THE GRAND JURY AND THE ARTICLE 32:

A COMPARISON

A Thesis

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The opinions and conclusions expressed herein are those of the individual student author and do not necessarily represent the views of either The Judge Advocate General's School, U.S. Army, or any other governmental agency. References to this study should include the foregoing statement.

By

Captain Lawrence J. Sandell 527-42-7612

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SCOPE

A comparison of procedural safeguards common to both the federal grand jury and the military's Article 32 investigation, including a study of the historical development of both institutions, together with suggestions for improving the Article 32 procedure.

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I. INTRODUCTION

Efficiency studies of criminal justice reveal that the grand jury is seldom better than a rubber stamp for the prosecuting attorney and has ceased to perform or to be needed for the functions for which it was established. A compulsory grand jury hearing throws an unnecessary burden upon the administration of justice.[1] This remarkable commentary was made not in 1971, but in 1931, by President Hoover's Wickersham Commission. Since that time lawyers and writers have continued to condemn the grand jury.[2] In a recent assessment of the grand jury as an institution, Time Magazine accurately stated:

> The grand jury generally approves whatever charge the prosecutor indicates that he wants, apparently on the theory that he would not make an accusation if he could not back it up in a court. As a result, prosecutors almost always get their way. "I have never known a grand jury to refuse to indict," says one prominent California defense attorney. "Never! They are just rubber stamps for the prosecution."[3]

Despite the grand jury's questionable utility, in the landmark case of O'Callahan v. Parker,[4] one of

the principal reasons for limiting the jurisdiction of courts-martial was the fact that servicemen tried by court-martial are not entitled to "the benefit of an indictment by a grand jury."[5] Presumably, the "benefit" to which Mr. Justice Douglas referred was the historic role of the grand jury as a protective rampart between the citizen and the potentially oppressive government.[6] The framers of the Constitution expressly exempted the military from the Fifth Amendment requirement of grand jury indictment.[7] Does this mean that servicemen are deprived of whatever benefits are inherent in indictment by a grand jury? If all the benefits alluded to in O'Callahan are provided to servicemen in a comparable proceeding, then the eminent Justice is guilty of raising form above substance, at the expense of military justice.

The military's pretrial, or Article 32,[8] investigation has been compared to the civilian grand jury proceeding.[9] In the sense that they serve the same general purpose, the comparison is valid. A study of the history and growth of these institutions[10] reveals that their reasons for being and the purposes they serve are strinkingly similar. However, an analysis of the procedural safeguards provided for accused persons at

these proceedings[11] indicates that, in many important areas, the prevailing civilian and military philosophies are strikingly dissimilar. Because of the military's enlightened pretrial practice with respect to discovery, right to counsel, and confrontation of witnesses, it is readily apparent that the military accused is deprived of none of the benefits of an indictment by grand jury.

This article is intended to demonstrate, by comparison, that the procedural safeguards and advantages afforded an accused at the Article 32 investigation far surpass those accorded his civilian counterpart at a grand jury proceeding. In addition, recognizing that the military pretrial investigation procedure is good, but not perfect, suggestions for improving the procedure will be discussed.

II. HISTORY AND NATURE OF GRAND JURY PROCEEDING AND ARTICLE 32 INVESTIGATION

A. Historical Development

The Grand Jury

The grand jury as we know it today is an English institution, but its roots sprang from the Carlovingian

inquisitio of eighth century France.[12] The inquisitio was used by the crown as a quasi-judicial inquiry, usually pertaining to land. The inquests were conducted by persons selected from the body of the community where the transaction occurred,[13] and consisted of summoning subjects before the king and forcing them to supply the crown with information touching the administration of the government.[14] The inquisition became a Norman institution after 912.[15] William the Conqueror introduced the custom to England in 1066, and inaugurated the practice of using a body of neighbors summoned by a public officer to give, upon oath, a true answer to some question.[16] From the very outset the presentments made by these accusing juries did not constitute an assertion that the person indicted was guilty, but merely that he was suspected. Guilt or innocence was still determined by the traditional modes of trial by battle or ordeal. With the decay of these ancient modes of trial in the twelfth and thirteenth centuries, the accusing jury both accused suspects and judged their guilt or innocence. During the thirteenth and fourteenth centuries, all or some members of the grand jury always

formed part of the petit jury which tried a suspected person. This practice was eliminated by statute in 1352.[17]

Commencing about 100 years after the Norman invasion, the enactment of several statutes helped to insure the place of the accusatory/inquisatory body in the common law. The Constitution of Clarendon in 1164, the Assise of Clarendon in 1166, the Assize of Northampton in 1176, and the Ordinance of 1194 all formally recognized the accusing body and made procedural refinements.[18] Each hundred, or county subdivision, had its own inquest or accusing jury. During the reign of Edward III in the 14th century, the sheriff of the county returned an additional panel of 24 knights to inquire at large for the county. This "grand inquest" was destined to be permanent by reason of its jurisdiction over the entire county, and because 24 knights were less unwieldy than several groups of twelve from each hundred in the county.[19]

In America, the constitutional guarantee of grand jury indictment was valued by the founders primarily as an agent to protect the citizen from unjust political prosecutions.[20] The basic purpose of the

English grand jury was to provide an impartial means of instituting criminal proceedings against persons believed to have committed crimes; the American grand jury was intended to operate substantially like its English progenitor.

Until the eve of the Revolutionary War, American colonists considered themselves Englishmen with all the rights and privileges attached to that status, including the ancient common law right of indictment by grand jury. This was one of the liberties most treasured by Englishmen, and it was natural that they would want to bring it to the New World. In most of the newly-settled provinces, English judicial procedure was spontaneously followed.[21]

Grand juries flourished throughout the eighteenth century as potent weapons with which to harass British authority. The power of the grand juries lay in their ability to block all criminal proceedings begun by royal officials. Simply by refusing to find a true bill they could effectively prevent the enforcement of criminal statutes. The political importance of juries made the colonists doubly jealous of their right to indictment before being brought to trial. They

had long opposed the practice of royal prosecutors bringing persons to trial upon an information and several colonies enacted laws expressly prohibiting use of the information.[22]

At the end of the Revolutionary War indictment by grand jury was a dearly cherished right. It was an institution taken for granted by the people and the leaders of the Revolution. Each of the thirteen states enacted laws providing for grand juries.[23] Following the ratification of the new Constitution, there was a great cry from the people for a Bill of Rights. James Madison submitted twelve proposed amendments to the House of Representatives, and a grand jury provision was included in the seventh amendment. The House rejected the first two amendments and renumbered the proposals so that the grand jury provision was included in the fifth amendment. The House adopted Madison's proposed grand jury amendment without change, and the Senate amended the language to its present form.[24]

Former Chief Justice Warren has graphically described the role played by the modern grand jury:

> Historically, this body 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, whether the latter be an individual, minority group, or other, to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will.[25]

The grand jury performs this function simply by determining whether or not there is probable cause to believe than an offense has been committed.[26] But the manner in which it does this leads one to believe that the grand jury's only saving grace today is that its decision not to indict is not subject to review by any other body.[27]

Article 32 Investigation

While the genesis of the grand jury proceeding is shrouded by centuries of history, the Article 32 investigation is strictly a twentieth century creation. Prior to 1920 a formal investigation before referring charges was not required in the military. An informal investigation before preferring charges is all that was necessary.[28] The War Department's policy was that only such charges as upon sufficient investigation were

found to be supported by the facts should be preferred for trial. General Orders had repeatedly reflected the fact that the preferring of charges, without a proper investigation of the facts initially, was a neglect of duty which entailed not only a needless waste of time spent in trial, but also the arrest and confinement of an innocent person.[29] The convening authority could not refer the charges to a general court-martial for trial until he approved them, and approval was not to be given until the convening authority examined the charges.[30]

As amended in 1920, Article of War 70 provided, inter alia, "No charge will be referred for trial until after a thorough and impartial investigation thereof shall have been made."[31] The investigation was required to include inquiries as to the truth of the matter set forth in the charges, the form of the charges, and what disposition of the case should be made. Additionally, the accused was permitted to cross-examine available witnesses against him, and to present anything he desired in defense or mitigation.[32] Note that this procedure was required before charges could be referred to trial by any court-martial. The only additional requirement

for a general court-martial was the appointing authority's obligation to refer a charge to his staff judge advocate for consideration and advice before directing trial by general court-martial.[33]

The pre-referral investigation was normally conducted by the accused's commanding officer, who summoned the accuser, the accused, and all available witnesses before him. The witnesses were sworn but no record of their testimony was made.[34] The commanding officer could, at his discretion, permit the appearance of counsel for both the defense and the prosecution, but this was the exception rather than the rule. Before receiving any statement from the accused, the commanding officer was required to warn him that he need not make a statement, but that if he did it may be used against him.[35] If it appeared that charges would be referred to trial, the investigating officer had to reduce the testimony of each witness to a clear statement or summary which was to be read to the witness, and signed and sworn to by him. The investigating officer was also permitted to include with other statements signed, unsworn statements from distant witnesses who were unavailable.[36]

