

25. (Services) Please list any reviews being done by your Service to analyze the utility of Article 32 proceedings in sexual assault cases and provide a copy of said review. If no such review has been undertaken, please provide to the Response Systems Panel your Service position regarding the utility of Article 32 hearings, to include whether Article 32 proceedings should be replaced by a grand jury or preliminary hearing-type of proceeding.

CJCS	<p>Article 32 hearings are an important procedural protection for the accused, and one that should remain in some form. However, revision of Article 32 that would clarify and streamline the process would be welcome, so long as it is well-considered. Article 32 proceedings provide the commander with important insight into cases, and provide the defense with a discovery opportunity to confront witnesses and obtain evidence. Because of the military context, it is often difficult for the defense to obtain this access without the benefit of an Article 32 investigation. Any proposal that would maintain this balance and that is likely to survive the significant appellate challenges that we can expect from the defense would be welcome for consideration.</p>
USA	<p>The Joint Services Committee was recently asked by DOD General Counsel to provide input into amending Article 32, UCMJ. All of the services concurred with a number of changes to help streamline the process in order to avoid continually conducting mini trial rehearsals, which was never the intent of the hearing.</p> <p>First, the services all recommended that the word “thorough” should be struck from “thorough and impartial investigation” and add that the investigation shall be limited to (1) whether there is probable cause to conclude that the accused committed the offense for which the accused is charged, (2) whether a court-martial would have jurisdiction over the accused and the offense, and (3) consideration of the form of the charge or specification. The report of investigation shall include a recommendation by the investigating officer as to each matter specified in the preceding sentence. This varies from the current language of Article 32 which requires a thorough investigation that 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 interest of justice and discipline.”</p> <p>Second, the services all recommend that a military victim, not just a sex assault victim, should have the right to declare themselves unavailable for purposes of the Article 32 investigation. In other words, military and civilian victims should all be treated the same. Instead of simply declaring them per se unavailable, the current recommendation would allow for a victim to testify at the hearing should they, upon the advice of their Special Victim Counsel or the recommendation of the Special Victim Prosecutor, choose to do so.</p> <p>Third, in keeping with expanding victim’s rights at the Article 32 investigation, and in particular, the rights of sex assault victims, each of the services recommended amending Article 32 to reflect that while, Military Rule of Evidence (MRE) 412 applies at the Article 32 investigation such that prior sexual behavior and predisposition evidence is not admissible, the exceptions under MRE 412b cannot</p>

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even be considered at an Article 32 investigation. The exceptions and the accompanying balancing test to determine their admissibility should be reserved for a military judge and military judge only at an Article 39, UCMJ, session after the Article 32 report of investigation is complete.

Fourth, the accused may cross examine any available witness as is their right under the current Article 32, but the accused's right to call witnesses on their own behalf would be significantly reduced. The accused would be limited to calling witnesses to present evidence only if it is relevant to the charges themselves under investigation. This would preclude the calling of character evidence witnesses in a number of cases, and significantly limit the number of witnesses called to offer extenuating or mitigating circumstances testimony as is currently permitted under Article 32. None of the services believe that it is a good idea to replace the Article 32 with a federal grand jury type proceeding. The Article 32 investigation serves a number of relevant, useful purposes and provides the accused a limited opportunity to cross-examine the witnesses called by the government and to conduct limited discovery.

In the Army's practice, the Article 32 investigation has proven to be very beneficial in cases, including non-sexual assault cases, in seeking just outcomes in specific cases. There have been Law of Armed Conflict cases where a non-judge advocate Article 32 investigating officer was selected because of the unique training and perspective that an experienced combat arms branched officer brings to the investigation. Such experience and insight is generally not within the traditional purview of a judge advocate investigating officer. Absent such insight, a probable cause hearing would have necessarily sent the case forward to a court-martial which would not have been in the interest of justice.

The Army has also had instances where foreign national witnesses testified at an Article 32 investigation in a combat zone only to be killed later on. Because those statements were taken under oath and the accused had a right to cross examine the witness, the testimony was preserved and used later at the court-martial. A grand jury type proceeding, where the accused has no such right to cross examine witnesses under oath, would have precluded the use of that evidence at a later trial.

The federal preliminary hearing is much more akin to the current Article 32 investigation. Under the current Article 32, the accused is informed of the hearing itself – unlike the grand jury where the accused is not on notice of the investigation; the accused has a right to be present; the accused may be represented by counsel; the defense has the opportunity to cross-examine witnesses who testify at the hearing; and an accused may call witnesses on behalf of the defense. These rights are consistent with those afforded an accused during an Article 32 investigation. In practice, the Article 32 investigation is in reality much more robust than the preliminary hearing. Rarely does the accused cross examine witnesses or call witnesses on their own behalf at the preliminary hearing. Almost routinely, the accused exercises these rights at the Article 32 investigation.

