

ARTICLE: Not Your Momma's 32: Explaining the Impetus for Change Behind Key Provisions of the Article 32 Preliminary Hearing

July, 2016

Reporter

2016 Army Law. 8 *

Length: 10583 words

Author: Lieutenant Colonel John Loran Kiel Jr. *

* Judge Advocate, U.S. Army. Presently assigned as the Deputy Staff Judge Advocate, I Corps and Joint Base Lewis-McChord. LL.M., 2008, The Judge Advocate General's Legal Center & School, U.S. Army, Charlottesville, Virginia; J.D., 1999, The Florida State University College of Law; B.A., 1996, Brigham Young University. Previous assignments include Chief, Policy Branch, Criminal Law Division, Office of the Judge Advocate General, Washington, D.C., 2013-2015; Deputy Staff Judge Advocate, 7th Army Joint Multinational Training Command, Grafenwoehr, Germany, 2011-2013; Brigade Judge Advocate, 3rd Brigade Combat Team, 82nd Airborne Division, Fort Bragg, North Carolina, 2008-2010; Assistant Professor of Law, United States Military Academy, West Point, New York, 2005-2007; Trial Defense Counsel, Region VIII, Vilseck, Germany, 2003-2005; Operational Law Attorney, Trial Counsel, Legal Assistance Attorney, Claims Judge Advocate, XVIII Airborne Corps, Fort Bragg, North Carolina, 1999-2003. Member of the bars of Florida, the Court of Appeals for the Armed Forces, and the Supreme Court of the United States. Previous publications include "War Crimes in the American Revolution: Examining the Conduct of Lt. Col. Banastre Tarleton and the British Legion During the Southern Campaigns of 1780-1781," *Military Law Review*, Fall 2012; "Crossing the Line: Reconciling the Right to Picket Military Funerals with the First Amendment," *Military Law Review*, Winter 2008; "When Soldiers Speak Out: A Survey of Provisions Limiting Freedom of Speech in the Military," *Parameters*, U.S. Army War College Quarterly, Autumn 2007.

Text

[*8] I. Introduction

Nearly two years after the private screening of "The Invisible War" ¹ to a small audience of influential Senators in Washington, D.C. and a year after an historic hearing conducted by the Senate Armed Services Committee (SASC), which solicited testimony from each of the Service Chiefs and their legal advisors about what they were doing to combat sexual assault in the military, Congress passed what proved to be the equally historic National

¹ THE INVISIBLE WAR (Chain Camera Pictures 2012). After viewing this documentary, Sen. Kirsten Gillibrand (D, NY) began to spearhead an effort to remove the decision to prosecute sex assault and other felony-level offenses from commanders and give the responsibility to a senior (O-6) judge advocate. Sen. Gillibrand introduced the Military Justice Improvement Act (MJIA) in 2013 and has attempted to reintroduce it every year since then for a Senate vote. See James Weirick et al., *The Time for Military Justice Reform is Now*, AIR FORCE TIMES, JUNE 7, 2016, 4:27 PM, <http://www.airforcetimes.com/story/opinion/2016/06/07/time-military-justice-reform-now/85558266/> Although the MJIA has yet to garner enough votes for passage, it has been influential in the sense that most of the sex assault reforms discussed in this **article** were introduced in an effort to either bolster or defeat it.

Defense Authorization Act for Fiscal Year 2014 (FY14 NDAA).² The FY14 NDAA was consequential because it contained more revisions to the Uniform Code of Military Justice (UCMJ) than at any time since it was appreciably modified decades ago by the Military Justice Act of 1983.³ To be exact, the FY14 NDAA enacted thirty-six statutory provisions that pertain to sexual assault.⁴ One of the most monumental changes was the wholesale revision of **Article 32**, UCMJ.⁵

The purpose of this **article** is to highlight for military justice practitioners and potential preliminary hearing officers the reasons behind key revisions to **Article 32** and to examine certain aspects of the preliminary hearing that diverge significantly from the **pretrial investigation**. As a former member of the Joint Service Committee on Military Justice (JSC)⁶ who helped write the rules⁷ governing **Article 32** preliminary hearings, the author will explain the thought process behind why Congress permitted an exception to the new requirement that the hearing be conducted by a judge advocate, how the role of the preliminary hearing officer (PHO) was designed to specifically prevent the hearing from being used as a discovery tool for the accused, and how the JSC designed an additional safeguard to protect victims who exercise their right not to testify at the hearing from deposition abuse after the hearing. Lastly, the **article** will examine recommendations made by the Military Justice Review Group (MJRG) to further modify **Article 32** in a legislative proposal they recently submitted to Congress titled "The Military Justice Act of 2016."⁸ It is important to note at the outset, that the views expressed in this **article** are based on the author's own experience and observations as a member of the JSC and do not necessarily reflect the views of other members of the JSC.

II. Impetus for Change

During the summer of 2013, three Naval Academy football players were charged with raping a fellow midshipman.⁹ The case garnered national media attention [***9**] when two reporters from the *Washington Post* ran an exposé titled *Aggressive Tactics Highlight the Rigors of Military Rape Cases*, which focused on the **Article 32 pretrial investigation** that took over a week to complete and included more than thirty hours of live testimony by the alleged victim.¹⁰ The *Washington Post* piece highlighted a number of provocative questions military defense

² National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1702, **127 Stat. 672, 954-55 (2013)** [hereinafter FY14 NDAA].

³ Military Justice Act of 1983, Pub. L. No. 98-549, [97 Stat. 1393 \(1983\)](#).

⁴ See FY14 NDAA §§ 1701-53 (containing thirty-six enacted provisions pertaining to sexual assault).

⁵ UCMJ **art. 32** (2013).

⁶ The Joint Service Committee on Military Justice (JSC) is comprised of two judge advocates from each of the Services, including the Coast Guard. The senior judge advocate serves as a voting group member while the junior judge advocate serves as a working group member. The JSC proposes changes to the Manual for Court-Martial (MCM) in Executive Orders that are submitted to the President for signature. See JOINT SERVICE COMMITTEE ON MILITARY JUSTICE, <http://jsc.defense.gov/> (last visited July 19, 2016).

⁷ Rule for Courts-Martial (RCM) 404A sets forth disclosure requirements prior to the hearing and RCM 405 sets forth the rules that govern the hearing. Exec. Order No. 13696, [80 Fed. Reg. 119](#) (June 22, 2015).

⁸ Military Justice Review Group, *Military Justice Act of 2016*, DOD.MIL, http://www.dod.mil/dodgc/images/military_justice2016.pdf (last visited July 13, 2016) [hereinafter *Military Justice Act of 2016*]. The Military Justice Review Group submitted to Congress *The Military Justice Act of 2016* on December 28, 2015. *Press Release*, DoD.mil (Dec. 28, 2015), http://www.dod.mil/dodgc/images/press_release_dec.pdf [hereinafter *MJA Press Release*].

⁹ Melinda Henneberger & Annys Shin, *Aggressive Tactics Highlight the Rigors of Military Rape Cases*, WASH. POST (Sept. 1, 2013) <http://www.baltimoresun.com/news/maryland/anne-arundel/annapolis/bs-md-navy-rape-trial-20130901-story.html>.

