THE CODE INDICTED: WHY THE TIME IS RIGHT TO IMPLEMENT A GRAND JURY PROCEEDING IN THE MILITARY

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The grand jury gets to say—without any review, oversight, or second–guessing—whether probable cause exists to think that a person committed a crime.[1]

I. Introduction

On August 9, 2014, onlookers attending a sprint car race in Canandaigua, New York, watched in horror as NASCAR driver Tony Stewart, while operating a dirt–track sprint car, struck and killed fellow racer Kevin Ward Jr. who was walking along the track.[2] Ward Jr. had "exited his car after he and Stewart were involved in a racing incident that left Ward's car wrecked near the top wall of the track . . . ."[3] Video of the incident shows that as cars continued to round the track under caution, Ward began to walk near the path of the vehicles as Stewart came around.[4] Ultimately, the rear of Stewart's car struck Ward, who subsequently died

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[1] Kaley v. United States, 134 U.S. 1090, 1098 (2014).

[2] Joe Sutton & Steve Almasy, *NASCAR's Tony Stewart Hits, Kills Driver at Dirt-Track Race in New York*, CNN, http://www.cnn.com/2014/08/10/justice/tony-stewart-hits-driver/index.html?iref=allsearch (last updated Aug. 11, 2014, 12:00 PM).

[3] Steve Almasy, *Tony Stewart Won't Face Charges in Kevin Ward Jr.'s Death,* CNN, http://www.cnn.com/2014/09/24/us/tony-stewart-no-charges/index.html?iref=allsearch (last updated Sept. 25, 2014, 9:18 AM).

[4] *Cops: Tony Stewart Hit and Killed Driver*, CNN (Aug. 10, 2014), http://www.cnn.com/video/data/2.0/video/ us/ 2014/08/10/newday-cops-tony-stewart-hit-and-killed-driver.cnn.html.

of his injuries.[5] As with any death, local authorities quickly began an investigation amidst the media frenzy and public debate about whether Stewart intended to harm Ward. The investigation eventually led to the presentation of evidence before a twenty–three member Ontario County grand jury who reviewed the photographic and video evidence and heard testimony "from more than two dozen witnesses" before determining that "there is no evidence to charge Tony Stewart with any crimes."[6] Though Ward's family voiced disagreement with the finding, no charges would be filed against Tony Stewart, and he would eventually return to the race track.[7]

In many cases, especially those receiving national attention, it is inevitable that legal critics, analysts, and the public have opinions about what occurred, whether justice was served, and what should have been done. The debate is often unending. Sometimes, however, during the quest for justice, the outcome resulting from the judicial process or the very process used to achieve that result is so abhorrent, so appalling, that it shocks the conscience and forces a change in the system—for better or for worse.

Take the 2014 events of Ferguson, Missouri, for example. Ferguson was the epicenter of public unrest after officer Darren Wilson, a white Ferguson police officer, shot and killed Mr. Michael Brown, an unarmed black teenager in August 2014.[8] A grand jury reviewed the events surrounding the shooting in November 2014, and chose not to indict Wilson.[9] A separate Department of Justice report cleared Wilson of "any federal civil rights charges."[10] However, this did not end the problems for the town of Ferguson, but instead signaled the beginning.

A "federal investigation into Ferguson's broader justice system found systemic problems in the local police department, court and jail systems" and the fall–out from this report promptly began.[11] In addition to Mr. Wilson leaving the police department, the Ferguson city manager, John Shaw; a municipal judge, Judge Ronald Brock; and two police supervisors, Captain Rick Henke and Sergeant William Mudd, have since resigned.[12] Thereafter, Ferguson Police Chief Thomas Jackson resigned on Wednesday, March 11, 2015, and several

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[5] Sutton & Almasy, *supra* note 2.
[6] Almasy, *supra* note 3.
[7] Tony Stewart executed NASCAR's first 200 mile per hour qualifying lap on an intermediate track Friday, Oct. 31, 2014. *See Tony Stewart Hits 200 mph at Texas*, ESPN.COM, http://espn.go.com/racing/nascar/story/_/id/11799103/tony-stewart-hits-200-mph-matt-kenseth-takes-pole-texas (last updated Oct. 31, 2014, 11:49 PM).
[8] *See* Tierney Sneed, *Ferguson Report Prompts Resignations*, *Court Takeover*, U.S. NEWS & WORLD REPORT (Mar. 11, 2015), http://www.usnews.com/news/articles/2015/03/11/doj-ferguson-report-prompts-resignations-court-takeover.
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] *Id.*

hours later two police officers were shot standing guard outside of the police station.[13] The city was forced to begin a "nationwide search for a permanent replacement" for Chief Jackson while the public demanded justice in Ferguson amidst calls for the resignation of Mayor James Knowles.[14] Cataclysmic events like those in Ferguson are not limited to the confines of the civilian world, and have recently erupted in the realm of the U.S. military justice system.

No better recent example of public scrutiny and outcry resulting in change exists than that of the "sweeping changes" made to the Uniform Code of Military Justice (UCMJ), [15] through the National Defense Authorization Act for Fiscal Year 2014 (FY14 NDAA).[16] The FY14 NDAA made a number of substantive and procedural changes to the UCMJ, specifically for the purposes of improving the military system in cases of sexual assault and sex–related violence.[17] There were a number of factors that contributed to the movement, resulting in change. These factors included the May 2013 release of the Department of Defense Annual Report on Sexual Assault in the Military for Fiscal Year 2012[18] and a series of high–profile criminal cases that garnered considerable public attention and congressional scrutiny.[19]

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[13] *See* Michael Pearson, *The Tough Task Ahead for Ferguson's Next Police Chief*, CNN (Mar. 13, 2015, 8:22 PM), http://www.cnn.com/2015/03/13/us/ferguson-next-police-chief/index.html.

[14] *Id.*

[15] The Uniform Code of Military Justice (UCMJ) is codified at 10 U.S.C. §§ 801–946, it "establishes a military member's rights and the procedures for military prosecutions." Allen v. United States Air Force, 603 F.3d 423, 425-26 (8th Cir. 2010).

[16] National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, §§ 1701–1753, 127 Stat. 672 (2013) [hereinafter FY14 NDAA]. *See also* David Vergun, *New Law Brings Changes to Uniform Code of Military Justice*, DoD NEWS (Jan. 8, 2014), http://www.defense.gov/news/newsarticle.aspx?id=12144 4 ("The [FY14 NDAA] passed last month requires sweeping changes to the Uniform Code of Military Justice, particularly in cases of rape and sexual assault.").

[17] *Id.*

[18] Dep't of Def. Sexual Assault Prevention & Response Office (SAPRO), DEP'T OF DEF. ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY: FISCAL YEAR 2012 (2013), http://www.sapr.mil/index.php/ annual-reports. The report indicates that approximately 26,000 active duty servicemembers may have experienced some form of unwanted sexual contact in fiscal year 2012 and only 3374 of those individuals reported the assaults. *Id*. at 18, 25.

[19] *See generally* Timothy Williams, *General Charged with Sexual Misconduct*, NY TIMES (Sept. 27, 2012), http://www.nytimes.com/2012/09/28/us/decorated-general-charged-with-violations-of-military-law.html?_r=0 (detailing the charges levied in September 2012 against Brig. Gen. Jeffrey Sinclair, former Deputy Commanding General–Support at the 82d Airborne Division, for alleged forcible sodomy and wrongful sexual conduct); *Jeffrey Krusinski, Air Force Officer in Charge of Sexual Assault Prevention Program, Arrested for Alleged Sexual Assault*, HUFFINGTON POST (May 6, 2013), http://www.huffingtonpost.com/2013/05/06/jeffrey-krusinski-arrested_n_3225155.html (announcing the May 6, 2013, arrest of Air Force Lieutenant Colonel Jeffrey Krusinski, "the chief of the Air Force Sexual Assault Prevention and Response program" for sexual battery). *Id.*

Another change–producing event was the investigation into rape allegations levied against Naval Academy Midshipmen and football players Joshua Tate, Eric Graham, and Tra'ves Bush in April of 2012.[20] Aside from the growing public interest due to the nature of the alleged offenses, the parties involved, and the institution to which the accused belonged, the Naval Academy case was truly thrust into the spotlight during the pre–trial Article 32, UCMJ investigation that was conducted in August 2013. It was there, news agencies reported, that the victim endured "withering cross–examination" for "roughly [thirty] hours over several days," and was subjected to a number of purportedly inappropriate questions, some of which concerned her oral sex technique and whether or not she "wore a bra" on the night she was allegedly raped.[21] Critics, scholars, and the public were quick to react to the treatment this victim received during the proceeding and voiced their strong disapproval.[22] What resulted has set the stage for further change to the military justice system, and underscores the reason why the time is right to implement a grand jury proceeding in the military.

The public's dissatisfaction with the perceived treatment of the victim in the Naval Academy rape case went beyond mere rhetoric. The victim's attorney, Susan Burke,[23] subsequently spoke with Representative Jackie Speier (Democrat,

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[20] Ali Weinberg, *Naval Academy Rape Case Could Prompt Changes to Military Hearings*, NBC NEWS (Dec. 12, 2013), http://www.nbcnews.com/news/other/naval-academy-rape-case-could-prompt-changes-military-hearings-f2D11732125.

[21] Jennifer Steinhauer, *Navy Hearing in Rape Case Raises Alarm*, N. Y. TIMES (Sept. 20, 2013), http://www.nytimes.com/2013/09/21/us/intrusive-grilling-in-rape-case-raises-alarm-on-military-hearings.html?pagewanted=all&_r=0 (stating "[f]or roughly [thirty] hours over several days, defense lawyers . . . grilled [the victim] about her sexual habits. . . . [t]hey asked the woman . . . whether she wore a bra, how wide she opened her mouth during oral sex and whether she had apologized to another midshipman with whom she had intercourse 'for being a ho [sic].'"). *See also* Melinda Henneberger & Annys Shin, *Military's Handling of Sex Assault Cases on Trial at Naval Academy Rape Hearing,* WASH. POST (Aug. 31, 2013), http://www.washingtonpost.com/local/militarys-handling-of-sex-assault-cases-is-on-trial-at-naval-academy-rape-hearing/2013/08/31/5700c9de-10d3-11e3-b4cb-fd7ce041d814_story.html (describing the questioning of the victim as "withering cross–examination" and detailing the types of questions asked of the victim).

[22] *See* Steinhauer, *supra* note 21 ("If this is what Article 32 has come to be, then it is time to either get rid of it or put real restrictions on the conduct during them.") (quoting Jonathan Lurie, professor emeritus of legal history at Rutgers University); Henneberger & Shin, *supra* note 21 (quoting the opinion of Lisae Jordan (the executive director of the Maryland Coalition Against Sexual Assault) that the questions asked "probably would not be allowed in a Maryland courtroom" and would "likely be deemed irrelevant").

[23] By her own account, Ms. Burke "spearheads a nationwide series of lawsuits designed to reform the manner in which the military prosecutes rape and sexual assault." SUSAN L. BURKE, http://burkepllc.com /attorneys/susan-l-burke/ (last visited July 29, 2015). Her work is "the subject of a documentary called The Invisible War." *Id.* Indeed, Ms. Burke has been the attorney of record in several lawsuits filed against Department of Defense (DoD) officials by former and current servicemembers concerning allegations of sexual

California), to discuss the mistreatment of Burke's client during the Article 32 hearing, and similar clients' mistreatment in the past.[24] The result was a change to Article 32, a provision that had been relatively unchanged for more than fifty years.[25] Representative Speier succinctly summarized Susan Burke's role (and by necessary implication, the role of the victims who were maligned by the procedures used in the military justice process) in the pending changes: "She is a significant reason why all of this is happening."[26]

On December 26, 2014, the changes to Article 32 took effect.[27] On that date, the Article 32 "pre–trial investigation" ceased to be, and officially became a "preliminary hearing" for the purposes of: determining whether probable cause exists to believe an offense was committed by the accused; determining whether jurisdiction over the accused and the offenses exists; to examine the form of the charges; and to issue recommendations concerning the disposition of the case.[28] Another significant change prevents the compulsory testimony of the victim at the preliminary hearing if he or she declines to participate.[29] Only time will tell whether these and the other changes made by the FY 14 NDAA will prevent the abuses of the system it seeks to cure. Regardless of these efforts, Congress and legal practitioners must ask the question: Have we done enough to restore faith in the military justice system? The answer is: more can be done.

The systemic attack against the UCMJ by the media and politicians is relentless and obvious. At its core is the charge that commanders are not doing enough to maintain good order and discipline and have too much authority with respect to the administration of justice, especially where it concerns felony offenses.[30] Senator Kirsten Gillibrand's Testimony to the Response Systems

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assault that were allegedly mishandled or wrongfully disposed of by the chain of command. *Id.* *See generally* Cioca v. Rumsfeld, 720 F.3d 505 (4th Cir. 2013); Klay v. Panetta, 924 F.Supp.2d 8 (D.D.C. 2013).

[24] Weinberg, *supra* note 20.

[25] The issues surrounding the Naval Academy case were not the only reason for the changes that went before Congress in the form of the FY14 NDAA, but did, however, shine a "spotlight" on them. *Id.*

[26] *Id.*

[27] Fiscal Year 2014, *supra* note 16, § 1702; *See also* Carl Levin and Howard P. "Buck" McKeon, National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 531(g)(1) (2014) [hereinafter FY15 NDAA] (amending the effective date of the FY14 NDAA amendments to Article 32 to the "later of December 26, 2014, or the date of enactment of the [FY15 NDAA]" and establishing the applicability of those amendments to preliminary hearings conducted on or after the effective date).

[28] 10 U.S.C.S. § 832(a)(2) (2015).

[29] *Id.* at § 832(d)(3) ("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 purposes of the preliminary hearing.").

