Response Systems Panel

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In Defense of the Article 32: Maintaining Fairness and Balance in the Military Justice System

Introduction

Navy defense counsel are anxious these days, and what keeps us up at night is worrying about the potential for wrongful convictions and whether our system will reach accurate results in sexual assault cases. It is incredibly important that the military justice system produce results that are just, accurate and in which the public has confidence. This is especially true given the extraordinary consequences that result from sexual assault convictions, including sex offender registration. Before we deprive a person of their liberty, deprive them of earned benefits, remove them from service, render them virtually unemployable in what is already a difficult and unforgiving labor market, impair their ability to secure shelter, find a mate, or even simply volunteer for a civic organization, and before we render them unable to ever escape the overwhelming stigmatization and ostracism that accompanies this offense, we

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[1] The views expressed herein are solely my own and do not necessarily reflect the views of the Department of the Navy, including the Secretary, the Chief of Naval Operations or the Judge Advocate General of the Navy.

[2] Defense Service Office Southeast is one of four Navy defense commands world-wide with offices in 19 locations. Our sole mission is defending service members. Since our October 1, 2012 establishment, the four defense commands have reported to the Chief of Staff for Defense Service Offices and ultimately to Commander, Naval Legal Service Command. Worldwide, there are 74 officers and 38 enlisted legalmen providing defense services. Of those 74 officers, slightly more than half are core defense counsel engaged primarily in court-martial litigation and supervisory counsel. The remaining counsel are accession officers who come to us for 6 or 8 month rotations during their first tour in the Navy. They represent service members at separation boards and provide advice concerning a variety of administrative matters, including non-judicial punishment. In addition to the command supervisory counsel, defense counsel are supported by the Defense Counsel Assistance Program staffed by two officers and a senior civilian and may consult with them on a privileged basis.

For several years now, the Navy defense caseload has included approximately 300 cases tried by court-martial, divided roughly equally between special and general courts-martial, a large number of which are sexual assault cases.

must do all we can to ensure we reach an accurate result. Any change to the military justice system should first and foremost ensure that reliability and fairness are neither weakened nor sacrificed. Change should be motivated by a desire to increase the accuracy of results, not a desire to disadvantage the accused. The Article 32 investigation is one process which improves both the accuracy and the fairness of the system, and it should not be discarded.

Purpose of the Article 32 Investigation

Comparative analyses of the military justice system with other criminal justice systems typically identify the pre-trial Article 32 Investigation[3] as one of the hallmarks of military

[3] The Article 32 Investigation was succinctly explained in the United States' Response in Opposition to the Plaintiff's Request for a Preliminary Injunction in Doe v. Miller, Case No. ELH 13-2577, United States District Court for the District of Maryland. The Investigation was described as follows at pp. 7-9 of the Response:

> The Article 32 hearing serves as a thorough and impartial investigation governed by RCM 405. The primary purpose of an Article 32 Investigation is to inquire into the truth of the charges, the form of the charges and to secure information to determine an appropriate forum for the disposition of charges. RCM 405(a). However, the Article 32 also serves as a means of discovery for the defense. *Id.* The Article 32 proceeding is often likened to a Grand Jury proceeding. *See Morgan v. Perry,* 142 F.3d 670, 678 n. 13 (3rd Cir. 1998). However, since Congress created the Article 32 hearing to protect service members from unwarranted or politically motivated prosecutions, it offers more rights to the accused then a civilian grand jury proceeding or preliminary hearing. The accused is entitled to be present throughout the investigative hearing (unlike a civilian grand jury proceeding). RCM 405(f). At the hearing, the accused has the right to be represented by appointed military defense counsel or may request an individual military defense counsel by name and may hire a civilian attorney at his or her own expense. RCM 405(d). Again, unlike a civilian grand jury proceeding, the service member, through the member's attorney, has the following rights: to call witnesses, to present evidence, to cross-examine witnesses called during the investigation; to compel attendance of reasonable available military witnesses; to ask the investigating officer to invite relevant civilian witnesses to provide testimony during the investigation; and, to testify, although he or she cannot be compelled to do so. RCM 405(f).
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> Because an Article 32 hearing also serves as a means of discovery, the defense has the opportunity to explore the testimony of the witness on any issue relevant to the charges. RCM 405(e). The Article 32 also affords the defense an

justice.[4] Indeed, the Article 32 is customarily spot-lighted as a major strength[5] rather than a topic of derision. A thorough,

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> opportunity to demonstrate weaknesses in the government's case and to explore avenues for impeachment of the witnesses at any subsequent trial. *Id.* The rules instruct the investigating officer who presides over the hearing to give the defense "wide latitude when cross-examining witnesses." RCM 405(h)(2).
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> The commander directing an investigation under Article 32 details a commissioned officer as investigating officer, who will conduct the investigation and make a report of conclusions and recommendations. RCM 405(d). As a matter of practice, the Navy uses judge advocates to sit as investigating officers for Article 32 hearings. In complex cases or as required, the Navy uses more experienced senior officer judge advocates with significant trial experience, including those serving as military judges.
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> The investigating officer will, generally, review all non-testimonial evidence and then proceed to examination of witnesses. Except for a limited set of rules on privileges, interrogation, and the rape-shield rule (MRE 412), the military rules of evidence (which are similar to the federal rules of evidence) do not apply at this investigative hearing. RCM 405(i). This does not mean, however, that the investigating officer ignores evidentiary issues. The investigating officer will comment on all evidentiary issues that are critical to a case's disposition. RCM 405(j). All testimony is taken under oath or affirmation, except that an accused may make an unsworn statement. RCM 405(h)(1)(A).