¹⁰ *Id.*

counsel asked the victim on cross-examination to include whether she "felt like a ho" and how wide she opens her mouth when she performs oral sex. ¹¹ The timing of this investigation was problematic for the military because several Senators who were fresh from viewing "The Invisible War" became convinced that the military had a serious problem and began looking for reasons to overhaul what appeared to them to be a system of justice incapable of properly investigating and prosecuting sexual assault cases. ¹² Not even twenty-four hours had passed after the article was published, before members of the JSC and the Judge Advocate Generals (TJAGs) of each of the Services began receiving requests to meet with members of Congress to help them figure out how Congress was going to go about tackling Article 32 reform. A few days after that, the author and his supervisor were asked to meet with senior staffers from the House Armed Services Committee (HSAC) (and later the Senate Armed Services Committee (SASC)) who were tasked to examine and rewrite Article 32, UCMJ. ¹³ Only a few of the staffers at the meeting had prior military experience, so the bulk of the three-hour meeting was spent explaining the Article 32 investigation process and the purpose it served in the military justice system. ¹⁴

Throughout the discussion, the staffers kept comparing the Article 32 investigation to a federal grand jury proceeding, with which they were all familiar. ¹⁵ Initially, it appeared that they were considering doing away with Article 32 altogether until we explained that the 5th Amendment grand jury requirement does not apply to members of the armed forces ¹⁶ and that the Article 32 pretrial investigation was originally intended to provide a substitute for the grand jury. ¹⁷ We also discussed how Congress, when it enacted Article 32 in 1920, intended for the pretrial investigation to serve as a bulwark against trivial or baseless charges from being referred to general courts-martial. ¹⁸ From the staffers own reflections, they acknowledged that the military justice system has been widely lauded over the years by critics precisely because of the abundance of due process rights it affords the accused. ¹⁹ After discussing with them that unlike a grand jury proceeding, the accused actually knows about the investigation and has substantial rights there, the staffers recognized that the Article 32 investigation was more akin to a federal preliminary hearing conducted under Federal Rule of Criminal Procedure 5.1. ²⁰ Revised Article

¹¹ *Id.*

¹² Press Release, Boxer, Blumenthal, Speier, Urge Immediate Reform of Military Justice System to Protect Sexual Assault Victims During Article 32 Proceedings (Sept. 25, 2013) (on file with author), <https://www.boxer.senate.gov/?p=release&id=209>.

¹³ The author was at the time, the Army working group member of the JSC. His supervisor, Colonel (COL) Mike Mulligan, was the Army voting group member of the JSC. Both officers met with senior staffers from the House Armed Services Committee (HASC) charged with drafting the House rewrite of Art. 32, UCMJ. The meeting took place the first week of September 2013 in the HASC committee room and lasted approximately four hours. A few weeks later, the author met with the Chairman of the Joint Chiefs of Staff's legal advisor and a lawyer from the White House to answer similar questions about how a pretrial hearing worked and compared it to a civilian grand jury. This assertion is based on the author's recent professional experiences as a working group member of the JSC from 2012-2015 [hereinafter Professional Experiences-JSC].

¹⁴ *Id.*

¹⁵ *Id.* Most of the HASC staffers the author and COL Mulligan met with were lawyers and were familiar with the civilian federal court system to include grand jury proceedings. They understood that the accused finds out about the grand jury proceeding after it has already secretly met and returned an indictment against him. Because the accused does not know about the hearing, he has no right to appear, to testify, to call witnesses or to cross-examine adverse witnesses. *Id.*

¹⁶ U.S. CONST. amend. V. The Fifth Amendment specifically exempts "cases arising in the land or naval forces, or in the Militia, when in actual service, in time of War, or public danger" from the requirement of a grand jury indictment prior to trial in federal criminal court. *Id.*

¹⁷ United States v. Loving, 41 M.J. 213, 296-97 (C.A.A.F. 1994).

¹⁸ Lieutenant Colonel William A. Murphy, The Formal Pretrial Investigation, 12 MIL. L. REV. 1, 4 (1961). Lieutenant Colonel (Lt. Col.) Murphy lays out a fascinating history of the pretrial investigation beginning with its statutory origins in Article of War 70. *Id.* The author and his supervisor made a number of similar arguments about why the Article 32 investigation was still a

32 then, would be modelled after the federal preliminary hearing under Rule 5.1 where the government has the burden of proof to demonstrate that probable cause exists to believe an offense has been committed and that the accused committed it and where the accused possesses the right to cross-examine adverse witnesses, call his own witnesses, and testify on his own behalf. ²¹

When meeting with both the HASC and SASC staffers, it was clear that Congress had at least three objectives in mind for the new **Article 32** preliminary hearing--first, they wanted to ensure that no victim, military or civilian, could be compelled to testify against her will, second, they wanted to [*10] ensure that the right person with the right training was in charge of the hearing, and third, they wanted to guarantee that the purpose of the hearing was to get to a probable cause determination and not serve as a discovery tool for the accused. ²²

III. Victims May Refuse to Testify

After reading about the Naval Academy rape case in the newspaper, U.S. Rep. Jackie Speier (D-Calif.), Sen. Barbara Boxer (D-Calif.), and Sen. Richard Blumenthal (D-Conn.), sent a letter to President Barack Obama indicating that they were,

Shocked and alarmed to learn that **Article 32** allows sexual assault victims to be questioned in a manner that is intimidating and degrading, and what we believe has a major chilling effect on sexual assault reporting. According to legal experts, no civilian court in our nation would allow the questioning that was allowed in the **Article 32** proceeding in the Naval Academy case. ²³

The trio of lawmakers then urged the President to direct the JSC to take "immediate steps to modify **Article 32** proceedings in the Manual for Courts-Martial in a way that would mirror the rules that govern preliminary hearings in the Federal Rules of Criminal Procedure." ²⁴

Throughout the summer, a number of amendments seeking to reform **Article 32** were introduced by various members of Congress. ²⁵ The seminal feature of each of these bills was to ensure that victims of sexual assault

useful tool in helping convening authorities prevent baseless charges from being referred to general court-martial. Professional Experiences-JSC, *supra* note 13.

¹⁹ *Larry King Live* (CNN television broadcast Feb. 3, 2007) <http://www.cnn.com/TRANSCRIPTS/0702/03/lkl.01.html>. Host Larry King discussed a variety of aspects of our criminal justice system with famed civilian criminal defense attorneys. *Id.* Part of the discussion centered on an observation made by F. Lee Bailey, one of O.J. Simpson's criminal defense attorneys, that the military justice system was fairer because of its panel composition than its civilian counterpart. *Id.* This quote from F. Lee Bailey is frequently cited to in the media and in military justice circles as an example of how our system tends to be fairer to the accused in general. *Id.*

²⁰ [FED. R. CRIM. P. 5.1.](#)

²¹ *Id.*

²² Professional Experiences-JSC, *supra* note 13. Congress already knew that **Article 32** was originally intended to be a probable cause hearing. Their concern was that the **investigation** had become a mini-trial instead. See generally Uniform Code of Military Justice: Hearing on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed Servs., 81st Cong. 997 (1949) (statement of Rep. Norblad).

²³ Press release, Boxer, Blumenthal, Speier Urge Immediate Reform of Military Justice System to Protect Sexual Assault Victims During **Article 32** Proceedings (Sept. 25, 2013), <http://www.boxer.senate.gov/?p=release&id=209>.

