



SECRETARY OF THE ARMY
WASHINGTON

24 FEB 2015

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: Army Directive 2015-09 (Implementation of Section 1702 of the National Defense Authorization Act for Fiscal Year 2014—Article 32, Uniform Code of Military Justice Preliminary Hearing)

1. References:

a. National Defense Authorization Act for Fiscal Year 2014, Public Law 113-66, section 1702, 127 Stat. 954-958.

b. Manual for Courts-Martial (2012).

c. Department of the Army Pamphlet 27-17 (Procedural Guide for Article 32(b) Investigating Officer), 24 July 2014.

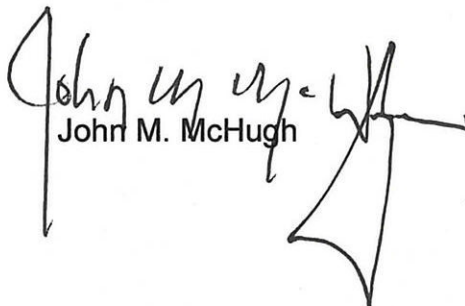
2. Purpose. Pursuant to references 1a and 1b, this directive implements Section 1702 of the National Defense Authorization Act for Fiscal Year 2014, which states that "No charge or specification may be referred to a general court-martial for trial until completion of a preliminary hearing." Generally speaking, section 1702 limits the scope of an Article 32 hearing and retitles it as a "preliminary hearing." The investigating officer, whenever practicable, will be a Judge Advocate equal to or greater in grade to counsel representing the parties in the case. All victims (military and civilian) will have the right to decline to testify.

3. Policy. Effective immediately, the procedures outlined at enclosure 1 will be used when conducting Article 32, Uniform Code of Military Justice preliminary hearings. Sample documents related to the procedures are at enclosure 2. These sample figures replace the correlating figures in reference 1c.

4. Proponent. The provisions of this directive are effective immediately. The Judge Advocate General is the proponent for this policy and will incorporate it into the next revision of reference 1c. This directive is rescinded upon publication of the revised pamphlet.

Encls

DISTRIBUTION:
(see next page)


John M. McHugh

SUBJECT: Army Directive 2015-09 (Implementation of Section 1702 of the National Defense Authorization Act for Fiscal Year 2014—Article 32, Uniform Code of Military Justice Preliminary Hearing)

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**PROCEDURES FOR IMPLEMENTATION OF SECTION 1702 OF THE
NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2014**

REVISION OF ARTICLE 32 OF UNIFORM CODE OF MILITARY JUSTICE

1. **General.** Except as provided in paragraph 10 of this enclosure, no charge or specification may be referred to a general court-martial for trial until completion of a preliminary hearing in substantial compliance with reference 1a and this directive. A preliminary hearing conducted in accordance with reference 1a and this directive is not intended to serve as a means of discovery and will be limited to an examination of those issues necessary to determine whether probable cause exists to conclude that an offense or offenses have been committed and the accused committed it, to determine whether a court-martial would have jurisdiction over the offense(s) and the accused, to consider the form of the charge(s), and to recommend the disposition that should be made of the charge(s). Failure to comply with this directive shall have no effect on the disposition of the charge(s) if the charge(s) is not referred to a general court-martial. Details of the new procedures are in this enclosure. Sample documents related to the procedures are at enclosure 2.

2. **Earlier Preliminary Hearing.** If a preliminary hearing of the subject matter of an offense has been conducted before the accused is charged with an offense, and the accused was present at the preliminary hearing and afforded the rights to counsel, cross-examination and presentation of evidence required by this rule, no further preliminary hearing is required.

3. **Who May Direct a Preliminary Hearing.** Unless prohibited by Army regulations, a preliminary hearing may be directed by any court-martial convening authority. That authority may also give procedural instructions not inconsistent with these rules.

4. **Personnel**

a. Preliminary Hearing Officer. Whenever practicable, the convening authority directing a preliminary hearing under Public Law 113-66, section 1702 and this directive will detail an impartial judge advocate (JA) certified under Article 27(b), Uniform Code of Military Justice (UCMJ), not the accuser, as a preliminary hearing officer. The preliminary hearing officer will conduct the preliminary hearing and make a report that addresses whether probable cause exists to believe that an offense or offenses have been committed and that the accused committed the offense(s), whether a court-martial would have jurisdiction over the offense(s) and the accused, the form of the charges(s), and a recommendation on the disposition of the charge(s).

(1) When the appointment of a JA as the preliminary hearing officer is not practicable, or in exceptional circumstances in which the interest of justice warrants, the convening authority directing the preliminary hearing may detail an impartial commissioned officer, who is not the accuser, as the preliminary hearing officer. If the

preliminary hearing officer is not a JA, an impartial JA certified under Article 27(b) shall be available to provide legal advice to the preliminary hearing officer.