[4] The trifecta of strengths the military justice system is said to enjoy include the right of an accused to counsel in every case, the fact that Article 31(b) rights pre-dated and are stronger than *Miranda*, and the fairness of the Article 32 investigation. *See, e.g.,* Jack L. Rives & Steven J. Ehlenbeck, *Civilian Versus Military Justice in the United States: A Comparative Analysis,* 52 A.F. L. Rev. 213 (2002).

[5] *See, e.g.,* Advance Policy Questions for the Honorable Kevin A. Ohlson of September 19, 2013, to the Senate Armed Services Committee. Judge Ohlson is the newest member of the Court of Appeals for the Armed Forces, and he submitted these responses in advance of his confirmation hearing.
In your view, what are the major strengths and weaknesses of the military justice system?

> In my view, the following are the major strengths of the military justice system. First, every accused in the military is entitled to a free, qualified defense counsel at every step of the judicial process. Second, there are sufficient resources devoted to criminal cases in the military so that every case receives the necessary and proper amount of attention. Third, in the military justice system there is no undue pressure for either the government or the defendant to plea bargain a case. Fourth, the accused's right to be present at, and to participate in, the Article 32 proceeding far exceeds any rights that a similarly-situated defendant would have in the civilian

transparent investigation prior to the referral of charges can only enhance confidence in the military justice system on the part of those who are distrustful of the system from both a complaining witness and accused perspective.

Under the Uniform Code of Military Justice (UCMJ), the government and the defense are required to have equal access to witnesses and evidence.[6] The consistent theme of the discovery and disclosure obligations in the Rules for Courts-Martial (RCM) is to avoid "trial by ambush" and to ensure that both parties are well prepared to put forth their best facts so that truth and justice can emerge from a direct clash of the evidence in the crucible of trial.

Often described as the last "bulwark against oppressive charges,"[7] the Article 32 Investigation is intended to protect the accused against political prosecutions, harassment and unwarranted prosecutions.[8]

It is especially important in the military to avoid going forward on baseless charges because of the extraordinary consequences that attach as a result of just being charged. The accused is frequently removed from his or her unit and reassigned from a typically cohesive, tight knit work center to a command where the member is a stranger. The accused is typically reassigned out of rate, which means that the member does not continue to build skills in a military specialty. The entire time during the pendency of charges becomes "unproductive time" or "down time," and even if the member is ultimately acquitted, it can be difficult to recover professionally due to the non-competitive assignment and non-competitive fitness reports or evaluations during that assignment.

Eliminating of the Article 32 and/or its discovery function is likely to impact other stages of the process and create a

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justice system. And fifth, the jurors in the military are uniformly educated, informed, and engaged.

[6] Article 46, UCMJ.

[7] *See, e.g., United States v. Garcia*, 59 M.J. 447 (CAAF 2004).

[8] Brian C. Hayes, *Strengthening Article 32 to Prevent Politically Motivate Prosecution: Moving Military Justice Back to the Cutting Edge,* 19 Regent L. Rev. 173 (2006). Mr. Hayes concludes that the Article 32 hasn't always protected accused from "political" prosecutions.

number of negative unintended consequences that are contrary to the goals of transparency and full disclosure. The demise of the pretrial investigation could ultimately impair the accused's ability to confront the evidence and defend against criminal charges as well as hinder the CA's ability to make a decision based upon a thorough investigation. As recently as June of this year, the Defense Legal Policy Board, a Federal Advisory Committee established to provide independent advice to the Secretary of Defense, reviewed the Article 32 and concluded that no changes to the statute were required.[9]

The Article 32 Investigation and its antecedents have served the military justice system well for nearly 100 years. As currently constituted, it brings balance, fairness and transparency to the military justice system. Calls for replacing it with either a grand jury or preliminary hearing type procedure and concomitantly eliminating Article 32's discovery function should be rejected.

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[9] The Defense Legal Policy Board's Subcommittee on Military Justice in Combat Zones Report of June 14, 2013 (hereafter DLPB Report) includes the following recommendation that no changes were required to the Article 32 Investigation at Section 8.12 (citations omitted):

> The Article 32 investigation process in the deployed environment mirrors the process in garrison. This Subcommittee and the Board considered whether the current Article 32 process is too cumbersome in the deployed environment. Some argue that Article 32 investigations afford the accused too many rights and delay resolving the case. They argue that the Article 32 process should be limited to assessing the charges and recommending a disposition to the convening authority and that they be eliminated in the deployed environment and be replaced with a preliminary hearing that would combine the summary nature of the federal court preliminary hearing with the grand jury's denial of the right of an accused to be present, represented, or to produce witnesses or evidence.
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> We found no support from the commanders or practitioners (both defense and prosecution) for changing the Article 32 process. The commanders agreed that Service members should not be afforded less rights in the deployed environment then in garrison, and that the Article 32 process functioned effectively in its current form.

Professor Fidell was a member of that Subcommittee and while he filed a separate statement taking exception to some portions of the Subcommittee's Report, the Article 32 Investigation was not one of his objections at that time.