²⁴ *Id.*

²⁵ **Article 32** Reform Act, H.R. 3459, 113th Cong. (1st Sess. 2013). This first version of the amendment was slightly different than the one that passed and was cosponsored by Reps. Jackie Speier (D-Calif.), Patrick Meehan (R-Penn.), Betty McCollum (D-Minn.), Julia Brownley (D-Calif.), and Niki Tsongas (D-Mass.).

could not be forced to testify at a **pretrial** hearing against their will.²⁶ The bill that eventually passed was co-sponsored by Reps. Speier and Patrick Meehan (R-Penn.), along with Sen. Boxer.²⁷ Rep. Speier issued a press release on the day the FY14 NDAA was approved by the Senate declaring that,

It is time we bring the military justice system in line with our civilian criminal courts and give the same rights to brave men and women who come forward to report a crime as their civilian counterparts. If we are serious about addressing the epidemic of sexual assault we must stop treating the victim as the criminal and continue protecting the sexual predators.²⁸

The Speier, Boxer, Meehan bill was contained in section 1702 of the FY14 NDAA and it made clear that a victim can refuse to testify at a preliminary hearing.²⁹ If a victim elects not to testify, the victim shall be deemed "not available" for purposes of the hearing according to the statute.³⁰ Additionally, Congress also expanded the definition of "victim" to cover more than just sexual assault victims.³¹ The term victim encompasses "any person who is alleged to have suffered a direct physical, emotional, or pecuniary harm as a result of the matters set forth in a charge or specification being considered and is named in one of the specifications." **32**¹

IV. Protecting Victims from Deposition Abuse

After the FY14 NDAA was signed into law by President Obama, the JSC began the deliberative process of deciding how Rule for Court Martial (RCM) 405 should be redrafted to implement the new statute. One of the hot topics it and the Judicial Proceedings Panel (JPP), a Congressional panel set up to examine other aspects of the military justice system, were concerned about was how to prevent victims from having to provide deposition testimony after they exercised their statutory right not to testify at a preliminary hearing.³³ In the same Executive Order that contained RCMs 404A and 405, the JSC amended RCM 702, the rule governing depositions.³⁴ The old version of RCM 702 stated that a deposition could be ordered after prefferal of charges when "due to the exceptional circumstances of the case it is in the interest of justice that the testimony of the prospective witness be taken and preserved for use at an **investigation** under [*11] **Article 32** or a court-martial."³⁵ Under the revised RCM 702, the JSC added a modification clarifying that,

A victim's declination to testify at a preliminary hearing or a victim's declination to submit to **pretrial** interviews shall not, by themselves, be considered exceptional circumstances. In accordance with subsection (b) of this

²⁶ *Id.*

²⁷ FY14 NDAA, Pub. L. No. 113-66, § 1702, **127 Stat. 672, 954-55 (2013)**.

²⁸ Press release, Congresswoman Jackie Speier on Inclusion of the **Article 32** Reform Act in the National Defense Authorization Act (Dec. 17, 2013), http://www.speier.house.gov/index.php?option=com_content&view=article&d=1318:congresswoman-jackie-speier-on-inclusion-of-the-article-32-reform-act-in-the-national-defense-authorization-act&catid=20&Itemid=7.

²⁹ FY14 NDAA, Pub. L. No. 113-66, § 1702, **127 Stat. 672, 954-55 (2013)**.

³⁰ *n30 Id.*

³¹ *Id.*

³² *Id.*

³³ The Judicial Proceedings Panel (JPP) is a follow-on panel to the Response Systems Panel on Adult Sexual Assault, both of which the Secretary of Defense (SECDEF) was directed to establish by Congress in section 576 of the FY13 NDAA. National Defense Authorization Act for Fiscal Year 2013, Pub. Law No. 112-239, § 1702, **126 Stat. 1632, 1759-62 (2013)**.

³⁴ Exec. Order No. 13696, **80 Fed. Reg. 119** (June 22, 2015).

³⁵ MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 702 (2012) [hereinafter MCM].

rule, the convening authority or military judge may order a deposition of a victim only if it is determined, by a preponderance of the evidence, that the victim will not be available to testify at court-martial. ³⁶

The intent of this modification was to protect victims from deposition abuse after they exercised their statutory right not to testify at the preliminary hearing and then later opted out of interviews with defense counsel prior to trial. ³⁷ Of course, the JSC understood that there may be circumstances where a victim who declined to testify at the preliminary hearing would not later be available for any number of reasons, and that under those unique circumstances the use of a deposition would potentially be in the interests of justice. ³⁸

It is also important to underscore that Congress codified the "Military Crime Victim's Rights Act" in **Article 6b** of the UCMJ as reflected in section 1701 of the FY14 NDAA. ³⁹ In addition to a host of notification rights and rights to appear at various courts-martial proceedings, victims "have the right to be treated with fairness and with respect for the dignity and privacy of the victim of an offense under this chapter." ⁴⁰ The definition of "victim" here is broader than it is under RCM 405 in that the victim under **Article 6b** does not have to be named in one of the charged specifications. ⁴¹ Congress tasked the Secretary of Defense to develop mechanisms to enforce victim's **Article 6b** rights, to include fashioning disciplinary sanctions for anyone who willfully or wantonly fails to comply with the requirements relating to any of those rights. ⁴² The JSC's modification of RCM 702 coupled with Congress's codification of **Article 6b**, UCMJ, appears for the moment, to be enough to assuage Rep. Speier's concerns about subjecting future victims to the type of "intimidating and degrading" cross-examination questions the victim in the Naval Academy rape case was forced to endure at the **pretrial investigation**. ⁴³

V. Judge Advocate Preliminary Hearing Officers--Line Officer Exception

Congress' next objective was to make sure that the right person, with the right professional training, conducted the preliminary hearing. The HASC staffers at the meeting were surprised to learn that the Army was the only service that primarily utilized line officers and not judge advocate investigating officers (IOs) to conduct **pretrial investigations**. ⁴⁴ For almost an hour, the merits of using line officers who were assisted by a judge advocate

³⁶ Exec. Order No. 13696, [80 Fed. Reg. 119](#) (June 22, 2015).

³⁷ Professional Experiences-JSC, *supra* note 13. After listening to public deliberations from the JPP where they expressed concern about the accused trying to circumvent a victim's right not to testify at the preliminary hearing by subjecting her to a deposition, and the JSC having the same concerns, the JSC went about tightening up the rule to prevent that from happening on a regular basis. *Id.*

³⁸ *Id.* The JSC did recognize that in some situations, a victim might not be available to testify at trial and the rule makes accommodations for that too. *Id.*

³⁹ FY14 NDAA, Pub. L. No. 113-66, § 1701, **127 Stat. 672, 954-55 (2013)**.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ Henneberger & Shin, *supra* note 9.