(2) In cases where the accused has been charged with a sexual assault-related offense, the convening authority will appoint a JA preliminary hearing officer without exception. Sexual assault-related offenses include, but are not limited to, violations of: Article 120(a), Article 120(b) and Article 125 (forcible sodomy), UCMJ, and attempts to commit such offenses under Article 80, UCMJ.

(3) When practicable, the preliminary hearing officer will be equal or senior in grade to the military counsel detailed to represent the accused and the Government at the preliminary hearing.

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

b. Counsel to Represent the United States. A JA, not the accuser, shall serve as counsel to represent the United States and shall present evidence on behalf of the Government relevant to the limited scope and purpose of the preliminary hearing.

c. Defense Counsel

(1) *Detailed Counsel*. Except as provided in paragraph 4c(2) of this enclosure, military counsel certified in accordance with Article 27(b) shall be detailed to represent the accused.

(2) *Individual Military Counsel*. The accused may request to be represented by individual military counsel. Such requests shall be acted on in accordance with Rule for Courts-Martial (R.C.M.) 506(b).

d. Civilian Counsel. The accused may be represented by civilian counsel at no expense to the United States. Upon request, the accused is entitled to a reasonable time to obtain civilian counsel and to have such counsel present for the preliminary hearing. However, the preliminary hearing will not be unduly delayed for this purpose. Representation by civilian counsel will not limit the rights to military counsel under paragraph 4c of this directive.

e. Others. The convening authority who directed the preliminary hearing may also, as a matter of discretion, detail or request an appropriate authority to detail a reporter and an interpreter.

5. Scope of Preliminary Hearing

a. The preliminary hearing officer will limit the inquiry to the examination of evidence, including witnesses, necessary to:

(1) determine whether probable cause exists to believe an offense or offenses have been committed and whether the accused committed it,

(2) determine whether a court-martial would have jurisdiction over the offense(s) and the accused,

(3) consider whether the form of the charge(s) is proper, and

(4) make a recommendation on the disposition of the charge(s).

b. If evidence adduced during the preliminary hearing indicates that the accused committed any uncharged offense(s), the preliminary hearing officer may examine evidence and hear witnesses relating to the subject matter of such offense(s) and make the findings and recommendations enumerated in paragraph 5a regarding such offense(s) without the accused first having been charged with the offense. The accused's rights under paragraph 7b of this enclosure and, where it would not cause undue delay to the proceedings, paragraph 7, are the same with regard to both charged and uncharged offenses. When considering uncharged offenses identified during the preliminary hearing, the preliminary hearing officer will inform the accused of the general nature of each uncharged offense considered and otherwise afford the accused the same opportunity for representation, cross examination and presentation afforded during the preliminary hearing of any charged offense.

6. Disclosures

a. Required Disclosures. When a convening authority directs a preliminary hearing under R.C.M. 405, within 5 days of issuance of the Article 32 appointing order, counsel for the Government will, subject to paragraphs 6b–d, provide to the defense the following information or matters:

(1) charge sheet,

(2) Article 32 appointing order,

(3) documents accompanying the charge sheet on which the preferral decision was based,

(4) documents provided to the convening authority when deciding to direct the preliminary hearing,

(5) documents the counsel for the Government intends to present at the preliminary hearing, and

(6) access to tangible objects counsel for the Government intends to present at the preliminary hearing.

b. Contraband. If items covered by paragraph 6a are contraband, the disclosure required under this rule is a reasonable opportunity to inspect said contraband before the hearing.

c. Privilege. If items covered by paragraph 6a are privileged, classified or otherwise protected under Section V of Part III of the Manual for Courts-Martial, no disclosure of those items is required under this rule. However, counsel for the Government may disclose privileged, classified or otherwise protected information covered by paragraph 6a(1) if authorized by the holder of the privilege, or in the case of Military Rule of Evidence (Mil. R. Evid.) 505 or 506, if authorized by a competent authority.

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

7. Rights of the Accused

a. Before any preliminary hearing under this directive, the accused has the right to:

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

(a) For the purposes of this directive, a “written statement” is one that the witness signed or otherwise adopted or approved that is within the possession or control of counsel for the Government; and

(b) For the purposes of this directive, a “recorded statement” is an oral statement the witness made that is recorded contemporaneously with the making of the oral statement and contained in a digital or other recording or a transcription thereof that is within the possession or control of counsel for the Government.

(2) notice of, and reasonable access to, any other evidence the Government intends to offer at the preliminary hearing; and

(3) notice of, and reasonable access to, evidence within the possession or control of counsel for the Government that negates or reduces the degree of guilt of the accused for an offense charged.

