Article 32 – Preliminary Hearing

10 U.S.C. § 832

[Military Justice Review Group Report Extract. This proposal was not adopted by Congress.]

1. Summary of Proposal

This proposal would focus the preliminary hearing on an initial determination of probable cause prior to referring charges to a general court-martial; require a more comprehensive preliminary hearing report; and provide an opportunity for the government, the defense, and victims to submit additional information at the conclusion of the hearing pertinent to an appropriate disposition of the charges and specifications. The proposal would replace the statute's provision for a "recommendation" on disposition with a requirement for the preliminary hearing officer to analyze and organize the information from the proceeding in a manner designed to better assist the staff judge advocate and the convening authority in fulfilling their respective disposition responsibilities under Articles 30 and 34. Part II of the Report will address changes in the rules implementing Article 32 that would be required as a result of the proposed statutory amendments.

2. Summary of the Current Statute

Article 32, as recently amended by NDAA FY 2014 and NDAA FY 2015, requires completion of a preliminary hearing as a precondition to referral of charges to a general court-martial. The statute provides that the purpose of a preliminary hearing is limited to: (1) determining whether there is probable cause to believe the accused committed the offense; (2) determining whether there is jurisdiction over the accused and the offense(s); (3) considering the form of the charge(s); and (4) recommending "the disposition that should be made of the case." An impartial hearing officer, normally a judge advocate senior in rank to the accused, presides at the preliminary hearing and prepares a post-hearing report for the convening authority addressing probable cause, jurisdiction, the form of the charges, and the hearing officer's recommendation as to disposition. At the hearing, the accused, who must be advised of the charges, has the right to be represented by counsel, to cross-examine witnesses who testify, and to present evidence in defense and mitigation that is relevant to the purposes of the hearing. The hearing officer may consider uncharged misconduct, subject to providing notice to the accused and affording the accused the same opportunities for representation, cross-examination, and presentation of evidence as are available regarding the charges.

Article 32(d)(3) provides that a victim (including any military member) who declines to testify at the preliminary hearing cannot be required to do so. Under Article 32(e), the preliminary hearing must be recorded, and a copy of the recording must be provided to a victim upon request. The requirements of Article 32 are binding on all convening authorities; however, failure to follow them does not constitute jurisdictional error.

3. Historical Background

Article 32 traces its history to the 1920 amendments to the Articles of War, which grew out of the post-World War I debates concerning the administration of military justice in the Army during the war.[1] A significant concern raised during the hearings and debates concerned the practice under which "a soldier may be put on trial by a commanding officer's arbitrary discretion, without any preliminary inquiry into the probability of the charge."[2] The 1920 amendments to the Articles of War established a requirement that:

> No charge will be referred for trial until after a thorough and impartial investigation thereof shall have been made. This investigation will include inquiries as to the truth of the matter set forth in said charges, form of charges, and what disposition of the case should be made in the interest of justice and discipline. At such 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 investigating officer shall examine available witnesses requested by the accused. If the charges are forwarded after such investigation, they shall be accompanied by a statement of the substance of the testimony taken on both sides . . . .[3]

The goal of this statutory pretrial investigation was to ensure adequate preparation of cases; to guard against hasty, ill-considered charges; to save innocent persons from the stigma of unfounded charges; and to prevent trivial cases from going before general courts-martial.[4]

The post-World War II military justice debates resulted in a series of amendments to the Articles of War known as the Elston Act.[5] Among the changes, Congress moved "pretrial investigations" to Article 46 and amended the statute to permit the accused to be

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[1] AW 70 of 1920. Like the rest of the Articles of War, this requirement applied only to the United States Army. Discipline in the Navy was controlled by the Articles for the Government of the Navy, which contained no statutory provision for a pretrial investigation. The Articles for the Government of the Navy were adopted in 1862 and had not been substantially amended since that time. Coast Guard Disciplinary Regulations called for a "careful investigation into the circumstances on which the complaint is founded" and a written report which included available witnesses and evidence.

[2] WAR DEPARTMENT, MILITARY JUSTICE DURING THE WAR 63 (1919). It was also during this time that the Army first developed the criminal investigative division within the Military Police Corps to conduct criminal investigations. However, at this early stage, investigators were selected from military police units within each individual command, and they generally lacked investigative training and experience. The Navy's criminal investigative organization did not develop until 1945, when the Office of Naval Intelligence charter was expanded to include criminal investigations.

