] jury.⁵ Although the **Article 32 investigation** is not exactly equivalent to either federal proceeding, it has elements of both and serves as the soldier's counterpart in guaranteeing that the accused will not be tried on baseless charges.⁶

The Court of Appeals for the District of Columbia Circuit has emphasized the significance of the pretrial **investigation**.⁷ In *Talbot v. Toth*⁸ the accused was charged with murder and was placed in pretrial confinement. He petitioned for a writ of habeas corpus arguing that court-martial procedures denied him due process. He specifically contended that the lack of a grand jury inquiry and indictment constituted a denial of procedural due process. Recognizing that the fifth amendment exempts "cases arising in the land or naval forces" from the requirement of indictment by grand jury, the court of appeals went on to add that:

These provisions of the Uniform Code [**Articles 32** and 34] seem to afford an accused as great protection by way of preliminary inquiry into probable cause as do requirements for grand jury inquiry and indictment. . . . Thus, the basic purpose of a hearing preliminary to trial is being met by a method designed pursuant to constitutional provisions, and the method meets all elements essential to due process.⁹

The purpose of this **article** is to provide a comprehensive guide to the law applicable to the **Article 32** pretrial **investigation** and the **Article 34** pretrial advice.

[*51] PART ONE -- THE **ARTICLE 32** PRETRIAL **INVESTIGATION**

II. THE PURPOSE OF THE **INVESTIGATION**

A. STATUTORY

The three statutorily recognized purposes of the **Article 32** pretrial **investigation** are to (1) inquire into the truth of the matters set forth in the charges; (2) consider the form of the charges; and (3) obtain an impartial recommendation as to the disposition that should be made of the case.¹⁰ Although the recommendations of the investigating officer are only advisory,¹¹ the **investigation** provides the convening authority with a screening device to identify and dismiss specifications which are not supported by available evidence or which are otherwise legally deficient. The convening authority is specifically precluded from referring a specification to a general court-

⁵ See, e.g., [United States v. Nichols, 8 C.M.A. 119, 23 C.M.R. 343 \(1957\)](#) (Sooner or later the military services must realize that this process is the military counterpart of a civilian preliminary hearing, and it is judicial in nature and scope.); [MacDonald v. Hodson, 19 C.M.A. 582, 42 C.M.R. 184 \(1970\)](#) (The **Article 32 investigation** partakes of the nature both of a preliminary judicial hearing and of the proceedings of a grand jury.). See also Murphy, *The Formal Pretrial Investigation*, 12 Mil. L. Rev. 9 (1961); Moyer, *Procedural Rights of the Military Accused: Advantages Over a Civilian Defendant*, 22 Me. L. Rev. 105 (1970).

⁶ [United States v. Samuels, 10 C.M.A. 206, 27 C.M.R. 280 \(1959\)](#) (It is apparent that the **Article [32 investigation]** serves a twofold purpose. It operates as a discovery proceeding for the accused and stands as a bulwark against baseless charges.). See generally [Fed. R. Crim. P. 5.1](#) (Preliminary Examination); [Fed. R. Crim. P. 6](#) (The Grand Jury).

⁷ [Talbot v. Toth, 215 F.2d 22 \(D.C. Cir. 1954\)](#).

⁸ *Id.*

⁹ [Id. at 28](#).

¹⁰ UCMJ **art. 32(a)**; R.C.M. 405(a) discussion.

¹¹ R.C.M. 405(a) discussion. See also [Green v. Widdecke, 19 C.M.A. 576, 42 C.M.R. 178 \(1970\)](#) (investigating officer's recommendation that the accused be prosecuted for voluntary manslaughter did not preclude referral of an unpremeditated murder charge).

martial if the staff judge advocate concludes in the pretrial advice that the specification is not warranted by the evidence indicated in the Article 32 report of investigation.¹²

B. DISCOVERY

Although the Article 32 investigation was not originally designed to be a defense discovery procedure,¹³ the broad rights afforded the accused [*52] to have reasonably available witnesses¹⁴ and evidence¹⁵ produced at the investigation make it a useful discovery tool. Appellate courts have generally recognized that the Article 32 investigation does fulfill a legitimate defense discovery purpose.¹⁶ This discovery purpose has also been recognized by the drafters of Military Rule of Evidence (Rule) 804¹⁷ and Rule for Courts-Martial (R.C.M.) 405.¹⁸

C. PRESERVATION OF TESTIMONY AS A COLLATERAL PURPOSE

In addition to its express statutory purposes and recognized discovery purpose, the Article 32 investigation also serves a collateral purpose related to the preservation of testimony. The Article 32 investigating officer is charged with identifying whether potential witnesses will be available for trial¹⁹ and evidentiary rules allow for some Article 32 testimony to be used at trial.²⁰

[*53] 1. Prior statements under Rule 801(d)(1).

Under Rule 801(d)(1) prior statements of a witness are admissible at trial as substantive evidence if the witness testifies at trial and the prior statement fits within one of three categories: (1) prior consistent statements offered to rebut an express or implied charge that the witness' incourt testimony was recently fabricated; (2) statements of identification of a person made after perceiving the person; or (3) prior inconsistent statements given under oath subject to the penalty for perjury at a trial, hearing, or other proceeding.

¹² UCMJ art. 34(a)(2).

¹³ There is some disagreement whether the Article 32 investigation was originally intended to be a defense discovery device. There is some support in the legislative history for both sides of the issue. Proponents of the position that the Article 32 investigation was intended to be a defense discovery device point to the following testimony given by Mr. Larkin before the House Committee on Armed Services:

[The Article 32 investigation] goes further than you usually find in a proceeding in a civil court in that not only does it enable the investigating officer to determine whether there is probable cause . . . but it is partially in the nature of a discovery for the accused in that he is able to find out a good deal of the facts and circumstances which are alleged to have been committed which by and large is more than an accused in a civil case is entitled to.

Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services, 81st Cong., 1st Sess. 997 (1949).

Opponents of the defense discovery position point to the fact that the hearings taken as a whole demonstrate an intent to create a mechanism for determining the existence of probable cause. Any utility the investigation may have as a discovery tool is viewed as a purely coincidental by-product of this probable cause determination. See generally [United States v. Connor](#), 19 M.J. 631 (N.M.C.M.R. 1984), petition granted, 20 M.J. 363 (C.M.A. 1985). Because the defense discovery purpose is not mentioned anywhere else in the legislative history, or in Article 32 itself, the better view is probably that defense discovery was intended only to be a collateral consequence of the investigation.

¹⁴ R.C.M. 405(g)(1)(A). See generally *infra* section IV.

¹⁵ R.C.M. 405(g)(1)(B). See generally *infra* section IV.

¹⁶ See, e.g., [United States v. Roberts](#), 10 M.J. 308, 311 (C.M.A. 1981) (There is no doubt that a military accused has important pretrial discovery rights at an Article 32 investigation. Nevertheless, such pretrial discovery is not the sole purpose of the investigation nor is it unrestricted in view of its statutory origin.); [United States v. Payne](#), 3 M.J. 354, 357 n.14 (C.M.A. 1977) (One of Congress' intentions in creating the Article 32 investigation was to establish a method of discovery.); [United States v. Samuels](#), 10 C.M.A. 206, 212, 27 C.M.R. 280, 286 (1959) (It is apparent that the Article [32 investigation] serves a twofold

While all three categories of prior statements can have important applications at trial, the last category, prior inconsistent statements, is the one that is potentially the most useful for counsel. It is not uncommon for witnesses to change the substance of their testimony between the time of the **Article 32** hearing and the time of trial. Because all testimony at the **Article 32** hearing must be given under oath,²¹ except unsworn statements by the accused,²² and false testimony at the **Article 32** hearing can be punished as perjury,²³ **Article 32** testimony can be admitted [*54] as a prior inconsistent statement. The prior testimony serves not only to impeach the witness' in-court testimony,²⁴ it also can be considered on the merits as substantive evidence to establish an element of the offense or to raise a defense.²⁵

2. Former testimony under Rule 804(b)(1).

Under Rule 804(b)(1) testimony given at an **Article 32** hearing is admissible at a subsequent trial if there is a verbatim transcript of the **Article 32** testimony, the witness is unavailable to testify at the trial, and the party against whom the testimony is offered had an opportunity and similar motive to develop the testimony at the **Article 32** hearing.²⁶

The report of the **Article 32 investigation** must include the substance of the witness testimony taken on both sides.²⁷ The investigating officer ordinarily will summarize the testimony and, when practical, will have the witness swear to the truth of the summary.²⁸ Although the accused has no right to have a verbatim transcript of the **Article 32** hearing prepared,²⁹ the appointing authority can direct that a verbatim transcript be taken.³⁰ When a verbatim transcript is not ordered originally, but audio recordings of the testimony are made to assist the investigating officer in producing a summarized transcript, those tape recordings may later constitute a verbatim record of testimony under Rule 804(b)(1).³¹

Witness unavailability for the purpose of admitting **Article 32** testimony as an exception to the hearsay rule is generally defined in Rule [*55] 804(a). **32**¹ When the former **Article 32** testimony is to be introduced by the

purpose. It operates as a discovery proceeding for the accused and stands as a bulwark against baseless charges.); *United States v. Tomaszewski*, 8 C.M.A. 266, 24 C.M.R. 76 (1957) (The **Article 32 investigation** "operates as a discovery proceeding."). But see *United States v. Eggers*, 3 C.M.A. 191, 194, 11 C.M.R. 191, 194 (1953) (Discovery is not a prime object of the pretrial **investigation**. At most it is a circumstantial by-product -- and a right unguaranteed to defense counsel.); *United States v. Connor*, 19 M.J. 631 (N.M.C.M.R. 1984), petition granted, 20 M.J. 363 (C.M.A. 1985).

¹⁷ In discussing whether testimony at the **Article 32 investigation** should fall with the federal "former testimony" exception to the hearsay rule, the drafters of Rule 804 specifically addressed the discovery role of the **Article 32 investigation**.

Because **Article 32** hearings represent a unique hybrid of preliminary hearings and grand juries with features dissimilar to both, it was particularly difficult for the Committee to determine exactly how . . . the Federal Rule would apply to **Article 32** hearings. The specific difficulty stems from the fact that **Article 32** hearings were intended by Congress to function as discovery devices for the defense as well as to recommend an appropriate disposition of charges to the convening authority.

Mil. R. Evid. 804(b) analysis (1980) (the Military Rules of Evidence will be cited as Rule in the text and Mil. R. Evid. in the footnotes).

¹⁸ After outlining the primary (statutorily recognized) purposes of the **Article 32 investigation**, the drafters of R.C.M. 405 state that "[t]he **investigation** also serves as a means of discovery." R.C.M. 405(a) discussion.

¹⁹ R.C.M. 405(h)(1)(A) discussion; Dep't of Army, Pamphlet No. 27-17, Procedural Guide For **Article 32**(b) Investigating Officer, para. 3-3a (Mar. 1985) (hereinafter cited as DA Pam 27-17); see also DD Form 457, Investigating Officer's Report, block 16 (Aug. 1984).

²⁰ Mil. R. Evid. 613 (impeachment with prior inconsistent statements); Mil. R. Evid. 801(d)(1) (prior statements of witnesses admissible as substantive evidence); Mil. R. Evid. 804(b)(1) (former testimony of unavailable witnesses admissible as substantive evidence).

²¹ R.C.M. 405(h)(1)(A).

²² R.C.M. 405(f)(12) and 405(h)(1)(A).

government, the accused's right to confront witnesses against him or her also impacts upon the government's obligation to demonstrate unavailability. The confrontation clause requires the government to demonstrate a good faith effort to obtain the witness' presence at trial. ³³ The Supreme Court defined this "good faith" requirement in *Ohio v. Roberts*: ³⁴

[I]f no possibility of procuring a witness exists . . . "good faith" demands nothing of the prosecution. But if there is a possibility, albeit remote, that affirmative measures might produce the declarant, the obligation of good faith *may* demand their effectuation. "The lengths to which the prosecution must go to produce a witness . . . is a question of reasonableness." ³⁵

The greatest stumbling block to the admissibility of **Article 32** testimony pursuant to Rule 804(b)(1) is the requirement that opposing counsel had an opportunity and similar motive to develop the **Article 32** testimony through direct, cross, or redirect examination. ³⁶ The proponent of the evidence bears the burden of establishing this "opportunity and similar motive." ³⁷

There are two typical situations where counsel opposing the admission of former testimony may argue the lack of opportunity to develop the testimony at the **Article 32**. First, counsel opposing the evidence at trial may argue that they were not personally present at the **Article 32**. The [*56] defense counsel representing the accused at trial may not have been hired until after the **Article 32** hearing or may have allowed detailed military counsel to handle the pretrial **investigation**. ³⁸ Government counsel also may decide not to attend the **Article 32** hearing, even though entitled to attend as the government's representative, ³⁹ and instead allow the investigating officer to conduct the examination.

Second, counsel may argue that they had no opportunity to inquire into certain areas of cross-examination because of limited **investigation** and preparation time, or because important evidence concerning the case was not discovered until after the **investigation**. ⁴⁰

²³ Military witnesses are subject to court-martial for perjury under **Article 131**. UCMJ **art.** 131 defines the crime of perjury as follows:

Any person subject to . . . [the Code] who in a judicial proceeding or in a course of justice willfully and corruptly --

(1) upon a lawful oath or in any form allowed by law to be substituted for an oath, gives any false testimony material to the issue or matter of inquiry. . . .

is guilty of perjury and shall be punished as a court-martial may direct.

The phrase "in a course of justice" includes an **investigation** conducted under **Article 32**. MCM, 1984, Part IV, para. 57c(1). See also *United States v. Crooks*, 12 C.M.A. 677, 680, 31 C.M.R. 263, 266 (1962) ("That the **Article 32 investigation** is a 'judicial proceeding or in a course of justice' within the meaning of **Article 131** is not open to question."); *United States v. Poole*, 15 M.J. 883 (A.C.M.R. 1983) (Accused convicted of committing perjury while testifying at an **Article 32 investigation**).

Civilian witnesses and military witnesses who testify falsely at an **Article 32** hearing could be tried in federal court for perjury in violation of [18 U.S.C. § 1621](#) (1982). [18 U.S.C. § 1621](#) provides:

Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury. . . . This section is applicable whether the statement or subscription is made within or without the United States.

A more difficult, and unanswered, question exists regarding the admissibility under Mil. R. Evid. 810(d)(1) of prior **Article 32** testimony given by a foreign national who is not amenable to a perjury prosecution before a U.S. tribunal. Arguably the prior inconsistent statement would be admissible if the false **Article 32** testimony would be punishable as perjury under the laws of

Although military case law does not yet address all of these specific issues, federal courts do not take such a restrictive view of the opportunity requirement. ⁴¹ Common law required an identity of parties and an identity of issues between the trial and the pretrial hearing, ⁴² but these requirements may be somewhat relaxed when admissibility is analyzed in terms of opportunity and similar motive. ⁴³

There is little doubt that in any given case a defense counsel's motive to develop a government witness' testimony at the **Article 32** hearing may be different than the motive the defense counsel would have at trial. The defense counsel may treat the **Article 32** hearing as a discovery device to conduct an "initial interview" of the witness, as a practice opportunity to try a new advocacy technique, or as a *pro forma* proceeding where little or no defense counsel participation is necessary. Because the recommendations of the investigating officer are purely advisory ⁴⁴ it may not be to the accused's benefit to discredit the government witness at the **Article 32** hearing. If the defense counsel believes the charges inevitably will be referred to trial by general court-martial, the prudent defense [*57] counsel will seek to conceal the defense strategy and will save effective areas of cross-examination and impeachment for trial where the element of surprise can be used to the best tactical advantage.

Notwithstanding that the defense counsel's motives may be dissimilar *in fact*, the courts vary in how they assess the presence or absence of this "similar motive" as a matter of law.

The drafters' analysis to Rule 804(b)(1) suggests that a defense counsel who uses the **Article 32** hearing for discovery rather than impeachment would not have a "similar motive" within the intended meaning of Rule 804(b)(1). ⁴⁵ The drafters go on to suggest that although the defense counsel's assertion of his or her motive is not binding on the military judge, the prosecution has the burden of establishing admissibility and that burden "may be impossible to meet should the defense counsel adequately raise the issue." ⁴⁶

Military courts have not found it as difficult to find "similar motive" as the drafters suggested in their analysis. In *United States v. Hubbard* ⁴⁷ the Army Court of Military Review noted with approval the broad interpretation that federal courts have given the term "similar motive" used in Federal Rule of Evidence (Federal Rule) 804(b)(1). ⁴⁸

the nation where the testimony occurred or under the laws of the nation where the witness held citizenship. Alternatively, counsel could attempt to have the statement admitted under the general hearsay exception in Mil. R. Evid. 804(b)(5).

²⁴ See Mil. R. Evid. 613.

²⁵ Mil. R. Evid. 801(d)(1) analysis (1980).

²⁶ Mil. R. Evid. 804(b)(1).

²⁷ R.C.M. 405(j)(2)(B).

²⁸ R.C.M. 405(h)(1)(A) discussion.

²⁹ [United States v. Allen, 5 C.M.A. 626, 18 C.M.R. 250 \(1955\)](#); [United States v. Matthews, 13 M.J. 501 \(A.C.M.R. 1982\)](#) (The lack of a verbatim **Article 32** transcript in a capital case did not deprive the accused of the sixth amendment right to effective representation by counsel.); [United States v. Fredrick, 7 M.J. 791 \(N.C.M.R. 1979\)](#).

³⁰ R.C.M. 405(c) gives the appointing authority the power to establish procedures for conducting the **investigation** so long as the procedures established are not inconsistent with the Rules for Courts-Martial.

³¹ The requirement that a verbatim record of the testimony be produced was added to [Fed. R. Evid. 804\(b\)\(1\)](#) to ensure accuracy of the former statement. The actual tape recordings of the testimony would be the most accurate record of the testimony available. Mil. R. Evid. 804(b)(1) analysis (1980).

³² Mil. R. Evid. 804(a) provides that a declarant is unavailable when the declarant --

(1) is exempted by ruling of the military judge on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or

(2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the military judge to do so; or

Instead of accepting the defense counsel's assertion as to motive, the court determined the issue by an objective examination of counsel's conduct at the **Article 32** hearing.⁴⁹ In *Hubbard* the defense counsel conducted a thorough, lengthy, and vigorous cross-examination that covered all obvious areas of possible attack;⁵⁰ and thus objectively demonstrated a similar motive.