Why Calls to Eliminate the Article 32 Investigation Threaten to Upset the Balance in the Military Justice System

There have been recent calls to eliminate the Article 32 Investigation and replace it with either a grand-jury equivalent or a preliminary hearing in the manner provided in the Federal Rules of Criminal Procedure for federal defendants.[10] It is extremely ill-advised to selectively parse the federal procedures, picking and choosing only those that favor the Government. The likely outcome will be more weak cases and unwarranted charges being referred to trial by court-martial. Stripping away the accused's right to a thorough and impartial pretrial investigation with the right to conduct discovery would be a giant step backwards for military justice.

If the military justice system is to be replaced in its entirety with the federal rules, then I as a military defense counsel would take that trade. I would favor the accused having the right to a jury of his peers rather than his seniors, for having random selection of members rather than those hand-selected by the charging authority, having a jury of 12 members rather than the 5 or 6 we frequently have for general courts-martial or the 3 members we see for special courts-martial. I think the accused would benefit from a requirement that the members return a unanimous verdict rather than a two-third majority for conviction. I would prefer to have panels with members that share the racial and ethnic heritage of the accused. I would prefer not to be required to disclose my witness list and evidence far in advance of trial, thereby providing the Government a significant window into my trial

[10] *See, e.g.,* Eugene R. Fidell, *Opening Statement Before the Response Systems to Adult Sexual Assault Crimes Panel*, September 24, 2013, available at http://responsesystemspanel.whs.mil/index.php/component/content/article?id=17 While there have been calls to eliminate the Article 32, the precise legislative language is, for the most part, unavailable as of this writing. Representative Turner of Ohio has filed HR 3360 which would replace the Article 32 with a preliminary hearing. The bill provides that the complaining witness(es), military or civilian, cannot be compelled to testify at the Article 32. It would change the standard of review from "reasonable grounds" to "probable cause." However, the Article 32 Preliminary Hearing he has proposed has more disclosure requirements than Rule 5.1. While eliminating discovery as a purpose of the Article 32, it guarantees that the defense has access to some information in the possession of the Government at the time of the Article 32. The bill accomplishes this by enshrining some of the disclosure requirements from RCM 405 into the statute.

strategy, and I would willingly forego the highly supervised discovery process I now have. I would like to have subpoena power for witnesses and evidence, a travel budget and investigative assistance from experienced investigators. I would like to have a break between trial on the merits and sentencing (weeks and sometimes months), and I would like for the accused to have a presentencing report prepared by a pretrial services officer prior to the accused being sentenced, particularly for all the first-time offenders we represent. I would like to see every service member have the right to be able to refuse non-judicial punishment and to have the standard of proof required at non-judicial punishment to be beyond a reasonable doubt. Finally, I would like all service members to have the right to appeal the decisions of the Court of Appeals for the Armed Forces to the Supreme Court.

It is curious that those calling for eliminating the Article 32 Investigation and replacing it with a probable cause preliminary hearing akin to that provided by the Federal Rules of Criminal Procedure seek only to import those features of the preliminary hearing that are most favorable to the Government, while ignoring those features that afford rights to the accused. Under Rule 5.1 of the Federal Rules of Criminal Procedure, if the Government fails to prove probable cause at the preliminary hearing, the charges are dismissed. If the Government cannot satisfy even the incredibly low standard of probable cause, there seems to be no obvious reason why cases should thereafter go forward to trial. Yet convening authorities will still have the right to go forward on such charges in the military justice system, rendering the Article 32 preliminary hearing virtually meaningless.

Professor Fidell of Yale University seems to premise his recommendation to eliminate the Article 32 Investigation on the grounds that it will not impair the defense's ability to conduct discovery. He asserts confidence that defense counsel will always be able to either depose or personally interview the complaining witness prior to trial.[11] I see no such right to compel participation in a deposition or interview provided in the Code or the Rules.

[11] *Id.*

Depositions are authorized by Article 49 of the UCMJ but may be denied for good cause, which under RCM 702 includes the fact that the witness will be available for trial. If there is no pretrial investigation or if complaining witnesses are presumptively exempted from participation in Article 32 Investigations, then depositions would only seem to be authorized if the witness is not going to be available for trial. If a complaining or other witness refuses to be deposed or interviewed by the defense and asserts availability for trial, I am unaware of any requirement that would mandate their pretrial cooperation in defense discovery. The precedents compelling pretrial depositions were for essential witnesses who were ruled unavailable to attend the Article 32[12], but if there is no requirement to participate in an Article 32, then I fail to see how participation in the Article 32 is a relevant consideration.

Based on Article 42's provision for equal access to evidence and witnesses, I believe Military Judges will use their good offices to encourage pretrial interviews and may even contemplate abating the trial if the complaining witness refuses to be interviewed by the defense. However, many judges interpret "access" as "access to ask" the witness for an interview or deposition, but not to compel them to do so against their will. It should also be emphasized that Victim's Legal Counsel will undoubtedly advise their clients of their rights and ensure they are enforced, and may well object to requests for depositions or interviews on behalf of their clients.