Article of War 70 was amended in 1937[37] to require a formal pretrial investigation only for those charges which were to be referred to general court-martial for trial. The amendment was intended to simplify the court-martial procedure in cases referred to summary and special courts-martial. The majority of those cases involved minor infractions of regulations or neglects of duty, and a preliminary investigation resulted, practically, in trying the case twice, involving added and unnecessary expenditure of time by the investigating officer and witnesses.[38]

The 1928 Manual[39] was amended to reflect this change, together with other changes affecting the testimony of witnesses at the pretrial investigation. If the investigating officer advised the accused of the expected testimony of a witness and the accused did not want to cross-examine him, the witness did not have to be called, even if he were available.[40] Additionally, witnesses were no longer required to be sworn or to sign their statements, although the investigating officer was empowered to require either or both.[41]

By the Act of 24 June 1948[42] the pretrial investigation provisions were removed from Article of

War 70 and included in Article of War 46(b). The following provision was added:

> The accused shall be permitted, upon his request, to be represented at such investigation by counsel of his own selection, civil counsel if he so provides, or military if such counsel be reasonably available, otherwise by counsel appointed by the officer exercising general courts-martial jurisdiction over the command.[43]

The 1949 Manual[44] again changed the procedure for witnesses. They were not required to be examined under oath, but they were required to sign and swear to the truth of the substance of their statements after they had been reduced to writing.[45]

An expanded pretrial investigation procedure was included in Article 32 of the 1950 Uniform Code of Military Justice.[46] In its present form, unchanged since 1950, Article 32 retains much of the substance included in its Article of War predecessors. The investigating officer must now advise the accused of the charges to be investigated and of his right to counsel at the investigation. If charges are forwarded for trial they must be accompanied by a statement of the substance of all the testimony taken, and the

accused is entitled to a copy of all statements.[47] If the accused was present at the investigation of an offense before charges were preferred, and he was afforded all the rights provided by Article 32(b), no further investigation is required after a charge involving the same subject matter has been preferred unless the accused demands it.[48] Finally, the controversial Article 32(d) makes the entire article binding on all persons administering the Code, while providing that a failure to adhere to the requirements of the article does not constitute jurisdictional error.[49]

B. Nature of the Proceedings

Historically, the Article 32 investigation and the grand jury proceeding evolved for the same purpose: to protect the individual from baseless criminal charges. Procedurally, however, in all respects save one,[50] the nature of the military investigation is better suited than the civilian grand jury proceeding to provide an accused person with meaningful pretrial safeguards.

The Grand Jury

The proceeding before a grand jury constitutes a judicial inquiry, and it has been called an integral

part of our judicial system.[51] The scope of a grand jury investigation is limited neither by the probable result of its inquiry nor by doubts whether any particular individual will be found subject to indictment. Its inquiry need not be preceded by any definition of the crime to be investigated or the persons against whom an accusation is sought.[52] Since a grand jury does not decide innocence or guilt, its proceedings have never been conducted with the assiduous regard for the preservation of procedural safeguards which normally attends the ultimate trial of the issues. The Supreme Court eloquently emphasized this in 1919:

> It is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime. As has been said before, the identity of the offender, and the precise nature of the offense, if there be one, normally are developed at the conclusion of the grand jury's labors, not at the beginning.[53]

Moreover, there is no right to counsel, no right of confrontation, no right to cross-examine or to intro-

duce evidence in rebuttal, and ordinarily no requirement that the evidence introduced be only such as would be admissible at trial.[54]

Courts have often said that the Constitution itself makes the grand jury "a part of" the judicial process.[55] It would be more accurate to say that the grand jury is "attached" to the judicial process, in much the same fashion that a parasite lives on and derives sustenance from another organism. A grand jury is a part or branch of a court having general criminal jurisdiction, and has no existence apart from the court which calls it into being.[56] A grand jury functions only after it has been summoned and impaneled by a court invested with the requisite criminal jurisdiction.[57]

By its own terms the Fifth Amendment requires a grand jury indictment only for capital or infamous crimes.[58] It is not the nature of the offense, but the punishment which determines whether a crime is "infamous" within the meaning of the Fifth Amendment. It has long been the Federal rule that crimes punishable by imprisonment in a prison or penitentiary, with or without hard labor are infamous crimes.[59]

Once the grand jury is properly impaneled it is permitted to operate free of the procedural chains which generally shackle a judicial proceeding. The Federal grand jury may institute an investigation based on its collective suspicion that crimes have been committed, without any knowledge of the names or descriptions of the crimes or persons who may be involved, and without the necessity of a charge having been filed against anyone.[60] The Supreme Court has stated that the jurors may inquire for themselves whether a crime cognizible by the court has been committed;[61] they need not sit idly by waiting for evidence of suspected offenses to be brought to them. Refusing to suppress, prior to indictment, evidence allegedly obtained as the result of an illegal search, a Federal court reached the anomalous conclusion that the office of the grand jury in our system is so important that its ability to function should not be limited by questions of propriety as long as constitutional rights are not infringed.[62]

Such rulings have helped create the aura of absolute independence which surrounds grand juries. In actual practice most grand juries have little to do with the investigation of crime, but are used by prosecutors

to review evidence already gathered by police agencies and prepared by the prosecutor's staff.[63] There are statistics to indicate that, although grand juries will occasionally operate independently and exercise initiative and freedom of judgment, they are more likely to be a fifth wheel in the administration of criminal justice in that they rubber stamp the wishes of the prosecutor.[64] An indictment is invalid unless it is signed by the U.S. Attorney, and to this extent the grand jury is subject to the control of the prosecutor. "In truth the grand jury is quite dependent on the prosecutor. Though there are exceptions, ordinarily it will be the prosecutor who determines what witnesses to call and who examines the witnesses."[65] The grand jury is even powerless to compel the attendance of witnesses. It depends on the court to issue subpoenas.[66]

Article 32 Investigation

Descriptions of the nature of the Article 32 investigation have a familiar ring to them. The investigation is a proceeding similar in character to a grand jury investigation.[67] An Article 32 investigation is not a mere formality, but rather an integral part of the

court-martial proceedings and is judicial in character.[68] It serves the two-fold purpose of operating as a discovery proceeding for the accused, and standing as a bulwark against baseless charges.[69] The Article 32 investigation is not a trial on the merits, and the strict rules of evidence applicable at trials need not be followed.[70] But this does not detract from its character as a judicial proceeding. An Air Force board of review determined that the investigation was sufficiently a judicial proceeding for it to affirm a conviction of obstructing justice against a person who interfered with a witness who was to testify at a pretrial investigation.[71] The U.S. Court of Military Appeals affirmed a conviction for perjury at the Article 32 investigation, holding that the investigation was a "judicial proceeding or in a course of justice" within the meaning of Article 131, UCMJ.[72]

Like the grand jury indictment, the requirement for an Article 32 investigation is based upon the punishment for a crime rather than on the nature of the offense. It is required only when it is anticipated that charges may be referred to a general court-martial for trial,[73] and only a general court-martial can adjudge a punishment

which includes death, dishonorable discharge, total forfeitures or confinement in excess of six months.[74]

An Article 32 investigation also depends for its existence on the intervention of some outside force. When an officer exercising summary court-martial jurisdiction feels that the charged offenses are so serious that it may be appropriate to forward them with a recommendation for trial by general court-martial, he will appoint a commissioned officer to investigate the charges.[75] The Manual suggests that the investigating officer should be a mature field grade officer, or one with legal training and experience, but the only real limitations on the power of appointment are that neither the accuser nor any officer who is expected to participate in the trial of the case as military judge or counsel may be appointed.[76] While a grand jury may investigate anyone or anything, the scope of the Article 32 investigation is limited to the matters set forth in the charges.[77] Within this limitation, however, the investigating officer is encouraged to extend his investigation as far as may be necessary to make it thorough.[78]

The Achilles heel of the Article 32 investigation is the fact that the investigating officer's

recommendations are not binding on the convening authority. Another fault which ought not to be overlooked is the ever present spectre, or appearance, of command influence. Schiesser and Benson[79] point out:

> The Article 32 officer is usually a member of the local command, and is usually a line officer rather than a member of a Judge Advocate General's Corps. He is rated by local commanders, who themselves may be rated by the convening authority involved. The opportunities for command influence are virtually unlimited, insofar as the relationship between the Article 32 officer and the convening authority is concerned.[80]

The authors admit, however, that in the vast majority of cases convening authorities follow the advice and recommendations of their staff judge advocates,[81] and presumably all staff judge advocates would advise against referring baseless or unfounded charges to trial.