The Navy-Marine Court of Military Review went further and held the drafters' analysis of Rule 804(b)(1) to be of "little persuasive value."⁵¹ In *United States v. Connor* the court interpreted the legislative **history** of **Article 32** as refuting any specific discovery purpose behind the **investigation**. Instead they viewed the **investigation** strictly as a probable cause determination which coincidentally provided an opportunity for some defense discovery.⁵² Accordingly, the "similar motive" requirement contained [***58**] in Rule 804(b)(1) was interpreted to require nothing more than an "opportunity" to cross-examine the witness at a proceeding where there is identity of parties and identity of issues.⁵³

The Army Court of Military Review approach outlined in *Hubbard* represents the better view. In *Connor* the Navy-Marine court failed to recognize that the "similar motive" requirement is more than a suggestion by the drafters of the Military Rules of Evidence. It is a foundational element specifically contained in both Federal Rule 804(b)(1) and Rule 804(b)(1), and actually *replaced* the old requirements of identity of parties and identity of issues.⁵⁴ Additionally, the court in *Connor* failed to recognize the role "similar motive" plays in satisfying the confrontation clause by ensuring that the former testimony has the requisite indicia of reliability.⁵⁵

An unresolved issue is the extent to which one party can impose a "similar motive" on opposing counsel by announcing beforehand that he or she intends to use the witness' **Article 32** testimony as "former testimony" should the witness become unavailable for trial.

III. PARTICIPANTS

- (3) testifies to a lack of memory of the subject matter of the declarant's statement; or
- (4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or
- (5) is absent from the hearing and the proponent of the declarant's statement has been unable to procure the declarant's attendance . . . by process or other reasonable means; or
- (6) is unavailable within the meaning of **Article** 49(d)(2).

³³ [Barber v. Page, 390 U.S. 719 \(1968\).](#)

³⁴ [448 U.S. 56 \(1980\).](#)

³⁵ [Id. at 74.](#)

³⁶ Mil. R. Evid. 804(b)(1).

³⁷ *Id.* analysis (1980).

³⁸ At the **Article 32** hearing the accused has the right to be represented by detailed military counsel, to request available individual military counsel, or to hire a civilian counsel. R.C.M. 405(d)(2).

³⁹ R.C.M. 405(d)(3).

⁴⁰ The investigating officer is charged with conducting a timely **investigation**. R.C.M. 405(j)(1). If the accused is in pretrial confinement, the report of **investigation** should be forwarded to the general court-martial convening authority within eight days of the imposition of the confinement. UCMJ **art.** 33.

⁴¹ See generally M. Graham, Handbook on Federal Evidence 903 (1981). See also [United States v. Zurosky, 614 F.2d 779, 791 \(1st Cir. 1979\)](#) ("[**Fed. R. Evid. 804(b)(1)**] doesn't focus on practical realities facing defense counsel but rather upon the scope and nature of the opportunity for cross-examination permitted by the court."). A change in counsel after the pretrial

A. APPOINTING AUTHORITY

Unless prohibited by service regulations, any court-martial convening authority can appoint an **Article 32** investigating officer and direct that [*59] an **investigation** be conducted.⁵⁶ There is no requirement that the appointing authority be neutral and detached. In fact, by definition, the appointing authority will order an **Article 32 investigation** only after making the determination that the charged offenses possibly merit trial by general court-martial.⁵⁷ Although all convening authorities have the general authority to order an **Article 32 investigation**, that prerogative can be curtailed or circumscribed by a superior convening authority.⁵⁸

B. INVESTIGATING OFFICER

The appointing authority who directs an **Article 32 investigation** also appoints an investigating officer to conduct the **investigation**.⁵⁹ The investigating officer must be mature⁶⁰ and impartial,⁶¹ and must conduct the **investigation** as a quasi-judicial proceeding.⁶²

1. Maturity.

The investigating officer must be a commissioned officer.⁶³ The Manual for Courts-Martial goes on to define "maturity" in terms of a preference for a field grade officer or an officer with legal training.⁶⁴ Although there is no requirement that a lawyer serve as investigating officer, many jurisdictions do make lawyers available to serve as investigating officers -- particularly in complex or serious cases.⁶⁵

2. Impartiality.

Article 32 entitles the accused to a "thorough and impartial **investigation**,"⁶⁶ but neither the UCMJ nor the Manual goes on to further define [*60] when an investigating officer should be disqualified because of lack of impartiality. The only specific prohibition in the Manual is that the accuser is disqualified from serving as investigating officer.⁶⁷

hearing will not, standing alone, defeat the admissibility of former testimony under Mil. R. Evid. 804(b)(1). [United States v. Kelly, 15 M.J. 1024 \(A.C.M.R. 1983\)](#). Accord [Ohio v. Roberts, 448 U.S. 56 \(1980\)](#).

⁴² M. Graham, Handbook on Federal Evidence 903 (1981).

⁴³ *Id.* See also [United States v. Hubbard, 18 M.J. 678, 683 n.1 \(A.C.M.R. 1984\)](#).

⁴⁴ R.C.M. 405(a) discussion.

⁴⁵ Mil. R. Evid. 804(b)(1) analysis (1980).

⁴⁶ *Id.*

⁴⁷ [18 M.J. 678 \(A.C.M.R. 1984\)](#).

⁴⁸ [Id. at 683 n.1.](#)

⁴⁹ [Id. at 682.](#) Accord S. Saltzburg, L. Schinasi & D. Schlueter, Military Rules of Evidence Manual 376-77 (1981).

⁵⁰ [Hubbard, 18 M.J. at 683](#) (The court specifically noted that the defense counsel attempted to discredit the government witness with prior inconsistent statements and by showing past criminal activity of the witness.).

⁵¹ [United States v. Connor, 19 M.J. 631 \(N.M.C.M.R. 1984\)](#), petition granted, **20 M.J. 363 (C.M.A. 1985)**.

⁵² [Id. at 636.](#)

⁵³ [Id. at 638.](#) In reaching this conclusion the Navy-Marine Court of Military Review relied primarily on the fact that the legislative **history** to **Article 32** did not expressly provide for a discovery role and an analysis of the old "reported testimony" hearsay exception contained in MCM, 1951, para. 145b.

Case law provides some guidance as to when a person should be disqualified from serving as an investigating officer. Prior knowledge about a case, standing alone, does not disqualify an officer from serving as an **Article 32** investigating officer.⁶⁸ By the same token, participation in a related case, as an investigating officer⁶⁹ or military judge,⁷⁰ is not a disqualification. An officer is disqualified from serving as an investigating officer if he or she has had a prior role in perfecting the case against the accused⁷¹ or has previously formed or expressed an opinion concerning the accused's guilt.⁷²

[*61] As a general proposition an investigating officer should be disqualified anytime his or her impartiality reasonably might be questioned.⁷³

3. Quasi-judicial character.

It is well established in case law that the **Article 32 investigation** is a judicial (or quasi-judicial) proceeding⁷⁴ and that the investigating officer performs a quasi-judicial function.⁷⁵ Accordingly, courts require the investigating officer to comply with applicable provisions of the ABA Code of Judicial Conduct and the ABA Standards for Criminal Justice.⁷⁶ Although there are a number of ethical standards which have been applied to the **Article 32** investigating officer,⁷⁷ the most significant provisions involve the prohibition against *ex parte* communications.⁷⁸

[*62] The general rule is that the **Article 32** investigating officer must receive *all* legal advice from a *neutral* judge advocate *and* no advice concerning *substantive* matters can be given *ex parte*.⁷⁹ While the rule itself is easily stated, the courts have struggled in defining the parameters of the specific prohibitions.

When the **Article 32** investigating officer is not legally trained, it is usually desirable to have a legally trained "advisor" available to assist the investigating officer in conducting a legally sufficient **investigation** and to address the myriad of legal questions which arise during the course of a typical **investigation**.

⁵⁴ M. Graham, Handbook on Federal Evidence 903 (1981). The Navy-Marine Court of Military Review relied on [United States v. Eggers, 3 C.M.A. 191, 11 C.M.R. 191 \(1953\)](#) and [United States v. Burrow, 16 C.M.A. 94, 36 C.M.R. 250 \(1966\)](#). Both cases predated Mil. R. Evid. 804(b)(1). In *Eggers* and *Burrow* the Court of Military Appeals declined the opportunity to read a "similar motive" requirement into the reported testimony hearsay exception. The court did not address the issue of what "similar motive" would mean were it an actual part of the evidentiary rule contained in the Manual for Courts-Martial. Cf. [United States v. Feldman, 761 F.2d 380 \(7th Cir. 1985\)](#), where the court held that the "similar motive" requirement of [Fed. R. Evid. 804\(b\)\(1\)](#) required more than a mere "naked opportunity" to cross-examine. In assessing the party's motive to develop testimony, the court said the judge should consider the type of proceeding in which the testimony is given, counsel's trial strategy, potential penalties or financial stakes, and the number of issues and parties. [Id. at 385](#).

⁵⁵ [Ohio v. Roberts, 448 U.S. 56 \(1980\)](#). See also [United States v. Thornton, 16 M.J. 1011 \(A.C.M.R. 1983\)](#). In *Thornton* the government introduced a sworn statement of the victim under the residual hearsay exception, Mil. R. Evid. 804(b)(5), arguing in part that defense cross-examination of the victim at the **Article 32 investigation** provided the "indicia of reliability" required by the confrontation clause. The Army Court of Military Review rejected that argument saying "it is more than a possibility that the defense counsel used the **Article 32** hearing for discovery purposes alone." [Thornton, 16 M.J. at 1014](#).

⁵⁶ R.C.M. 405(c).

⁵⁷ [United States v. Wojciechowski, 19 M.J. 577 \(N.M.C.M.R. 1984\)](#) (No error occurred where special court-martial convening authority told the accused he was going to send the case to a general court-martial, even though the special court-martial convening authority had not yet received the report of the **Article 32 investigation**).

⁵⁸ [United States v. Turner, 17 M.J. 997 \(A.C.M.R. 1984\)](#) (The general court-martial convening authority can require subordinate convening authorities to appoint one of two designated officers to perform any **investigation** conducted pursuant to **Article 32**, UCMJ.). See generally [United States v. Blaylock, 15 M.J. 190 \(C.M.A. 1983\)](#).

⁵⁹ R.C.M. 405(d)(1).

⁶⁰ R.C.M. 405(d)(1) discussion.

The investigating officer must get *all* his or her legal advice from a neutral legal advisor.⁸⁰ Communications with non-neutral personnel are permissible only if they involve patently trivial administrative matters, e.g., when to take a lunch break.⁸¹ The trial counsel appointed to attend the **Article 32** hearings as the government representative is clearly not neutral.⁸² Generally, anyone performing a "prosecutorial function" is disqualified from serving as legal advisor to the **Article 32** investigating officer.⁸³ [*63] Although the determination of whether a chief of military justice or a trial counsel for another jurisdiction is performing a "prosecution function" depends on the specific facts in the case,⁸⁴ the better practice is to appoint a judge advocate having no criminal law related responsibilities as the legal advisor for the **Article 32 investigation**.⁸⁵

Even when the **Article 32** investigating officer does go to a neutral legal advisor for advice, if the advice involves substantive matters, it cannot be given *ex parte*.⁸⁶ In theory, advice concerning purely procedural matters can be given *ex parte*; however, the distinction between substance and procedure is too ill-defined to be of practical use.⁸⁷ The safest approach is to treat all advice as a matter of substance.

Unfortunately, it is unclear just what makes a communication "*ex parte*." When must the parties be given notice of the substantive advice sought and what forum must be utilized in providing the parties an opportunity to respond to the advice received?

[*64] The ABA Code of Judicial Conduct [seems to sanction after-the-fact notice to the parties,⁸⁸ while the ABA Standards for Criminal Justice and case law require prior notice to the parties.⁸⁹ Although no authority requires that the legal advice be given in the context of a full adversarial proceeding,⁹⁰ none of the cases discusses the minimum acceptable procedures.

As a practical matter the government's interests are protected best by using procedures which fully document the context of all investigating officer-legal advisor communications. Once the defense fairly raises the issues of substantive *ex parte* advice, the government bears the burden of showing by clear and convincing evidence that substantive matters were not discussed or that the accused was not prejudiced.⁹¹

⁶¹ R.C.M. 405(a).

⁶² R.C.M. 405(d)(1) discussion; [United States v. Payne, 3 M.J. 354 \(C.M.A. 1977\)](#).

⁶³ R.C.M. 405(d)(1).

⁶⁴ R.C.M. 405(d)(1) discussion. Although the MCM, 1984, does not discuss these qualifications as indicative of "maturity" they are carried over from MCM, 1969, Para. 34a, which did discuss them in that context.

⁶⁵ See, e.g., [United States v. Durr, 47 C.M.R. 622 \(A.F.C.M.R. 1973\)](#). See also [United States v. Davis, 20 M.J. 61 \(C.M.A. 1985\)](#) (The court encouraged the use of lawyers as investigating officers noting that "the use of legally trained persons to perform the judicial duties involved avoids some of the complaints lodged against lay judges.").

⁶⁶ UCMJ **art. 32**(a).

⁶⁷ [United States v. Cunningham, 12 C.M.A. 402, 30 C.M.R. 402 \(1961\)](#) (Appointment of an accuser as the pretrial investigating officer is inconsistent with the codal requirement of a thorough and impartial **investigation** of the charges.); R.C.M. 405(d)(1).

⁶⁸ [United States v. Schreiber, 16 C.M.R. 639 \(A.F.B.R. 1954\)](#). The investigating officer detailed to investigate Schreiber's case had previously been the **Article 32** investigating officer in a related case. The board of review held that mere familiarity with the facts and details of a case was not a disqualification.

⁶⁹ [United States v. Collins, 6 M.J. 256 \(C.M.A. 1979\)](#). During the course of Airman Collins' **Article 32** hearing, the investigating officer discovered that Collins had threatened potential witnesses in the **investigation**. After the investigating officer passed this information to the appointing authority, the appointing authority directed the same investigating officer to include the allegations of communicating a threat in the ongoing **Article 32 investigation**. The court held that the investigating officer's actions did not make him an accuser and did not manifest a lack of impartiality.

[*65] Once an officer has served as an **Article 32** investigating officer in a case he or she is disqualified from subsequently serving as trial counsel,⁹² military judge,⁹³ court member,⁹⁴ or staff judge advocate⁹⁵ with respect to that case. The investigating officer subsequently can serve as defense counsel only if requested by the accused.⁹⁶

C. COUNSEL

1. Government counsel.

The appointing authority who directed the **Article 32 investigation** may detail, or request an appropriate authority to detail, counsel to represent the government at the **investigation**.⁹⁷ Counsel representing [*66] the government appears as a partisan advocate and cannot function as the legal advisor to the **Article 32** investigating officer.⁹⁸ As a partisan advocate, the government representative may question witnesses who appear at the **Article 32** hearing,⁹⁹ may examine any evidence considered by the investigating officer,¹⁰⁰ and may argue for an appropriate disposition of the case.¹⁰¹

2. Counsel for the accused.

The **Article 32 investigation** is a critical stage in the prosecution of a case and, therefore, the accused is entitled to be represented by counsel.¹⁰² The accused's right to counsel at the **Article 32** hearing are the same as they are at trial¹⁰³ and generally include the right to be represented by a detailed military counsel,¹⁰⁴ the right to be represented by individually requested military counsel if that counsel is reasonably available,¹⁰⁵ [*67] and the right to be represented by civilian counsel at no expense to the United States Government.¹⁰⁶

The accused must be advised of his or her right to be represented by counsel at the **investigation**;¹⁰⁷ the accused's elections regarding the rights to counsel should be documented in the report of the **investigation**.¹⁰⁸

⁷⁰ [United States v. Jones, 20 M.J. 919 \(N.M.C.M.R. 1985\)](#); [United States v. Wager, 10 M.J. 546 \(N.C.M.R. 1980\)](#) (A military judge who presides over a companion case is not automatically disqualified from later serving as the **Article 32** investigating officer in a coaccused's case.).

⁷¹ [United States v. Parker, 6 C.M.A. 75, 19 C.M.R. 201 \(1955\)](#). In *Parker* a "serious incident investigator" was assigned the task of assisting CID in the **investigation** of a series of offenses. This investigator accompanied the accused to CID headquarters and assisted in the interrogation, eventually getting the accused to confess. This same serious incident investigator was then appointed the **Article 32** investigating officer. As the **Article 32** investigating officer his "hearing" consisted of no more than a consideration of his own prior investigative file. Calling this scenario "not even token compliance with **Article 32**," the Court of Military Appeals held that the investigating officer's prior role in "solving these mysteries and insuring an ironclad conviction of the wrongdoer" deprived him of impartiality. See also [United States v. Lopez, 20 C.M.A. 76, 42 C.M.R. 268 \(1970\)](#).

⁷² [United States v. Natalello, 10 M.J. 594 \(A.F.C.M.R. 1980\)](#). In *Natalello* an investigating officer of a related case determined from his **investigation** that Natalello was also involved in the offenses he was investigating. Charges were brought against Natalello and the same investigating officer was detailed to conduct the **Article 32 investigation**. The court held that he should have been disqualified because of "his prior conclusions drawn and expressed about the accused's culpability."

⁷³ [United States v. Castleman, 11 M.J. 562 \(A.F.C.M.R. 1981\)](#). The **Article 32** investigating officer in *Castleman* was a good friend of the accuser-main government witness in the case. In holding that the investigating officer should have disqualified himself, the court relied on the ABA Standards for Criminal Justice, The Function of the Trial Judge, Standard 1.7 (1972) which states, "The trial judge should recuse himself whenever he has any doubt as to his ability to preside impartially in a criminal case or whenever he believes his impartiality can reasonably be questioned" (emphasis supplied). Compare [United States v. Reynolds, 19 M.J. 529 \(A.C.M.R. 1984\)](#) (where the court declined the opportunity to decide whether a judge advocate was disqualified from being the **Article 32** investigating officer in a case where the trial counsel, assistant trial counsel, and government witnesses were all co-workers assigned to other branches of the same staff judge advocate office), *petition granted, 20 M.J. 363 (C.M.A. 1985)* with [United States v. Davis, 20 M.J. 61 \(C.M.A. 1985\)](#) (investigating officer should have recused

Although the accused has the right to hire civilian counsel, the government is not required to delay the investigation for an unreasonable amount of time to facilitate the retention of civilian counsel. ¹⁰⁹

Counsel for the accused has the right to cross-examine witnesses at the investigation, ¹¹⁰ to compel production of reasonably available witnesses and evidence, ¹¹¹ and to argue for an appropriate disposition of the case. ¹¹²

[*68] D. OTHER PERSONNEL

Interpreters and reporters may be detailed, as needed, at the direction of the convening authority who initiated the investigation. ¹¹³

IV. MATTERS CONSIDERED BY THE ARTICLE 32 INVESTIGATING OFFICER

A. SCOPE OF THE INVESTIGATION

Article 32 requires the investigating officer to conduct a "thorough" investigation of all matters set forth in the charges and specifically directs that this include an inquiry as to the truth of the matters set forth in the charges, a consideration of the form of the charges, and a recommendation as to the disposition which should be made of the case. ¹¹⁴

Article 32 does not provide a general unlimited mandate to investigate criminal activity or criminal suspects, but rather should be limited to an investigation of issues raised by the charges and necessary to a proper disposition of the case. ¹¹⁵ The investigation may properly include an inquiry into the legality of a search, seizure, or confession, even though such an inquiry is not required ¹¹⁶ and the Article 32 investigating officer need not rule on the admissibility of evidence. ¹¹⁷ The investigation is not limited to an examination of witnesses and evidence mentioned in the allied papers accompanying the charges ¹¹⁸ but should include all reasonably available witnesses and evidence relevant to the investigation. ¹¹⁹

himself where his supervisory relationship with defense counsel could impair defense counsel's effectiveness in representing the accused).