I disagree that the costs in time and money outweigh the benefits of the Article 32. There are few actual out of pocket expenses occasioned by the Article 32. Only those witnesses who are within 100 miles of the Article 32 site are "reasonably available" within the meaning of the rule, so witness attendance is typically a "day trip" if travel is required at all. The out-of-pocket expenses amount to at most approximately $100.00 per witness in those few cases where mileage reimbursement and meal (per diem) reimbursements are required.

There are of course "overhead" expenses, i.e. time and the value of the pay and allowances of the participants in the

[12] *See, e.g., United States v. Ledbetter,* 2 M.J. 37 (CMA 1971).

Investigation. However, the Article 32 Investigation significantly streamlines the pretrial discovery and preparation process, is efficient overall, and reduces "overhead expenses" later in the process that would be associated with discovery, increased litigation over discovery and continuance requests and a potentially slower-moving trial. Of course, any overhead expenses pale in comparison to bringing unwarranted or false charges and the full weight of the military justice system to bear against an innocent individual.

The desire to eliminate the Article 32 Investigation seems to be premised on the recent Naval Academy Article 32 Investigation involving three Navy midshipmen, which would appear from news reports[13] to be a rather extreme outlier, as detailed below. Radical changes should not be premised on an atypical case. Bad facts make bad law. While it is not uncommon for Courts-Martial or Courts of Inquiry to last five or six days, the vast majority of Article 32 Investigations are completed in a day or two. I have no hard data, but I would guesstimate that most last between 4 and 8 hours.

There appear to be many atypical factors that led to the length of this Investigation, including the fact that there were three accused in a joint hearing, a large number of fact witnesses, many incomplete or inconsistent witness statements, hazy memories fogged by alcohol, and significant time delay from the offense to the Article 32 Investigation.

The questions asked of the complaining witness do not appear to have been asked with the intent to abuse, intimidate or humiliate her, and appear to be intended to elicit relevant evidence and to probe the credibility and reliability of the complaining witness. The rape shield was enforced, and defense attorneys were only permitted to ask certain questions objected to by the Government and the complaining witnesses' counsel after the Investigating Officer determined in a session closed to the public that recognized rape shield exceptions were applicable. The rape shield hearing conducted pursuant to RCM 412 was forwarded under seal.

[13] My command does not represent any of the accused and I have no first-hand knowledge of the case.

Certainly no one enjoys answering questions of a personal or intimate nature, but the desire to minimize the discomfort of the complaining witness should be balanced against the importance of sparing the accused from the trauma and unjustness of a federal court-martial proceeding on an unwarranted charge. Ultimately, the case against one of the midshipmen was not forwarded to trial by court-martial because of the thorough and impartial investigation conducted at the Article 32, which undoubtedly would not have been the case if a mere probable cause hearing had been conducted.

Clearly, there are strengths and weaknesses in the federal, military and various state and local criminal justice systems. However, the Article 32 Investigation continues to be a extremely important right in the military justice system that provides some of the balance and fairness to the accused that are sorely needed and lacking in other parts of the system. [14] By comparing features of each system in isolation without considering how they work holistically and how fair they are overall, there is a high risk of significant disruption, unintended consequences, and of upsetting the entire apple cart.

The Proposed Alternatives

It is important to understand what the Article 32 process will become if the investigation is replaced with a grand jury or preliminary hearing system which is, in short, not much at all. The accused will have no right to attend or participate and indeed will have no knowledge concerning those secret proceedings. While a grand jury may protect against outrageously unwarranted charges, it obviously serves no confrontation or discovery functions and it is commonly

[14] Professor Fidell states that an "outdated, paternalistic" view of military justice is no longer warranted. I disagree. Some degree of paternalism will always be warranted due to a unitary chain of command making all decisions concerning the convening of a court-martial, the ever-present specter of unlawful command influence, and the fact that we will simply never have a counsel who has sustained, unbroken experience in a particular military justice role. The typical Navy military judge serves three years on the bench at one time. Certainly, the Navy's military justice litigation career track is resulting in a number of counsel with more experience remaining in the courtroom, but there will always be new counsel with little experience participating in military justice.

understood that a prosecutor could indict the proverbial “ham sandwich.”

Eliminating confrontation and the right of the accused and defense counsel to participate in the pretrial process may be less of a danger in a system that is not prone to unlawful command influence. Indeed, for a military offense investigated pursuant to a command investigation[15], the investigation, charging decision and selection of the court-martial members could all come from within a single command. Moreover, under the UCMJ, anyone can prefer charges and any convening authority can forward them to an Article 32. There is no requirement for a thorough legal scrub by an experienced prosecutor before an Article 32 is convened. Finally, the decisions of the grand jury are binding, whereas the proposal for the military would still allow the convening authority to proceed with charges.

The federal system also has other checks and balances, such as prosecutorial independence and discretion vested in the prosecutor. There are prosecutorial standards that inform decisions whether to charge and which provide consistency, and prosecutors and law enforcement agents typically have greater experience in making such decisions. In the federal criminal system, defense counsel are less dependent on the government in conducting defense discovery and have to disclose less to the government prior to trial. This potential for defense surprise breeds caution in the prosecution and ensures that a case has been very thoroughly investigated and vetted before the U.S. Attorney seeks to indict.

