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SUBJ/NEW ARTICLE 32, UCMJ, PRELIMINARY HEARING PROCEDURES//

REF/A/DOC/PUBLIC LAW 113-66 (FY14 NATIONAL DEFENSE AUTHORIZATION ACT)
REF/B/DOC/FY15 NATIONAL DEFENSE AUTHORIZATION ACT
REF/C/DOC/MANUAL FOR COURTS-MARTIAL (2012 EDITION)
REF/D/DOC/ALNAV 080/13
REF/E/DOC/MCO P5800.16A
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223-9304//

RMKS/1. Ref A, enacted on 26 December, 2013, contained a number of significant changes to the Uniform Code of Military Justice (UCMJ) and military justice process. On 19 December 2014, the President signed Ref B which amends those portions of section 1702 of Ref A related to Article 32, UCMJ, preliminary hearings. This ALNAV, effective on 26 December 2014, implements portions of Ref A and Ref B, promulgates training requirements related to Article 32 proceedings, and will remain in effect until superseded by higher authority or cancelled.

2. Disclosure of matters following direction of preliminary hearing:

(a) When a convening authority directs a preliminary hearing pursuant to Article 32, UCMJ, counsel for the government shall, subject to subsections (b)-(d) of this paragraph, within 5 days of issuance of the Article 32 appointing order, provide to the defense the following information or matters:

(1) Charge sheet;
(2) Article 32 appointing order;
(3) Documents accompanying the charge sheet on which the referral decision was based;

(4) Documents provided to the convening authority when deciding to direct the preliminary hearing;

(5) Documents the counsel for the government intends to present at the preliminary hearing; and

(6) Access to tangible objects counsel for the government intends to present at the preliminary hearing.

(b) Contraband. If items covered by subsection (a) above are contraband, the disclosure required under this ALNAV is a reasonable opportunity to inspect said contraband prior to the hearing.

(c) Privilege. If items covered by subsection (a) above are privileged,

classified or otherwise protected under Section V of Part III of Ref C, no disclosure of those items is required under this ALNAV. However, counsel for the government may disclose privileged, classified or otherwise protected information covered by subsection (a) above if authorized by the holder of the privilege, or in the case of Military Rule of Evidence (Mil. R. Evid.) 505 or 506, if authorized by a competent authority.

(d) Protective order if privileged information is disclosed. If the government agrees to disclose to the accused information to which the protections afforded by Section V of Part III of Ref C may apply, the convening authority, or other person designated by regulation of the Secretary concerned, may enter an appropriate protective order, in writing, to guard against the compromise of information disclosed to the accused. The terms of any such protective order may include prohibiting the disclosure of the information except as authorized by the authority issuing the protective order, as well as those terms specified by Mil. R. Evid. 505(g)(2)-(6) or 506(g)(2)(5).

Discussion. The purposes of this provision are to provide the accused with the documents used to make the determination to prefer charges and direct a preliminary hearing, and to allow the accused to prepare for the preliminary hearing. This provision is not intended to be a tool for discovery and does not impose the same discovery obligations found in Rule for Court-Martial (R.C.M.) 405 prior to amendments required by Ref A or R.C.M. 701. Additional guidance for disclosure of witnesses and other evidence in the preliminary hearing are provided below.

3. At the Preliminary Hearing:

(a) In general. Except as provided in subsection (k) of this paragraph, no charge or specification may be referred to a general court-martial for trial until completion of a preliminary hearing in substantial compliance with Ref A and this ALNAV. A preliminary hearing conducted in accordance with Ref A and this ALNAV is not intended to serve as a means of discovery and will be limited to an examination of those issues necessary to determine whether there is probable cause to conclude that an offense or offenses have been committed and whether the accused committed it; to determine whether a court-martial would have jurisdiction over the offense(s) and the accused; to consider the form of the charge(s); and to recommend the disposition that should be made of the charge(s). Failure to comply with Ref A or this ALNAV shall have no effect on the disposition of the charge(s) if the charge(s) is not referred to a general court-martial.