⁴⁴ U.S. DEP'T OF ARMY, PAM. 27-17, PROCEDURAL GUIDE FOR **ARTICLE 32(B)** INVESTIGATING OFFICER (16 Sept. 1990). This version of the Department of the Army Pamphlet (DA PAM) contemplated that the investigating officer (IO) would be a line officer who had a judge advocate legal advisor assigned to them during the **investigation**. *Id.* The Army was the only service that did not utilize judge advocate IOs exclusively but it did occasionally use judge advocates (and sometimes military judges) to preside over high profile **Article 32 investigations**. Professional Experiences-JSC, *supra* note 13.

legal advisor, as IOs, especially in certain types of cases, was explained.⁴⁵ The author shared an example from a case he dealt with in Germany that involved a war crime allegation against a platoon sergeant serving in the 38th Route Clearance Platoon of the 541st Sapper Company.⁴⁶ Sergeant First Class (SFC) Walter Taylor was alleged to have shot and killed an Afghan civilian female obstetrician in violation of the rules of engagement (ROE).⁴⁷ Sergeant First Class Taylor's platoon was conducting route clearance when they were hit by a complex improvised explosive device (IED) attack.⁴⁸ Immediately after the attack, which wounded at least five of his Soldiers, SFC Taylor attempted to set up a defensive perimeter when his patrol came under small arms attack by two white cars that circled around the kill zone minutes after the IED explosion.⁴⁹ A third black car attempted to maneuver [*12] around the kill zone shortly after the two white cars fired shots and sped away.⁵⁰ Sergeant First Class Taylor and his platoon assumed that the black car was also involved in the attack and fired on it until it came to a complete stop.⁵¹ Once the car stopped, the passenger in the front seat exited the car and proceeded to move towards the trunk area.⁵² The passenger ignored SFC Taylor's repeated warnings to put their hands up and get down on the ground so he opened fire.⁵³ It turned out that the deceased was one of a handful of female obstetricians in all of Afghanistan who was returning from a medical conference with her husband, sixteen-year-old niece, and eighteen-year-old son, when they happened upon the attack.⁵⁴ Her husband was the only survivor in the car.⁵⁵

The author explained to the staffers that the convening authority and the staff judge advocate (SJA) wanted to ensure that SFC Taylor got a fair and impartial look at the **Article 32 investigation**. In order to ensure that the **pretrial investigation** was fair, impartial, and thorough, the convening authority appointed a lieutenant colonel who had recently relinquished command of a battalion in the 173rd Airborne Brigade Combat Team and the SJA assigned as the IO's legal advisor, a judge advocate who had served previously as an infantry platoon leader in the 3rd Brigade Combat Team, 82nd Airborne Division on his last deployment.⁵⁶ The convening authority wanted to appoint someone who had been in combat under the same or similar circumstances that SFC Taylor faced, as opposed to appointing an IO who had not. After several days of examining evidence and hearing from multiple witnesses, the IO concluded the **investigation**, handed in his lengthy report, and issued findings in his report that

⁴⁵ *Id.* In addition to talking to the HASC staff about the benefits of having an infantry officer preside over an **investigation** involving alleged war crimes, we also discussed how in the past, the author had finance officers preside over **investigations** involving complex basic allowance for housing (BAH) and temporary duty (TDY) fraud charges for example. Professional Experiences-JSC, *supra* note 13.

⁴⁶ Kim Murphy, *Four Seconds in Afghanistan: Was it Combat or a Crime?*, L.A. TIMES (June 10, 2012), <http://articles.latimes.com/2012/jun/10/nation/la-na-afghan-shooting-20120614/4>.

⁴⁷ *Id.* At the time of the shooting, Sergeant First Class (SFC) Taylor had no idea about the gender or age of the victim. This assertion is based upon the author's experience as a Defense Counsel for Region VIII, Vilseck Germany, from 2003-2005 [hereinafter Professional Experience-Defense Counsel].

⁴⁸ Murphy, *supra* note 46.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* Sergeant First Class Taylor did not know at the time that the person he was shouting instructions to was a female because of the way she was dressed and covered. Professional Experience-Defense Counsel, *supra* note 47.

⁵⁴ Murphy, *supra* note 46. The victim was identified as Dr. Aqilah Hikmat, a forty-nine-year-old mother of four who was head of the obstetrics department at the Ghazni provincial hospital. Professional Experience-Defense Counsel, *supra* note 47.

SFC Taylor had not violated any of the ROE in effect at the time of the engagement.⁵⁷ Furthermore, the IO recommended that the convening authority dismiss the charges, which he promptly did.⁵⁸ The author explained to the staffers that the convening authority, the lawyers representing both parties, and eventually even the accused himself, thought that the Army had done the right thing at the end of the day, by charging the case and fully investigating it at the pretrial investigation with an IO who was himself a combat arms war veteran.⁵⁹

The author and his boss also spoke about other cases where it might make sense to have someone other than a judge advocate serve as the preliminary hearing officer (PHO) due to the kinds of charges involved and the type of specialized training a particular kind of officer, other than a lawyer, might possess.⁶⁰ At the end of the day, the staffers and ultimately Congress agreed that when "in exceptional circumstances in which the interests of justice warrant," an impartial officer other than a judge advocate may be better suited to serve as a preliminary hearing officer.⁶¹ It is important to remember though, that this exception does not apply to sexual assault cases as the Secretary of Defense has directed that in sexual assault cases, a judge advocate must always serve as PHO.⁶²

While Congress was willing to grant the Army this exception, they were still concerned about assertions that were made in "The Invisible War" and echoed by Sen. Kirsten Gillibrand (D-N.Y.), that the military fosters "a culture where rapists go free, there's no accountability for sexual assault, there's a climate where everything is shoved under the rug and people are actually punished for reporting sexual assault."⁶³ In an effort to tackle that perception, Congress wanted someone with professional legal training to serve as PHO and they initially only wanted military judges to preside in that capacity.⁶⁴ Given the finite number of military judges there are in the Army, the author and his boss explained how that was not a feasible solution. It was explained for instance, that in a typical fiscal year, the Army tries roughly 1,100 [*13] general and special courts-martial.⁶⁵ In Fiscal Year 13 for example, the Army tried 714 general courts-martial, which required at a minimum 714 Article 32 pretrial investigations.⁶⁶ By way of comparison, the Air Force, Marine Corps, Navy, and Coast Guard tried 260, 135, 121, and 9 general courts-martial respectively in FY13.⁶⁷ In FY12, the numbers were roughly the same--the Army,

⁵⁵ Murphy, *supra* note 46.

⁵⁶ The staff judge advocate (SJA) recommended to the convening authority that he appoint two infantry officers with recent combat experience to conduct the investigation. One as the IO, the other as the legal advisor. Professional Experience-Defense Counsel, *supra* note 47.

⁵⁷ Kim Murphy, *Criminal Charges Dismissed Against Soldier in Afghanistan Shooting*, L.A. TIMES (Aug. 9, 2012), <http://articles.latimes.com/2012/aug/09/nation/la-na-nn-afghan-shootingsoldier-20120809>.

⁵⁸ *Id.*

⁵⁹ *Id.* Sergeant First Class Taylor, when speaking about the convening authority's decision to dismiss the negligent homicide and dereliction of duty charges after reviewing the IO's recommendation stated, "It's not just a victory for me, it's a victory for all soldiers They don't have to think in their mind that one of their comrades was being done wrong." *Id.*

⁶⁰ A few examples might include appointing a doctor or nurse as preliminary hearing officer (PHO) in a shaken baby case or a finance officer to preside over a complex TDY or BAH fraud case. Professional Experiences-JSC, *supra* note 13.