[30] *Response Systems to Adult Sexual Assault Crimes Panel (RSP): Public Meeting, Transcript of Testimony* 296–343 (Sept. 24, 2013) [hereinafter *Transcript of Testimony*] (statement of Senator Kirsten Gillibrand), http://140.185.104.231/.public/docs/meetings/

Panel [31] concerning the Military Justice Improvement Act [32] adequately summarizes her, and fifty–four other senators' feelings regarding the commander's authority and the role that these Senators believe commanders should play in the administration of justice within our military:

> Our carefully crafted common sense proposal, written in direct response to the experiences of those who have gone through a system rife with bias and conflict of interest, is not Democratic. It's not Republican. Senators from both sides of the aisle have listened to the victims' voices and agreed that what's right is not just tweaking the status quo, but a real transformational change required to give victims the hope of a fair shot at justice so that they are willing to come forward and report the heinous crimes committed against them . . . . It's time to move the sole decision making power over whether serious crimes akin to a felony go to trial from the chain of command into the hands of non–biased, professionally trained military prosecutors where it belongs.[33]

Though the March 6, 2014 cloture motion concerning the Military Justice Improvement Act (MJIA) was rejected by a vote of fifty–five to forty–five,[34] the fact remains that those in support of removing commanders from the decision–making process continue to lobby for these changes.[35] If there was any doubt that such removal of power and authority was possible, one must look no further than some of the additional changes made by the FY 14 NDAA that severely limit the convening authority's ability to grant post–trial relief when taking action on the sentence of a court–martial.[36]

20130924/24_Sep_13_Day1_Final.pdf.

[31] Established by Section 576(a)(1) of the National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, the Response Systems Panel was charged with the responsibility of conducting "an independent review and assessment of the systems used to investigate, prosecute, and adjudicate crimes involving adult sexual assault and related offenses . . . for the purpose of developing recommendations regarding how to improve the effectiveness of such systems." *See* Charter, Response Systems Panel, http://responsesystemspanel.whs.mil/public/docs/Response_Systems_Panel_Charter_(2013-2015).pdf.

[32] Military Justice Improvement Act of 2013, S. 1752, 113th Cong. (2013).

[33] *Transcript of Testimony*, *supra* note 30, at 297-98.

[34] 160 CONG. REC. S1348–49 (daily ed. Mar. 6, 2014).

[35] *See, e.g.*, *Comprehensive Resource Center for the Military Justice Improvement Act*, THE OFFICE OF KIRSTEN GILLIBRAND, http://www.gillibrand.senate.gov/mjia (last visited July 29, 2015) (stating that the Military Justice Improvement Act (MJIA) was "unfortunately filibustered again[,] meaning the fight to pass this critically needed reform will continue").

[36] FY14 NDAA, *supra* note 16, § 1702(b). This section of the FY14 NDAA amended 10 U.S.C. § 860 (Article 60, UCMJ) and curtailed the convening authority's ability to disapprove, commute, or suspend sentences in those cases where the maximum sentence

Commanders should play a role in the military justice process. There is some credence, however, to the question of how much of a role the commander should play when it comes to the disposition of offenses which are truly criminal in nature and not just military specific offenses.[37] The commission of offenses such as rape, murder, and sexual assault go beyond the mere disruption of good order and discipline; they have victims that often suffer devastating and sometimes lethal consequences. In these circumstances, it is the command's responsibility to look beyond the focused parameters of command and control, to properly execute their responsibilities as enforcers of the laws and norms of society as a whole. To do this, military justice practitioners and Congress must examine the military justice system, look at the weaknesses and failures that have been identified through the recent onslaught of public scrutiny and senior leader misconduct, and correct them. Only then will commanders truly be able to maintain good order and discipline within the Armed Forces and restore the faith in the service and the justice system that has been eroded by the failure of others to exercise sound judgment.

Piece–meal changes to the military justice system will not be effective where those changes are narrowly made without sufficient forethought into the second and third order effects of those changes on our system as a whole—the changes cannot be made to simply eliminate one possible outcome from a trial, but must be made in light of the system as a whole.[38] The current changes to Article 32 may work for the short term, but they treat the symptoms; they do not provide a cure.

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of confinement that may be adjudged does not exceed two years and the sentence adjudged does not include a punitive discharge or confinement for more than six months, except in limited circumstances when the accused has entered into a pre–trial agreement or has substantially assisted "in the investigation or prosecution of another person who has committed an offense . . . ." *Id.*

> However, even where an exception applies, if the case involves a mandatory minimum sentence of a dishonorable discharge, the convening authority may only commute the sentence to a bad conduct discharge. With respect to other mandatory minimum sentences, they may only be altered by the convening authority when the accused both enters into a pretrial agreement and substantially assists in investigating or prosecuting another offender.

Id.

[37] The author uses the phrase "truly criminal in nature" in reference to traditionally common–law crimes frequently found in the civilian justice system, such as rape, murder, larceny, etc.

[38] For example, the changes made by the FY14 NDAA now permit a victim to refuse to testify at an Article 32 investigation. FY14 NDAA, *supra* note 16, § 1702.

It is time to eliminate the Article 32 proceeding and institute the use of a military grand jury, whose determination regarding whether or not to indict an accused for an offense would be binding on the command and the convening authority. This article will examine the role of Article 32, UMCJ, will trace its history and evolution to what it has become today, and will address the need for further change to pre–trial procedures through the imposition of a grand jury system. Finally, this article will explore the means by which a military grand jury should be implemented, and the manner in which it should be utilized.

II. The Uniform Code of Military Justice

"The fundamental function of the armed forces is 'to fight or be ready to fight wars.'"[39] Because of this unique function and the commander's need to maintain good order and discipline within the ranks, a separate system to administer military justice was created.[40] Today, this system is embodied in what is known as the Uniform Code of Military Justice (UCMJ).[41] The UCMJ, together with the Manual for Courts–Martial[42] (MCM), which, in addition to containing the provisions of the UCMJ, also contains the Military Rules of Evidence (MRE) and the Rules for Courts–Martial (RCM), "establish a military member's rights and the procedures for military prosecutions."[43] Over the years, the UCMJ and the MCM have undergone a number of revisions, and the code today is not the code of years past.

A. Origins of Article 32 and the Uniform Code of Military Justice

Prior to the establishment of the uniform code in May of 1950, the conduct of servicemembers was governed by acts known as the Articles of War.[44] First established by the Second Continental Congress on June 30, 1775, the Articles of War underwent several revisions in 1776, 1806, 1874, 1916, and 1920.[45] It was through these revisions that concern for fairness in the military justice process

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[39] Curry v. Sec'y of Army, 595 F.2d 873, 877 (D.C. Cir. 1979) (citing Toth v. Quarles, 350 U.S. 11, 17 (1955)).

[40] Burns v. Wilson, 346 U.S. 137, 140 (1953) (explaining that Congress established a "Uniform Code of Military Justice applicable to all members of the military establishment" because "the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty, and the civil courts are not the agencies which must determine the precise balance to be struck in this adjustment").

[41] 10 U.S.C. §§ 801–946.

[42] MANUAL FOR COURTS–MARTIAL, UNITED STATES (2012) [hereinafter MCM].

[43] Allen v. United States Air Force, 603 F.3d 423, 425–26 (8th Cir. 2010).

[44] THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., THE BACKGROUND OF THE UNIFORM CODE OF MILITARY JUSTICE 5–9 (May 20, 1970) [hereinafter BACKGROUND OF THE UCMJ].

[45] *Id.* at 5–7.

was evident, shifting focus from the commander's authority to swiftly administer punishment, to ensuring that those accused of committing offenses were only subjected to fair and just proceedings.

1. The Articles of War of 1920

After the end of World War I, the military justice system was the subject of several studies and discussions based on a proposed revision to the Articles of War of 1916.[46] In August of 1919, the United States Senate, Subcommittee of the Committee on Military Affairs began hearings on bill S. 64, A Bill to Establish Military Justice.[47] During those hearings, emphasis was placed on how to improve the Articles of War of 1916, the lack of a comprehensive body of law, the lack of courts of review to establish *stare decisis*, and the "arbitrary power of the commanding officer" when it came to establishing and executing courts–martial.[48] Ultimately, the Articles of War of 1920 were passed into law as "Chapter II of the Army Reorganization Act" on June 4, 1920.[49]

The new articles contained significant changes to military justice procedures that were more favorable to the accused, including a new prohibition on the reconsideration by a court of an acquittal or a finding of not guilty of any specification.[50] The changes that specifically addressed an accused's rights during pre–trial procedures included the addition of the accused's right to cross–examine witnesses against him at the preliminary investigation,[51] the criminalization of unnecessary delay by the investigating officer or in bringing a case to trial,[52] and the placement of defense counsel on equal footing as prosecutors.[53] With respect to pre–trial investigation of offenses, the 1920 Articles of War prohibited any charge from being referred for trial "until after a thorough and impartial investigation" had occurred.[54]

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[46] *Id.* at 4.
[47] *Establishment of Military Justice: Hearings on S. 64 Before the Subcomm. of the S. Comm. on Military Affairs*, 66th Cong. (1919) [hereinafter *S.64 Hearings*].
[48] *Id.* at 49 (statement of Major (Retired) J.E. Runcie, U.S. Army, United States Military Academy (USMA) Instructor of Law from 1880 to 1884 and judge advocate).
[49] BACKGROUND OF THE UCMJ, *supra* note 44, at 4.
[50] *Id.* at 5 (¶ 11).
[51] *Id.* at 5 (¶ 2).
[52] *Id.* at 5 (¶ 4).
[53] *Id.* at 5 (¶ 7).
[54] Army Reorganization Act, ch. 227, 41 Stat. 759, 802 (1920). In the proposed revisions to the Articles of War of 1916, the provisions concerning pre–trial investigation were found in Article 19. *S.64 Hearings, supra* note 47, at 8. However, in the final version of the 1920 Articles of War, passed into law on June 4, 1920, in Chapter II of the Army Reorganization Act, the provisions would be found in Article 70. 41 Stat. 759, 802. Article 70 provided the following:

2. The Articles of War of 1948

After the conclusion of World War II, the Articles of War again underwent significant revision in 1948. In light of studies and reviews of the military justice system after the war, the 1948 changes came about in order to "improve the administration of military justice, to provide for more effective appellate review, to ensure the equalization of sentences, and for other purposes."[55] Under the new articles, pre–trial investigation became governed by Article 46b, which limited the requirement to conduct a pre–trial investigation to those charges that would be referred to a general court–martial[56] for trial.[57] The purpose of the investigation remained: "[T]o inquire into the truth of the matters set forth in the charges, to review the form of the charges, and to make recommendations on how to dispose of a case."[58] In addition, unlawful command influence of courts–martial or the members of a court–martial was prohibited, and accused were now permitted to have counsel present at their pre–trial investigation if they so desired.[59]

> No charge will be referred for trial until after a thorough and impartial investigation thereof shall have been made. This investigation will include inquiries as to the truth of the matter set forth in said charges, form of charges, and what disposition of the case should be made in the interest of justice and discipline. At such investigation 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 investigating officer shall examine available witnesses requested by the accused. If the charges are forwarded after such investigation, they shall be accompanied by a statement of the substance of the testimony taken on both sides.

Id.

[55] H.R. REP. NO. 80-1034, at 1 (1947).

[56] Under the UCMJ, there are three levels of court–martial: general, special, and summary. MCM, *supra* note 42, R.C.M. 201(f). A general court–martial is the most severe form of courts–martial, has jurisdiction over all persons in the military for offenses committed under the UCMJ, and can impose all lawful sentences including dishonorable discharge and death. 10 U.S.C.S. §§ 816, 818 (2014). Special courts–martial have jurisdiction to try all persons subject to the code for any noncapital offenses; however, the severity of punishment is limited. 10 U.S.C.S. §§ 816, 819 (2014). The maximum punishment authorized at a special courts–martial is a bad conduct discharge, confinement for one year, forfeiture of two–thirds pay per month for up twelve months, and reduction to E–1 (if an enlisted accused). 10 U.S.C.S. § 819 (2014). Unlike general and special courts–martial, a summary court–martial only has jurisdiction over enlisted servicemembers, consists of only one commissioned officer, may only try those who consent to trial by summary court–martial, and is utilized for minor offenses. 10 U.S.C.S. §§ 816(3), 820 (2014).

[57] Selective Service Act of 1948, ch. 625, § 222, 62 Stat. 604, 633 (1948).

[58] *Id.*

[59] *Id.*

3. Unifying the Code

Despite the changes implemented in the 1948 Articles of War, the Department of Defense (DoD) continued to examine the military justice system. In May of 1948, then Secretary of Defense (SecDef) James Forrestal appointed a committee to examine "the possibility of developing a uniform system of military justice" that would apply to all of the services.[60] The committee sought to create a code that "integrate[d] the military justice systems of the" services; "modernize[d] the existing systems" by protecting "the rights of those subject to the code and increasing public confidence in military justice without impairing" the function or performance of the military; and sought to improve the readability of the code through revision and re–arrangement of the articles.[61] Ultimately, what resulted from this committee's work was the establishment of a Uniform Code of Military Justice (UCMJ) on May 5, 1950.[62]

Codified within the initial version of the UCMJ was what is known to many modern–day military practitioners as the "Article 32 Investigation."[63] Though it had been re–numbered, the substantive provisions are largely the same as they were in the Articles of War of 1948.[64] The provisions of the newly unified code were eventually incorporated into the 1951 Manual for Courts–Martial (1951 MCM).[65] Over the next sixty years, the MCM underwent a number of changes and revisions, each incorporating various changes in the law. The pre–trial investigation of charges required by Article 32, however, remained relatively

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[60] Letter from James Forrestal, Secretary of Defense, to Chan Gurney, Chairman, U.S. Senate Committee on Armed Services (May 14, 1948), http://www.loc.gov/rr/frd/Military_Law/Morgan-Papers/Vol-I_correspondence.pdf.

[61] Committee on a Uniform Code of Military Justice, Minutes of Meeting, Aug. 18, 1948, at 9, http://www.loc.gov/rr/frd/Military_Law/Morgan-Papers/Vol-I_memoranda-minutes.pdf.

[62] On this date, the President signed into law H.R. 4080, an act to unify, consolidate, revise, and codify the Articles of War, the Articles for the Government of the Navy, and the disciplinary laws of the Coast Guard and to enact and establish a Uniform Code of Military Justice. 96 Cong. Rec. 6640 (1950), http://www.loc.gov/rr/frd/Military_Law/pdf/congr-floor-debate.pdf (appearing on page 321).

[63] *See* UCMJ art. 32 (1949), http://www.loc.gov/rr/frd/Military_Law/pdf/morgan.pdf.