Discussion. The function of the preliminary hearing is to ascertain and impartially weigh the facts needed for the limited scope and purpose of the preliminary hearing. The preliminary hearing is not intended to perfect a case against the accused and is not intended to serve as a means of discovery or to provide a right of confrontation required at trial. Determinations and recommendations of the preliminary hearing officer are advisory.

Failure to substantially comply with the requirements of Article 32, which failure prejudices the accused, may result in delay in disposition of the case or disapproval of the proceedings. See R.C.M. 905(b)(1) and 906(b)(3) concerning motions for appropriate relief relating to the preliminary hearing.

The accused may waive the preliminary hearing. See subsection (k) of this paragraph. In such case, no preliminary hearing need be held. However, the convening authority authorized to direct the preliminary hearing may direct that it be conducted notwithstanding the waiver.

(b) Earlier preliminary hearing. If a preliminary hearing of the subject matter of an offense has been conducted before the accused is charged with an offense, and the accused was present at the preliminary hearing and afforded

the rights to counsel, cross-examination, and presentation of evidence required by this ALNAV, no further preliminary hearing is required.

(c) Who may direct a preliminary hearing. A preliminary hearing may be directed under this ALNAV by any court-martial convening authority. That authority may also give procedural instructions not inconsistent with this ALNAV.

(d) Personnel.

(1) Preliminary hearing officer. Whenever practicable, the convening authority directing a preliminary hearing under this ALNAV shall detail an impartial judge advocate certified under Article 27(b), not the accuser, as a preliminary hearing officer, who shall conduct the preliminary hearing and make a report that addresses whether there is probable cause to believe that an offense or offenses have been committed and that the accused committed the offense(s); whether a court-martial would have jurisdiction over the offense(s) and the accused; the form of the charges(s); and a recommendation as to the disposition of the charge(s).

Except as provided in Ref D and E, when the appointment of a judge advocate as the preliminary hearing officer is not practicable, or in exceptional circumstances in which the interest of justice warrants, the convening authority directing the preliminary hearing may detail an impartial commissioned officer, who is not the accuser, as the preliminary hearing officer. If the preliminary hearing officer is not a judge advocate, an impartial judge advocate certified under Article 27(b) shall be available to provide legal advice to the preliminary hearing officer.

When practicable, the preliminary hearing officer shall be equal or senior in grade to the military counsel detailed to represent the accused and the government at the preliminary hearing.

The preliminary hearing officer shall not depart from an impartial role and become an advocate for either side. The preliminary hearing officer is disqualified to act later in the same case in any other capacity.

Discussion. The preliminary hearing officer, if not a judge advocate, should be an officer in the grade of O-4 or higher. The preliminary hearing officer may seek legal advice concerning the preliminary hearing officer's responsibilities from an impartial source, but may not obtain such advice from counsel for any party or counsel for a victim.

(2) Counsel to represent the United States. Except as provided in Ref E, a judge advocate, not the accuser, shall serve as counsel to represent the United States, and shall present evidence on behalf of the government relevant to the limited scope and purpose of the preliminary hearing as set forth in subsection (a) of this paragraph.

(3) Defense counsel.

(A) Detailed counsel. Except as provided in subsection (d)(3)(B) of this paragraph, military counsel certified in accordance with Article 27(b) shall be detailed to represent the accused.

(B) Individual military counsel. The accused may request to be represented by individual military counsel. Such requests shall be acted on in accordance with R.C.M. 506(b).

(C) Civilian counsel. The accused may be represented by civilian counsel at no expense to the United States. Upon request, the accused is entitled to a reasonable time to obtain civilian counsel and to have such counsel present for the preliminary hearing. However, the preliminary hearing shall not be unduly delayed for this purpose. Representation by civilian counsel shall not limit the rights to military counsel under subsections (d)(3)(A) and (B) of this paragraph.