⁷⁴ See, e.g., [United States v. Samuels, 10 C.M.A. 206, 212, 27 C.M.R. 280, 286 \(1959\)](#) ("It is judicial in nature."); [United States v. Nichols, 8 C.M.A. 119, 124, 23 C.M.R. 343, 348 \(1957\)](#) ("Its judicial character is made manifest by the fact that testimony taken at the hearing can be used at the trial if the witness becomes unavailable.").

⁷⁵ [United States v. Payne, 3 M.J. 354, 355 n.5 \(C.M.A. 1977\)](#) ("[T]he investigating officer must be viewed as a judicial officer, and function accordingly."); [United States v. Collins, 6 M.J. 256, 258 \(C.M.A. 1970\)](#) (The Article 32 investigating officer is referred to as "the Article 32 judicial officer.").

⁷⁶ [United States v. Payne, United States v. Collins; United States v. Grimm, 6 M.J. 890 \(A.C.M.R. 1979\)](#).

⁷⁷ See, e.g., [Collins, 6 M.J. at 259](#):

The Standards Relating to the Administration of Criminal Justice, as compiled by the American Bar Association regarding the Function of the Trial Judge, provide proper guidelines for any person acting in a judicial capacity or quasi-judicial capacity. Without fully reiterating all the General Standards relating to the judicial person's obligations, we regard the duty to protect the witness [ABA Standards, The Function of Trial Judge § 5.4 (1972)] and the duty to maintain order [ABA Standards, The Function of Trial Judge § 6.3 (1972)] as pertinent to the facts of this case.

⁷⁸ Code of Judicial Conduct Canon 3A(4) provides:

A judge should . . . neither initiate nor consider *ex parte* or other communications concerning a pending or impending proceeding. A judge, however, may obtain the advice of a disinterested expert on the law applicable to a proceeding before him if he gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond.

B. EVIDENTIARY CONSIDERATIONS

1. Application of the Military Rules of Evidence.

The Military Rules of Evidence, other than Rules 301, 302, 303, 305, and Section V, do not apply in pretrial **investigations**.¹²⁰ If, during the **investigation**, [*69] the investigating officer suspects a military witness of having committed an offense under the UCMJ, the investigating officer should comply with the warning requirements of Rule 305.¹²¹

2. Form of the evidence.

All testimony at the **Article 32 investigation**, except the testimony of the accused,¹²² must be given under oath.¹²³ There is a preference for the personal appearance of witnesses and the actual production of relevant [*70] evidence,¹²⁴ but alternative forms of evidence are permissible under some circumstances.¹²⁵

When a witness is not reasonably available to appear personally at the **Article 32 investigation**,¹²⁶ the investigating officer can consider "(i) [s]worn statements; (ii) [s]tatements under oath taken by telephone, radio, or similar means providing each party the opportunity to question the witness under circumstances by which the investigating officer may reasonably conclude that the witness' identity is as claimed; (iii) [p]rior testimony under oath; and (iv) [d]epositions of that witness."¹²⁷ Arguably these alternative forms of evidence cannot be considered if the defense objects and the witness is reasonably available.¹²⁸

The investigating officer cannot consider unsworn statements,¹²⁹ stipulations of fact, stipulations of expected testimony, or offers of proof of expected testimony if the defense objects.¹³⁰

When the actual physical evidence is not reasonably available¹³¹ the investigating officer may consider testimony describing the evidence, or an authenticated copy, photograph, or reproduction of similar accuracy of the evidence.

Commentary: The proscription against communications concerning a proceeding includes communications from lawyers, law teachers, and other persons who are not participants in the proceeding, except to the limited extent permitted. It does not preclude a judge from consulting with other judges, or with court personnel whose function is to aid the judge in carrying out his adjudicative responsibilities.

Standards of Criminal Justice, Special Functions of the Trial Judge § 6-2.1 (1980) provide, "The trial judge should insist that neither the prosecutor nor the defense counsel nor any other person discuss a pending case with the judge ex parte, except after adequate notice to all other parties and when authorized by law or in accordance with approved practice."

⁷⁹ *United States v. Payne*. The court in *United States v. Grimm* interpreted *Payne* as follows:

We read *Payne* as forging two tests for error. First, does the individual furnishing *any* advice to an I.O. serve in a prosecutorial function? If so, there is error. Second, did the I.O. obtain advice from a non-prosecutor advisor on a *substantive* question without prior notice to all other parties? If so, again there is error.

[6 M.J. at 893.](#)

⁸⁰ *United States v. Payne* (To do otherwise would constitute an abandonment of the required impartiality and would result in a derogation of the judicial functions inherent in that office.).

⁸¹ [Grimm, 6 M.J. at 893 n.8](#) (We believe that reason mandates that the "advice" *Payne* condemns does not include patently trivial matters, e.g., scheduling of a hearing room or arranging for a legal clerk or court reporter to assist the I.O. Notwithstanding, the better practice would be to minimize I.O. and prosecution contacts on even administrative matters.).

⁸² [Payne, 3 M.J. at 355](#) ("However laudable . . . [the investigative officer's] . . . desires to confer with someone more 'familiar' with the case may have been, we find that these ex parte discussions with the prosecuting attorney were violative of his role as a judicial officer.").

¹³² Arguably, these alternatives cannot be considered if the defense objects and the actual physical evidence is reasonably available. ¹³³

If the defense objects, the investigating officer cannot consider a stipulation of fact or a stipulation of expected testimony concerning the evidence, a stipulation as to the contents of a document, an unsworn statement describing the evidence, or an offer of proof concerning pertinent [*71] characteristics of the evidence. ¹³⁴ Arguably, other alternative forms of the evidence, e.g., unauthenticated copies, photographs, or reproductions, can never be considered. ¹³⁵

The investigating officer can consider other matters, such as a personal observation of the crime scene, so long as the parties are informed of the other evidence that will be considered and are given an opportunity to examine the evidence. ¹³⁶

C. DEFENSE EVIDENCE

At the pretrial investigation the defense has broad rights to have reasonably available witnesses and evidence produced, to cross-examine witnesses, and to present anything it may desire in defense or mitigation. ¹³⁷

1. Witness production.

The witness production provisions of Article 32 provide the basis for a statutory confrontation guarantee and make the Article 32 investigation a useful defense discovery tool. ¹³⁸ The courts recognize that the Article 32 investigation does perform a legitimate, but not unlimited, discovery [*72] purpose. ¹³⁹ Defining the limits of the defense right to have witnesses produced at the investigation has provided the courts some difficulty. The general rule is that upon timely request by the accused "any witness whose testimony would be relevant to the investigation and not cumulative, shall be produced if reasonably available." ¹⁴⁰

⁸³ *United States v. Payne; United States v. Grimm.*

⁸⁴ *United States v. Grimm.* In *Grimm* the court discussed whether the chief of criminal law at Ft. Ord performed a "prosecutorial function" within the meaning of *Payne*. Holding that regular duty titles are not dispositive of the issue, the court went on to look at the actual duty functions of the chief of criminal law. The court concluded that *this* chief of criminal law did not perform a prosecutorial function where his duties were primarily administrative in nature, consisting of monitoring pretrial and post-trial processing, making recommendations to the SJA regarding disposition of a case, assigning trial counsel to cases, and rating trial counsel on efficiency reports. The chief of criminal law did not appear in court as a trial counsel, did not direct the trial tactics or strategy of trial counsel, and did not routinely advise law enforcement personnel.

⁸⁵ For example, legal assistance officers, claims judge advocates, or administrative law specialists.

⁸⁶ *United States v. Grimm.*

⁸⁷ In *Payne*, 3 M.J. at 355 n.4, the court cited "questions of the applicable burden of proof, evidentiary standards, and most critically, the legality of the search which produced the incriminating evidence" as examples of substantive rather than procedural matters. In *Grimm*, 6 M.J. at 894, government counsel at trial and on appeal conceded that substantive advice was given "regarding the role a weapon would have to play to support an aggravated assault charge." In *United States v. Saunders*, 11 M.J. 912 (A.C.M.R. 1981), the Article 32 investigating officer had an *ex parte* conversation with the accused's battalion commander regarding the accused's mental capacity and mental responsibility. The court treated this as impermissible *ex parte* communication. *But see* Judge Lewis' dissent:

I cannot believe that Congress intended that the full panoply of the American Bar Association Canons of Judicial Ethics be applicable to investigating officers. Few could find fault with the notion that an investigating officer loses his required neutrality and detachment where he is receiving *ex parte* substantive advice from the person who will later prosecute the case as occurred in *Payne*. Here the communication was with a non-prosecutor and conveyed the same information that later came before the investigating officer properly.

[Id. at 916.](#)

The determination of when a witness is reasonably available involves a balancing test. ¹⁴¹ "A witness is 'reasonably available' when 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." ¹⁴² This balancing test should be applied to determine the "reasonable availability" of any defense requested witness regardless of whether the witness will be called by the prosecution or the defense at trial. ¹⁴³ If the requested witness is not one which the prosecution is going to call at trial, the defense has the burden of providing enough information to the investigating officer to demonstrate the significance of the witness' testimony. ¹⁴⁴

[*73] A witness who would be unavailable for trial under Rule 804(a) is *per se* "not reasonably available" for testimony at the **Article 32 investigation**. ¹⁴⁵

The **Article 32** investigating officer makes the initial determination of whether a military witness is reasonably available. ¹⁴⁶ Because a military witness is susceptible to the lawful orders of superiors and is usually available for worldwide travel on short notice, distance from the site of trial will generally not be the controlling factor in applying the balancing test. ¹⁴⁷ This is especially true when the government transfers the witness shortly before the **Article 32** hearing. ¹⁴⁸ A military witness who **[*74]** is determined to be reasonably available can, and should, be ordered to testify absent the lawful assertion of a testimonial privilege. ¹⁴⁹

The **Article 32** investigating officer's determination that a military witness is reasonably available can be reversed by the witness' immediate commander. ¹⁵⁰ Any determination by the **investigation** officer or the witness' immediate commander that the witness is not reasonably available is reviewable at trial by the military judge. ¹⁵¹ The **Article 32** investigating officer also makes the initial determination of whether a civilian witness is reasonably available by applying a balancing test. ¹⁵²

As a general proposition, a civilian witness cannot be compelled by subpoena to attend an **Article 32 investigation**. ¹⁵³ If the civilian witness is employed by the United States Government and the **Article 32**

⁸⁸ Code of Judicial Conduct Canon 3A(4) provides that a judge "may obtain the advice of a disinterested expert on the law . . . if he gives notice to the parties of the person consulted and the substance of the advice. . . ."

⁸⁹ Standards for Criminal Justice, Special Functions of the Trial Judge § 6-2.1 (1980) provides that no person may "discuss a pending case with the judge ex parte, except after adequate notice to all other parties. . . ." In [Grimm, 6 M.J. at 894](#), the court, after finding that the neutral legal advisor had discussed a substantive matter with the investigating officer, went on to conclude that "[i]nasmuch as counsel for the accused and the prosecution were not given prior notice, we find a violation of *Payne*. . . ."

⁹⁰ In two concurring opinions Judge Jones distinguished the **Article 32** hearing from a trial and suggested that

The **Article 32** investigating officer should be required to list in his report the names of all persons from whom he obtained legal advice on substantive questions, but he should not be required to obtain the advice in an adversary proceeding. This would convert the **investigation** into a "mini-trial" and only cause delay without adding a concurrent benefit to the accused or the Government.

[Grimm, 6 M.J. at 896](#) (Jones, J., concurring); [United States v. Crumb, 10 M.J. 520, 528 n.3 \(A.C.M.R. 1980\)](#) (Jones, J., concurring).

⁹¹ [Payne, 3 M.J. at 357](#).

Although we determine that the **Article 32** investigating officer was acting in violation of the applicable standards of conduct for the judicial office he served, it is nonetheless incumbent upon us to examine the record for a determination of whether this impropriety prejudiced the appellant. We are not unmindful of the inherent difficulty presented by requiring a defendant to demonstrate the prejudice resulting from improper actions by a judicial officer, the full extent or text of which he may be unaware in part or whole. We conclude that this is a *matter requiring a presumption of prejudice*. Absent clear and convincing evidence to the contrary, we will be obliged to reverse the case.

investigation concerns matters which are related to the civilian's job, the civilian witness can be ordered to testify as an incident of employment. ¹⁵⁴ If **[*75]** the civilian witness is a foreign national, compulsion to testify at an **Article 32 investigation** would be covered by local law. ¹⁵⁵

Although a civilian witness may not be compelled to testify, if the witness is reasonably available they may be invited to attend, ¹⁵⁶ and when previously approved by the general court-martial convening authority, ¹⁵⁷ they may be paid transportation expenses and a per diem allowance. ¹⁵⁸ As an alternative, civilian witnesses can be subpoenaed to a deposition proceeding. ¹⁵⁹

The Manual contains no separate provisions concerning the production of expert witnesses at the **Article 32 investigation**. Although at least one court of review has attempted to treat expert witnesses as a different category, ¹⁶⁰ the better view is that their production should be governed **[*76]** by the same reasonable availability balancing test applicable to other witnesses.

2. Evidence production.

Upon timely request by the accused any documents or physical evidence "which is under the control of the government and which is relevant to the **investigation** and not cumulative shall be produced if reasonably available." ¹⁶¹

"Reasonable availability" is initially determined by the investigating officer by applying a balancing test weighing the significance of the evidence against the difficulty, expense, delay, and effect on military operations of obtaining the evidence. ¹⁶² If the release of the evidence is privileged under Section V of the Military Rules of Evidence, it is not reasonably available. ¹⁶⁴

Id. (emphasis added). In *Payne* the government was able to meet the burden because of the extensive testimony of the **Article 32** investigating officer and because the officer who rendered the advice prepared extensive notes outlining the matters discussed. The court concluded its decision, however, by warning that in "future cases when testing for prejudice, we will resolve doubts against the judicial officer who participates in such a practice." *Id. at 358.*

The problems inherent in this area were well illustrated in *United States v. Brunson, 15 M.J. 898 (C.G.C.M.R. 1982)*. In *Brunson* the **Article 32** investigating officer conducted numerous *ex parte* discussions concerning substantive and procedural matters with non-neutral officers. Because the parties involved did not build a complete record of the substance of all *ex parte* discussions, the court held that the government had failed to overcome the presumption of prejudice by clear and convincing evidence. *Id. at 901.* The General Counsel, Department of Transportation filed a certificate for review asking the Court of Military Appeals to require the accused to show actual prejudice rather than apply a presumption of prejudice under *Payne*. *United States v. Brunson, 15 M.J. 72 (C.M.A. 1982)*. The Court of Military Appeals responded by summarily affirming the presumption of prejudice test, citing *Payne* as controlling authority. *United States v. Brunson, 17 M.J. 181 (C.M.A. 1983)*.

⁹² UCMJ **art.** 27(a)(2).

⁹³ UCMJ **art.** 26(d).

⁹⁴ UCMJ **art.** 25(d)(2).

⁹⁵ UCMJ **art.** 6(c) (investigating officer is disqualified from serving as staff judge advocate to any reviewing authority upon the same case); UCMJ **art.** 64(a) (investigating officer is disqualified from preparing the post-trial review); accord *United States v. Jollif, 22 C.M.A. 95, 46 C.M.R. 95 (1973)* (The **Article 32** investigating officer is disqualified from later drafting the post-trial review for the staff judge advocate.). See also R.C.M. 405(d)(1) ("The investigating officer is disqualified to act later in the same case in any other capacity."). But see *United States v. Beard, 15 M.J. 768 (A.F.C.M.R. 1983)* (The **Article 32** investigating officer, who was subsequently made the SJA to the accused's special court-martial convening authority, was not "acting as a staff judge advocate" where the only function he performed relating to the accused's case was the ministerial act of recommending changes in court-martial panel membership.).

The investigating officer's determination that evidence is reasonably available can be reversed by the custodian of the evidence.¹⁶⁵ Any determination by the investigating officer (or the custodian of the evidence) that the evidence is not reasonably available is reviewable at trial by the military judge.¹⁶⁶

3. *Testimony of the accused.*

At the **Article 32** hearing the accused has the right to remain silent¹⁶⁷ or to make a statement in any form.¹⁶⁸ At trial the trial counsel may not directly produce evidence (or comment) on the fact that the accused elected to remain silent at the **Article 32 investigation**;¹⁶⁹ however, the accused's silence at the pretrial **investigation** may be raised collaterally [*77] if the government attempts to show that the accused's in-court testimony was recently fabricated.¹⁷⁰

V. PROCEDURE

A. SEQUENCE OF EVENTS

The **Article 32 investigation** was originally designed to be an informal proceeding with relaxed rules of evidence.¹⁷¹ Although the Military Rules of Evidence generally do not apply,¹⁷² the adversary nature of the current proceedings tends to make the hearing more formal.¹⁷³ The appointing authority has the power to prescribe specific procedures to be followed in conducting the **investigation**.¹⁷⁴ If the appointing authority does not provide procedural guidance or if (as is usual) the appointing authority directs the use of DA Pam 27-17¹⁷⁵ as procedural guidance, the investigating officer will have broad discretion in determining the sequence of events necessary to complete the **investigation**. The **investigation** may extend over as many sessions as necessary to thoroughly investigate the charges.¹⁷⁶ The investigating officer is free to determine the order in which the witnesses and evidence are presented,¹⁷⁷ and the [*78] order in which individual witnesses will be questioned by the investigating officer and counsel.¹⁷⁸

⁹⁶ UCMJ **art.** 27(a)(2).

⁹⁷ R.C.M. 405(d)(3)(A). UCMJ **art.** 32 is silent regarding the presence of government counsel at the **investigation**. Originally the **Article 32** hearing was treated as an *ex parte* proceeding in that the government was not formally represented as a party. [United States v. Samuels](#), 10 C.M.A. 206, 212, 27 C.M.R. 280, 286 (1959). In [United States v. Young](#), 13 C.M.A. 134, 32 C.M.R. 134 (1962), the legal advisor to the **Article 32** investigating officer attended the hearing and assisted the investigating officer by examining witnesses and advising on legal rulings. The same legal advisor was subsequently detailed trial counsel and prosecuted the case. The court sanctioned this practice, holding that it did not violate **Article** 27(a) because the legal advisor had not become the *de facto* investigating officer and that the participation of the legal advisor or even a member of the prosecution is permissible so long as it does not displace or encroach upon the impartiality of the investigating officer.

In [United States v. Weaver](#), 13 C.M.A. 147, 32 C.M.R. 147 (1962), the court specifically approved the practice of having a government representative participate in the **Article 32 investigation**:

The **Article 32 investigation** is an important part of court-martial procedure. Manifestly, the Government as well as the accused has an immediate and material interest in the proceedings. Although no provision of the Uniform Code or the Manual requires the Government to be present, its appearance may be desirable and helpful . . . "we can find no fault with the practice, which has the legitimate effect of making the **investigation** an adversary proceeding, presided over by the investigating officer."