⁶¹ FY14 NDAA, Pub. L. No. 113-66, § 1702, **127 Stat. 672, 954-55 (2013)**.

⁶² Memorandum from SecDef to Sec'ys of the Military Dep'ts et al., subject: Sexual Assault Prevention and Response (Aug. 14, 2013), http://www.sapr.mil/public/docs/news/SECDEF_Memo_SAPR_Initiatives_20130814.pdf.

⁶³ Robert Draper, *The Military's Rough Justice on Sexual Assault*, N.Y. TIMES MAG. (Nov. 26, 2014), http://www.nytimes.com/2014/11/30/magazine/the-militarys-rough-justiceon-sexual-assault.html?_r=0.

Air Force, Marine Corps, Navy, and Coast Guard tried 725, 182, 125, 137, and 14 general courts-martial respectively. ⁶⁸

It was also explained that a number of charges are dismissed or disposed of in some other way after the **pretrial investigation** that are not necessarily reflected in reported court-martial statistics and that a conservative estimate of **pretrial investigations** the Army actually conducts every FY is closer to 1,000. ⁶⁹ Additionally, the Army only has twenty-seven military judges on active duty who preside over all of its special and general courts-martial proceedings. ⁷⁰ Adding nearly 1,000 preliminary hearings to the mix would be virtually impossible for twenty-seven active duty judges to handle without causing significant delays in courts-martial proceedings. ⁷¹ The author finally noted that the IO in the Naval Academy rape case was a seasoned military judge and he still permitted the cross-examination questions members of Congress were outraged over, despite his training and experience. ⁷² After considering all of the data points, the staffers decided against recommending that military judges serve as PHOs.

VI. Judge Advocate Preliminary Hearing Officers--Senior in Pay Grade Exception

Even though the military judge proposal did not move forward, Congress still wanted to make sure that judge advocates with sufficient experience and legal training serve as PHOs. To do this, they included language requiring that the PHO be "equal to or senior in grade to military counsel detailed to represent the accused or the Government at the preliminary hearing." ⁷³ The Army asked for an exception to this requirement as well. While most of the judge advocates available to serve as PHOs will be captains (paygrade O-3), several of the Army's special victim prosecutors are majors (paygrade O-4) and lieutenant colonels (paygrade O-5) as are its senior defense counsel (paygrade O-4) and regional defense counsel (paygrade O-5). ⁷⁴

Adhering to such a rigid requirement would be onerous in cases where any of these senior lawyers represented one of the parties because the convening authority would likely have to appoint a more senior lawyer from another installation to be able to fulfill the grade requirement. ⁷⁵ That would mean inevitable delays in the proceedings and

⁶⁴ These staffers, in speaking with the other services, understood that the Navy and Air Force routinely used military judges as **Article 32** IOs. They initially liked the idea of having the most seasoned military justice experts preside over the hearing. Professional Experiences-JSC, *supra* note 13.

⁶⁵ The author reviewed the U.S. Court of Appeals for the Armed Forces (CAAF) annual reports for fiscal years 2012, 2013, and 2014, added the number of reported general courts-martial tried by the Army for all three FYs and divided by three to determine the average. These reports, along with other fiscal years, are available on the CAAF website. U.S. COURT OF APPEALS FOR THE ARMED FORCES, <http://www.armfor.uscourts.gov/newcaaf/home.htm> (last visited July 11, 2016).

⁶⁶ COURT OF APPEALS FOR THE ARMED FORCES, ANNUAL REPORT SUBMITTED TO THE COMMITTEES ON ARMED FORCES AND TO THE SECRETARY OF DEFENSE, SECRETARY OF HOMELAND SECURITY, AND THE SECRETARIES OF THE ARMY, NAVY, AND AIR FORCE PURSUANT TO THE UNIFORM CODE OF MILITARY JUSTICE (Oct. 1, 2012 to Sept. 30, 2013), <http://www.armfor.uscourts.gov/newcaaf/annual/FY13AnnualReport.pdf> [hereinafter CAAF FY 13 ANNUAL REPORT].

⁶⁷ *Id.*

⁶⁸ COURT OF APPEALS FOR THE ARMED FORCES, ANNUAL REPORT SUBMITTED TO THE COMMITTEES ON ARMED FORCES AND TO THE SECRETARY OF DEFENSE, SECRETARY OF HOMELAND SECURITY, AND THE SECRETARIES OF THE ARMY, NAVY, AND AIR FORCE PURSUANT TO THE UNIFORM CODE OF MILITARY JUSTICE (Oct. 1, 2011 to Sept. 30, 2012), <http://www.armfor.uscourts.gov/newcaaf/annual/FY12AnnualReport.pdf> [hereinafter CAAF FY 12 ANNUAL REPORT].

⁶⁹ The author and his boss spent a considerable amount of time explaining how cases might be disposed of after an **Article 32 investigation**, to include approval of an administrative discharge in lieu of court martial, dismissing charges, referring to a lesser court-martial, non-judicial punishment, and adverse administrative action. Professional Experiences-JSC, *supra* note 13.

a lot of money spent on travel costs.⁷⁶ The staffers then wanted to know who else could conduct the hearings without having to bring someone in from another installation. It was explained that in a typical Army Office of the Staff Judge Advocate (OSJA), the only lawyers who would not be routinely conflicted out from serving as PHOs are the captains (paygrade O-3) serving in the administrative law division, claims, and the operational [*14] law division, if it had one.⁷⁷ Given the human resource limitations and fiscal constraints involved, coupled with the likelihood that delays would impact the government's speedy trial clock, Congress agreed on the caveat that made it into the final statute, which states that "whenever practicable" the PHO will be equal or greater in grade to counsel representing the parties, otherwise the convening authority may appoint someone junior in grade to conduct the hearing.⁷⁸

In the end, Congress achieved its goal of bringing the Army in line with the other services by requiring the appointment of judge advocate PHOs, while simultaneously recognizing that sometimes, when the interest of justice warrants it, a line officer may be better suited to serve as the PHO.⁷⁹ Congress also recognized, that sometimes, when a senior officer is not available, the convening authority and the SJA may have to appoint that junior O-3 in the administrative law division to conduct the hearing and they were okay with that too. Conveniently and by design, both exceptions provide SJAs and convening authorities with enough flexibility to conduct preliminary hearings efficiently and effectively.⁸⁰

VII. Role of the PHO

Congress's final objective for the preliminary hearing was to ensure that its purpose was to focus on the probable cause determination and not on making the hearing a discovery tool for the accused.⁸¹ In order to attain that goal, Congress did three things in the statute.⁸² First, it excised the language that previously called for a "thorough and impartial *investigation*" to be conducted.⁸³ Second, it replaced that language and also limited the scope of the hearing by requiring a determination whether there is probable cause to believe an offense has been committed

⁷⁰ U.S. Army Trial Judiciary, JAGCNET, <https://www.jagcnet2.army.mil/USATJ> (last visited July 11, 2016).

⁷¹ *Id.* Even if it were possible to supplement the twenty-seven active duty military judges (MJs) with the twenty-three reserve MJs, it would still be impossible to preside over nearly 1,000 preliminary hearings and 1,200 or so general and special courts-martial every year.