(4) Others. The convening authority who directed the preliminary hearing may also, as a matter of discretion, detail or request an appropriate authority to detail:

(A) A reporter; and

(B) An interpreter.

(e) Scope of preliminary hearing.

(1) The preliminary hearing officer shall limit the inquiry to the examination of evidence, including witnesses, necessary to:

(A) Determine whether there is probable cause to believe an offense or offenses have been committed and whether the accused committed it;

(B) Determine whether a court-martial would have jurisdiction over the offense(s) and the accused;

(C) Consider whether the form of the charge(s) is proper; and

(D) Make a recommendation as to the disposition of the charge(s).

(2) If evidence adduced during the preliminary hearing indicates that the accused committed any uncharged offense(s), the preliminary hearing officer may examine evidence and hear witnesses relating to the subject matter of such offense(s) and make the findings and recommendations enumerated in subsection (e)(1) of this paragraph regarding such offense(s) without the accused first having been charged with the offense. The accused's rights under subsection (f)(2) of this paragraph, and, where it would not cause undue delay to the proceedings, subsection (g) of this paragraph, are the same with regard to both charged and uncharged offenses. When considering uncharged offenses identified during the preliminary hearing, the preliminary hearing officer shall inform the accused of the general nature of each uncharged offense considered, and otherwise afford the accused the same opportunity for representation, cross examination, and presentation afforded during the preliminary hearing of any charged offense. Discussion. Except as set forth in subsection (h) below, the Mil. R. Evid. do not apply at a preliminary hearing. Except as prohibited elsewhere in this ALNAV, a preliminary hearing officer may consider evidence, including hearsay, which would not be admissible at trial.

(f) Rights of the accused.

(1) Prior to any preliminary hearing under this ALNAV the accused shall have the right to:

(A) Notice of any witnesses that the government intends to call at the preliminary hearing and copies of or access to any written or recorded statements made by those witnesses that relate to the subject matter of any charged offense;

(i) For purposes of this ALNAV, a 'written statement' is one that is signed or otherwise adopted or approved by the witness that is within the possession or control of counsel for the government; and

(ii) For purposes of this ALNAV, a 'recorded statement' is an oral statement made by the witness that is recorded contemporaneously with the making of the oral statement and contained in a digital or other recording or a transcription thereof that is within the possession or control of counsel for the government.

(B) Notice of, and reasonable access to, any other evidence that the government intends to offer at the preliminary hearing; and

(C) Notice of, and reasonable access to, evidence that is within the possession or control of counsel for the government that negates or reduces the degree of guilt of the accused for an offense charged.

(2) At any preliminary hearing under this ALNAV the accused shall have the right to:

(A) Be advised of the charges under consideration;

(B) Be represented by counsel;

(C) Be informed of the purpose of the preliminary hearing;

(D) Be informed of the right against self-incrimination under

Article 31;

(E) Except in the circumstances described in R.C.M. 804(c)(2), be

present throughout the taking of evidence;

(F) Cross-examine witnesses on matters relevant to the limited scope and purpose of the preliminary hearing;

(G) Present matters in defense and mitigation relevant to the limited scope and purpose of the preliminary hearing; and

(H) Make a statement relevant to the limited scope and purpose of the preliminary hearing.

Discussion. Unsworn statements by the accused, unlike those made under R.C.M. 1001(c)(2), shall be limited to matters in defense and mitigation.

(g) Production of Witnesses and Other Evidence.

(1) Military Witnesses.

(A) Prior to the preliminary hearing, defense counsel shall provide to counsel for the government the names of proposed military witnesses whom the accused requests that the government produce to testify at the preliminary hearing, and the requested form of the testimony, in accordance with the timeline established by the preliminary hearing officer. Counsel for the government shall respond that either (1) the government agrees that the witness testimony is relevant, not cumulative, and necessary for the limited scope and purpose of the preliminary hearing and will seek to secure the witness's testimony for the hearing; or (2) the government objects to the proposed defense witness on the grounds that the testimony would be irrelevant, cumulative, or unnecessary based on the limited scope and purpose of the preliminary hearing.