Id. at 149 (citations omitted). Based on *Weaver*, the 1969 Manual for Courts-Martial contained a specific authorization that "if the accused is represented by counsel, the government may be represented by counsel with equivalent qualifications designated by the officer who directed the **investigation**, at the discretion of the latter." MCM, 1969, para. 34c; Dep't of Army, Pamphlet No. 27-2, Analysis of Contents, Manual for Courts-Martial, United States 1969, Revised Edition, p. 7-4 (July 1970). This provision was later changed to simply provide that "The government may be represented at the **investigation** by counsel designated by the officer who directed the **investigation**." MCM, 1969, para. 34c (C6, 1 Sept. 1982).

Prior to commencement of any investigation the accused must be informed of the charges under investigation,¹⁷⁹ the identity of the accuser,¹⁸⁰ the witnesses and other evidence known to the investigating officer,¹⁸¹ the purpose of the investigation,¹⁸² and the right against self-incrimination.¹⁸³

B. TIMELINESS OF THE INVESTIGATION

The investigating officer is charged with conducting the investigation as expeditiously as possible and with issuing a timely written report of the investigation.¹⁸⁴ Normally duties as an Article 32 investigating officer takes priority over all other assigned duties.¹⁸⁵ Although there are no hard and fast time limits for conducting a thorough investigation, the appointing authority will typically set a deadline as part of the procedural guidance to the investigating officer.¹⁸⁶ If the accused is ordered into arrest or confinement, the charges and the report of investigation "should" be forwarded to the general court-martial convening authority within eight days after the restraint.¹⁸⁷ Time spent conducting the Article 32 investigation may be time accountable to the government for speedy trial purposes,¹⁸⁸ so the investigating officer should maintain a chronology documenting all delays.¹⁸⁹

[*79] C. CONTROL OF THE PROCEEDING

1. Presence of the accused.

The accused will normally be present throughout the taking of evidence.¹⁹⁰ The only two exceptions to this general rule are voluntary absence after being notified of the time and place of the proceeding¹⁹¹ and removal by the investigating officer for disruptive conduct after being warned that continued disruptive conduct will cause removal.¹⁹²

2. Presence of the counsel for the accused.

The accused is entitled to the presence and assistance of counsel throughout the hearing.¹⁹³ Civilian defense counsel cannot be excluded from the investigation because of a lack of security clearance.¹⁹⁴

⁹⁸ [United States v. Payne, 3 M.J. 354 \(C.M.A. 1977\)](#). The court in *Payne* specifically overruled [United States v. Young, 13 C.M.A. 134, 32 C.M.R. 134 \(1962\)](#) and its progeny to the extent they sanctioned this practice. [Payne, 3 M.J. at 357](#).

⁹⁹ DA Pam 27-17, para. 1-2d.

¹⁰⁰ R.C.M. 405(h)(1)(B).

¹⁰¹ DA Pam 27-17, para. 1-2d.

¹⁰² UCMJ [art. 32\(b\)](#) ("The accused has the right to be represented at that investigation as provided in . . . [Article 38](#) . . . and in regulations prescribed under that section."); R.C.M. 405(f)(4).

¹⁰³ UCMJ [art. 32\(b\)](#). See also [United States v. Tomaszewski, 8 C.M.A. 266, 24 C.M.R. 76 \(1957\)](#) where the court rejected the government argument that counsel could include non-lawyer officers:

[T]he connection between the investigation and the trial itself is so close that we are of the opinion that Congress did not intend to differentiate between the two in regard to the qualifications of counsel appointed for the accused. We conclude, therefore, that the accused is entitled to be represented by the same kind of counsel to which he is entitled at trial, namely, counsel qualified within the meaning of [Article 27\(b\)](#).

Id. at 79.

¹⁰⁴ UCMJ [art. 38\(b\)\(3\)\(A\)](#); R.C.M. 405(d)(2)(A).

¹⁰⁵ UCMJ [art. 38\(b\)\(3\)\(B\)](#); R.C.M. 405(d)(2)(B). See also [United States v. Courtier, 20 C.M.A. 278, 279, 43 C.M.R. 118, 119 \(1971\)](#) ("[t]he right to the assistance of counsel of one's own choice during the pretrial proceedings, when such counsel is reasonably available, is a substantial right entitled to judicial enforcement"). For a discussion of the procedures used in

3. Presence of the public.

Although there is a preference of a "public" pretrial *investigation*,¹⁹⁵ the Manual provides that "access by spectators to all or part of the proceeding may be restricted or foreclosed in the discretion of the commander who directed the *investigation* or the investigating officer."¹⁹⁶ This provision makes it seem like there is unfettered discretion to deny the public access to the **Article 32** hearing. The better view, based on case law,¹⁹⁷ is that the proceedings should be closed only if there is a reasonable, [*80] articulable reason why closure is required,¹⁹⁸ and the closure should be limited to only those portion of the *investigation* where it is necessary.¹⁹⁹

D. REPORT OF **INVESTIGATION**

Article 32 provides that "if the charges are forwarded after the *investigation*, they shall be accompanied by a statement of the substance of the testimony taken on both sides and a copy thereof shall be given to the accused."²⁰⁰ The Manual goes further and specifies that the report of *investigation* shall include:

(A) A statement of names and organizations or addresses of defense counsel and whether defense counsel was present throughout the taking of evidence, or if not present the reason why;

(B) The substance of the testimony taken on both sides, including any stipulated testimony;

processing a request for individual military counsel and in determining when counsel is "reasonably available" see R.C.M. 506 and Dep't of Army, Reg. No. 27-10, Military Justice, para. 5-7 (1 July 1984) (hereinafter cited as AR 27-10).

¹⁰⁶ UCMJ **art.** 38(b)(2); R.C.M. 405(d)(2)(c). See also [United States v. Nichols, 8 C.M.A. 119, 23 C.M.R. 343 \(1957\)](#) (The accused's right to be represented by civilian counsel cannot be curtailed by a service-imposed obligation to obtain a security clearance for access to service classified matter.).

¹⁰⁷ UCMJ **art.** 32(a).

¹⁰⁸ R.C.M. 405(j)(2)(A). See also DA Pam 27-17, para. 2-3; DD Form 457 (Aug. 1984).

¹⁰⁹ R.C.M. 405(d)(2)(c) ("The *investigation* shall not be unduly delayed for [the purpose of obtaining civilian counsel]."). See generally [United States v. Bowie, 17 M.J. 821 \(A.C.M.R. 1984\)](#) (Military judge did not abuse his discretion in denying the accused a continuance to hire a civilian counsel where the accused had already been given more than two months delay, the accused was still unable to name a specific firm or counsel he desired to retain, and the government had gone to the expense of bringing witnesses from a substantial distance.); [United States v. Brown, 10 M.J. 635 \(A.C.M.R. 1980\)](#) (Military judge did not abuse his discretion in denying a continuance for the accused to hire a civilian counsel where the accused had known for some time about his rights to counsel and the date of the scheduled trial; the government had relied on the scheduled date to produce witnesses at great expense and inconvenience and the nature of the delay was to resolve a fee problem.). But see [United States v. Maness, 23 C.M.A. 41, 46, 48 C.M.R. 512, 517 \(1974\)](#) ("[O]nly in 'an extremely unusual case' should an accused be 'forced to forego civilian counsel'. . . ." On the facts of the case it was error not to postpone the **Article 32** hearing to allow the accused's retained civilian counsel to participate.); [United States v. Lewis, 8 M.J. 838 \(A.C.M.R. 1980\)](#) (The **Article 32** investigating officer denied the accused a substantial right in failing to delay the *investigation* for a reasonable effort to seek out civilian counsel. Although the accused asked for no specific time delay there was no indication that the request was made for an improper motive and there was no indication that a few days delay would have inconvenienced or prejudiced the interests of the government.).

¹¹⁰ UCMJ **art.** 32(b); R.C.M. 405(f)(8).

¹¹¹ UCMJ **art.** 32(b); R.C.M. 405(f)(9), (10).

¹¹² DA Pam 27-17, para. 3-3i.

¹¹³ R.C.M. 405(d)(3). For a discussion of when a verbatim record is required see *infra* section V.

¹¹⁴ UCMJ **art.** 32(a); R.C.M. 405(e).

¹¹⁵ R.C.M. 405(a) discussion.

(C) Any other statements, documents, or matters considered by the investigating officer, or recitals of the substance or nature of such evidence;

(D) A statement of any reasonable grounds for belief that the accused was not mentally responsible of the offense or was not competent to participate in the defense during the investigation;

(E) A statement whether the essential witness will be available at the time anticipated for trial and the reasons why any essential witness may not then be available;

(F) An explanation of any delays in the investigation;

(G) The investigating officer's conclusion whether the charges and specifications are in proper form;

[*81] (H) The investigating officer's conclusion whether reasonable grounds exist to believe that the accused committed the offenses alleged; and

(I) The recommendations of the investigating officer, including disposition. ²⁰¹

Normally the report of investigation will consist of a completed DD Form 457 (Investigating Officer's Report) ²⁰² and an attached summary of the witnesses' testimony. ²⁰³ There is no requirement for, and the accused has no right to, a verbatim transcript of the witnesses' testimony. ²⁰⁴ The appointing authority does have the prerogative of ordering a verbatim transcript ²⁰⁵ and should normally do so in particularly complex or serious cases, or when it is necessary to preserve a witness' testimony for later use at trial. ²⁰⁶

Where there is no verbatim transcript authorized, the investigating officer is responsible for preparing a summary of each witness' testimony. ²⁰⁷ Typically a legal clerk or some other assistant will be present at the hearings to assist in preparing this summary. If substantially verbatim notes, or tape recordings, of a witness' testimony are made to assist in preparing the report of investigation, they should be preserved **[*82]** until completion of the trial. ²⁰⁸

¹¹⁶ R.C.M. 405(e) discussion.

¹¹⁷ R.C.M. 405(i) discussion (an investigating officer may consider any evidence, even if that evidence would not be admissible at trial); R.C.M. 405(h)(2) (an investigating officer is not required to rule on any objections made by counsel at the Article 32 hearing).

¹¹⁸ R.C.M. 405(a) discussion.

¹¹⁹ See generally R.C.M. 405(g).

¹²⁰ Mil. R. Evid. 1101(d); R.C.M. 405(i). The military "rape shield" protections in Mil. R. Evid. 412 do not apply to the Article 32 investigation, although the investigating officer arguably can afford similar protection to a rape victim by enforcing Mil. R. Evid. 303's prohibition against degrading questions. R.C.M. 405(i) analysis. See also [United States v. Martel, 19 M.J. 917 \(A.C.M.R. 1985\)](#) (error for the investigating officer to consider matters covered by the marital privilege, Mil. R. Evid. 504(b)). Cf. [United States v. Dagenais, 15 M.J. 1018 \(A.F.C.M.R. 1983\)](#) (Witness at an Article 32 investigation could properly refuse to answer questions concerning alleged homosexuality where the questions were not material to the offenses being investigated and did not impact on the witness' credibility.).

¹²¹ UCMJ art. 31; Mil. R. Evid. 305; R.C.M. 405(h)(1)(A) discussion. See also [United States v. Poole, 15 M.J. 883 \(A.C.M.R. 1983\)](#) (Article 32 investigating officer is required to give rights warnings to a military witness when the investigator actually suspects that the person being questioned has committed an offense or "when the totality of circumstances are such that the questioner reasonably should have harbored that suspicion.") In *Poole* the accused was convicted of committing perjury at the Article 32 investigation of PFC Houck. PFC Houck was charged with being one of four soldiers who committed an assault and robbery near the 1-2-3 Club on post. PFC Houck's alibi was that he had been in PVT Poole's barracks room all evening. The allied documents accompanying the charges against PFC Houck contained several conflicting statements from PVT Poole. Two sergeants who escorted PVT Poole to the MP station for questioning made statements saying that PVT Poole admitted being at the 1-2-3 Club and intervening in a fight involving PFC Houck sometime during the weekend in question. In the sworn statement given to the military police, PVT Poole denied being near the 1-2-3 Club on Saturday night and supported PFC Houck's alibi.

The accused has no right to tape-record the **Article 32** proceeding but taping may be permitted as a matter within the investigating officer's discretion. ²⁰⁹ The substance of a witness' testimony which is produced for the report of **investigation** should, whenever possible, be shown to the witness so that the witness can sign and swear to the truth of the summary. ²¹⁰

When the **Article 32** report of **investigation** is complete, a copy must be furnished to the appointing authority who will in turn ensure that a copy is served on the accused. ²¹¹

[*83] VI. NATURE OF THE **ARTICLE 32 INVESTIGATION**

A. GENERAL

Because the **Article 32** pretrial **investigation** is *sui generis*, having no exact counterpart in any civilian criminal jurisdiction, ²¹² courts have struggled to define the precise nature of the proceeding.

Article of War 70 (1920), the precursor to UCMJ **Article 32**, was the subject of extensive litigation in federal district court based on writs of habeas corpus from soldiers alleging errors in their pretrial **investigations**. ²¹³ Initially, a majority of the federal district courts dealing with the issue held that the military's failure to provide an accused with all the rights guaranteed in **Article** of War 70 constituted either "jurisdictional error" ²¹⁴ or a denial of due process. ²¹⁵ Eventually the Supreme Court addressed the nature of the military pretrial **investigation** in *Humphrey v. Smith*, ²¹⁶ holding that defects in the investigative procedures were nonjurisdictional.

Based on *Humphrey v. Smith* the drafters of the Uniform Code of Military Justice specifically provided that the "requirements of . . . **Article 32** are binding on all persons administering this chapter but failure to follow them does not constitute jurisdictional error." ²¹⁷

The allied papers also contained a second statement given gby PVT Poole to the military police maintaining the alibi defense. This second statement was given after the military police advised Poole of his **Article 31** rights. The military police suspected Poole of being involved in the assault and attempted robbery along with PFC Houck, and false swearing in his first statement. At PFC Houck's pretrial **investigation**, PVT Poole again supported PFC Houck's alibi.

The court held that the totality of the circumstances was not such that the investigating officer should reasonably have suspected PVT Poole of any offense. The "mere existence of some circumstances that would suggest to a suspicious mind that a witness might have been involved" in the offense being investigated is not enough to trigger the rights warning requirement. [Id. at 887.](#) The courts also indicated that, although the test is an objective standard, it was appropriate to consider that the **Article 32** investigating officer was not a trained investigator, had not done an **Article 32 investigation** before, and did not have a legal advisor present at the hearing.

Cf. [United States v. Williams, 9 M.J. 831 \(A.C.M.R. 1980\)](#). PVT Williams was also convicted of committing perjury as a witness at an **Article 32 investigation**. Unlike *Poole*, PVT Williams was never implicated as being involved in the offenses being investigated. Instead, PVT Williams was a government confidential informant who had made pre-**investigation** statements inculcating SP5 Johnson. PVT Williams was then called to testify as a government witness at SP5 Johnson's **Article 32 investigation**. At the **Article 32 investigation** PVT Williams had a "memory lapse" and was unable to remember the events being investigated and could not recall making any previous statements.

At Williams' court-martial (for AWOL and perjury) the defense argued that at some point during Williams' **Article 32** testimony either the investigating officer or the government representative should have recognized that Williams was lying and should have read Williams his **Article 31** rights for perjury. The court held that **Article 31** does apply to witnesses at an **Article 32 investigation** when they are suspected of having committed *past* criminal offenses, but that **Article 31** does not apply to future offenses and does not require the interruption of testimony at the **Article 32 investigation** to advise the witness that if they continue they subject themselves to possible perjury charges.

¹²² R.C.M. 405(f)(12) (the accused has the right to make a statement in any form).

¹²³ R.C.M. 405(h)(1)(A). For a suggested form of the oath to be administered see R.C.M. 405(h)(1)(A) discussion.

[*84] Although defects in the Article 32 investigation are not jurisdictional, courts have consistently maintained that the pretrial investigation is a "judicial proceeding"²¹⁸ and that it is "not a mere formality,"²¹⁹ but rather is "an integral part of the court-martial proceedings"²²⁰ providing the accused with "substantial pretrial rights."²²¹

Defining the nature of the Article 32 investigation involves much more than merely assigning labels. Categorizing the proceedings as "judicial," "nonjurisdictional," or as "a substantial pretrial right" has practical consequences impacting upon how the proceedings must be conducted and affecting what remedies are available to an accused who has been afforded a less-than-perfect pretrial investigation.

B. ADEQUATE SUBSTITUTES FOR THE ARTICLE 32 INVESTIGATION

No Article 32 investigation is necessary if the subject matter of the charged offenses has already been investigated at a proceeding which afforded the accused the opportunity to be present, to be represented by counsel, to cross-examine available witnesses, and to present matters in his or her own behalf.²²² After being officially informed of the charges, the accused does have the right to demand further investigation to recall witnesses for further cross-examination and to offer any new evidence.²²³

When an Article 32 investigating officer discovers through the presentation of evidence at the hearing that the accused has committed additional uncharged offenses, additional charges may be referred to trial [*85] along with the original charges without conducting an additional Article 32 investigation unless specifically requested by the accused.²²⁴

C. WAIVER OF THE ARTICLE 32 INVESTIGATION

The accused may completely waive the right to an Article 32 investigation²²⁵ Waiver may be made a condition of a pretrial agreement²²⁶ so long as the accused freely and voluntarily entered into the agreement.²²⁷ While the accused may offer to waive the Article 32 investigation, the offer does not bind the government.²²⁸

¹²⁴ R.C.M. 405(g)(2)(B) discussion.

¹²⁵ See generally R.C.M. 405(g)(4), (5).

¹²⁶ For a discussion of reasonable availability see R.C.M. 405(g)(2) and *infra* section IV.

¹²⁷ R.C.M. 405(g)(4)(B).

¹²⁸ The 1969 Manual contained the simple prohibition that, "Upon objection by the accused or his counsel, statements of unavailable witnesses which are not under oath or affirmation will not be considered by the investigating officer." MCM, 1969, para. 34*d*.

The 1984 Manual went further and attempted to address consideration of various alternatives to testimony with more particularity. Although the drafters clearly did not intend these provisions to be more restrictive than the standards contained in the 1969 Manual, a literal reading of R.C.M. 405(g)(4)(B) arguably is more restrictive. The intent of the drafters was probably to acknowledge that if the defense objected and the witness was reasonably available, the witness had to be produced in addition to consideration of the sworn statement or other recognized testimony alternative.

¹²⁹ R.C.M. 405(g)(4)(A)(vi). See also [United States v. Samuels, 10 C.M.A. 206, 213, 27 C.M.R. 280, 287 \(1959\)](#) (A "statement of a witness may be considered by the investigating officer only if it is supported by oath or affirmation.").

¹³⁰ R.C.M. 405(g)(4)(A).

¹³¹ For a discussion of reasonable availability see R.C.M. 405(g)(2)(C).

¹³² R.C.M. 405(g)(5)(B).

¹³³ See *supra* note 130.