⁷² Annys Shin, *Two ex-Navy Football Players to go on Trial in Rape Case Despite Judge's Recommendation*, WASH. POST (Oct. 10, 2013), https://www.washingtonpost.com/local/two-of-three-ex-navy-football-players-charged-in-alleged-rape-will-face-court-martial/2013/10/10/0544abaa-31ae-11e3-8627-c5d7de0a046b_story.html.

⁷³ FY14 NDAA, Pub. L. No. 113-66, § 1702, **127 Stat. 672, 954-55 (2013)**.

⁷⁴ A search of the current U.S. Army Judge Advocate General's (JAG) Corps online directory reveals, by position, location, and name, where and how many special victim prosecutors (SVP), regional defense counsel (RDC), and senior defense counsel (SDC) are currently serving on active duty. See *JAG Directory*, JAGCNET, <https://www.jagcnet2.army.mil/Sites/ppto.nsf/JagDirectory.xsp> (last visited on July 21, 2016).

⁷⁵ At a typical numbered combat division, the Staff Judge Advocate (SJA) is a Colonel in the paygrade of O-6 and the Deputy Staff Judge Advocate (DSJA) is in the paygrade of O-5. If the RDC or SVP, who are usually in the O-5 grade, represented one of the parties, the only person in the office of the staff judge advocate (OSJA) (likely the installation) who could serve as the PHO might be the DSJA if they were at least equal in grade. Otherwise, the convening authority would have to bring in a senior O-5 judge advocate (JA) TDY to serve as PHO. Professional Experiences-JSC, *supra* note 13.

⁷⁶ One factor Congress was concerned about with military justice reform was cost. During sequestration downsizing and budget cuts, both the HASC and the Senate Armed Services Committee (SASC) staffers were cognizant of the fiscal restraints the Services were facing and they understood that adding more TDY expenses would necessarily result in cuts to the commander's budget elsewhere.

and whether the accused committed it. ⁸⁴ Third, it required that the presentation of evidence and the examination of witnesses at the preliminary hearing be narrowed in scope such that only evidence that is "relevant to the limited scope of the hearing" be considered at the hearing. ⁸⁵

While these additions appear to clarify the hearing's real purpose, one final insertion made by Congress threatened to unravel it all. In laying out the accused's rights at the hearing, which includes the right to be represented by counsel and the right to cross-examine government witnesses, Congress also afforded the accused the right to "present additional evidence in defense and mitigation, relevant to the limited purposes of the hearing." ⁸⁶ This last phrase led to several months of debates and discussions among the JSC and the TJAGs about the meaning of "in defense and mitigation" and how they could reconcile this right with the requirement to keep the scope of the hearing limited. ⁸⁷ In fact, for almost two months, the JSC members met with their respective TJAGs to examine the PHO's potential role and how they could help ensure that the scope of the hearing was limited to a probable cause determination. ⁸⁸

The TJAGs in turn, met once a month to discuss the issue among themselves. ⁸⁹ The discussions centered on whether the PHO should be able to *sua sponte* call additional witnesses and ask for more evidence outside of what the parties offered into evidence at the hearing. ⁹⁰ One primary concern focused on what should happen if the government proved up most of the elements of an offense but not others. Should the PHO be able, for the sake of efficiency and expediency, to call an additional witness or two on their own or issue a *subpoena duces tecum* for additional evidence in order to satisfy the missing elements? The Services were split initially, but after **[*15]** a few meetings, they all agreed that if the government failed to meet its burden of proof at the hearing, then the convening authority had three options--she could dismiss the charges the PHO said were insufficient, she could ignore the PHO's recommendation and press forward to referral anyways, or she could order another preliminary hearing. ⁹¹ What everyone agreed could not happen was to allow the PHO to try and request additional evidence or witnesses

⁷⁷ Lawyers representing clients (legal assistance attorneys and Special Victim Counsels) could not serve as PHOs, neither can judge advocates (JAs) representing the parties as trial counsel (TCs), or the SJA. That leaves administrative law, claims, and operational law JAs and the operational law section is typically very small and is frequently deployed to contingency operations or exercises. The three operational law attorneys in the I Corps office, for example, are deployed to exercises and planning conferences every month in support of the Corps' Pacific Pathways mission. This assertion is based upon the author's professional experience as the Deputy Staff Judge Advocate at I Corps and Joint Base Lewis-McChord.

⁷⁸ FY14 NDAA, Pub. L. No. 113-66, § 1702, **127 Stat. 672, 954-55 (2013)**.

⁷⁹ See *supra* text accompanying note 60.

⁸⁰ After speaking with the other services and looking at the courts-martial numbers for several fiscal years, the staffers understood that the Army would be the only Service likely to rely on these necessary exceptions. Professional Experiences-JSC, *supra* note 13.

⁸¹ FY14 NDAA, Pub. L. No. 113-66, § 1702, **127 Stat. 672, 954-55 (2013)**.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

on their own.⁹² With all of that under consideration, the JSC began to methodically lay out the role of the PHO in RCM 405 to ensure that the scope of the hearing was limited to a probable cause determination the way Congress intended, despite the seemingly contradictory rights and requirements they laid out in the statute.

In a recent edition of the *Military Law Review*, one author who advocates replacing the preliminary hearing with a military grand jury, reviewed all of the recent changes to **Article 32** and concluded that, "While the scope of the preliminary hearing was narrowed, the authority given to the PHO was expanded."⁹³ He cites as evidence the fact that the PHO can direct the government to order a *subpoena duces tecum* to secure evidence not in the government's control over the government's objection.⁹⁴ While that is partially true, the rest of the rule states that if the government fails to issue the subpoena after the PHO has determined that the evidence is relevant, not cumulative, and necessary, all the PHO can do is make a note of it in his report.⁹⁵ The PHO has no authority to issue his own subpoena to secure the evidence.⁹⁶ With regard to evidence that is under the government's control, if the PHO determines over government counsel's objection that the evidence is relevant, not cumulative, and necessary, the government shall make "reasonable efforts" to obtain the evidence.⁹⁷ The rule does not specify what "reasonable efforts" means, and if the government fails to produce the evidence, the only thing the PHO may do is again, make a note in his report.⁹⁸

Similar restraints on the PHO's authority also apply to producing witnesses. If the defense requests to hear from a military witness over government objection, the PHO must determine whether the witness is relevant, not cumulative, and necessary based on the limited scope and purpose of the preliminary hearing.⁹⁹ If the PHO makes such a determination, then under the rule, the military witness's commander then gets to decide, based on operational necessity or mission requirements, if that witness is available to provide testimony at the hearing.¹⁰⁰ If there is a dispute among the parties about the manner in which the military witness will testify, the commander also

⁸⁷ Interestingly enough, some of the staffers requested a meeting with the Chair of the JSC shortly after passage of the FY14 NDAA to discuss how changes to the hearing were playing out in practice. Professional Experiences-JSC, *supra* note 13. During the course of the meeting, the staffers seemed caught off guard that the final version of the bill that passed included in it the accused's right to present evidence in defense and mitigation. *Id.*

⁸⁸ The Joint Service Committee on Military Justice voting group members are appointed by their respective The Judge Advocate Generals (TJAGs) to sit on the JSC and they meet with them frequently to discuss proposed modifications to the MCM in order to obtain their service's official positions. *Id.*

⁸⁹ Sometimes when the JSC cannot resolve key differences among themselves, the service TJAGs will get together to resolve them at their level and issue appropriate guidance to their respective voting group members. *Id.*

⁹⁰ Since Congress did not give specific guidance with respect to what the PHO's role was, the services had to figure that out. *Id.* Because each service's military justice practice and culture is different, this particular discussion took several weeks to iron out. *Id.* Some services did not experience the mini-trial effect that others had in recent years and were initially less concerned about restricting the PHO's powers at the hearing. *Id.*

⁹¹ MCM, *supra* note 35, R.C.M. 403(b), 404, 407(a).

