



ARTICLE 32, UCMJ, AMENDMENTS

Original Article 32

No charge or specification may be referred to a general court-martial until a thorough and impartial investigation of all 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 as to the form of the charges, and a recommendation as to the disposition which should be made of the case in the interest of justice and discipline. (Art. 32, 2012 MCM)

...full opportunity shall be given to the accused to cross-examine witnesses against him if they are available and to present anything he may desire in his own behalf, either in defense or mitigation, and the investigation officer shall examine available witnesses requested by the accused.

Investigating officer – commissioned officer not the accuser...should be an officer in the grade of major or lieutenant commander or higher or one with legal training. (R.C.M. 405 and discussion)

FY14 National Defense Authorization Act, Section 1702

New Article 32

No charge or specification may be referred to a general court-martial for trial until completion of a preliminary hearing. The purpose of the hearing shall be *limited* to the following: (A) Determining whether there is probable cause to believe an offense has been committed and the accused committed the offense. (B) Determining whether the convening authority has jurisdiction over the offense and the accused. (C) Consideration of the form of charges. (D) Recommending the disposition that should be made of the case. (Art. 32, Sec. 1702 FY14 NDAA)

The accused may cross-examine witnesses who testify at the preliminary hearing and present additional evidence in defense and mitigation, relevant to the limited purposes of the hearing...

A victim may not be required to testify at the preliminary hearing. A victim who declines to testify shall be deemed to be not available for the purposes of the preliminary hearing.

Hearing officer – preliminary hearing shall be conducted by an impartial judge advocate certified under Article 27(b) whenever practicable or in exceptional circumstances in which the interests of justice warrant, by an impartial hearing officer who is not a judge advocate. (Art. 32)
Whenever practicable, the preliminary hearing officer shall be equal to or senior in rank to the government and defense counsel.

ARTICLE 32 PRACTICE & PROCEDURE

ARTICLE 32 – Hearing **before** 26 Dec 2014

KEY POINTS: DISCOVERY OPPORTUNITY FOR DEFENSE. MILITARY VICTIMS CAN BE ORDERED TO TESTIFY.

PURPOSE: Thorough and impartial investigation of all matters set forth in the charges.

- Truth of the matter set forth in charges;
- Consideration of the form of the charges; and
- Recommendation as to disposition of the case.

Investigating Officer (IO): Judge advocate or O-4 or higher (Navy and Marine Corps, by instruction, have used judge advocates as IOs since Dec 4, 2013 see ALNAV 080/13 and by practice has done so for over 20 years).

Role of IO: Active investigator with ability to subpoena documents, rule on availability of witnesses and evidence, and call and question witnesses.

Authority of IO: IO can make rulings on limited evidentiary issues, order government action to produce witnesses and subpoena documentary evidence.

Nature of Investigation: Thorough and impartial investigation with significant discovery opportunity for the defense.

Discovery: Investigation serves as a means of discovery for defense and defense has few bounds on nature of discovery.

Witnesses: Civilians can decline to testify. Military witnesses who are deemed available and necessary must testify (including the victim).

Rules of Evidence: Generally don't apply, except privileges, prohibition of derogatory questions and rape shield (often read to allow exceptions to rule). Note: The exclusions of MRE 412 apply, but so do the exceptions.

Article 32 Report: Is a recommendation and is not binding on CA.

ARTICLE 32 – Hearing **on/after** 26 Dec 2014

KEY POINTS: SPECIFICALLY NOT A DISCOVERY PROCESS. ALL NAMED VICTIMS CAN DECLINE TO TESTIFY

PURPOSE: Limited hearing to determine:

- Probable cause to believe offense has been committed and accused committed it;
- Whether there is jurisdiction over the offense and over the accused;
- Consideration of the form of the charges; and
- Recommendation as to disposition of the case.

Preliminary Hearing Officer (PHO): Judge advocate equal to or senior in rank to counsel for the government and defense counsel (when practicable). In exceptional circumstances, PHO may be other than judge advocate, but must have judge advocate to advise.

Role of PHO: Limited to the 4 above-listed purposes based on the evidence presented. PHO can cut off presentation of evidence that is not relevant to purpose of hearing (above), but cannot otherwise dictate what evidence is presented or the form of that evidence.

Authority of PHO: PHO can determine evidence is not relevant or material to hearing, can ask either party for more information on relevant issues, but cannot force either side to produce or present evidence on that issue. PHO cannot *sua sponte* call witnesses or subpoena documents.

Nature of Hearing: Limited hearing with focus on probable cause and matters related to the above-listed purposes of hearing.

Discovery: Hearing is not a means of discovery and all evidence presented must be related to the purpose of the hearing.

Witnesses: Civilians and all victims (named in the specifications) can decline to testify regardless of military status or availability.

Rules of Evidence: Generally don't apply, except privileges and prohibition of derogatory questions. MREs 412 and 514 "constitutionally required" exception is removed from Article 32 hearing under ALNAV 086/14. MRE 513 "constitutionally required" exception is removed by FY15 NDAA.

Article 32 Report: Is a recommendation and is not binding on the CA..