CHAPTER 9 THE ARTICLE 32 INVESTIGATION

SYNOPSIS

§ 9-10.00 INTRODUCTION

By its express terms, the Fifth Amendment right to grand jury indictment is inapplicable to the armed forces. In its absence, the Uniform Code of Military Justice provides that:

> [n]o 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.[1]

Generally termed the "Article 32 investigation," this pretrial inquiry had its statutory[2]origins in Article of War 70, which was enacted in 1920[3] in order 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.[4]

In its present statutory form, the Article 32 investigation has four primary purposes:

> 1. It protects the accused from baseless charges;
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> 2. It provides the convening authority with information with which to determine whether to refer the charges to trial by court-martial;
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> 3. It provides the convening authority with information with which to determine what specific disposition to make of a case which is to be referred to trial; and
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> 4. It provides the defense with pretrial discovery.[5]

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[1] U.C.M.J. art. 32(a). R.C.M. 405(a) implements the Code:

> Except as provided in subsection (k) of this rule [pertaining to waiver], 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 in substantial compliance with this rule. Failure to comply with this rule shall have no effect if the charges are not referred to a general court-martial.

[2] Article of War 70, § 1, ch. 2, 41 Stat. 759, 802 (1920).

[3] See MCM, 1917 (Change 4, 1919), which predates the amendment of Article of War 70.

[4] Murphy, *The Formal Pretrial Investigation*, 12 Mil. L. Rev. 1, 5 (1961) (citing at n.22, War Department, Military Justice During the War 63 (1919)). *See also* 12 Mil. L. Rev. 1, 5 (1961) at n.20 (citing generally Hearings on S. 64 Before a Subcomm. of the Senate Comm. on Military Affairs, 66th Cong., 1st Sess. (1919)).

[5] Uniform Code of Military Justice, Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Forces, 81st Cong., 1st Sess. 997 (1949) (statement of Mr. Larkin) [hereinafter Hearings on H.R. 2498]. *See also* Gaydos, *A Comprehensive Guide to the Military Pretrial Investigation*, 111 Mil. L. Rev. 49, 51 (1986) (indicating that discovery was probably only a collateral consequence); R.C.M. 405(a) Discussion ("[t]he investigation also serves as a means of discovery"); Hutson v. United States, 42 C.M.R. 39 (C.M.A. 1970); United States v. Samuels, 27 C.M.R. 280 (C.M.A. 1959); United States v. Tomaszewski, 24 C.M.R. 76, 78 (C.M.A. 1957); United States v. Allen, 18 C.M.R. 250, 256 (C.M.A. 1955); Analysis of the 1980 Amendments to the *Manual for Courts-Martial*, Analysis of Rule 804(b)(1), MCM, 2005, A22-56.

Although the legislative history supports the position that discovery was a purpose of the Article 32 investigation, and it is apparent that discovery is a tactical goal of the examination, the Court of Military Appeals has disparaged the discovery goal. Having held that "discovery was not 'a prime object of the pretrial investigation' " (United States v. Arruza, 26 M.J. 234 (C.M.A. 1988), citing United States v.

Because of its screening function, the Article 32 investigation has often been compared to both the civilian preliminary hearing and the grand jury.[6] Indeed, during the hearings on the Uniform Code, one member of Congress stated: "It is merely the preliminary investigation to satisfy the officer investigating that there is probable cause that the man did commit the crime and there is enough evidence to warrant that he should be put on trial."[7]

Insofar as the Article 32 investigation is an inquiry into the facts surrounding the charges against the accused, and thus an important pretrial screening device, it is functionally similar to both the preliminary hearing and grand jury. It is, however, a unique hybrid, and dissimilar in large part to both civilian proceedings.

At its core, the Article 32 investigation is composed of an open[8] hearing at which the accused and counsel are present with the right to cross-examine adverse witnesses and to present defense evidence. Because it supplies the convening authority with information on which to make a general disposition decision[9] as well serving as a general defense discovery mechanism, it is far broader in scope than is the normal preliminary hearing.[10] Although its scope is theoretically similar to that of the grand jury, the grand jury is a secret proceeding that deprives a testifying accused of the right of confrontation, the right to present defense evidence,[11] and, generally, the right to counsel before the grand jury when the accused does testify.[12] Consequently, the Article

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Eggers, 11 C.M.R. 191, 194 (C.M.A. 1953)), the court subsequently found it to be so unimportant that the court would not permit defense counsel to use it as the basis for defense strategy. United States v. Connor, 27 M.J. 378 (C.M.A. 1989) (counsel could not claim that he lacked "similar motive" under Mil. R. Evid. 804(b)(1) because he was using the investigation as a discovery device). *See generally* Lederer, *The Military Rules of Evidence, Origins and Judicial Implementation*, 130 Mil. L. Rev. 5, 24–26 (1990).

[6] *See, e.g.*, Murphy, above note 4, at 10–12. *See also* Section 9-64.00.

[7] Hearings on H.R. 2498, above note 5, at 997 (statement of Mr. Norblad). Hearings on H.R. 2498, above note 5, at 999 (statement of Mr. Felix Larkin, Assistant General Counsel, Office of Secretary of Defense).

[8] Although most Article 32 hearings are open to the public, provision does exist to close them. See Section 9-64.00.

[9] Such a decision extends to far more than a decision as to whether probable cause exists to believe the accused committed the offense. It includes consideration of nonjudicial dispositions (see Chapters 3 and 8) and the policy question—conceding that the accused committed the offense—of whether the accused should be tried or otherwise punished for it.

[10] Although grand juries serve as the "conscience" of the community and may choose not to indict an individual notwithstanding sufficient evidence (Yale Kamisar, Wayne R. Lafave, Jerold. H. Israel, & Nancy J. King, Modern Criminal Procedure 1065 (11th ed. 2005)), magistrates are not generally recognized as having such authority. F. Miller, Presection: THE DECISION TO CHARGE A SUSPECT WITH A CRIME 93 (1970). Although valuable discovery may be obtained from some preliminary hearings, discovery is not generally recognized as a proper purpose of a preliminary hearing, *see, e.g.*, Modern Criminal Procedure, *above*, at 1027, and the limited nature of many examinations renders even the pragmatic opportunity to obtain discovery a limited one at best. Yale Kamisar, Wayne R. Lafave, Jerold. H Israel, & Nancy J. King, Modern Criminal Procedure 1029–30 (11th ed. 2005).

[11] In most jurisdictions, a grand jury "target" may volunteer to give testimony.

[12] United States v. Mandujano, 425 U.S. 564, 581 (1976); Fed. R. Crim. P. 6(d). *See generally* Y. Kamisar, W. Lafave & J. Israel, Modern Criminal Procedure Wayne R. LaFave, Jerold H. Israel & Nancy J. King, Criminal Procedure 493 (4th ed. 2004) (stating that approximately 20 states permit at least some witnesses to have counsel with them in the grand jury room). Witnesses before a grand jury may interrupt their testimony to consult with counsel outside the grand jury room. 425 U.S. 564, 581 (1976).

32 investigation is far more protective of the accused than is any analogous civilian proceeding.[13]

It is, however, also more limited in that the recommendation of the investigating officer is advisory only and may be ignored with impunity by the convening authority. In civilian procedure, a finding by a magistrate at a preliminary hearing that no probable cause exists to hold an accused at least technically can have greater legal or practical effect as when permitted resubmission to another magistrate (or in a minority of jurisdictions to a grand jury) is the most probable avenue for prosecutorial relief.[14] A refusal to indict on the part of a grand jury is final, subject only to the possible indictment of the defendant by another grand jury.[15] Although both civilian proceedings thus have prosecution "escape clauses," which may be easily used in any specific case, systematically they are more protective of the accused in this area than is the Article 32 recommendation.[16]

§ 9-20.00 INITIATION OF THE INVESTIGATION

§ 9-21.00 In General

Article 32 of the Code does not specify who shall initiate an Article 32 investigation; it merely requires that such an investigation, or its equivalent,[17] take place before charges are referred to a general court-martial. The Rules for Courts-Martial state only that an investigation may be ordered by any officer exercising either court-martial authority unless prohibited by service regulations.[18]This is a change from the *1969 Manual*, which seemed to express preference

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[13] *See generally* Moyer, *Procedural Rights of the Military Accused: Advantages Over a Civilian Defendant*, 51 Mil. L. Rev. 1, 6–11 (1971); *Sandell, The Grand Jury and the Article 32: A Comparison*, 1 N. KY. ST. L. F. 25 (1973). *See also* Richard A. Posner, The Economics of Justice 84 (2d ed. 1983) ("The grand jury has become an instrument of prosecutorial investigation, rather than being the protection for the criminal suspect that the framers of the Bill of Rights expected it to be.").

[14] Fed. R. Crim. P. 5.1 (f)(c). *See generally* Wayne R. LaFave, Jerold H. Israel & Nancy J. King, Criminal Procedure 728–29 (4th ed. 2004)

[15] "A significant minority of jurisdictions do impose limitations" [on resubmission]. Wayne R. LaFave, Jerold H. Israel & Nancy J. King, Criminal Procedure 752 (4th ed. 2004).

[16] The degree to which convening authorities follow the recommendations of Article 32 officers is unclear, especially where the recommendation amounts to dismissal of charges. One study, Gentry, *The Article 32 - A Dead Letter*? (thesis on file at The Judge Advocate General's School, U.S. Army), *reprinted* in Lederer, 3 Analysis of the Military Criminal Legal System 347 (TJAGSA, 2d ed. 1975), found that 37.2% of all Judge Advocate respondents believed that the investigating officer's recommendations were followed in almost all cases, and 46.7% believed that they were followed in a majority of cases. Gentry at 3e, reprinted in Analysis at 472. However, even assuming that the population sample surveyed was adequate, then Major Gentry concluded that his results may well reflect "not only the experience level of the respondents but also either confidence or distrust of the system in general… ." Gentry at 32–33, reprinted in ANALYSIS 358–59. Of course, in light of the age of the data, its contemporary meaning is questionable.

The authors' empirical experience suggests that although the investigating officer's recommendations are not necessarily followed by the convening authority, those recommendations submitted by officers with good track records (i.e., past recommendations ultimately borne out by conviction or sentence results) or well-articulated and reasoned reports are highly likely to be followed.

[17] *See Section* 9-22.00.