[3] AW 70 of 1920.

[4] Humphrey v. Smith, 336 U.S. 695, 698-99 (1949) (citing WAR DEPARTMENT, MILITARY JUSTICE DURING THE WAR 63 (1919)).

[5] Act of June 24, 1948, ch. 625, tit. II, 62 Stat. 627.

represented by counsel at the investigation.[6] Two years later, Congress consolidated the Articles of War, the Articles for the Government of the Navy, and the Disciplinary Rules for the Coast Guard into the UCMJ and incorporated the requirement for a pretrial investigation.[7] The language of Article 32 outlining its purpose, however, remained essentially the same as under the original statute under the 1920 Articles of War: an inquiry as to the truth of the matter set forth in the charges, consideration of the form of charges, and a recommendation as to the disposition which should be made of the case "in the interest of justice and discipline."[8]

Subsequent to enactment of the UCMJ, the statutory provisions governing the Article 32 investigation remained largely unchanged over the next six decades, with only minor technical and clarifying amendments. The Military Justice Amendments of 1981 clarified the accused's right to individual military counsel at the investigation and aligned the right to counsel in Article 32(b) with the right to counsel under Article 27 and the duties of counsel contained in Article 38.[9] NDAA FY 1996 amended the statute to provide for the investigation of uncharged misconduct,[10] and NDAA FY 2012 expanded the subpoena authority under Article 47 to include a subpoena to compel the production of documents and evidence issued in connection with an Article 32 investigation.[11]

In NDAA FY 2014, Congress revised Article 32 in its entirety, with the new provisions applying to offenses committed on or after December 27, 2014.[12] The Joint Explanatory Statement accompanying the final bill noted that the legislation "changes Article 32, UCMJ, proceedings from an investigation to a preliminary hearing."[13] The statement drew the

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[6] AW 46(b) of 1948 ("The accused shall be permitted, upon his request, to be represented at such investigation by counsel of his own selection, civil counsel if he so provides, or military if such counsel be reasonably available, otherwise by counsel appointed by the officer exercising general court-martial jurisdiction over the command . . . ."). As Congress was enacting the Elston Act, the Navy was conducting a review of the Articles for Government of the Navy. Although these Articles did not require a pretrial investigation, internal Service regulations called for an inquiry by the officer recommending court-martial, who could order a board of investigation or court of inquiry if additional development of the facts was needed. *See* SYNOPSIS OF RECOMMENDATIONS FOR THE IMPROVEMENT OF NAVAL JUSTICE, OFFICE OF THE JUDGE ADVOCATE GENERAL, NAVY DEPARTMENT (1947), *available at* http://www.loc.gov/mwg-internal/de5fs23hu73ds/progress?id=yHs22rx0-_bQk8Zm_NTgo2FGtJbHsUEszdpj8uXPbRo.

[7] Act of May 5, 1950, ch. 169, 64 Stat. 108.

[8] Article 32(a) (1950-2013).

[9] Military Justice Amendments of 1981, Pub. L. No. 97-81, § 4, 95 Stat. 1085.

[10] NDAA FY 1996, Pub. L. No. 105-85, § 1131, 111 Stat. 1759 (1997).

[11] NDAA FY 2012, Pub. L. No. 112-81, § 542, 125 Stat 1298 (2011); *see* R.C.M. 703(e)(2)(c)(1).

[12] NDAA FY 2014, Pub. L. No. 113–66, § 1702, 127 Stat. 672 (2013). NDAA FY 2015 subsequently amended the new Article 32 to apply to all hearings held on or after December 27, 2014, irrespective of the date of the offenses. NDAA FY 2015, Pub. L. No. 113-291, § 531(a)(4), 128 Stat. 3292 (2014).

