

STRENGTHENING ARTICLE 32 TO PREVENT POLITICALLY MOTIVATED PROSECUTION: MOVING MILITARY JUSTICE BACK TO THE CUTTING EDGE

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I. INTRODUCTION

During the last fifteen years, the United States military has experienced a series of high-profile criminal investigations of its servicemembers.¹ These events highlight a potentially critical flaw in the protections which the Uniform Code of Military Justice (U.C.M.J.)² provides the accused: in the military justice system, the accused may face court-martial in the absence of a showing of probable cause that he or she has committed the charged offense.

Article 32 of the U.C.M.J. requires a “thorough and impartial investigation” of charges before they may be referred to a general court-martial.³ Commentators on the military justice system frequently stress the extensive protections that the Article 32 process offers the accused.⁴ These include the rights to be represented by counsel (including the right to appointed military counsel regardless of financial status), to present evidence, to cross-examine witnesses, and to receive a copy of the investigating officer’s report if the charges are referred to court-martial.⁵

What Article 32 does not provide, however, is a bar to prosecutions based on insufficient evidence. The Article 32 process may facilitate the preparation of a fair and accurate report. However, a court-martial convening authority is free to disregard that report—even if the report finds no probable cause to believe that the accused has committed an offense.⁶ As a result, the convening authority may decide to refer charges in the absence of any evidence that suggests that the accused has committed a crime.⁷

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¹ See *infra* Part IV.

² The U.C.M.J. consists of 145 articles, codified at 10 U.S.C. §§ 801–945 (2000 & Supp. 2006).

³ 10 U.S.C. § 832(a) (2000).

⁴ See, e.g., Jack L. Rives & Steven J. Ehlenbeck, *Civilian Versus Military Justice in the United States: A Comparative Analysis*, 52 A.F. L. REV. 213, 221 (2002).

⁵ 10 U.S.C. § 832(b) (2000).

⁶ See *infra* Part IV.

⁷ MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 601(d) (2002) [hereinafter MCM]. The language of the rule requires the convening authority to have “reasonable grounds to believe that an offense triable by a court-martial has been

This lack of protection from unwarranted prosecution is a critical flaw in Article 32.⁸ The political pressures inherent in the military justice system create a dangerous incentive for court-martial convening authorities to prosecute despite lack of evidence. To protect servicemembers from baseless charges, Congress should revise Article 32 to require the independent establishment of probable cause before a convening authority may refer charges to court-martial.

II. EXTERNAL INFLUENCES ON THE DECISION TO PROSECUTE

The armed services have a strong interest in maintaining an effective system of criminal justice. Military installations and communities, like their civilian counterparts, must deal with common legal issues, such as domestic violence, property crimes, drug use, and other challenges. Commanders must also maintain military discipline; the use of the military justice system to punish so-called “military crimes” is essential in this regard.⁹ When there is probable cause to believe that the accused has committed a court-martial offense, either of these interests justifies prosecution.

Consider, however, two other scenarios: 1) a crime has occurred, but there is not probable cause to believe that the accused has committed it; or 2) there has been an allegation that a servicemember has committed a crime, but there is not probable cause to believe that he or she has in fact done so. In a routine case, the Article 32 investigation might well put the matter to rest. However, when the case is widely publicized or politically sensitive, the calculus changes. Despite lack of evidence, the convening authority may still have incentive to prosecute.

First, the convening authority may prosecute to protect the reputation of the command or service. When high-profile crimes occur, there is often concern that failure to prosecute someone (anyone) will create the perception that the command does not take the issue seriously—or worse, that a cover-up is afoot. Specific circumstances—including the race, sex, or rank of the victim and/or accused, the nature of the offense, and perception of how the command has handled similar cases—may aggravate the risk that the military community or the public

committed and that the accused committed it, and that the specification alleges an offense” before referring a charge to court-martial. *Id.* As a practical matter, however, the decision is limited only by the convening authority’s good faith. In addition, the fact that the convening authority is responsible for enforcing the law makes it all but impossible for him or her to be truly impartial. *Cf.* *Gerstein v. Pugh*, 420 U.S. 103 (1975) (stating that responsibility of prosecutor to enforce the law is inconsistent with neutral and detached evaluation of probable cause).

⁸ See *infra* Part III.

⁹ See generally MICHAEL J. DAVIDSON, A GUIDE TO MILITARY CRIMINAL LAW (1999).

will perceive impropriety.¹⁰ Because trust in leadership is an essential component of military effectiveness, it is understandable that commanders wish to demonstrate that they are serious about responding to crime. The decision to refer charges to court-martial allows the convening authority to fend off allegations that the command or service condones certain criminal behavior, or that some servicemembers are immune from prosecution.

A second, less justifiable motive, is the convening authority's desire to protect his or her own reputation and career. Recent military scandals have seen widespread media and political pressure on the court-martial convening authority.¹¹ In some circumstances, this pressure may encourage the convening authority to prosecute simply in order to stave off criticism.

Senior military leaders are extremely susceptible to congressional pressure. Their promotions require the advice and consent of the Senate,¹² and officers holding 3- or 4-star rank must gain Senate approval to keep their rank upon retirement.¹³ The typical court-martial convening authority must therefore maintain the goodwill of the Senate in order to secure his or her future. Angering even a single legislator may have serious, even fatal, repercussions for an officer's career.¹⁴ As a result, it is understandable that senior officers may be eager to avoid taking action that will bring criticism from Congress.

In similar fashion, military leaders are often sensitive to media coverage of their decisions. Although the media have no official power over military officers, their influence is significant.¹⁵ By shaping the way that Congress and the public view unfolding events, journalists can

¹⁰ For example, it is likely that the 1998 decision to recall Major General David Hale from retirement to face court-martial on adultery charges—a highly unusual step—was motivated at least in part by allegations that senior officers accused of sexual misconduct were not subject to the same punishment as other servicemembers. *See Army Misconduct Case Proceeds Against Retired Two-Star General*, HOUS. CHRON., Sept. 24, 1998, at A8.

¹¹ *See infra* Part IV.

¹² 10 U.S.C. §§ 624(c), 629(b) (2000).

¹³ 10 U.S.C. § 1370(a), (c) (2000).

¹⁴ For example, in 1992, naval aviators at Miramar Naval Air Station staged a comedy show which included sexual innuendos about Representative Patricia Schroeder. Five officers, including three fighter squadron commanders, were relieved over the incident—including one who had apparently just stopped in the officers' club for a drink and had been cleared of wrongdoing. H.G. Reza, *Five Officers at Miramar are Relieved of Command*, L.A. TIMES, July 25, 1992, at 1; H.G. Reza, *Happenstance Guns Down Miramar Officer's Career*, L.A. TIMES, Aug. 11, 1992, at 1.

¹⁵ The tension between military and media and the challenge of achieving accurate coverage, particularly in the post-Vietnam era, are well documented. *See, e.g.*, James Kevin Lovejoy, *Improving Media Relations*, 82 MIL. L. REV. 49 (2002).

bring enormous pressure to bear.¹⁶ A convening authority who becomes associated with a high-profile case is likely to receive closer scrutiny from Congress when considered for promotion or reassignment, particularly if the coverage has been unflattering. A controversial decision not to prosecute may threaten the convening authority's career.

For example, Army Major General Robert Clark commanded Fort Campbell, Kentucky during the 1999 murder of Private First Class Barry Winchell by a fellow soldier who believed Winchell to be homosexual. The Senate twice delayed Clark's promotion to lieutenant general, although an Army investigation had concluded that Clark had done nothing wrong.¹⁷ This hesitation reflected media coverage of the nomination that focused largely on Clark's role in Winchell's murder. For instance, despite the fact that Clark had served for 33 years, including combat in Vietnam and the first Gulf War, a New York Times headline referred to him simply as the "General in [the] Gay-Bashing Case."¹⁸ Among other criticisms, media commentators accused Clark of being too lenient towards one of the soldiers convicted in connection with Winchell's murder.¹⁹

Because convening authorities are responsible for the administration of military justice, it may be appropriate to examine how well they have carried out that responsibility. Nevertheless, episodes like the Clark nomination send a disturbing message: in high-profile cases, a decision not to prosecute to the fullest extent of the law may be fatal to one's career. This dilemma creates an incentive for convening authorities to refer charges to court-martial in order to preserve their career prospects. Inherent in this conflict of interest is the possibility that innocent servicemembers may be required to face loss of life or liberty in order to protect their superiors.

¹⁶ For example, attorneys representing a former Air Force Academy cadet informed members of the Senate Armed Services Committee of an article in *Vanity Fair* and an upcoming television appearance (on Oprah Winfrey's talk show) concerning their client's case. The attorneys requested a hearing before the Committee and promised to list the names of senators who supported their request on Winfrey's website. The Committee granted the hearing; according to one of the lawyers, the publicity was a "significant contributing factor." Vivia Chen, *Rough Flight*, AM. LAW., Feb. 2004, at 68.

¹⁷ Bradley Graham, *Panel Backs Disputed Promotion of General*, WASH. POST, Oct. 24, 2003, at A23.

¹⁸ John Files, *Committee Approves Promoting General in Gay-Bashing Case*, N.Y. TIMES, Oct. 24, 2003, at A16.

¹⁹ Thomas Oliphant, *Justice Moves Slowly in Army Murder Case*, BOSTON GLOBE, June 17, 2003, at A17. Specialist Justin Fisher pled guilty to making a false official statement and was sentenced to twelve and a half years in prison. As a result, he avoided charges of being an accessory to Winchell's murder. Private Calvin Glover, the soldier who killed Winchell, was convicted of murder and sentenced to life in prison. Graham, *supra* note 17.

III. CONSEQUENCES OF UNWARRANTED PROSECUTION

What are the consequences of prosecuting a charge not supported by probable cause? From an extreme position, one could argue that such prosecutions do no real harm. Because the government must still prove guilt beyond a reasonable doubt in order to convict, perhaps it does not matter if the occasional defendant goes to court-martial without a showing of probable cause. Military defendants have the right to appointed defense counsel at no cost; they do not have to worry about losing a job while awaiting trial. In other words, if there really is no probable cause to prosecute, the accused will undoubtedly be acquitted and need not incur any expense. No harm, no foul.

This view, however, ignores the real damage inflicted by unwarranted prosecutions. First, the experience of court-martial harms the accused, even when he or she is eventually acquitted. Second, unnecessary courts-martial waste legal resources and decrease readiness. Third, guilty parties may escape punishment. Fourth, such cases create an ethical dilemma for military trial counsel. And finally, the practice of prosecuting without probable cause raises concerns about the legitimacy of the military justice system.

A. Consequences to the Accused

It is simply disingenuous to say that a person is not harmed by having to endure a court-martial, even one that results in acquittal. Despite the presumption of innocence, society attaches significant stigma to criminal defendants.²⁰ The experience places incredible strain on the servicemember and his or her family and friends. It may damage or destroy a marriage or other close relationship. Promotions are routinely delayed during the course of the court-martial proceeding,²¹ and the accused may be suspended from normal duties. Being associated with a criminal investigation also has the potential to permanently destroy careers, even for those who are exonerated.²² Military leaders

²⁰ See *In re Fried*, 161 F.2d 453 (2d Cir. 1947).

For a wrongful indictment is no laughing matter; often it works a grievous, irreparable injury to the person indicted. The stigma cannot be easily erased. In the public mind, the blot on a man's escutcheon, resulting from such a public accusation of wrongdoing, is seldom wiped out by a subsequent judgment of not guilty. Frequently, the public remembers the accusation, and still suspects guilt, even after an acquittal.

Id. at 458–59.

²¹ See 10 U.S.C. § 624 (2000).

²² An example of the power of guilt by association is the experience of Captain Robert Stumpf, U.S. Navy, Retired. Stumpf attended the 1991 Tailhook Symposium, see *infra* Part VI.A, and became a subject of the investigation. Investigators cleared Stumpf of any wrongdoing, and he was selected for promotion and approved by the Senate. In 1995, however, the Senate Armed Services Committee asked the Navy not to promote Stumpf,

owe their subordinates loyalty and fairness, and should never place them at risk without solid evidence.

Even more significant is the fact that courts-martial do make mistakes. As in most civilian criminal courts, court-martial conviction rates run well over 90 percent.²³ Although an innocent accused will likely be acquitted, a small number of courts-martial result in convictions despite insufficient evidence.²⁴ By referring a charge to court-martial without probable cause, the convening authority creates the risk—however small—that an innocent servicemember will be convicted. This is simply unjust.

B. Effects on Readiness

The demands of military readiness also militate against convening unnecessary courts-martial. The court-martial process requires the labor of military judges and attorneys; it also takes witnesses and panel members away from their duties. Obviously, time spent in a court-martial is time that cannot be spent elsewhere; readiness suffers accordingly.

The accused's unit also suffers. It is common for the accused to be suspended from normal duties or administratively reassigned while charges are pending, placing an increased burden on the unit.²⁵ There is also a less tangible, but potentially more serious, effect on the unit's

claiming that it had been unaware of his connection with Tailhook. Then-Secretary of the Navy John Dalton removed Stumpf's name from the promotion list. Stumpf was selected for promotion to captain a second time, upon which Secretary Dalton ordered a new investigation into Stumpf's role in Tailhook '91. Unwilling to endure another investigation, Stumpf retired. He was retroactively promoted to captain in 2002, only after intervention by Senator John McCain. Rowan Scarborough, *Tailhook Scandal 'Injustice' Righted*, WASH. TIMES, July 31, 2002, at A1.

²³ In fiscal year 2002, statistics for general courts-martial convictions were as follows: Army, 757 of 788 (96%); Navy and Marine Corps, 481 of 499 (96%); Air Force, 534 of 564 (95%); Coast Guard, 4 of 4 (100%). C.A.A.F. ANN. REP. (2002), available at <http://www.armfor.uscourts.gov/annual/FY02/FY02AnnualReport.pdf>.

²⁴ See *United States v. Ayers*, 54 M.J. 85 (C.A.A.F. 2000) (reversing convictions for indecent assault based on insufficient evidence). Ayers, a drill sergeant at Fort Lee, Virginia, was charged with several offenses arising from encounters with a trainee in 1996. *Id.* at 87–89. The trainee testified that she was “a willing participant,” that she did not believe that she had been assaulted, and that Ayers stopped his advances when she objected. *Id.* at 88. Nevertheless, Ayers was convicted of indecent assault. *Id.* at 90. The court-martial took place during the unfolding scandal at Aberdeen Proving Ground, amidst tremendous pressure to prosecute drill sergeants accused of sexual misconduct. *Id.* at 92–93. Ayers's experience thus serves as a warning to those who see a decision to refer charges to court-martial as a harmless way of defusing public outcry. See also *United States v. Campbell*, 55 M.J. 591 (C.G. Ct. Crim. App. 2001); *United States v. Dennis*, No. NMCM 9900402, 2000 WL 33250668 (N-M. Ct. Crim. App. 2000); *United States v. Johnson*, 54 M.J. 67 (C.A.A.F. 2000); *United States v. Ward*, No. ACM 29083, 1992 WL 133256 (A.F.C.M.R. 1992).

²⁵ See MCM, *supra* note 7, R.C.M. 305 (providing for pretrial confinement).

readiness. Trust is an essential component of unit cohesion,²⁶ and the fact that a member of the unit has been charged with a crime may damage that trust. If the accused is a leader, the potential for harm is even greater. Subordinates may have genuine concern about serving under someone who has been accused of criminal behavior. In addition, the leader's ability to maintain discipline may be compromised by the perception that he or she is "in trouble" and vulnerable. Even an acquittal may not entirely undo the damage.²⁷ Convening authorities must recognize that the decision to refer a baseless charge does not come without consequences for the command.

C. Effect on Subsequent Prosecutions

Pursuing the innocent may also make it more difficult to punish the guilty. The Navy's Tailhook experience provides a case in point.²⁸ Although as many as 90 victims were assaulted during the course of the 1991 Tailhook Symposium,²⁹ the Navy was unable to obtain a single court-martial conviction in connection with the incident. This was partly due to the Navy's heavy-handed response, which actually hindered thorough investigation.³⁰ The pursuit of questionable charges tied up legal and investigative resources that should have been focused on finding and punishing those actually responsible.

Prosecuting the wrong defendant also makes it more difficult to convict the right defendant. First, trial counsel must explain away the earlier decision to charge someone else with the offense. Second, the convening authority risks crying "wolf." If one defendant has already been prosecuted without probable cause, panel members may be more skeptical of the government's motives in pursuing subsequent prosecutions.³¹

D. Ethical Concerns for Military Attorneys

When the convening authority decides to prosecute without probable cause, he or she also creates an ethical dilemma for the trial

²⁶ Sam Nunn, *The Fundamental Principles of the Supreme Court's Jurisprudence in Military Cases*, in *EVOLVING MILITARY JUSTICE* 3, 5-8 (Eugene R. Fidell & Dwight H. Sullivan eds., 2002).

²⁷ See *supra* note 22.

²⁸ See *infra* Part IV.A.

²⁹ Office of Inspector Gen., U.S. Dep't of Def., Report of Investigation: Tailhook '91, at F1 (1993).

³⁰ See Scott Wilson, *APG Case Faces Test*, *BALT. SUN*, Mar. 31, 1997, at 1B.

³¹ See *United States v. Denier*, 47 M.J. 253, 258 (C.A.A.F. 1997). In *Denier*, panel members were overheard discussing the case during a recess. *Id.* at 253. Two of the members commented that "if it weren't for command interest and problems they were having with the sexuality with the Tailhook scandal . . . Major Denier probably wouldn't get found guilty or just get a slap on the wrist." *Id.* at 258.

counsel assigned to prosecute the case.³² It is a generally accepted principle of legal ethics that prosecutors should not pursue a charge not supported by probable cause.³³ This is expressly codified in state ethics rules and prosecutors' self-imposed professional standards,³⁴ and has been affirmed by the U.S. Supreme Court.³⁵ As a result, a civilian prosecutor who believes a charge to be baseless is not only permitted, but ethically obligated, to refuse to prosecute.³⁶

The unique nature of the military justice system places trial counsel in a much more difficult position. The decision to prosecute rests not with the lawyer, but with the convening authority. In contrast to civilian codes of professional responsibility, military rules require only that the trial counsel recommend that any charge or specification not warranted by the evidence be withdrawn.³⁷ The convening authority is free to reject the recommendation and require the trial counsel to prosecute the case.³⁸

This poses a serious ethical and moral dilemma. On one hand, as a military officer, the trial counsel is obligated to obey the lawful orders of a superior. On the other hand, it is the trial counsel who must pursue the repugnant task of trying to win a conviction while believing it to be unwarranted by the evidence.³⁹ It is wrong to place military lawyers in this morally untenable position.

³² This is a question of "ethics" in the sense of what is right, not in the sense of what conduct will bring disciplinary action. Because military lawyers are typically members of a state bar, it is theoretically possible that they could be disciplined for prosecuting a charge not supported by probable cause. However, it is likely that the Supremacy Clause would protect military lawyers from state discipline. *See* 1 FRANCIS A. GILLIGAN & FREDRIC I. LEDERER, COURT-MARTIAL PROCEDURE § 5-52.00 (2d ed. 1999 & Supp. 2003). Even if constitutionally permissible, state disciplinary action would be extremely unlikely. Although federal law now permits states to discipline United States attorneys, 28 U.S.C. § 530B (2000), such actions are virtually unheard of. *See* Jennifer Blair, *The Regulation of Federal Prosecutorial Misconduct by State Bar Associations*, 49 UCLA L. REV. 625 (2001).