The characteristics common to both the civilian grand jury and the military Article 32 investigation are readily apparent. Although both are judicial proceedings, neither is bound by rigid evidentiary rules, and neither can exist until an outside force breathes life into

them. They are blessed with broad powers of investigation, and they are intended to serve as protective barriers against intimidating accusers.

It is the critical area of differences between the two proceedings which turns the tide in favor of the Article 32 investigation as the proceeding which provides the most meaningful safeguards for the individual. An examination of additional safeguards normally associated with judicial proceedings will highlight the fact that the serviceman does not lose any advantages because he is not entitled to indictment by grand jury.

III. COMPARISON OF PROCEDURAL SAFEGUARDS

A. Right to Counsel

The Grand Jury

There has been a paucity of litigation involving a defendant's right to counsel at a grand jury investigation, because he has none. A person is not entitled to have counsel present with him while he testifies before the grand jury.[82] The only persons who can be present while the grand jury is in session are the attorney for the government, the witness, interpreters, and stenographers.[83] Perhaps the defendant would be

entitled to counsel if he were permitted to cross-examine witnesses against him at grand jury investigations, but that, too, is doubtful. In 1960, Chief Justice Warren emphasized that it has never been considered essential that a person being investigated by the grand jury be permitted to cross-examine witnesses who may have accused him of wrongdoing. Undoubtedly, this right has not been extended to grand jury proceedings because of the disruptive influence its injection would have on the proceedings, and also because the grand jury merely investigates and reports; it does not try.[84] So even if confrontation were extended to grand jury proceedings, it could still be argued that, since the question of guilt or innocence is not involved, representation by counsel before a grand jury would not be required.

Since 1960, however, the Supreme Court has made some far-reaching declarations in the right-to-counsel area, and some of its comments can be applicable to grand jury proceedings. In Escobedo v. Illinois,[85] the court stated that it would exalt form over substance to make the right to counsel depend on whether at the time of the interrogation the authorities had secured a formal indictment.[86] In Miranda v. Arizona,[87] the

court pointed out that counsel's presence at an interrogation would insure that statements made in the government-established atmosphere are not the product of compulsion.[88] In Coleman v. Alabama,[89] the Supreme Court held that a preliminary hearing is a critical stage of the criminal process where the accused is entitled to aid of counsel. The Court then cited Wade[90] for the proposition that the accused is entitled to the assistance of counsel at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial.[91] The language from Wade is significant because a lineup, like the grand jury interrogation may occur prior to any indictment or accusation. Yet during the investigation, when an individual may be only one of several suspects, he is entitled to the presence of counsel. Viewed from the standpoint of a nervous layman in a hostile atmosphere faced with the distinct possibility that he may incriminate himself, there is no justifiable distinction between a custodial interrogation in the station house, a pretrial lineup, and interrogation during subpoena-compelled attendance at a grand jury investigation. Yet in spite of Miranda, Escobedo and Coleman, the courts

continue to hold that there is no constitutional right to counsel in the grand jury room.[92]

The Pennsylvania Supreme Court recently evidenced a remarkable example of 19th century reasoning in attempting to balance the need for orderly grand jury proceedings against the need to protect a witness' privilege against self-incrimination. In Commonwealth v. McCloskey[93] the court announced that a grand jury witness has a limited right to counsel during his testimony. The supervising court must instruct the witness that he may consult with counsel prior to and following his appearance, but not during his testimony. The witness must also be instructed that, should he become confused, or doubtful as to whether his answer to a given question may incriminate him, he can come before the court accompanied by counsel and obtain a ruling as to whether or not he should answer the question. The court condemned the practice of permitting a witness to leave the grand jury room and consult with his attorney at the door prior to responding to every question because such a practice would cause undue delay and all but terminate the institution of the investigating grand jury. As the two dissenting justices infer, it is

inconceivable how the majority can determine that their suggested procedure would not constitute a serious interruption of the grand jury investigation. Further, to deny a witness the opportunity of adequate consultation with his counsel is to render his right under the Fifth Amendment meaningless.

Because of the layman's inability to deal with the privilege against self-incrimination by himself, at least one commentator has stated that counsel must be allowed in the grand jury room.[94]

> Resolution of the scope of the privilege against self-incrimination and the applicability of the waiver doctrine on a question-by-question basis certainly raises issues as difficult and as complex as those which required the appointment of counsel because of "special circumstances" and "potential prejudice" even under the pre-Gideon cases.[95]

Mr. Meshbesher is absolutely right. There is no longer a compelling reason, if, indeed, there ever was one, why the expanded Sixth Amendment right to counsel provisions long enjoyed by servicemen should not be equally applicable to those unfortunate private citizens facing a hostile prosecutor before a grand jury.

Article 32 Investigation

The Army has acknowledgedthe accused's right to counsel at a pretrial investigation for more than half a century.[96] It was not until 1957, however, that the United States Court of Military Appeals determined that "counsel" meant "lawyer," and not just any officer. In United States v. Tomaszewski,[97] the Court enumerated the following three reasons for its holding that Article 32 and the 1951 Manual required the appointment of a lawyer to represent the accused as counsel at a pretrial investigation: 1) An Article 32 investigation is required only for charges referred to a general court-martial for trial, and at a general court-martial the accused is entitled to be represented by a lawyer; 2) Not to have a lawyer would defeat the purpose of the investigation as a discovery proceeding; and 3) If a lawyer is present to cross-examine a witness, a verbatim transcript of his testimony is admissible at a subsequent trial if the witness is unable to appear in person.[98] Because of Tomaszewski, the words "certified under Article 27(b)" were inserted after "counsel" in paragraphs 34b and 34c(3) of the 1969 Manual[99] to reflect this change in the law.

The accused can always retain a civilian attorney to represent him at a pretrial investigation,[100] and the United States Court of Military Appeals has indicated that it will not stand for any attempts to deprive the accused of this right. In United States v. Nichols,[101] the accused's civilian counsel was not permitted to attend the Article 32 investigation because the charges and the investigative files were classified, and the attorney did not have the requisite security clearance. In reversing, the court pointed out that, although Congress could have done so, it did not impose any qualifications on a civilian lawyer's right to practice before a court martial. Therefore, the accused's right to a civilian attorney cannot be limited by a service-imposed obligation to obtain clearance for access to service-classified matters. The court stated that, where there is a question of a security risk, the burden is on the government to prove that civilian counsel is disqualified, rather than the converse.[102]

In an earlier case,[103] however, an Air Force board of review demonstrated little sympathy for an accused who attempted to use his right to civilian counsel as

a sword rather than a shield. When requests for postponements of the investigation due to the unavailability of his civilian counsel were denied, the accused objected to the continuance of the proceedings, refused to call or examine any witnesses, and objected to his military counsel's examining witnesses. On two occasions the accused said that he had two different civilian attorneys, but neither of them ever appeared for him. On appeal, the accused contended that he had been prejudiced because he was denied the right to be represented at the pretrial investigation by individual counsel of his own choice. The board rejected the accused's contention, stating bluntly that his insistence on representation by civilian counsel was apparently part of a well-conceived plan to impede and hamper the proceedings.[104] The board was not convinced that the failure to await the pleasure and convenience of the accused's civilian counsel constituted an irregularity, in view of the Manual admonition that the pretrial investigation should not be delayed if the accused is unable to provide civilian counsel of his own choice within a reasonable time after being given the opportunity to do so.[105] Needless to say, only

peculiar and aggravated circumstances would warrant such a holding.

In United States v. Courtier,[106] the United States Court of Military Appeals stated that the right to the assistance of counsel of one's own choice during the pretrial proceedings, when such counsel is reasonably available, is a substantial right entitled to judicial enforcement. In Courtier, however, the court did not practice what it preached. The accused's request to be represented by individual military counsel at the Article 32 investigation was denied. Both the accused and his detailed counsel unsuccessfully objected at the investigation to proceeding without the requested individual military counsel. At trial the accused's motion for a new Article 32 investigation was denied, and he was thereafter convicted pursuant to his guilty plea. Because of the accused's plea, and because the requested lawyer had been detailed as assistant defense counsel about one month prior to trial, the court refused to set aside the conviction. Judge Ferguson dissented. He would have reversed on the basis that, since the convening authority had not acted on accused's request for indi-

vidual military counsel, the accused had been denied the effective assistance of counsel at the Article 32 investigation.

B. Rules of Evidence and Right of Confrontation

The Grand Jury

Any discussion of a defendant's right of confrontation before the grand jury is necessarily a brief one. He simply does not have that right. Unless he is testifying as a witness, a defendant is not permitted in the grand jury room, and his attorney is not permitted under any circumstances.[107] Writing for the majority in Hannah v. Larche,[108] Chief Justice Warren stated that it has never been considered essential that a person being investigated by the grand jury be permitted to cross-examine witnesses who may have accused him of wrongdoing. This right has not been extended to grand jury proceedings, according to Warren, because of the disruptive influence its injection would have on the proceedings, and also because the grand jury merely investigates and reports. It does not try an individual.[109] The court's explanation, or excuse, does

not withstand critical analysis. The Article 32 proceeding only investigates and reports, but the right of confrontation afforded at that proceeding surely does not constitute a disruptive influence. Rather it affords the accused an invaluable right at a critical stage of a criminal proceeding. The archaic rule of nonconfrontation which binds the grand jury proceeding is totally out of step with today's enlightened concepts of criminal justice.

As is the case with the military's pretrial investigation, the grand jury is not bound by the formal rules of evidence. Neither the Fifth Amendment nor any other constitutional provision prescribe the kind of evidence upon which grand juries must act,[110] and the courts will rarely quash an indictment because of some deficiency in the evidence. The Federal courts zealously protect the grand jury's right to indict on any evidence, without regard to its competency or truthfulness. Their reasoning is that if indictments were to be held open to challenge on the ground that there was inadequate or incompetent evidence before the grand jury, the resulting delay would be great. Before a trial on the merits a defendant could always insist upon a kind of

preliminary trial to determine the competency and adequacy of the evidence before the grand jury. Therefore, an indictment returned by a legally constituted and unbiased grand jury, if valid on its face, is enough to call for trial of the charge on the merits.[111] Even the fact that all the evidence before the grand jury was hearsay is not a sufficient ground for challenging the indictment.[112] The possibility that, following indictment, there may be little or no competent evidence upon which a defendant may be tried does not seem to trouble the Federal courts. The Court of Appeals for the District of Columbia stated, "The very existence of the institution of the Grand Jury presupposes the possibility that this body may err in issuing an indictment."[113] The court went on to explain that the nature of its function contemplates that a grand jury will hear from many sources, uninhibited by the strict rules of evidence and untested by the traditional adversary tools such as cross-examination. Therefore, so long as the grand jury itself is not tainted in the sense that it was improperly constituted, or that its members were necessarily biased, its actions, if valid on their face, are valid.[114]

For the same reasons, the Federal courts make short shrift of challenges to indictments which were based wholly or partly on illegally obtained evidence. Thus in Laughlin v. United States,[115] where it was determined that the grand jury considered illegally obtained recordings of telephone conversations, the court stated that all that was required was an indictment valid on its face. The defendant has ample opportunity at trial to prevent any ultimate prejudice stemming from the government's illegal actions.[116] In West v. United States,[117] the court flatly stated that there is no case which extends the rule prohibiting the consideration of illegally obtained evidence at trial to grand jury proceedings.[118]

Although a grand jury may consider any illegally obtained evidence which is presented to it, the 7th Circuit would not go so far as to permit the grand jury to issue a subpoena for the production of physical evidence, the seizure of which would have violated the witness' Fourth Amendment rights. In In re Dionisio,[119] the court reversed a lower court's contempt citation which was based upon the defendant's refusing to obey a grand jury order to go to the U. S. Attorney's Office

to furnish voice examplars to be compared with voices contained on previously obtained FBI recordings of telephone conversations. The court held that the Fourth Amendment bans wholesale intrusions upon personal security, and that the interposition of the grand jury between the witness and the government did not eliminate the Fourth Amendment protection which would otherwise bar the government's obtaining the evidence.[120]

In a similar vein, a Federal District Court in Ohio has recently held that if a grand jury's questions are based on evidence obtained by any violation of a witness' Fourth Amendment rights he is justified in refusing to answer the questions. The court held that a district court may consider a motion to suppress in a proceeding ancillary to a grand jury hearing. The possibility that a larger number of witnesses in cases involving other than electronic violations of the Fourth Amendment may seek suppression hearings is not enough to justify curtailment of Fourth Amendment rights.[121]

Article 32 Investigation

A pretrial investigation is a quasi-judicial proceeding. Since the purpose of the investigation is

to secure information, the investigating officer is not bound by the strict rules of evidence.[122] This practice makes the Article 32 investigation a valuable discovery vehicle for the defense. The defense counsel is attempting to pry as much information as possible from the government witnesses so he is not likely to raise technical objections to their testimony. In many cases he will eagerly take advantage of the relaxed procedure to engage in a "fishing expedition" with the witnesses. Even in the few instances when the government is represented by counsel and the investigation becomes a quasi-adversary proceeding, it still retains its character as a discovery device and the investigating officer, who may be placed in the uncomfortable position of having to rule on the government counsel's objections, is still instructed that the formal rules of evidence are relaxed at the Article 32 investigation.[123]

For the foregoing reasons, there are relatively few cases which raise the issue that the investigating officer considered incompetent evidence in making his recommendations. In United States v. Brakefield,[124] the accused contended on appeal that the evidence at the Article 32 investigation did not amount to a prima

facie case or constitute sufficient probable cause to convene a general court-martial. The Court of Military Review held that the federal rule prohibiting a defendant from challenging a grand jury indictment on the ground that it is not supported by adequate or competent evidence should be applied to courts-martial in the absence of an indication of a clear abuse of discretion or malicious intent.

Most of the decided cases in this area touch on the accused's right of confrontation at the pretrial investigation,[125] where the defense has claimed prejudice because the investigating officer has either considered the written statements of absent witnesses, or has failed to secure the attendance of all the witnesses requested by the defense. Thus in United States v. Samuels,[126] the defense objected to the investigating officer's considering the written statements of 58 witnesses who had been transferred and who were more than 100 miles away at the time of the investigation. The court held that, while unavailability affects the accused's right to cross-examine a witness, it does not preclude the investigating officer's considering the

witnesses' statements, provided that they are under oath or affirmation.[127]

United States v. Lassiter[128] is an unusual example of a case in which the court seemingly went out of its way to apply the doctrine of waiver against the accused. The defense counsel moved that all the witnesses the government intended to use at the trial be produced at the Article 32 investigation. All but one of the witnesses were unavailable and, without objection, the investigating officer considered their unsworn statements. At trial the law officer denied a defense motion to dismiss the charges, or to refer them to another investigation, because of the unavailability of the government witnesses. In a hair-splitting split decision, the court held that the defense waived any objection to the investigating officer's improper consideration of the unsworn statements, because the objection at trial was addressed only to the unavailability of the witnesses, and did not specifically mention the investigator's improper action.[129] Judge Ferguson dissented, stating that since the defense did object generally to the inadequacy of the pretrial proceedings, a mere failure

to make a specific objection should not amount to a waiver.[130]

There are two cases which indicate that physical presence or absence are not the only factors used to determine whether a witness is available and whether an accused has been denied his right of confrontation. In United States v. Craig,[131] the accused and his counsel were denied access to a classified report at the pretrial investigation because defense counsel was not cleared for "confidential" information. It was held that counsel with a proper security clearance should have been appointed. This amounted to a denial of the accused's statutory right of confrontation at the pretrial investigation.[132]

The second case is United States v. Doyle,[133] where the victim of a rape was brought from the hospital to the Article 32 investigation. After some preliminary questioning the investigating officer determined that the victim was in a state of shock, and he stopped the examination. A previous statement made by the witness to criminal investigators was read to the accused and incorporated into the report of investigation. The board of review held that, in this context, the word

"available" should be used in its general sense of being available for examination. Availability is not dependent solely upon the factor of physical presence, but also includes others, such as a state of physical health that will permit one to undergo examination. In the absence of such a state of health, the witness was unavailable.[134]

Neither the Article 32 investigation nor the grand jury proceeding are bound by rigid evidentiary rules. The grand jury is always, and the Article 32 investigation is usually, an ex parte proceeding, but with one vital difference. In the civilian proceeding the defendant is never present, unless he happens to be a witness, while in the military the accused and his counsel are always present. The Article 32 investigation is a discovery proceeding, and the rules of evidence should be relaxed so that the accused can take full advantage of the opportunity to obtain information. The grand jury, however, is anything but a discovery device. On the contrary, it is designed to operate in secrecy, and a defendant doesn't even have a right to know who the witnesses against him were.

C. Discovery and Disclosure

The difference between a military and civilian accused's pretrial discovery rights is as great as the difference between secrecy and disclosure. The keynote in the military is disclosure, and that in the federal practice is secrecy. It takes little imagination to determine which is the more advantageous practice, for both the individual and the government, and the federal courts are slowly and reluctantly beginning to realize this.

The Grand Jury

An individual being investigated by the grand jury is not only excluded from their proceedings unless he is a witness,[135] but he is not entitled to know what occurred before the grand jury.[136] He has no right to know who the witnesses were, or what they said. The prohibition against disclosure is contained in rule 6(e), Federal Rules of Criminal Procedure. That rule permits disclosure of grand jury proceedings only to the attorneys for the government, unless a court directs disclosure in connection with a judicial proceeding. A defendant may be permitted to inspect his own grand

jury testimony, but only upon court order, and only if his testimony was recorded.[137] It is readily apparent that rule 16(a)(3) permits a defendant to "discover" only that which he already knows. In stark contrast to the military practice, the civilian defendant is entitled to inspect papers and documents in the possession of the government only if he can convince a court that the documents are material to the preparation of his defense and that the request is reasonable.[138] Even if a defendant is fortunate enough to be aware of the existence of statements or other physical evidence, the requirement that he show materiality to the preparation of his defense presents a formidable obstacle when he has not seen the documents and is not familiar with their content.

A fissure in the facade of nondisclosure of grand jury proceedings in the federal courts has only recently begun to appear, but during its long years of existence the policy of absolute secrecy has had powerful and respected advocates. In denying a defendant's right to inspect grand jury minutes, Judge Learned Hand stated:

> It is said to lie in discretion, and perhaps it does, but no judge of this court has granted it, and I hope none ever will. Under our

> criminal procedure the accused has every advantage. While the prosecution is held rigidly to the charge, he need not disclose the barest outline of his defense. He is immune from question or comment on his silence; he cannot be convicted when there is the least fair doubt in the minds of any one of the twelve. Why in addition he should in advance have the whole evidence against him to pick over at his leisure, and make his defense, fairly or foully, I have never been able to see . . . . Our dangers do not lie in too little tenderness to the accused . . . . What we need to fear is the archaic formalism and the watery sentiment that obstructs, delays, and defeats the prosecution of crime.[139]

However, another jurist aptly makes the point that those who oppose pretrial discovery because it would give an undue advantage to the defendant overlook the fact that the protection afforded the defendant against discovery is in large measure counterbalanced by the abundant resources for investigation available to the prosecution.[140]

A review of the 'secrecy' cases until 1970 reveals that, with few exceptions, courts tended to adhere to Judge Hand's thinking and kept the lid of secrecy on grand jury proceedings. In United States v. Procter

& Gamble Company,[141] Mr. Justice Douglas set forth the following reasons for the long-established policy of secrecy: (1) to encourage witnesses to testify freely without fear of retaliation; (2) to prevent the escape of those whose indictment may be contemplated; (3) to insure the utmost freedom to the grand jury in its deliberations; (4) to prevent subornation of perjury or tampering with witnesses who may testify before the grand jury and later appear at the trial of those indicted by the grand jury; and (5) to protect an innocent accused who is exonerated from disclosure of the fact that he has been under investigation.[142] The court then reiterated the general rule that the indispensable secrecy of grand jury proceedings must not be broken except where there is a compelling necessity, and the circumstances which create the compelling necessity must be shown with particularity.[143] The court did concede that using a grand jury transcript at trial to impeach a witness, to refresh his recollection, or to test his credibility would be cases of particularized need where the secrecy of the proceedings could be lifted discretely and limitedly.[144]

The following year, in Pittsburgh Plate Glass Company v. United States,[145] the Supreme Court restated

the instances of particularized need set out in Procter & Gamble, held that whether to allow disclosure is discretionary with the trial judge, and emphasized that a mere showing that a trial witness testified before the grand jury does not entitle the defendant to inspect the grand jury testimony.[146] In Dennis v. United States[147] the Supreme Court found that a particularized need had been shown by the defendant, where the government admitted in its brief that the interest of secrecy was minimal since the witness had repeated his testimony so often.[148]

Dennis really did not dilute the earlier Supreme Court decisions. In both Pittsburgh Plate Glass Co. and Procter & Gamble, the defendants sought wholesale disclosure of grand jury testimonyas a matter of right, while in Dennis the defendants sought disclosure of particular testimony for which they had demonstrated a particular need. Following Dennis, however, the Circuit Courts began to chip away at the Supreme Court's rigid rules of secrecy. In United States v. Youngblood,[149] the Second Circuit stated that it did not read Pittsburgh Plate Glass Co., Procter & Gamble and Dennis as limiting the discretion of the trial court to order disclosure only when a particularized need is

shown. Rather, those cases merely indicate a minimum standard to which the courts must adhere, and they do not limit a court's power to order disclosure in additional situations where a showing of particularized need has not been made.[150] The court then announced a new rule for future trials in the Second Circuit. Where a witness has testified at trial, and disclosure is limited to that portion of a witness' grand jury testimony which was the subject of direct examination at trial, the traditional reasons for grand jury secrecy are largely inapplicable, and disclosure of the grand jury testimony should be permitted without requiring a showing of particularized need.[151] Obviously even this rule is not entirely satisfactory. First, the witness' grand jury testimony need not be transcribed at all. Secondly, because he is familiar with the witness' prior testimony, the prosecutor can be very selective in the subject matter of the direct examination at trial. But the government may not always be able to control these factors, and half a loaf is better than none.

In Cargill v. United States,[152] the court held that, irrespective of a showing of particularized need,

a request for the grand jury testimony of a specific witness to use during his cross-examination at trial to impeach him, to refresh his recollection, or to test his credibility, should be granted.[153] Again, in Allen v. United States,[154] the court stated that, in the absence of the reasons for secrecy contained in Pittsburgh Plate Glass Company, the mere fact that a witness' prior testimony was given to a grand jury is not a clear and compelling reason to immunize it from later scrutiny after he has testified on the same subject at trial. There is a growing realization that disclosure, rather than suppression, of relevant materials ordinarily promotes the proper administration of justice.[155] One federal circuit has gone so far as to hold that a defendant is entitled to examine the grand jury testimony of a witness at the trial in order to attempt to impeach the witness,[156] even without a showing that the witness has materially deviated from his prior testimony.

The foregoing discussion of a defendant's right to discovery of grand jury minutes was based upon the State of the law until 1970. Until that time the courts had always held that the Jencks Act,[157] which authorized a court to order the United States to produce

any statement of a witness called by the government who has testified on direct examination, did not apply to grand jury minutes.[158] The Organized Crime Control Act of 1970[159] amended the Jencks Act to include grand jury minutes within the definition of a "statement" which must be produced. The federal courts will now be able to disregard the rigid particularized need[160] rule which thwarts a defendant's discovery and disclosure privileges. It should be noted, however, that even the new statutory amendment does not mention, much less recognize, a defendant's right to pretrial discovery of a witness' grand jury testimony. The courts and Congress have gone only as far as permitting a defendant to examine a witness' prior testimony at trial, after the witness has testified if the witness' grand jury testimony was recorded.

The civilian defendant has a long way to go before he reaps the benefits of the carte blanche pre-trial discovery rights which his military counterpart now enjoys, but inroads are slowly being made. In a "Pentagon Papers" case, a California district court has announced that a witness is entitled to a record of his own grand jury testimony, if it was recorded, without

a showing of compelling necessity or particularized need.[161] The court pointed out that witnesses themselves have been free since 1946 to disclose what transpired during their presence in the federal grand jury room, and that there is no evidence that this breach of secrecy has diminished the effectiveness of the grand jury system or adversely affected the government's ability to investigate crime and bring offenders to justice.[162] This ruling will help a defendant who has testified as a witness before the grand jury to obtain a transcript of his own prior testimony. However, the civilian defendant in federal court is still unable to obtain copies of the grand jury testimony of other witnesses prior to trial.

Article 32 Investigation

Congress recognized that, in order to insure a fair and expeditious military trial, an accused should not have to come to court guessing. Article 32(b) of the code provides specifically that the accused shall be advised of the charges against him at the investigation, that he has the right to cross-examine witnesses,

and that a copy of the charges and statements of the witnesses after the investigation shall be given to the accused. From the time he first becomes a suspect until charges are preferred, the accused is kept aware of the nature of the charges and the witnesses against him. A suspect cannot be interrogated unless he is first informed of the nature of the accusation.[163] Before charges are forwarded, the accused's immediate commander must inform the accused of the charges against him, and must complete and sign the certificate to that effect on the charge sheet.[164] At the outset of the investigation the accused is again informed of the offense charged against him, the names of the witnesses against him, and of his right to cross-examine available witnesses.[165] In the Army, the investigating officer is directed to contact the accused's counsel prior to the investigation for the purpose of delivering a complete copy of the file to him.[166]

The pretrial investigation is designed to operate as a discovery proceeding for the accused,[167] and it should be obvious from the foregoing discussion that it accomplishes that purpose. The accused is informed, on several occasions, of the offenses he is

charged with. Before the formal investigation begins he knows who the prosecution witnesses will be, and he has copies of their statements and can interview them. He is present throughout the entire investigation and has the opportunity to hear the testimony of the witnesses against him and to cross-examine them. The civilian being investigated by a grand jury enjoys none of these benefits. Yet, despite the military's enlightened pre-trial procedure, there is still room for improvement.

IV. RECOMMENDED CHANGES IN ARTICLE 32 PROCEDURE

The Article 32 investigation is not a perfect medium; there is room for improvement. The military justice enthusiasts who crow that the military is way ahead of the civilian community in providing due process guarantees would do well to hesitate and consider Sherman's observation that "Probably the most objective assessment of military and civilian court procedural due process rights would find them roughly equal, with perhaps a slight edge for the civilian procedures, primarily because of the command control aspect which still affects certain military rights."[168] The spectre

of command control, real or imagined, continues to permeate the Article 32 procedure. The commander appoints one of his men as investigating officer, and is free to disregard the investigating officer's recommendations.

Some reforms are necessary, but effecting them is no simple matter. Commanders have historically opposed any changes which derogate from their control over command discipline. While testifying before a congressional committee in 1879, General William T. Sherman said:

> I agree that it will be a grave error if by negligence we permit the military law to become emasculated by allowing lawyers to inject into it the principles derived from their practice in the civil courts, which belong to a totally different system of jurisprudence.[169]

More than 80 years later the Powell Committee reported that field commanders were unhappy with pretrial investigations because they were increasingly difficult to conduct and they consumed too much time.[170]

Nevertheless, in recent years there has been increasing agitation, particularly by members of Congress,

for substantial changes in the administration of military justice in addition to those effected by the Military Justice Act of 1968. It would be useful to examine those portions of the proposed changes which deal with the pretrial investigation.

A. The Powell Report

The Powell Committee, apparently more concerned with delays than with command control, recommended speeding up the pretrial procedure by having the investigation conducted by the same lawyer who would ultimately act as trial counsel, accompanied by a defense counsel. The advantage of this procedure is that counsels' activity would constitute their preparation for trial, so that they could proceed with a minimum of delay when charges were referred to trial.[171]

This recommendation obviously did not receive a cordial reception. The revised edition of the 1969 Manual still prohibits an officer who is expected to become a member of the prosecution from acting as an investigating officer.[172] It has been the author's experience that Article 32 investigations are usually conducted and completed with reasonable dispatch. The

Powell Committee's recommendation fails to address the real weakness of the Article 32 investigation: it is still subject to command control.

B. The Hatfield Bill

In June 1971, Senator Mark Hatfield introduced a bill[173] in the 92nd Congress which was designed, in part, to reduce command control of the pretrial investigation procedure. The Hatfield Bill divides the world into armed forces judicial circuits, each commanded by an Armed Forces Judicial Circuit Officer.[174] Upon written request from a convening authority, the judicial circuit officer will detail an investigating officer to investigate charges.[175] The investigating officer submits his report of investigation to the judicial circuit officer for review. If the judicial circuit officer disagrees with a recommendation of the investigating officer not to refer a charge to trial, then he is required to make a written report and indicate his reasons for determining that there is legally sufficient evidence to refer the charge to trial.[176] If the convening authority disagrees with a recommendation of either the investigating officer or the judicial circuit officer that a charge

not be referred to trial by general court-martial, he may submit the charge to The Judge Advocate General of the service of which he is a member for review and final decision.[177]

Senator Hatfield's bill solves the problem of command influence of the investigating officer, since that officer cannot be a member of the convening authority's command. However, the investigating officer's recommendation not to refer a charge to general court-martial is still subject to review and the procedures required to overrule that recommendation can lead to interminable delays.

It can be argued that, in practice, a judicial circuit officer and a convening authority will not take the time or effort required to overrule the investigating officer's recommendation. Perhaps. However, a convening authority with an axe to grind will not be too concerned if an accused spends an additional 30 or 60 days in pre-trial confinement pending a final decision by The Judge Advocate General. If an individual is sufficiently mature, impartial, experienced and educated to be appointed investigating officer, his decision not to

refer a charge to trial by general court-martial ought not to be subject to review.

C. The Bayh Bill

In March 1971, Senator Birch Bayh introduced a bill in the 92d Congress[178] which would substantially revise the Uniform Code of Military Justice. The revised Article 32 eliminates an investigation conducted by an investigating officer. Instead, a suspect must be taken before a military judge within 24 hours after arrest or after charges have been preferred. At this initial appearance the military judge will inform the accused of the charges, of his right to counsel, and of his right to have a preliminary examination. The accused is allowed a reasonable time to consult with counsel, and he may waive the preliminary examination. If the accused requests a preliminary examination it must be conducted by the military judge within a reasonable time. There the accused may cross-examine witnesses and discover and introduce evidence. If the military judge determines that there is probable cause to believe that an offense has been committed by the accused, he will hold the

accused for trial. Although the bill is silent on the matter, it appears that the military judge's determination that there is no probable cause is final.

The obvious advantages of this plan are that the preliminary examination would always be conducted by legally trained personnel not subject to command influence, and that the military judge's determination of lack of probable cause is not subject to review. Furthermore, an accused would have the option of waiving the preliminary examination. The accused would receive all of the benefits, without any of the disadvantages, of the present Article 32 procedure.

The Bayh Bill also has its disadvantages. It permits a preliminary examination for all charges, whether or not trial by general court-martial is contemplated. This would be a totally impracticable burden without a substantial increase in judicial personnel. Even if a preliminary examination were requested in only half the cases, there would be more than 25,000 examinations per year in the Army. At those installations where a military judge is not permanently stationed, it would be difficult, if not impossible, to comply

with the requirement that an accused be brought before the military judge within 24 hours after arrest or after charges have been preferred. Further, it is conceivable that this procedure would narrow the present scope of the accused's discovery rights at the pretrial investigation. The requirement to determine the existence of probable cause may not necessitate examining all the evidence surrounding each specification. Once a judge finds probable cause, he may be able to limit the accused's right to call or cross-examine additional witnesses by simply ending the investigation.

D. A Suggested Procedure

There is a very simple way to improve the Article 32 procedure within the existing framework of the Code. First, the investigating officer's recommendation not to refer a specification or charge to trial by general court-martial should be binding upon the convening authority.[179] This can be accomplished by amending paragraph 34a of the Manual. Second, all Article 32 investigations should be conducted by a special court-martial (Class II) military judge. This has the double advantage of providing an investigating

officer who is both legally trained and free from command control. No legislation is required, and such a procedure would not run afoul of the Manual prohibition against designating the person who is expected to become the military judge at the trial of the case as investigating officer.[160]

V. SUMMARY

The grand jury, as we know it today, evolved, flourished and died in England. Ironically, the country which for many centuries nurtured the grand jury determined in the 20th century to abolish it; yet in the United States the military's jurisdiction has been limited because it does not provide for indictment by grand jury, while at the same time the military's Article 32 investigation provides an accused with procedural due process which far surpasses the pretrial safeguards which the grand jury indictment offers a civilian defendant.

This paper has examined and compared a few of the defendant's most important pretrial safeguards. The institutions themselves - the Article 32 investi-

gation and the grand jury - are both designed to protect the individual from unjust prosecution by the government. However, there is a marked difference in the procedural safeguards actually permitted by the military and civilian institutions. At the Article 32 investigation, an accused may be represented by counsel, either military or civilian. An accused who is denied the right to counsel is entitled to a new Article 32 investigation. A civilian is not entitled to counsel at a grand jury investigation. The civilian suspect is not even permitted to attend the grand jury proceeding unless he is testifying as a witness.

The military accused has a statutory right to confront available witnesses at the Article 32 investigation. The investigating officer cannot consider the unsworn statements of absent witnesses if the accused objects. There is obviously no right of confrontation at the grand jury proceeding, since neither the accused nor his attorney are permitted to be present. Neither the Article 32 investigation nor the grand jury proceeding are bound by the formal rules of evidence. But if strict evidentiary rules were applied, who would object for the defendant at the grand jury proceeding?

At the Article 32 investigation the government's file is almost literally open to the accused. He must be told what the charges are and who the witnesses are, and his counsel is given a complete copy of the file by the investigating officer. The pretrial investigation serves as a discovery proceeding for the accused. Just the opposite is true of a federal grand jury proceeding. A civilian defendant has no right to know who the witnesses are, and he is not entitled to know anything about the proceedings. The proceedings can be disclosed only to government attorneys. The defendant must obtain a court order to inspect his own recorded grand jury testimony. He must show materiality to obtain the court's permission to inspect other documentary evidence considered by the grand jury - a substantial burden when a defendant has no idea what evidence the grand jury considered.

Finally, the grand jury's unfettered power, when in session, to investigate anyone or anything on the merest suspicion creates the appearance of a vigilante group which has long been regarded as anathema to the proper administration of criminal justice.

It is apparent that an accused in the military, lacking the constitutional "benefit" of grand jury indictment, has a much greater pretrial advantage than his civilian counterpart enjoys. Nevertheless, the Article 32 investigation should be further improved by eliminating any vestige of command influence. This can be done by making the investigating officer's recommendation not to refer a charge to trial by general court-martial final, and by appointing a Class II military judge as investigating officer in all cases. With the adoption of these recommended changes, the Article 32 investigation will become the finest and fairest pretrial investigative institution in American jurisprudence.

FOOTNOTES

1. National Commission on Law Observance and Enforcement - Report on Prosecution (1931), p. 124.

2. Nichols, The Justice of Military Justice, 12 William and Mary L. Rev. 482, 495 (1971); Williams, Crime, Punishment, Violence: The Crisis in Law Enforcement, 54 Judicature 418, 420 (May 1971); Rabinowitz, Reif and Litt, Repression by Grand Jury, 29 Guild Practitioner 44 (1971).

3. Time Magazine, p. 59 (Feb. 7, 1972).

4. 395 U.S. 258 (1969).

5. Id. at 262.

6. Gaither v. United States, 413 F.2d 1061 (D.C. Cir. 1969).

7. 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, ..." This exception was made in order to authorize the trial by court-martial of members of the armed forces for all crimes which under the Fifth and Sixth Amendments might otherwise have been deemed triable in the civil courts. Ex Parte Quirin, 317 U.S. 1, 43 (1942).

8. Uniform Code of Military Justice, [hereafter cited as UCMJ] art. 32, states:

> § 832. Art. 32. Investigation
>
> (a) No charge or specification may 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. This investigation shall include inquiry as to the truth of the matter set forth in the charges, consideration of the form of charges, and a recommendation as to the disposition which should be made of the case in the interest of justice and discipline.

(b) The accused shall be advised of the charges against him and of his right to be represented at that investigation by counsel. Upon his own request he shall be represented by civilian counsel if provided by him, or military counsel of his own selection if such counsel is reasonably available, or by counsel detailed by the officer exercising general court-martial jurisdiction over the command. At that 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 the investigation, they shall be accompanied by a statement of the substance of the testimony taken on both sides and a copy thereof shall be given to the accused.

(c) If an investigation of the subject matter of an offense has been conducted before the accused is charged with the offense, and if the accused was present at the investigation and afforded the opportunities for repre-

sentation, cross-examination, and presentation prescribed in subsection (b), no further investigation of that charge is necessary under this article unless it is demanded by the accused after he is informed of the charge. A demand for further investigation entitles the accused to recall witnesses for further cross-examination and to offer any new evidence in his own behalf.

(d) The requirements of this article are binding on all persons administering this chapter but failure to follow them does not constitute jurisdictional error.

9. United States v. Koleske, 24 C.M.R. 652 (AFBR 1957); pet. den., 24 C.M.R. 311 (1957).

10. Part II, A, infra.

11. Part III, infra.

12. Morse, A Survey of the Grand Jury System, 10 Ore. L. Rev. 101 (1931) [hereafter cited as Morse].

13. M. Lesser, The Historical Development of the Jury System (1894), 93 [hereafter cited as Lesser].

14. Morse at 104.

15. Lesser at 94; I W. Holdsworth, A History of English Law (1956) 312.

16. Morse at 106.

17. Morse at 114.

18. Lesser at 137-140; G. Edwards, The Grand Jury (1906) 7-9 [hereafter cited as Edwards.]

19. Edwards at 26.

20. Watts, Grand Jury: Sleeping Watchdog or Expensive Antique?, 37 N.C. L. Rev. 290, 293 (1959).

21. II H. Osgood, American Colonies in the Seventeenth Century (1904) 303.

22. Younger, Grand Juries and the American Revolution, 63 Va. Mag. of Hist. and Biog. 257 (July 1955).

23. Id. at 265.

24. I. Brant, The Bill of Rights - Its Origin and Meaning (1965) 64; 2 B. Schwartz, The Bill of Rights: A Documentary History (1971) 1117, 1154.

25. Wood v. Georgia, 370 U.S. 375, 390 (1962).

26. United States v. Cox, 342 F.2d 167 (5th Cir. 1965), cert. den. 381 U.S. 935 (1965).

27. Gaither v. United States, 413 F.2d 1061 (D.C. Cir. 1969). Of course, there is nothing to prevent the government from seeking an indictment from another grand jury, and a persistent prosecutor can always reduce the charge and proceed on information.

28. Winthrop, Military Law and Precedents, 150 (2d ed. 1920) [hereafter cited as Winthrop].

29. Id. at 151.

30. Id. at 154-155.

31. Articles of War (1920), art. 70.

32. Id.

33. Id.

34. A Manual for Courts-Martial, U.S. Army (1921), para. 76a (3).

35. Id.

36. Id. at para. 76a(8).

37. Act of 20 August 1937; 50 Stat. 724.

38. H. Rep. No. 1517, 75th Cong., 1st Sess. (1937).

39. A Manual for Courts-Martial, U.S. Army (1928).

40. Id. at para. 35a.

41. Id.

42. 62 Stat. 633 (1948).

43. Id.

44. Manual for Courts-Martial, U.S. Army, 1949.

45. Id. at para. 35a.

46. Note 8, supra.

47. UCMJ, art. 32(b).

48. UCMJ, art. 32(c).

49. Shortly after Article of War 70 was amended in 1920, The Judge Advocate General of the Army opined that the pretrial investigation was jurisdictional, and that lack of substantial compliance deprived the court of jurisdiction. Then during World War II,

The Judge Advocate General approved a board of review opinion that the pretrial investigation provision was directional only, and that lack of substantial compliance did not affect jurisdiction. Following the war, however, in a habeas corpus proceeding, a federal court held that compliance with the pretrial investigation provisions was jurisdictional. Confusion reigned supreme. Many courts adopted that holding, but found substantial compliance and denied habeas corpus writs. Index and Legislative History 668.

The United States Supreme Court finally spoke in Humphrey v. Smith, 336 U.S. 695 (1949). Smith was convicted by court-martial of rape and assault with intent to commit rape. He filed a writ of habeas corpus challenging the validity of the conviction. The court held that Congress did not mean for Article of War 70 to be jurisdictional. There was no intent to make an otherwise valid court-martial wholly void because the pretrial investigation fell short of the standards prescribed by Article of War 70.

The present Article 32(d) provision is based on the decision in Humphrey v. Smith. Legal and Legislative Basis, Manual for Courts-Martial 1951, 53. The drafters intended that the pretrial investigation procedure should be mandatory, but that less than full compliance which does not materially prejudice the accused's substantial rights should not be jurisdictional error. Index and Legislative History 999.

50. Para. 34a, Manual for Courts-Martial, United States 1969 (Revised Edition) [hereafter cited as MCM, 1969] makes the recommendation of the Article 32 investigating officer advisory only. The convening authority is free to disregard the investigating officer's recommendation to dismiss a specification or a charge, while a grand jury's decision not to

indict is binding. Perhaps it can be argued that one man's opinion ought to be questioned, while the combined judgment of several minds need not be. Nevertheless, a "thorough and impartial" investigation followed by a recommendation which is advisory only can do little to stem the tide of baseless charges. Relying on one man's opinion is certainly not without precedent in civilian practice. In many states the decision of a justice of the peace who conducts a preliminary hearing not to bind a charge over for trial is final.

51. United States v. Neff, 212 F.2d 297, 301 (3d Cir. 1954).

52. Id. at 301.

53. Blair v. United States, 250 U.S. 273, 282 (1919).

54. United States v. Scully, 225 F.2d 113 (2d Cir. 1955); cert. den. 350 U.S. 897 (1955).

55. 38 Corpus Juris Secundum [hereafter cited as C.J.S.] Grand Juries, § 1c; Levine v. United States, 362 U.S. 610 (1960); reh. den. 363 U.S. 858 (1960).

56. 38 C.J.S. Grand Juries § 1b.

57. Id. at § 2.

58. Note 7, supra.

59. Ex Parte Wilson, 114 U.S. 417 (1885); Mackin v. United States, 117 U.S. 348 (1886). But the courts have made an exception to the general rule in the case of criminal contempts. See Green v. United States, 356 U.S. 165 (1958). The current Federal Rules provide that an offense punishable by death, imprisonment for a term in excess of one year or at hard labor must be prosecuted in indictment. FRCrP, rule 7(a).

60. 38 C.J.S. Grand Juries § 34a.

61. Hale v. Henkel, 201 U.S. 43 (1906).

62. United States v. Harte-Hanks Newspapers, 254 F.2d 366 (5th Cir. 1958); cert. den. 357 U.S. 938 (1958). The court seems to say that an illegal search would be a mere impropriety, rather than the infringement of a constitutional right. This is difficult to comprehend, but perhaps the court found some solace in holding, parenthetically, that there was not an illegal search in this case.

