

NDA 2014 changes to UCMJ and Roles of SJA, Prosecutor, Convening Authority, Defense Counsel and Sexual Assault Victim's Counsel

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Article 32

Prior provision	NDA 2014
<p>(a) No charge or specification may be referred to a general court-martial for trial until a thorough and impartial investigation of all the matters set forth therein has been made. This investigation shall include 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.</p>	<p>“(a) PRELIMINARY HEARING REQUIRED.—(1) No charge or specification may be referred to a general court martial for trial until completion of a thorough and impartial investigation.</p>
<p>(b) The accused shall be advised of the charges against him and of his right to be represented at that investigation by counsel. The accused has the right to be represented at that investigation as provided in section 838 of this title [10 USCS § 838] (article 38) and in regulations prescribed under that section. At that 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 the investigation, they shall be accompanied by a statement of the substance of the testimony taken on both sides and a copy thereof shall be given to the accused.</p>	<p>“(2) The purpose of the preliminary hearing shall be limited to the following:  “(A) Determining whether there is probable cause to believe an offense has been committed and the accused committed the offense.  “(B) Determining whether the convening authority has court-martial jurisdiction over the offense and the accused.  “(C) Considering the form of charges.  “(D) Recommending the disposition that should be made of the case</p>
<p>(c) If an investigation of the subject matter of an offense has been conducted before the accused is charged with the offense, and if the accused was present at the investigation and afforded the opportunities for representation, cross-examination, and presentation prescribed in subsection (b), no further investigation of that charge is necessary under this article unless it is demanded by the accused after he is informed of</p>	<p>(d)(3) A victim may not be required to testify at the preliminary hearing. A victim who declines to testify shall be deemed to be not available for purposes of the preliminary hearing.</p>

<p>the charge. A demand for further investigation entitles the accused to recall witnesses for further cross-examination and to offer any new evidence in his own behalf.</p>	
<p>(d) If evidence adduced in an investigation under this article indicates that the accused committed an uncharged offense, the investigating officer may investigate the subject matter of that offense without the accused having first been charged with the offense if the accused--</p> <ul style="list-style-type: none"> <li>(1) is present at the investigation;</li> <li>(2) is informed of the nature of each uncharged offense investigated; and</li> <li>(3) is afforded the opportunities for representation, cross-examination, and presentation prescribed in subsection (b).</li> </ul> <p>(e) The requirements of this article are binding on all persons administering this chapter [10 USCS §§ 801 et seq.] but failure to follow them does not constitute jurisdictional error.</p>	<p>(e) Hearing "shall be recorded" (f) may consider uncharged offenses</p>

#### Investigating Officer

Absent "exceptional circumstances", the Article 32 preliminary hearings must now be conducted by a Judge Advocate who is "equal to or senior" to the accused's or government's counsel. Article 32 (b)(2). The non-JAG hearing officer is required to be advised by a JAG. Article 32 (b)(1).

#### Accused's rights

The NDAA 2014 has curtailed the right of the accused at the hearing from presenting "anything he may desire on his own behalf", to include calling adverse witnesses. The defense may not get a chance to cross-examine the victim who is "not be required to testify at the preliminary hearing." Article 32(d)(3). Under revised Article 32, Congress specified that the accused has the right to:

- A) "[B]e advised of the nature of the charges." Article 32(d)(1)
- B) Be "represented by counsel". Id.
- C) "Cross-examine witnesses who testify at the preliminary hearing". Article 32(d)(2).
- D) "[P]resent additional evidence in defense and mitigation, relevant" to the probable cause determination. Id.

The legislation requires that the preliminary hearing "be recorded by a suitable recording device." Article 32(d)(4).

## Rights of Victims

Article 6b(b) defines a "victim" to mean a person who "suffered a direct physical, emotional, or pecuniary harm as a result of the "commission of an offense under" the Uniform Code of Military Justice. It does not require the victim be named in the specification although that may be the intent of the change. Investigators in listing suspects, list them for "commission of an offense under" the Uniform Code of Military Justice. But Article 32(h)(2) requires the "victim" to be "named on one of the specifications."