[18] R.C.M. 405(c). *See also* McKinney v. Jarvis, 46 M.J. 870 (Army Crim. App. 1997) (statute prevents accuser from performing a number of functions but does not disqualify him from appointing Article 32 investigating officer or from forwarding charges to a superior for disposition when there is no allegation

for appointment by the summary court-martial-convening authority.[19]

Nothing in the *Manual for Courts-Martial* or the Uniform Code of Military Justice prohibits the appointment of an Article 32-type investigation when the appointing authority desires additional information to make a disposition decision, even though charges will not be referred to a general court-martial. Although not expressly permitted by the Uniform Code, such an investigation would appear to be in accord with the Rules for Courts-Martial, in the accused's favor, and not subject to objection.[20]

Irregular appointment of investigating officers may deprive the accused of a properly informed disposition decision by that officer. In such a case, the appropriate remedy would be to return the case to the summary court-martial convening authority for a disposition decision based upon the investigating officer's report.[21]

§ 9-22.00 Substitutes for the Article 32 Investigation

When "an investigation of the subject matter of an offense has been conducted before the accused is charged with the offense," and the investigation has given the accused the same rights given by Article 32(b), no Article 32 investigation need be held.[22] In such a case, however, the Code gives the accused the right to demand further investigation, which includes the right "to recall witnesses for further cross-examination and to offer new evidence in his own behalf."[23] Although potentially applicable in any of the armed forces, the ability to substitute other

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accuser will be biased).

[19] MCM, 1969 ¶ 33e. The *Manual* also permitted investigation by an officer unable to convene a summary court-martial, *see* MCM, 1969 ¶ 33e(2). Such officer was required, however, to exercise Article 15 jurisdiction over the accused. United States v. Donaldson, 49 C.M.R. 542, 543 (C.M.A. 1975).

[20] Because Article 32 does not prohibit such an investigation, the convening authority could utilize the inherent powers of command to appoint a nonjudicial investigation. An Article 32 investigation would appear to be more protective of the accused, however, and thus not subject to defense objection. Compare, e.g., R.C.M. 405 with Army Reg. No. 15-6. This especially should be true since Article 32(c) contemplates use of other investigations in lieu of an Article 32 investigation.

[21] Noncompliance with Article 32 is nonjurisdictional in nature, U.C.M.J. art. 32(d). However, some defects may merit corrective action to include reopening the investigation and resubmission of the case to the convening authority. *See* Section 9-80.00.

[22] U.C.M.J. art. 32(c). R.C.M. 405(b) accordingly provides:

> If an investigation of the subject matter of an offense has been conducted before the accused is charged with an offense, and the accused was present at an investigation and afforded the rights to counsel, cross-examination, and presentation of evidence required by this rule, no further investigation is required unless demanded by the accused to recall witnesses for further cross-examination and to offer new evidence.

A speedy pretrial investigation may be of great assistance to the prosecution in expediting the case, placing the accused off balance, and recording testimony for later use at trial. *See generally* Hausken, *Article 32(c): A Forgotten Provision Can Assist the Prosecutor*, Army Law., April 1988, at 39, 42.

[23] U.C.M.J. art. 32(c); R.C.M. 405(b).

investigations for that required by Article 32 appears to be of value primarily to the Navy and Coast Guard, which use "Courts of Inquiry"[24] and "Administrative Investigations"[25] to a much greater extent than the other armed services.

§ 9-23.00 Effect of Alterations in the Charges

Pursuant to the *1969 Manual for Courts-Martial*, amendment of the charges did not require another investigation so long as the charges were investigated prior to reaching the officer exercising summary court-martial jurisdiction "unless there is reason to believe that a further investigation would aid in the administration of military justice."[26] However, if after completion of the Article 32 investigation, charges were amended "to allege a more serious or essentially different offense, a new investigation should be directed… ."[27] The convening authority could, when appropriate, direct "supplementary investigations by the same or a different investigating officer… ."[28] The *2005 Manual* excludes these provisions, because they are implicit in the Rule.[29]

The Discussion to Rule for Courts-Martial 404(j) states that the investigating officer may recommend that additional charges be preferred.[30] The Discussion does not indicate whether these charges must be further investigated, but Article 32 would appear to require such investigation. In 1984, the Army's Wartime Legislative Team Study recommended that the law be modified so that such additional charges would not need to be investigated.[31] Such a change was initiated by the Joint Service Committee on Military Justice[32] in December 1988.[33] It provides that the investigating officer may broaden the scope of the investigation to include the subject matter of uncharged offenses if the accused is informed of the nature of the uncharged offense, and counsel is afforded the opportunity to be present at the investigation to represent the accused, cross-examine witnesses, and present evidence.[34] This change was proposed as part of S. 727, the FY96 DOD Authorization bill. In 1995 this change was enacted as an amendment to

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[24] U.C.M.J. art. 135. The Manual expressly contemplates use of a Court of Inquiry as a substitute for the Article 32 investigation. R.C.M. 405(b) Discussion. *See also* United States v. Gandy, 26 C.M.R. 135 (C.M.A. 1958) (commander's board of investigation adequate substitute).

[25] *See generally* JAGINST 5800.7D ch. II (15 March 2004).

[26] MCM, 1969 ¶ 33e(2).

[27] MCM, 1969 ¶ 33e(2).

[28] MCM, 1969 ¶ 33e(2).

[29] The Discussion to Rule 405(b) states that "If at any time after an investigation under this rule the charges are changed to allege a more serious or essentially different offense, further investigation should be directed with respect to the new or different matters alleged." The Discussion is based on MCM, 1969 ¶ 33e(2). Analysis of the Rules for Courts-Martial, MCM, 2005, A21-33.

[30] This flows directly from the fundamental fact-finding nature of the Article 32 investigation.

[31] Report to the Judge Advocate General by the Wartime Legislative Team 33 (Sept. 1983), *reprinted* in Gates & Casida, Report to The Judge Advocate General by the Wartime Legislative Team, 104 Mil. L. Rev. 139, 159 (1984).

[32] *See* Chapter 1, note 144.

[33] Minutes of the Department of Defense Joint Service Committee on file in the U.S. Army, Office of The Judge Advocate General.

[34] Minutes of the Department of Defense Joint Service Committee on file in the U.S. Army, Office of The Judge Advocate General.

Article 31(d).[35]

§ 9-24.00 Waiver of the Article 32 Investigation

The right to an Article 32 investigation may be waived by an accused,[36] and such waiver may be made a condition of a plea bargain.[37] In sustaining the legality of such a pretrial agreement provision, the Court of Military Appeals reasoned that in a particular case the accused could obtain significant benefits from such a waiver. Writing for the court, Chief Judge Everett enumerated the following potential benefits:

> 1. The accused may wish to be tried as soon as possible.
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> 2. The investigation might "reveal that an accused has committed previously unsuspected offenses, so additional charges may be preferred."
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> 3. The accused may prefer to avoid the potential strengthening of the prosecution's case which might result from reducing the sworn testimony of witnesses to writing.
>
> 4. The accused may desire to avoid making "the prosecution aware of potential defenses and thereby better prepare him to disprove those defenses."[38]

Judge Everett added that, in any event, "The pretrial investigation does not delimit the evidence that later will be considered by the trier of fact in determining guilt or innocence, so its waiver does not amount to a restructuring of the trial procedure which Congress has provided for determining guilt beyond reasonable doubt."[39]

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[35] Section 1131, Military Justice Amendments of 1995 changing Art. 32(d). *See also* R.C.M. 405(e) (1998 ed.).

[36] R.C.M. 405(k). *See also* <SUPPLEMENT>

note 36. After "See also" insert:

Note, *Prosecutorial Power and the Legitimacy of the Military Justice System*, 123 HARV. L. REV. 937 (2010);</SUPPLEMENT> <SUPPLEMENT>

United States v. Wiechmann, 67 M.J. 456, 463 (C.A.A.F. 2009);</SUPPLEMENT> United States v. Nickerson, 27 M.J. 30, 31 (C.M.A. 1988). The Analysis of Rule 405(k) indicates that it "is consistent with previous practice," *citing* United States v. Schaffer, 12 M.J. 425, 427 (C.M.A. 1982) (citing in turn United States v. Payne, 31 C.M.R. 41 (C.M.A. 1961); United States v. Mickel, 26 C.M.R. 104 (C.M.A. 1958)), and observing that under federal law both a grand jury indictment and preliminary hearing may be waived. 12 M.J. at 427 (citations omitted). MCM, 2005, A21-26. The first sentence of the Analysis to subdivision (k) notes that the Rule "is based on Article 34(a), as amended, Military Justice Act of 1983, Pub. L. No. 98-209, § 4(a)(2), 97 Stat. 1393 (1983), which expressly permits waiver of the Article 32 investigation." MCM, 2005, A21-26. U.C.M.J. Art. 34(a)(2) prohibits referral of charges to a general court-martial unless the staff judge advocate in the pretrial advice finds that "the specification is warranted by the evidence indicated in the report of investigation under…(Article 32) (*if there is such a report*… .)" (emphasis added).

[37] R.C.M. 705(c)(2)(E). The Analysis of the Rule indicates that it was based on United States v. Schaffer, 12 M.J. 425 (C.M.A. 1982). MCM, 2005, A21-40.

[38] United States v. Schaffer, 12 M.J. 425, 429 (C.M.A. 1982). To these could be added a desire to avoid making prosecution testimony admissible as former testimony under Mil. R. Evid. 804(b)(1), and numerous tactical reasons common to the reaction of witnesses to multiple hearings.

[39] United States v. Schaffer, 12 M.J. 425, 429–30 (C.M.A. 1982).

In many respects, it is difficult to challenge the court's decision. Although the Article 32 investigation may be useful to the accused, many cases are clearly destined for trial by general court-martial because of the seriousness of the offense, and the discovery available through the investigation may be of little value given the open discovery usually practiced in the armed forces. Both the government and the defense may lawfully originate a waiver provision incident to plea bargaining.[40] As is true of plea bargaining generally, there is always a possibility of prosecutorial overreach,[41] and permitting governmental initiation of such a condition might contribute to its likelihood. Although a prohibition on government initiation of a waiver provision might protect the accused, pragmatism suggests that there is little difference between a formal government proposal and defense counsel's knowledge that offers without such a provision are less likely to be successful than those with one.[42]

Any qualms about permitting an accused to waive the pretrial investigation as a condition of plea bargaining can hardly be noted, however, without observing that the Supreme Court has clearly permitted the government the most expansive power to obtain plea bargains from defendants.[43] Although military plea bargaining has been a good deal more controlled and limited,[44] the Court of Military Appeals may have been signaling its ultimate willingness to permit the government to use waiver of the pretrial investigation as a bargaining chip.

If the accused waives the Article 32 investigation before trial and seeks to withdraw the waiver at trial, the defense must show good cause for such an investigation.[45]
<SUPPLEMENT>

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After note 45, add a new paragraph:
The Court of Appeals for the Armed Forces has held that when an accused's conviction is reversed on appeal, the accused may withdraw from a previously existing pretrial agreement and is entitled to an Article 32 investigation even though the accused had waived such an

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[40] R.C.M. 705(c)(2). The seminal case in the area, United States v. Schaffer, 12 M.J. 425 (C.M.A. 1982) dealt only with a waiver provision initiated by the accused.