63. Meshbesher, Right to Counsel Before Grand Jury, 41 F.R.D. 189 (1966).

64. Hall, Kamisar, LaFave, and Israel, Modern Criminal Procedure (1969) 792. The authors did not cite the statistics to which they referred.

65. 1 C. Wright, Federal Practice and Procedure (1969) 152; Accord: Note, The Grand Jury as an Investigatory Body, 74 Harv. L. Rev., 590, 596 (1961).

66. 38 C.J.S. Grand Juries § 41b.

67. United States v. Koleske, 24 C.M.R. 652 (AFBR 1957); pet. den. 24 C.M.R. 311 (1957).

68. United States v. Nichols, 8 U.S.C.M.A. 119, 23 C.M.R. 343 (1957).

69. United States v. Samuels, 10 U.S.C.M.A. 206, 27 C.M.R. 280 (1959).

70. MacDonald v. Hodson, 19 U.S.C.M.A. 582, 42 C.M.R. 184 (1970).

71. United States v. Daminger, 31 C.M.R. 521 (AFBR 1961); rev. den. 31 C.M.R. 314 (1961).

72. United States v. Crooks, 12 U.S.C.M.A. 677, 31 C.M.R. 263 (1962).

73. UCMJ, art. 32(a).

74. Id., art. 18.

75. MCM, 1969, para. 32e.

76. Id., para. 34a.

77. Id.

78. Id.

79. Schiesser and Benson, Modern Military Justice, 19 Cath. U. L. Rev. 489 (1970).

80. Id. at 514-515.

81. Id. at 515.

82. Gollaher v. United States, 419 F.2d 520 (9th Cir. 1969); cert. den. 396 U.S. 960 (1969).

83. FRCrP, rule 6(d).

84. Hannah v. Larche, 363 U.S. 420 (1960); reh. den. 364 U.S. 855 (1960).

85. 378 U.S. 478 (1964).

86. Id. at 486.

87. 384 U.S. 436 (1966).

88. Id. at 466.

89. 399 U.S. 1, 10 (1970).

90. United States v. Wade, 388 U.S. 218 (1967).

91. Coleman, note 89, supra, at 7.

92. Comment, Right to Counsel in Grand Jury Proceedings, 26 Wash. and Lee L. Rev. 97 (1969).

93. 443 Pa. 117, 277 A.2d 764 (1971).

94. Meshbesher, Right to Counsel Before Grand Jury, 41 F.R.D. 189 (1966).

95. Id. at 196.

96. Part II, A, infra.

97. 8 U.S.C.M.A. 266, 24 C.M.R. 76 (1957).

98. Id. at 78.

99. Analysis of Contents - Manual for Courts-Martial, United States, 1969, Revised Edition, Dep't of the Army Pam No. 27-2, page 7-3.

100. UCMJ, art. 32(b).

101. 8 U.S.C.M.A. 119, 23 C.M.R. 343 (1957).

102. Id. at 349.

103. United States v. Westergren, 14 C.M.R. 560 (AFBR 1953).

104. Id. at 576.

105. Id. at 577.

106. 20 U.S.C.M.A. 278, 43 C.M.R. 118 (1971).

107. FRCrP, rule 6(d).

108. 363 U.S. 420 (1960); reh. den. 364 U.S. 855 (1960).

109. Id. at 449.

110. Costello v. United States, 350 U.S. 359 (1956); reh. den. 351 U.S. 904 (1956).

111. Id. at 363.

112. United States v. Bitter, 374 F.2d 744, 748 (7th Cir. 1967); rev'd. on other grounds, 389 U.S. 15 (1967).

113. Coppedge v. United States, 311 F.2d 128, 132 (D.C. Cir. 1962); cert. den. 373 U.S. 946 (1963).

114. Id.

115. 385 F.2d 287 (D.C. Cir. 1967).

116. Id. at 291.

117. 359 F.2d 50 (8th Cir. 1966); cert. den. 385 U.S. 867 (1966).

118. Id. at 56.

119. 442 F.2d 276 (7th Cir. 1971).

120. Id. at 279, 280.

121. In re Calandra, 332 F. Supp. 737 (1971).

122. United States v. Yuille, 14 C.M.R. 450, 457 (NBR 1953).

123. Military Justice Handbook Procedural Guide for Article 32(b) Investigating Officer Dep't of the Army Pam No. 27-17 (June 1970).

124. 43 C.M.R. 828 (ACMR 1971); pet. for rev. den., 43 C.M.R. 413 (1971).

125. UCMJ, art. 32(b).

126. 10 U.S.C.M.A. 206, 27 C.M.R. 280 (1959).

127. Id. at 287. The court would probably not make this distinction today, and would undoubtedly find that the witnesses were available and should have been at the Article 32 investigation in person. In United States v. Davis, 19 U.S.C.M.A. 217, 41 C.M.R. 217 (1970), the court held that, since a serviceman subject to military orders is always within the jurisdiction of the military court, he is not unavailable simply because he is stationed more than one hundred miles from the site of the trial. The same rationale should apply with respect to military witnesses at the pretrial investigation.

128. 11 U.S.C.M.A. 89, 28 C.M.R. 313 (1959).

129. Id. at 314.

130. Id.

131. 22 C.M.R. 466 (ABR 1956); aff'd on other grounds, 8 U.S.C.M.A. 218, 24 C.M.R. 28 (1957).

132. Id. at 469.

133. 17 C.M.R. 615 (AFBR 1954); pet. den., 17 C.M.R. 381 (1954).

134. Id. at 638.

135. FRCrP, rule 6.

136. Id.

137. FRCrP, rule 16(a).

138. Id., rule 16(b).

139. United States v. Garsson, 291 F. 646, 649 (D.C. S.D.N.Y. 1923).

140. Traynor, Ground Lost and Found in Criminal Discovery, 39 N.Y.U. L. Rev. 228 (1964).

141. 356 U.S. 677 (1958).

142. Id. at 682.

143. Id.

144. Id. at 683.

145. 360 U.S. 395 (1959); reh. den. 361 U.S. 855 (1959).

146. Id. at 399.

147. 384 U.S. 855 (1966).

148. Id. at 872. The court also confirmed the trial court's discretionary power under rule 6(e), FRCrP, to direct the disclosure of grand jury testimony in connection with a judicial proceeding.

149. 379 F.2d 365 (2d Cir. 1967).

150. Id. at 369.

151. Id. at 369-370.

152. 381 F.2d 849 (10th Cir. 1967); cert. den. 389 U.S. 1041 (1967).

153. Id. at 852.

154. 390 F.2d 476 (D.C. Cir. 1968); motion to modify opinion den., 404 F.2d 1335 (D.C. Cir. 1968).

155. Id. at 480-481.

156. United States v. Braico, 422 F.2d 543 (7th Cir. 1970); cert. den. 398 U.S. 912 (1970).

157. 18 U.S.C.A. § 3500 (1969).

158. Pittsburgh Plate Glass, n. 145, supra; Matthews v. United States, 407 F.2d 1371 (5th Cir. 1969); cert. den. 398 U.S. 968 (1970); reh. den. 400 U.S. 857 (1970).

159. 84 Stat. 926 (1970).

160. "Particularized need" is another one of those phrases, like "service connected," which courts love to grab hold of without really knowing what it means. Traynor, n.140, supra, says, at page 230, "No one seems quite certain about the particulars of particularization."

161. In Re Russo, 10 Cr L 2145 (October 17, 1971).

162. Id. at 2146.

163. MCM, 1969, para. 34b.

164. Id., para. 32f(1).

165. Id., para. 34b.

166. Note 123, supra.

167. Note 126, supra.

168. Sherman, The Civilianization of Military Law, 22 Maine L. Rev. 3, 65-66 (1970).

169. As quoted Id. at 4.

170. Report to Honorable Wilbur M. Brucker, Secretary of the Army, by The Committee on The Uniform Code of Military Justice, Good Order and Discipline in the Army, 18 Jan 60, page 90.

171. Id.

172. MCM, 1969, para. 34a.

173. S.2171, 92d Cong., 1st Sess.

174. Id., subpara. (1).

175. Id., subpara. (8).

176. Id., subpara. (10).

177. Id., subpara. (11).

178. S.1127, 92d Cong., 1st Sess.

179. Alternatively, the investigating officer can be limited to a determination of whether there is sufficiant evidence to warrant referring a specification to trial. His determination that there is sufficient evidence should be final. However, once the determination has been made that there is sufficient evidence, the convening authority should then decide whether the case should be tried, and in what forum. This alternative would require Congressional action.

180. MCM, 1969, para. 34a. There is a possibility that a Class II military judge who investigated a case might be required to judge the same case if it were subsequently referred to trial by special court-martial. This is not a serious obstacle. It happens relatively infrequently, and it is not illegal.