[64] *Id.* (Commentary).

[65] MANUAL FOR COURTS–MARTIAL, UNITED STATES (1951) [hereinafter 1951 MCM]. The provisions concerning pre–trial investigation of charges were found in Chapter VII of the 1951 MCM. *Id.* at ¶ 34.

unchanged.[66] Even the guidance found in the 1951 MCM also remained a part of the 2012 MCM, albeit appearing now in the RCM.[67]

B. Article 32, UCMJ Prior to the FY 14 NDAA—The Pre–Trial Investigation

Prior to the FY14 NDAA amendments to Article 32, the proceeding conducted by the Article 32 officer was appropriately called an "investigation."[68] On its face, Article 32 required that the investigating officer inquire into the facts surrounding the allegations specified in the charges, that he ensure the charges were properly written, and that he make a non–binding recommendation to the convening authority on how he believed the convening authority should dispose of the case.[69] In addition to these statutory purposes, the Article 32 investigation also served as a means of discovery for the defense.[70] Though the purpose of the investigation was not to "perfect a case against the accused," it was designed "to secure information on which to determine what disposition should be made of the case."[71]

Titled as an investigation, the procedures employed in the proceeding resembled more of a condensed, loosely–governed trial than an inquiry. The robust investigation that has been utilized over the last fifty plus years was developed to protect the neutrality of the system and to ensure fairness to the accused in response to the many criticisms of the procedures in use during World War II.[72] As described by the U.S. War Department's Advisory Committee on Military Justice, two of the top criticisms of the military justice system were that

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[66] *Compare* 1951 MCM, *supra* note 65, ¶ 34 (mandating pre–trial investigation of charges in accordance with Article 32, UCMJ and providing guidance to the manner in which the investigation should be conducted), *with* UCMJ art. 32 (2012) (requiring that "no charge or specification 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").

[67] MCM, *supra* note 42, R.C.M. 405 (2012).

[68] UCMJ art. 32 (2012).

[69] *Id.* at 32(a).

[70] MCM, *supra* note 42, R.C.M. 405(a), discussion ("The investigation also serves as a means of discovery. 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."). *See also* United States v. Samuels, 27 C.M.R. 280, 286 (1959) (citations omitted) ("It is apparent that [Article 32, UCMJ] serves a twofold purpose. It operates as a discovery proceeding for the accused and stands as a bulwark against baseless charges.").

[71] *Id.*

[72] During World War II approximately 1.7 million courts–martial took place, amounting to "one third of all criminal cases tried in the nation during the same period." THE ARMY LAWYER: A HISTORY OF THE JUDGE ADVOCATE GENERAL'S CORPS, 1775–1975, at 191–92 (1975). Because a "large number of civilians" who had been drafted into the war were subjected to these courts–martials, "a loud public clamor was made for a revision of the systems of military justice . . . ." BACKGROUND OF THE UCMJ, *supra* note 44, at 6.

the "command frequently dominated the courts in the rendition of their judgment," and that the pre–trial investigations "were frequently inefficient or inadequate."[73] The committee subsequently made recommendations on how to improve the system, including that of making mandatory the appointment of defense counsel who were actually lawyers.[74] This recommendation, along with a number of others, eventually became law and made its way into the Articles of War of 1948, and the Uniform Code of Military Justice.[75]

Accordingly, a system was born wherein an officer, commonly without any legal experience,[76] was appointed to serve in a judicial capacity[77] to investigate allegations of criminal misconduct and to preside over an investigative proceeding wherein a trained prosecutor and defense counsel might square off against each other: calling witnesses; presenting evidence; making objections; and making arguments all in the hope of swaying the investigating officer to find in their favor.[78] Though mandatory prior to referring a case to general court–martial, the investigator's findings were not binding on the convening authority. Although an important step in the quest for justice, the proceeding and resulting report were sometimes nothing more than a mock trial for the government, defense, and their witnesses—and an additional piece of data for the convening authority to consider in making his final decision on whether or not to refer the case to trial. Regardless

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[73] STAFF OF WAR DEPARTMENT ADVISORY COMMITTEE ON MILITARY JUSTICE, REP.OF ADVISORY COMMITTEE ON MILITARY JUSTICE 4 (Comm. Print Dec. 13, 1946), http://www.loc.gov/rr/frd/Military_Law/pdf/ report-war-dept-advisory-committee.pdf).
[74] *Id.* at 11.
[75] Selective Service Act of 1948, *supra* note 57, at 629. It was in the 1948 Articles of War where the military justice proceedings became more judicial in nature and less of a purely command–focused tool. *Id.* In addition to the mandatory appointment of lawyer defense counsel when lawyer trial counsel were appointed to represent the government, it was made mandatory that the military judge be a judge advocate, the Judge Advocate General was given the authority to assign its officers, counsel were prohibited from acting in conflicting capacities on the same cases, and a prohibition was emplaced on reprimanding of members of a court–martial for the exercise of their duties. *Id.* at 629, 634, 639. *See also* BACKGROUND OF THE UCMJ, *supra* note 44, at 6–9.
[76] MCM, *supra* note 42, R.C.M. 405(d)(1) ("The commander . . . shall detail a commissioned officer not the accuser . . . who shall conduct the investigation and make a report of conclusions and recommendations.").
[77] United States v. Reynolds, 24 M.J. 261, 263 (C.M.A. 1987) ("As we have stated, the appointed Article 32 officer must be impartial and, as a quasi–judicial officer, is held to similar standards set for a military judge." (citing United States v. Collins, 6 M.J. 256 (C.M.A. 1979)). *See Samuels*, 27 C.M.R. at 286 (citations omitted) (stating that the Article 32 "is judicial in nature").
[78] *See generally* MCM, *supra* note 42, R.C.M. 405; U.S. DEP'T OF ARMY, PAM. 27–17, PROCEDURAL GUIDE FOR ARTICLE 32(B) INVESTIGATING OFFICER (24 July 2014) [hereinafter 2014 DA PAM. 27-17] (describing the procedures for the investigating officer to open the proceedings, take testimony, and examine evidence).

of whether or not the investigating officer found that reasonable grounds[79] existed to believe that the accused committed the alleged offenses, the convening authority was free to independently decide whether or not to refer the case to trial.[80]

The usefulness counsel make of the Article 32 investigation in preparation for trial is entirely dependent on the counsel's choice in how to use it. In some cases, the Article 32 investigation is used as a discovery tool that may help counsel involved in the case identify weaknesses and strengths for their arguments. Defense counsel may glean the government's posture from questions, and perhaps its plans to prove certain elements of the charged offenses. More importantly, the investigation gives counsel the ability and opportunity to evaluate witnesses. The outcome of the investigation may even influence the way each party approaches the future proceedings or pre–trial negotiations. An investigation that goes poorly for the government may result in the dismissal of charges, or the acceptance of an offer to plead guilty with a sentencing agreement that otherwise would not have been accepted. Conversely, an investigation that goes well for the government could result in the inducement of a guilty plea in a case that might otherwise have gone to trial and cost the military more money and time to try in front of a panel. In either event, the varying goals of the defense and trial counsel shape the way counsel approach the proceeding.

If a defense counsel believes, notwithstanding his presentation, that sufficient evidence exists for the investigating officer to reach the reasonable grounds standard, he may choose to keep his strategy close–hold and forego cross–examination, or decline to present any evidence during the investigative proceeding. On the other hand, if the defense counsel believes that he has an opportunity to portray a witness or evidence in a poor light or believes that the government lacks sufficient evidence to establish the reasonable grounds standard, he may choose to vigorously cross–examine witnesses and present his case as if he were at trial.

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[79] MCM, *supra* note 42, R.C.M. 405(j)(2)(H). The investigating officer's report of investigation must include "[t]he investigating officer's conclusion whether reasonable grounds exist to believe that the accused committed the offenses alleged." *Id.* As defined in the Manual for Courts–Martial (MCM), "reasonable grounds" is that "kind of reliable information that a reasonable, prudent person would rely on which makes it more likely than not that something is true . . . . A person who determines probable cause may rely on the reports of others." MCM, *supra* note 42 discussion; R.C.M. 302(c).

[80] MCM, *supra* note 42, R.C.M. 601. Once a convening authority finds that reasonable grounds exist to believe an accused has committed an offense, and he has received a charge sheet with specifications that allege the offense(s), the convening authority is only required to "ha[ve] received" the advice of the staff judge advocate regarding the charges before he refers them to trial. *Id.* at 601(d)(1)-(2). The convening authority's findings "may be based on hearsay in whole or in part" and he may consider information from "any source." *Id.* at 601(d)(1).

It is this latter strategy that was observed during the midshipmen's trial concerning the Naval Academy rape case. Without specific knowledge of the defense's strategy at this particular investigation, what is clear from the media coverage of the Article 32 investigation is that counsel in that case vigorously attacked the foundations of the allegations by zealously asking questions of the victim.[81] It was ultimately the midshipmen's counsels' zealous representation that cast a brighter light on the military justice system and the manner in which pre–trial investigations were conducted, and members in Congress called for change.[82]

C. Article 32, UCMJ Post FY 14 NDAA—The Preliminary Hearing

Unlike the post–World War II changes to the UCMJ that were made to protect servicemembers' and accuseds' rights, the FY14 NDAA changes to the UCMJ and the military justice process were made with an increased focus on the protection of victims and their rights. These changes occurred in the wake of the DoD's renewed focus on sexual assault and the handling of sex–related crimes in the military. One example is the recent change to Article 32. On December 26, 2014, Article 32 officially became a "preliminary hearing" rather than an "investigation," in accordance with the FY14 NDAA.[83] More than a change in title, the new article substantively altered the way military justice practitioners process pre–trial actions.

The new Article 32 no longer calls for an investigation into "the truth of the matter set forth in the charges," but rather, a "preliminary hearing's" purpose is to determine "whether there is probable cause to believe an offense has been committed and the accused committed the offense."[84] No changes were made to the preliminary hearing officer's (PHO) requirements to consider the form of the charges and to make a recommendation as to the proposed disposition of the case; however, the PHO must also make a determination as to "whether the convening authority has court–martial jurisdiction over the offense and the accused."[85]

In addition to the substantive changes to the purpose of the preliminary hearing, the new article also made procedural changes to the manner in which the hearing is conducted. These changes included a renewed emphasis on the requirement that the PHO be an impartial judge advocate certified under Article 27(b), UCMJ "whenever practicable."[86] Appointment of a non–judge advocate PHO is authorized, but only under "exceptional circumstances in which the

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[81] *See infra* p. 3; *see* FY14 NDAA, *supra* note 16.
[82] *See* FY14 NDAA, *supra* note 16.
[83] *Id.*; 10 U.S.C.S. § 832 (2014).
[84] 10 U.S.C.S. § 832(a)(2)(A) (2015).
[85] 10 U.S.C.S. § 832(a)(2)(B)-(D) (2015).
[86] 10 U.S.C.S. § 832(b)(1) (2015).

interests of justice warrant."[87] This exception does not apply when the government is prosecuting a case involving sexual assault, in which case the Article 32 PHO must be a judge advocate.[88]

Another change to the proceeding is the limitation of evidence and examination of witnesses to only that which is necessary to determine the existence, or lack thereof, of probable cause and to answer the question of jurisdiction over the offenses and the accused.[89] The accused is still permitted to present evidence in defense and mitigation and to cross–examine witnesses; however, that presentation and cross–examination is limited to the aforementioned purposes of the hearing[90] and is further limited should any military victim exercise their newly conferred right to refuse to testify at the preliminary hearing.[91] In short, the newly implemented rules were designed to eliminate the use of the preliminary hearing as a discovery tool.[92]

While the scope of the preliminary hearing was narrowed, the authority given to the PHO was expanded.[93] Under the new paradigm, the PHO has the authority to direct government counsel, over their objection, to issue *subpoenas duces tecum* to secure evidence not under the control of the government when the PHO determines that "the evidence is relevant, not cumulative, and necessary based on the limited scope and purpose of the preliminary hearing."[94] In addition, the PHO

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[87] *Id.*
[88] Memorandum from SecDef to Sec'ys of the Military Dep'ts et al., subject: Sexual Assault Prevention and Response (Aug. 14, 2013), http://www.sapr.mil/public/docs/news/SECDEF_Memo_SAPR_ Initiatives_20130814.pdf.
[89] 10 U.S.C.S. § 832(d)(4) (2015).
[90] 10 U.S.C.S. § 832(d)(2) (2015).
[91] 10 U.S.C.S. § 832(d)(3) (2015). Pursuant to this provision, "[a] victim may not be required to testify at the preliminary hearing." *Id.*
[92] *See* U.S. Dep't of Def., Report to the President of the United States on Sexual Assault Prevention and Response, Annex 4 at 19 (Nov. 25, 2014), http://www.sapr.mil/public /docs/reports/FY14_POTUS/FY14_DoD_Report_to_POTUS_Annex_4_OGC.pdf) (stating that defense counsel's use of the Article 32 hearings "to gather evidence by calling witnesses whom they would question about a broad range of topics . . . will no longer be an authorized purpose" of the hearing).
[93] Exec. Order. No. 13,696, 80 Fed. Reg. 35,783 (June 17, 2015) [hereinafter Exec. Order. 13,696] (amending Rules for Courts-Martial (RCM) 405 and 703).
[94] *Id.* at 35, 794–96 (amending RCM 405(g)). In addition to the listed determinations, the PHO must also find that the issuance of the subpoena would not cause undue delay to the preliminary hearing. *Id.* at 35, 795. While this amendment to RCM 405 provides the PHO with considerable authority, this recent change eliminated the PHO's prior authority to issue subpoenas. *See* Exec. Order. No. 13,669, 79 Fed. Reg. 34,999, 35,002 (June 18, 2014) [hereinafter Exec. Order. 13,669] (amending RCM 703(e)(2)(C)) (granting authority to issue a subpoena to either the investigating officer or "detailed counsel representing the United States at" the preliminary hearing). Though a subpoena issued by the PHO or detailed counsel may compel the production of books, papers, documents, and other data,

must use the procedures a military judge would use at trial to evaluate testimony and evidence in accordance with Military Rule of Evidence 412.[95]

These changes to the Article 32 procedures demonstrate that the pendulum has swung from a focus on protecting an accused and ensuring fairness of the system, to focusing on protecting victims and demonstrating sensitivities toward them during the process. Article 32 was initially developed as a tool to check the power of commanders, and to prevent the unfair levying of charges against an accused servicemember. The current system has become more like a federal grand jury procedure.[96]

III. The Federal Criminal Justice System and the Grand Jury

A. Constitutional Requirements

1. The Fifth Amendment

When the federal judiciary was established in 1789, there was no mention of a grand jury before which allegations of criminal misconduct would be brought to determine whether a case should proceed to trial.[97] It was not until 1791 when the Fifth Amendment to the Constitution was ratified and adopted in the Bill of Rights that the grand jury was established.[98] The Fifth Amendment provides,

> No person shall be held to answer for a capital, or otherwise infamous, crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service, in time of War, or public danger; nor shall any person be subject, for the same

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it "shall not command any person to attend or give testimony at" the preliminary hearing. Exec. Order. 13,696, *supra* note 93, at 35,803 (amending RCM 703(e)(2)(B)).

