

Preliminary Hearings in the United States Military

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I. INTRODUCTION

In the United States military justice system, cases cannot proceed to the most serious criminal forum, the general court-martial, unless they are first subject to a preliminary hearing pursuant to Article 32 of the Uniform Code of Military Justice (UCMJ). 10 U.S.C. § 832(a)(1) (2019). Given its status as a jurisdictional threshold, Article 32 plays a consequential role in shaping which cases go forward to trial and which ones fall by the wayside to lesser forms of disposition.

Since 2014, preliminary hearing procedures have been twice upended by Congress. What once was a robust *investigation* is now a scaled-down *hearing*. Compare 10 U.S.C. § 832(a) (2019) (requiring a hearing), with 10 U.S.C. § 832 (2012) (requiring an investigation). Despite robust reform and the procedure's importance in producing military justice outcomes, the new preliminary hearing procedures have received scant attention from scholars or appellate courts.

Because of the downgrade from an investigation, the preliminary hearing would seem to be a less important part of the military justice lifecycle than ever before—a mere procedural speedbump for the government to quickly overcome. Yet the hearings have maintained a meaningful role. This article considers the opportunities and shortcomings of procedures for preliminary hearings. The article first considers the context and instigation for reform: how the old procedure as a generous investigative tool was used to harass and intimidate victims of sexual assault. It next assesses the new procedures by considering the perspectives of four stakeholders: the government, the accused, victims, and the public.

The article concludes that Article 32 reform yielded both a predictable result as well as a couple mild surprises. The predictable result is that the new procedures provide favorable conditions for the government and crime victims. The surprises are that the accused is not demonstrably disadvantaged even after the loss of defense-friendly procedures, however, the reform has inadvertently harmed the public's access to the proceedings.

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II. BACKGROUND

The Article 32 that existed until 2014 required a “thorough and impartial investigation.” *Id.* § 832(a). It afforded the accused the “full opportunity” to cross-examine available witnesses and present evidence in defense or mitigation. *Id.* § 832(b). The investigation also afforded inquisitorial powers to the investigating officer, usually a non-lawyer military officer, to examine witnesses requested by the accused. *Id.* The proceeding was called a “preliminary investigation.” It was implemented in [Rule for Court-Martial \(R.C.M.\) 405](#), which added that one of the purposes of the investigation was to serve as “a means of discovery.”

The early 2010s were also a period in which [intensive public and political attention](#) was directed at military justice, and in particular at the military’s effectiveness in sexual assault prosecutions. One sexual assault case especially highlighted the seemingly unfair procedures of Article 32 investigations. In 2013, a 21-year old female midshipman at the United States Naval Academy in Annapolis accused three of the school’s football players of raping her at a party that year. During the Article 32 investigation, the victim [experienced the following](#):

- She was questioned for four days about her medical history, her sexual history, her dance moves, and her underwear.
- One defense attorney asked her, “Were you wearing a bra [to that party]?” and “Were you wearing underwear?”
- She was asked if she lies “at least once a day” and whether she “felt like a ho” the morning after the party.
- A military defense attorney asked her how wide she opens her mouth to perform oral sex.
- Requests from the victim’s personal attorney to refrain from harassing treatment were ignored.
- After testifying for four days, the victim pleaded for a day off from testimony on a Saturday. One of the defense attorneys opposed this request, saying, “What was she going to be doing anyway? . . . Something more strenuous than sitting in a chair? We don’t concede there’s been any stress involved.”

The case demonstrated disparities between military and civilian justice, and in particular, the seemingly unnecessary requirement that the military put victims through two trials rather than one. Whatever other errors may have contributed to this treatment in the Naval Academy

case, the Article 32 demand for a “thorough investigation” and the hearing’s discovery purpose certainly played a role. The case further highlighted why many sexual assault victims did not want to participate in the military justice process.

The Naval Academy case resulted in public outcry and placed political attention on Article 32 procedures. U.S. Representative Jackie Speier and Senators Richard Blumenthal and Barbara Boxer [wrote](#) to President Barack Obama:

Article 32 allows sexual assault victims to be questioned in a manner that is intimidating and degrading, and that we believe has had a major chilling effect on sexual assault reporting. . . . According to legal experts, no civilian court in our nation would allow the questioning that was allowed in the Article 32 proceeding in the Naval Academy case.