[13] 159 CONG. REC. H7949 (daily ed. Dec. 12, 2013) (Joint Explanatory Statement on H.R. 3304).

following contrast between an Article 32 "investigation" under then-current law and an Article 32 "preliminary hearing" under the new version of Article 32:

> Under current law and Rule 405 of the Rules for Courts-Martial, an Article 32, UCMJ investigation includes an inquiry into the truth of the matters set forth in the charges, provides a means to ascertain and impartially weigh all available facts in arriving at conclusions and recommendations, and serves as a tool of discovery. The agreement establishes that an Article 32, UCMJ, preliminary hearing has a narrower objective: (1) Determine whether there is probable cause to believe an offense has been committed and that the accused committed the offense; (2) Determine whether the convening authority has court-martial jurisdiction over the offense and the accused; (3) Consider the form of the charges; and (4) Recommend the disposition that should be made of the case.[14]

Subsequently, Congress approved a technical amendment to the new Article 32 to clarify that the accused, as under prior law, could waive the Article 32 proceeding.[15]

4. Contemporary Practice

The new Article 32 provisions apply to all preliminary hearings held on or after December 27, 2014. A recent executive order contains the implementing rules and procedures for the new Article 32, including a new R.C.M. 404A addressing disclosure of matters to the defense before the preliminary hearing.[16] The substance of the new statute and the new implementing provisions have not been addressed in reported appellate decisions.[17] Part II of this Report will further consider contemporary practice in light of any developments in the implementing rules or the applicable case law concerning Article 32.

5. Relationship to Federal Civilian Practice

There is not a direct corollary to the Article 32 hearing in federal civilian practice. Both the prior Article 32 investigation and the current Article 32 preliminary hearing have been compared to two distinct types of civilian proceedings—a civilian grand jury and a judicial probable cause hearing.[18] The current Article 32 preliminary hearing has some of the traits of both, and possesses other traits common to neither.

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[14] *Id.*

[15] NDAA FY 2015, Pub. L. No. 113-291, § 531(a)(4), 128 Stat. 3292 (2014).

[16] Exec. Order No. 13,696, 80 Fed. Reg. 35,783 (Jun. 22, 2015).

[17] *See* Manual for Courts-Martial; Proposed Amendments, 79 Fed. Reg. 59,938-59,942 (Oct. 3, 2014).

[18] *See, e.g.*, Lawrence J. Sandell, *The Grand Jury and the Article 32: A Comparison*, 1 N. KY. L. REV. 25 (1973); *see also* REPORT OF THE COMPARATIVE SYSTEMS SUBCOMMITTEE TO THE RESPONSE SYSTEMS TO ADULT SEXUAL ASSAULT CRIMES PANEL (May 2014) (comparing the prior Article 32 investigation and the new Article 32 preliminary hearing to the civilian preliminary hearing, and identifying two major differences: (1) unlike civilian preliminary hearings, Article 32 hearings have traditionally served as a discovery tool for the defense; and (2) unlike

In federal civilian criminal trials, the right to a grand jury is established through the Fifth Amendment to the Constitution and is implemented in the Federal Rules of Criminal Procedure, which recognize the right to grand jury indictment in all felony cases.[19] The Supreme Court has described the purpose and powers of the grand jury in expansive terms:

> [The grand jury] serves the dual function of determining if there is probable cause to believe that a crime has been committed and of protecting citizens against unfounded criminal prosecutions. It has . . . extraordinary powers of investigation and great responsibility for directing its own efforts. . . . Without thorough and effective investigation, the grand jury would be unable either to ferret out crimes deserving of prosecution, or to screen out charges not warranting prosecution.[20]

The U.S. Attorney's Manual, however, describes a narrower role for grand jurors:

> While grand juries are sometimes described as performing accusatory and investigatory functions, the grand jury's principal function is to determine whether or not there is probable cause to believe that one or more persons committed a certain Federal offense within the venue of the district court. . . . The grand jury's power, although expansive, is limited by its function toward possible return of an indictment . . . [and] cannot be used solely to obtain additional evidence against a defendant who has already been indicted [or] used solely for pre-trial discovery or trial preparation.[21]

Although the grand jury is often described as an independent body—and grand juries do act with independence in many areas—the Supreme Court has stated that it is "an appendage of the court, powerless to perform its investigative function without the court's aid, because powerless itself to compel the testimony of witnesses."[22] This specifically includes the ability of the grand jury to issue subpoenas. However, the court's ability to exercise its supervisory power over grand juries is limited.[23]

Regular federal grand juries are standing bodies, impaneled for up to eighteen months, although they may actually sit for as little as once a month. Grand juries have a maximum of 23 members, with 16 needed for a quorum. An indictment may be returned by a vote of 12

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civilian preliminary hearings, the Article 32 hearing officer's determination regarding probable cause is not binding on the convening authority).