[95] Exec. Order. 13,696, *supra* note 93, at 35,796 (amending RCM 405(h)). Military Rule of Evidence (MRE) 412 concerns the general inadmissibility of evidence of a victim's sexual behavior or predisposition in sex offense cases, except under limited circumstances. MCM, *supra* note 42, MIL. R. EVID. 412 (Supp. 2014).

[96] Article 32 proceedings have frequently been likened to grand jury proceedings. *See, e.g.*, Morgan v. Perry, 142 F.3d 670, 677 (3d Cir. 1998) (stating that the Article 32 investigation is "the military counterpart to a civilian grand jury"); United States v. MacDonald, 531 F.2d 196, 209 (4th Cir. 1976) (Craven, dissenting) (referring to Appellant's Article 32 investigation as "the substantial equivalent of an open grand jury proceeding resulting in the failure to return a true bill"), *rev'd,* 435 U.S. 850 (1978); Umphreyville v. Gittins, 662 F.Supp.2d 501, 504 n.2 (W.D. Va. 2009) (noting that the Article 32 investigation is similar to the civilian grand jury). However, as discussed *infra*, in Part III, the recent changes truly do re–align the proceedings to be more like those used in the federal court system.

[97] Judiciary Act of 1789, 1 Stat. 73 (1789).

[98] U.S. CONST. amend. V.

> offence, to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.[99]

Adopted from the grand jury system developed in England between the twelfth and seventeenth centuries,[100] the grand jury system instituted by the American colonies was to serve as a guardian against prosecution motivated by "malice," "ill will," or the like.[101] Accordingly, a system was established wherein a jury would be assembled, not to determine guilt or innocence, but to determine whether sufficient evidence existed to believe a crime had occurred.

2. *The Sixth Amendment*

In addition to the requirements of the Fifth Amendment, criminal proceedings must comply with the Sixth Amendment's guarantees, including that the accused "be informed of the nature and cause of the accusation."[102]

B. Initiating a Criminal Case in the Federal Court System

Though the provisions of the Fifth Amendment specifically provide that an accused may only be held to answer for his capital or felony[103] offenses upon a "presentment or indictment of a grand jury,"[104] grand jury proceedings are not the only route that a prosecutor may take to bring a case to trial.

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[99] U.S. CONST. amend. V.

[100] Costello v. United States, 350 U.S. 359, 362 (1956) ("The grand jury is an English institution, brought to this country by the early colonists and incorporated in the Constitution by the Founders.").

[101] Wood v. Georgia, 370 U.S. 375, 390 (1962) (citations omitted) ("Historically, [the grand jury] has been regarded as a primary security to the innocent against hasty, malicious and oppressive persecution; it serves the invaluable function in our society of standing between the accuser and the accused . . . to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will.").

[102] U.S. CONST. amend. VI.

[103] The term "infamous" rather than "felony" appears in the Fifth Amendment. U.S. CONST. amend. V. However, in accordance with case law examining the term "infamous," the term "felony" has been incorporated into Rule 7 of the Federal Rules of Criminal Procedure. FED. R. CRIM. P. 7(a)(1). *See also* FED. R. CRIM. P. 7(a)(1), Notes to Subdivision (a).1 (explaining the definition of an infamous crime); DIAMOND, FEDERAL GRAND JURY PRACTICE AND PROCEDURE 49 (4th ed. 2001) (citing Green v. United States, 356 U.S. 165, 183 (1958) ("Courts have ruled that an 'infamous' crime is one punishable by more than one year imprisonment.").

[104] U.S. CONST. amend. V.

In the federal system, a criminal case generally begins when a formal accusation, usually in the form of an indictment or information,[105] is brought against a person alleging that he has committed an illegal act.[106] The Federal Rules of Criminal Procedure require in felony cases (those punishable by death or imprisonment for more than one year), that the offense be prosecuted by an indictment or information.[107] In misdemeanor and petty offense cases, trial may also proceed by complaint or, with respect to petty offenses, on a citation or violation notice.[108] An accused may waive prosecution by indictment and be prosecuted by information for offenses punishable by more than one year of imprisonment after being advised of the nature of the charge and of his rights.[109] However, an accused may not waive prosecution by indictment for a capital offense.[110]

Regardless of the method of prosecution, "the indictment or information must be a plain, concise, and definite written statement of the essential facts constituting the offenses charged and must be signed by an attorney for the government."[111] In addition, "[f]or each count, the indictment or information must give the official or customary citation of the statute, rule, regulation, or other provision of law that the defendant is alleged to have violated."[112] Once a prosecutor determines that a case must be heard by the grand jury, he proceeds by submitting and presenting his case to the impaneled jury in accordance with the responsible court's rules.[113]

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[105] An "information" is a formal charge brought by the prosecutor alone without leave of court. *See* DIAMOND, *supra* note 103, at 50.
[106] United States v. Allied Asphalt Paving Co., 451 F.Supp. 804 (N.D. Ill. 1978) "The basic purpose of an indictment or information is to clearly apprise a defendant of the charges and what he must be prepared to meet." *Id.*
[107] FED. R. CRIM. P. 7(a)(1).
[108] FED. R. CRIM. P. 7(a)(2), 58(b)(1).
[109] FED. R. CRIM. P. 7(a)(2).
[110] FED. R. CRIM. P. 7(b). *See also* United States v. Hartwell, 448 F.3d 707, 716 (4th Cir. 2006) (holding that noncompliance with the provision of FED. R. CRIM. P. 7(b) which "does not permit a defendant charged with a capital crime to waive indictment" did not deprive the court of subject–matter jurisdiction); Matthews v. United States, 622 F.3d 99 (2d Cir. 2010) (holding that an un–waivable right to indictment by a grand jury "exists only where the charging instrument exposes the defendant to the risk of capital punishment"), *cert. denied*, 2011 U.S. LEXIS 1138 (2011).
[111] FED. R. CRIM. P. 7(c)(1).
[112] *Id.*
[113] In accordance with Federal Rule of Criminal Procedure 6(a)(1), the district courts have the authority to summon "one or more grand juries" as "the public interest requires," FED. R. CRIM. P. 6(a)(1); *See also* Petition of A & H Transportation, Inc., 319 F.2d 69, 71 (4th Cir. 1963), holding,

> The authority to convene or discharge a grand jury is vested in the District Court. Its exercise of discretion to convene, or not to convene,

C. The Grand Jury

1. Impanelment

When a grand jury is seated, it must have at least sixteen, but no more than twenty–three members.[114] During selection, "the court may also select alternate jurors."[115] The selection of the grand jury members must comply with The Jury Selection and Service Act,[116] which requires that the juries be "selected at random from a fair cross section of the community in the district or division wherein the court convenes."[117] The exclusion of grand jurors on the basis of "race, color, religion, sex, national origin, or economic status" is prohibited.[118] Generally, individuals are qualified to serve on a grand jury provided they are citizens of the United States; are eighteen years old; have resided in the judicial district for which the jury is being impaneled for a period of one year; can sufficiently read, write, speak, and understand the English language; are mentally and physically able to "render satisfactory jury service" and do not have state or federal charges pending against them for a crime punishable by more than one year of imprisonment or have not been convicted of the same for which their civil rights have not been restored.[119] Challenges to the composition of the jury may be made by "[e]ither the government or a defendant . . . on the ground that it was not lawfully drawn, summoned, or selected, and [either] may challenge an individual juror on the ground that the juror is not legally qualified."[120]

2. Procedures

> a special grand jury, or to discharge a grand jury, is not reviewable on appeal, and a Court of Appeal cannot by mandamus, or any other extraordinary writ, inject itself into the discretionary area reserved to the District Court.

Cert. denied, 375 U.S. 924 (1963); *See generally* 18 U.S.C. § 3331 (giving authority to the district courts to summon and impanel special grand juries); DIAMOND, *supra* note 103, at 10–11 (noting that "the court" referenced in Federal Rule of Criminal Procedure 6(a)(1) "is the federal district court, which has virtually unreviewable discretion respecting grand jury impanelment").

[114] FED. R. CRIM. P. 6(a)(1).

[115] *Id.*

[116] 28 U.S.C. §§ 1861–1878.

[117] 18 U.S.C. § 1861.

[118] 18 U.S.C. § 1862. *See also* Vasquez v. Hillery, 474 U.S. 254, 264 (1986) (affirming the grant of *habeas corpus* relief where an accused was convicted in lawfully conducted state court proceedings, but only after indictment by a grand jury which was selected through the improper use of racial discrimination).

[119] 18 U.S.C. § 1865.

[120] FED. R. CRIM. P. 6(b)(1).

Once impaneled, the court will appoint a foreperson (and a deputy foreperson to act in the foreperson's absence) who is responsible for recording the number of jurors concurring in every indictment and filing the record with the clerk when the court so orders.[121] In addition, the foreperson may administer oaths and affirmations and sign all indictments.[122] Jurors are then sworn, usually by the clerk of the court, and take an oath to "inquire diligently and objectively into all federal crimes committed within the district about which they have or may obtain evidence, and to conduct such inquiry without malice, fear, ill will, or other emotion."[123] The judge then provides instructions to the jurors and advises them of their obligations and duties.[124]

It is the grand jury's task to "determine whether the person being investigated by the government shall be tried for" whatever crime it is he is suspected of committing.[125] To do so, the grand jury receives evidence and information, usually presented by the "attorney for the government."[126] In order to take evidence, a quorum of sixteen members of the grand jury must be present.[127] When quorum is met, the attorney for the government usually presents the evidence, in whatever form it may be, to the grand jury.[128] If the grand jury believes additional information is necessary, it may call more witnesses.[129] Witnesses that are called are sworn to their testimony and both the government attorney and the grand jurors are able to ask questions.[130]

During the presentation of evidence, the only personnel allowed to be present are the "attorneys for the government, the witness being questioned, interpreters when needed, and a court reporter or an operator of a recording device."[131]

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[121] FED. R. CRIM. P. 6(c).
[122] *Id.*
[123] Admin. Office of the U.S. Courts, *Handbook for Federal Grand Jurors* 7, http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/FederalCourts/Jury/grand-hand book.pdf (last visited July 29, 2015) [hereinafter Handbook].
[124] *Id.* This is also known as the "Charge to the Grand Jury." *Id.* at 16.
[125] *Id.* at 4.
[126] FED. R. CRIM. P. 6(d). "Attorney for the government" is the attorney general, an authorized assistant of the attorney general, a U.S. attorney, an authorized assistant U.S. attorney, and certain other persons. FED. R. CRIM. P. 1(b). *See also* 28 U.S.C. § 547 (giving U.S. attorneys the responsibility to "prosecute for all offenses against the United States"); 28 U.S.C. § 542 (giving assistant U.S. attorneys the authority to conduct proceedings in the district of their appointment).
[127] Handbook, *supra* note 123, at 7.
[128] *Id.* at 8.
[129] *Id.*
[130] *Id.*
[131] FED. R. CRIM. P. 6(d).

Notably, the accused is not present during the grand jury proceedings[132] unless called to testify, but has no right to present testimony.[133]

Grand juries are not bound by the rules of evidence, with the exception of privileges,[134] and an indictment may be issued based solely on hearsay evidence.[135] However, hearsay evidence may not be presented in a manner that "misleads the grand jury into thinking it is receiving firsthand testimony when it is in fact receiving hearsay" nor may hearsay evidence be solely relied upon "if there is a high probability that the defendant would not have been indicted had only nonhearsay evidence been used."[136]

During deliberations and voting, "[n]o person other than the jurors, and any interpreter" may be present.[137] Upon assembly for deliberation, and after all unauthorized personnel have vacated the room,

> [t]he foreperson will ask the grand jury members to discuss and vote upon the question of whether the evidence persuades the grand jury that a crime has probably been committed by the person being investigated by the government and that an indictment should be returned. Every grand juror has the right to express his or her view of the matter under consideration, and grand jurors should listen to the comments of all their fellow grand jurors before making up their minds. Only after each

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[132] Handbook, *supra* note 123, at 10 ("Normally, neither the person being investigated by the government nor any witness on behalf of that person will testify before the grand jury.").

[133] United States v. Smith, 552 F.2d 257 (8th Cir. 1977); United States v. Gardner, 516 F.2d 334 (7th Cir. 1975), *cert. denied*, 423 U.S. 861 (1975); United States v. Niedelman, 356 F. Supp. 979 (S.D.N.Y. 1973). *See also* U.S. Department of Justice, *U.S. Attorney's Manual*, Offices of the U.S. Attorneys 9-11.152, http://www.justice.gov /usao/eousa /foia_reading_room/usam/title9/11mcrm.htm#, 9-11.152 (stating that the U.S. attorney has "no legal obligation to permit such witnesses to testify" but a "refusal to do so can create the appearance of unfairness").

[134] FED. R. EVID. 1101(d)(2); United States v. Calandra, 414 U.S. 338 (1974); United States v. Ortiz, 687 F.3d 660 (5th Cir. 2012).

