Opening Statement of

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Response Systems to Adult Sexual Assault Crimes Panel

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Madam Chair and Members of the Panel:

Thank you for affording me an opportunity to testify telephonically. I would like to address three related questions: (1) how widely should the Panel (and Congress) cast its net; (2) what should be done about Article 32; and (3) what should be the scope of court-martial subject matter jurisdiction.

First, sexual assault issues are important in themselves, but more broadly shine a light on structural defects in the UCMJ that apply to all kinds of offenses. The Panel should therefore consider the entire military justice system when recommending any changes. Because the parts are interactive, sharpshooting one aspect or another would be unwise. Thus, tinkering with or abrogating the convening authority's *post*-trial powers under Article 60 would make little sense without addressing the convening authority's *pre*trial powers with respect to such matters as the decision to charge, jury selection, and pretrial agreements. In my view, the time has come to reassign those powers for offenses other than minor disciplinary matters.

Second, the question of who should have the charging power cannot sensibly be addressed without a sober evaluation of the Article 32 pretrial investigation. In this connection, I refer you to my op-ed in last Monday's *Baltimore Sun* concerning the Naval Academy case. As you will see, I have come to the conclusion that Article 32 hearings are an anachronism and should be replaced by a simple probable cause hearing.

The Naval Academy case – a nasty one – got me to take a hard look at Art. 32. It was introduced in the 1920 Articles of War as a protection, perhaps influenced by the notorious Ft. Sam Houston race riot cases. The legislative history reports that the idea of a preliminary investigation was based on a British Army model. The provision was strengthened in the 1948 Elston Act and expanded to the other services when Congress passed the UCMJ in 1950. The Article 32 hearing was often waived in years past, but it still has been regarded as both a protection for GIs (a valuable discovery tool) and a benefit to prosecutors as well, to help them see weaknesses in their case. But it also has become bloated, as Article 32 investigating officers, fearful that a military trial or appellate judge down the road will find that the investigation was incomplete, have permitted it to become a second trial, before the real one. This means, in sexual assault cases particularly but in other cases as well, that the complainant and other government witnesses will be subjected to withering cross-examination in a public proceeding even before there is a trial. Obviously, this is going to discourage all but the hardiest souls from pursuing their complaints. Investigating officers lack the whip hand a military judge has in the

actual trial. (I gather the IO in the Naval Academy case felt he was on such a short leash -- even though he is a military judge -- that he had to get approval from the Superintendent even to grant adjournments.) Accused obviously have a right to cross-examine witnesses under the Confrontation Clause, but the Constitution doesn't confer such a right before trial. Equally obviously, the defense has a right and duty to prepare for trial, and that includes discovery, but that doesn't mean there is a constitutional right to a trial before the trial.

Charging decisions ought to be shifted from the command to a non-chain-of-command prosecutor. These are legal decisions that ought to be made by lawyers for offenses other than minor disciplinary matters (think mast-type offenses). Reforming Article 32 is a natural corollary of such a shift, since all Article 32 officers do is make a recommendation to the convening authority, who can accept it or reject it. Once that shift is made, there is no need for a disposition recommendation. Restructured Article 32 hearings could be limited to determining probable cause -- a role that requires little if any probing into witness credibility. The model would be Fed. R. Crim. P. 5.1, which calls for probable cause hearings conducted by magistrate judges in non-indictment cases. This seems to me to be faster, cheaper, and wiser all around. Discovery issues can then be resolved by the military judge if they are not worked out informally. And if a complainant has not been made available for interview/deposition before trial, I am 100% confident any military judge would give the defense an opportunity to do so.

Article 32 made sense in 1920, 1948 and 1950 as a check on command's sweeping power, but with the expanded right to counsel, the creation of a military bench that can properly control the pretrial process, introduction of the Military Rules of Evidence, and the existence of a two-tier appellate court structure to ride herd on the system, it seems to me that Article 32's costs in time, cost to the taxpayers, and toll on complainants (including deterrent effect) are exorbitant (especially given the fact that all they produce in the end is a recommendation). The goals sought to be achieved can be achieved by other, less convoluted means. Because of its current command-centric wiring, the military justice system has become encrusted with features like this. Abandon command-centricity and the system can be made much simpler, but still be fair. Even if Congress were to decide not to shift to an independent prosecution function with charging power, it would still be wise to reform Article 32. The Naval Academy case illustrates why.

The UK, incidentally, repealed the requirement for a Formal Preliminary Examination when Parliament passed the Armed Forces Act 2006.