Most importantly, the **civilian** preliminary hearing provides a check and balance not present in the military where the investigative, prosecution, defense and judicial functions are all lodged within one department in the executive branch of

[15] As a matter of policy, every unrestricted report of sexual assault is investigated by the Naval Criminal Investigative Service, or, in some cases by a civilian law enforcement jurisdiction. However, a number of other cases, primarily involving uniquely military offenses, may have initially been investigated by a preliminary inquiry or command investigation conducted by a “lay” investigating officer who is not professionally trained or legally experienced. An Article 32 Investigation can be particularly beneficial in determining whether these cases should be referred to trial by court-martial.

government, rather than being divided between different branches of government.[16]

Under the Federal Rules of Criminal Procedure, the preliminary hearing is relatively rare given the prosecutorial preference for indictment. When it does occur, the Government typically presents one witness, typically a law enforcement agent. The defense has no right to discovery at that stage, and it is entirely foreseeable that a preliminary hearing in the military will be similarly limited[17] to the evidence the government elects to present. This system suffers from many of the same disabilities as the grand jury process.

It should also be pointed out that the federal process is not necessarily the "gold standard" for ensuring discovery and disclosure and guaranteeing fairness. The Federal Rules of Criminal Procedure are often criticized for the "gamesmanship" they breed. Some states are moving in the opposite direction.

The opinion of many defense counsel, including myself, is that there is likely to be a dramatic increase in "paper" hearings if a preliminary hearing system is adopted that do little or nothing in terms of seeking truth, strengthening the government case or protecting the rights of the accused.

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[16] The DLPB Report, *supra*, states the following at Section 8.12, p. 123.

> In the civilian preliminary hearing process, there is a system of divided powers, characterized by the executive arguing against a defendant before another branch of government. This division of power ensures an inherent check and balance built into the structure of the system, which safeguards a grand jury system where the defendant has little, if any, rights. In contrast, the military justice system is unitary in nature, with the executive presiding over and convening courts. The system needs a check and the Article 32 investigation affords an accused a public forum in which the charges brought forward are thoroughly investigated.

[17] Alternatively, the Government might simply introduce the Report of Investigation if the NCIS agent were not available, which is not infrequent due to NCIS agents' transience, mobility, work-related travel and other mission requirements. Knowing the complaining witness' may not be called at the preliminary hearing, the Government may elect to present solely the complaining witness' written statement without even providing the entire NCIS Report of Investigation, and limit pre-trial disclosure to the defense as much as possible.

Why a Thorough and Impartial Article 32 Investigation is Effective and Efficient

One of the key benefits of the Article 32 Investigation is its function in identifying cases that should not go forward to court-martial, either because they are factually weak or because they involve such minor misconduct that trial by court-martial is unwarranted. A number of cases each year are dismissed or disposed of at administrative forums because of the thoroughness of the investigation conducted at the Article 32. This is a salutary effect of the Article 32 that will disappear if the Investigation is replaced with a probable cause preliminary hearing.

Moreover, a thorough and impartial investigative process is entirely appropriate for many of the sexual assault cases preferred to an Article 32, which are often based on hazy, alcohol-fogged memories and where the cases turn on the reliability of such memories and the credibility of the declarants. In these types of sexual assault cases, there are frequently statements that are significantly inconsistent or otherwise lacking in credibility, obvious motives to fabricate testimony, insufficient evidence, and cases which have been insufficiently investigated, at least in the opinion of the defense.

The Article 32 Investigation makes the military justice system more efficient. The time invested at the front-end reduces litigation at later stages of the court-martial. The Article 32 Investigation performs a beneficial winnowing function that results in perfected charges, ensures the convening authority truly has the information necessary to determine how to dispose of charges, helps identify and narrow the issues in contention, ensures the parties understand the strengths and weaknesses of their respective cases, clarifies which witnesses will be required for trial and minimizes litigation over discovery and production.

A foreseeable consequence of the elimination of the Pretrial Investigation is that there is likely to be more litigation over discovery and the production of witnesses and

evidence, more motions for continuances[18] and litigation concerning continuances, and more trial interruptions.[19] Better developed and thoroughly explored facts lead to more focused theories and more focused trials on a narrower sets of issues. Indeed, better understanding of the case also is more likely to lead to pre-trial resolution than when parties are fumbling around in the dark. This in turn eases the court docket and thereby facilitates more efficient movement of cases. Overall, the Article 32 Investigation is a clarifying process.

In the typical sexual assault case, an agent from the Naval Criminal Investigative Service has interviewed a witness and then writes a compilation of the answers into a statement for the witness to sign. The statements are usually a couple of pages, and don't always contain much elaboration or detail; certainly questions are not typically posed from a defense perspective.

Words on paper can be incredibly misleading and are often lacking context. The statements made by witnesses are not typically recorded or preserved.[20] Rather than a stilted statement taken by the Government's investigator, hearing from all the different witnesses directly in their own words increases accuracy and reliability, and gives the Investigating Officer and ultimately the Convening Authority a much better understanding of the nature and relative seriousness of the allegations and the proper forum for resolution of charges.

The Article 32 Investigation can also help focus the attention of young adults who are our most frequent witnesses,

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[18] There are likely to be more requests for continuance as the parties discover relevant evidence later in the process that causes shifts in the parties' cases.

[19] Interruptions are likely to occur because there will likely be more Article 39a sessions for the defense to renew its requests for production, more uncertainty concerning the facts of the case, and more pauses as parties request to interview witnesses they have not previously had an opportunity to question.