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	<p>The services all recommended that the Article 32 investigation be preserved in some form and should not be eliminated, though it could be limited in scope in the ways laid out above. The Article 32 investigation serves a useful purpose for commanders to decide whether or not case should move forward to a general court-martial or whether it should be dismissed or disposed of in some other venue. The Article 32 investigation enables the prosecution to see the weaknesses in its case and in its evidence before fatally discovering these shortcomings at trial where it is too late to correct them. In some instances, an Article 32 investigation may demonstrate to an accused the weight and scope of the admissible evidence likely to be introduced at trial. In such a case, the Article 32 may guide an accused to consider the alternatives to a fully contested court-martial. Alternatively, the Article 32 investigation may ultimately benefit an accused when the defense is able to successfully achieve the dismissal of a single charge or even all charges. In such situations, the judicial economy achieved by through the Article 32 process saves the government, along with the witnesses, the time and the resources which would have otherwise been expended to try the case.</p>
USAF	<p>DoD is currently composing a consolidated DoD proposal for any future changes to Article 32. As such, it would be premature for the Air Force to share its analysis of Article 32 proceedings.</p>
USN	<p>The Navy, working closely with the Joint Service Committee on Military Justice (JSC) has continued to analyze the Article 32 process. Derived from Article 70 of the Articles of War, the Article 32 investigation was designed 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.” <i>Humphrey v. Smith</i>, 336 U.S. 695, 698 (1949). But developments in the law and in practice have significantly eroded those 1949 fears.</p> <p>Military pretrial hearing rights are established by both statute and regulation. Article 32 establishes the purpose of the hearing to include making recommendations in the interests of justice and discipline after making an inquiry into “all of the matters set forth” in the charges and specification. The rights established by code are to be advised of the charges, represented by counsel, “full opportunity” to cross-examine witnesses who are available, present “anything he may desire in his own behalf,” and to have the investigating officer examine any available witnesses desired by the accused.</p> <p>R.C.M. 405 provides standards for availability of witnesses, repeats the rights afforded within the statute, and establishes the convening authority as the entity who directs the investigation and appoints the investigating officer. The discussion section articulates the concepts from case law that the hearing fulfills various purposes, to include inquiring into the truth of the charges, securing information regarding what disposition to recommend, and as a means of discovery. R.C.M. 405 permits alternatives to testimony and evidence, regardless of availability. The rules of evidence do not apply except with regard to privilege, relevance, and degrading questions. The recommendation resulting from the investigation is not binding. The</p>

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	<p>Navy has reviewed various alternatives and amendments to the Article 32, evaluating the pros and cons of each as well as the substantive and procedural changes that would be required to maintain appropriate access to information for all parties and to ensure investigatory bodies have the ability to consider the influences unique to military culture (UCI and accuser, for example). For example the Navy has recently compared four alternative structures to the Article 32: the “Pennsylvania” model, the “Federal Grand Jury” model, the “Preliminary review” model, and the notion of repealing Article 32. Working with the JSC, the Navy has proposed changes to the Article 32 process that we feel meet the goals of the process while protecting the rights of the accused and protecting the victim from unreasonable scrutiny</p>
USMC	<p>On October 10, 2013 the Secretary of the Navy provided a proposal to modify certain aspects of Article 32. That proposal is appended to this submission.</p> <p>The Marine Corps Defense Services Organization’s (DSO) position that a robust Article 32 process is vital to the military justice system, including adequate representation of the accused as guaranteed under the Sixth Amendment to the U.S. Constitution. Absent from the DSO’s power are assigned defense investigators, subpoena power and other resources available to civilian public defenders. When taken in context, the government marshals its resources to investigate, refers the charges, picks the members, and is not required to obtain a unanimous verdict for a conviction. A robust Article 32 investigation is one of the balancing factors to assist in determining what (if any) charges should go forward and what the appropriate level of disposition is. It is a tool used for discovery that offsets, to a degree, the lack of dedicated defense investigators and subpoena power. The Article 32 investigating officer can issue subpoena duces tecum to force the production of documentary evidence necessary for the case. Replacing the Article 32 investigation with a less-robust proceeding akin to a grand jury proceeding where the accused does not have a right to confront witnesses will tip the scales even more towards a results-driven system and away from a system of justice.</p>
USCG	<p>The Coast Guard has not conducted a review analyzing the utility of Article 32 proceedings in sexual assault cases.</p> <p>The Coast Guard believes that the Article 32 provides an invaluable procedure in the military justice system.</p> <p>The Article 32 hearing has often erroneously been compared to a civilian grand jury proceeding or mischaracterized as inferior to the preliminary hearing. The Article 32 process is a distinctive feature of the military justice process that is not easily compared to any civilian judicial counterpart. The purpose of the Article 32 is broader in scope and offers greater protection to a military accused than a civilian defendant. It is analogous only in the sense that it precedes a decision to send a case to a felony-level court.</p> <p>Prior to Article 32 implementation, a convening authority would determine whether or not the accused should be brought to trial based on an examination of the preferred</p>