Article 6b. grants extensive rights to victim. And some of these may be expanded under service regulations. Under Article 6b victims of qualified offense have rights to have "reasonable, accurate, and timely notice" of hearing on continuation of pretrial confinement, preliminary hearings, Article 32 hearings, courts-martial, clemency hearings, and parole hearings. The victim may not be "excluded" from these hearings "unless the military judge or investigating officer by "clear and convincing evidence, determines that testimony by the victim of an offense . . . would be materially altered if the victim heard other testimony." The victim also has the "right to be reasonably heard" at the hearing on continuation of pretrial confinement, hearing on "sentencing related to offense", clemency hearings, and parole hearings. Article 6b(a)(4). The victim also has "reasonable right to confer with the counsel representing the Government at any proceeding described" above, Article 6b(a)(5), the "right to receive restitution as provided in law", Article 6b(a)(6), the "right to proceedings free from unreasonable delay", Article 6b(a)(7), and the "right to be treated with fairness and with respect for the dignity and privacy of the victim of an offense". Article 6b(a)(8).

Sequestering victim. Article 6b(a)(3) provides that the victim may not be excluded from the Article 32 or trial "unless the military judge or investigating officer" receives "clear and convincing evidence" that the testimony of the victim might be altered by such presence. For strategic reasons, the defense may request that the victim testify first. This rule may be consistent with MRE 615. If the victim is sequestered counsel may request to be present at the hearing.

The 1950 UCMJ granted the accused the right to counsel at the general court martial. This right has been extended by the courts and rules. Edward J. Imwinkelried et al, Courtroom Criminal Evidence chs. 25, 26, and 28 (5th ed. and 2013 Supp.) and 300 Rules of Evidence. Now Article 32(d) of the NDAA 2014 grants the victim the right to "be represented by counsel at the preliminary hearing" under Article 32. The NDAA 2014 does not expressly give the victim the right to counsel at the hearing on continuation of pretrial confinement, courts-martial, clemency hearings, and parole hearings. Secretarial regulations, may grant this right.

Actions of defense counsel. Art. 6b(a)(8) provides the right to be treated with fairness "with respect for . . . privacy of the victim." This is buttressed by sec. 1701(b)(2)(B) & (E), which require "mechanisms" to ensure: that service members and civilians "make their best efforts to ensure that victims are notified of, and accorded, the rights specified in such sections;" and the existence of "[d]isciplinary sanctions for" service members and civilians "who willfully or wantonly fail to comply with requirements relating to

such rights.” Should defense counsel ask for a protective order? These sections are fatally inconsistent with the duties of DC and MJs and likely violate both Fifth and Sixth Amendments.

Discovery by defense counsel at Article 32 is now limited since the preliminary hearing is restricted to probable cause determination and the accused may not present “anything he may desire on his own behalf” as appeared in prior provision of Article 32(b).

Actions of defense counsel. DC may wish to consider waiving the preliminary inquiry to avoid having the government’s entire case paraded in front of the victim and SVC:

Article 60 changes

Congress rejected Sen. Kirsten Gillibrand’s (D-N.Y.) proposal to take military sexual assault cases outside the chain of command.

Removing the convening authority’s “sole discretion”, Article 60(c) changed to prohibit disapproving, commuting sentence related to qualifying offense or suspending a sentence for more than six months unless pursuant to pretrial agreement or based on the recommendation of the trial counsel based on “substantial assistance by the accused” in an investigation or prosecution.

The bill strips commanders’ ability to overturn guilty verdicts, requires mandatory discharge for those convicted of sexual assault and expands a counsel program for assault victims. The Article 71(d) prohibits suspension of most sentences.

It also gives victims more protection during the military’s pretrial court process, known as Article 32.

For non 120 and 125 offenses with no mandatory maximum sentence exceeding two years, no discharge and no sentence for “more than six months,” CA retains present authority.