[19] FED. R. CRIM. P. 7(a).

[20] United States v. Sells Engineering, Inc., 463 U.S. 418, 423 (1983) (internal quotations and citations omitted).

[21] U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-11.101 (1997) [hereinafter USAM].

[22] Brown v. United States, 359 U.S. 41, 49 (1959).

[23] *See* United States. v. Williams, 504 U.S. 36 (1992) ("Given the grand jury's operational separateness from its constituting court, it should come as no surprise that we have been reluctant to invoke the judicial supervisory power as a basis for prescribing modes of grand jury procedure.").

or more members.[24] The grand jury does not conduct its business in open court, and a federal judge does not preside over its proceedings. It meets behind closed doors, in secret, with only the grand jurors, the attorney for the government, witnesses, a recorder, and possibly an interpreter present. The target of a grand jury investigation or a potential defendant may request to appear and testify before the grand jury, but may actually appear only if invited or subpoenaed and may not be accompanied by counsel while testifying. In addition, a potential defendant has no right to cross-examine witnesses and no right to introduce evidence in rebuttal. Hearsay evidence is generally permissible at the grand jury proceeding, and there is no legal requirement for the prosecutor to present exculpatory evidence.[25]

There are four possible outcomes from a federal grand jury investigation: (1) an indictment, in which the grand jury accuses an individual investigated of a specific crime and the government is authorized to proceed to trial; (2) a vote not to indict, which is binding on the government unless the U.S. Attorney specifically authorizes the case to be re-presented to the same or a different grand jury; (3) the discharge or expiration of the grand jury without any action; or (4) the submission of a presentment or report to the court.[26] In the majority of cases that go before a grand jury, the government will have already conducted a criminal investigation, and is primarily seeking an indictment. In these cases, the attorney for the government will present evidence to the grand jury, including testimony from criminal investigators or law enforcement agents, in order to establish probable cause for the indictment. In other cases, however, the investigation will be incomplete before the grand jury stage, and the grand jury—either on its own initiative or at the suggestion of the attorney for the government—will investigate the matter presented by the government. In its investigative capacity, the grand jury has the power to issue subpoenas to compel the testimony of witnesses and the production of documents

[24] FED. R. CRIM. P. 6(a) and (f).

[25] *See Williams*, 504 U.S. at 55 ("[W]e conclude that courts have no authority to prescribe such a duty [to disclose exculpatory evidence to the grand jury] pursuant to their inherent supervisory authority over their own proceedings."). Although there is not a legal requirement, Department of Justice policy requires a prosecutor who is personally aware of substantial evidence that directly negates the guilt of a subject to disclose that evidence to the grand jury before seeking an indictment. USAM, *supra* note 21, at § 9-11.241. *Cf.* R.C.M. 601(d)(1) (providing that charges may be referred to court-martial by a convening authority "based on hearsay in whole or in part" and that "[t]he convening authority or judge advocate may consider information from any source . . . ."); R.C.M. 701(a)(6) (requiring the trial counsel to disclose to the defense "as soon as practicable" evidence known to the trial counsel that reasonably tends to negate the guilt of the accused of an offense charged, reduce the degree of guilt, or reduce the punishment).

[26] *See generally* SUSAN W. BRENNER, GREGORY C. LOCKHART & LORI E. SHAW, FEDERAL GRAND JURY: A GUIDE TO LAW AND PRACTICE, 1 FED. GRAND JURY § 3:4 (2d ed., 2006). At common law, 'indictments' were returned based upon evidence presented to the grand jury, while 'presentments' were "the notice taken by the grand jury of any offense from their own knowledge or observation, without any bill of indictment laid before them. . . ." Presentments are no longer a common practice.

and physical evidence.[27] A grand jury uses the court's subpoena power, as provided in Fed. R. Crim. P. 17.