D. TREATMENT OF DEFECTS

On of the consequences of having the clear but unembellished congressional mandate that "defects in the **Article 32 investigation** are not jurisdictional"²²⁹ is that the President and the courts are left to fashion guidelines as to when relief should be granted to cure defects which are raised at the trial and appellate levels. Some basic guidance is provided in the legislative **history** to **Article 32(d)**:

There has been a considerable amount of difficulty in construing the binding nature of the pretrial **investigation**. . . . The point we are trying to make clear is that the pretrial **investigation** is a valuable proceeding but that it should not be a jurisdictional requirement.

It is a valuable proceeding for the defendant as well as for the Government. We desire that it be held all the time. But in the event that a pretrial **investigation**, less complete than is provided here, is held and thereafter at the trial full and complete evidence is presented which establishes beyond a reasonable doubt the guilt of the accused, there doesn't seem [*86] to be any reason . . . [that] the case should be set aside *if the lack of full compliance doesn't materially prejudice his substantial rights*. . . . Now if it has, that is and should be grounds for reversal of a verdict of guilty.²³⁰

The courts have adopted this reasoning and consistently have held that even though defects in the **Article 32 investigation** are not jurisdictional they may constitute grounds for appropriate relief,²³¹ usually in the form of a continuance to cure the defect,²³² and when the defect operates to prejudice the substantial rights of the accused, may constitute grounds to reverse a conviction without regard to whether it touches jurisdiction.²³³

¹³⁴ R.C.M. 405(g)(5)(A).

¹³⁵ See *supra* note 128. This interpretation has the anomalous effect of creating a more restrictive authentication requirement at the **Article 32** hearing than at the actual court-martial, despite the clear intent that the Military Rules of Evidence should not encumber the pretrial **investigation**.

¹³⁶ R.C.M. 405(h)(1)(B). See also [United States v. Craig, 22 C.M.R. 466](#) (A.B.R. 1956) (Error for the **Article 32** investigating officer to consider an Inspector General's Report which he then refused to disclose to the defense counsel because of its "confidential" classification.).

¹³⁷ UCMJ **art. 32(b)** provides, "At the **investigation** full opportunity shall be given to the accused to cross-examine witnesses against him if they are available and to present anything he may desire in his own behalf, either in defense or mitigation, and the **investigation** officer shall examine available witnesses requested by the accused."

¹³⁸ See, e.g., [United States v. Roberts, 10 M.J. 308 \(C.M.A. 1981\)](#); [United States v. Ledbetter, 2 M.J. 37 \(C.M.A. 1976\)](#); [United States v. Samuels, 10 C.M.A. 206, 27 C.M.R. 280 \(1959\)](#). Although courts readily recognized that **Article 32** provides for a statutory confrontation right distinguishable from constitutional rights to confrontation, the exact difference has never been defined by the courts. As a general proposition, statutory confrontation under **Article 32** has a more liberal definition of unavailability which in turn triggers the admissibility of testimony alternatives which have a lower indicia of reliability than would be required at an actual trial. Compare [United States v. Ledbetter, 2 M.J. 37 \(C.M.A. 1976\)](#) (balancing test for availability . . . sworn statements as testimony substitute) with [Ohio v. Roberts, 448 U.S. 56 \(1980\)](#) (good faith effort by government to procure the witness required . . . testimony substitute required to have extra indicia of reliability).

1. General rule.

The best and most often cited statement of how defects in the pretrial **investigation** should be treated is contained in *United States v. Mickel*:

[I]f an accused is deprived of a *substantial pretrial right on a timely objection, he is entitled to judicial enforcement of his right, without regard to whether such enforcement will benefit him at the trial.* At that stage of the proceedings, he is perhaps the best judge of the benefits he can obtain from the pretrial right. Once the case comes to trial on the merits, the pretrial proceedings are superseded by the procedures at the trial; the rights accorded to the accused in the pretrial stage merge into his rights at trial. If there is *no timely objection* to the pretrial proceedings *or no indication* that these proceedings *adversely affected the accused's rights at the trial*, there is *no good reason in law or logic to set aside his conviction.* ²³⁴

[*87] Although the Manual provisions are somewhat less clear, they are essentially consistent with the *Mickel* standard. R.C.M. 405 provides that no charge may be referred to a general court-martial unless there has been a thorough and impartial **investigation** made in "substantial compliance" with the Manual. ²³⁵ A motion for appropriate relief ²³⁶ made prior to trial ²³⁷ should be granted to cure defects in the **Article 32 investigation** ²³⁸ which are raised and preserved through timely objection ²³⁹ if the defect "deprives a party of a right or hinders a party from preparing for trial or presenting its case." ²⁴⁰

2. Timeliness of objections.

The first step for the accused to get judicial enforcement of substantial pretrial rights is to make a timely objection to the alleged defect. ²⁴¹ If a defect is not objected to in a timely manner, the accused is entitled to relief only if there was less than substantial compliance with **Article 32** ²⁴² or if the defect prejudiced the accused at trial. ²⁴³

Defects in the pretrial **investigation** which are discovered during the course of the **investigation** must be raised to the investigating officer **[*88]** "promptly upon discovery of the alleged error." ²⁴⁴ The investigating officer can

¹³⁹ [United States v. Roberts, 10 M.J. 308, 311 \(C.M.A. 1981\)](#) ("There is no doubt that a military accused has important pretrial discovery rights at an **Article 32 investigation**. Nevertheless, such pretrial discovery is not the sole purpose of the **investigation** nor is it unrestricted in view of its statutory origin."). See also [United States v. Nichols, 8 C.M.A. 119, 23 C.M.R. 343, 352 \(1957\)](#):

There is a distinct advantage in having a dress rehearsal, and Congress has given that privilege to an accused. When it is taken away, among other things, the opportunity to probe for weaknesses in the testimony of witnesses is denied; the probability of developing leads for witnesses who may be of assistance to the defense is decreased.

¹⁴⁰ R.C.M. 405(g)(1)(A).

¹⁴¹ [United States v. Ledbetter, 2 M.J. 37 \(C.M.A. 1976\)](#); R.C.M. 405(g)(1)(A).

¹⁴² R.C.M. 405(g)(1)(A). The Manual test adopts the basic test announced in *United States v. Ledbetter* but goes on to add "delay" and "effect on military operations" as factors to be weighed against the significance of the witness' testimony.

¹⁴³ *United States v. Ledbetter*.

¹⁴⁴ [United States v. Martinez, 12 M.J. 801 \(N.M.C.M.R. 1981\)](#) (The defense request that members of a vessel's crew be brought from South America to testify at an **Article 32** hearing in Charleston, South Carolina, was properly denied where the government did not plan to call the individuals as witnesses, and the defense wanted to question them regarding the character of the accused and the victim but was unable to do more than speculate as to the significance of their testimony.); [United States v. Thomas, 7 M.J. 655 \(A.C.M.R. 1979\)](#) (The defense request that a confidential informant be brought from the United States to testify at an **Article 32** hearing in Germany was properly denied where the government did not intend to call the informant as a witness, and the defense could only speculate that the informant's testimony might support a possible entrapment defense.).

¹⁴⁵ R.C.M. 405(g)(1)(A). Mil. R. Evid. 804(a) provides that a witness is unavailable when the witness.

require that the objection be made in writing.²⁴⁵ This requirement for prompt objection allows the government to cure obvious defects without unnecessary delay;²⁴⁶ however, the investigating officer is not required to act on,²⁴⁷ or even render a ruling on,²⁴⁸ the objection. If the objection raises a substantial question regarding the validity of the proceedings, the appointing authority should be notified immediately.²⁴⁹ Normally the investigating officer should discuss defense objections with the neutral legal advisor.²⁵⁰

All objections should be noted in the report of investigation even though the Manual only makes this mandatory when the objection relates to non-production of a defense-requested witness or evidence,²⁵¹ or when the defense counsel specifically requests that it be noted.²⁵²

Objections to defects discovered during the course of the investigation which are not raised in a timely manner are waived absent a showing of good cause.²⁵³

After the accused receives a copy of the report of investigation, the defense has only five days to object to the appointing authority about defects contained in the report.²⁵⁴ Objections not timely made are waived absent a showing of good cause.²⁵⁵ This provision will likely require some development of what constitutes "good cause" because the five-day time period begins with service of the report on the accused rather than service on the defense counsel.²⁵⁶ This provision places a heavy burden on defense counsel to preserve objections because the rule purports to require **[*89]** defense counsel to object "again" if objections made during the course of the investigation are not noted in the report of investigation.²⁵⁷

If objections to defects in the Article 32 investigation are preserved, the accused may be entitled to relief at trial by making a motion for appropriate relief prior to entry of the plea.²⁵⁸ Failure to make the motion prior to plea constitutes waiver of the objection absent a showing of good cause for relief from waiver.²⁵⁹

The Manual suggests that "even if the accused made a timely objection to the investigating officer's failure to produce a witness, a defense request for a deposition may be necessary to preserve the issue for later review."²⁶⁰

(1) is exempted by ruling of the military judge on the ground of privilege from testimony concerning the subject matter of the declarant's statement; or

(2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the military judge to do so; or

(3) testifies to a lack of memory of the subject matter of the declarant's statement; or

(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) is absent from the hearing and the proponent of the declarant's statement has been unable to procure the declarant's attendance . . . by process or other reasonable means; or

(6) is unavailable within the meaning of [UCMJ] Article 49(d)(2).

¹⁴⁶ R.C.M. 405(g)(2)(A).

¹⁴⁷ [United States v. Cruz, 5 M.J. 286, 288 n.4 \(C.M.A. 1978\)](#) ("Availability of the service person is not measured in terms of distance from the trial."); [Ledbetter, 2 M.J. at 43](#) ("In *United States v. Davis*, . . . we rejected the notion that a serviceman's availability to testify at trial could be measured solely in terms of miles. . . . That rationale is equally appropriate . . . [at the Article 32 investigation, even though dealing with a] statutory standard of confrontation."). See [United States v. Jones, 20 M.J. 919 \(N.M.C.M.R. 1985\)](#) (The investigating officer properly applied the *Ledbetter* balancing test in denying a defense request for production of his agents who investigated the case where the witnesses were 8000 miles away from the hearing site, the witnesses had a heavy workload, and the appointing authority elected not to fund travel for the witnesses.). See also [United States v. Cumberledge, 6 M.J. 203 \(C.M.A. 1979\)](#) (In dicta the court indicated that where TDY funds are available, time, distance, and expense were not very persuasive reasons to deny a defense request for production of the key prosecution witness at the Article 32 hearing.).

Although this requirement is not very well defined, either in the Manual or in case law, some courts have maintained that a request to depose the witness is necessary as a matter of timeliness.²⁶¹ This contemplated use of the deposition as a discovery and interviewing device (or to cure error committed by the **Article 32** investigating officer) is specifically authorized by the Manual²⁶² despite the fact that it clearly exceeds the permissible uses of the deposition sanctioned by federal courts.²⁶³

[*90] 3. *Standard for relief.*

Once the threshold requirement of a timely objection is satisfied, the court must then decide whether the alleged defect involves a substantial pretrial right of the accused, which is thus entitled to enforcement without any showing of benefit at trial, or whether the accused must demonstrate some specific prejudice to get relief.²⁶⁴ Analyzing cases in these terms, a direct result of the court's language in *Mickel*,²⁶⁵ is essential to understand the reported decisions in the area, but also presents practical problems. The courts never define what constitutes a "substantial pretrial right" and they continually blur the distinction between "prejudice at the **Article 32 investigation**" and "prejudice at trial."²⁶⁶ As a practical matter, the defense should get relief at trial (or on appeal) only if the defect is such that it denied the accused the right to discover evidence material to the charges, the right to confront adverse witnesses, the right to present matters which might affect the disposition of the case, or the right to a neutral recommendation as to disposition from the **Article 32** investigating officer.

The courts have never expressly defined the distinction between defects involving substantial pretrial rights and "other defects." But, on a case-by-case basis they have held that the accused was denied a substantial pretrial right when the **Article 32 investigation** was ordered by an officer who lacked authority to appoint one,²⁶⁷ when the accused was improperly denied representation at the **investigation** by counsel of choice,²⁶⁸ when the accused was denied the effective representation of **[*91]** counsel at the **investigation**,²⁶⁹ when the investigating officer failed to produce reasonably available key government witnesses,²⁷⁰ and when the accused was not mentally competent to understand the nature of the proceedings or to participate in his defense.²⁷¹ In each of these cases

¹⁴⁸ [Ledbetter, 2 M.J. at 44](#) (In applying the balancing test the substantial distance and expense involved in bringing the requested witness from Thailand to Florida was "diluted" by the fact that the witness had been transferred to Thailand only two weeks before the **Article 32 investigation**.)

¹⁴⁹ [United States v. Colter, 15 M.J. 1032 \(A.C.M.R. 1983\)](#). In *Colter* the defense requested the production of PVT Jackson, the suspected confidential informant, as a witness at the **Article 32 investigation**. PVT Jackson appeared at the hearing but refused to testify. The **Article 32** investigating officer, the appointing authority, and the general court-martial convening authority refused the defense request to order the witness to testify. The court ruled that absent a valid assertion of some privilege the accused was entitled to the compelled testimony of a reasonably available military witness. See generally Mil. R. Evid. 1101 (The evidentiary rules of privilege are applicable to **Article 32 investigations**.)

¹⁵⁰ R.C.M. 405(g)(2)(A).

¹⁵¹ R.C.M. 405(g)(2)(A); R.C.M. 906(b)(3). Disagreements between the investigating officer and the immediate commander of a requested witness can also be resolved in command channels. R.C.M. 405(g) analysis.

¹⁵² R.C.M. 405(g)(1)(A).

¹⁵³ R.C.M. 405(g)(2)(B) discussion. This principle has been generally accepted in prior Manuals and in case law. See, e.g., [United States v. Chuculate, 5 M.J. 143 \(C.M.A. 1978\)](#); MCM, 1951, para. 34d. But see [United States v. Roberts, 10 M.J. 308, 310 n.1, 311 n.3 \(C.M.A. 1981\)](#) where the court hinted that there may be some authority to support subpoena power at the **Article 32 investigation**. Citing the *Index and Legislative History, Uniform Code of Military Justice, Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services, 81st Cong., 1st Sess., 996-98*, the court opined that "the legislative hearings on **Article 32** provide some indication that the use of a subpoena at the pretrial **investigation** was contemplated in extraordinary situations." [Roberts, 10 M.J. at 311 n.3](#). Although the majority apparently saw the issue as being open, the better view was probably expressed by J. Cook in the concurring opinion: "I see no justification for the suggestion, in footnotes 1 and 3, that there is uncertainty in military law as to whether a subpoena may issue to compel a civilian witness to appear and testify at an **Article 32 investigation**." [Roberts, 10 M.J. at 316](#).

the accused was entitled to judicial enforcement of the right to a properly conducted **Article 32 investigation** without regard to whether it would eventually benefit the accused at trial. In fact, in *United States v. Saunders*,²⁷² the Army Court of Military Review actually found that there was no reasonable possibility that the accused had been prejudiced either at the **investigation** or at trial. The court called upon the Court of Military Appeals to adopt a "test for prejudice" standard in all cases involving defective **Article 32 investigations** except those which, like *Mickel*, involve a denial of the right to counsel.²⁷³

[*92] If the alleged defect in the pretrial **investigation** is objected to in a timely manner, but does not involve a substantial pretrial right, the court must determine whether the defect prejudiced the accused at trial.²⁷⁴ Defects which should be tested for prejudice fall into five categories: (1) minor/technical irregularities; (2) nonproduction of defense requested witnesses;²⁷⁵ (3) lack of impartiality of the investigating officer;²⁷⁶ (4) investigating officer's improper receipt of *ex parte* or nonneutral legal advice,²⁷⁷ and (5) consideration of improper evidence.²⁷⁸

The accused is not entitled to a perfect **Article 32 investigation**. Accordingly, the courts will look behind "minor irregularities" (such as the investigating officer's limitation of defense cross-examination on impeachment matters),²⁷⁹ and "technical defects" (such as the defense counsel's lack of certification under **Article 27(b)**)²⁸⁰ to see whether the defect prejudiced the accused at trial by affecting the convening authority's **[*93]** referral to general court-martial²⁸¹ or by hindering the accused's ability to conduct a defense.²⁸²

On at least two occasions the Court of Military Appeals has determined that the failure to produce the key government witness at the **Article 32 investigation** deprived the accused of a substantial pretrial right.²⁸³ The better view is that nonproduction should be tested for prejudice. Obviously the accused is prejudiced when the government denies the defense an opportunity to interview the key government witness prior to trial.²⁸⁴ On the other hand, as the Army and Navy-Marine Courts of Military Review have recognized, there is no good reason to reopen an **Article 32 investigation** if the witness' testimony would not affect the disposition of the case and the accused's "rights" to discovery and to cross-examine the witness under oath have been vindicated by granting the defense an opportunity to depose the witness prior to trial.²⁸⁵ This view is consistent with provisions in the 1984

¹⁵⁴ See, e.g., [Weston v. Dept of Housing & Urban Development, 724 F.2d 943 \(Fed. Cir. 1983\)](#) (A federal employee can be removed from his or her position for failure to cooperate in an internal agency **investigation** relating to matters which affect the efficiency of the agency. If the employee's testimony would tend to be incriminatory the testimony can still be compelled by granting the employee immunity from prosecution.)

¹⁵⁵ The U.S. military has no inherent authority to compel a foreign national to appear before an **Article 32** hearing being held overseas, however local status of forces agreements may provide a mechanism for compelling attendance through host nation procedures. See generally [United States v. Clements, 12 M.J. 842 \(A.C.M.R. 1982\)](#).

¹⁵⁶ R.C.M. 405(g)(2)(B) discussion.

¹⁵⁷ AR 27-10, para. 5-12. No civilian witness will be requested to appear at an **Article 32 investigation** until after approval by the GCM convening authority. The authority to approve the payment of transportation expenses and per diem may be delegated to the investigating officer or the GCM convening authority's SJA. Only the GCM convening authority can disapprove the payment of expenses to an otherwise reasonably available civilian witness.

¹⁵⁸ R.C.M. 405(g)(3) authorizes the payment of transportation expenses and a per diem allowance. Procedures to effect payment are to be prescribed by the Secretary of a Department. See, e.g., AR 27-10, para. 5-12; DOD Joint Travel Regulations, paras. C3054, C6000.