[135] United States v. Bowie, 618 F.3d 802 (8th Cir. 2010), *cert. denied*, 131 S. Ct. 954 (2011); United States v. Steele, 685 F.2d 793, 806 (3rd Cir. 1982) (citation omitted) ("We have held that an indictment may be based upon hearsay evidence."); Costello v. United States, 350 U.S. 359, 362-63 (1956) (holding that "neither the Fifth Amendment nor any other constitutional provision prescribes the kind of evidence upon which grand juries must act" and that indictment based entirely on hearsay evidence was not in violation of Fifth Amendment protections).

[136] United States v. Restrepo, 547 Fed. Appx. 34, 44 (2d. Cir. 2013) (quoting United States v. Ruggiero, 934 F.2d 440, 447 (2d Cir. 1991)).

[137] FED. R. CRIM. P. 6(d)(2).

> grand juror has been given the opportunity to be heard will the vote be taken.[138]

In order to indict, at least twelve jurors must concur.[139] This is also known as a "true bill."[140] If twelve jurors do not concur, then "the grand jury vote a 'no bill,' or 'not a true bill.'"[141] As previously discussed, the determination of whether the grand jurors vote a "true bill" or "no true bill" depends on whether they are convinced that probable cause exists to believe the person being investigated has committed the crime.[142]

The indictment must contain a "plain, concise, and definite written statement of the essential facts constituting the offense charged and must be signed by an attorney for the government."[143] When reviewing an indictment for sufficiency, the court will evaluate it by "reading it as a whole, giving practical effect to its language."[144] An indictment is sufficient if it:

> contains the elements of the charged offense in sufficient detail (1) to enable the defendant to prepare this defense; (2) to ensure him that he is being prosecuted on the basis of the facts presented to the grand jury; (3) to enable him to plead double jeopardy; and (4) to inform the court of the alleged facts so that it can determine the sufficiency of the charge.[145]

"The return of an indictment formally commences a criminal prosecution."[146] Because the indictment acts as a charging instrument, it has two purposes: "to apprise the accused of the charges against him and to describe the crime with which he is charged with sufficient specificity to enable him to protect against

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[138] Handbook, *supra* note 123, at 12.
[139] FED. R. CRIM. P. 6(f).
[140] Handbook, *supra* note 123, at 5.
[141] *Id.*
[142] United States v. Marcucci, 299 F.3d 1156 (9th Cir. 2002) (citations omitted) ("The Supreme Court has repeatedly emphasized that the grand jury protects the individual by requiring probable cause to indict."); Branzburg v. Hayes, 408 U.S. 665, 686-87 (1972) ("[T]he ancient role of the grand jury . . . has the dual function of determining if there is probable cause to believe that a crime has been committed and of protecting citizens against unfounded criminal prosecutions."). *See also* Admin. Office of the U.S. Courts, *Model Grand Jury Charge*, US COURTS, http://www.uscourts.gov/FederalCourts/JuryService /ModelGrandJuryCharge.aspx (2005) [hereinafter Model Charge]; Handbook, *supra* note 123, at 18 (establishing the probable cause standard as "finding necessary in order to return an indictment against the person being investigated" for the alleged crime).
[143] FED. R. CRIM. P. 7(c).
[144] DIAMOND, *supra* note 103, at 52 (citing United States v. McNeese, 901 F.2d 585, 602 (7th Cir. 1990) (additional citations omitted)).
[145] United States v. Bernhardt, 840 F.2d 1441, 1445 (9th Cir. 1988) (citation omitted), *cert. denied sub nom.* McCarthy v. United States, 484 U.S. 954 (1988).
[146] DIAMOND, *supra* note 103, at 49.

future jeopardy for the same offense."[147] Provided the indictment (or information for that matter) complies with the sufficiency requirements discussed *infra*, it will fulfill the Sixth Amendment's requirement that the defendant be informed of the nature of the charges levied against him.[148]

IV. The Right Time to Change

A. Dynamic Military Justice and Uncertain Times

On May 3, 2013, the DoD gave notice that it was establishing the Response Systems to Adult Sexual Assault Crimes Panel (Response Systems Panel or RSP).[149] The RSP was given the task of providing "recommendations on the effectiveness of the investigation, prosecution, and adjudication of crimes involving adult sexual assault and related offenses" covered by Article 120, UCMJ, 10 U.S.C. § 920.[150] One of the required tasks was to compare the "military and civilian systems for the investigation, prosecution, and adjudication" of these crimes.[151]

Throughout the twelve months following its establishment, "the RSP held [fourteen] days of public meetings," and along with its subcommittees conducted an additional sixty–five "subcommittee meetings and preparatory sessions."[152] On June 27, 2014, the RSP submitted its report to the SecDef and the members of both the Senate and House Armed Services Committees.[153] The panel made 132

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[147] United States v. Haldeman, 559 F.2d 31 (D.C. Cir. 1976) (citing Hamling v. United States, 418 U.S. 87, 117 (1974), *rehearing denied*, 419 U.S. 885 (1975)); Russell v. United States, 369 U.S. 749, 763-64 (1962); United States v. Debrow, 346 U.S. 374, 377-78 (1953)).

[148] *Russell*, 369 U.S. at 761. *Accord* United States v. Higgs, 353 F.3d 281, 296 (4th Cir. 2003) ("In conjunction with the notice requirement of the Sixth Amendment, the Indictment Clause provides two additional protections: the right of a defendant to be notified of the charges against him through a recitation of the elements, and the right to a description of the charges that is sufficiently detailed to allow the defendant to argue that future proceedings are precluded by a previous acquittal or conviction."), *cert. denied*, 2004 U.S. LEXIS 7689 (2004).

[149] Notice of Establishment of the Response Systems to Adult Sexual Crimes Panel, 78 Fed. Reg. 25, 972 (May 3, 2013) [hereinafter RSP]. The RSP was established pursuant to the National Defense Authorization Act for Fiscal Year 2013 (FY13 NDAA). *See* FY13 NDAA, PUB L. NO. 112-239, § 576, 126 Stat. 1632 (2013).

[150] Notice of Establishment of the Response Systems to Adult Sexual Crimes Panel, 78 Fed. Reg. 25, 972 (May 3, 2013).

[151] *Id.*

[152] REPORT OF THE RESPONSE SYSTEMS TO ADULT SEXUAL ASSAULT CRIMES PANEL at 1 (June 27, 2014) [hereinafter RSP REPORT], http://responsesystemspanel.whs.mil/Public/docs/Reports/00_Final/00_ Report_Final_20140627.pdf.

[153] *Id.*

recommendations.[154] One such recommendation asked the SecDef to consider directing "the Military Justice Review Group or Joint Service Committee to evaluate if there are circumstances when a general court–martial convening authority should not have authority to override an Article 32 investigating officer's recommendation against referral of an investigated charge for trial by court–martial."[155] In other words, the RSP recommended that consideration be given to whether the convening authority should be bound by the Article 32 officer's decision under certain circumstances. On December 15, 2014, the SecDef issued his decision concerning the various recommendations made by the RSP.[156] He approved the RSP's recommendation to evaluate the possibility of a binding Article 32 officer's recommendation, and alteration of the plea–bargaining process.[157]

The review of the military justice system did not end with the RSP, and the examination of the military justice system continues in earnest. On June 27, 2014, the DoD established the Judicial Proceedings Panel (JPP) to "conduct an independent review and assessment of judicial proceedings conducted under the [UCMJ] involving adult sexual assault and related offenses since the amendments made by section 541 of the [FY12 NDAA] for the purpose of developing recommendations for improvements to such proceedings."[158] Among the many issues up for the panel's review, one included a review and assessment of "those instances in which prior sexual conduct of [an alleged sexual assault victim] was considered" during an Article 32, UCMJ investigation and "any instances in which prior sexual conduct was determined to be inadmissible."[159] Since its establishment, the JPP has held thirteen public meetings with various officials, including DoD counsel, active and retired military law practitioners, civilian experts, numerous professors, and other legal scholars.[160]

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[154] *Id.*
[155] RSP REPORT, *supra* note 152, at 49 (listing RSP Recommendation 116). Among the multitude of other recommendations, the RSP recommended that the military plea–bargaining process be reviewed (at Recommendation 117) and requested that the possibility and ramifications of involving a military judge earlier in the proceedings be evaluated (at Recommendation 118). *Id.*
[156] Memorandum from SecDef, to Sec'ys of the Military Dep'ts. et al., subject: DoD Implementation of the Recommendations of the Response Systems to Adult Sexual Assault Crimes Panel (Dec. 15, 2014) [hereinafter RSP Recommendation Implementation], http://jpp.whs.mil/Public/docs/03_TopicAreas/01General_Information/05_DoDResponse RSPRecommendations_20141215.pdf.
[157] *Id.* at enclosure 2.
[158] Notice of Establishment of the Judicial Proceedings Panel, 79 Fed. Reg. 36,480 (June 27, 2014) [hereinafter JPP].
[159] *Id.*
[160] Judicial Proceedings Panel, http://jpp.whs.mil/ (Meetings; Transcripts) (last visited Sept. 16, 2015).

In addition to the RSP and the JPP, the SecDef directed the DoD General Counsel to conduct a "comprehensive review of the [UCMJ] and the military justice system."[161] In turn, the General Counsel established the Military Justice Review Group (MJRG) to carry out this task.[162] At the time of this article, this group continues to evaluate the military justice system. The General Counsel's report is expected to include an analysis of the UCMJ, the MCM, and recommendations for "any appropriate amendments."[163]

Though the RSP and JPP were established to review the DoD's procedures when processing sexual assault cases (and the treatment of victims of sexual assault), the changes resulting from their recommendations will have a much broader effect. The recommended changes are only a starting point, and may affect how *all* military justice cases are processed and tried. Accordingly, the time is ripe to implement and enact further change and correction to the system. To be sure, one only need review the recent and wide–ranging changes to the UCMJ and the MCM that have forced counsel to reacquaint themselves with the law, adjust their tactics, and modify their procedures.

The FY14 NDAA enacted thirty–six provisions concerning sexual assault.[164] As described by the RSP, "[c]ollectively, the thirty–six sexual assault related provisions included in the FY14 NDAA represent the most comprehensive modification of the military justice system in decades."[165] The proposed and instituted changes to the U.S. Code and the MCM have been extensive and challenging for all involved in the process. The time is ripe for further change, considering that the MJRG and Joint Service Committee are now evaluating whether binding decisions by Article 32 officers have a place within military judicial process, and whether it is feasible and advisable to allow military judges to take a more expansive and earlier interest in the proceedings. Congress and the DoD have a rare opportunity to make a number of changes at once. Making the changes all at one time will avoid repeated changes in the future. It will also meet both the requirement to improve the manner in which the military investigates and

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[161] Memorandum from Sec'y of Def., to Sec'ys of the Military Dep'ts et. al., subject: Comprehensive Review of the Uniform Code of Military Justice (Oct. 18, 2013).
[162] Notice of Comprehensive Review of the Military Justice System, Establishment of Military Justice Review Group, 79 Fed. Reg. 28,688 (May 19, 2014) [hereinafter MJRG].
[163] Memorandum from Sec'y of Def., to Sec'ys of the Military Dep'ts et. al., subject: Comprehensive Review of the Uniform Code of Military Justice (Oct. 18, 2013) [hereinafter Comprehensive Review of the UCMJ]. The Military Justice Review Group's (MJRGs) report for recommending changes to the UCMJ was due on March 25, 2015, and the report recommending changes to the MCM was due on September 21, 2015. *See* Notice of Revision to MJRG, *supra* note 162, 79 Fed. Reg. 52,306 (Sept. 3, 2014). The legislative proposal report on the UCMJ was submitted to the General Counsel on March 25, 2015 and is undergoing "internal DoD and Executive Branch review." MJRG, http://www.dod.gov /dodgc/mjrg.html (last visited Sept. 16, 2015).
[164] FY14 NDAA, *supra* note 16.
[165] RSP REPORT, *supra* note 152, at 58.

prosecutes offenses (not just those pertaining to sexual assault), and the need to maintain impartiality and fairness toward those accused of offenses. Additionally, it will fulfill the mandate to improve our treatment of victims, with respect to privacy, assistance, and the demand for justice.

B. The Article 32 Preliminary Hearing and the Grand Jury: A Comparison

The evolution of the Article 32 to a preliminary hearing rather than an investigation has aligned the proceeding, to some extent, with the federal grand jury system. The most similar function between the two proceedings is their established purpose: to determine whether or not probable cause exists to believe an accused committed an offense.[166] Of course, the processes used by each are vastly different. In a federal grand jury, the accused does not have the right to be present at the proceeding,[167] as compared with Article 32, where the accused not only has the right to be present, but to be present with counsel, to make a statement, to hear witness testimony, and to cross–examine witnesses.[168] Some of these procedural differences can be attributed to the posture of the case with respect to timing. Unlike a subject in a federal grand jury proceeding, a subject is charged or placed under indictment only after the grand jury returns a true bill, whereas the servicemember–accused has already been charged when he is brought before the Article 32 PHO.[169]

While there are a number of differences, such as the absence of the accused and the requirement for secrecy during the grand jury proceeding, [170] substantively, the two proceedings are generally the same. In both forums, evidence must be presented to the jurors or PHO to determine the existence, or lack thereof, of probable cause; the rules of evidence are generally inapplicable;[171]

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[166] *Compare* 10 U.S.C.S. § 832(a)(2)(A) (2015) *with* Model Charge, *supra* note 142, *and Kaley*, 134 U.S. at 1098.

[167] Handbook, *supra* note 123, at 10.

[168] 10 U.S.C.S. § 832(d) (2015).

[169] MCM, *supra* note 42, R.C.M. 403–404. Within the military, the authority to dispose of charges rests with those authorized to convene courts–martial or to administer non–judicial punishment under Article 15, UCMJ. MCM, *supra* note 42, R.C.M. 401. Once a commander authorized to convene courts–martial has received the charges, he may direct a pre–trial investigation under RCM 405. MCM, *supra* note 42, R.C.M. 403–404.

[170] FED. R. CRIM. P. 6(e). For a complete history and the purpose, relevance, and concern regarding a grand jury's entitlement to secrecy, *see* Mark Kadish, *Behind the Locked Door of an American Grand Jury: Its History, Its Secrecy, and Its Process*, 24 FLA. ST. U.L. REV. 1 (1996).