[41] *Cf.* United States v. Schaffer, 12 M.J. 425, 427, 428–30 (C.M.A. 1982). It is unclear whether the court in Schaffer was really concerned with prosecutorial overreaching. Although it noted that various protections against such conduct exist in military law, primarily in the providency inquiry conducted by the military judge (12 M.J. at 428–29 (C.M.A. 1982), the court's reasoning does not necessarily prohibit the government from conditioning a pretrial agreement upon waiver of the investigation. The court, however, has held in the past that waiver of the investigation is improper when such waiver is the standard practice in the jurisdiction. United States v. Ellsworth, 44 C.M.R. 844 (A.C.M.R. 1971).

[42] *See* United States v. Nickerson, 27 M.J. 30, 31 (C.M.A. 1988) (although trial judge found that a waiver was not part of the pretrial agreement, even a sub rosa part, the timing of the waiver—immediately following defense submission of a pretrial agreement—leads one to question what was "expected" of counsel). One can argue that a moral distinction may exist between expressly permitting the government to propose such a condition and maintenance of a system in which it may be unwritten but de facto, and that the system would be "purer" if it took whatever steps may be reasonably possible to prohibit governmental overreaching.

[43] United States v. Goodwin, 457 U.S. 368 (1982); Bordenkircher v. Hayes, 434 U.S. 357 (1978).

[44] *See generally* Chapter 12.

[45] R.C.M. 405(k); United States v. Nickerson, 27 M.J. 30 (C.M.A. 1988). "Good cause" is a question of law. 27 M.J. at 32 (C.M.A. 1988).

investigation in the agreement.[45.1]</SUPPLEMENT>
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§ 9-30.00 THE INVESTIGATING OFFICER

§ 9-31.00 Qualifications for Appointment

Although Article 32 does not require that the individual to be appointed to conduct the Article 32 investigation possess any specific qualifications, it does refer to "the investigating officer,"[46] and it would thus appear that only a commissioned officer[47] may be appointed, a result adopted by Rule 405(d)(1) of the Rules for Courts-Martial.

Although the *1969 Manual for Courts-Martial* stated that "[t]he officer appointed… should be a mature officer, preferably an officer of the grade of major or lieutenant commander or higher, or one with legal training and experience,"[48] this preference was omitted from Rule 405 proper but retained in its Discussion. The Court of Military Appeals noted with disapproval the appointment of a junior officer to investigate charges against a senior officer, even though the investigator was a licensed attorney.[49]

The *Manual* permits the use of military lawyers as investigating officers, and the Court of Military Appeals expressly approved the Navy's use of judicially trained personnel as investigating officers.[50] It is not, however, common practice throughout the armed forces. Lawyers are usually appointed in the Army, for example, only in complex cases, although lawyer appointment may be an increasing trend. This is unfortunate, because nonlegally trained personnel are dependent upon other sources for legal advice and may improperly utilize the prosecutor rather than an impartial advisor.[51]

[45.1] United States v. Von Bergen, 2009 C.A.A.F LEXIS. 474 (April 2, 2009) (but finding no prejudice).

[46] U.C.M.J. art. 32(b). See also Uniform Code of Military Justice, Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services, 81st Cong., 1st Sess. 997 (1949) (Statement of Mr. Norblad referring to the "officer investigating").

[47] R.C.M. 405(d)(1).

[48] MCM, 1969 ¶ 34a. *The Manual* expressed a preference rather than a requirement. Consequently, a junior officer could have been appointed.

[49] United States v. Reynolds, 24 M.J. 261 (C.M.A. 1987) ("a gross breach of military protocol and courtesy" (24 M.J. at 263 (C.M.A. 1987)) and "to be avoided even if not strictly prohibited" (24 M.J. at 263 n.2 (C.M.A. 1987)).

[50] United States v. Payne, 3 M.J. 354, 355 n.6 (C.M.A. 1977). *See also* United States v. Davis, 20 M.J. 61, 65 (C.M.A. 1985). ("[W]e do not wish to establish a rule which will lead to the appointment of line officers, rather than military lawyers, as investigating officers… . [The] use of legally trained persons to perform judicial duties involved avoids some of the complaints lodged against lay judges.").

[51] *See, e.g.*, United States v. Payne, 3 M.J. 354 (C.M.A. 1977), *overruling* United States v. Young, 32 C.M.R. 134 (C.M.A. 1962). *See generally* Section 9-33.00.

An accuser may not serve as an investigating officer.[52] Unless there is an attempt to influence the investigating officer's determination of probable cause, an investigating officer is not disqualified because of his or her social and professional contacts with the prosecutor or potential government witnesses.[53] Nor does an interoffice relationship, which is likely if the investigator is a judge advocate, result in an unacceptable appearance of impropriety when the offices involved actually operate as separate subject matter entities.[54]

The Court of Military Appeals made it clear that the individual appointed to conduct the Article 32 functions in a judicial capacity[55] and must be impartial.[56] A biased investigator may result in reversal of a case for a new investigation.[57] Given the judicial nature of the investigating officer, actual bias need not be shown. It is sufficient that a perception of bias may exist that would necessitate recusal of a military judge.[58] Even when the investigating officer is technically impartial, the appearance of partiality caused by rating or command relationships may be such as to strongly disfavor the appointment of some officers.[59] A complaint of partiality may require a showing of prejudice before relief will be granted by the military judge.[60]

In appropriate cases, a single investigating officer can investigate multiple related cases:

> This Court has previously approved the appointment of a single

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[52] R.C.M. 405(d)(1). An officer is not disqualified merely for forwarding charges. United States v. Nix, 36 M.J. 660 (N.M.C.M.R. 1993), *rev'd*, 40 M.J. 6 (1994).

[53] United States v. Reynolds, 24 M.J. 261, 263 (C.M.A. 1987).

[54] 24 M.J. 261, 263 (C.M.A. 1987). The investigating officer was a member of the Legal Assistance Division of the Staff Judge Advocate's Office. The trial counsel was also part of the office and responsible to the Staff Judge Advocate. In dictum, the court refused to find that the Staff Judge Advocate's Office is "strictly analogous to a larger 'firm' " as its members lack the profit motive and economic ties common to a private law firm. 24 M.J. at 264, *citing* ABA Committee on Ethics and Professional Responsibility, Informal Op. 1235 (1972). Given that promotion is the military equivalent to civilian law firm financial gain, and that within the office of the Staff Judge Advocate, the SJA is responsible for supervising and rating all subordinates, directly or indirectly, one might reasonably question the holding in *Reynolds*.

[55] United States v. Payne, 3 M.J. 354, 355 n.5 (C.M.A. 1977) (citing United States v. Samuels, 27 C.M.R. 280 (C.M.A. 1959)). In *Payne*, the court applied the ABA's Standards for Criminal Justice, The Function of the Trial Judge, to the Investigating Officer in the Case. 3 M.J. at 356.

[56] See, e.g., United States v. Payne, 3 M.J. 354 (C.M.A. 1977); United States v. Lopez, 42 C.M.R. 268 (C.M.A. 1970). Cf. United States v. Collins, 6 M.J. 256, 258–59 (C.M.A. 1979). United States v. Reynolds, 19 M.J. 529 (A.C.M.R. 1984), aff'd, 24 M.J. 261 (C.M.A. 1987). *See also* United States v. Willis, 43 M.J. 889 (A.F. Crim. App. 1996) (investigating officer who was SJA of sister wing not disqualified).

[57] United States v. Parker, 19 C.M.R. 201 (C.M.A. 1955). *See also* United States v. Castleman, 11 M.J. 562 (A.F.C.M.R. 1981); United States v. Natalello, 10 M.J. 594 (A.F.C.M.R. 1980). Failure to raise the issue at trial will waive it. R.C.M. 905(e). *See, e.g.*, United States v. Durr, 47 C.M.R. 622, 630 (A.C.M.R. 1973).

[58] *See, e.g.*, United States v. Castleman, 11 M.J. 562, 564–65 (A.F.C.M.R. 1981).

[59] United States v. Davis, 20 M.J. 61, 65 (C.M.A. 1985). Being an executive officer of a Legal Service Office and in the defense counsel's chain-of-command did not make the investigator partial. *See also* United States v. Nicholson, 15 M.J. 436 (C.M.A. 1983) (court expressed concern about the prosecutor being the defense counsel's military superior but held it nonprejudicial). The Coast Guard Court of Military Review has held that the admonishment of defense counsel by the investigating officer did not, per se, call the investigator's impartiality into question. United States v. Spinner, 27 M.J. 892, 896–97 (C.G.C.M.R. 1989).

[60] United States v. Thorn, 36 M.J. 955, 957 (A.F.C.M.R. 1993), citing United States v. Reynolds, 24 M.J. 261, 263 (C.M.A. 1987).

> investigating officer in related cases, "so long as the exercise of his functions in one investigation does not impair his impartial consideration of the evidence developed in other investigations."[61]

The investigating officer is disqualified to act as counsel or judge in the same case.[62]

§ 9-32.00 Appointment

Neither the Uniform Code of Military Justice nor the *Manual for Courts-Martial* specify a manner of appointment of the investigating officer. All that is required is that such an officer be appointed.[63] Consequently, although customary practice is appointment via written orders, an oral appointment would appear lawful.

§ 9-33.00 Function

According to the Discussion of Rule 405(a), "The function of the investigation is to ascertain and impartially weigh all available facts in arriving at conclusions and recommendations, not to perfect a case against the accused."[64] The Article 32 investigating officer thus functions as an investigating magistrate somewhat similar to the French *Juge d'Instruction*. A significant limitation may exist, however. Although unclear, the Uniform Code and the *Manual* appear to contemplate that the investigation be carried out solely in the form of a formal hearing at which the accused and counsel may attend and cross-examine any adverse witnesses who testify.[65] Consequently, it appears probable that the investigating officer is foreclosed from conducting an initial informal investigation intended to locate relevant evidence not already known—at least insofar as it may amount to examination of witnesses for more than administrative purposes.[66] An investigating officer must be impartial at all times, even after completion of the investigation. Any additional information brought to the attention of the investigating officer post-investigation should be communicated promptly to the appropriate authorities, and the investigating officer should take care not to engage in inappropriate ex parte communications. In this respect, the Court of Appeals for the Armed Forces has opined:

> In view of the unique facts of this case—an *ex parte* post-referral communication to the trial counsel—we decline to speculate as to the circumstances, if any, in which it would be appropriate for an investigating officer to provide an unrequested supplementary recommendation to the command. At a minimum, however, any such communication must be reported promptly to the command and the accused. If the trial counsel or the staff judge advocate becomes aware of a communication by the investigating officer about the case to the command, the prosecution, or government's investigators after the investigating officer's report has been

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[61] 36 M.J. at 957 (A.F.C.M.R. 1993), citing United States v. Durr, 47 C.M.R. 622, 631 (A.F.C.M.R. 1973).
[62] R.C.M. 405(d)(1).
[63] R.C.M. 405(d)(1).
[64] R.C.M. 405(a) Discussion.
[65] U.C.M.J. art. 32(b); R.C.M. 405(f)(h).
[66] See United States v. Whitt, 21 M.J. 658, 660 (A.C.M.R. 1985) (investigator exercised poor judgment in ex parte interviewing of witnesses).