¹⁵⁹ UCMJ **art.** 47(a)(1). While it is clear that a civilian witness can be subpoenaed to attend a deposition proceeding pertaining to a court-martial case which has been referred to trial, it is less clear whether a civilian may be subpoenaed to provide a deposition for use at an **Article 32 investigation**. For a general discussion of the issue see [Roberts, 10 M.J. at 316](#) (Cook, J., concurring). R.C.M. 702 specifically provides that a witness may be deposed so that the deposition may be considered at the **Article 32 investigation**. A request for deposition may only be denied "for good cause." "Good cause" normally includes the fact that the witness will be available *for trial*, however the drafters contemplate the use of depositions when there has been an improper denial of a witness request at an **Article 32** hearing or when an essential witness is unavailable to appear at the **Article**

Manual which clearly contemplate the use of depositions to cure errors in the nonproduction of defense requested witnesses at the Article 32 investigation.²⁸⁶

When there is evidence that the Article 32 investigating officer may not have been "impartial" the courts will generally test for prejudice by looking at the way the investigation was actually conducted for indicia [*94] of impartiality (e.g., the thoroughness of the investigation and the reasonableness of the recommendations in light of the evidence).²⁸⁷

When the defense shows that the investigating officer received legal advice from someone performing a prosecution function, or received *ex parte* legal advice on substantive matters from a neutral legal advisor, the courts will apply a presumption of prejudice which the government must rebut by clear and convincing evidence.²⁸⁸ If there have been such conversations and the government witnesses are unable to document or recall what the substance of the conversations were the accused is entitled to a new Article 32 investigation.²⁸⁹

There are a number of cases which have held that a plea of guilty at trial waives all pretrial objections that do not amount to jurisdictional error or constitute a denial of due process.²⁹⁰ This waiver has been applied to defects in the Article 32 proceeding which otherwise would have [*95] constituted a deprivation of a substantial pretrial right.²⁹¹ While a guilty plea will clearly waive errors that might otherwise have affected findings of guilty as to the offenses covered by the plea, the plea should not constitute a waiver of objection to defects which might have affected the level of referral.²⁹²

E. REMEDY TO CURE DEFECTS

At trial the normal remedy available to cure a defective Article 32 investigation is a continuance to re-open the investigation.²⁹³ Because the Article 32 investigation is not jurisdictional, charges do not have to be re-referred after the corrective action is taken at the investigation.²⁹⁴ It is sufficient that the convening authority reaffirm the original referral.²⁹⁵

32 hearing. R.C.M. 702 discussion. *But see* R.C.M. 702(a) analysis (Depositions are intended for exceptional circumstances when necessary to preserve testimony and are not generally to be used as a discovery device.).

¹⁶⁰ *United States v. Taylor*, CM 832910 (N.M.C.M.R. 21 Dec. 83). In *Taylor* the defense requested that Mr. Flynn, a fibers expert, be produced to testify at the Article 32 investigation. The defense had not previously interviewed the fiber expert and did not articulate any specific reason why the expert's presence was necessary. The court refused to apply the *Ledbetter* balancing test for "reasonable availability" in reviewing the non-production of Mr. Flynn. Instead the court held that the defense had not met the threshold "foundational" requirements of *United States v. Vietor*, 10 M.J. 69 (C.M.A. 1980). In *Vietor* the admission of a laboratory report into evidence at trial did not give the accused the automatic right to the attendance of the person who performed the tests. Instead the defense counsel was required to show that the expert's testimony would reveal some "chink in the competence or credibility of the analyst, or cast doubt, in the slightest degree, on the reliability of the processes or the analysis or its results." *Vietor*, 10 M.J. 72. The Navy-Marine Court of Military Review acknowledged the "right to discovery" element of the Article 32 investigation but held that it was "not so broad as to subsume the *Vietor* foundational rule."

¹⁶¹ R.C.M. 405(g)(1)(B). Although the Jenck's Act is not expressly applicable to pretrial investigations (R.C.M. 914), the defense can use this provision to discover pretrial statements made by government witnesses.

¹⁶² R.C.M. 405(g)(2)(C). *But cf.* *United States v. Jackson*, 33 C.M.R. 844, 890 (A.F.B.R. 1963) ("We conclude, as a matter of fundamental fairness under the general concept of 'military due process' . . . that the rights accorded under the 'Jencks Statute' should be available to an accused during an Article 32 investigation and we so hold.").

¹⁶⁴ R.C.M. 405(g)(1)(B).

¹⁶⁵ R.C.M. 405(g)(2)(C).

¹⁶⁶ R.C.M. 405(g)(2)(C); R.C.M. 906(b)(3). Disagreement between the investigating officer and the custodian of the evidence can also be resolved in command channels. R.C.M. 405(g) analysis.

¹⁶⁷ R.C.M. 405(f)(7).

PART TWO -- THE **ARTICLE** 34 PRETRIAL ADVICEVII. GENERAL

A. STATUTORY REQUIREMENT

"Before directing the trial of any charge by general court-martial, the convening authority shall refer it to his staff judge advocate for consideration and advice." ²⁹⁶ The pretrial advice is a statutory prerequisite for trial by general court-martial but is not required for referral of charges to any inferior court-martial. ²⁹⁷

B. PURPOSE OF THE PRETRIAL ADVICE

The courts have been inconsistent in discussing the nature and purpose of the pretrial advice. On one end of the spectrum the pretrial advice has been called "a substantial pretrial right" ²⁹⁸ which protects the **[*96]** accused from being brought to trial on baseless charges and from having his or her case referred to an inappropriate level of court-martial in contravention of the policy that charges be disposed of at the lowest appropriate level. ²⁹⁹ On the other end of the spectrum, the pretrial advice has been labeled a "prosecutorial tool" ³⁰⁰ which merely affords the accused the "salutory" benefit of having the charges examined by someone with legal training. ³⁰¹

1. UCMJ art. 34 (1951).

The legislative **history** of the 1951 Code made it clear . . . that the purpose of the pretrial advice is to inform the convening authority concerning the circumstances of a case in such a manner that he personally will be able to make an informed decision whether there has been compliance with the other pretrial procedures; whether the case should be tried; and the type of tribunal to which the charges should be referred. ³⁰²

¹⁶⁸ R.C.M. 405(f)(12). Although the Manual does not specify what forms the accused's statement may take, the broad language used is probably intended to include all the traditional testimonial options, e.g., sworn statement, personal unsworn statement, and unsworn statement through counsel.

¹⁶⁹ See, e.g., [United States v. Stegar, 16 C.M.A. 569, 37 C.M.R. 189 \(1967\)](#); [United States v. Tackett, 16 C.M.A. 226, 36 C.M.R. 382 \(1966\)](#); [United States v. Suttles, 15 M.J. 972 \(A.C.M.R. 1983\)](#); [United States v. Langford, 15 M.J. 1090 \(A.C.M.R. 1983\)](#).

¹⁷⁰ [United States v. Fields, 15 M.J. 34 \(C.M.A. 1983\)](#); [United States v. Reiner, 15 M.J. 38 \(C.M.A. 1983\)](#); [United States v. Fitzpatrick, 14 M.J. 394 \(C.M.A. 1983\)](#). These three cases all deal with a similar scenario: the accused remained silent at the **Article 32 investigation**; all (or substantially all) of the government's evidence was presented at the **Article 32** hearing; and, at trial the accused testified to an exculpatory version of the facts which to the maximum extent possible was consistent with, or fit "between the cracks" of, the government evidence. On cross-examination of the accused the trial counsel elicited testimony that the accused had an opportunity to hear all of the government's case at the **Article 32 investigation**, that since the pretrial **investigation** the accused had a long time to prepare a defense, and that the in-court testimony at trial was the first time the trial counsel had heard the accused's version of the facts. The defense argued that this cross-examination amounted to an impermissible comment on the accused's silence at the **Article 32 investigation**. The Court of Military Appeals disagreed, holding that the totality of the cross-examination was not designed to highlight the accused's exercise of his right to remain silent. Instead, the trial counsel was properly showing that the accused had the motive and the opportunity to fabricate a version of the facts consistent with the government evidence.

¹⁷¹ See, e.g., [United States v. Samuels, 10 C.M.A. 206, 27 C.M.R. 280 \(1959\)](#) (Comparing the **Article 32** hearing to its federal counterpart, the federal preliminary examination, the court endorsed the federal position that "proceedings in a preliminary examination are not expected nor required to be as regular and formal as in a final trial.").

¹⁷² Mil. R. Evid. 1101(d).

¹⁷³ The **Article 32 investigation** was originally an *ex parte* proceeding with no government representative present. Now, R.C.M. 405(d)(3) specifically provides for the appointment of counsel to represent the government.

The role of the staff judge advocate (SJA) was strictly one of a "legal advisor." The courts required that the pretrial advice contain all the facts which might have a substantial effect on the convening authority's decision to refer the case to trial³⁰³ or which might have a substantial effect on the convening authority's decision as to level of court-martial.³⁰⁴ In many respects the SJA's role was a matter of efficiency, saving the convening authority "the duty of going through a record with a fine tooth comb."³⁰⁵ All of the SJA's legal conclusions and recommendations contained in the pretrial advice were purely advisory.³⁰⁶ The convening authority exercised unfettered prosecutorial discretion.

[*97] 2. UCMJ art. 34 (1983).

In response to criticism that the pretrial advice had become an administrative burden on SJA's and commanders,³⁰⁷ Congress provided for a streamlined pretrial advice in the Military Justice Act of 1983.³⁰⁸ Rather than have commanders make legal determinations about jurisdiction and the legal sufficiency of the charges, the new **Article 34** requires that those determinations be made by the SJA.³⁰⁹

A direct consequence of this change is that some prosecutorial discretion is taken away from the convening authority. If the SJA concludes that there is no jurisdiction to try the accused by court-martial,³¹⁰ that the form of a charge is legally deficient,³¹¹ or that a charge is not warranted by the evidence in the **Article 32** report of **investigation**,³¹² then the convening authority is precluded from referring that charge to a general court-martial.³¹³

An indirect consequence of the 1983 changes to **Article 34** may be that the pretrial advice has become less of a "prosecutorial tool" and become more "a substantial pretrial right of the accused." Correspondingly, the role of the SJA in rendering a pretrial advice may be less like a district attorney presenting a complaint to a grand jury for action³¹⁴ and more **[*98]** like a quasi-judicial magistrate making a probable cause determination that protects the accused from being prosecuted on baseless charges.³¹⁵ Changing the fundamental nature of the SJA's pretrial

¹⁷⁴ R.C.M. 405(c) (so long as the procedural guidance is not inconsistent with the Rules for Courts-Martial).

¹⁷⁵ See generally DA Pam 27-17.

¹⁷⁶ DA Pam 27-17, para. 2-4b.

¹⁷⁷ *Id.*

¹⁷⁸ See DA Pam 27-17, app. F, for suggestions regarding the examination of witnesses at the **Article 32** hearing.

¹⁷⁹ UCMJ art. 32(b); R.C.M. 405(f)(1). See also DA Pam 27-17, app. B, for a sample notification letter informing the accused of rights afforded at the **Article 32 investigation**; DA Pam 27-17, app. A, for a boilerplate procedural guide to be used to advise the accused of rights at the **Article 32** hearing; and DD Form 457 (Aug. 1984).

¹⁸⁰ R.C.M. 405(f)(2).

¹⁸¹ R.C.M. 405(f)(5).

¹⁸² R.C.M. 405(f)(6).

¹⁸³ UCMJ art. 32(b); R.C.M. 405(f)(7).

¹⁸⁴ R.C.M. 405(j)(1); DA Pam 27-17, para. 2-1.

¹⁸⁵ DA Pam 27-17, para. 1-2a.

¹⁸⁶ R.C.M. 405(c); DA Pam 27-17, para. 2-1.

¹⁸⁷ UCMJ art. 33.

advice could arguably have an impact on the standard of impartiality required of the SJA,³¹⁶ the role of the trial counsel in pretrial processing,³¹⁷ and the treatment of defects in the pretrial advice.³¹⁸

VIII. CONTENTS

A. MANDATORY CONTENTS

The Military Justice Act of 1983 contemplates that a legally sufficient pretrial advice need contain only the SJA's legal conclusions regarding jurisdiction, the form of the charges, and the sufficiency of the evidence at the **Article 32 investigation**, and the SJA's recommended disposition of the case.³¹⁹ This is in sharp contrast to prior case law which required that the pretrial advice highlight any matter which might have a substantial effect on the convening authority's referral decision.³²⁰ It remains to be seen how the courts deal with the new "bare-bones" pretrial advice.

While the SJA is required to decide whether the charge is "warranted by the evidence indicated in the report of **investigation**,"³²¹ neither the UCMJ nor the Manual sets out an express standard against which the evidence must be weighed. The best view is that the charges must be supported by that "quantum of evidence . . . which would convince a reasonable, prudent person there is probable cause to believe a crime was committed and the accused committed it."³²²

[*99] B. OPTIONAL CONTENTS

The legislative **history** to **Article 34**³²³ and the non-binding discussion of the Manual³²⁴ suggest that, when appropriate, the pretrial advice should include such things as "a brief summary of the evidence; discussion of significant aggravating, extenuating, or mitigating factors; and any previous recommendations by others who have forwarded the charges."³²⁵ The Manual further suggests that failure to include these items can never constitute

¹⁸⁸ No case law specifically excludes time spent conducting the **Article 32 investigation** from government accountability under the "90 day rule" of *United States v. Burton*, 21 C.M.A. 112, 44 C.M.R. 166 (1971). The 1984 Manual provides for a new regulatory "120 day rule" and specifically purports to exclude from government accountability "any period of delay resulting from a delay in the **Article 32** hearing." R.C.M. 707(c)(5).

¹⁸⁹ R.C.M. 405(j)(2)(F); DA Pam 27-17, para. 2-1.

¹⁹⁰ R.C.M. 405(f)(3).

¹⁹¹ R.C.M. 405(h)(4)(A).

¹⁹² R.C.M. 405(h)(4)(B).

¹⁹³ R.C.M. 405(f)(4).

¹⁹⁴ *United States v. Nichols*, 8 C.M.A. 119, 125, 23 C.M.R. 343, 349 (1957) ("[T]he accused's right to a civilian attorney of his choice cannot be limited by a service-imposed obligation to obtain clearance for access to service classified matter.").

¹⁹⁵ R.C.M. 405(h)(3) discussion.

¹⁹⁶ R.C.M. 405(h)(3).

¹⁹⁷ By its terms, the sixth amendment guarantee of a right to a "public trial" only applies to "trials." Recent Supreme Court decisions have expanded the right beyond trial on the merits to voir dire proceedings (*Press-Enterprise Co. v. Superior Court*, 104 S. Ct. 819 (1984)) and pretrial suppression hearings (*Waller v. Georgia*, 104 S. Ct. 2210 (1984)). In *Waller* the Court supported this extension by pointing out that suppression hearings often resemble a bench trial with witnesses giving sworn testimony and counsel arguing their positions. The same analogy might be applicable to the **Article 32 investigation**. But see *MacDonald v. Hodson*, 19 C.M.A. 582, 42 C.M.R. 194 (1970). In *MacDonald*, the accused, Captain Jeffrey MacDonald, sought a writ of injunction and temporary restraining order enjoining the **Article 32** investigating officer and the appointing authority from closing his pretrial **investigation** to the public. The court denied the petition holding that the **Article 32 investigation** is not a "trial" within the meaning of the sixth amendment. It should be noted, however, that this decision predates recent Supreme

error,³²⁶ presumably because the case file which accompanies the pretrial advice contains them should the convening authority be interested.

What matters are actually put into the pretrial advice is left to local practice -- influenced primarily by the predilections of the convening authority. Any matters put into the pretrial advice, whether required or not, must be accurate.³²⁷

C. FORM OF THE ADVICE

Neither the UCMJ nor the Manual requires that the pretrial advice be in any particular form other than the requirement that the advice "shall include a written and signed statement" containing the mandatory conclusions and recommendation discussed above.³²⁸ So long as this minimum requirement is met, additional matters can arguably be presented for the convening authority's consideration orally³²⁹ or in the form of an unsigned back-up memorandum.

The Manual does require that a "copy of the advice of the staff judge advocate shall be provided to the defense if charges are referred to trial by general court-martial."³³⁰ Arguably this provision would require the [*100] SJA to disclose oral communications with the convening authority which are provided to assist the convening authority in making a referral decision.³³¹

IX. PREPARATION OF THE PRETRIAL ADVICE

The staff judge advocate need not personally draft the pretrial advice but the final version which is presented to the convening authority must reflect the independent professional judgment of the staff judge advocate.³³²

Court cases in the area and that the court in *MacDonald* relied in part on the fact that at the time the **Article 32 investigation** was an *ex parte* and not an adversarial proceeding.

¹⁹⁸ See, e.g., R.C.M. 405(h)(3) discussion ("Closure may encourage complete testimony by an embarrassed or timid witness."); R.C.M. 405(h) analysis which suggests looking to R.C.M. 806 for examples of some reasons why a pretrial **investigation** hearing might be closed.

¹⁹⁹ Even if the **Article 32 investigation** were held to be a "trial" within the meaning of the sixth amendment right to a public trial, the right to an open proceeding is not absolute. The right to a public trial may give way to overriding concerns such as ensuring that the accused with have a fair trial or protecting the government from disclosure of sensitive information. If the **Article 32 investigation** is a "trial" closure is still permissible under *Waller v. Georgia* if there is an overriding interest likely to be prejudiced, closure is tailored to a specific harm; the **Article 32** investigating officer considers reasonable alternatives, and the **Article 32** investigating officer articulates the basis for closure "on the record."

²⁰⁰ UCMJ **art. 32**(b).

²⁰¹ R.C.M. 405(j)(2).

²⁰² R.C.M. 405(j)(2) discussion; DA Pam 27-17, para. 4-1.

²⁰³ R.C.M. 405(j)(2)(B).

²⁰⁴ [United States v. Allen, 5 C.M.A. 626, 18 C.M.R. 250 \(1955\)](#). In *Allen* the defense challenged the **Article 32** report of **investigation** based on the omission of some portions of witness testimony. Interpreting the **Article 32**(b) requirement that the "substance" of the testimony be included in the report, the court held that it was "manifest that this phrasing authorizes an impartial condensation of the information obtained from witnesses during this stage of the proceedings. . . . [I]t was not the Congressional intentment that the summaries of testimony taken during a proceeding held in conformity to **Article 32** must of necessity reflect every clue which might possess meaning for a Sherlock Holmes." *Id.* at 255. See also [United States v. Matthews, 13 M.J. 501 \(A.C.M.R. 1982\)](#) (Where retained civilian defense counsel voluntarily elected not to attend the **Article 32** hearing and the accused was instead represented by detailed military counsel, the accused was not denied any sixth

If the advice remains a purely prosecutorial tool, as suggested in *United States v. Hardin*,³³³ it may be acceptable for the trial counsel to draft the preliminary pretrial advice although a safer approach would be to have a neutral judge advocate perform that function.³³⁴

X. TREATMENT OF DEFECTS

Unlike the **Article 32** pretrial *investigation*,³³⁵ the pretrial advice generally has not been held to encompass substantial pretrial rights which are judicially enforceable without any showing by the accused of benefit at trial.³³⁶ By making a timely motion for appropriate relief³³⁷ the accused may be entitled to a continuance³³⁸ and a new pretrial advice if the **[*101]** existing advice is so "incomplete, ill-considered, or misleading"³³⁹ as to a material matter that the convening authority might have made an erroneous referral.³⁴⁰

Objections to defects are waived if they are not raised prior to the entry of a plea³⁴¹ or if the accused pleads guilty.³⁴²

amendment right to effective assistance of counsel when the government failed to order a verbatim transcript of the **Article 32 investigation**); *United States v. Frederick*, 7 M.J. 791 (N.C.M.R. 1979).

²⁰⁵ R.C.M. 405(c).