See figure 1 at enclosure 2.

b. At any preliminary hearing under this directive, the accused has the right to:

- (1) be advised of the charges under consideration;
- (2) be represented by counsel;
- (3) be informed of the purpose of the preliminary hearing;
- (4) be informed of the right against self-incrimination under Article 31;
- (5) be present throughout the taking of evidence, except in the circumstances described in R.C.M. 804(c)(2);
- (6) cross-examine witnesses on matters relevant to the limited scope and purpose of the preliminary hearing;
- (7) present matters in defense and mitigation relevant to the limited scope and purpose of the preliminary hearing; and
- (8) make a statement relevant to the limited scope and purpose of the preliminary hearing.

See figure 2 at enclosure 2.

8. Production of Witnesses and Other Evidence

a. Military Witnesses

(1) Before the preliminary hearing, defense counsel will provide to counsel for the Government the names of proposed military witnesses the accused requests that the Government produce to testify at the preliminary hearing, and the requested form of the testimony, in accordance with the timeline established by the preliminary hearing officer. Counsel for the Government will respond that the Government either:

- agrees that the witness testimony is relevant, not cumulative and necessary for the limited scope and purpose of the preliminary hearing and will seek to secure the witness's testimony for the hearing; or
- objects to the proposed defense witness on the grounds that the testimony would be irrelevant, cumulative or unnecessary based on the limited scope and purpose of the preliminary hearing.

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

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

b. Civilian Witnesses

(1) Defense counsel will provide to counsel for the Government the names of proposed civilian witnesses whom the accused requests that the Government produce to testify at the preliminary hearing, and the requested form of the testimony, in accordance with the timeline established by the preliminary hearing officer. Counsel for the Government will respond that the Government either:

- agrees that the witness testimony is relevant, not cumulative and necessary for the limited scope and purpose of the preliminary hearing and will seek to secure the witness's testimony for the hearing; or
- objects to the proposed defense witness on the grounds that the testimony would be irrelevant, cumulative or unnecessary based on the limited scope and purpose of the preliminary hearing.

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

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

c. Other Evidence

(1) *Evidence Under Government Control*

(a) Before the preliminary hearing, defense counsel shall provide to counsel for the Government a list of evidence under the Government's control that the accused requests the Government produce to the defense for introduction at the preliminary hearing. The preliminary hearing officer may set a deadline by which defense requests must be received. Counsel for the Government will respond that the Government either:

- agrees that the evidence is relevant, not cumulative and necessary for the limited scope and purpose of the preliminary hearing and will make reasonable efforts to obtain the evidence; or
- objects to production of the evidence on the grounds that the evidence would be irrelevant, cumulative or unnecessary based on the limited scope and purpose of the preliminary hearing.

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

(2) *Evidence Not Under Government Control*

(a) Evidence not under the Government's control may be obtained through noncompulsory means or by *subpoenas duces tecum* issued by counsel for the Government in accordance with the process established by R.C.M. 703.

(b) Before the preliminary hearing, defense counsel will provide to counsel for the Government a list of evidence not under the Government's control that the accused requests the Government obtain. The preliminary hearing officer may set a deadline by which defense requests must be received. Counsel for the Government will respond that the Government either:

- agrees that the evidence is relevant, not cumulative and necessary for the limited scope and purpose of the preliminary hearing and will issue *subpoenas duces tecum* for the evidence; or
- objects to production of the evidence on the grounds that the evidence would be irrelevant, cumulative or unnecessary based on the limited scope and purpose of the preliminary hearing.

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

See figure 3 at enclosure 2.

9. Military Rules of Evidence. The Military Rules of Evidence do not apply in preliminary hearings under this directive except as follows:

- a. Mil. R. Evid. 301–303 and 305 shall apply in their entirety.
- b. Mil. R. Evid. 412 shall apply in any case that includes a charge defined as a sexual offense in Mil. R. Evid. 412(d), except that Mil. R. Evid. 412(b)(1)(C) shall not apply.
- c. Mil. R. Evid., Section V, Privileges, shall apply, except that Mil. R. Evid. 505(f)–(h) and (j); and 506(f)–(h), (j), (k) and (m) shall not apply.
- d. In applying these rules to a preliminary hearing, the term “military judge,” as used in these rules will mean the preliminary hearing officer, who will assume the military judge’s authority to exclude evidence from the preliminary hearing and who will, in discharging this duty, follow the procedures set forth in the rules cited in paragraphs 9a–c. However, the preliminary hearing officer is not authorized to compel production of communications covered under Mil. R. Evid. 513 and 514.
- e. Failure to meet the procedural requirements of the applicable rules of evidence will result in exclusion of that evidence from the preliminary hearing, unless good cause is shown.