In response to this furor, Article 32 was reformed in 2014. Pub. L. No. 113-66, § 1702, 127 Stat. 672, 954–55 (2013). The preliminary investigation became a preliminary hearing. The hearing was now limited to the following four purposes:

- A. Determining whether there is probable cause to believe an offense has been committed and the accused committed the offense.
- B. Determining whether the convening authority has court-martial jurisdiction over the offense and the accused.
- C. Considering the form of the charges.
- D. Recommending the disposition that should be made of the case.

10 U.S.C. § 832(a)(2) (2016).

Another change was that the investigating officer, usually a non-lawyer, would now be called a preliminary hearing officer, presumptively a lawyer. *Id.* § 832(b). (The author credits conversations with U.S. Army JAG Captain Tugsu Armstrong for advancing his thinking on the changed role of the preliminary hearing officer.) Victims would no longer be required to participate if they did not wish to; they would be presumptively unavailable. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 405(d) (2016). The old discovery purpose of Article 32 was now specifically disclaimed. R.C.M. 405(a), Discussion (2016 M.C.M.). The new

R.C.M. 405 put emphasis on the “limited scope and purpose” of the new Article 32 by repeating those words eighteen times throughout the rule and three more times in the discussion to the rule. R.C.M. 405 *passim* (2016 M.C.M.).

By the time the 2019 Manual for Courts-Martial was published, some of the rough spots and inconsistencies of Article 32 and R.C.M. 405 were smoothed out in yet another change to the law. Three of the four purposes given for the 2014 Article 32 remained in essentially the same form, while a new one—whether the specification alleges an offense—replaced the previous purpose of considering the form of the charges. The final (and current) purposes of the Article 32 became:

- A. Whether or not the specification alleges an offense under this chapter.
- B. Whether or not there is probable cause to believe that the accused committed the offense charged.
- C. Whether or not the convening authority has court-martial jurisdiction over the accused and over the offense.
- D. A recommendation as to the disposition that should be made of the case.

10 U.S.C. § 832(a) (2019).

R.C.M. 405 dropped the eighteen references to the “limited scope and purpose” of the hearing but retained a reminder that the hearing is not intended as a means of discovery. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 405 (2019). The victim’s elective participation in the proceedings remained unchanged from the 2014 version.

III. ANALOGOUS PROCEEDINGS

In order to further understand what the Article 32 hearing has become and how it currently impacts any interested parties, it is useful to look at what the preliminary hearing is not. The [reformed Article 32 procedures](#) are commonly likened to civilian grand jury proceedings. That is not a good comparison. Grand jury proceedings differ in material respects: they involve the summoning of jurors, they are secret proceedings that exclude the public, and they are *ex parte* proceedings in which the accused and his attorney cannot participate. *See* FED. R. CRIM. P. 6. In those and other key respects, grand jury procedures diverge widely from those of Article

32. Moreover, the chasm between the two involves not merely procedural differences, but also a constitutional distinction: the right to a grand jury is specifically made inapplicable to members of the military by the Fifth Amendment. U.S. Const. amend. V (stating the application of the constitutional right to a grand jury “except in cases arising in the land and naval forces, or in the Militia, when in actual service in time of War or public danger...”).

While the grand jury example is inapposite, a better comparison to Article 32 procedures is the federal preliminary examination. *See* 18 U.S.C. § 3060; FED. R. CRIM. P. 5.1. The purpose of the preliminary examination is “to determine whether there is probable cause to believe that an offense has been committed and that the arrested person has committed it.” 18 U.S.C. § 3060(a). That language closely tracks the second current listed purpose of the Article 32 preliminary hearing. Preliminary examinations, like Article 32 hearings, must also occur promptly, usually within fourteen to twenty days following an arrestee’s initial appearance. *Id.* § 3060(b). Notably, preliminary examinations [served as the template](#) during legislative reform of Article 32 procedures in 2014.

However, to be sure, Article 32 procedures are not the same as preliminary examination procedures. Preliminary examinations are often performed by a sitting federal magistrate judge while the Article 32 preliminary hearing officer is usually a legal officer appointed ad hoc for a specific hearing by a convening authority. *Compare id.*, with 10 U.S.C. § 832(b) (2019). Most significantly, Article 32 procedures have a wider mandate: while the probable cause standard is modeled on federal preliminary examination procedures, Article 32 has three additional purposes—jurisdiction, form of charges, and recommendation of a disposition. While more limited in scope than the old preliminary hearing, this still represents a broader range of purposes than what preliminary examination procedures, and certainly grand jury proceedings, permit.