(B) If the government objects to the proposed defense witness, defense counsel may request that the preliminary hearing officer determine whether the witness is relevant, not cumulative, and necessary based on the limited scope and purpose of the preliminary hearing.

(C) If the government does not object to the proposed defense military witness or the preliminary hearing officer determines that the military witness is relevant, not cumulative, and necessary, counsel for the government shall request that the commanding officer of the proposed military witness make that person available to provide testimony. The commanding officer shall determine whether the individual is available based on operational necessity or mission requirements, except that a victim, as defined in paragraph 3(i)(2)(A) of this ALNAV, who declines to testify shall be deemed to be not available. If the commanding officer determines that the military witness is available, counsel for the government shall make arrangements for that individual's testimony. The commanding officer's determination of unavailability due to operational necessity or mission requirements is final. The military witness's commanding officer determines the availability of the witness and, if there is a dispute among the parties, determines whether the witness testifies in person, by video teleconference, by telephone, or similar means of remote testimony.

Discussion. A commanding officer's determination of whether an individual is available, as well as the means by which the individual is available, is a balancing test. The more important the testimony of the witness, the greater the difficulty, expense, delay, or effect on military operations must be to deny production of the witness. Based on operational necessity and mission requirements, the witness's commanding officer may authorize the witness to testify by video conference, telephone, or similar means of remote testimony. Factors to be considered in making this determination include the costs of producing the witness; the timing of the request for production of the witness; the potential delay in the proceeding that may be caused by the production of the witness; and the likelihood of significant interference with operational deployment, mission accomplishment, or essential training.

(2) Civilian Witnesses.

(A) Defense counsel shall provide to counsel for the government

the names of proposed civilian witnesses whom the accused requests that the government produce to testify at the preliminary hearing, and the requested form of the testimony, in accordance with the timeline established by the preliminary hearing officer. Counsel for the government shall respond that either (1) the government agrees that the witness testimony is relevant, not cumulative, and necessary for the limited scope and purpose of the preliminary hearing and will seek to secure the witness's testimony for the hearing; or (2) the government objects to the proposed defense witness on the grounds that the testimony would be irrelevant, cumulative, or unnecessary based on the limited scope and purpose of the preliminary hearing.

(B) If the government objects to the proposed defense witness, defense counsel may request that the preliminary hearing officer determine whether the witness is relevant, not cumulative, and necessary based on the limited scope and purpose of the preliminary hearing.

(C) If the government does not object to the proposed civilian witness or the preliminary hearing officer determines that the civilian witness testimony is relevant, not cumulative, and necessary, counsel for the government shall invite the civilian witness to provide testimony and, if the individual agrees, shall make arrangements for that witness's testimony. If expense to the government is to be incurred, the convening authority who directed the preliminary hearing, or the convening authority's delegate, shall determine whether the witness testifies in person, by video teleconference, by telephone, or similar means of remote testimony.

Discussion. Factors to be considered in making this determination include the costs of producing the witness; the timing of the request for production of the witness; the potential delay in the proceeding that may be caused by the production of the witness; the willingness of the witness to testify in person; and, for child witnesses, the traumatic effect of providing in-person testimony. Civilian witnesses may not be compelled to provide testimony at a preliminary hearing. Civilian witnesses may be paid for travel and associated expenses to testify at a preliminary hearing. See Department of Defense Joint Travel Regulations.

(3) Other evidence.

(A) Evidence under the control of the government.

(i) Prior to the preliminary hearing, defense counsel shall provide to counsel for the government a list of evidence under the control of the government the accused requests the government produce to the defense for introduction at the preliminary hearing. The preliminary hearing officer may set a deadline by which defense requests must be received. Counsel for the government shall respond that either (1) the government agrees that the evidence is relevant, not cumulative, and necessary for the limited scope and purpose of the preliminary hearing and shall make reasonable efforts to obtain the evidence; or (2) the government objects to production of the evidence on the grounds that the evidence would be irrelevant, cumulative, or unnecessary based on the limited scope and purpose of the preliminary hearing.