10. Procedure

a. General. The preliminary hearing will begin with the preliminary hearing officer informing the accused of the accused’s rights under paragraph 7 of this directive. (See figures 4 and 5 at enclosure 2.) Counsel for the Government will then present evidence. Upon the conclusion of counsel for the Government’s presentation, defense counsel may present matters in defense and mitigation consistent with paragraph 7. For the purposes of this directive, “matters in mitigation” are defined as matters that may serve to explain the circumstances surrounding a charged offense. Both counsel for the Government and defense shall be afforded an opportunity to cross-examine

adverse witnesses. The preliminary hearing officer may also question witnesses called by the parties. If the preliminary hearing officer determines that additional evidence is necessary to satisfy the requirements of paragraph 5, the preliminary hearing officer may give the parties an opportunity to present additional testimony or evidence relevant to the limited scope and purpose of the preliminary hearing. The preliminary hearing officer will not consider evidence not presented at the preliminary hearing. The preliminary hearing officer will not call witnesses *sua sponte*.

b. Notice to and Presence of the Victim(s)

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

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

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

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

c. Presentation of Evidence

(1) *Testimony.* Witness testimony may be provided in person, by video teleconference, by telephone or by similar means of remote testimony. All testimony will be taken under oath, except that the accused may make an unsworn statement. (See figures 6 and 7 at enclosure 2.) The preliminary hearing officer shall only consider testimony that is relevant to the limited scope and purpose of the preliminary hearing.

(2) *Other Evidence.* If relevant to the limited scope and purpose of the preliminary hearing and not cumulative, a preliminary hearing officer may consider other evidence, in addition to or in lieu of witness testimony, including statements, tangible evidence or reproductions thereof, offered by either side, that the preliminary hearing officer determines is reliable. This other evidence need not be sworn. (See figure 8 at enclosure 2.)

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

e. Presence of Accused. The further progress of the taking of evidence shall not be prevented and the accused shall be considered to have waived the right to be present whenever the accused:

(1) is voluntarily absent after being notified of the time and place of the proceeding, or

(2) persists in conduct that justifies exclusion from the proceeding after being warned by the preliminary hearing officer that disruptive conduct will cause removal from the proceeding.

f. Recording of the Preliminary Hearing. Counsel for the Government will ensure that the preliminary hearing is recorded by a suitable recording device. A victim, as defined by paragraph 10b(1) of this directive, may request access to or a copy of the recording of the proceedings. Upon request, counsel for the Government will provide the requested access to or copy of the recording to the victim not later than a reasonable time after the conclusion of the proceedings or dismissal of the charges, unless charges are dismissed for the purpose of re-referral or court-martial adjournment. A victim is not entitled to classified information or closed sessions in which the victim did not have the right to attend under paragraphs 10b(3)–(4) of this directive.

g. Objections. Any objection alleging failure to comply with this directive will be made to the convening authority via the preliminary hearing officer.

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

11. Report of Preliminary Hearing

a. General. The preliminary hearing officer will make a timely written report of the preliminary hearing to the convening authority who directed the preliminary hearing. The report will be completed using DD Form 457 (Preliminary Hearing Officer's Report).

b. Contents. The report of preliminary hearing shall include:

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

(2) the substance of the testimony taken on both sides;

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

(4) a statement that an essential witness may not be available for trial;

(5) an explanation of any delays in the preliminary hearing;

(6) a notation if counsel for the Government failed to issue a *subpoena duces tecum* that the preliminary hearing officer directed;

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

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

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

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

(11) the recommendations of the preliminary hearing officer regarding disposition of the charge(s).

c. Sealed Exhibits and Proceedings. If the report of preliminary hearing contains exhibits, proceedings or other matters the preliminary hearing officer ordered sealed in accordance with R.C.M. 1103A, counsel for the Government shall cause such materials to be sealed to prevent unauthorized viewing or disclosure.

d. Distribution of the Report. The preliminary hearing officer will cause the report to be delivered to the convening authority who directed the preliminary hearing. That convening authority will promptly make sure a copy of the report is delivered to each accused.

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

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

FIGURES

ORGANIZATION LETTERHEAD

S: (suspense date)

(Office Symbol)

(date)

MEMORANDUM FOR (name and address of accused)

SUBJECT: Article 32(b) Preliminary Hearing

1. On (date), at (time) in (building number), (room number), I will conduct a preliminary hearing pursuant to Article 32(b), UCMJ, to inquire into the facts and circumstances concerning (a) charge(s) preferred against you by (rank and name of person who preferred charge(s)). The charge(s) is/are (general nature of the charge(s)) in violation of (UCMJ article(s)).
2. You have the right to be present during the entire preliminary hearing. Additionally, you have the right to be represented at all times during the hearing by legally qualified counsel. Counsel may be a civilian lawyer of your choice provided at no expense to the United States; a qualified military lawyer of your selection, if reasonably available; or a qualified military counsel detailed by the U.S. Army Trial Defense Service. There is no cost to you for military counsel. You also have the right to waive representation by counsel. Send your decision to me by (suspense date).
3. The names of witnesses known to me who will be asked to testify at the hearing are:
 - a. (Name of witness).
 - b. (Name of witness).
 - c. (Name of witness).
 - d. (Name of witness).
4. Additionally, I have been asked to examine and consider the following evidence:
 - a. (Describe evidence and its location).
 - b. (Describe evidence and its location).
 - c. (Describe evidence and its location).
5. As preliminary hearing officer, I will try to arrange for the appearance of the witnesses you want to testify at the hearing so long as those witnesses are relevant to the limited purposes of the hearing—which is to determine if an offense under the UCMJ was committed and whether you committed it. Send names and addresses of such witnesses to me by (suspense date for witness notification). If you identify additional witnesses at a later time, inform me of their names and addresses.
6. You may contact me by writing to (hearing officer's rank, name and military address).

(Name)
(Rank, Branch)
Hearing Officer

Figure 1. Notification to the Accused

The following procedure provides guidance for an introductory session with the accused.

Preliminary Hearing Officer (to accused): I am (rank and name). By order of (rank and name of appointing authority), I have been appointed preliminary hearing officer under article 32(b) of the Uniform Code of Military Justice to inquire into (a) certain charge(s) against you. The charge(s) allege(s) in general, the offense(s) of (name of offense(s) and description(s) of conduct). The name of the accuser is (rank and name of accuser). The names of the witnesses thus far known to me are (name all known witnesses).

I am now going to advise you of your rights at this preliminary hearing. You have the right to be present throughout the taking of evidence so long as your conduct is not disruptive. You will have the right at the proper time to cross-examine the witnesses who testify against you at the hearing, to present evidence in defense and mitigation on your own behalf, to make a statement in any form at the proper time, to remain silent, or to refuse to make any statement regarding any offense you are accused or suspected of committing. In addition, you are advised that any statement made by you might be used as evidence against you in a trial by court-martial. Do you understand?

As the preliminary hearing officer, it is my duty to ascertain and impartially weigh evidence presented in support of the charge(s) against you that are relevant to the limited scope and purpose of the hearing. This preliminary hearing will include inquiries as to whether probable cause exists to believe an offense(s) has been committed under the UCMJ and whether you committed the offense(s), whether the convening authority has court-martial jurisdiction over the offense and you, the form of the charge(s), and an appropriate disposition that should be made of the case. You and your counsel will be given full opportunity to cross-examine witnesses who testify against you at the preliminary hearing and to present additional evidence either in defense or mitigation, relevant to the limited scope and purpose of the hearing. I can recommend that the charge(s) against you be referred for trial to a general court-martial or to a different type of court-martial, or that the charge(s) be dismissed or disposed of other than by trial by court-martial. It is not my purpose during this preliminary hearing to act as a prosecutor, but only as an impartial fact finder. Do you understand?

Before I begin the preliminary hearing and examination of any of the witnesses in this case, I must inform you that you have the right to be represented at all times by legally qualified counsel. This means that you have the right to be represented by a civilian lawyer of your choice, but at no expense to the United States; by military counsel of your own selection if that counsel is reasonably available; or by counsel detailed by the Trial Defense Service to represent you during the preliminary hearing. There is no cost to you for military counsel. Do you wish to be represented by counsel? If so, state the type of counsel you want to represent you.

Note: If the accused is hesitant about whether to ask for counsel, the preliminary hearing officer should encourage the accused to obtain legally qualified counsel. If the accused requests counsel other than a lawyer, you must advise the accused that such non-lawyer counsel cannot serve as defense counsel before a general court-martial or a special court-martial that can adjudge a bad-conduct discharge.

Figure 2. Preliminary Advice to the Accused

XXXX-XX (XXX-XX/Date) 1st End Accused/XX/AV XXX-XXXX

SUBJECT: Article 32(b), UCMJ Preliminary Hearing

(Name and address of accused)

FOR (Name and military address of preliminary hearing officer)

1. Receipt of basic communication is acknowledged.
2. I want to be represented by (select one of the six options):
 - a. Civilian counsel, who is (name and address).
 - b. An individual military counsel, who is (rank, name and military address), if he or she is reasonably available.
 - c. A legally qualified military counsel detailed by the Trial Defense Service.
 - d. A civilian counsel, who is (name and address), and individually requested military counsel, who is (rank, name and military address).
 - e. Detailed military counsel and civilian counsel, who is (name and address).
 - f. I do not want to be represented by counsel.
3. I understand that the Government will not cover the cost of a civilian attorney, but military attorneys will be provided at no cost to me.
4. I want the following witnesses and/or evidence present at the hearing.
 - a. (Name and address of witness, including information on how they can be contacted, or description and location of evidence).
 - b. (Name and address of witness, including information on how they can be contacted, or description and location of evidence).

(Accused)
(Rank), U.S. Army

Figure 3. Response of the Accused

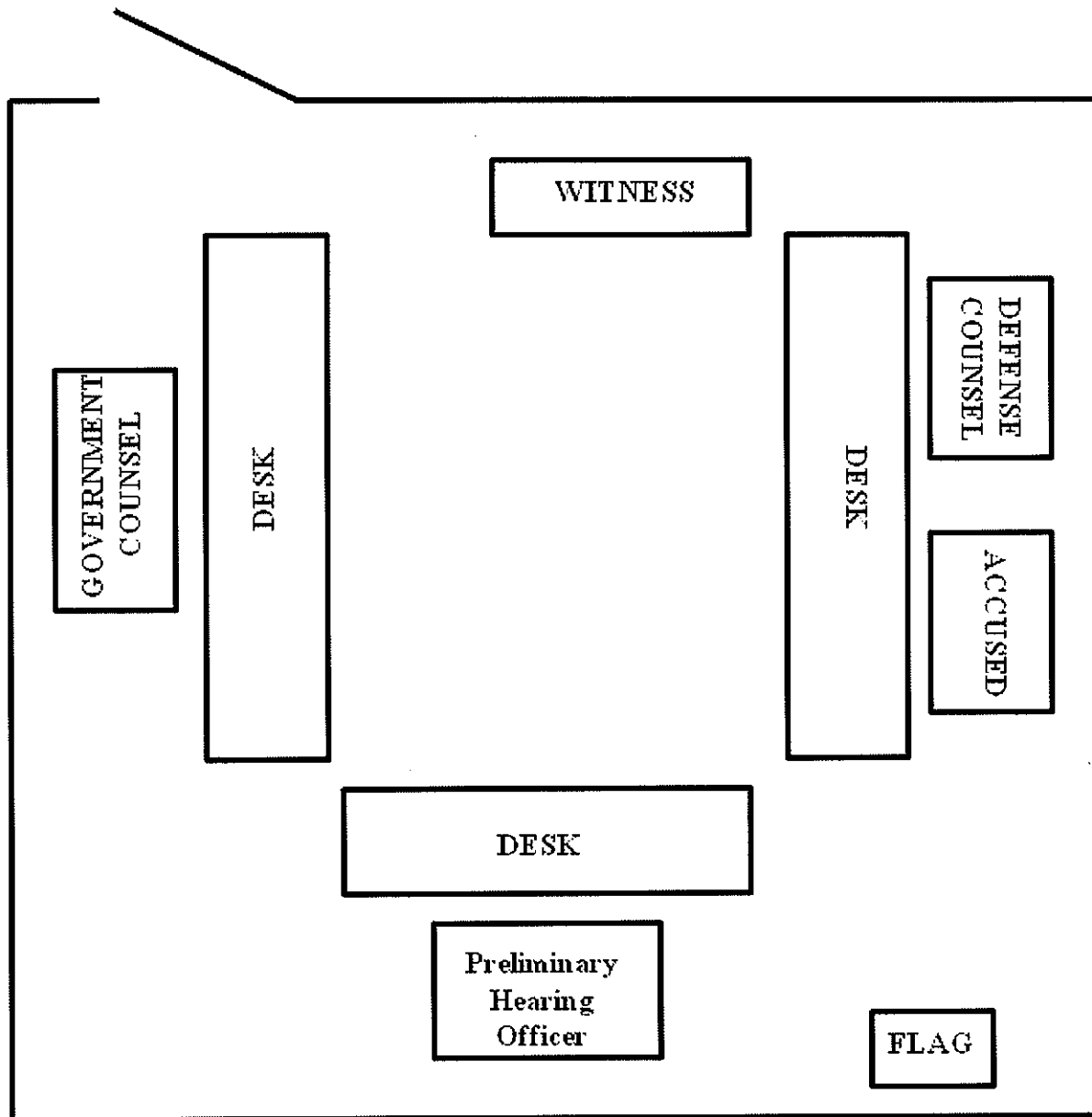


Figure 4. Arrangement of Room for Investigation

Preliminary Hearing Officer (PHO) (to accused-counsel): This is a formal preliminary hearing into (a) certain charge(s) against (rank and name of accused) ordered pursuant to Article 32(b), UCMJ, by (rank and name of appointing authority). On (date of notification), I informed you of your right to be represented by civilian counsel at no expense to the United States, military counsel of your own selection if reasonably available, or military counsel detailed by the Trial Defense Service. You informed me that you (did not desire to be represented by counsel/desired to be represented by (name of civilian counsel)/desired to be represented by (rank and name of individually requested counsel)/desired to be represented by (rank and name of detailed military counsel)).