[20] The interrogations of accused are now customarily video-taped by NCIS. This is a commendable change in policy by NCIS which increases the accuracy of the military justice system and confidence in the integrity of NCIS interrogations. Video-taping ends up being detrimental to some accused and beneficial to others, but either way it provides greater certainty about what transpired in the interrogation room.

and impresses upon them both the seriousness of the proceeding and its consequential nature.

As illustration, in a common fact pattern alleging a sexual assault based on the substantial incapacitation of the complaining witness, the accused and the complaining witness will have both been consuming alcohol in a social setting with numerous other adult witnesses. The complaining witness will have alleged a sexual assault, and the accused will have responded that the sexual activity was consensual. There will be varying perceptions of the complaining witnesses' interactions. One of the key issues will be whether the complaining witness was in fact so substantially incapacitated that he or she could not have consented to sexual activity. The Naval Criminal Investigative Service will have conducted interviews of the complaining witness, an interrogation of the accused, and perhaps interviews of some but not all of the witnesses present. NCIS will not have focused on the extent of the complaining witness' intoxication. Obtaining that evidence is vitally important to the defense's preparation, and the defense's expert toxicologist will need all of that evidence before being able to provide expert assistance.

With an Article 32 Investigation and the right to conduct a thorough investigation, where the defense has the right to call witnesses and conduct discovery, these matters can be systematically and comprehensively addressed on the record before a quasi-judicial officer. Both parties will have such evidence as exists on the issue, and the expert toxicologist will have the information needed to provide expert assistance and can begin assessing the evidence.

By contrast, at the end of a probable cause hearing, the defense is unlikely to have learned even the identity of all the witnesses that were present, much less had an opportunity to question them. The defense will have reviewed only that evidence the Government has elected to provide, and is unlikely to obtain the information it needs to begin identifying witnesses until after referral of the charges. It will take time to identify all the witnesses present, more time still to interview them, and additional time to memorialize those interviews appropriately, none of which will be under oath and

on the record, which diminishes the credibility of the statements.

Because cases tend to be docketed for trial relatively soon after arraignment, the defense will likely be required to litigate one or more continuances to have adequate time to conduct discovery and obtain expert assistance. The upshot of eliminating the Investigation on the front end is likely to be more fluid and unpredictable court dockets on the back end, and more litigation concerning procedure rather than focusing on substantive issues, which will also deprive all parties of a speedy and efficient resolution.

The ability to conduct discovery during the Article 32 Investigation jump-starts the entire discovery process, gives both the defense and the government substantially more information concerning their cases earlier in the process, and allows the Investigating Officer to provide meaningful recommendations about whether there are reasonable grounds to believe an offense was committed, recommend changes to the form and substance of charges and to make recommendations as to the strength of the evidence and the disposition of the offenses.

The Benefits of the Article 32 Investigation to the Government

The thorough and impartial Article 32 Investigation that includes the accused's right to conduct discovery has significant benefits for the Government. The Article 32 Investigation, because of its thoroughness and transparency, builds confidence in the military justice system both at home and abroad in the deployed environment.[21]

[21] The DLPB Report states at Section 8.12, p. 123-24:

> Beyond protecting the rights of an accused, the Article 32 investigation is an important tool for the deployed commander. Cases involving civilian casualties are inherently complicated and often high profile. They place the legitimacy of the deployed military justice system at issue in the eyes of the public. 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 basis for a commander to not move forward

The Government benefits equally with the defense from having the opportunity to fully understand the strengths and weaknesses of its case[22] and having the ability to perfect its case. The Government discovers whether the evidence supports the charges actually preferred, whether other charges not originally anticipated should be added, or whether different charges should be alleged because they are more supportable. The Government has the opportunity to observe the demeanor of their witnesses, and the Article 32 session can help witnesses be better prepared for trial. Some witnesses come across differently on the witness stand than they do in an office interview. Trial Counsel can often perfect their presentation of the case after observing a complaining witness respond to direct and cross examination. The Government profits from the insights and analysis of the Investigating Officer on important evidentiary issues that may impact the case. The Investigating Officer is often more senior and experienced than either party's counsel and helps narrow and focus the issues.

One recent Navy case that has received media attention involves the death of two divers. The Government selected an Article 32 Investigation and appointed a senior Captain (0-6) judge advocate as an Investigating Officer because it wanted a thorough assessment of the case to help determine whether there was criminal responsibility for the deaths. The Article 32 Investigation performed an important clarifying function, and based on the evidence obtained in the Article 32 Investigation, the Convening Authority decided not to refer the charges to a general court-martial on serious, felony-level offenses and instead chose to refer the cases to special court-martial where the accused face substantially lesser charges. The hearing was weighty and thorough and greatly assisted in understanding what transpired. The Convening Authority's decision was better

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with the case. The Article 32 investigation greatly assists both the government and defense counsel in assessing allegations and increases flexibility in administering military justice. The Subcommittee concludes that the right to a full Article 32 investigation should not be limited in the deployed environment.

[22] DLPB Report, Section 8.12 p. 124 states: "The Article 32 Investigation greatly assists both the government and defense counsel in assessing allegations and increases flexibility in administering military justice."

informed and was more deliberate because of the Article 32 Investigation in the case.