[171] *Compare* Exec. Order. 13,696, *supra* note 93 (amending RCM 405(h)) (providing that the "Military Rules of Evidence do not apply" to the preliminary hearing with the exceptions of privilege and MRE 412), *with* FED. R. EVID. 1101(d)(2) (rules of evidence do not apply "except for those on privilege" to grand–jury proceedings), *and* United States v. Calandra, 414 U.S. 338, 353 (1974) (citations omitted) (stating that "absent some recognized privilege of confidentiality, every man owes his testimony" at a grand jury

the jurors or PHO may rely on hearsay evidence; and evidence may be obtained in both forums by subpoena.[172] With only a few substantive differences, the issue then becomes how to establish the military grand jury (MGJ) and how to fit it into the military justice system.

V. The Military Grand Jury

The Fifth Amendment does not require the use of a grand jury to indict servicemembers for offenses, but it also does not prohibit it. As stated by the Court of Appeals for the Armed Forces, "[t]he Fifth Amendment expressly excludes 'cases arising in the land or naval forces' from the requirement for indictment by grand jury. Nevertheless, Article 32, UCMJ, 10 USC § 832 was intended to provide a substitute for the grand jury."[173] Though the grand jury is not required in military proceedings, the substitution of an MGJ for the Article 32 will be more beneficial for the command, and fairer to accused and victims alike. Proper procedural and functional implementation of the MGJ is the key to its success.

A. Procedural Posture

1. The Military Grand Jury's Function

Like the current Article 32 preliminary hearing, the MGJ will determine whether or not probable cause exists to believe an accused committed an offense.[174] Unlike the PHO, however, the MGJ will not have the requirements to make a recommendation as to the proposed disposition of the case or to make a determination as to "whether the convening authority has court–martial jurisdiction over the offense and the accused."[175] The assessment of whether a convening authority has jurisdiction over an offense or an accused, as well as the recommendations concerning the proper disposition of offenses, are matters more properly within the purview of the legal advisor to the respective commander, not the MGJ or a PHO.[176] Moreover, court–martial jurisdiction is challengeable

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proceedings), *and* United States v. Ortiz, 687 F.3d 660 (5th Cir. 2012) (discussing the applicability of FED. R. EVID. 1101(d)(2) and explaining that the "rule against hearsay does not apply in grand–jury proceedings").

[172] *See* discussion *infra* Parts II.C. and note 94; GRAND JURY 2.0—MODERN PERSPECTIVES ON THE GRAND JURY 5 (Roger A. Fairfax, Jr. ed., 2011) ("[A] grand jury can subpoena the owner of records or other evidence without showing of probable cause and—absent a valid claim of privilege—the evidence must be produced.") (citations omitted).

[173] United States v. Loving, 41 M.J. 213, 296-97 (C.A.A.F. 1994).

[174] 10 U.S.C.S. § 832(a)(2)(A) (2015).

[175] 10 U.S.C.S. § 832(a)(2)(B)–(D) (2015).

[176] *See generally* 10 U.S.C.S. § 3037(d) (2014) (providing that officers and DoD employees may not interfere with "the ability of judge advocates of the Army" assigned to

regardless of the assessment made prior to trial and can continue to be litigated during the court–martial process, both at trial and on appeal.[177] Thus, any determination made by the MGJ regarding jurisdiction is functionally irrelevant.

2. The Military Grand Jury's Place in the Process

Having defined the purpose of the MGJ, the next issue is *where* the MGJ will fit in the military justice process. Given that the MGJ would replace the Article 32, it is a natural consequence that the MGJ will be utilized in the post–preferral process, procedurally situated where the preliminary hearing is now. To do otherwise would involve a number of substantive changes to the military justice process that are unnecessary and would likely not be well–received.

For instance, under the current pre–trial model utilized in the military, the preliminary hearing does not occur until after an accused has been charged.[178] Once charged, the case is only presented to a PHO if the case is likely to be referred to a general court–martial.[179] If the entire federal charging system were to be adopted, then a command wishing to bring charges against an accused for a felony offense would need to present the allegations through the trial counsel to

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military units to give "independent legal advice" to those commanders); U.S. DEP'T OF ARMY, FIELD MANUAL 1-04, LEGAL SUPPORT TO THE OPERATIONAL ARMY para. 5-2 (18 Mar. 2013) [hereinafter FM 1-04] ("The SJA advises commanders concerning administrative boards, the administration of justice, the disposition of alleged offenses . . . and action on courts–martial findings and sentences.").

[177] *See, e.g.*, Hennis v. Hemlick, 666 F.3d 270 (4th Cir. 2012). *Hennis* presented a number of unique jurisdictional issues that are illustrative of this point. In *Hennis,* the servicemember–accused was on active duty in the Army when he faced civilian trial on three separate occasions for the rape and murder of a woman and two of her children. *Id*. Hennis was acquitted of the charges at the third trial. *Id.* Ultimately, Hennis returned to military service and retired, but was subsequently court–martialed for the offenses after being involuntarily placed on active duty. *Id.* Prior to the commencement of the trial, Hennis's case was presented to an Article 32 investigating officer who recommended that the case proceed to trial. *See Trial Recommended in 1985 Triple Murder Case*, MILITARY TIMES (Jun. 10, 2007), http://archive.militarytimes.com/article/20070610/NEWS/706100311/Trial-recommended-1985-triple-murder-case. Despite the Article 32 review, the issue concerning jurisdiction continued to be litigated pre–trial, during trial, and post–trial. *Hennis*, 666 F.3d 270.

[178] A person is not "charged" in the military until an accuser signs a charge sheet containing the charges and specifications describing the offenses the accused is alleged to have committed. MCM, *supra* note 42, R.C.M. 307. An "accuser" is defined in the UCMJ as "a person who signs and swears to charges, any person who directs that charges nominally be signed and sworn to by another, and any other person who has an interest other than an official interest in the prosecution of the accused." 10 U.S.C. § 801.

[179] 10 U.S.C.S. § 832(a)(1) (2015).

the grand jury, which would then determine whether to indict the accused for the offense.[180]

Adopting such an approach would not simply change the vehicle through which the accused is protected from the levying of unwarranted criminal charges, it would completely alter the road on which that vehicle travels. This is because the implementation of the grand jury system in the military as either the charging mechanism or a procedural check after charges are preferred would not displace the current process utilized for charging offenses. By necessity then, the implementation of the MGJ as the charging body would create a second charging system running parallel with that utilized for non–MGJ offenses. Creating such additional hurdles is unnecessary because the end result (a grand jury determination concerning probable cause) would be reached regardless of when the grand jury proceeding is held. To adopt an entirely new charging process would create new logistical issues, leading to additional opportunities for error and the introduction of unnecessary appellate issues.

Allowing the MGJ to be the charging vehicle would impact the command's ability to plea bargain (or at least change the manner in which it is done).[181] By initially charging an accused based on the command's determination that sufficient evidence exists to believe the accused committed an offense, a commander is able to notify the accused of the alleged offenses, afford him the opportunity to seek legal counsel, and to negotiate with said counsel concerning possible courses of action. Utilizing the MGJ as the charging instrument would consume valuable time that is currently utilized by commanders to negotiate pleas. This translates into a waste of time and money for the government, and interferes with prompt closure for victims. In addition, such a process has the potential to be prejudicial to good order and discipline because delay in taking action against an accused while awaiting an MGJ's decision may appear to be a lack of concern (or action) by the commander of the unit.[182] This would send the

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[180] FED. R. CRIM. P. 6.

[181] The author takes no position on the fairness of utilizing a procedural right as a bargaining tool during military justice proceedings, nor is it the focus of this article. However, the fact remains that plea bargaining has its place in the military justice process, so much so that the right of an accused to waive his Article 32 preliminary hearing is plainly stated in the MCM, as is the ability to include that waiver as part of a pre–trial agreement. *See* 10 U.S.C.S. § 832(a)(1) (2015); MCM, *supra* note 42, R.C.M. 705(c)(2)(E) (providing that a pre–trial agreement may include a promise to waive, among other things, the Article 32 investigation); *See also* Major Michael E. Klein, *The Bargained Waiver of Unlawful Command Influence Motions: Common Sense or Heresy?* 3, *in* ARMY LAW., (Feb. 1998), (discussing the role of plea bargaining).

[182] "Ensuring the proper conduct of soldiers is a function of command." U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY para. 4-4a. (6 Nov. 2014) [hereinafter AR 600-20]. In order to maintain good order and discipline, when exercising their authority, commanders must do so "promptly, firmly, courteously and fairly." *Id.* para. 4-6a.

wrong message to other servicemembers and observers.[183] Such a result would be unacceptable, would be detrimental to the command, and would be an injustice to victims. By placing the MGJ in the same procedural position as the Article 32, these additional problems would be avoided.

For these procedural reasons, and for the preservation of good order and discipline, commanders must retain their authority to impose punishment and convene courts–martial, especially where it concerns military–specific offenses.[184] The purpose of the proposed implementation of the grand jury proceeding is not to remove authority from commanders, but to remove burdens. At its core, the commander's authority to convene general and special courts–martial must remain in place because only certain offenses would be subject to MGJ review. The remainder of the offenses, including those concerning strictly military infractions such as disrespect, absence without leave, or adultery, would still need a venue and procedure under which commanders can adjudicate and dispose of offenses. Furthermore, a convening authority would still be necessary under the proposed system to appoint the members of the MGJ.

3. Jurisdictional Attributes—When the Grand Jury Procedures Apply

The mechanics of implementing a grand jury in the military depends on the span of offenses that require MGJ review. Under current court–martial procedures, "[n]o charge or specification may be referred to a general court–martial for trial until completion of a preliminary hearing, unless such hearing is waived by the accused."[185] Because the MGJ would take the place of the Article 32, the implementation of the MGJ would have no effect on this procedural requirement and any offense for which the command wished to proceed to general court–martial would have the same requirement.

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[183] The use of the Military Grand Jury (MGJ) in this manner could also be viewed by some as usurping the commander's authority to charge a person with a crime. However, such an argument fails to account for the purpose of the MGJ, or even the preliminary hearing for that matter—to ensure that probable cause exists for an alleged offense, and to relieve commanders of shouldering the moral burden of having to determine if a weak or baseless case should proceed to trial based on an allegation alone. Moreover, regardless of who charges the accused, the MGJ would still review the case, and only one of two outcomes would occur; a true bill or no true bill.

[184] *See, e.g.*, *RSP Role of the Commander Subcommittee, Report to the Response Systems Panel*, WHS.MIL, Slide 12 (May 6, 2014), http://responsesystemspanel.whs.mil/Public/docs/Reports/02_RoC/ROC_Report_Slides_20140506_Final.pdf (recommending against further modification to the authority vested in commanders also designated as court–martial convening authorities); Jim Garamone, *Commanders Should Retain Prosecution Authority, Leaders Say*, U.S. DEP'T OF DEF. (July 18, 2013), http://www.defense.gov/News/NewsArticle.aspx?ID=120476.

[185] 10 U.S.C.S. § 832(a)(1) (2015).

As previously discussed, grand jury proceedings are not the only route a U.S. attorney takes when bringing charges to the courthouse doors. The Fifth Amendment does not require that every crime be taken to a grand jury for indictment before an accused is tried for offenses.[186] Instead, only offenses punishable by death or imprisonment for more than one year must be prosecuted by indictment.[187] Even then, an accused can waive prosecution for indictment and a prosecutor can proceed to trial by information, provided the case is not a capital one.[188] This is similar to the current statute governing military process that, although requiring that every charge and specification proceeding to trial by general court–martial be reviewed at a preliminary hearing, allows the accused to waive his right to an Article 32 hearing.[189]

Accordingly, the MGJ should be instituted in a similar manner to that imposed by Rule 7 of the Federal Rules of Criminal Procedure.[190] At present, there are over 100 offenses, or variations thereof, listed in the MCM with a possible punishment of more than one year of imprisonment.[191] The majority of these offenses concern serious criminal misconduct including: desertion in time of war;[192] assault consummated by a battery;[193] wrongful use of controlled substances;[194] murder and related offenses;[195] rape;[196] sexual assault;[197] and robbery.[198] This may initially appear to increase the number of offenses that are required to go before a grand jury, thereby adding to the burden on potential grand jurors and potentially hampering the speed with which a command could prosecute crimes. However, additional implementations and changes to the code, discussed below, would remedy these potential issues with little effect on the commander's ability to maintain good order and discipline.

First, as previously discussed, an accused would still be able to waive his appearance at a grand jury. Second, to minimize the number of offenses required to go before the grand jury, a substantive review of the offenses and their maximum punishments should be conducted. Those offenses that do not warrant lengthy prison sentences, or those for which extended prison sentences are rarely, if ever, adjudged should have their maximum punishment reduced.

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[186] U.S. CONST. amend. V.
[187] FED. R. CRIM. P. 7(a).
[188] FED. R. CRIM. P. 7(b).
[189] MCM, *supra* note 42, R.C.M. 405(k), *amended by* Exec. Order. 13,696, *supra* note 93.
[190] FED. R. CRIM. P. 7.
[191] MCM, *supra* note 42, Appendix 12.
[192] MCM, *supra* note 42, pt. IV, ¶ 9 (2012), *amended by* Exec. Order. 13,696, *supra* note 93.
[193] MCM, *supra* note 42, pt. IV, ¶ 54 (2012).
[194] MCM, *supra* note 42, pt. IV, ¶ 37 (2012).
[195] MCM, *supra* note 42, pt. IV, ¶ 43 (2012).
[196] MCM, *supra* note 42, pt. IV, ¶ 45 (2012).
[197] MCM, *supra* note 42, pt. IV, ¶ 45 (2012).
[198] MCM, *supra* note 42, pt. IV, ¶ 47 (2012).

Second, in conjunction with reducing the maximum punishment for certain offenses, the definition of "felony," for purposes of establishing which offenses would require MGJ review, should be defined in a manner that would reduce the number of offenses subject to MGJ review. For example, the offense of willfully disobeying the lawful order of a superior commissioned officer carries a possible punishment of up to five years in confinement.[199] Certainly, this offense is a serious one, but the offense itself, without other aggravating factors (such as in time of war, etc.) does not generally warrant confinement for five years. If imposed, such a sentence might even trigger appellate review.[200] In order to keep offenses, particularly those concerning good order and discipline, within the commander's immediate purview, the maximum punishment for an applicable offense might be lowered to two years, for instance. Then, the MGJ rule can be drafted so as to require that only offenses punishable by *more than two years of imprisonment* undergo MGJ proceedings, thereby removing the requirement for an MGJ.