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charges and the investigative report. The act of preferring charges would require an obligation to investigate to the point of determining whether there is prima facie evidence to support the charges. Essentially, the probable cause determination was made by the convening authority with the assistance of his or her staff judge advocate. The modern military justice system imposes a check on the convening authority's once-unfettered decision to refer cases to general courts-martial, where the trial forum may impose felony-level sentences, but allows no such check on referral decisions to special courts-martial. In essence, the vital purpose of an Article 32 investigation is to protect the accused by providing an extra layer of procedural insulation against unlawful command influence and meritless charges thorough examination of the evidence in an open forum by an independent and neutral investigating officer. The Defense Legal Policy Board (DLPB) "found no support from commanders or practitioners (both defense and prosecution) for changing the Article 32 process." Acknowledging that some have argued to replace the Article 32 with a preliminary hearing modeled after the federal system or a grand jury system, the DLPB, instead recommended "enhanced training for Article 32 investigators and judge advocates representing the government and individual accused to address what is and is not required and helpful during an Article 32 investigation and proper exercise of discretion by Article 32 investigating officers to limit such investigations." See Defense Legal Policy Board, Report of the Subcommittee on Military Justice in Combat Zones, Final Report, May 30, 2013.

In keeping with the original purpose in mind, the Coast Guard generally supports reforms proposed by the Joint Service Committee on Military Justice and backed by the Department of Defense in its legislative proposal modifying Article 32. The reform clarifies the standard of proof, limits the scope of the hearing, and affords crime victims an option to not testify.

The Article 32 does not only provide a statutory right to the accused, but it also is an important command and prosecutorial tool. The Article 32 process reveals weaknesses in the government's case, potentially reduces the chances of convening authorities committing resources to cases that may not warrant a felony-level conviction, sorts for witness credibility and bias, and other factors that may militate against convening a general court-martial. As the DLPB noted: "Each case poses a risk that charges could be referred to court-martial where the evidence is insufficient or that the charges may be dismissed when there is sufficient evidence to refer the case. Where Article 32 investigations inform commanders that a court-martial is not necessary or advisable, valuable command resources can be saved and the investigation provides a credible bases for a commander to not move forward with a case." Accordingly, Article 32 reform should guard against creating a procedure too summary to preserve these substantial interests.

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THE SECRETARY OF THE NAVY
WASHINGTON, D.C. 20350-1000

October 10, 2013

MEMORANDUM FOR GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE

SUBJECT: Proposal to Amend Article 32, Uniform Code of Military Justice (UCMJ)

As part of continuing efforts to improve the military justice system and in light of the recent attention on the Article 32 process, I directed the Judge Advocate General of the Navy to review Article 32 of the UCMJ, as well as certain related articles and Rules for Courts-Martial, with a view toward proposing any necessary changes. I understand you directed the Joint Service Committee on Military Justice (JSC) to conduct a similar review.

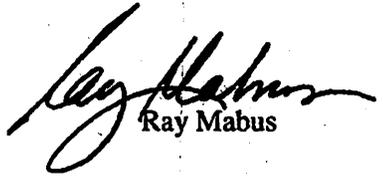
The Department of the Navy recommends statutory and regulatory changes to Article 32 investigation procedures to streamline the Article 32 investigation process, clarify the standard of proof, and afford crime victims, both military and civilian, the ability to elect not to testify at Article 32 hearings. Importantly, these changes preserve the rights of the accused to be present and to participate in the proceedings.

Clarify the Standard of Proof. The Article 32's primary purpose should be to determine whether there is "probable cause" to believe that an offense was committed and that the accused committed it.

Limit the Scope and Function of the Article 32 Investigation Process. The scope of the Article 32 investigation should be limited to a determination of probable cause for those offenses preferred, in order to inform the convening authority's disposition decision. The investigation should be used for that purpose and not as a discovery tool.

Afford Crime Victims the Option Not to Testify. All alleged crime victims, military and civilian, should have the option not to testify at Article 32 hearings. This affords military victims the same option currently available to civilian victims.

These changes will preserve the rights of accused, enhance the rights of crime victims, and refocus the scope and function of the Article 32 process. This proposal was also provided to the JSC for review and consideration and has the concurrence of the Chief of Naval Operations and the Commandant of the Marine Corps. The proposal envisions statutory and regulatory amendments requiring Congressional and Presidential action to implement.


Ray Mabus

Attachments:
None

cc:
Judge Advocate General of the Navy