> submitted, the substance of the communication shall be reported promptly to the commander who ordered the investigation and the accused. If such a matter arises after referral, the information shall be provided promptly to the commander who referred the case to trial, the military judge, and the accused. The parties will be in the best position to determine whether any motions or objections are warranted based upon the nature of the information.[67]

§ 9-34.00 Legal Advice

The Article 32 investigating officer is often required to resolve complex legal matters in order to determine what case disposition to recommend. The investigating officer may obtain legal advice from any proper neutral source—customarily a member of the Staff Judge Advocate or Legal Advisor's office—specially designated for that purpose. The investigator may not obtain advice from "counsel for any party."[68] This rule stems from *United States v. Payne*,[69] in which the Court of Military Appeals cited as controlling authority the ABA Standard Relating to the Function of the Trial Judge[70] that declared: "The trial judge should insist that neither the prosecutor nor the defense counsel nor any other person discuss a pending case with him *ex parte*, except after adequate notice to all other parties and when authorized by law or in accordance with approved practice."[71]

In interpreting the court's holding in *Payne*, the Army Court of Military Review has held that the investigating officer is prohibited from receiving "advice from a non-prosecutor advisor on a *substantive* question without prior notice to all other parties."[72] Given the decision in *Payne*, the Court of Military Review appears correct. Indeed, in *Payne*, the Court of Military Appeals classified as "substantive… questions of the applicable burden of proof, evidentiary standards, and, most critically, the legality of the search which produced the incriminating evidence against the appellant"[73] and subsequently commented that the Article 32 investigating officer could not have sought "advice concerning *substantive* questions surrounding the search and seizure" from the proper legal advisor in an *ex parte* fashion.[74] If the Army Court of Military Review was

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[67] United States v. Holt, 52 M.J. 173, 184 n.4. (C.A.A.F. 1999).

[68] R.C.M. 405(d)(1) Discussion.

[69] 3 M.J. 354 (C.M.A. 1977) [hereinafter cited as *Payne*] *overruling* United States v. Young, 32 C.M.R. 134 (C.M.A. 1962). *See also* United States v. Clark, 11 M.J. 179 (C.M.A. 1981).

[70] ABA Standards, The Function of The Trial Judge § 1.6 (1972). *See also* 1 ABA Standards for Criminal Justice, Standard 6-2.1 (2d ed. 1980).

[71] United States v. Payne, 3 M.J. 354, 356 (C.M.A. 1977). *See also* United States v. Argo, 46 M.J. 454, 458-59 (C.A.A.F. 1997) ("*Ex parte* communications between an Article 32 investigating officer and a member of the prosecution are improper… An SJA is not a prosecutor and is usually in a position to give neutral advice." But it is improper for staff judge advocate of special court martial convening authority to have case specific *ex parte* conversation with Article 32 investigating officer.).

[72] United States v. Grimm, 6 M.J. 890, 893 (A.C.M.R. 1979) (emphasis in original). In *Grimm*, the court also held that the Chief of Criminal Law was not a prosecutor, notwithstanding that the chief was the trial counsel's supervisor. Given that fact and the usual duties performed in the Army by the Chief of Criminal Law, that aspect of Grimm seems clearly erroneous.

[73] 3 M.J. at 355, n.4.

[74] 3 M.J. at 356, n.11 (emphasis in original). It is not clear why this one "substantive" issue was singled out, except that it may have been presented to the prosecutor as a request for resolution of the search question as

correct, however, there would appear to be little information obtainable in an *ex parte* fashion from a proper legal advisor other than the most fundamental procedural advice. The ABA Standards do not mandate this. Rather, they deal with *ex parte* communications between counsel and judge rather than between judge and law clerk or judge and judicial colleague. Given the nonbinding nature of the Article 32 officer's recommendations, and the historical dependence on lay investigators, the proper solution would appear to be to permit *ex parte* legal advice from a *proper*, impartial, legal advisor, so long as it does not deal with the actual resolution of the issue.[75]

Although the investigator is to receive legal advice from a neutral source, the Army Court of Military Review, in *United States v. Bramel*,[76] upheld the use of the government's representative at the Article 32 investigation as the legal advisor to the convening authority who appointed the investigating officer:

> We find no legal or practical impediment to the summary court-martial convening authority receiving legal procedural advice from the military lawyer detailed to appear as government's representative at the pretrial investigation… . As this process [the investigation] is intrinsically adverse to the accused's interests, the government's legal representative is one of the most appropriate individuals who may render legal advice to the convening authority.[77]

Bramel is a strange decision. Although the investigating officer must receive neutral advice, the officer who appoints and directs that officer[78] may be given potentially biased advice. Its "saving grace" is its apparent limitation to "procedural advice."[79]

§ 9-35.00 Classified Information

Rule for Courts-Martial 405(g)(1)(B), as promulgated by the 1994 Change to the *Manual for Court-Martial*, provides that the investigating officer notify the appropriate authorities when there has been a request for classified information protected under Military Rule of Evidence 505 or 506. This allows those authorities to decide whether to prosecute or seek a protective order under Rule for Courts-Martial 405(g)(6). Without this notice requirement, information might be improperly released to the investigating officer or defense without an adequate balancing of

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such, rather than for legal advice concerning the law of search and seizure.

[75] Indeed, this resolution may be too conservative, and is primarily based on concern that the lay investigating officer might accede too easily to the legal advisor's opinion. The key concern is that the investigating officer be made aware that he or she is not bound by the opinion of the legal advisor. It should be noted that the Comment to Canon 3(B)(7)(b)) of the ABA Model Code of Judicial Conduct (2000) permits a judge to consult with a disinterested legal expert so long as the parties are given notice of that fact and the substance of the advice furnished, and are given a reasonable opportunity to respond.

[76] 29 M.J. 958 (A.C.M.R.), *aff'd on other grounds*, 32 M.J. 3 (C.M.A. 1990).

[77] 29 M.J. at 967 (A.C.M.R. 1990).

[78] In *Bramel*, the convening authority took the prosecutor's advice and ordered the investigator to use a partition to separate the accused from a child witness.

[79] Of course, the convening authority is advised by the Staff Judge Advocate, who may legitimately be viewed as the chief prosecutor. It may be that the line drawn by *Bramel* is justified, but it does further blur the lines drawn to protect the impartiality of the investigating officer.

national security interests.

§ 9-40.00 THE RIGHT TO COUNSEL

The Uniform Code of Military Justice was amended in 1981[80] to provide that for all investigations beginning[81] on or after January 20, 1982, the accused would be entitled to the same rights to counsel provided the accused at trial by special or general court-martial.[82] Those rights now provide the accused with the right to be represented by civilian counsel provided by the accused[83] and either detailed military counsel[84] or military counsel of the accused's own selection if reasonably available.[85]

Although the accused is not entitled as of right to more than one military counsel, the convening authority may, as a discretionary matter, permit the accused both detailed and individually selected military counsel or appoint additional military counsel, or both.[86] When the accused is represented by both civilian and military counsel, military counsel shall act as associate counsel.[87] The right to civilian counsel is particularly important, and its effective denial will entitle the accused to a new investigation.[88] A civilian counsel otherwise entitled to practice before courts-martial[89] may not be excluded from an Article 32 investigation because of his or her lack of a security clearance.[90]

The Army Court of Military Review held that the right of pro se representation at trial extends to the Article 32 hearing, but need not be granted when exercised as a ploy or to vex the prosecution or the court.[91]

§ 9-50.00 WITNESSES

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[80] Military Justice Amendments of 1981, Pub. L. No. 97-81, 95 Stat. 1085 (1981).

[81] An Article 32 investigation should "begin" on the date the investigating officer is appointed.

[82] Military Justice Amendment of 1981, Pub. L. No. 97-81, § 7(b)(3), 95 Stat. 1085, 1089 (1981) (amending U.C.M.J. art. 32(b)). Those rights to counsel are set forth in U.C.M.J. art. 38(b), as amended by Military Justice Amendments of 1981, Pub. L. No. 97-81, § 7(b)(4), 95 Stat. 1085 (1981). *See generally* Section 5-12.00.

[83] R.C.M. 405(d)(2)(C); *see* Section 5-24.00.

[84] R.C.M. 405(d)(2)(A); *see* Section 5-22.00.

[85] R.C.M. 405(d)(2)(B); *see* Section 5-23.00.

[86] U.C.M.J. art. 38(b)(6).

[87] U.C.M.J. art. 38(b)(4).

[88] United States v. Nichols, 23 C.M.R. 343, 348 (C.M.A. 1957) (citing United States v. Allen, 18 C.M.R. 250 (C.M.A. 1955)). *See also* United States v. Maness, 48 C.M.R. 512, 517–18 (C.M.A. 1974). This is not, however, to say that proceedings may be indefinitely postponed to permit civilian counsel to be obtained and be present.

[89] *See* § 5-24.00.

[90] United States v. Nichols, 23 C.M.R. 343, 349–50 (C.M.A. 1957). *See also* United States v. King, 53 M.J. 425 (C.A.A.F. 2000) (stay of Article 32 continued pending granting of defense security clearances or adequate defense cooperation).

[91] United States v. Bramel, 29 M.J. 958, 965–66 (A.C.M.R. 1990), *aff'd*, 32 M.J. 3 (C.M.A. 1990) (summary disposition).

§ 9-51.00 In General

Article 32(b) mandates that "full opportunity shall be given to the accused to cross-examine witnesses against him if they are available… ." The right to crossexamine witnesses under oath at the investigative hearing is particularly important to the defense in view of the discovery function served by the hearing.[92] Accordingly, the degree to which the defense is entitled to procure or confront live witness testimony at the Article 32 investigation may be critical.

The Uniform Code of Military Justice lacks any express definition of "available" as used in Article 32(b). The original version of the *1969 Manual for Courts-Martial* simply required that the commanding officer of the requested witness determine his or her availability while also declaring that "[t]here is no provision for paying compensation to any witness who gives evidence at the investigative hearing."[93] The *1969 Manual* also noted that "[t]here is no provision for compelling the attendance of witnesses not subject to military jurisdiction."[94] As originally promulgated, Rule for Courts-Martial 405(g)(1)(A) declared a witness to be "reasonably available" when the significance of the testimony and personal appearance of the witness' appearance outweighs the difficulty, expense, delay, and effect on military operations of obtaining the witness' appearance." The 1991 amendment to R.C.M. 405(g)(1)(A) provides:

> A witness is "reasonably available" when the witness is located within 100 miles of the situs of the investigation and the significance of the testimony and personal appearance of the witness outweighs the difficulty, expense, delay, and effect on military operations of obtaining the witness's appearance.

In *United States v. Marrie*,[95] the court opined in dictum that Rule 405(g)(1)(A) doesn't define which witnesses aren't available, only those who are. The investigating officer "must find that a witness meets both criteria."[96] in an unusual case, the Court of Appeals for the Armed Forces held in *United States v. Johnson*[97] that although trial counsel in Germany obtained the testimony of a critical prosecution witness for the Article 32 investigation via an "illegally ordered 'subpoena,' " the accused lacked standing to contest reliable evidence.

§ 9-52.00 Military Personnel

In its seminal case in the area, *United States v. Ledbetter*,[98] the Court of Military Appeals reversed the accused's conviction on the grounds "that the trial judge prejudicially erred in failing

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[92] *See, e.g.*, R.C.M. 405(a) Discussion; United States v. Cumberledge, 6 M.J. 203, 204 n.4; 205 n.13 (C.M.A. 1979); United States v. Chestnut, 2 M.J. 84, 85 (C.M.A. 1976); United States v. Ledbetter, 2 M.J. 37, 43 (C.M.A. 1976). *Cf.* United States v. Roberts, 10 M.J. 308, 311 (C.M.A. 1981). As for the reception of the Court of Military Appeals of the discovery rationale, *see above*, note 5.

[93] MCM, 1969 ¶ 34d as originally promulgated by Exec. Order No. 11476, June 19, 1969. This has been changed. *See* R.C.M. 405(g)(2)(B) Discussion.

[94] MCM, 1969 ¶ 34d. This provision remains in the present version of the *Manual*. *See* Section 9-53.00.

[95] 39 M.J. 993, 997 (A.F.C.M.R. 1994), aff'd, 43 M.J. 35 (C.A.A.F. 1995). *See also* United States v. Burfitt, 43 M.J. 815 (A.F. Crim. App. 1996) (100-mile radius not a per se rule).

[96] 43 M.J. at 40.

[97] 53 M.J. 459 (C.A.A.F. 2000).

[98] 2 M.J. 37 (C.M.A. 1976).

to grant the appellee's motion to reopen the investigation and to order the live appearance of the Government witness."[99] In so holding, the court expressly rejected the argument that a servicemember's availability should be tested purely in terms of distance from the location of the investigation[100] and declared that: "In the absence of congressional definition, we believe the concept of availability embodied in Article 32 requires a balancing of two competing interests. The significance of the witness' testimony must be weighed against the relative difficulty and expense of obtaining the witness' presence at the investigation."[101] The court also noted in *Ledbetter* the apparent absence of "military exigencies or other extraordinary circumstances"[102] to justify a finding of nonavailability. While stating that the travel expenses necessary to return the witness from Florida to Thailand, the situs of the investigation, would have been substantial, the court held that factor "somewhat diluted by virtue of [the witness'] untimely transfer from Thailand less than 2 weeks prior to … the Article 32 investigation."[103]

The court has since recognized that concern about witness safety, justified by "a proper record to support government contentions that exigencies such as the need to protect witnesses existed," may justify proceeding without the live testimony of a given witness.[104] The court has proposed, however, the use of deposition testimony as an alternative.[105]

Once the investigating officer has decided to request a military witness, availability is determined by the immediate commanding officer of the witness.[106] The determination by the commander is not subject to appeal.[107] Following the suggestions of the Court of Military Appeals,[108] Rule for Courts-Martial 405(g)(2)(D) provides that if there is a proper objection, the investigating officer "shall" include a statement supporting the determination of unavailability.[109] In the event that the witness is improperly determined to be unavailable, counsel may subsequently request the military judge to order that the witness be made available and the hearing reopened.[110] Counsel may so move, however, only if they have adequately preserved the issue.[111]

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[99] 2 M.J. at 44 (C.M.A. 1976).

[100] 2 M.J. at 43. (C.M.A. 1976). *See also* United States v. Cruz, 5 M.J. 286, 288 n.4 (C.M.A. 1978).

[101] United States v. Ledbetter, 2 M.J. 37, 44 (C.M.A. 1976).

[102] 2 M.J. 37, 44 (C.M.A. 1976).

[103] 2 M.J. at 37, 44 (C.M.A. 1976).

[104] United States v. Cumberledge, 6 M.J. 203, 205 n.13. (C.M.A. 1979). Although not finding prejudicial denial to witnesses because of the unique facts of the case, the court observed in *Cumberledge* that the instant witnesses were "being protected from actions by the accused or his cohorts, not defense counsel, and it is, therefore, improper to deny the counsel the necessary avenues of discovery provided by Congress." 6 M.J. 203, 205 n.13. (C.M.A. 1979).

[105] 6 M.J. 203, 205 n.13. (C.M.A. 1979).

[106] R.C.M. 405(g)(2)(A). *See also* 43 M.J. at 40.

[107] R.C.M. 405(g)(2)(A).

[108] To assist the judge in resolving availability disputes, the Court of Military Appeals has suggested that when the investigating officer determines the witness is unavailable, the circumstances for that finding should be recorded. United States v. Roberts, 10 M.J. 308, 311 (C.M.A. 1981), citing United States v. Samuels, 27 C.M.R. 280, 286 (C.M.A. 1959).

[109] R.C.M. 405(g)(2)(D).

[110] R.C.M. 405(g)(2)(A).

[111] *See* § 9-54.00.

§ 9-53.00 Individuals Not Subject to Military Jurisdiction

§ 9-53.10 Voluntary Attendance

A civilian witness may, of course, voluntarily appear before the Article 32 investigating officer to testify. The critical issue is, however, whether the travel and per diem expenses of such a witness may be paid. The *Manual for Courts-Martial* was amended in 1975[112] to provide that the Secretary of a Department may prescribe regulations that permit the payment of transportation expenses and a per diem allowance to civilians requested to testify in conjunction with the pre-trial investigation, and this change was preserved in the Rules for Courts-Martial.[113] Appropriate service regulations have implemented this provision.[114]

§ 9-53.20 Involuntary Attendance

§ 9-53.21 In General

The Court of Military Appeals observed: "Since 1923, military authorities have consistently held that there is no legal authority to compel a civilian witness to appear at a pretrial investigation… ."[115] The validity of this axiom is in doubt, however, as the Court of Military Appeals itself concluded.[116]

The Uniform Code of Military Justice states: "Process issued in court-martial cases to compel witnesses to appear and testify … shall be similar to that which courts of the United States having criminal jurisdiction may lawfully issue… ."[117] Clearly, witnesses may be subpoenaed to a federal preliminary hearing.[118] The crux of the problem may be the definition of "court-martial cases," particularly in Article 47 of the Code, which makes noncompliance with a subpoena a federal offense, applying only when a witness has been subpoenaed to appear "before a court-martial, military commission, court of inquiry, or any other military court or board… ."[119] This provision clearly omits the Article 32 investigation as such, but could be read to include it within the meaning of either "court-martial" or "board." Given that the Article 32 investigation is

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[112] Exec. Order No. 11835, January 27, 1975.

[113] R.C.M. 405(g)(3).

[114] *See, e.g.*, Army Reg. No. 27-10, Military Justice ¶ 5-12 (16 November 2005).

[115] United States v. Roberts, 10 M.J. 308, 310 n.1 (C.M.A. 1981). *See also* United States v. Chuculate, 5 M.J. 143, 144 (C.M.A. 1978); <SUPPLEMENT>
note 115. In the second sentence of the note after the citation to United States v. Chuculate, insert: United States v. Seldes, 2009 CCA LEXIS 436 (A.F. Ct. Crim. App. Oct. 27, 2009) (per curiam);</SUPPLEMENT> Murphy, *The Formal Pretrial Investigation*, 12 Mil. L. Rev. 1, 24 (1961).

[116] United States v. Roberts, 10 M.J. 308, 310 n.1, 311 n.3 (C.M.A. 1981). Dissenting, Judge Cook states that he sees no justification for the suggestion that there is uncertainty as to whether a civilian may be subpoenaed to an Article 32 investigation. 10 M.J. at 316. Interestingly, he quotes Murphy, *The Formal Pretrial Investigation*, 12 Mil. L. Rev. 1, 24 (1961), who, in turn, quotes now Chief Judge Everett's text, Military Justice In The Armed Forces Of The United States (1956), as stating that a civilian cannot be so subpoenaed. 10 M.J. at 316 (citing Murphy, above, note 4, at 27).

[117] U.C.M.J. art. 46.

[118] Fed. R. Crim. P. 5.1(a). *See* United States v. Roberts, 10 M.J. 308, 310 n.1 (C.M.A. 1981).

[119] U.C.M.J. art. 47(a)(1).

functionally similar to the federal preliminary examination, and was so regarded by Congress when hearings were held on the Uniform Code,[120] it appears inescapable that there is a "court-martial case" in being at the time of the investigation. The accused is subject to being deprived of liberty[121] and has been given the right to counsel and the opportunity to respond to criminal charges. Although the disposition of the case is unknown, one can hardly view such matters as so premature as to permit them not to be considered a criminal case at the time of the investigation—even though referral of charges has not yet occurred. From this conclusion, one can reasonably conclude that the investigation is a "court-martial" within the meaning of Article 49.

Although ambiguous, the legislative history of Article 32 supports this ultimate conclusion to the extent that some members of Congress apparently considered subpoena of witnesses to the Article 32 investigation possible.[122] Although the *1969 Manual for Courts-Martial* declared that "[t]here is no provision for compelling the attendance of witnesses not subject to military jurisdiction,"[123] a legal conclusion now contained in the Discussion to Rule 405(g)(2)(b), an otherwise binding *Manual* provision is of no legal effect if it contradicts the Uniform Code.[124] Further, as the Court of Military Appeals noted, the origins of the *1969 Manual* language would not appear to apply to the formal Article 32 investigation.[125] The 1975 amendment of the *Manual* to permit payment of witness fees to civilian witnesses attending Article 32 investigations[126] supplies the funds necessary to subpoena a witness and prosecute a noncomplying witness under Article 47.[127]

§ 9-53.22 Effects of an Inability to Secure Attendance

Assuming, *arguendo*, that the defense is legally unable to subpoena desired civilian witnesses to the Article 32 investigation, the question necessarily arises of whether such inability rises to constitutional dimensions. The Court of Military Appeals, addressing the defense's inability to obtain testimony from a witness, stated: "We acknowledge that the statutory standard of confrontation for Article 32 investigations is different from the constitutional standard applicable to criminal trials. Under different facts it may be that absence of the [witness] may invalidate the proceeding."[128] Approached from a confrontation perspective, the accused would not appear to have a constitutional right to confrontation at the civilian preliminary hearing.[129]

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[120] *See above*, note 7.

[121] *See generally* Chapter 4.

[122] Uniform Code of Military Justice, Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services, 81st Cong. 1st Sess. 997–98 (1949). *See also* United States v. Roberts, 10 M.J. 308, 311 n.3 (C.M.A. 1981).

[123] MCM, 1969, ¶ 34d; R.C.M. 405(g)(2)(B) Discussion. *See also* United States v. Roberts, 10 M.J. 308, 310 n.1 (C.M.A. 1981).