Additionally, where a witness has testified under oath and been subject to cross-examination, the recorded testimony can typically be introduced at trial over the defense's objection if the witness becomes unavailable for trial. For example, an important witness in the Major Hasan shooting at Fort Hood testified at the Article 32 but was not available at trial, and his Article 32 testimony was introduced in lieu of his live testimony. I suspect that there will be little in the way of Article 32 testimony that the Government will have in its hip pocket if a witness becomes unavailable for trial if the Article 32 becomes merely a probable cause hearing.

Why is a Thorough and Impartial Article 32 Investigation with Right of Discovery so Critical to the Defense?

The defense's ability to utilize the Article 32 for discovery brings balance to a disclosure and discovery process that, taken as a whole, is regulated in favor of the Government in other key respects. In the military justice system the defense is required to disclose to the Government its entire witness list on the merits of a case well in advance of trial, and indeed must obtain the Government's consent or the military judge's order to ensure the witnesses' attendance at trial.[23] In contrast, our counterparts in the Federal Public Defender's Office have the ability to independently issue subpoenas for

[23] The DLPB Report, *supra*, includes the following recommendation at Section 8.17 "Defense Access to Witnesses" (citations omitted), concerning the disclosure requirement's impact on the defense case:

> Although the MCM provides that the prosecution, defense, and court-martial shall have equal opportunity to obtain witnesses and evidence, an accused who desires the attendance of a witness at trial must request the witness from the trial counsel in the first instance and production can be refused if the trial counsel concludes it is not required under the rule. When there is a disagreement, the matter can be submitted to the military judge, but reliance on the trial counsel, initially, potentially requires disclosure of strategic aspects of the defense case to opposing counsel at a premature stage of preparation of the defense (to demonstrate that a witness on the merits is relevant and necessary). The Subcommittee recommends review of whether to amend the MCM so that the defense does not need to first request a trial witness from the trial counsel.

material witnesses pursuant to Rule 17 of the Federal Rules of Criminal Procedure, thereby securing the witnesses' attendance at trial without providing advance notice to the Government.

Similarly, under Rule 17 of the Federal Rules of Criminal Procedure, our civilian counterparts at the federal level are able to issue subpoenas independently for documents and evidence that are material, and the Government is not typically aware of the defense's discovery efforts until such time as the Rules or the Judge compel disclosure.

In the Department of the Navy, it is also the Government or the Military Judge that controls approval for travel funding for defense counsel. When defense counsel are stationed at a site that is distant from the geographic location of witnesses or the site of the offense, and the defense counsel wishes to conduct interviews or an inspection, the defense must ask the Government or, if that request is denied, the Military Judge for funding to conduct travel. Federal public defenders have funds to conduct travel without having to disclose such travel to the Government.

Finally, military defense counsel do not have investigative assistance available unlike many of their civilian counterparts in the federal public defender offices. In the Navy, neither military defense counsel nor enlisted legalmen have any training in conducting a background investigation. They typically have no ties and no history in the community in which they live, and certainly no prior experience with the federal, state and local law enforcement agencies in the jurisdictions where they are stationed, no familiarity with the state and local records systems for everything from vital statistics to vehicle registrations to offender registration data bases, and little familiarity with the geography, demography, culture or political institutions where they are stationed. This "localized knowledge" is particularly important in sexual assault cases, given dual jurisdiction and the fact that it is not uncommon for civilian law enforcement agencies to have been the first responders or conducted the initial investigation. Accordingly, lack of investigative experience and lack of experience conducting investigations in the locality where they are assigned greatly hampers the ability of the defense to conduct its investigation and prepare a defense.

What makes the Article 32 an actual investigation and a meaningful proceeding for the defense, rather than a hollow procedural formality is the right of the accused to conduct discovery at the Article 32 itself.[24] Because the accused has this right to discovery, the Government must product the evidence in its control at that stage pursuant to RCM 405(f)(10). From that documentary evidence, both the Investigating Officer and the defense learn the identity of the witnesses, and the defense can then either examine or cross-examine witnesses under oath pursuant to RCMs 405(f)(8) and (9).

If the accused's discovery rights do not attach until later in the process, then the amount of time the defense has to properly prepare for trial could be reduced. Timing of discovery is problematic in a system where the case may proceed to arraignment and even trial after a waiting period of just three days for a special court-martial or five days for a general court-martial. While the military judge has authority to regulate the timing of discovery and the scheduling of trial, military judges tend to be reluctant in granting continuances in comparison with their civilian counterparts. In any event, if the practice adjusts to allow for more time from arraignment to trial to account for the defense conduct of discovery later in the process, it seems likely that there will be more litigation concerning discovery and more litigation concerning continuances than is currently the case.

It is important to remember that military personnel are members of a distinct society in which members are subject to the authority of the chain of command at all times and that the chain of command controls not just their livelihood and promotion opportunities, but many other facets of their lives as well. The military is rigidly hierarchical, and its organizing principle is to produce the results the commander or commanding

[24] The fact that the defense has the right to conduct discovery at the Article 32 Investigation means that functionally, the defense obtains the evidence in the Government's possession at that stage of the case and can begin preparing for trial from that moment. The accused's right to discovery in RCM 405(f)(10) to "have evidence, including documents or physical evidence, within the control of military authorities produced" flows from Article 32's discovery rights at the investigation stage. If the statute is modified to provide that the defense cannot use the Article 32 Investigation to conduct discovery, then presumably the accused's discovery rights will not attach until referral of charges.

officer directs and desires. Military culture tends to produce both an uncommon, occasionally unquestioning, obedience to authority and a disinclination to question authority. Commands tend to be especially tight-knit and wary of outsiders; the term "closing ranks" is an apt description of the phenomenon.

All this is a round-about way of saying that commands are not always overly welcoming of defense counsel who, as outsiders, might bring forth evidence that would contradict the existing narrative or bring forth facts that might challenge or even embarrass the command. Remember also that defense counsel are often only able to make contact with prospective witnesses ***through*** the chain of command. At times, prospective witnesses, especially enlisted members, who are already disinclined to speak with officers, can be less than forthcoming with outsiders who are not sanctioned by the chain of command as "one of us."

A typical response that a Navy defense counsel receives when asking a witness for an interview is "I need to talk to my Chief first." (Or some variant such as "I need to get the permission of the Chain of Command;" or "I need to talk to the Judge" (meaning the SJA for the command); or "I'm not sure I'm supposed to;" or "this won't end up with me on legal hold, will it?") After speaking with the Chain of Command, or SJA or Trial Counsel, the next response is "I talked with my Chain of Command and they told me they couldn't tell me what to do but that I wasn't required to speak with defense counsel" and "I think it might be better if I didn't get involved" or, "I don't want to be placed on legal hold." Defense witnesses seem to have a need for a permission structure that sanctions their cooperation with defense counsel, and the Article 32 Investigation (or the knowledge a witness may be required to attend the Article 32 Investigation and testify) creates that necessary permission structure.[25]

Do we as defense counsel attempt to thoroughly interview every potential witness before an Article 32 Investigation and

[25] While there are undoubtedly some civilian witnesses that "don't want to get involved," experience indicates less resistance and more independence from civilian witnesses, probably because there is no unitary chain of command that holds civilian's lives, reputations and advancements in its hand.

elicit as much information on our own as possible? Of course we do. Are we sometimes able to complete discovery on our own? Certainly; our own leg-work and our independently conducted interviews are sometimes sufficient for discovery purposes. However, the Article 32 hearing itself can be extraordinarily useful in eliciting information that might not otherwise be forthcoming. To have an Article 32 Investigating Officer presiding, directing witnesses to tell the whole truth and nothing but the truth, and treating the defense counsel's role and questions as normal and appropriate often overcomes the earlier disinclination to speak with defense counsel and helps to overcome the wall of silence.

Military personnel are highly transient, executing permanent change of station orders every two, three or four years, and frequently deployed. This transience and mobility impairs the defense ability to conduct in-person interviews and inhibits the fact finding ability of defense counsel. Moreover, because defense counsel have to prove to the convening authority or military judge in advance of trial why remote witnesses should be produced, it is extremely beneficial to the defense to be able to establish on the record at the Article 32 a given witnesses' relevance. Given that defense counsel cannot simply exercise their independent professional judgment and subpoena witnesses they believe to be material, but must justify every request for production to the Trial Counsel and either the Convening Authority or Military Judge, it makes sense to allow the defense the opportunity to demonstrate relevance in the investigation.[26]

[26] A curtailed Article 32 investigation minimizes the defense ability to establish relevance on the record and increases the likelihood of increased amounts of litigation concerning production of witnesses, with wrangling over production devolving into proffers and counter-proffers from the defense and the government rather than actual evidence from the Article 32. Certainly, not every relevant witness ends up being available to testify at an Article 32, but a thorough investigation increases the likelihood that a given witness' relevance has been explored. Given the transience and mobility of military personnel, if you have them present at a critical stage of the proceedings, why wouldn't you want to take their

Affording discovery rights at the Article 32 Investigation strikes an appropriate balance overall given the enhanced disclosure requirements imposed on the defense in the military justice system and the legal and practical limits on the military defense counsel's ability to conduct discovery independently.

Conclusion

Having more information typically results in better decision making. In a country where an individual is presumed to be innocent until proven guilty beyond any reasonable doubt and where the criminal defense system is predicated on the notion that it is better for 10 guilty individuals to go free rather than one innocent individual be wrongly convicted and incarcerated, the tendency should be to provide more information rather less and to want decision-makers to be more informed rather than less informed. The entire military justice system should strain towards disclosure and transparency so that each party has the information necessary to make its best case and so that truth will prevail.

I reject the notion that our service members, who volunteer to serve their country at the potential cost of their lives, who leave their homes and are often thousands of miles away from their home communities and the support of their friends and family, who are sworn to uphold and defend the Constitution and obey without question the orders of the President and the officers appointed over them, deserve fewer rights and less fairness than other defendants accused of offenses. I am not arguing that service entitles military personnel to a superior criminal justice system or to avoid criminal responsibility, but the sacrifice and patriotism of our service members do not warrant a system containing fewer or inferior protections.

The elimination of the Article 32 as a thorough and impartial investigation where the accused has the right to conduct discovery removes one of the Uniform Code's very best and fairest features. Stripping away the accused's rights by eliminating this hallmark of our system is ultimately bound to

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testimony while they are available, given the real possibility they may not be later?

erode confidence in military justice and to result in a system that is less fair and less just.