Third, to further limit offenses subject to the MGJ, congressional action could be taken to specifically exempt offenses from the MGJ requirement, or alternatively impose mandatory minimum sentences for offenses, thereby indirectly affecting whether they are subject to a MGJ proceeding.[201]

B. Mechanics of the Military Grand Jury

1. Selection of Jurors

In the civilian federal court system, "[t]he authority to convene or discharge a grand jury is vested in the District Court."[202] The district court may order "one

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[199] MCM, *supra* note 42, pt. IV, ¶ 14 (2012).

[200] The author does not discount that a commander may encounter conduct that warrants harsher penalties; however, in the author's experience, such circumstances are usually accompanied with the commission of other serious misconduct for which enhanced penalties are normally applicable. The author simply suggests that under normal circumstances, disobedience of a lawful order alone would not warrant the imposition of a punishment of five years imprisonment. This assertion is based on the author's experience as a military magistrate, trial counsel, and administrative law attorney at Fort Bragg, North Carolina from 2006-2010 and as the Deputy Regimental Judge Advocate for the 75th Ranger Regiment at Fort Benning, Georgia from 2012-2014.

[201] *See, e.g.*, FY14 NDAA, *supra* note 16, § 1705 (amending 10 U.S.C. § 856 to require that individuals convicted of certain listed offenses receive a dismissal or dishonorable discharge and amending 10 U.S.C. § 818, requiring that the only forum to try those charged with rape, sexual assault, sexual assault of a child, forcible sodomy, or attempts thereof, is that of the general court–martial).

[202] Petition of A & H Transportation, Inc., 319 F.2d 69, 71 (4th Cir. 1963), *cert. denied*, 375 U.S. 924 (1963).

or more grand juries to be summoned at such time as the public interest requires."[203] The Jury Selection and Service Act (Jury Act)[204] outlines the manner in which grand jurors are summoned. Once the impanelment order is issued by the district court, "the clerk or jury commission or their duly designated deputies shall issue summonses for the required number of jurors."[205] Each district court is required to make and execute a written plan for random selection of grand jurors.[206] That plan must, among other things, either establish a jury commission or authorize the clerk of court to manage the jury selection process, must specify where the names of prospective jurors will be selected from, must specify the procedures to be utilized by the jury commission or clerk in selecting names from the prospective juror list, and must provide for a master jury wheel,[207] or similar device, into which the names of those randomly selected shall be placed.

When the time comes to impanel a grand jury, the clerk or jury commission will randomly draw names from the master jury wheel to establish the potential juror pool.[208] Once potential jurors are identified, the clerk or jury commission mails a juror qualification form to the prospective juror.[209] Based upon the responses to the juror qualification form, the chief judge, designated district court judge, or the clerk under supervision of the court determines whether a person is unqualified, exempt, or excused from service.[210] A qualified jury wheel is then maintained, and random names are drawn to serve for grand and petit jury panels.[211]

Much like district court judges vested with the authority to establish procedures to impanel their juries, convening authorities in the military are vested with the power to appoint courts–martial and detail members of a court–martial panel.[212] Of course, no such system for appointing a grand jury exists in the military because the Fifth Amendment grand jury requirement does not apply to courts–martial.[213] The Jury Act is informative, however, for purposes of developing an MGJ scheme, despite the lack of feasibility to implement all of its requirements because of the unique aspects of military service and the small

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[203] FED. R. CRIM. PROC. 6(a).
[204] 28 U.S.C. §§ 1861–1878.
[205] 28 U.S.C. § 1866(b).
[206] 28 U.S.C. § 1863.
[207] The term "jury wheel" includes "any device or system similar in purpose or function, such as a properly programmed electronic data processing system or device." 28 U.S.C. § 1869(g).
[208] 28 U.S.C. § 1864(a).
[209] *Id.*
[210] 28 U.S.C. § 1865(a).
[211] 28 U.S.C. § 1866(a).
[212] UCMJ art. 25 (2012). *See also* United States v. Dowty, 60 M.J. 163, 169 (C.A.A.F. 2004) ("It is blackletter law that the [convening authority] must personally select the court–martial members.") (citing United States v. Allen, 5 C.M.A. 626 (1955)).
[213] U.S. CONST. amend. V.

cross–section of personnel serving in any given command. Rigid implementation of the requirements of the Jury Act is not required to properly establish the MGJ,[214] nor is it necessary, because the foundation and systems for instituting the MGJ already exist in those procedures used by convening authorities to appoint military court–martial panel members.[215]

The current procedures to select court–martial panel members can be altered to identify a pool of possible grand jurors. At present, when an accused servicemember elects trial by members, the convening authority appoints a panel to try the servicemember.[216] The convening authority appoints those members who, in his opinion, "are best qualified for the duty by reason of their age, education, training, experience, length of service, and judicial temperament."[217] The convening authority must personally appoint panel members, but he is permitted to rely on his staff to nominate them.[218] In this respect, a convening authority's reliance on his staff to nominate members is not unlike a district court judge relying on the court clerk or jury commission to randomly draw names from the master jury wheel to establish the potential juror pool.[219] The military system differs slightly from the federal system, in that the military uses a system similar to that known as a "key man system,"[220] or one where commanders are given the

[214] The U.S. Constitution gives Congress the authority to "make rules for the government and regulation of the land and naval forces." U.S. Const. art. I, § 8, cl. 14. Article 36, UCMJ gives the President the authority to prescribe rules governing the "[p]retrial, trial, and post–trial procedures . . . for cases . . . triable in courts–martial . . . ." UCMJ art. 36 (2012). Article 36 further provides that when making those rules, the President should, as far as "he considers practicable" conform those laws and rules to those which are "generally recognized in the trial of criminal cases in the United States district courts," but the rules may not be contrary to other provisions of the UCMJ. *Id.* Courts have interpreted this to mean that "[t]he implication is that Congress intended that, to the extent 'practicable,' trial by court–martial should resemble a criminal trial in federal district court." United States v. Valigura, 54 M.J. 187, 191 (C.A.A.F. 2000). As previously discussed, however, grand jury requirements do not apply to trial by courts–martial. U.S. CONST. amend. V.

[215] Rigid application of the Jury Act is also not required because of the unique jurisdiction of courts–martial where the Sixth Amendment right to trial by jury does not wholly apply. *See* United States v. Kemp, 46 C.M.R. 152, 154 (C.M.A. 1973) ("[T]he Sixth Amendment right to trial by jury with accompanying considerations of constitutional means by which juries may be selected has no application to the appointment of members of courts–martial."); Dowty, 60 M.J. at 169 (citations omitted) ("A servicemember has no right to have a court–martial be a jury of peers, a representative cross–section of the community, or [be] randomly chosen."). However, the servicemember does have "a right to members who are fair and impartial." United States v. Roland, 50 M.J. 66, 68 (C.A.A.F. 1999).

[216] MCM, *supra* note 42, R.C.M. 504(d).

[217] MCM, *supra* note 42, R.C.M. 502(a).

[218] United States v. Benedict, 55 M.J. 451, 455 (C.A.A.F. 2001); United States v. Kemp, 46 C.M.R. 152, 155 (C.M.A. 1973).

[219] 28 U.S.C. § 1864(a).

[220] *See* 1 SARA SUN BEALE & WILLIAM C. BRYSON, GRAND JURY LAW AND PRACTICE § 4:05 (1986) (describing the "key man system" as that "in which a small group of judges or jury

discretion to select those individuals they believe are best qualified to serve as jurors. The system would be sufficient for the selection and nomination of grand juror members, with one alteration: once the convening authority issued an impanelment order and the members are appointed as grand jurors, the authority to excuse, summon, and assign a case to the grand jury should be delegated to the command's Staff Judge Advocate (SJA).[221]

2. The Authority to Excuse Grand Jurors and to Refer Cases to Grand Jury Panels

In federal practice, "the methods of issuing orders for the summoning of a grand jury and similar provisions, are intramural internal regulations for the benefit of the Court and in the interest of efficiency in the transaction of the public business."[222] In the interest of efficiency and fairness, and to insulate the process from actual or perceived unlawful command influence, the authority to assign members to the MGJ panel should be delegated to the legal office responsible for advising the general court–martial convening authority. By delegating authority, but not responsibility, the convening authority can reduce the chance of unlawfully influencing his subordinate commanders or the panel members. Such a system would not be a significant departure from that which is already utilized in selecting members for a court–martial.[223]

At present, when a convening authority details members to a court–martial, he is permitted to change the members without cause prior to their assembly.[224] The convening authority may, however, delegate this authority to his SJA or legal officer.[225] This delegation is not unfettered, and when so delegated, the SJA's authority to excuse is limited to "no more than one–third of the total number of members detailed by the convening authority."[226] However, the implementation of a grand jury rule authorizing the SJA to exercise excusal authority need not conform to the one–third rule. Just as the clerk under supervision of the district court may determine whether a person is unqualified, exempt, or excused from service,[227] so too should the SJA. By allowing the SJA to rule on excusals, efficiency in the process would be preserved with little effect on the command.

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commissioners—often called 'key men'—are given discretion to select qualified individuals").

[221] MCM, *supra* note 42, R.C.M. 505(c)(1)(B) (permitting the convening authority to delegate to his Staff Judge Advocate his authority to change the composition of a court–martial panel prior to the members' assembly).

[222] United States v. Brown, 36 F.R.D 204, 207 (D.D.C. 1964).

[223] MCM, *supra* note 42, R.C.M. 505(c)(1)(B).

[224] MCM, *supra* note 42, R.C.M. 505(c)(1)(A).

[225] MCM, *supra* note 42, R.C.M. 505(c)(1)(B).

[226] *Id.*

[227] 28 U.S.C. § 1865(a). *See also* United States v. Maskeny, 609 F2d 183, 193 (5th Cir. 1980) *cert. denied*, 447 U.S. 921 (1980) (refusing to reverse appellants' convictions where

Similarly, assignment authority to a specific MGJ panel should be delegated to the SJA as well. This process would be unique to the military because unlike civilian jurisdictions, there is no standing court to which a case is automatically assigned, because convening authorities refer cases to court–martial. Under MGJ procedures, once a convening authority impaneled the grand jury, (or in some cases, more than one grand jury) and a case was ready to be presented, the SJA would assign the case to the next available MGJ panel. As the manager of the panels, the SJA would bear the responsibility of ensuring that an adequate number of panels are established and that cases continually flow through the MGJ process. At present, it is the convening authority who determines what officer will be assigned as the PHO to hear a case.[228] By allowing the SJA to randomly refer cases to the selected panels, less opportunity exists for bias to enter the process, because the convening authority will not know which panel is to review the case. This process would align with the federal system where "[a]s a practical matter . . . the grand jury is under the prosecutor's virtually complete control."[229]

3. Rules Pertaining to Grand Jury Sessions and the Presentation of Evidence

The current rules of evidence applicable to the Article 32 preliminary hearing are similar in nature to those applicable to the federal grand jury. Accordingly, the MGJ's evidentiary proceedings should continue to be governed by RCM 405(h).[230] In both forums the rules of evidence are generally inapplicable;[231] the jurors or the PHO may rely on hearsay evidence; and evidence may be obtained in both forums by subpoena.[232] More specifically, the current rules concerning

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court clerks decided grand juror excuses in violation of a statute requiring the judge to make the determinations because defendant failed to show that the clerks' decisions were erroneous).

[228] MCM, *supra* note 42, R.C.M. 404 (e) (providing that a special court–martial convening authority may direct a pre–trial investigation under RCM 405).

[229] HARRY I. SUBIN ET AL., THE CRIMINAL PROCESS, PROSECUTION AND DEFENSE FUNCTIONS § 12.3 (1993).

[230] Exec. Order. 13,696, *supra* note 93, at 35, 796 (amending RCM 405(h)).

[231] *Compare* Exec. Order. 13,696, *supra* note 93 (amending RCM 405(h)) (providing that the "Military Rules of Evidence do not apply in preliminary hearings" with the exceptions of privilege and MRE 412), *with* FED. R. EVID. 1101(d)(2) (rules of evidence do not apply "except for those on privilege" to grand–jury proceedings), *and* United States v. Calandra, 414 U.S. 338, 353 (1974) (citations omitted) (stating that "absent some recognized privilege of confidentiality, every man owes his testimony" at a grand jury proceeding), *and* United States v. Ortiz, 687 F.3d 660 (5th Cir. 2012) (discussing the applicability of Federal Rule of Evidence 1101(d)(2) and explaining that the "rule against hearsay does not apply in grand–jury proceedings").

[232] *See* discussion *infra* Parts II.C. and note 94; GRAND JURY 2.0—MODERN PERSPECTIVES ON THE GRAND JURY 5 (Roger A. Fairfax, Jr. ed., 2011) (citations omitted) (stating that "a grand jury can subpoena the owner of records or other evidence without showing of probable cause and—absent a valid claim of privilege—the evidence must be produced").

the inapplicability of the military rules of evidence to the preliminary hearing would apply to MGJ proceedings.[233] The exceptions to that general rule make MRE 412 applicable to the preliminary hearing,[234] and apply rules concerning the privilege against self–incrimination,[235] privileges concerning mental examinations of the accused,[236] the prohibition on degrading questions,[237] warnings about rights,[238] and applicable rules of Section V of the MRE.[239]

Applying the rules of evidence currently utilized in the preliminary hearing to MGJ proceedings would not require significant change to a counsel's presentation of the evidence. What would be significantly different, however, is the manner in which evidence is presented at federal grand jury proceedings, compared to that of an Article 32 preliminary hearing. The implementation of the MGJ would require changes to the procedural rules, particularly with respect to the accused's right to be present during the investigation. However, because discovery has been eliminated as a purpose of the preliminary hearing (and likewise will not be a purpose of the MGJ proceeding), and victims are no longer required to testify at preliminary hearings, there are fewer due process concerns with an accused's absence at a MGJ proceeding. Nevertheless, a procedural change would be required under the rules.