[124] Although the *Manual* could limit the prosecution's right to obtain witnesses without reversible error, it could not limit the defense's right absent statutory authority.

[125] United States v. Roberts, 10 M.J. 308, 312 n.5 (C.M.A. 1981).

[126] *See* Section 9-53.10. This provision is now contained in R.C.M. 405(g)(3).

[127] U.C.M.J. art. 47(a)(2).

[128] United States v. Chuculate, 5 M.J. 143, 145 n.7 (C.M.A. 1978).

[129] Goldsby v. United States, 160 U.S. 70 (1895).

Further, both federal practice[130] and that in many states permit the use of hearsay and other inadmissible evidence in whole or in part at the preliminary hearing and before the grand jury.[131] Approached as a compulsory process issue, the issue is far less clear, and the defense might well be successful given the evolving nature of the right.[132]

§ 9-54.00 Preserving Objections to an Inability to Examine Witnesses

Although the Court of Military Appeals has held that depriving the accused "of a substantial pretrial right" entitles the accused, on timely objection, to judicial enforcement of the right "without regard to whether such enforcement will benefit him at the trial,"[133] and that the court will not "in the face of timely and proper objection … test for prejudice,"[134] the defense must make an appropriate objection. To preserve an objection to an inability to examine witnesses at the investigation, counsel must specifically raise the issue at the Article 32 investigation and raise the issue in a timely fashion at trial via a motion for appropriate relief.[135] In addition, "[e]ven if the accused made a timely objection to failure to produce a witness, a defense request for a deposition may be necessary to preserve the issue for later review."[136] Absent such defense action, the court will generally either find a waiver or that the right to cross-examination at the Article 32 investigation has merged with the right of examination at trial and will not affect the case.[137]

§ 9-60.00 THE INVESTIGATIVE HEARING

§ 9-61.00 In General

Because of the accused's statutory right to a speedy trial,[138] the investigative hearing should be scheduled to take place as soon as is reasonably possible. Although continuances may be necessary to afford defense counsel an opportunity to attend, the investigation may not be indefinitely postponed because of a civilian counsel's other commitments.[139]

The hearing will be attended by the investigating officer, the accused, and the defense counsel. In some cases the government may be represented by a prosecutor[140] and, occasionally,

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[130] Fed. R. Crim. P. 5.1(a).

[131] *See generally* Wayne R. LaFave, Jerold H. Israel & Nancy J. King, Criminal Procedure § 14.4(b) (4th ed. 2004).

[132] *See generally* Chapters 11 and 20.

[133] United States v. Chuculate, 5 M.J. 143, 144–45 (C.M.A. 1978) (quoting United States v. Mickel, 26 C.M.R. 104, 107 (C.M.A. 1958)).

[134] United States v. Chuculate, 5 M.J. 143, 145 (C.M.A. 1978) (citing United States v. Chestnut, 2 M.J. 84 (C.M.A. 1976)).

[135] R.C.M. 405(h)(2), 405(k).

[136] R.C.M. 405(k) Discussion. United States v. Marrie, 39 M.J. 993, 997 (A.F.C.M.R. 1994) (absent prejudice preservation of failure to obtain witness by requesting a deposition, no reversible error), *aff'd*, 43 M.J. 35 (C.A.A.F. 1995). *See generally* Chapter 18.

[137] *See, e.g.*, United States v. Cruz, 5 M.J. 286, 289 (C.M.A. 1978). Assuming that the accused's rights at trial were not affected.

[138] U.C.M.J. Art. 10. *See generally* Chapter 17.

[139] See, e.g., R.C.M. 405(d)(2)(C).

[140] See Section 9-62.00.

by a legal clerk to take a nonverbatim record or, rarely, a court reporter.[141] Witness testimony is taken in the presence of the accused and counsel. The Army Court of Military Review, however, sustained, in a child molestation case, the use of a partition between the accused and the complainant.[142]

The exact procedure to be followed in the hearing is not specified in either the Uniform Code or *Manual*. Standard procedure,[143] however, is that the Article 32 investigating officer will

1. Announce the beginning of the investigation and its purpose;

2. Review the accused's right to counsel and ascertain whether the accused will be represented and, if so, by whom;

3. Formally read the charges preferred against the accused;

4. Advise the accused of his or her rights to make a statement or to remain silent;

5. Review the documentary or real evidence available against the accused;

6. Call any available adverse witnesses;

7. Review documentary or real evidence in favor of the accused;

8. Call available favorable witnesses;

9. Hear any evidence presented by the accused;

10. Hear any statement the accused or defense counsel may make.

Because the hearing is not a contested trial, this sequence often will be blurred, with the investigating officer first reviewing all nontestimonial evidence and then proceeding to examination of witnesses. Witnesses shall present their testimony under oath or affirmation. The accused may cross-examine all witnesses called by the investigating officer and may, subject to availability,[144] call defense witnesses.

When the prosecution[145] is represented at the hearing, the usual procedure is to hold a minitrial, with initial examination of prosecution witnesses being conducted by trial counsel; this is followed by the defense's cross-examination, with the investigating officer examining the witnesses following completion of counsel's questions. When defense witnesses are involved, the investigating officer examines following completion of any defense redirect.

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[141] See Section 9-65.00.

[142] United States v. Bramel, 29 M.J. 958 (A.C.M.R. 1990).

[143] *See, e.g.*, Dep't Army Pam. 27-17, Legal Services, Procedural Guide for Article 32(b) Investigating Officer ch. 3 (16 September 1990). The suggested procedure that follows differs somewhat from Pamphlet 27-17 in that it separates the prosecution evidence from the defense.

[144] *See* Section 9-50.00.

[145] *See* Section 9-62.00.

§ 9-62.00 Prosecution

The *Manual for Courts-Martial*[146] expressly permits the officer who directed the Article 32 investigation to designate counsel to represent the government. Prior to the amendment, government counsel could be designated only when the accused was represented by counsel.[147] Pragmatically, the prosecution is represented at the hearing only when the case is of such importance or complexity that diversion of usually scarce legal resources is believed to be justified. When the investigating officer is a layman, appointment of a prosecutor tends to complicate an already difficult situation because the investigating officer will likely have to cope with competing legal arguments.[148] In such circumstances, great care must be taken to ensure that the investigating officer has access to a proper legal advisor.[149] <SUPPLEMENT>
At the end of the section after note 149, add:
It appears that prosecutorial misconduct at an Article 32 will be tested for prejudice rather than examining counsel's intent.[149.1]</SUPPLEMENT>

§ 9-63.00 Situs of the Investigation

Neither the Uniform Code nor the *Manual* indicate where the Article 32 investigation should be held. Accordingly, there appears to be no legal reason why the Article 32 investigation may not be held at a location chosen for the convenience of witnesses. Thus, the ability to move the hearing may be used to obtain witness testimony not otherwise available.[150]

§ 9-64.00 Attendance of the Public and Media

Attendance of spectators at trials and trial-related hearings is potentially guaranteed by the Sixth and First Amendments. The Sixth Amendment guarantees the *accused* a public trial and the First Amendment protects the public right via the press. The constitutional distinction is critical, because under the Sixth Amendment a trial can be closed to the public upon defense request or consent.

In the absence of Code or *Manual* provision, the Court of Military Appeals held, in *MacDonald v. Hodson*,[151] that the Article 32 investigation is not "a trial within the meaning of the Sixth Amendment… ." and that "there is no requirement that its proceedings be 'public.' "[152] In so holding, the court not only upheld the investigating officer's discretionary closing of the

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[146] R.C.M. 405(d)(3)(A).

[147] Exec. Order No. 12340, 47 Fed. Reg. 3071 (January 20, 1982) amending MCM, 1969, ¶ 34c to create ¶ 34c(2). *See also* United States v. Clark, 11 M.J. 179 (C.M.A. 1981).

[148] Although defense counsel will often raise a number of legal matters, two opposing counsel create an adversarial proceeding that tends to generate even more matters, although the adversarial hearing usually better presents facts and legal issues.

[149] *See* § 9-34.00.

[149.1] United States v. Quintanilla, 63 M.J. 29, 38 (C.A.A.F. 2006).

[150] For example, operational needs may foreclose travel of one or more witnesses to a hearing. Additionally, a civilian witness not subject to subpoena (see Section 9-53.20) may be willing to attend the hearing so long as the witness need not travel.

[151] 42 C.M.R. 184 (C.M.A. 1970).

[152] 42 C.M.R. at 185 (C.M.A. 1970). *See also* San Antonio Express-News v. Morrow, 44 M.J. 706 (A.F. Crim. App. 1996) (citing R.C.M. 405(h)(3), court held Article 32 Investigating Officer did not abuse his discretion in closing the investigation to the press).

investigation, apparently without specific justification and over the defense's objection, but also sustained the Army's regulation[153] restricting release of information to the public.[154] Despite the fact that *MacDonald* was decided before the Supreme Court's contemporary decisions dealing with closure of court proceedings,[155] the *2005 Manual* provides, based on *MacDonald*: "Access by spectators to all or part of the proceeding may be restricted or foreclosed in the discretion of the [appointing] commander."[156]

In *Gannett Co. v. DePasquale*,[157] the Supreme Court held that a pretrial suppression hearing could be closed to the public so long as it was at the request of both parties. Although there is authority in *Gannett* to support the proposition that pretrial hearings may be closed per se,[158] the facts of *Gannett*[159] and the Court's often repeated assertion that both parties consented to closure[160] strongly suggests otherwise.[161] More importantly, in light of the evolving nature of the Court's treatment of the First Amendment right, in *Press-Enterprise Co. v. Superior Court*,[162] the Court subsequently held that the public's *First Amendment* right of access to criminal proceedings applies to preliminary hearings similar to the "elaborate preliminary hearings" held in California. The closure of such a preliminary hearing for the purpose of protecting the accused's right to a fair trial is permitted only upon the demonstration that there is a substantial probability that the right to a fair trial will be prejudiced by publicity that the closure will prevent, and that reasonable alternatives to closure cannot adequately protect the accused's right to a fair

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[153] Army Reg. No. 345-60.

[154] MacDonald v. Hodson, 42 C.M.R. 184, 185 (C.M.A. 1970).

[155] Press-Enterprise Co. v. Superior Court, 478 U.S. 1 (1986) (*Press-Enterprise II*) (41-day preliminary hearing that was closed to the public and media on the defendant's unopposed motion violated First Amendment); Waller v. Georgia, 467 U.S. 39 (1984) (suppression hearing was closed unconstitutionally over the objection of some of the defendants); Press-Enterprise Co. v. Superior Court, 464 U.S. 501 (1984) (*Press-Enterprise I*) (closing all but three days of six weeks of voir dire and jury selection in a capital prosecution for murder and rape was unlawful); Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982) (state may not constitutionally require trial judges to generally close court during the testimony of sex offense victims under age 18); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980) (In a number of separate opinions, eight justices (Justice Rehnquist dissenting) held that the public and media have a right to attend trials: "Absent an overriding interest articulated in findings, the trial of a criminal case must be open to the public.").

[156] R.C.M. 405(h)(3). Reasons for closing the hearing are set forth in Rule 806(b). *But see* Press-Enterprise Co. II.

[157] 443 U.S. 368 (1979).

[158] *See, e.g.*, Justice Rehnquist's concurring opinion (443 U.S. at 403), in which he states (at 404) that since the Court held that pretrial proceedings are not "trials" for Sixth Amendment purposes, closure may be ordered without jurisdiction. However, even he presupposes consent of the accused.

[159] Gannett involved a murder case in which there was extensive pretrial publicity. The defendants moved to suppress allegedly involuntary pretrial statements and derivative evidence, and the accused, prosecutor, and trial judge all agreed that closure was necessary to assure a fair trial. 443 U.S. at 371–76.

[160] *See* 443 U.S. at 371, 382 n.11, 385. *See also* 443 U.S. at 401–02 (Powell, J., concurring), 443 U.S. at 404 (Rehnquist, J., concurring).

[161] Technically, the Court's decision in Gannett dealt only with whether the public and media have a right of access to pretrial motion hearings. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 564 (1980) (plurality opinion). The Court's emphasis in Gannett on the fact that the defense requested closure suggests strongly that the Article 32 investigation could not be closed over defense objection.

[162] 478 U.S. 1 (1986).

trial.[163] The Article 32 investigation is similar to the preliminary hearing in California. In California, the accused has the right to personal appearance and to cross-examine hostile witnesses.

Although the Article 32 investigation does have aspects similar to the grand jury, it is more similar to the preliminary hearing.[164] Notably, unlike the secrecy surrounding the grand jury,[165] the accused and counsel are present at the Article 32 investigation,[166] and in the usual case there is even a provision for the attendance of spectators. Another key functional difference between the grand jury and the Article 32 investigation exists as well. At least in its origins, the grand jury is a major investigative tool, the utility of which would be harmed, if not destroyed, by public attendance. Like the public preliminary hearing and unlike the grand jury, the Article 32 investigation primarily concerns only a named defendant who has already entered the criminal justice process. On balance, at least for these purposes, the Article 32 investigation should be considered functionally similar to an expansive civilian preliminary hearing and thus subject to the Court's holding in *Press-Enterprise*.[167]

This issue received attention in a number of high profiles cases. In *ABC News, et al. v. Powell, et al.*,[168] the Court of Appeals for the Armed Forces stated: "[W]e have never addressed the direct question whether the Sixth Amendment to the Constitution affords a military accused the right to a public Article 32 hearing… . Today we make it clear that, absent 'cause shown that outweighs the value of openness,' the military accused is likewise entitled to a public Article 32 hearing."[169] While the press enjoys the same right to an open hearing, the right is not absolute. Closing a hearing, which "[o]rdinarily … should be open to spectators," requires a cases-by-case evaluation.[170]

A court-martial may be closed to the public provided the following test is met:

1. The party seeking closure advances an overriding interest;
2. The closure is narrowly tailored to protect that interest;
3. There are no reasonable alternatives; and
4. Adequate findings support closure.[171]

<SUPPLEMENT>

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[163] [T]he preliminary hearing shall be closed only if specific findings are made demonstrating that first, there is a substantial probability that the defendant's right to a fair trial will be prejudiced by publicity that closure would prevent and, second, reasonable alternatives to closure cannot protect the defendant's rights.

478 U.S. at 14.

[164] *See above*, note 7 and accompanying text.

[165] Fed. R. Crim. P. 6.

[166] Fed. R. Crim. P. 6.

[167] Subject to any unique need based upon national security.

[168] 47 M.J. 363 (C.A.A.F. 1997).

[169] 47 M.J. at 365 (C.A.A.F. 1997).

[170] 47 M.J. at 365 (C.A.A.F. 1997) The reasons set forth by the convening authority did not justify closing the hearing in the case of former Sergeant Major of the Army McKinney.

[171] United States v. Anderson, 46 M.J. 728, 731–32 (Army Crim. App. 1997).

<SUPPLEMENT>
After note 171, add a new paragraph:
In *United States v. Davis*, [171.1] the Court of Appeals dealt with a case in which the Article 32 officer improperly closed the hearing during the testimony of sexual offense victims. The military judge erred in failing to craft a proper remedy,[171.2] such as a new investigation. On appeal, the Court held that for appellate purposes the judge's error was to be tested for prejudice. The Air Force Court of Criminal Appeals had classified the error as "a nonstructural error of constitutional dimension that could be tested for prejudice."[171.3] Declaring that all Article 32 errors should be evaluated under Article 59(a), but failing to clarify whether an order improperly closing an Article 32 investigation was of constitutional dimension, the Court applied Article 59(a) and held that under the circumstances of the case the error was harmless beyond a reasonable doubt. Concurring, Judge Ryan noted that *ABC News*, *supra* , had not held that the Sixth Amendment right to an open trial applies to Article 32 investigations.[171.4]</SUPPLEMENT>
</SUPPLEMENT>

§ 9-65.00 Record and Transcript

The Uniform Code of Military Justice mandates only that "[i]f 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."[172] The *Manual for Courts-Martial* echoes the Code provision,[173] and it is thus clear that the accused does not have a right to a verbatim transcript of the Article 32 investigation proceeding.[174] In the Army, summarized records are sometimes made by legal clerks, and sometimes Article 32 investigation officers make their own from notes or tape recordings. Although a summarized record is thus both lawful and customary,[175] it may be that any given record may be too brief to adequately set forth the substance of witness testimony, in which case a defense objection might lie.[176]

Although not required, occasionally a verbatim record is made of the Article 32 hearing[177]

[171.1] 64 M.J. 445 (C.A.A.F. 2007).
[171.2] *Id.* at 448.
[171.3] *Id.* at 449.
[171.4] *Id.* at 450.
[172] U.C.M.J. art. 32(b).
[173] R.C.M. 405(j)(3).
[174] United States v. Allen, 18 C.M.R. 250, 255 (C.M.A. 1955). *See also* United States v. Scott, 6 M.J. 547, 549 (A.F.C.M.R. 1978).
[175] The record of the proceedings may be made by the Article 32 investigating officer or by a legal clerk or court reporter. *See* R.C.M. 405(d)(3)(B). *See also* R.C.M. 405(j)(2).
[176] In United States v. Allen, 18 C.M.R. 250, 255 (C.M.A. 1955), the court stated: "It is manifest that [the phrasing of Article 32(b)] authorizes an impartial condensation of the information obtained from witnesses during this stage of the proceedings." The court then made it clear that the written transcript need not contain all of the testimony's content. 18 C.M.R. 250, 255 (C.M.A. 1955). The court's opinion does appear to suggest, however, that there may be a limit to how brief the summary may be. The court did find in Allen, however, that even if error had occurred, it would not have affected the conviction. 18 C.M.R. at 256.
[177] *See, e.g.*, United States v. Connor, 27 M.J. 378 (C.M.A. 1989), verbatim record may be admissible

either via a tape recording or a court reporter. The fact that a verbatim record is kept does not necessarily mean that a verbatim transcript will be made, however.[178] In order to utilize testimony given at an Article 32 hearing as former testimony at trial, both an unavailable witness[179] and a verbatim transcript will be necessary.[180] A substantially verbatim record[181] may be subject to a defense demand for production under the Jencks Act.[182]
<SUPPLEMENT>

<SUPPLEMENT>
After note 182 add a new paragraph:
In *United States v. Garcia*,[182.1] the court held that an accused has neither a constitutional nor statutory right to record an Article 32 hearing. It pointedly observed, however, that "This is not to say that the convening authority did not abuse his discretion in denying the defense request to be permitted to tape-record the proceedings and provide tapes to the government." It then added by footnote that: "We find the Government's arguments attempting to justify the denial unconvincing. We have considerable doubt that it can be justified, provided the recording process is not disruptive."[182.2]</SUPPLEMENT>
</SUPPLEMENT>

The *1984* and *2005 Manuals* deleted the prior *Manual* requirement that witnesses testifying at the hearing "should sign and swear to the truth of the substance of their statements after they have been reduced to writing" unless that would cause undue delay.[183]

§ 9-66.00 Rules of Evidence

§ 9-66.10 In General

Other than the privilege rules[184] and interrogation Rules 301–03; 305, and 412 the Military Rules of Evidence do not apply to Article 32 investigations. In *United States v.*

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under Mil. R. Evid. 804(b)(1); United States v. Crumb, 10 M.J. 520, 528 (A.C.M.R. 1980) (Jones, J., concurring); United States v. Scott, 6 M.J. 547 (A.F.C.M.R. 1978).

[178] Air Force regulations prohibit preparation of a verbatim record of an Article 32 investigation without the advance approval of the Staff Judge Advocate of the special court-martial convening authority. Air Force 111-1, Law, Administration Of Military Justice ¶ 4.1.3 (26 November 2003). The Air Force regulation clearly contemplates exceptions to the general rule of prohibiting verbatim transcripts and suggests as one such exception cases involving testimony by children where the exact testimony is needed. Air Force 111-1, Law, Administration of Military Justice ¶ 4.1.3 (26 November 2003).

[179] Mil. R. Evid. 804(b)(1). *See, e.g.*, United States v. Hubbard, 28 M.J. 27 (C.M.A. 1989).

[180] Mil. R. Evid. 804(b)(1). *See also* Chapter 20.

[181] Regardless of the absence of a verbatim transcript.

[182] *See, e.g.*, United States v. Crumb, 10 M.J. 520, 528 (A.C.M.R. 1980) (Jones, J., concurring); United States v. Thomas, 7 M.J. 655, 658 (A.C.M.R. 1979); United States v. Scott, 6 M.J. 547, 548 (A.F.C.M.R. 1978). *See generally* Chapter 11.

[182.1] 68 M.J. 561 (C.G. Ct. Crim. App. 2009).

[182.2] *Id.* at 564, note 2.

[183] MCM, 1969, ¶ 34d.

[184] United States v. Martel, 19 M.J. 917 (A.C.M.R. 1985) (nonprejudicial error not to apply marital privilege).

Cunningham,[185] the court held that, although nonprejudicial on the facts of the case[186] and not required by Rule for Courts-Matial 405, the failure of an Article 32 investigating officer to note defense objections on request was error.

The June 27, 1991 amendments to the *Manual* contained in Executive Order 12767 created a new Rule for Courts-Martial 405(g)(4)(B)(v), which permits "*in time of war*" unsworn statements to be used against the accused over his or her objection.