Let the record show that (name of civilian counsel/rank and name of individually requested military counsel who was available/rank and name of detailed counsel) are present here with you.

((Name of civilian counsel), I ask you to step forward and enter your appearance by filling out item 7a on the official hearing officer's report (DD Form 457).

PHO (to accused-counsel): I want to remind you that my sole function as the Article 32 preliminary hearing officer in this case is to determine all of the relevant facts of this case, to weigh and evaluate those facts, and to determine whether an offense under the UCMJ has been committed and whether you committed it. I shall also consider whether a court-martial would have jurisdiction over the offense(s) and the form of the charge(s), and make a recommendation concerning the disposition of the charge(s) that has/have been preferred against you. I will now read you the charge(s). (At this point, the defense may waive reading of the charge(s).) It/They is/are as follows:

Charge (I): Violation of the Uniform Code of Military Justice, (article number).

Specification (1): (the specification).

Specification (2): (the specification).

(Charge (II): (Additional Charge): Violation of the Uniform Code of Military Justice, (article number).

Specification (1): (the specification).

I will now show you the charge(s) and specification(s).

I advise you that you do not have to make any statement regarding the offense(s) you are accused of and that any statement you do make may be used as evidence against you in a trial by court-martial. You have the right to remain silent concerning the offense(s) with which you are charged. You may, however, make a statement either sworn or unsworn and present evidence in defense and mitigation so long as it is relevant to the limited scope and purpose of this hearing. If you do make a statement, whatever you say will be considered and weighed as evidence by me just like the testimony of other witnesses.

You have previously been given a copy of the investigation file that has been compiled in your case. It contains (list all documents in the case file). I will not consider any of this material in making my decisions, unless I give you an opportunity to object to it and I decide on the record to admit it into evidence for this preliminary hearing. It is my intention to hear as Government witnesses during this preliminary hearing (list all witnesses who will be called to

Figure 5. Procedure for Opening Session of the Formal Preliminary Hearing

testify at the hearing). After these witnesses testify, you or your counsel will have the right to cross-examine them. You also have the right to produce other evidence on your behalf in defense and mitigation for the limited scope and purpose of the hearing. I have coordinated through the Government counsel for the appearance of those witnesses previously requested by you that I have determined to be relevant, not cumulative and necessary to the limited scope and purpose of the hearing. I do not intend to consider as a witness (*name of witness*) (because it has been determined that the witness is unavailable or because the witness's commander has determined that they are unavailable). I therefore intend to consider the sworn statement of the witness in my recommendations as it is contained in the file.

PHO (to accused-counsel): Before proceeding further I now ask you whether you have any questions concerning your right to remain silent, concerning the offense(s) of which you are accused, your right to make a statement either sworn or unsworn, the use that can be made of any statement you may make, your right to cross-examine witnesses against you, or your right to present evidence in your own behalf in defense or mitigation.

(Counsel-Accused): (Yes/no).

Note: At this point, answer any questions the accused may have with respect to rights or procedural or other matters concerning the preliminary hearing. You should not proceed further until convinced that the accused understands these rights. If the accused is represented by counsel, however, the latter will generally indicate that he or she has explained these matters to the accused and that they are understood.

Figure 5 – Continued

Note: The word "oath" as used in this appendix includes the word "affirmation." All oaths and affirmations should be made in the presence of the accused. Generally, only witnesses need be sworn at an Article 32 preliminary hearing. You as the hearing officer or counsel are not required to be sworn. Interpreters must also be sworn before beginning their duties. You may administer the oath in the following manner: You should raise your right hand and have the person being sworn stand with their right hand raised. You should then read or recite the appropriate oath and receive the appropriate response.

Oath for Witnesses

PHO: Do you swear that the evidence you shall give in the case now in hearing shall be the truth, the whole truth and nothing but the truth, so help you God?

Affirmation

PHO: Do you affirm that the evidence you shall give in the case now in hearing shall be the truth, the whole truth and nothing but the truth?

Note: The "affirmation" is used when administering the oath to persons who have conscientious concerns against taking an oath or to persons who do not believe in the existence of a supreme being. (See R.C.M. 807.) Persons who recognize special forms or rites as obligatory and persons who do not believe in a supreme being may be sworn in their own manner or according to the ceremonies of the religion they profess and declare to be binding.

Oath for Interpreter

PHO: Do you (swear) (affirm) that in the case now in hearing you will interpret truly the testimony you are called upon to interpret, (so help you God).

Note: When testimony is given through an interpreter, the interpreter must first be sworn. (See R.C.M. 807.) *The interpreter must translate questions and answers in verbatim form.*

Figure 6. Oaths

Introductory questions to witnesses

(Swear witness) See figure 3–3.

PHO: State your full name and (for military witnesses, grade, organization and Military Service) (for civilian witnesses: residence address and occupation).