²⁰⁶ See generally Mil. R. Evid. 804(b)(1).

²⁰⁷ R.C.M. 405(j)(2)(B).

²⁰⁸ R.C.M. 405(h)(1)(A) discussion. See generally *United States v. Thomas*, 7 M.J. 655 (A.C.M.R. 1979) (Jencks Act, 18 U.S.C. § 3500 (1982) is applicable to testimony given at an **Article 32** investigative hearing); R.C.M. 914 (codification of Jencks Act). In *Thomas* a court reporter made tape recordings of the witnesses' testimony at the **Article 32** hearing to assist the reporter in providing the investigating officer a summarized transcription. The trial defense counsel specifically requested that the tapes be preserved until final disposition of the charges. Due to a breakdown in communications between the investigating officer and the court reporter, the tapes were recorded-over. When the government witnesses testified at trial, the defense counsel requested

production of the tapes pursuant to the Jencks Act and, in the alternative, moved that the government witness' testimony be stricken from the record (the prescribed statutory remedy for Jencks Act violations). The court held that although the Jencks Act applied to tapes of **Article 32** testimony there was no prejudice in this case and the testimony need not be stricken. In finding a lack of prejudice, the court noted the ample opportunity defense counsel had had to observe, listen to, and cross-examine the witnesses, and pointed out that the testimonial summaries contained in the **Article 32** report of **investigation** had only slight variances from the tape recordings. See also [United States v. Patterson, 10 M.J. 599 \(A.F.C.M.R. 1980\)](#) (In evaluating whether the negligent destruction of **Article 32** tapes prejudiced the accused or was harmless error the court should look at whether the summarized statements made by the investigating officer substantially incorporated the testimony of the witness.); [United States v. Scott, 6 M.J. 547 \(A.F.C.M.R. 1977\)](#) (The Jencks Act was applied to tape recordings of **Article 32** testimony and the court held that the testimony of government witnesses should have been stricken at trial where: (1) the government had a duty under applicable Air Force regulations to preserve the tapes; (2) the government could not claim any "good faith" loss because of the negligence of government officials in handling the tapes; and (3) the error was not harmless because the summaries of the witnesses' testimony contained in the report of **investigation** were inadequate to use as impeachment vehicles.). Cf. [United States v. McDaniel, 17 M.J. 553 \(A.C.M.R. 1983\)](#) (No Jencks Act issue was raised where the legal clerk attempted to record testimony at the **Article 32 investigation** but produced only blank tapes due to a lack of familiarity with the equipment. The blank tapes did not constitute a "statement" within the meaning of the Jencks Act. The sketchy written notes taken by the legal clerk were also not "statements" where they were not substantially verbatim and they were never signed or adopted by the witnesses.).

²⁰⁹ [United States v. Milan, 16 M.J. 730 \(A.F.C.M.R. 1983\)](#); [United States v. Svoboda, 12 M.J. 866 \(A.F.C.M.R. 1982\)](#); [United States v. Rowe, 8 M.J. 542 \(A.F.C.M.R. 1979\)](#).

²¹⁰ R.C.M. 405(h)(1) discussion. See also [United States v. Goda, 13 M.J. 893 \(N.M.C.M.R. 1982\)](#) (Manual provision [in 1969 MCM] providing that the summarized testimony should be adopted by the witness under oath is not mandatory, but rather, is hortatory in nature.).

²¹¹ R.C.M. 405(j)(3).

²¹² See *supra* notes 5, 6. See also [United States v. Schaffer, 12 M.J. 425, 530 \(C.M.A. 1982\)](#) (Fletcher, J., concurring) ("An **Article 32 investigation** is akin to a grand jury indictment or a preliminary examination, not a brother but a cousin.").

²¹³ See, e.g., [Henry v. Hodges, 76 F. Supp. 968 \(S.D.N.Y. 1948\)](#); [Anthony v. Hunter, 71 F. Supp. 823 \(D. Kan. 1947\)](#); [Hicks v. Hiatt, 64 F. Supp. 238 \(M.D. Pa. 1946\)](#).

²¹⁴ See, e.g., [Henry v. Hodges](#) (jurisdictional error for military not to provide the accused a "thorough and impartial" **investigation** in accordance with **Article** of War 70 when the accuser in the case was also appointed as the investigating officer).

²¹⁵ See, e.g., [Anthony v. Hunter, 71 F. Supp. at 831](#) (The court found error in a general court-martial conviction because the accused was not afforded the opportunity to cross-examine available witnesses at the pretrial **investigation** as guaranteed by **Article** of War 70. In ordering the accused's release from detention the court held that "whether failure to do the things required be construed as a defect precluding the acquiring of jurisdiction or whether the failure be held to deprive the accused of due process contemplated by organic law, the result is the same."); [Hicks v. Hiatt, 64 F. Supp. at 249](#) (The accused was denied due process of law when the investigating officer failed to develop, or allow the defense to develop, testimony concerning the alleged rape victim's bad moral character.). But see [Waide v. Overlade, 164 F.2d 722 \(7th Cir. 1947\)](#) (Alleged relaxations of pretrial **investigation** requirements were not of a nature to seriously impair any of the accused's fundamental constitutional rights.).

²¹⁶ [Humphrey v. Smith, 336 U.S. 695, 700 \(1949\)](#) ("We hold that a failure to conduct pretrial **investigations** as required by **Article** 70 does not deprive general courts-martial of jurisdiction so as to empower courts in habeas corpus proceedings to invalidate court-martial judgments.").

²¹⁷ UCMJ **art. 32(d)**. See generally *Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong. 1st Sess. 998 (1949); *Hearings on S. 857 Before the Senate Comm. on Armed Services*, 81st Cong., 1st Sess. 170 (1949).

²¹⁸ See, e.g., [United States v. Payne, 3 M.J. 354, 355 n.5 \(C.M.A. 1977\)](#) ("[I]t has long been recognized that the **investigation** under **Article 32** is judicial in nature. . . . [C]learly for that premise to have viability, the investigating officer must be viewed as a

judicial officer, and function accordingly."); [United States v. Samuels, 10 C.M.A. 206, 27 C.M.R. 280, 286 \(1959\)](#) ("It is judicial in nature."); [United States v. Nichols, 8 C.M.A. 119, 124, 23 C.M.R. 343, 348 \(1957\)](#) ("Its judicial character is made manifest by the fact that testimony taken at the hearing can be used at the trial if the witness becomes unavailable.").

219 [Nichols, 8 C.M.A. at 124, 23 C.M.R. at 348.](#)

220 *Id.*

221 See, e.g., [United States v. Mickel, 6 C.M.A. 324, 26 C.M.R. 104 \(1958\).](#)

222 UCMJ [art. 32\(c\)](#); R.C.M. 405(b). See generally [United States v. Gandy, 9 C.M.A. 355, 26 C.M.R. 135 \(1958\)](#) (commander's board of **investigation** appointed to investigate the theft of clothing from the ship's clothing sales store satisfied the requirements of [Article 32\(c\)](#)).

223 UCMJ [art. 32\(c\)](#); R.C.M. 405(b).

224 See, e.g., [United States v. Holstrom, 3 C.M.R. 910 \(A.F.B.R. 1967\)](#) (The fact that the **investigation** officer of the prior **investigation** became the accuser for the subsequent charges is not by itself error.); [United States v. Lane, 34 C.M.R. 744 \(C.G.B.R. 1964\)](#) (But if the investigating officer prefers the additional charges and thereby becomes the accuser he is disqualified from presiding over any additional sessions of the **investigation** that may be demanded by the accused.).

225 R.C.M. 405(k).

226 [United States v. Schaffer, 12 M.J. 425 \(C.M.A. 1982\)](#); R.C.M. 705(c)(2)(E). In *Schaffer* the court held that waiver of the **Article 32 investigation** did not violate public policy where the accused proposed waiver as an inducement for a beneficial pretrial agreement. The court did not address the validity of waiver which originated from the government as a precondition plea negotiations. R.C.M. 705(d) only requires that the offer to plead guilty must originate with the accused. Once the defense initiated negotiations the government is free to propose terms.

227 R.C.M. 705(c)(1)(A).

228 R.C.M. 405(a) discussion (emphasis supplied).

229 UCMJ [art. 32\(d\)](#).

230 [United States v. Allen, 5 C.M.A. 626, 633, 18 C.M.R. 250, 257 \(1955\)](#), quoting testimony of Mr. Larkin at *Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong., 1st Sess. 998 (1949).

231 See, e.g., [United States v. Worden, 17 C.M.A. 486, 38 C.M.R. 284 \(1968\)](#) (The defense motion to dismiss charges because of a defective **Article 32 investigation** was treated as a motion for appropriate relief since that is the real basis for relief and counsels misdesignation of the motion is not fatal.).

232 R.C.M. 906(b)(3) discussion.

233 [United States v. Allen, 5 C.M.A. 626, 18 C.M.R. 250 \(1955\)](#); [United States v. Rhoden, 1 C.M.A. 193, 2 C.M.R. 99 \(1952\).](#)

234 [Mickel, 9 C.M.A. at 327, 36 C.M.R. at 107](#) (emphasis in original). In *Mickel* the accused was represented at the **Article 32 investigation** by a counsel who was not certified under the provisions of [Article 27\(b\)](#). The accused did not object to this defect until after trial on the merits. The court held that although the accused was excused from making a timely objection (because at the time the accused could not have fully understood his rights to qualified counsel), no relief should be granted unless there was a showing that the pretrial error prejudiced him at trial.

235 R.C.M. 405(a).

236 R.C.M. 906.

237 R.C.M. 905(b)(1) requires objections to nonjurisdictional defects in the pretrial **investigation** of charges to be made prior to the entry of plea at trial.

238 R.C.M. 906(b)(3) (correction of defects in the **Article 32 investigation** is a proper ground for appropriate relief).

²³⁹ See generally R.C.M. 405(h)(2) and (j)(4).

²⁴⁰ R.C.M. 906(a).

²⁴¹ [United States v. Mickel, 9 C.M.A. 324, 26 C.M.R. 104 \(1958\)](#).

²⁴² [United States v. Persinger, 37 C.M.R. 631 \(A.B.R. 1966\)](#). In *Persinger* the accused voluntarily waived representation by counsel. The **investigation** consisted only of the investigating officer's consideration of military police reports and an accusatory letter from an Assistant U.S. Attorney. Despite the absence of any defense objection at trial, the Army Board of Review reversed the accused's conviction because of this less than token compliance with **Article 32**, holding that substantial departures from fundamental pretrial procedures require reversal without "nice calculations as to the amount of prejudice resulting from the error."

²⁴³ See, e.g., [United States v. Chuculate, 5 M.J. 143 \(C.M.A. 1978\)](#) (the investigating officer's denial of the defense request to produce two civilian witnesses deprived the accused of a substantial pretrial right but, since defense made no effort to depose the witnesses, the defect was not raised in a timely manner and the issue was waived.). For examples of other defects which were waived by the defense's failure to make a motion for appropriate relief at trial, see [United States v. Donaldson, 23 C.M.A. 293, 49 C.M.R. 542 \(1975\)](#) (two months after the **Article 32 investigation** was completed on the original charges, additional charges were preferred and referred to the same trial without re-opening the pretrial **investigation**); [United States v. McCormick, 3 C.M.A. 361, 12 C.M.R. 117 \(1953\)](#) (the investigating officer failed to inquire into one of the charges); [United States v. Lassiter, 11 C.M.A. 89, 28 C.M.R. 313 \(1950\)](#) (the investigating officer denied a defense request for the presence of a witness and instead considered the witness' unsworn statement); [United States v. Tatum, 17 M.J. 757 \(C.G.C.M.R. 1984\)](#) (investigating officer engaged in *ex parte* discussions with government counsel).

²⁴⁴ R.C.M. 405(h)(2). This standard has some obvious enforcement problems. While it will be obvious when some defects were discovered, other defects will only be capable of being analyzed in terms of when they "reasonably should have been discovered."

²⁴⁵ *Id.*

²⁴⁶ R.C.M. 405(h)(2) analysis.

²⁴⁷ *Id.* discussion.

²⁴⁸ R.C.M. 405(h)(2).

²⁴⁹ *Id.* discussion.

²⁵⁰ These discussions cannot be held *ex parte* if they involve substantive matters.

²⁵¹ R.C.M. 405(g)(2)(D) (The investigating officer shall include a statement detailing the reasons why the witness or evidence was determined to be unavailable.).

²⁵² R.C.M. 405(h)(2).

²⁵³ R.C.M. 405(k).

²⁵⁴ R.C.M. 405(j)(4). Since there is no qualification placed on the time limit, this should be interpreted to mean five calendar days.

²⁵⁵ R.C.M. 405(k).

²⁵⁶ Are objections waived when the defense counsel is unavailable for consultation during the five-day period? When the accused is not permitted to consult with counsel? When the accused negligently fails to consult with counsel? When the accused loses the report of **investigation**?

²⁵⁷ R.C.M. 405(k) discussion. "If the report fails to include reference to objections which were made under subsection (h)(2) of this rule, failure to object to the report will constitute waiver of such objections in the absence of good cause for relief from waiver." It is unclear whether this was meant to apply to all objections made during the course of the **investigation** or only to objections which the defense requested be noted in the report of **investigation**.

²⁵⁸ R.C.M. 905(b)(1).

²⁵⁹ R.C.M. 905(e).

²⁶⁰ R.C.M. 405(k) discussion.

²⁶¹ [United States v. Chuculate, 5 M.J. 143 \(C.M.A. 1978\)](#). In *Chuculate* the defense requested the production of two civilian witnesses, one of whom was the victim of the charged offenses, at the **Article 32 investigation**. The witnesses were invited to attend the **investigation** but refused. Instead of deciding the case based solely upon the fact that the witnesses were not "reasonably available," the court decided that the refusal of the civilians to attend did not *eo ipso* nullify the defense right to cross-examine them, and the court specifically held that the accused had been deprived of a substantial pretrial right. *Id. at 144*. The court nonetheless denied the defense motion to re-open the **Article 32 investigation** because the defense had failed to timely urge the accused's substantial right -- in this instance, the opportunity to depose in lieu of cross-examination at the **Article 32 investigation** -- with no adverse effect at trial. See also [United States v. Matthews, 15 M.J. 622 \(N.M.C.M.R. 1982\)](#) (When the defense declined the military trial judge's offer to order a deposition of a witness the defense alleged was improperly denied at the pretrial **investigation**, they waived further litigation of the issue because they failed to timely urge the accused's substantial pretrial rights.); [United States v. Stratton, 12 M.J. 998 \(A.F.C.M.R. 1982\)](#).

²⁶² R.C.M. 702(c)(3)(A) discussion provides:

The fact that the witness is or will be available for trial is good cause for denial [of the request for deposition] in the absence of unusual circumstances, such as improper denial of a witness request at an **Article 32** hearing, [or] unavailability of an essential witness at an **Article 32** hearing

²⁶³ See generally R.C.M. 702(a) analysis (where the drafters recognize that under federal law the deposition is properly used only to preserve the testimony of witnesses likely to be unavailable at trial).

²⁶⁴ [United States v. Mickel, 6 C.M.A. 324, 26 C.M.R. 104 \(1958\)](#).

²⁶⁵ See *supra* note 234 and accompanying text.

²⁶⁶ See, e.g., [United States v. Mickel](#). In *Mickel* the accused was excused from making a timely objection to his representation at the pretrial **investigation** by a counsel who was not qualified under UCMJ **art.** 27(b). When the court evaluated this defect for "prejudice to the accused," they considered both the fact that counsel at the **Article 32 investigation** did a good job and the fact that nothing which occurred at the pretrial **investigation** was used against the accused at trial.

²⁶⁷ [United States v. Donaldson, 23 C.M.A. 293, 49 C.M.R. 542 \(1975\)](#) (The pretrial **investigation** was ordered by an officer-in-charge who exercised no court-martial jurisdiction over the accused.).

²⁶⁸ [United States v. Maness, 48 C.M.R. 512 \(C.M.A. 1974\)](#). In *Maness* the accused's retained civilian defense counsel was denied an opportunity to be present at the **Article 32** hearing because the investigating officer arbitrarily denied a reasonable defense request for postponement. The court held that it was "well settled that . . . improper exclusion of civilian counsel denies the accused a substantial right." *Id. at 518*.

²⁶⁹ [United States v. Worden, 17 C.M.A. 486, 38 C.M.R. 284 \(1968\)](#); [United States v. Porter, 1 M.J. 506 \(A.F.C.M.R. 1975\)](#). In both cases the accused's defense counsel was denied an opportunity to interview witnesses and prepare a defense case prior to the pretrial **investigation**. The courts held that under the circumstances the defense counsel was unable to prepare cross-examination and the accused was denied effective representation of counsel. When the accused is denied the effective assistance of counsel at the pretrial **investigation**, the court "will not indulge in nice calculations as to prejudice." [Worden, 17 C.M.A. at 489, 38 C.M.R. at 287](#).

But see [United States v. Davis, 20 M.J. 61 \(C.M.A. 1985\)](#) (The court refused to reverse the accused's conviction even though he had been ineffectively represented at the **Article 32 investigation**. Examining for prejudice the court concluded that there was nothing more that any other counsel could have done at the **Article 32** hearing or at trial.).

²⁷⁰ [United States v. Ledbetter, 2 M.J. 37 \(C.M.A. 1976\)](#); [United States v. Chestnut, 2 M.J. 84 \(C.M.A. 1976\)](#). In both cases the defense was forced to proceed to trial without interviewing the key government witness under oath because the investigating officer failed to properly assess the reasonable availability of the witness to testify at the **Article 32 investigation**. The court in

Chestnut succinctly reviewed the standard applicable to this type of defect saying, "This Court once again must emphasize that an accused is entitled to the enforcement of his pretrial rights without regard to whether such enforcement will benefit him at trial. Thus, Government arguments of 'if error, no prejudice' cannot be persuasive." [Chestnut, 2 M.J. at 85 n.4](#). But see [United States v. Teeter, 12 M.J. 716 \(A.C.M.R. 1981\)](#) and [United States v. Martinez, 12 M.J. 801 \(N.M.C.M.R. 1981\)](#) where the courts went on to analyze whether the accused was prejudiced by the government's failure to provide a defense requested witness at the **Article 32 investigation**.

²⁷¹ [United States v. Saunders, 11 M.J. 912 \(A.C.M.R. 1981\)](#).

²⁷² *Id.*

²⁷³ [Saunders, 11 M.J. at 915 n.2](#).

We respectfully request the Court of Military Appeals to reexamine its position . . . to the effect that an accused is entitled to the enforcement of a pretrial right without regard to whether such enforcement will benefit him at trial. The rule announced in *Mickel* . . . involved the denial of a right to counsel. . . . A violation of the right to counsel is of such magnitude that it can never be harmless. . . . We believe the rule in *Mickel* should be limited to the denial of the right to counsel.

It is interesting to note that the court in *Saunders* decided they could not test for prejudice because of *Mickel* when the court in *Mickel* actually denied the accused any relief by applying a prejudice test.