§ 9-66.20 Exclusionary Rule

Given that Military Rule of Evidence 1101(d) prohibits the application of the Rules of Evidence, other than privileges, to Article 32 investigations, and that the Military Rules of Evidence codify the law of confessions, search and seizure, and eyewitness identification,[187] it is clear that the exclusionary rule does not apply to the Article 32 investigation,[188] a result that appears fully constitutional.[189] This is not to say, however, that the Article 32 investigating officer should ignore exclusionary rule issues. Given the *Manual*'s charge to the investigating officer, it is apparent that the facts relating to a potential suppression motion may be critical to a case's disposition. Accordingly, this should be a proper area for comment by the investigating officer.[190]

§ 9-67.00 Statement by the Accused

The *Manual for Courts-Martial* provides that, in addition to presenting "anything in defense, extenuation, or mitigation,"[191] the accused may "[m]ake a statement in any form."[192] This permits a sworn statement under which the accused may be cross-examined, an unsworn statement that prohibits crossexamination, or a statement by counsel on behalf of the accused. It is unclear whether the accused may combine sworn and unsworn statements, although it would appear reasonable to permit counsel to make an unsworn statement in conjunction with an unsworn statement by the accused. Because the accused may clearly make either a written or oral statement, it would appear possible for the accused to submit a sworn written statement and not be subject to cross-examination. The accused need not, however, make any statement whatsoever and may remain silent.[193]

§ 9-68.00 Arguments by Counsel

Neither the Uniform Code of Military Justice nor the *Manual for Courts-Martial* make any reference to arguments by counsel before the Article 32 investigating officer. However, because the accused is entitled to be represented by counsel,[194] it appears probable that the right

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[185] 21 M.J. 585, 588 (A.C.M.R. 1985).
[186] R.C.M. 405(h)(2).
[187] Mil. R. Evid. Section III. The Exclusionary Rule is codified at Rules 304; 311; 321.
[188] R.C.M. 405(e) Discussion.
[189] *Cf.* United States v. Calandra, 414 U.S. 338 (1974).
[190] R.C.M. 405(e) Discussion; United States v. Payne, 3 M.J. 354, 355 n.4 (C.M.A. 1977) (implying that this is an important area of inquiry).
[191] R.C.M. 405(f)(11).
[192] R.C.M. 405(f)(12).
[193] U.C.M.J. art. 31(a). *See also* R.C.M. 405(f)(7).
[194] R.C.M. 405(d)(2).

includes the right for that counsel to make arguments on behalf of the accused following completion of the evidentiary portion of the examination.

§ 9-70.00 THE Article 32 INVESTIGATION REPORT

The *Manual* details the minimum content of the Article 32 investigator's report.[195] Among other matters, Rule 405(j) requires that the report include the "statements, documents, or matters considered" by the investigating officer;[196] a "statement of any reasonable ground for the belief that the accused was not mentally responsible for the offense or was not competent to participate in the defense during the investigation";[197] and the investigating officer's recommendations as to what disposition should be made of the case.[198]

Under current practice, the investigating officer's report is made on Department of Defense (DD) Form 457. This form appears to be inconsistent with the *Manual*, inasmuch as its only specific reference to disposition refers to the type of trial that is recommended.[199] Although the form indicates that the "block" should be completed "only if trial is recommended," no other specific item relates to nontrial disposition. Accordingly, the form is improperly biased towards trial.[200]

Experience suggests that the investigating officer's report is most likely to be effective when it contains a well-reasoned explanation for the investigating officer's recommendations—especially where trial by general court-martial is not recommended. This is particularly true when it appears that a conviction will not be possible because of exclusionary rule problems.

To encourage the early identification of possible defects in the Article 32 investigating officer's report,[201] Rule for Courts-Martial 405(j)(4) requires the defense counsel to make any objection to the report of investigation to the commander who directed the investigation within five days of its receipt by the accused.[202] The provision "does not prohibit a convening authority from referring the charges or taking other action within the 5-day period."[203]

§ 9-80.00 DEFECTIVE INVESTIGATIONS

Because Congress expressly intended that noncompliance with Article 32 not be treated as

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[195] R.C.M. 405(j). The *1969 Manual* expressly stated that, unless directed by superior authority, a formal report is not required if it does not appear that trial by general court-martial will take place. MCM, 1969, ¶ 34f. Although there will be cases in which it is clear that trial by general court-martial will not take place, the fact that the investigating officer's recommendations are advisory only made the *1969 Manual's* reference to an informal report a pragmatic nullity in almost all cases.

[196] R.C.M. 405(j)(2)(C).

[197] R.C.M. 405(j)(2)(D).

[198] R.C.M. 405(j)(2)(G), (H), (I).

[199] DD Form 457, Report of Investigation, Item 17.

[200] On first consideration, it would appear clear that some form of trial would result. However, experience suggests that, surprisingly often, a thorough Article 32 investigation will recommend either no action or, more often, administration disposition, especially during periods of great military activity when pretrial screening may not function as well as it should.

[201] R.C.M. 405(j)(4).

[202] R.C.M. 405(j)(4).

[203] R.C.M. 405(j)(4).

jurisdictional for federal habeas corpus purposes,[204] the Uniform Code states that, although binding, Article 32 is nonjurisdictional in scope.[205] The Court of Military Appeals held, however, that an accused deprived of a substantial pretrial right is entitled, upon timely objection, to judicial enforcement of that right, without regard to whether enforcement of the right will be one of benefit at trial.[206] The accused's pretrial rights merge into the accused's rights at trial, thus curing any error, unless the accused has made timely objection[207] and shown that the defect prevented the defense from proper preparation for trial or otherwise prejudiced substantial rights.[208] If prejudice of substantial rights is established, presumably on a preponderance basis, trial must be postponed until the error is cured, or a new investigation ordered,[209] and if the defect cannot be cured, dismissal of charges may be required.

Because of the difficulty in determining prejudice, the court, in *United States v. Martel*,[210] held that when the Article 32 investigating officer engages in *ex parte* actions, a presumption of prejudice exists that can be overcome by clear and convincing evidence. <SUPPLEMENT>
At the end of the section after "evidence", add:
However, in 2007, the Court of Appeals for the Armed Forces held on appeal that Article 32 errors would be evaluated under Article 59(a), declaring that:</SUPPLEMENT>
<SUPPLEMENT><SUPPLEMENT>

> The standard of review and allocation of burdens in such cases depends on whether the defect amounts to a structural constitutional error or other constitutional error, unlawful command influence, or other nonconstitutional error. To the extent that our prior case law reflects inconsistent treatment of Article 59(a) in the context of Article 32 errors, we take this opportunity to reiterate that Article 59(a) applies to all Article 32 errors considered on direct review of the findings and sentence

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[204] Uniform Code of Military Justice, Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services, 81st Cong. 1st Sess. 998–99 (1949) (Statement of Mr. Larkin).
[205] U.C.M.J. art. 32(d).
[206] *See* § 9-53.21. United States v. Miro, 22 M.J. 509 (A.F.C.M.R. 1986). Counsel was given the charges 24 hours prior to the Article 32 investigation. At the Article 32 investigation, a request for delay to interview the witnesses was denied. Counsel was allowed to interview each witness prior to testifying. The Court reversed. It indicated that the accused need not demonstrate prejudice in order to have relief, that is, a new Article 32 investigation. It is only necessary for the accused to show that he or she has been deprived of a substantial pretrial right. *But see* United States v. Davis, 20 M.J. 61 (C.M.A. 1985).
[207] R.C.M. 405(j)(4) & (k); *see also* Glasser v. United States, 315 U.S. 60, 71–72 (1942); United States v. Worden, 38 C.M.R. 284, 287 (C.M.A. 1968); United States v. Mickel, 26 C.M.R. 104, 107 (C.M.A. 1958). The failure to make a timely objection is not fatal where the accused was unaware of his or her rights or waiver would result in a miscarriage of justice. Mickel, 26 C.M.R. at 106–07 (C.M.A. 1958). When the accused becomes aware of the error after trial, a showing that the error caused specific prejudice at trial is necessary. 26 C.M.R. 104, 107 (C.M.A. 1958).
[208] *See, e.g.*, United States v. Mickel, 26 C.M.R. 104 (C.M.A. 1958).
[209] *See, e.g.*, United States v. Davis, 20 M.J. 61 (C.M.A. 1985) (failure to appoint an investigating officer who would not interfere with the independent professional judgment of the defense counsel was held not to be prejudicial when the accused was charged with five specifications of unauthorized absence). United States v. Johnson, 7 M.J. 396 (C.M.A. 1979).
[210] 19 M.J. 917, 921 (A.C.M.R. 1984).

of a court-martial.[210.1]

</SUPPLEMENT></SUPPLEMENT>

§ 9-90.00 TACTICAL CONSIDERATIONS

The Article 32 investigation provides a potentially useful discovery device for both prosecution and defense. The primary tactical decision to be made by the defense is whether to make a major effort to use the investigation to convince the convening authority to make some disposition other than trial by general court-martial, or to use the proceeding primarily to discover the case against the accused. Either decision presents risks, since the former may reveal the defense case in a premature fashion while the latter may abandon a possible tool to be used in later plea bargaining, even if trial by general court-martial is a foregone conclusion.

It should be noted that, if a verbatim record is kept, the witness' testimony may later be admissible at trial on the merits as former testimony if the witness becomes unavailable.[211]

Both prosecution and defense counsel should keep in mind that testimony given at the investigation may later be used at trial for impeachment.[212] Further, under certain circumstances, it may be used on the merits, even if the witness is available and a nonverbatim record was made.[213] Accordingly, counsel should obtain as complete a record of the Article 32 proceedings as possible. Often, an audiotape recording made by counsel is an inexpensive solution to the problem.[214]

[210.1] United States v. Davis, 64 M.J. 445, 449 (C.A.A.F. 2007).

[211] Mil. R. Evid. 804(b)(1). Under the drafter's analysis to Mil. R. Evid. 804(b)(1), MCM, 2005, ¶ A22-54 to 55, it was plain that such testimony could not later be used as "former testimony" unless defense counsel had the same motive at the Article 32 investigation as at trial to test adverse testimony through cross-examination. *See generally* Lederer, *The Military Rules of Evidence: Origins and Judicial Implementation*, 130 Mil. L. Rev. 5, 24–26 (1990). Accordingly, a vigorous cross-examination of prosecution witnesses would risk making the testimony of the witness admissible later at trial if the witness became unavailable. The Court of Military Appeals, however, has chosen to disregard the intent behind Mil. R. Evid. 804(b)(5) (United States v. Connor, 27 M.J. 378 (C.M.A. 1989)), and, accordingly, the defense now runs the same risk even if it chooses not to cross-examine at all and claims that it is solely using the investigative hearing as a discovery device.

[212] Mil. R. Evid. 613 (Prior Statements of Witnesses).

[213] Mil. R. Evid. 801(d)(1) (Statements which are not hearsay, prior statement by witness).

[214] In making such a recording, counsel should keep in mind that its introduction into evidence at trial may require authentication (Mil. R. Evid. 901), and that to avoid ethical difficulties, authentication should be made by someone other than counsel.