In addition to the grand jury, federal civilian practice also provides for an adversarial preliminary hearing, to be conducted between 14-21 days following a not-yet-indicted accused's initial appearance following arrest.[28] The hearing is presided over by a federal magistrate judge, whose role is to determine whether there is probable cause for the charges. If there is probable cause, the magistrate judge "binds over" the charges for felony trial (pending indictment) in U.S. district court; if there is not probable cause, the magistrate judge dismisses the complaint.[29] The purpose of this proceeding is to provide the accused a procedural protection against baseless charges early in the life of a case in situations where the government has not yet sought or obtained a grand jury indictment.[30]

With respect to state practice, the Constitutional guarantee of prosecution by grand jury indictment is not applicable to the states,[31] and the Supreme Court has held that independent judicial screening of felony-level charges through a preliminary hearing is not a due process requirement.[32] Nevertheless, all American jurisdictions provide at least one procedural avenue for obtaining such a screening, and nearly two-thirds of the states allow for filing of felony-level charges without a prior grand jury indictment.[33] Instead, most of these states allow felony cases to be brought following an adversarial preliminary hearing similar to the one provided for by Fed. R. Crim. P. 5.1. Six of these states permit bypassing the preliminary hearing through direct filing of an information (a charging instrument filed with the court similar in both content and function to charges that are referred to a court-martial).[34] In these direct filing jurisdictions, the trial judge makes an ex parte probable

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[27] *Cf.* R.C.M. 703(e)-(f), as amended by Exec. Order No. 13,669, 79 Fed. Reg. 34,999 (June 18, 2014) (providing trial counsel and the Article 32 investigating officer with the power to issue subpoena duces tecum prior to referral of charges to court-martial in support of the investigation).

[28] FED. R. CRIM. P. 5.1(c). The rule requires the preliminary hearing to take place within 14 days of the initial appearance only when the accused is in custody.

[29] FED. R. CRIM. P. 5.1(e)-(f); *see* WAYNE LAFAVE, JEROLD ISRAEL, NANCY KING, AND ORIN KERR, CRIMINAL PROCEDURE §14.1(a) (Screening) (3d ed. 2013).

[30] *See* LAFAVE ET AL., *supra* note 29, at § 14.1 (Functions of the preliminary hearing) (3d ed. 2013) ("Preliminary hearing screening is said to prevent hasty, malicious, improvident, and oppressive prosecutions, to protect the person charged from open and public accusations of crime, to avoid both for the defendant and the public the expense of a public trial, to save the defendant from the humiliation and anxiety involved in public prosecution, and to ensure that there are substantial grounds upon which a prosecution may be based."). Under FED. R. CRIM. P. 5.1(a)(2), the government can bypass the preliminary hearing requirement by securing a prior grand jury indictment.

[31] Hurtado v. California, 110 U.S. 516 (1884).

[32] Lem Woon v. Oregon, 229 U.S. 586 (1913).

[33] *See* LAFAVE ET AL., *supra* note 29, at § 14.1 (Indictment states) and § 14.2(d) (Information states).

[34] *Id*. The "direct filing" states include Florida, Iowa, Montana, Minnesota, Vermont, and Washington. Of these states, Minnesota and Vermont have eliminated the preliminary hearing entirely. *Id.*

cause determination after the filing of the information by the prosecutor, by reviewing the charges and the prosecutor's sworn affidavit summarizing the available evidence.[35]

Like Article 32 hearings, state-level preliminary hearings are generally adversarial in nature. The accused has a right to counsel and to cross-examine witnesses; though in the majority of jurisdictions the rules of evidence do not apply, except with respect to privileges.[36] Most jurisdictions recognize a general defense right to present defense witnesses at the preliminary hearing.[37] However, "[w]here the magistrate has reason to believe that the defense is calling a witness to obtain further discovery of the prosecution's case, the magistrate may require the defense to make an offer of proof as to what will be obtained from the witness' testimony."[38] Furthermore, in most jurisdictions, magistrate judges will not allow subpoenas of crime victims to testify at the preliminary hearing, or at any pretrial proceeding, unless it can be shown that they are likely to be unavailable to testify at trial.[39]

The primary purposes of preliminary hearings in both federal and state practice—similar to the primary purposes of Article 32 and its statutory predecessors in the Articles of War—are to prevent hasty, malicious, improvident, or oppressive prosecutions; to ensure that there are substantial grounds upon which a prosecution may be based; and to avoid the unnecessary public expense of an unwarranted trial.[40] To ensure these purposes are fulfilled, the magistrate judge's probable cause determination is generally binding on the government.[41] Preliminary hearings also serve several prosecution and public policy goals, including: helping to inform the decision by the government whether to proceed with criminal prosecution at the felony trial court; informing the ultimate decision by the

[35] *Id.*; *see, e.g.*, MINN. R. CRIM. P. 2.01.