(ii) If the government objects to production of the evidence, defense counsel may request that the preliminary hearing officer determine whether the evidence should be produced. The preliminary hearing officer shall determine whether the evidence is relevant, not cumulative, and necessary based on the limited scope and purpose of the hearing. If the preliminary hearing officer determines that the evidence shall be produced, counsel for the government shall make reasonable efforts to obtain the evidence.

(B) Evidence not under the control of the government.

(i) Evidence not under the control of the government may be obtained through noncompulsory means or by subpoenas duces tecum issued by

counsel for the government in accordance with the process established by R.C.M. 703.

(ii) Prior to the preliminary hearing, defense counsel shall provide to counsel for the government a list of evidence not under the control of the government that the accused requests the government obtain. The preliminary hearing officer may set a deadline by which defense requests must be received. Counsel for the government shall respond that either (1) the government agrees that the evidence is relevant, not cumulative, and necessary for the limited scope and purpose of the preliminary hearing and shall issue subpoenas duces tecum for the evidence; or (2) the government objects to production of the evidence on the grounds that the evidence would be irrelevant, cumulative, or unnecessary based on the limited scope and purpose of the preliminary hearing.

(iii) If the government objects to production of the evidence, defense counsel may request that the preliminary hearing officer determine whether the evidence should be produced. If the preliminary hearing officer determines that the evidence is relevant, not cumulative, and necessary based on the limited scope and purpose of the preliminary hearing and that the issuance of subpoenas duces tecum would not cause undue delay to the preliminary hearing, the preliminary hearing officer shall direct counsel for the government to issue subpoenas duces tecum for the defense-requested evidence. Failure on the part of counsel for the government to issue subpoenas duces tecum directed by the preliminary hearing officer shall be noted by the preliminary hearing officer in the report of preliminary hearing.

Discussion. A subpoena duces tecum to produce books, papers, documents, data, electronically stored information, or other objects for a preliminary hearing pursuant to Article 32 may be issued by counsel for the government. The preliminary hearing officer has no authority to issue a subpoena duces tecum. However, the preliminary hearing officer may direct counsel for the government to issue a subpoena duces tecum for defense-requested evidence.

(h) Military Rules of Evidence. The Military Rules of Evidence do not apply in preliminary hearings under this ALNAV except as follows:

(1) Mil. R. Evid. 301-303 and 305 shall apply in their entirety.

(2) Mil. R. Evid. 412 shall apply in any case that includes a charge defined as a sexual offense in Mil. R. Evid. 412(d), except that Mil. R. Evid. 412(b)(1)(C) shall not apply.

(3) Mil. R. Evid., Section V, Privileges, shall apply, except that Mil. R. Evid. 505(f)-(h) and (j); 506(f)-(h), (j), (k), and (m); 513(d)(8); and 514(d)(6) shall not apply.

(4) In applying this ALNAV to a preliminary hearing, the term "military judge," as used in provisions subsections (h)(1)-(3), above, shall mean the preliminary hearing officer, who shall assume the military judge's authority under these rules to exclude evidence from the preliminary hearing, and who shall, in discharging this duty, follow the procedures set forth in the rules cited in subsections (h)(1)-(3). However, the preliminary hearing officer shall not assume the military judge's authority to order production of communications covered by M.R.E. 513 and 514.

Discussion. The prohibition from ordering production of evidence does not preclude a preliminary hearing officer from considering evidence offered by the parties under Mil.R.Evid 513 or 514.

(5) Failure to meet the procedural requirements of the applicable rules of evidence shall result in exclusion of that evidence from the preliminary hearing, unless good cause is shown.

Discussion. Before considering evidence offered under subsection (h)(2), the preliminary hearing officer must determine that the evidence offered is relevant for the limited scope and purpose of the hearing, that the evidence

is proper under subsection (h)(2), and that the probative value of such evidence outweighs the danger of unfair prejudice to the alleged victim's privacy. The preliminary hearing officer shall set forth any limitations on the scope of such evidence.

Evidence offered under subsection (h)(2) above must be protected pursuant to the Privacy Act of 1974, 5 U.S.C. 552a. Although Mil. R. Evid. 412(b)(1)(C) allows admission of evidence of the victim's sexual behavior or predisposition at trial when it is constitutionally required, there is no constitutional requirement at an Article 32 hearing. There is likewise no constitutional requirement for a pretrial hearing officer to consider evidence under Mil. R. Evid. 513(d)(8), and 514(d)(6) at an Article 32 hearing. Evidence deemed admissible by the preliminary hearing officer should be made a part of the report of preliminary hearing. See subsection (j)(2)(C) below. Evidence not considered, and the testimony taken during a closed hearing, should not be included in the report of preliminary hearing but should be appropriately safeguarded or sealed. The preliminary hearing officer and counsel representing the government are responsible for careful handling of any such evidence to prevent unauthorized viewing or disclosure.

(i) Procedure.

(1) Generally. The preliminary hearing shall begin with the preliminary hearing officer informing the accused of the accused's rights under subsection (f) of this paragraph. Counsel for the government will then present evidence. Upon the conclusion of counsel for the government's presentation of evidence, defense counsel may present matters in defense and mitigation consistent with subsection (f) of this paragraph. For the purposes of this ALNAV, 'matters in mitigation' are defined as matters that may serve to explain the circumstances surrounding a charged offense. Both counsel for the government and defense shall be afforded an opportunity to cross-examine adverse witnesses. The preliminary hearing officer may also question witnesses called by the parties. If the preliminary hearing officer determines that additional evidence is necessary to satisfy the requirements of subsection (e) above, the preliminary hearing officer may provide the parties an opportunity to present additional testimony or evidence relevant to the limited scope and purpose of the preliminary hearing. The preliminary hearing officer shall not consider evidence not presented at the preliminary hearing. The preliminary hearing officer shall not call witnesses sua sponte.

Discussion. A preliminary hearing officer may only consider evidence within the limited purpose of the preliminary hearing and shall ensure that the scope of the hearing is limited to that purpose. When the preliminary hearing officer finds that evidence offered by either party is not within the scope of the hearing, he shall inform the parties and halt the presentation of that information.

(2) Notice to and presence of the victim(s).

(A) The victim(s) of an offense under the UCMJ has the right to reasonable, accurate, and timely notice of a preliminary hearing relating to the alleged offense and the reasonable right to confer with counsel for the government. For the purposes of this ALNAV, a 'victim' is a person who is alleged to have suffered a direct physical, emotional, or pecuniary harm as a result of the matters set forth in a charge or specification under consideration and is named in one of the specifications under consideration.

(B) A victim of an offense under consideration at the preliminary hearing is not required to testify at the preliminary hearing.

(C) A victim has the right not to be excluded from any portion of a preliminary hearing related to the alleged offense, unless the preliminary hearing officer, after receiving clear and convincing evidence, determines the testimony by the victim would be materially altered if the victim heard

other testimony at the proceeding.

(D) A victim shall be excluded if a privilege set forth in Mil. R. Evid. 505 or 506 is invoked or if evidence is offered under Mil. R. Evid. 412, 513, or 514, for charges other than those in which the victim is named.

(3) Presentation of evidence.

(A) Testimony. Witness testimony may be provided in person, by video teleconference, by telephone, or similar means of remote testimony. All testimony shall be taken under oath, except that the accused may make an unsworn statement. The preliminary hearing officer shall only consider testimony that is relevant to the limited scope and purpose of the preliminary hearing.

Discussion. The following oath may be given to witnesses:

"Do you (swear) (affirm) that the evidence you give shall be the truth, the whole truth, and nothing but the truth (so help you God)?"

The preliminary hearing officer is required to include in the report of the preliminary hearing, at a minimum, a summary of the substance of all testimony. See subsection (j)(2)(B) of this paragraph.

All preliminary hearing officer notes of testimony and recordings of testimony should be preserved until the end of trial.

If during the preliminary hearing any witness subject to the Code is suspected of an offense under the Code, the preliminary hearing officer should comply with the warning requirements of Mil. R. Evid. 305(c), (d), and, if necessary (e).

Bearing in mind that counsel are responsible for preparing and presenting their cases, the preliminary hearing officer may ask a witness questions relevant to the limited scope and purpose of the hearing. When questioning a witness, the preliminary hearing officer may not depart from an impartial role and become an advocate for either side.

(B) Other evidence. If relevant to the limited scope and purpose of the preliminary hearing, and not cumulative, a preliminary hearing officer may consider other evidence, in addition to or in lieu of witness testimony, including statements, tangible evidence, or reproductions thereof, offered by either side, that the preliminary hearing officer determines is reliable. This other evidence need not be sworn.

(4) Access by spectators. Access by spectators to all or part of the proceedings may be restricted or foreclosed in the discretion of the convening authority who directed the preliminary hearing or the preliminary hearing officer. Preliminary hearings are public proceedings and should remain open to the public whenever possible. When an overriding interest exists that outweighs the value of an open preliminary hearing, the preliminary hearing may be closed to spectators. Any closure must be narrowly tailored to achieve the overriding interest that justified the closure. Convening authorities or preliminary hearing officers must conclude that no lesser methods short of closing the preliminary hearing can be used to protect the overriding interest in the case. Convening authorities or preliminary hearing officers must conduct a case-by-case, witness-by-witness, circumstance-by-circumstance analysis of whether closure is necessary. If a convening authority or preliminary hearing officer believes closing the preliminary hearing is necessary, the convening authority or preliminary hearing officer must make specific findings of fact in writing that support the closure. The written findings of fact must be included in the report of preliminary hearing. Examples of overriding interests may include: preventing psychological harm or trauma to a child witness or an alleged victim of a sexual crime, protecting the safety or privacy of a witness or alleged victim, protecting classified material, and receiving evidence where a witness is incapable of testifying in an open setting.

(5) Presence of accused. The further progress of the taking of

evidence shall not be prevented and the accused shall be considered to have waived the right to be present whenever the accused:

(A) After being notified of the time and place of the proceeding is voluntarily absent; or

(B) After being warned by the preliminary hearing officer that disruptive conduct will cause removal from the proceeding, persists in conduct which is such as to justify exclusion from the proceeding.

(6) Recording of the preliminary hearing. Counsel for the government shall ensure that the preliminary hearing is recorded by a suitable recording device. A victim, as defined by subsection (i)(2)(A) of this paragraph, may request access to, or a copy of, the recording of the proceedings. Upon request, counsel for the government shall provide the requested access to, or a copy of, the recording to the victim not later than a reasonable time following dismissal of the charges, unless charges are dismissed for the purpose of re-referral, or court-martial adjournment. A victim is not entitled to classified information or closed sessions in which the victim did not have the right to attend under subsections (i)(2)(C) or (i)(2)(D) of this paragraph.

(7) Objections. Any objection alleging failure to comply with this ALNAV shall be made to the convening authority via the preliminary hearing officer.

(8) Sealed exhibits and proceedings. The preliminary hearing officer has the authority to order exhibits, proceedings, or other matters sealed as described in R.C.M. 1103A.

(j) Report of preliminary hearing.

(1) In general. The preliminary hearing officer shall make a timely written report of the preliminary hearing to the convening authority who directed the preliminary hearing.

Discussion. If practicable, the charges and the report of preliminary hearing should be forwarded to the general court-martial convening authority within 8 days after an accused is ordered into arrest or confinement. See Article 33, UCMJ.

(2) Contents. The report of preliminary hearing shall include:

(A) A statement of names and organizations or addresses of defense counsel and whether defense counsel was present throughout the taking of evidence, or if not present the reason why;

(B) The substance of the testimony taken on both sides;

(C) Any other statements, documents, or matters considered by the preliminary hearing officer, or recitals of the substance or nature of such evidence;

(D) A statement that an essential witness may not be available for trial;

(E) An explanation of any delays in the preliminary hearing;

(F) A notation if counsel for the government failed to issue a subpoena duces tecum that was directed by the preliminary hearing officer;

(G) The preliminary hearing officer's determination as to whether there is probable cause to believe the offense(s) listed on the charge sheet or otherwise considered at the preliminary hearing occurred;

(H) The preliminary hearing officer's determination as to whether there is probable cause to believe the accused committed the offense(s) listed on the charge sheet or otherwise considered at the preliminary hearing;

(I) The preliminary hearing officer's determination as to whether a court-martial has jurisdiction over the offense(s) and the accused;

(J) The preliminary hearing officer's determination as to whether the charge(s) and specification(s) are in proper form; and

(K) The recommendations of the preliminary hearing officer

regarding disposition of the charge(s).

Discussion. The preliminary hearing officer may include any additional matters useful to the convening authority in determining disposition. The preliminary hearing officer may recommend that the charges and specifications be amended or that additional charges be preferred. See R.C.M. 306 and 401 concerning other possible dispositions.

(3) Sealed exhibits and proceedings. If the report of preliminary hearing contains exhibits, proceedings, or other matters ordered sealed by the preliminary hearing officer in accordance with R.C.M. 1103A, counsel for the government shall cause such materials to be sealed so as to prevent unauthorized viewing or disclosure.

(4) Distribution of the report. The preliminary hearing officer shall cause the report to be delivered to the convening authority who directed the preliminary hearing. That convening authority shall promptly cause a copy of the report to be delivered to each accused.

(5) Objections. Any objection to the report shall be made to the convening authority who directed the preliminary hearing, via the preliminary hearing officer, within 5 days of its receipt by the accused. This subsection does not prohibit a convening authority from referring the charge(s) or taking other action within the 5-day period.

(k) Waiver. The accused may waive a preliminary hearing under Article 32, UCMJ. In addition, failure to make a timely objection, including an objection to the report, shall constitute waiver of the objection. Relief from the waiver may be granted by the convening authority who directed the preliminary hearing, a superior convening authority, or the military judge, as appropriate, for good cause shown.

Discussion. See also R.C.M. 905(b)(1); 906(b)(3).

The convening authority who receives an objection may direct that the preliminary hearing be reopened or take other action, as appropriate.

4. Training Requirements:

(a) All judge advocates shall review this ALNAV in its entirety.

(b) A judge advocate may not participate as a preliminary hearing officer, counsel to represent the government, defense counsel or victims' legal counsel in an Article 32 preliminary hearing, provide advice to a convening authority directing an Article 32 preliminary hearing, or provide Article 34, UCMJ, advice, until he or she has completed specific Naval Justice School training and reviewed the Naval Justice School's Article 32 Preliminary Hearing Officer Guide, in its entirety.

(c) No later than 30 January 2015 all active duty judge advocates shall complete specific Naval Justice School training and review the Naval Justice School's Article 32 Preliminary Hearing Officer Guide, in its entirety.

(d) No later than 28 February 2015 all reserve component judge advocates shall complete specific Naval Justice School training and review the Naval Justice School's Article 32 Preliminary Hearing Officer Guide, in its entirety. An extension is authorized for those reserve judge advocates scheduled to attend the reserve JAG Training Symposium scheduled for 24-26 April 2015.

5. Released by Ray Mabus, Secretary of the Navy.//

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