IV. INTERESTS OF STAKEHOLDERS

A. The Government

The government’s interest in Article 32 is relatively straightforward: if it wishes to prosecute a case at a general court-martial, it must pass through the preliminary hearing hurdle first. While the government must *undertake* the preliminary hearing, it need not *win*: a

convening authority can refer a case to general court-martial regardless of what the preliminary hearing officer recommends. R.C.M. 407 (2019).

The question of whether the preliminary hearing officer's recommendation should be binding is commonly debated among military lawyers and court-watchers. Examining the four purposes of 10 U.S.C. 832(a), it seems simplistic to answer this question with a direct yes or no. Certainly, the recommendation as to disposition seems just that: an exercise of discretion for which reasonable people could disagree. It would countervail the entire point of a recommendation to make it binding. However, no legitimate purpose is served by overruling the preliminary hearing officer on the three threshold purposes of Article 32: whether the charge states an offense, the existence of probable cause, and verification that jurisdiction is proper. It adds inefficiency to permit a convening authority to refer cases to general courts-martial where those foundational criteria are not met. Why should a military judge possibly hear a case when it has already been determined that the military does not even have jurisdiction over the accused or the offense? In sum, the preliminary hearing officer's findings should bind a convening authority on questions of the first three purposes of Article 32, but the fourth should remain discretionary.

In order to gain a favorable recommendation from the preliminary hearing officer, the government certainly has the right to put on a full show of evidence and witnesses at the preliminary hearing. There may be some cases where this is helpful. However, in practice the government has no incentive to do so because a preliminary hearing officer's finding against the government can be ignored and the case sent to trial anyway. The removal of the "thorough investigation" requirement, in combination with the fact that the government need not "win" or really show anything in particular at the hearing, gives the government every reason to put on only its most basic case. The simplest way for the government to do this is to introduce only a packet of investigative papers about the offense, thus dispensing with the trouble of presenting witnesses. That alone may be enough to show probable cause. Yet, even if the government does not achieve probable cause, it makes no difference because the government knows that it will not be thwarted from advancing to trial anyway due to the non-binding nature of the preliminary hearing officer recommendation.

Thus, the government's core interest at the preliminary hearing stage can be summarized as seeking to *expend as little effort as possible*. This goal has a practical effect on case timelines: the government may be able to move from preferral of charges to arraignment more quickly than before, but is likely to spend more time between arraignment and trial. This means that military judges will spend more time in supervision of cases than under the old Article 32 procedures, and criminal casefiles will remain underdeveloped and untested in early stages.

B. Victims

As a class, victims have the most reason to celebrate the transformed Article 32. Victims are no longer subject to the potentially mandatory and extensive testimony of the old "thorough investigation" procedures. A victim who elects not to testify at the preliminary hearing shall be deemed not available, and that declination cannot be used as the sole justification for the accused to seek the victim's deposition. 10 U.S.C. § 832(d)(3).

For purposes of Article 32 hearings, the definition of "victim" is broad. It means "an individual who is alleged to have suffered a direct physical, emotional, or pecuniary harm as a result of the commission of an offense under the UCMJ." R.C.M. 405(g)(1) (2019). This does not explicitly require that the victim be named on the charging document. Victims also enjoy the right to notice of the preliminary hearing, the right to not be excluded from the proceedings, and the opportunity to confer with government counsel. R.C.M. 405(g)(2)–(3) (2019 M.C.M.). They may petition the Court of Criminal Appeals for a writ of mandamus if any of their rights are violated; if granted, such a writ could result in the preliminary hearing proceedings being stayed or abated. 10 U.S.C. § 806b(e)(1); *see also* R.C.M. 405(i)(2(C)) (2019 M.C.M.) (as applied in sex-offense cases).

Victims at Article 32 hearings also enjoy the rights afforded by UCMJ Article 6b—another recent development of military law. That Article provides for rights to restitution, proceedings free from unreasonable delay, privacy, and possible representation by Special Victim's Counsel provided at no cost. *See generally* 10 U.S.C. § 806b.

C. The Accused

While the accused may not have the same access to victims as under the older Article 32, one element of Article 32 that has stayed constant is that the accused remains permitted to make an active defense. R.C.M. 405(d)(3)–(h) (2019 M.C.M.). He may be represented by military and or civilian defense counsel. The accused may request witnesses, introduce evidence, cross-examine government witnesses, and put on an affirmative defense. Conversely, the accused may also choose to do nothing, and even waive the Article 32 hearing.

While able to actively defend his case, the accused must couch efforts to produce evidence and witnesses within the requirements of relevance, necessity, and non-cumulativeness. R.C.M. 405(h) (2019 M.C.M.). Further, the accused must avoid the “d” word: *discovery*. Since the new Article 32 specifically repudiates discovery as a purpose of the hearing, the accused will likely get nowhere in asserting discovery as a purpose for seeking the production of evidence and witnesses. R.C.M. 405(a), Discussion (2019 M.C.M.).

Fortunately for the accused, the incredibly broad purposes of the new Article 32 counteract its new limitations. Take, for example, the probable cause purpose of preliminary hearings. It is not enough for the government to offer some evidence against an accused and claim that the probable cause threshold has been met. In analogous preliminary hearings in federal court, “probable cause” must be based on the “totality of the circumstances.” *See, e.g., United States v. Mims*, 812 F.2d 1068, 1072 (8th Cir. 1987) (utilizing totality test to determine whether probable cause existed in context of warrant). The totality of the circumstances is just as relevant at a military preliminary hearing, as military caselaw amply demonstrates. *See, e.g., United States v. Leedy*, 65 M.J. 208, 212 (C.A.A.F. 2007) (measuring probable cause based on a totality of circumstances test); *United States v. Bethea*, 61 M.J. 184, 187 (C.A.A.F. 2005) (holding that the totality of the circumstances includes the truthfulness of witnesses). The motive, bias, and credibility of a witness or victim pertain to probable cause and are just as relevant at the preliminary hearing as they would be at trial. The preliminary hearing officer’s acceptance of the government’s claim that its evidence meets the probable cause threshold is therefore subject to adjustment based on the defense’s insertion of doubt or evidence in defense. In this way, the probable cause purpose of the preliminary hearing gives the accused much to

work with... all the more so if the government treats the proceedings as a speedbump and opportunity to conserve energy.

The same is true of the preliminary hearing's purpose of recommending a disposition of the case. Nothing could be broader than this purpose. In accordance with the policy of the Manual for Courts-Martial, "[a]llegations of offenses should be disposed of in a timely manner at the lowest appropriate level of disposition." R.C.M. 306(b) (2019 M.C.M.). Disposition could range from dismissal of the case to general court-martial. In deciding on disposition, the Manual for Court-Martial offers Non-Binding Disposition Guidance. Appendix 2.1 (2019 M.C.M.). These include, to name a few: the nature, seriousness, and circumstances of the offense; the extent of harm to any victim; the willingness of the victim or other witnesses to testify; whether admissible evidence will result in a conviction; the truth-seeking function of a court-martial; and the probable sentence. *Id.* Defense counsel, who may couch their requests for evidence, witnesses, or cross-examination on any of these subjects, are acting within the authorized purpose of the preliminary hearing.

The usefulness of the preliminary hearing for the defense doesn't stop there. Testimony at the preliminary hearing will be substantive sworn evidence usable later at trial as prior inconsistent statements. MIL. R. EVID. 801(d)(1)(A). The defense can preserve testimony in case a witness later becomes unavailable. MIL. R. EVID. 804(b)(1). Finally, the defense can use the government's subpoena duces tecum powers to obtain evidence outside the government's control that the accused could not otherwise obtain on his own. R.C.M. 309, 405(h)(3)(B)(i) (2019 M.C.M.).

D. The Public

The stakeholder of the "public" is admittedly the most amorphous of the four mentioned. The public is often synonymous with the news media who seek access to military judicial proceedings. The public may include crime victims and others impacted by the criminal allegations at hand. The public also includes other military members. And since many aspects of the military justice system measure the public's perceptions of fairness, the public includes members of the population at large, who are passively conferred this form of standing even without tangible connections to a given case. *See United States v. Bergdahl*, 80 M.J. 230, 233

(C.A.A.F. 2020) (“An appearance of unlawful command influence arises in a case when an intolerable strain is placed on the public's perception of the military justice system because an objective, disinterested observer, fully informed of all the facts and circumstances, would harbor a significant doubt about the fairness of the proceeding.” (internal quotation marks omitted)); 10 U.S.C. § 934 (allowing for prosecution of conduct which may discredit the armed forces); S. COMM. ON CONST. RIGHTS, 88TH CONG., CONSTITUTIONAL RIGHTS OF MILITARY PERSONNEL (Comm. Print 1963) (“[I]t is essential that our excellent court-martial system generate public confidence in the basic fairness of the administration of military justice.”). The public is not just the American public: for military offenses that occur overseas especially, it also includes the host nation government, civil society, and citizens with an interest in knowing how the U.S. military addresses criminal allegations.