WITNESS: *(Complete response).*

PHO: Do you know the accused in this case?

WITNESS: *(Yes/no).*

Note: If the identification of the accused is not an essential part of the expected testimony of the witness, this question may be omitted. If the witness identifies the accused, the witness should normally be asked to state the accused's name and organization if known. If the identity of the accused is particularly relevant in a case, and the identity of the accused as the perpetrator of the offense depends on the ability of the witness to identify the accused, the accused's counsel may request that the witness be required to identify the accused from a nonsuggestive lineup of persons similar in appearance to the accused. This request should be granted whenever possible. Otherwise, the ability of the witness to identify the accused as the offender may be based on the fact that the accused is the only person whose conduct is being investigated. In any event, in this situation you should inquire into the basis for the witness's identification of the accused.

* * * * *

Government Witness

Government counsel will examine Government witnesses, followed by cross-examination by the accused or defense counsel, then followed by questioning by you only if you determine further clarification is necessary.

* * * * *

Cross-Examination of Government Witness

Note: When Government counsel has completed an examination of a witness, you should advise the accused and counsel (if the accused is represented by counsel) substantially as follows:

Figure 7. Examination of Witnesses – Continued

PHO (to accused-counsel): You may now cross-examine this witness concerning any of his/her testimony, any knowledge possessed of the offense(s), or the witness's worthiness of belief. (Since you are not represented by counsel, I will do this for you, if you wish, if you will inform me in a general way of the matters you want me to question the witness about.) Do you wish to cross-examine this witness?

(Counsel) (Accused): (Yes/no).

Note: If the accused or counsel desires to cross-examine the witness, proceed substantially as follows:

(Counsel) (Accused) (to the witness): Did you hear the subject of the argument between the accused and Sergeant Smith?

WITNESS: No sir, they were arguing at the time I came into the dayroom, and I did not hear what was said before I got there.

(Counsel) (Accused): Did you see any gestures made during the argument by Sergeant Smith?

WITNESS: I am not exactly sure what you mean, but . . . (witness continues to describe details of the incident).

PHO (to accused-counsel): Do you have any further questions you want this witness to answer?

(Counsel) (Accused): (Yes/no).

PHO: The witness is excused.

* * * * *

Calling Defense Witnesses

PHO (to accused-counsel): All of the witnesses for the Government have been called and have revealed to you the evidence I intend to consider during the preliminary portion of this hearing. As I have previously advised you, you may now present evidence in defense or mitigation so long as it is relevant to the limited scope and purpose of this preliminary hearing. Do you have any witnesses to testify in your defense or mitigation? If so, you may call them at this time.

(Counsel) (Accused): (No/yes, with name(s) and address(es)).

Figure 7. Examination of Witnesses – Continued

Note: If witnesses are to be called to testify on the accused's behalf, you should advise the accused substantially as follows:

PHO (to accused-counsel): You or your counsel may question each of the witnesses who are to testify for you.

Note: If the accused is represented by counsel, you should assume that counsel will conduct the examination of the witness and present evidence in a planned procedure. If the accused has elected not to have counsel at the preliminary hearing, you should permit the accused to examine or cross-examine witnesses personally if desired. The procedure for administering the oath (figure 6) and for introductory questioning of the witness set forth above should be followed for defense witnesses. After the accused or counsel has completed examination of the defense witness, the Government counsel may cross-examine the witness.

* * * * *

Explanation of Accused's Rights as a Witness

Note: After all the witnesses have testified and the accused or his counsel indicate that they have no further evidence to present, you should inquire of accused and counsel, if the accused has not previously made a statement, substantially as follows:

PHO (to accused): Earlier in this preliminary hearing, I advised you of your rights to make a statement or to remain silent. Do you want me to repeat this advice? Do you desire to make a statement in any form?

(Counsel) (Accused): (Yes/no).

Figure 7. Examination of Witnesses – Continued

Real Evidence (Physical Objects)

PHO (to witness): This is a knife which the Government has introduced into evidence and I have designated as (exhibit number).

PHO (to accused-counsel after questioning the witness further as to the circumstances under which the knife was found and after cross-examination, if any, of the witness): Do you have any objection to my considering this exhibit as evidence?

(Counsel) (Accused): (Yes, stating reason(s)/no).

Documentary Evidence Authenticated Official Record

PHO (to accused-counsel): I have SIDPERS document of (unit designation), for (inclusive dates), which the Government has introduced into evidence and I have designated (exhibit number). It appears to be certified as a true copy by (rank, name, organization and duty position of authenticating official). I now hand you this exhibit for your examination.

PHO (to accused-counsel after permitting him to examine the document): Do you have any objection to my considering this exhibit as evidence?

(Counsel) (Accused): (Yes, stating reason(s)/no).

Figure 8. Examination of Evidence