In order to protect and preserve the fairness of the process, grand jury proceedings should be held in "secret."[240] *Secrecy*, however, is a term of art that is slightly dissimilar to that of the secret grand juries held in federal or state courts. Unlike civilian grand jury proceedings, the military is a unique environment composed of smaller communities of servicemembers organized into distinct commands that are further broken down into smaller individual units. Because of the military's unique composition, convening authorities do not have the luxury of drawing jurors randomly from lists of names created from voting registration or licensed driver databases. Instead, the convening authority is usually required to draw his jurors from individuals under his command. Because of this, unlike a civilian suspect who will likely never know or cross paths with the grand jurors who reviewed the evidence surrounding his alleged crimes, a servicemember–

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[233] Exec. Order. 13,696, *supra* note 93, at 35,796 (amending RCM 405(h)).

[234] *Id. See also* MCM, *supra* note 42, MIL. R. EVID. 412 (Supp. 2014), *as amended by* Exec. Order 13,696, *supra* note 93, at 35,818.

[235] MCM, *supra* note 42, MIL. R. EVID. 301 (Supp. 2014).

[236] MCM, *supra* note 42, MIL. R. EVID. 302 (Supp. 2014).

[237] MCM, *supra* note 42, MIL. R. EVID. 303 (Supp. 2014).

[238] MCM, *supra* note 42, MIL. R. EVID. 305 (Supp. 2014).

[239] Exec. Order. 13,696, *supra* note 93, at 35,796 (amending RCM 405(h)) (providing that "Section V, Privileges, shall apply, except that Mil. R. Evid. 505(f)-(h) and (j); 506(f)-(h), (j), (k), and (m); and 514(d)(6) shall not apply").

[240] "Secrecy in Grand Jury Proceedings" is one of the provisions that would govern the MGJ proceedings and the styling of this proposed section is taken from the Commonwealth of Virginia's Annotated Code. *See* VA. CODE ANN. § 19.2-192 (LEXIS through 2015 Sess.).

accused is faced with the very real possibility that at some point in his career, he may very well work with or for someone who sat on his grand jury. More importantly, because the grand jurors would return to the very same work force that the accused is also employed in, the provisions concerning grand jury secrecy are of paramount importance.

Accordingly, additional code provisions would need to be implemented to require secrecy on the part of witnesses and grand jurors, among others, in order to preserve an environment that is "conducive to maximum productivity"[241] and is free of intimidating, hostile, or offensive working conditions.[242] The secrecy provision would require "every attorney for the Government, special counsel, sworn investigator, and member of the military grand jury to keep secret all proceedings which occurred during sessions of the grand jury."[243]

C. The Binding Indictment

In order to have the effect and purpose of insulating the commander from external scrutiny and ridicule, and to prevent bias or ill–will in the decision to prosecute or to refrain from prosecuting an alleged offender, the commander should be bound by the decision of the MGJ in the probable cause finding.[244] To

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[241] AR 600-20, *supra* note 182, para. 7-3.

[242] *Id.* para. 7-4. This article does not specifically address sexual harassment; however, the philosophy behind preventing sexual harassment in the workplace is equally applicable to fostering an environment free of intimidation and retribution where it concerns the judicial process.

[243] This proposed secrecy provision is a modified version of the Commonwealth of Virginia's code concerning secrecy in grand jury proceedings. That provision provides,

> Except as otherwise provided in this chapter, every attorney for the Commonwealth, special counsel, sworn investigator, and member of a regular special, or multi–jurisdiction grand jury shall keep secret all proceedings which occurred during sessions of the grand jury; provided, however, in a prosecution for perjury of a witness examined before a regular grand jury, a regular grand juror may be required by the court to testify as to the testimony given by such witness before the regular grand jury.

VA. CODE ANN. § 19.2-192 (LEXIS through 2015 Sess.).

[244] Adopting a binding system would be a minority approach as compared to the majority of state–implemented grand jury systems and the federal system. *See* 1 SARA SUN BEALE ET AL., GRAND JURY LAW AND PRACTICE § 6:41 (1986 & Supp. 1996) ("The traditional view that the prosecutor has discretion to resubmit charges either to the same grand jury or to a subsequent grand jury is recognized by statute, court rule, or judicial decision in the federal courts and in a large number of states."). *But see, e.g.*, GA. CODE ANN. § 17-7-53 (LEXIS through 2015 Sess.) (barring the future prosecution of a person for the same offense after

do otherwise simply places the final decision back on the convening authority and the commander to independently evaluate the evidence and to make a decision—the very problem the MGJ seeks to remedy. Essentially, as the system currently exists, convening authorities are the final arbiter on whether a case proceeds to trial. This makes the convening authority ultimately responsible in both the public's and the victim's eyes for a decision to not prosecute a case. The issue of convening authority bias and sufficiency of the evidence become irrelevant if the perception portrayed in the media or to the public is one of failure to act or a failure to treat victims with respect and dignity. By binding commanders via the MGJ, they are relieved of that liability. Any blame, deserved or not, would lie with the many (the MGJ) instead of the few (the commander).

D. Portability of the System

Changes to the military justice system must take into account the unique responsibilities and related requirements that commanders and servicemembers face each day. The system must be portable in the event of a deployment. Notably, the proposed MGJ system could be easily employed in a deployed environment. While additional manpower would be necessary to carry out MGJ responsibilities, that manpower would be limited based on the composition of the MGJ. Under the current federal system, the grand jury must be composed of sixteen to twenty–three members.[245] However, the military is not governed by the requirements of Rule 7. Accordingly, the MGJ can be developed to require fewer members, but should, at a minimum, contain a sufficient number of members so that a quorum could still be achieved in the absence of some members, such that a reasonable person viewing the proceedings would have confidence that the decision was just and fair. To that end, the MGJ should be composed of seven grand jurors and three alternate grand jurors. Thus, the presence of only five members should constitute a quorum for a military grand jury session.

The concept of altering the size of the grand jury is far from novel. To be sure, a brief comparison of state jurisdictions that utilize grand juries demonstrates that there is no singular method for establishing a functional grand jury system. Across the United States, the number of grand jurors required to constitute a quorum in a criminal proceeding varies greatly from state to state. For example, Massachusetts[246] and Pennsylvania[247] each require twenty–three jurors. Kansas

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two returns of "no bill" unless the returns were procured by fraud or new evidence is found and the judge approves).

[245] FED. R. CRIM. P. 6(a).

[246] MASS. GEN. LAWS ch. 277, § 2 (LEXIS through 2015 Sess.).

[247] PA. R. CRIM. P. 222. Pennsylvania utilizes an investigating grand jury, not an indicting grand jury, and requires that twenty–three jurors and a minimum of seven alternates be impaneled. *Id*. Only fifteen jurors are required to constitute a quorum. *Id.* Pennsylvania utilized indicting grand juries until the Pennsylvania Constitution was amended on November 6, 1973, to allow the courts of the common pleas "with approval of the Supreme

requires that the grand jury "consist of [fifteen] members" but only requires the presence of twelve to constitute a quorum.[248] In a number of states, including Ohio,[249] Oregon,[250] and Wyoming,[251] the number of grand jurors required is less than ten. In addition, some states, such as California, determine the number of jurors required based on the size of the county in which the grand jury is seated.[252]

It is clear from the varying forms of grand juries that it is not the size of the grand jury that is important, but rather, the function that the grand jury carries out. Despite the lack of any consistent form of grand jury composition, the current procedures used in courts–martial suggest that a requirement of a minimum of five grand jurors to create a quorum would be sufficient to establish the MGJ and satisfy scrutiny concerning fairness.

At present, with the exception of capital cases, those servicemembers whose cases are referred to a general court–martial and who subsequently elect to be tried by members must have a general court–martial composed of no fewer than five members.[253] As a starting point, this tried–and–true method of trial by court–martial suggests that at a minimum, the MGJ should be composed of at least five members. This is especially so under the proposed system because the MGJ would only concern severe cases, which would normally warrant trial by general court–martial. Should such a system be adopted, the MGJ would find itself in good company. The Commonwealth of Virginia currently permits the use of a

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Court" to provide for "initiation of criminal proceedings therein by information . . . ." PA. CONST. art. I § 10. The Pennsylvania legislature subsequently enacted law which prohibited the impanelment of an indicting grand jury in any judicial district in which the state supreme court had approved the initiation of criminal proceedings through information. 42 PA. CONS. STAT. § 8931(f) (1976). By 1992, all Pennsylvania counties had abolished the indicting grand jury system. 22 Pa. Bull. 3826 (1992). *See also* Commonwealth v. Weigle, 997 A.2d 306, 312 (Pa. 2010) (explaining that the criminal information replaced the indictment because the indicting grand jury was abolished).

[248] KAN. STAT. ANN. § 22-3001 (LEXIS through 2015 Sess.).

[249] OHIO R. CRIM. P. 6(A) ("The grand jury shall consist of nine members, including the foreman, plus not more than five alternates.").

[250] OR. REV. STAT. § 132.010 (LEXIS through 2015 Sess.) (explaining that a grand jury consists of "a body of seven persons").

[251] In Wyoming, a grand jury must consist of twelve persons, but only nine are required in order to constitute a quorum. WYO. STAT. ANN. § 7–5–103(a) (2015) (requiring the grand jury to consist of twelve persons); WYO. R. CRIM. P. 6(a)(4)(B) (providing that "not less than nine jurors may act as the grand jury"). In those cases where only nine members of the grand jury are present, all must concur in finding an indictment. WYO. STAT. ANN. § 7–5–104(b) (2015).

[252] CAL. PENAL CODE § 888.2 (Deering, LEXIS through 2015 Sess.) (requiring twenty–three grand jurors for counties with a population exceeding 4,000,000; eleven for counties having a population of 20,000 or less; and nineteen in all other counties).

[253] MCM, *supra* note 42, R.C.M. 501(a)(1)(A).

grand jury that can consist of as few as five persons.[254] Similarly, South Dakota[255] and Indiana[256] require that a grand jury consist of six members. By adopting a seven–member system, but requiring only five to constitute a quorum, commands could readily execute MGJ proceedings with limited negative impact on manpower. Furthermore, absence of members due to military duties or other exigent circumstances would not unduly delay the proceeding for lack of quorum, because additional alternate members could be appointed.

VI. Conclusion—The Military Grand Jury Better Serves the Command and the Military Justice Process

For the past three years, there has been intense focus on the military justice system and the manner in which the military, its commanders, and, by implication, its legal advisors, dispose of the misconduct of its servicemembers. At present, the MJRG continues its tireless efforts at evaluating the processes and procedures utilized to prosecute servicemembers and the group's first report was submitted on March 25, 2015.[257] As discussed throughout this article, the role of command influence continues to play a large part in the discussions regarding how effective the military's command–driven system can be and what changes should ultimately be made to the system in order to limit the commander's authority to dispose of cases, or alter judgments rendered by a court–martial panel. Unfortunately, these are some of the same discussions that have gone on for more than half a century, dating back to the initial creation of the Uniform Code, post–World War II, and extending through those periods when the Articles of War governed the conduct of servicemembers.[258]

The simple fact remains that while the military requires a different set of standards and rules in order to maintain good order and discipline and to prevent discredit to the service, non–military–specific criminal offenses are just that: crimes. In the civilian world, criminal behavior is dealt with through law enforcement agencies and the district attorney's office, in some form or another. While an offender's supervisor or employer may have the opportunity to write a letter, make a phone call, or otherwise vouch for the good character of the accused in an effort to minimize the ramifications of the offender's actions, they do not get to decide what punishment is fitting of the crime.[259] Yet, the UCMJ still

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[254] VA. CODE ANN. § 19.2-195 (LEXIS through 2015 Sess.).
[255] S.D. CODIFIED LAWS § 23A-5-1 (LEXIS through 2015 legis.). South Dakota further limits the number of grand jurors to a maximum of ten members. *Id.*
[256] IND. CODE ANN. § 35-34-2-2 (LEXIS through 2015 First Reg. Sess.). Indiana also requires that one alternate member be impaneled. *Id.*
[257] *See* Comprehensive Review of the UCMJ, *supra* note 163.
[258] *See supra* Part II.
[259] Bordenkircher v. Hayes, 434 U.S. 357, 365 (1978) (explaining that in the federal system "so long as the prosecutor has probable cause to believe that the accused committed an

permits commanders to make decisions regarding what should happen in purely criminal offenses. For more than fifty years, this system has remained in place, with enormous power and responsibility placed on the shoulders of commanders to not only fight and win wars, but to also play the role of sheriff and district attorney. Now, under the high–powered lens of congressional and public scrutiny, flaws in the military justice system have been exposed, resulting in opportunity for change that could both improve the process, and the lives it affects.

The proposed elimination of the Article 32 preliminary hearing and the establishment of the military grand jury would eliminate some of the burden on commanders. Each would retain responsibility for maintaining good order and discipline within their unit, and they would continue to have authority to dispose of military offenses as they choose. What the proposed change would avoid is the commander's sole responsibility to evaluate whether a servicemember's alleged felony misconduct, such as rape, sexual assault, or child abuse, should proceed to court–martial based on allegations alone, or weak evidence.

By allowing the judge advocate to execute his statutory mission in shepherding evidence of offenses through the military justice system, and to present evidence of those offenses to an independent panel of individuals charged with the responsibility of evaluating whether probable cause exists, the commander is no longer "pinned with the rose" for whatever action or inaction takes place. If the MGJ returns with a finding of probable cause, then the process moves forward, just as it has in civilian criminal jurisdictions for more than a century. If the MGJ finds that no probable cause exists, critics would be hard–pressed to blame commanders or convening authorities for the result. Not only would such a process insulate commanders from these burdens, the proposed process also promotes fairness in the military justice system.

By creating a binding system, outside influences that could possibly affect the decision of a preliminary hearing officer, commander, or convening authority would no longer be as prevalent. A commander would no longer bear the burden of having to decide whether he should disregard an Article 32 investigating officer's recommendation to dismiss charges and proceed to trial, nor would an accused be subjected to unwarranted prosecution based on political pressure upon one person, or the desire to avoid a negative perception. While no system is perfect, the implementation of a military grand jury is a step in the right direction toward a fully established system providing justice and vindication for victims, while simultaneously maintaining fundamental fairness and due process protections to an accused.

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offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion").