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

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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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