⁹² The services all eventually agreed that in order to properly limit the scope of the hearing's intent as Congress intended, the PHO could not be permitted to *sua sponte* consider additional evidence and witnesses. *Id.*

⁹³ Major John G. Doyle, *The Code Indicted: Why the Time is Right to Implement a Grand Jury Proceeding in the Military*, [223 MIL. L. REV. 644-45 \(2015\)](#).

⁹⁴ *Id.*

gets to decide whether the witness will testify in person, by video teleconference, by telephone, or by similar means of remote testimony. ¹⁰¹ The commander's decisions on each of these issues are final. ¹⁰²

Regarding civilian witnesses, if the PHO makes the determination that the witness is relevant, not cumulative, and necessary, government counsel "shall" invite the witness to testify, and if the witnesses agrees to testify, government counsel "shall" make the necessary arrangements. ¹⁰³ If expense to the government is incurred in procuring the witness however, the convening authority who ordered the hearing shall determine whether the witness will testify in person or by some other alternate means provided in the rule. ¹⁰⁴ The PHO again has no authority under the rule to override the convening authority's determination not to pay for travel for in-person witness testimony. ¹⁰⁵

What the PHO can do under the rule is to question the witnesses called by the parties and even suggest that the parties call additional witnesses or present more evidence in order to help him make a probable cause determination as required under subsection (e) of RCM 405. ¹⁰⁶ Even then, the JSC warned that the PHO "shall not call witnesses *sua sponte*," that the PHO "shall not consider evidence not presented at the preliminary hearing," and that the PHO "shall not depart from an impartial role and become an advocate for either side." ¹⁰⁷ With all of these restrictions in play, it is difficult to understand how the role of the PHO at a preliminary hearing is more expansive than what the role of the IO used to be at a **pretrial investigation** under the old statute. In reality, quite the opposite is true.

In conjunction with narrowing the scope of the PHO's role, the JSC had to figure out other ways to keep the preliminary hearing from becoming a mini-trial before the **[*16]** trial, like what Congress had witnessed in the Naval Academy rape case. ¹⁰⁸ As alluded to earlier, the JSC had to try and discern what Congress meant by permitting the accused to present "evidence in defense and mitigation". ¹⁰⁹ The first thing the JSC did was to scope the term "matters in mitigation" to mean "matters that may serve to explain the circumstances surrounding a charged

⁹⁵ Exec. Order No. 13696, [80 Fed. Reg. 119](#) (June 22, 2015).

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* These restrictions were specifically included to ensure that the PHO could not expand the limited scope of the hearing and turn the proceedings into a mini-trial like what it had become in recent years. Professional Experiences-JSC, *supra* note 13.

¹⁰⁸ Henneberger & Shin, *supra* note 9. Professional Experiences-JSC, *supra* note 13.

offense." ¹¹⁰ The JSC then tried to make clear in the introductory paragraph of RCM 405 that a preliminary hearing was by no means intended to serve as a discovery tool and that it would be limited to an examination of only those issues necessary to determine whether there is probable cause to conclude that an offense has been committed and whether the accused committed it." ¹¹¹ The JSC also made sure to articulate throughout the rule (twenty times to be exact) that any evidence presented at the preliminary hearing by either party, to include the accused's right to cross-examine witnesses, present matters in defense and mitigation, and to make a statement, had to be "relevant, not cumulative, and necessary for the limited scope and purpose of the preliminary hearing." ¹¹²

Whether any or all of the changes discussed thus far will satisfy the three objectives Congress set out to accomplish in reforming **Article 32** remains to be seen because they are still novel. Affording military and civilian victims the statutory right not to testify at the preliminary hearing will certainly eliminate the potential for future hostile and abusive interrogation like what took place in the Naval Academy rape case. ¹¹³ The revisions to RCM 702 will also ensure that these same victims who also subsequently decline to participate in interviews with the defense after the preliminary hearing are not then automatically subject to being deposed for opting out of that too. ¹¹⁴ In the author's experience, line officers made fine IOs in the past and will continue to do so by exception. ¹¹⁵ Judge advocates are already proving that they make fine PHOs, even junior ones who find themselves presiding over these hearings by exception. ¹¹⁶

There will always be challenges in attempting to limit the scope of the hearing to just probable cause, despite the twenty or so helpful reminders the JSC inserted in the rule that any evidence admitted must be "relevant, not cumulative, and necessary to the limited scope and purpose of the hearing". ¹¹⁷ So long as the accused is entitled to present matters in defense and mitigation and the PHO is required to make a disposition recommendation to the convening authority, there will always be opportunities for a savvy defense counsel to turn the hearing into a lengthy ordeal in some cases. ¹¹⁸ Only time will tell the true impact of these changes and even more change is on the way.

VIII. Military Justice Act of 2016

On December 8, 2015, the MJRG submitted a legislative proposal to Congress titled "The Military Justice Act of 2016 (MJA)." ¹¹⁹ The proposal is a massive overhaul of the entire military justice system. ¹²⁰ General Martin

¹⁰⁹ *Id.* Congress failed to define either term in the statute. The JSC looked at the definition of mitigation in RCM 1001(c)(1)(B) and determined that it was much too broad.

¹¹⁰ Exec. Order No. 13696, [80 Fed. Reg. 119](#) (June 22, 2015).

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ See Henneberger & Shin, *supra* note 9.

¹¹⁴ Exec. Order No. 13696, [80 Fed. Reg. 119](#) (June 22, 2015).

¹¹⁵ FY14 NDAA, Pub. L. No. 113-66, § 1702, **127 Stat. 672, 954-55 (2013)**.

¹¹⁶ Zachary D. Spilman, *Scholarship Saturday: Article 32--Why and What, and a new Keyboard*, CAAFlog (Feb. 28, 2015) <http://www.caaflog.com/category/miljus-scholarship/>. Navy Commander Robert Monahan was a military judge at the time of the hearing.*Id.* He recommended dismissing the charges against two of the co-accused. *Id.*

¹¹⁷ Exec. Order No. 13696, [80 Fed. Reg. 119](#) (June 22, 2015).

¹¹⁸ *Id.*

¹¹⁹ *MJA Press Release*, *supra* note 8.

Dempsey, Chairman of the Joint Chiefs of Staff at the time, advised the Secretary of Defense to conduct a holistic review of the entire UCMJ.¹²¹ In accordance with the Secretary of Defense's directive, the MJRG was established and took just over a year to complete its work.¹²² One of the major reforms contained in the proposal includes moving discovery from post-referral to pre-referral.¹²³ A second major reform would include providing military judges the same powers as their civilian counterparts and to let them exercise those powers at pre-referral instead of post-referral.¹²⁴ As you will see, these two major reforms tie in to other recommendations the MJRG made to further alter the complexion and function of the Article 32 preliminary hearing.