By the letter of R.C.M. 405, preliminary hearings should be open to the public. “Preliminary hearings are public proceedings and should remain open to the public whenever possible.” R.C.M. 405(j)(3) (2019 M.C.M.). Any restriction or closure of the proceedings to the public must be “narrowly tailored,” consider alternatives to closure, and shall require specific findings of fact that support the restriction or closure. *Id.*; *see also ABC, Inc. v. Powell*, 47 M.J. 363, 366 (C.A.A.F. 1997) (“Here, the [convening authority wrongly] decided to close the entire proceedings for unsubstantiated reasons.”). Some reasons why limited closure might be acceptable include protection of classified material, preventing psychological harm to a child witness, or where a witness is otherwise incapable of giving testimony in a public setting. *See* R.C.M. 405(j)(3), Discussion (2019 M.C.M.).

Yet despite the above public-friendly language of R.C.M. 405, the public’s ability to meaningfully access preliminary hearings is elusive. There are several reasons why. First, members of the public obviously cannot attend hearings that they do not know about. Preliminary hearings might be announced in advance to the public, but they also might not, and no real consequence attaches to any military unit’s failure to disclose such information. If the accused waives the preliminary hearing entirely, there is nothing for the public to see. If the interests of the government, accused, and victims in a given case are all inclined toward secrecy, even keenly interested members of the public will have no way to find out what is happening. While each service of the military has recently adopted public court-martial case information

systems in response to a new provision of law, these systems do not provide information on preliminary hearings, and instead begin their coverage at the later stage of court-martial arraignment. *See* U.S. ARMY COURT-MARTIAL PUBLIC RECORD SYSTEM, <https://www.jagcnet.army.mil/ACMPRS> (last visited Oct. 21, 2021); U.S. NAVY AND MARINE CORPS JAG CORPS MILITARY JUSTICE DOCKET, <https://jag.navylive.dodlive.mil/Military-Justice/Docket/> (last visited Oct. 21, 2021); THE JUDGE ADVOCATE GENERAL'S CORPS AIR FORCE DOCKET, <https://legalassistance.law.af.mil/AMJAMS/PublicDocket/docket.html> (last visited Oct. 21, 2021).

Second, preliminary hearings may be physically inaccessible to the public. The hearings may occur overseas during military operations. Even for hearings that occur in the United States, special arrangements are needed for non-military members of the public to enter the restricted military bases where the preliminary hearings occur. A prohibition on broadcasting or livestreaming the proceedings means that those members of the public who cannot physically attend the hearing will not be able to find out what happened.

Finally, even when members of the public do find out about preliminary hearings and are able to attend, they still might be constructively shut out of the proceedings. This could happen if the hearing consists of nothing more than the prosecution and defense each submitting a paper record to the preliminary hearing officer. Without being able to see those papers, the public would have no idea what was going on. Such a scenario is far more likely in the new Article 32 format, in which the government may view the hearing as a procedural speedbump and the defense does not vigorously assert their client's case.

Neither UCMJ Article 32 nor R.C.M. 405 addresses this scenario regarding the public's access to documentary evidence at preliminary hearings. Nothing requires the preliminary hearing officer or any military authority to consider objections raised by the public about being constructively obstructed from the hearing in this way. Military judges are not conferred authority to consider requests from the public to access preliminary hearings. With all other avenues to relief seemingly foreclosed, the public could still file a writ with a military appellate court. However, the standards for these writs have been shifting and inconsistent, a problem that [Professor Eric Carpenter coined](#) as the "Bergdahl Block," after a case in which the public was

shut out from viewing the evidence presented at a high-profile preliminary hearing, despite meeting all legal requirements for seeking appellate relief. In seeking relief, the public has a better chance if the accused joins the public in asserting access, due to the accused's relatively more enforceable Sixth Amendment rights to a public trial. *See, e.g., United States v. Davis*, 64 M.J. 445, 449 (C.A.A.F. 2007) (permitting the accused to file a petition for extraordinary relief to address Article 32 errors).

V. CONCLUSION

The past decade of Article 32 reform has largely succeeded in the goal of increasing protections for victims. However, the changes to Article 32 have had some unintended consequences as well. While the defense bar has not materially suffered by the new restrictions, as some had feared, the public's ability to meaningfully access the proceedings has become even more tenuous. Overall, the preliminary hearing has diminished in its impact on the court-martial lifecycle, which in turn has caused a shifting of more case development to the court-martial stage under the supervision of military judges. This is both a good and a bad result: the good result is that the cases spent more of their lifecycle under the supervision of a judge. The bad result is that when early-stage cases are pressed forward without rigorous evaluation, meritless cases are not culled and are put to trial instead.