Finally, the Panel should consider whether the subject matter jurisdiction of courts-martial ought to be confined to offenses that are "service connected." A majority of the Supreme Court held in *Solorio v. United States*, 483 U.S. 435 (1987), that the Constitution does not require such a limitation, but that case in no way restricts *Congress*'s power under Article I, § 8, cl. 14 to impose such a limit by statute, just as "Congress has never vested the federal courts with the entire

'judicial Power' that would be permitted by Article III."* Congress need not exercise the full range of its power. Structural reform of the military justice system would be incomplete if it left subject matter jurisdiction wide open, as it now is. Courts-martial should not be trying civilian-type offenses, *including sex offenses*, that have no connection to military service other than the accused's status as a member of the armed forces.

I will be happy to answer your questions.

* RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL L. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 276 (6th ed. 2009) (presenting partial list of exclusions).

The Naval Academy sex assault hearing should be the last of its kind

Article 32 hearings are an anachronism at odds with modern jurisprudence and the military's current priorities

By Eugene R. Fidell

September 16, 2013

The latest high-profile military justice case to come out of the **United States Naval Academy** in **Annapolis** merits nationwide attention. In a nutshell, it involves allegations of sexual assault of a female midshipman by several members of the Academy football team. Liquor seems to have played a pivotal role.

The case raises a host of issues, such as the facilitation of drinking by athletes at what amounts to an off-campus fraternity house. It is also disturbing that Naval Academy athletes seem over recent memory to have a real penchant for getting into trouble. It is tempting to argue that it is time to dial back not only liquor consumption but also athletics at what is, after all, supposed to be a training ground for officers and gentlemen.

The preliminary investigation recently conducted at the Washington Navy Yard pursuant to Article 32 of the Uniform Code of Military Justice (UCMJ) has been a terrible spectacle in itself. The accuser was subjected to hour after hour of cross-examination by lawyers for the accuseds. The questioning was at times plainly abusive, delving into such matters as preferred techniques for oral sex. The Constitution gives criminal defendants, including military personnel, a right to confront the witnesses against them, but there is still an obligation on the part of the presiding officer to impose reasonable limits. That does not seem to have happened here.

This is particularly baffling given the current heightened interest in fostering an environment in which military personnel who are victims of sexual assault are not discouraged from coming forward with complaints. Indeed, if one were looking for a way to create a chilling effect on complainants coming forward, it would be hard to do better than conduct an Article 32 investigation like the one that just ended.

It would also be hard to find a clearer case of a conflict of interest than having the superintendent of the Naval Academy — an institution of higher learning that has long prided itself on its football prowess — decide whether criminal charges should be brought against members of the football team. (A lawsuit seeking the superintendent's recusal from the process is pending in federal court. It should have been brought within the military justice system instead.)

Congress is considering changes in the UCMJ, particularly regarding the pre- and post-trial role of commanders who act as "convening authorities." The debate has already highlighted several aspects of the statute that are anachronisms which can be jettisoned. These include the commander's power to decide who shall be prosecuted for what, as well as the power to set aside convictions and reduce or disapprove sentences.

The Naval Academy case points to another. Congress first required a preliminary investigation in the 1920 Articles of War. At the time, that was considered reform legislation. It no longer is. Now there are military judges presiding over real courts, and lawyers play pivotal roles as prosecutors, defense counsel, and legal advisers to commanders. Additionally, there are appellate courts, including the all-civilian United States Court of Appeals for the Armed Forces.

Article 32 investigations have become trials nearly as fulsome and extensive as the actual general court-martial to which they are a prelude. This means that victims are likely to face not one, but two full-tilt cross-examinations. This is not what Congress intended, and it makes no sense given the other changes that have taken place in the nearly a century since the 1920 Articles of War were enacted. The benefits of subjecting complaining witnesses to what has become in effect a dry run — a trial-before-the-trial — do not come close to outweighing the costs, especially in light of the fact that all an Article 32 hearing produces is a recommendation to the commander, who may accept or reject it in his or her discretion.

It is time for Congress to repeal Article 32 and substitute a requirement for a bare bones preliminary hearing along the lines of those conducted in the federal district courts. The question such a hearing would address is a very simple one: is there "probable cause to believe an offense has been committed and the defendant committed it."

The court-martial defense bar will object to this reform. Its members will argue that the Article 32 investigation is a valuable right of the accused because it provides guaranteed broad discovery of the prosecution's case. Indeed, the Article 32 investigation is often pointed to as one of the respects in which the military justice system provides greater rights than the civilian criminal justice system. The objection should be carefully considered. My own view is that it reflects an outdated paternalistic view of the military justice system and fails to take account of the many improvements military justice has experienced since the UCMJ was enacted in 1950, not to mention 1920. It also fails to reflect the sea change in military justice that today takes increased account of the interests of crime victims.

The Naval Academy case is one of those shocking events that reveals systemic weakness and can galvanize public opinion. What happened at the Navy Yard should never happen again. President **Barack Obama**, Defense Secretary **Chuck Hagel** and many members of the House and Senate are anxious to do something serious about sexual assault. This time- and money-saving reform should be high on their to-do list.

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