The MJRG's first proposal would eliminate the requirement for the PHO to make a disposition recommendation to the convening authority in the final **[*17]** report.¹²⁵ Under the MJA, the parties and the victim may submit additional information after the preliminary hearing is concluded to the convening authority to better inform his disposition determination.¹²⁶ The PHO would have to organize and analyze this additional information and articulate for the convening authority how it is relevant to a disposition determination. The JSC would ultimately have to craft rules that would govern how this information is collected and sealed, if necessary, for consideration by the convening authority.¹²⁷ That information would undoubtedly be much broader in scope than information presented at the hearing itself, given the hearing's limited scope. The MJRG explained that this proposed change was

[B]ased in part on a recognition that the convening authority's ultimate disposition decision depends on a broad range of factors relating to good order and discipline--of which the preliminary hearing officer may not be aware and which may not directly relate to the legal or factual strengths or weaknesses of the limited case as presented at the preliminary hearing.¹²⁸

Although the PHO would not have to make a disposition recommendation under the MJA, he would be required to submit a more robust report to the convening authority under a second proposal.¹²⁹ Preliminary hearing officers would be required to analyze every specification of every charge and provide a statement of their reasoning and conclusions in light of the limited purpose of the hearing, including a summary of the relevant witness testimony and documentary evidence presented at the hearing along with any of the PHO's observations concerning the testimony of witnesses and the availability of evidence at trial.¹³⁰ The report would also include recommendations for any necessary modifications to the form of the charges or specifications and a statement of action taken on evidence

¹²⁰ The MJA proposes thirty-seven new articles to the UCMJ, substantive revisions to sixty-eight articles, and includes draft legislative language implementing all proposed changes. See REPORT OF THE MILITARY JUSTICE REVIEW GROUP PART I: UCMJ RECOMMENDATIONS (Dec. 22, 2015), http://www.dod.mil/dodgc/images/report_part1.pdf [hereinafter UCMJ RECOMMENDATIONS].

¹²¹ MILITARY JUSTICE REVIEW GROUP, <http://www.dod.mil/dodgc/mjrg.html> (last visited July 11, 2016).

¹²² *Id.*

¹²³ *Military Justice Act of 2016*, *supra*, note 8.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ UCMJ RECOMMENDATIONS, *supra* note 120, at 330.

¹²⁹ *Military Justice Act of 2016*, *supra*, note 8.

¹³⁰ *Id.*

adduced with respect to any uncharged offenses. ¹³¹ Lastly, the PHO, while not required to consider evidence of disposition during the hearing, would be required to review and analyze the evidence offered by the parties and the victim after the hearing and include a summary of that evidence in the final report. ¹³² The MJRG figured that by including such a requirement, the convening authority, at least, could make an informed decision as to disposition based on the PHO's summary in the report as opposed to what they get now--a recommendation in summary form without any analysis. ¹³³

The MJRG also followed the JSC's lead in protecting victims from deposition abuse after exercising the right not to testify at the preliminary hearing. ¹³⁴ They proposed statutory language in **Article 32** clarifying that a victim's declination to participate in the preliminary hearing "shall not serve as the sole basis for ordering a deposition" under **Article 49**, UCMJ. ¹³⁵ Since the MJRG has also proposed expanding the military judge's powers prior to the referral of charges, there will necessarily be a set of rules that govern the use of investigative depositions at referral and not just at the preliminary hearing or after referral as is currently the case. ¹³⁶

The proposal to move discovery from referral to referral will also have a significant impact on the **Article 32** preliminary hearing. ¹³⁷ Since the defense will have access to almost everything in the government's possession prior to the hearing, it should significantly diminish the defense's inclination to want to try and turn the hearing into a discovery tool. The fact that military judges and part-time magistrates working for the military judge (another separate MJRG proposal) have expanded powers prior to referral, should also eliminate most of the evidentiary issues that the PHO is currently required to consider at the hearing. ¹³⁸ For instance, one way to eliminate a frequent and complicated evidentiary issue in certain hearings would be to appoint a military judge as the PHO in a sexual assault case where Military Rule of Evidence (MRE) 412 sexual predisposition evidence frequently comes into play. ¹³⁹ Instead of conducting potentially two separate closed hearings--one before the PHO and another before the military judge prior to trial--there could be one hearing properly convened and executed at the preliminary hearing. There would be no need for the PHO to "assume the power of the military judge" as the current rule contemplates, when you could simply have an actual judge exercise her own powers. ¹⁴⁰ The military judge could also rule immediately on evidentiary and any latent discovery issues at the preliminary hearing instead of simply requiring **[*18]** the PHO to make a note in his report only to require a judge to sort it out later. ¹⁴¹

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ See *supra* text accompanying note 37.

¹³⁵ *Military Justice Act of 2016, supra* note 8, at 42.

¹³⁶ UCMJ RECOMMENDATIONS, *supra* note 120.

¹³⁷ *Id.*

¹³⁸ *Id.* The MJRG proposes, subject to TJAG approval, that part-time military magistrates (PTMM) be empowered to decide the same issues that the military judge would be asked to resolve, ie. motions, discovery, depositions, expert witnesses. Professional Experiences, *supra* note 13. Additionally, PTMMs could also preside over the new bench trial under the MJA, which is essentially a special court-martial that could not adjudicate a discharge or confinement for more than 6 months. *Id.*

¹³⁹ *Military Justice Act of 2016, supra*, note 8.

¹⁴⁰ Exec. Order No. 13696, [80 Fed. Reg. 119](#) (June 22, 2015).

¹⁴¹ *Id.*

There are hundreds more MJRG recommendations that would drastically alter the current military justice landscape. ¹⁴² Some are good, some are not, like the proposal to move discovery from referral to preferral and the amount of time the government will inevitably consume trying to locate and turn over evidence prior to the **Article 32** hearing. ¹⁴³ How would the government ever move a case the magnitude of a *United States v. Hassan* beyond the preferral stage if that were a requirement? The Hassan case involved hundreds of witnesses and hundreds of thousands of pages of medical records, autopsy reports, police reports, victim statements and other evidence stemming from the thirteen counts of premeditated murder and thirty-two counts of attempted murder with which Major Hasan was charged. ¹⁴⁴ We would still be waiting today to schedule Hassan's **Article 32** hearing as the prosecution and defense continued to sort out discovery issues.

IX. Conclusion

While there are many more pros and cons to the MRJG's legislative proposal, one thing is certain--everybody has a good idea and they are not afraid to share it. Whether these and other reforms ever see the light of day remains to be seen. In the meantime though, the author hopes that you at least have a better understanding about why Congress made some of the historic changes it did to the **Article 32** preliminary hearing.

The Army Lawyer
The Army Lawyer

End of Document

¹⁴² See *supra* text accompanying note 120.

¹⁴³ *Id.*

¹⁴⁴ Michael Muskal and Molly Hennessy-Fiske, *Maj. Nidal Malik Hasan Tells Court-Martial: "I am the Shooter"*, LA TIMES (Aug. 6, 2013), <http://www.articles.latimes.com/2013/aug/06/nation/la-na-nn-nidal-malikhasan-fort-hood-20130806>.