From one who is not aware of the error until after trial, we can except no less than a showing that the pretrial error prejudiced him at the trial. Here, the board of review concluded that the accused "could not" have fully understood his rights to qualified counsel at the pretrial **investigation**, but it did not inquire whether the failure to provide such counsel prejudiced him at the trial. In the absence of such prejudice, the pretrial error did not contaminate the proceedings in which the accused's guilt was actually determined.

[Mickel, 6 C.M.A. at 327, 328, 26 C.M.R. at 107, 108](#).

²⁷⁴ See *supra* note 234 and accompanying text.

²⁷⁵ For a discussion of the accused's right to have reasonably available witnesses produced at the pretrial **investigation** see *supra* notes 138-160 and accompanying text.

²⁷⁶ For a discussion of what constitutes impartiality see *supra* section III.

²⁷⁷ For a discussion of the investigating officer's obligation to perform duties in a quasi-judicial manner see *supra* notes 74-96 and accompanying text.

²⁷⁸ [United States v. Martel, 19 M.J. 917 \(A.C.M.R. 1985\)](#). In *Martel* the investigating officer gave *ex parte* consideration to police reports, a crime scene visit, and a discussion with a potential witness. Because of the difficulty in demonstrating prejudice from *ex parte* actions, the court applied a presumption of prejudice which the government was required to rebut by clear and convincing evidence. In *Martel* the investigating officer also improperly considered testimony and witness statements which should have been excluded by the marital privilege, Mil. R. Evid. 504(b). Because this information was presented at the hearing in the presence of defense counsel, the court did not apply any presumptions and instead put the burden on the defense to show specific prejudice.

²⁷⁹ [United States v. Harris, 2 M.J. 1089 \(A.C.M.R. 1977\)](#). In *Harris* the investigating officer denied the defense counsel for Harris (a black soldier) the opportunity to cross-examine the victim (a white soldier) about his racial biases and prejudices.

²⁸⁰ *United States v. Mickel*.

²⁸¹ In *Harris* the court considered the investigating officer's testimony that even if the victim had admitted racial bias it would not have influenced his recommendation as to disposition and the court concluded that there was "no reason to believe that the convening authority would have disposed of this case differently." [Harris, 2 M.J. at 1091](#).

²⁸² In *Harris* the accused was permitted to fully attack the witness' credibility at trial and the evidence of the accused's guilt was compelling. [Harris, 2 M.J. at 1091](#). In *Mickel* the court noted that the accused's counsel did a good job at the **Article 32** hearing,

that nothing which occurred at the pretrial **investigation** was later used against the accused at trial, and that, in fact, the defense used evidence developed at the **Article 32 investigation** to impeach government witnesses at trial. [Mickel, 26 C.M.R. at 107.](#)

²⁸³ [United States v. Ledbetter, 2 M.J. 37 \(C.M.A. 1976\); United States v. Chestnut, 2 M.J. 84 \(C.M.A. 1976\).](#)

²⁸⁴ This was the situation faced in both *Ledbetter* and *Chestnut*. The results in both of those cases would have been the same if the court had tested for prejudice.

²⁸⁵ [United States v. Teeter, 12 M.J. 716 \(A.C.M.R. 1981\); United States v. Martinez, 12 M.J. 801 \(N.M.C.M.R. 1981\).](#)

²⁸⁶ R.C.M. 702(d)(3)(A).

²⁸⁷ See, e.g., [United States v. Cunningham, 12 C.M.A. 402](#), 30 C.M.P. 402 (1961) (having the accuser serve as investigating officer was prejudicial error where the **investigation** failed to cover all the elements of the charged offenses and the investigating officer failed to examine a number of available witnesses); [United States v. Natalello, 10 M.J. 594 \(A.F.C.M.R. 1980\)](#) (the accused was specifically prejudiced by the fact that the investigating officer had already formed and expressed an opinion that the accused was guilty before conducting the **investigation**). But see [United States v. Castleman, 11 M.J. 562 \(A.F.C.M.R. 1981\)](#) (the accused's substantial right to an impartial **investigation** was abridged where the investigating officer was the best friend of the main government witness and the accused was thus entitled to relief without any showing of specific prejudice).

²⁸⁸ [United States v. Payne, 3 M.J. 354, 357 \(C.M.A. 1973\).](#)

We are not unmindful of the inherent difficulties presented by requiring a defendant to demonstrate the prejudice resulting from improper actions by a judicial officer, the full extent or text of which he may be unaware in part or whole. We conclude that this is a matter requiring a presumption of prejudice. Absent clear and convincing evidence to the contrary, we will be obliged to reverse the case.

²⁸⁹ See, e.g., [United States v. Brunson, 15 N.J. 898 \(C.G.C.M.R. 1982\)](#) (The court reluctantly set aside the accused's conviction where the record of trial did not contain the substance of *ex parte* conversations which had taken place between the investigating officer and the government representative.). The General Counsel, Department of Transportation, requested that the Court of Military Appeals review whether the court of military review erred in holding that the *ex parte* conversations were presumptively prejudicial rather than requiring a showing of actual prejudice. **United States v. Brunson, 15 M.J. 72 (C.M.A. 1982)**. The Court of Military Appeals affirmed the lower court's use of the presumption of prejudice standard announced in **Payne. United States v. Brunson, 17 M.J. 181 (C.M.A. 1983)**.

²⁹⁰ [United States v. Courtier, 20 C.M.A. 278, 43 C.M.R. 118 \(1971\)](#) (accused was improperly denied individually requested counsel at the pretrial **investigation**); [United States v. Lopez, 20 C.M.A. 76, 42 C.M.R. 268 \(1970\)](#) (investigating officer was not impartial). See, e.g., [United States v. Rehorn, 9 C.M.A. 487, 26 C.M.R. 267 \(1958\)](#) (accused's counsel at the pretrial **investigation** was not certified under **Article 27(b)**); [United States v. Judson, 3 M.J. 908 \(A.C.M.R. 1977\)](#) (accused was denied effective assistance of counsel at the **investigation**).

²⁹¹ [United States v. Courtier, 20 C.M.A. 278, 43 C.M.R. 118 \(1971\); United States v. Judson, 3 M.J. 908 \(A.C.M.R. 1977\).](#)

²⁹² [United States v. Engle, 1 M.J. 387 \(C.M.A. 1976\);](#) R.C.M. 910(j).

²⁹³ R.C.M. 906(b)(3) discussion.

²⁹⁴ [United States v. Clark, 11 M.J. 179 \(C.M.A. 1981\); United States v. Packer, 8 M.J. 785 \(N.C.M.R. 1980\).](#)

²⁹⁵ *United States v. Clark; United States v. Packer.*

²⁹⁶ UCMJ **art.** 34(a); R.C.M. 406(a).

²⁹⁷ R.C.M. 406(a) discussion.

²⁹⁸ See, e.g., [United States v. Schuller, 5 C.M.A. 101, 105, 17 C.M.R. 101, 105 \(1984\)](#) (The accused was deprived of "his right to have a qualified Staff Judge Advocate make an independent and professional examination of the expected evidence and submit to the convening authority his impartial opinion as to whether it supported the charges."); [United States v. Heaney, 9](#)

XI. CONCLUSION

[C.M.A. 6, 7, 25 C.M.R. 268, 269 \(1958\)](#) ("**Article** 34 is an important pretrial protection accorded to an accused."); [United States v. Greenwalt, 6 C.M.A. 569, 572, 20 C.M.R. 285, 288 \(1955\)](#) (The pretrial advice "is an important protection accorded to an accused and Congress had in mind something more than adherence to an empty ritual."); [United States v. Edwards, 32 C.M.R. 586 \(A.B.R. 1961\)](#) (Sending the accused to a general court-martial on charges that were different than the ones discussed in the pretrial advice deprived the accused of a substantial pretrial right.).

²⁹⁹ R.C.M. 306(b).

³⁰⁰ [United States v. Hardin, 7 M.J. 399 \(C.M.A. 1979\)](#). In *Hardin* the court rejected the view that the pretrial advice provided any judicial-type protection of a fundamental nature for the military accused. Instead the court held that the military trial judge judicially enforces the accused's "fundamental right" under **Article** 34 to have charges referred to a general court-martial only if the charge alleges an offense under the Code and is warranted by evidence indicated in the report of **investigation**. [Id. at 403-04.](#)

³⁰¹ [Id. at 404.](#)

³⁰² [United States v. Foti, 12 C.M.A. 303, 30 C.M.R. 303 \(1961\)](#).

³⁰³ See, e.g., [United States v. Foti](#) (The accused is entitled to an individualized treatment of factors in the case which would have a substantial influence on the convening authority's referral decision.); [United States v. Henry, 50 C.M.R. 685 \(A.F.C.M.R. 1975\)](#) (It was error for the pretrial advice to discuss a witness' unsworn statement in a misleading manner because it might have affected the convening authority's decision to refer the case to trial.).

³⁰⁴ See, e.g., [United States v. Rivera, 20 C.M.A. 6, 42 C.M.R. 198 \(1970\)](#) (It was error for the pretrial advice to omit the unit commander's opinion that the accused should not receive a punitive discharge.).

³⁰⁵ [Foti, 12 C.M.A. at 304, 30 C.M.R. at 304.](#)

³⁰⁶ MCM, 1969, para. 35b.

³⁰⁷ See generally Military Justice Act of 1983: Hearings on S.974 Before the House Comm. on Armed Services, 98th Cong., 1st Sess. (1983).

The staff judge advocate's advice has become a legal brief which can run from a few pages in length in simple cases, to scores of pages in more complicated ones. This takes the time and resources of lawyers, staff, and most importantly, the commander. The amendment of **Article** 34 removes the requirement that the convening authority examine the charges for legal sufficiency, and puts the burden where it belongs -- on the shoulders of the staff judge advocate who is a lawyer.

Id. at 43 (statement of MG Hugh J. Clausen, The Judge Advocate General of the Army).

³⁰⁸ The Military Justice Act of 1983 requires only that the pretrial advice include a written and signed statement by the staff judge advocate expressing his or her *conclusions* that

(1) the specification alleges an offense . . .

(2) the specification is warranted by the evidence indicated in the report of **investigation** . . . and

(3) a court-martial would have jurisdiction over the accused and the offense.

The advice must also include the staff judge advocate's recommendation as to disposition.

³⁰⁹ UCMJ **art.** 34(a).

³¹⁰ UCMJ **art.** 34(a)(3).

³¹¹ UCMJ **art.** 34(a)(1).

³¹² UCMJ **art.** 34(a)(2).

³¹³ UCMJ art. 34(a). The three legal conclusions that the SJA must make are binding on the convening authority; the SJA's recommended disposition is not. Even if the SJA's legal conclusion preclude referral of a charge to a general court-martial the convening authority would, in theory, retain the prerogative to send the charge to some inferior level of court.

³¹⁴ [United States v. Hayes, 7 C.M.A. 477, 22 C.M.R. 267 \(1957\).](#)

³¹⁵ Federal case law recognizes that the Article 32 pretrial investigation and the Article 34 pretrial advice, taken together, provide the military accused with due process guarantees which are equivalent to civilian indictment by grand jury or the federal preliminary examination. See generally [Talbot v. Toth, 215 F.2d 22 \(D.C. Cir. 1954\).](#)

In the past the Article 32 investigating officer has been the individual imbued with a judicial quality ([United States v. Payne, 3 M.J. 354 \(C.M.A. 1977\)](#)), and the Article 32 investigation was the substantial pretrial right which protected the accused against baseless charges. [United States v. Samuels, 10 C.M.A. 206, 27 C.M.R. 280 \(1959\).](#) This result is arguably skewed now that the staff judge advocate, a trained lawyer, makes binding legal conclusions concerning the sufficiency of the evidence to proceed to trial while the investigating officer, usually a layman, merely makes an advisory recommendation regarding disposition of the charges.

³¹⁶ See generally *supra* section III.

³¹⁷ See generally *supra* section III regarding *ex parte* advice to a "quasi-judicial" Article 32 investigating officer.

³¹⁸ See generally *supra* section VI regarding the enforcement of substantial pretrial rights without any showing of benefit at trial.

³¹⁹ UCMJ art. 34(a); R.C.M. 406(b).

³²⁰ [United States v. Foti, 12 C.M.A. 303, 30 C.M.R. 303 \(1961\).](#)

³²¹ UCMJ art. 34(a)(2).

³²² [United States v. Engle, 1 M.J. 387 \(C.M.A. 1976\).](#) Accord [Gerstein v. Pugh, 420 U.S. 103 \(1975\)](#); Model Code of Professional Responsibility DR 7-103(A) (1980).

³²³ S. Rep. No. 98-53, 98th Cong., 1st Sess. 17 (1983).

³²⁴ R.C.M. 406(b) discussion.

³²⁵ *Id.*

³²⁶ *Id.*

³²⁷ *Id.*

³²⁸ R.C.M. 406(b).

³²⁹ [United States v. Treadwell, 7 M.J. 864 \(A.C.M.R. 1979\).](#) In *Treadwell* the government urged that the staff judge advocate's oral advice to the convening authority cured a defective written pretrial advice which misstated the maximum punishment the accused could receive for the charged offenses. The court, in dicta, opined that, "Although the Manual . . . requires that the pretrial advice include a "written and signed statement" concerning specified matters (not including the maximum punishment), we know of no reason why the pretrial advice cannot be altered orally at least as to other matters, as was done in this case." [Id. at 866 n.2.](#) See also [United States v. Heaney, 9 C.M.A. 6, 25 C.M.R. 268 \(1958\)](#) (Since Article 34 does not prescribe the form or the manner of the advice it may be submitted in such manner and form as the convening authority may direct.); [United States v. Clements, 12 M.J. 842 \(A.C.M.R. 1982\)](#) (Staff judge advocate can orally cure a defective written pretrial advice.).

³³⁰ R.C.M. 406(c).

³³¹ R.C.M. 406(c) analysis provides that "the entire advice" should be provided to the defense so that "the advice can be subjected to judicial review when necessary."

The pretrial procedures afforded a soldier accused of a major felony actually provide more rights and protections than a similarly situated civilian. Unfortunately, the **Article 32** pretrial *investigation* and the **Article 34** pretrial advice are frequently given less attention than they deserve. A convening authority that appoints top quality investigating officers will avoid wasting resources on meritless charges and will have a higher conviction rate at general courts-martial than the convening authority who views the pretrial *investigation* as a *pro forma* proceeding. Similarly, the trial counsel who prepares for and participates in the pretrial *investigation* ultimately will be more successful at trial.

³³² R.C.M. 406(b) discussion. See also [United States v. Foti, 12 C.M.A. 303, 30 C.M.R. 303 \(1961\)](#) (Under the circumstances of the case, the SJA's use of a mimeographed form pretrial advice failed to afford the accused the "individualized treatment" required by **Article 34**.); [United States v. Greenwalt, 6 C.M.A. 569, 20 C.M.R. 285 \(1955\)](#) (**Article 34** "places a duty on the staff judge advocate to make an independent and informed appraisal of the evidence as a predicate for his recommendation."); [United States v. Schuller, 5 C.M.A. 101, 105, 17 C.M.R. 101, 105 \(1954\)](#) (The accused has the right to "have a qualified Staff Judge Advocate make an independent and professional examination of the expected evidence and submit to the convening authority his impartial opinion as to whether it supported the charges.").

³³³ [United States v. Hardin, 7 M.J. 399, 403 \(C.M.A. 1979\)](#).

³³⁴ In *Hardin* the court relied at least in part on the fact that the advice was not binding on the convening authority, and the fact that with all the content requirements the court could review the 28-page pretrial advice and conclude it was an "exemplary," "dispassionate evaluation" of the case. The court held that having the trial counsel prepare the advice was not *per se* error and held that under the facts of *Hardin* there was no error but the opinion falls far short of a wholesale endorsement of that procedure. [Hardin, 7 M.J. at 404-05](#).

³³⁵ See generally *supra* section VI.

³³⁶ *But cf.* [United States v. Porter, 1 M.J. 506 \(A.F.C.M.R. 1975\)](#) (Where the pretrial advice omitted relevant information about the accused's prior service *history* the court ordered a new advice without speculating on whether the new information might affect the convening authority's referral decision and instead held that "an accused is entitled to have his case considered in light of accurate information.").

³³⁷ R.C.M. 905(b)(1); R.C.M. 906(b)(3).

³³⁸ R.C.M. 906(b)(3) discussion.

³³⁹ [United States v. Greenwalt, 6 C.M.A. 569, 20 C.M.R. 285 \(1955\)](#); [United States v. Kemp, 7 M.J. 760 \(A.C.M.R. 1979\)](#); R.C.M. 406(b) discussion.

³⁴⁰ See, e.g., [United States v. Rivera, 20 C.M.A. 6, 42 C.M.R. 198 \(1970\)](#) (Reversible error not to inform the convening authority of the unit commander's opinion that the accused should not receive a punitive discharge.); [United States v. Greenwalt](#) (Statement in the pretrial advice that the **Article 32** investigating officer recommended trial by general court-martial, when in fact he recommended special court-martial, was a defect "likely to mislead the convening authority in the exercise of his power of referral."). *Cf.* [United States v. Kemp, 7 M.J. 760, 761 \(A.C.M.R. 1979\)](#) (Although there were several misstatements of fact in the pretrial advice, even taken together the court did "not believe that the convening authority might have referred the case to an inferior court."); [United States v. Riege, 5 M.J. 938, 944 \(N.C.M.R. 1978\)](#) (Not error to fail to discuss the element "prejudicial to good order and discipline" in the pretrial advice where the convening authority "was adequately advised of all the facts that might have had a substantial influence upon his decision."); [United States v. Skaggs, 40 C.M.R. 344, 346 \(A.B.R. 1968\)](#) (Failure to include unit commander's recommendation against a punitive discharge was not reversible error where there was "no reasonable likelihood . . . that the convening authority would have disposed of the charges differently . . .").

³⁴¹ [United States v. Heaney, 9 C.M.A. 6, 25 C.M.R. 268 \(1958\)](#); [United States v. Fountain, 2 M.J. 1202 \(N.C.M.R. 1978\)](#); R.C.M. 905(c). *But see* [United States v. Edwards, 32 C.M.R. 586 \(A.B.R. 1962\)](#).

³⁴² See generally R.C.M. 910(j) and *supra* section VI. See also [United States v. Packer, 8 M.J. 785 \(N.C.M.R. 1980\)](#); [United States v. Blakney, 2 M.J. 1135 \(C.G.C.M.R. 1976\)](#); [United States v. Henry, 50 C.M.R. 685 \(A.F.C.M.R. 1975\)](#).

The **Article 32 investigation** is truly a substantial pretrial right for the accused. It not only provides the defense counsel with an opportunity to test the government's case, but also is the best discovery vehicle available in any criminal justice system.

[*102] Although there are currently some unresolved legal issues pertaining to the **Article 32 investigation** and the **Article 34** pretrial advice, most of the applicable rights, procedures, and legal standards are fairly clear. This **article** is intended to cover all the relevant law and to highlight all the important issues. It is designed to serve as a comprehensive guide for judge advocates serving in any criminal law position.

Military Law Review

End of Document