[36] LAFAVE ET AL., *supra* note 29, at § 14.4 (Preliminary hearing procedures). The right to cross-examine witnesses at a preliminary hearing is based on local law only, as the Supreme Court has long held that cross-examination at a preliminary hearing is not required by the confrontation clause of the Sixth Amendment. *See* Goldsby v. United States, 160 U.S. 70 (1895).

[37] LAFAVE ET AL., *supra* note 29, at § 14.4(d).

[38] *Id.*

[39] *Id.*; *see also id.* at § 20.2(e) (Depositions) (explaining that in the vast majority of jurisdictions, so-called "discovery depositions" are not allowed).

[40] *Id.* at § 14.1(a). *Cf.* Humphrey v. Smith, 336 U.S. 695, 698-99 (1949) ("[The pretrial investigation's] original purposes were to insure adequate preparation of cases, to guard against hasty, ill-considered charges, to save innocent persons from the stigma of unfounded charges, and to prevent trivial cases from going before general courts-martial.") (referring to AW 70 of 1920, the predecessor to Article 32 of the UCMJ).

[41] LAFAVE ET AL., *supra* note 29, at § 14.3. In most jurisdictions, the consequence of the magistrate judge not finding probable cause is a dismissal without prejudice, with the ability for the prosecution to seek a new preliminary hearing with new evidence, or even with the same evidence. *Id.* at § 14.3(c). A minority group of states, however, prohibit refiling on the same evidence and provide for prosecution appeal of a dismissal to the trial court. *Id.*

accused with respect to his plea;[42] gaining the defense perspective as to what actually happened; promoting the victim's interest in pursuing the matter by presenting it in a public forum; and promoting public confidence in a sensitive prosecutorial decision by having the evidence presented in a public forum and the decision ratified by a neutral and detached magistrate (or, if the case is likely to be dismissed, by showing that the dismissal stemmed from deficiencies in the evidence rather than any favoritism on the part of the prosecutor).[43] For these reasons, in most states where there is an option to bypass the preliminary hearing with a grand jury indictment, prosecutors generally choose not to exercise this option.[44]

The recently enacted Article 32 preliminary hearing differs from its federal and state civilian counterpart in that the preliminary hearing officer does not exercise judicial powers with respect to the disposition of charges. Instead, the preliminary hearing and the report of the preliminary hearing officer serve primarily as vehicles for developing and analyzing information for consideration by the staff judge advocate and the convening authority. The responsibility for determining probable cause and jurisdiction, as well as the responsibility for making a decision on disposition, only arise after the preliminary hearing officer prepares and forwards the report required by Article 32. At that point, before the charges and specifications may be referred to a general court-martial for trial, the staff judge advocate makes a determination on the legal issues of probable cause, jurisdiction, and whether each specification states an offense under military law which is binding on the convening authority if any of the three are lacking. As a separate matter, the staff judge advocate makes an advisory recommendation on disposition to the convening authority, the officer charged with the responsibility for making the ultimate disposition decision.

6. Recommendation and Justification

Recommendation 32: Amend Article 32(a)-(c) by revising the current requirement for a disposition "recommendation" to focus the preliminary hearing officer more directly on providing an analysis of the information that will be useful in fulfilling the statutory responsibilities of: (1) the staff judge advocate, in providing legal determinations and a disposition recommendation to the convening authority under Article 34; and (2) the convening authority, in disposing of the charges and specifications "in the interest of justice and discipline" under Article 30.

- This proposal would retain the core purposes of the Article 32 preliminary hearing as amended—to determine whether or not each specification alleges an offense, whether or not there is probable cause to believe that the accused committed the

[42] *Id.* at § 14.1(e) ("The hearing may then provide a valuable 'educational process' for the defendant who is not persuaded by his counsel's opinion that the prosecution has such a strong case that a negotiated plea is in the defendant's best interest.").

[43] YALE KAMISAR ET AL., MODERN CRIMINAL PROCEDURE: CASES, COMMENTS & QUESTIONS 1015 (13th ed. 2012).

[44] *See id.* at § 14.2(d), noting that the bypass option is utilized in many state jurisdictions in less than ten percent of felony cases. This is different from the federal practice, where federal prosecutors routinely bypass scheduled preliminary hearings by obtaining prior indictments. *See id.* at § 14.2(b).

offense charged, and whether or not the convening authority has jurisdiction over the accused and the offense—while restructuring the current requirement for a disposition recommendation. As amended, the parties and any victim of an offense could submit additional matters relevant to disposition to the hearing officer, which the hearing officer would then organize and analyze in the preliminary hearing report. As such, the proposed amendments would retain the current limitations on the nature of the Article 32 preliminary hearing, while expanding the opportunity for victims and the accused to provide timely and useful input for consideration in the disposition decision-making process.

- The proposed amendments recognize that the preliminary hearing officer is in a unique position to organize and analyze the information developed during the preliminary hearing and—as will be developed more fully in the proposed implementing rules in Part II of this Report—a broader range of additional documentary information that the government, the accused, and the victim would be able to submit following the hearing. Under the proposed amendments, the hearing officer would use all of this information to assist and inform the staff judge advocate's recommendation and the convening authority's ultimate disposition decision.

- Under the proposal, the hearing officer's report would be required to include an analysis of whether each specification alleges an offense; whether there is probable cause to believe the accused committed the offense; whether any modifications to the specifications are needed; the evidence supporting the elements of each offense; a summary of witness testimony and documentary evidence; observations concerning the testimony of witnesses; additional information relevant to the convening authority's disposition decision under Articles 30 and 34; and a discussion of any uncharged offenses.

- The proposed amendments would emphasize that the primary responsibility for a disposition recommendation resides with the staff judge advocate under Article 34. Also, while not requiring the preliminary hearing officer to make a recommendation, the proposed legislation does not preclude the preliminary hearing officer from doing so, either when required by service regulations or by the convening authority in a particular case.

- As in the current statute, the proposal reflects that none of the preliminary hearing officer's conclusions would be binding on the convening authority, who is ultimately responsible for determining the appropriate disposition of the charges and specifications for each case in the interest of justice and discipline.

- This proposal reaffirms that a victim's desire not to testify at the preliminary hearing will not, alone, be grounds for ordering a deposition.

7. Relationship to Objectives and Related Provisions

- This proposal supports the GC Terms of Reference by incorporating, to the extent practicable and appropriate, the principles of law and the rules of procedure used in the trial of criminal cases in the United States district courts into military justice practice.
- This recommendation also supports the GC Terms of Reference by examining and incorporating where appropriate the recommendations, proposals and analysis of the Response Systems Panel—in particular, Recommendation 115 (concerning the ordering of depositions), Recommendation 116 (regarding the treatment of the hearing officer's recommendation), and Recommendation 55 (regarding creation and implementation of mechanisms requiring trial counsel to convey the victim's specific concerns and preferences to the convening authority regarding case disposition) of the Response Systems Panel's final report.
- This recommendation is related to the proposed amendments to Articles 30, 33 and 34 concerning the staff judge advocate's responsibility to provide a recommendation, the convening authority's responsibility to appropriately dispose of the case, and guidance concerning the exercise of disposition authority.

8. Legislative Proposal

SEC. 603. PRELIMINARY HEARING REQUIRED BEFORE REFERRAL TO GENERAL COURT-MARTIAL.

(a) IN GENERAL.—Section 832 of title 10, United States Code (article 32 of the Uniform Code of Military Justice), is amended by striking the section heading and subsections (a), (b), and (c), and inserting the following:

"§832. Art. 32. Preliminary hearing required before referral to general court-martial

"(a) IN GENERAL.—(1)(A) Except as provided in subparagraph (B), a preliminary hearing shall be held before referral of charges and specifications for trial by general court-martial. The preliminary hearing shall be conducted by an