³³ *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 3.8(a) (2004).

³⁴ U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-27.200 (Sept. 1997), available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/27mcr.m.htm.

³⁵ *Wayte v. United States*, 470 U.S. 598, 606 (1985).

³⁶ This is of course the ideal, and reality inevitably falls short. *See infra* Part V.A.

³⁷ U.S. DEP'T OF ARMY, REG. 27-26, RULES OF PROF'L CONDUCT FOR LAW. R. 3.8(a) (May 1, 1992); Navy Rules of Prof'l Conduct, 32 C.F.R. § 776.47 (2004); Air Force TJAG Policy Mem. TJS-2, AIR FORCE RULES OF PROF'L CONDUCT R. 3.8(a) (Dec. 20, 2002); U.S. DEP'T OF TRANSP., COAST GUARD MILITARY JUSTICE MANUAL, COMDTINST M5810.1D § 6.C.1.a. (Aug. 17, 2000) [hereinafter CGMJM].

³⁸ In the Coast Guard, the convening authority who disapproves a recommendation for dismissal must also communicate in writing to the trial counsel the reasons for the disapproval and instructions as to how to proceed. CGMJM, *supra* note 37, COMDTINST M5810.1D § 6.C.1.b.

³⁹ A number of military lawyers clearly believe that it is unethical to prosecute a charge that is not supported by probable cause, despite military ethics rules that allow

E. Legitimacy of the Military Justice System

Finally, the need to preserve the legitimacy of the military justice system—among both servicemembers and civilians—argues against permitting unwarranted prosecution. To fulfill its role, military justice must not only be fair; it must also be perceived as fair.⁴⁰ The decision to prosecute without probable cause is antithetical to most Americans' basic notions of fairness, and risks the perception that the military is sacrificing the innocent in order to protect the institution.⁴¹ When servicemembers believe that discipline is unfair, military effectiveness suffers accordingly.⁴²

When a case has received extensive publicity, the need to demonstrate thoroughness and impartiality is even greater. High-profile prosecutions bring heightened scrutiny and the potential for wide-spread damage to the system's legitimacy. As an internal Navy JAG memorandum noted during the Tailhook investigation, "the military justice system and (Navy prosecutors) were going to be under the gun to demonstrate that these cases could be handled fairly and appropriately. I'm beginning to get very concerned that we're not passing the test."⁴³ These comments demonstrate the potential for serious damage to the perceived fairness of the system. When trained military lawyers begin to lose faith in the system's ability to do justice, what must the ordinary soldier or sailor think?

The American people must also have confidence that their military treats its servicemembers justly. Concerns about fairness in the military justice system have received increasing attention in the popular press,⁴⁴

them to do so. See Commander Roger D. Scott, *Kimmel, Short, McVay: Case Studies in Executive Authority, Law, and the Individual Rights of Military Commanders*, 156 MIL. L. REV. 52, 188 n.521 (1998) (stating that generally accepted ethical standards require showing of probable cause); Major James C. Mallon, *And the Blood Cried Out*, 154 MIL. L. REV. 149, 150 (1997) ("The duty of a prosecutor is to seek justice, not merely to convict, and charges should never be brought where probable cause is lacking." (footnote omitted)).

⁴⁰ See *United States v. Argo*, 46 M.J. 454, 464 (C.A.A.F. 1997) (Sullivan, J., concurring).

⁴¹ For example, the statement of Staff Sergeant Nathanael C. Beach: "They are trying to show everybody that their back yard is clean, that they are going to punish offenders to the full extent of the law . . . [b]ut they have to investigate first." Wilson, *supra* note 30.

⁴² See Fredric I. Lederer & Barbara S. Hundley, *Needed: An Independent Military Judiciary: A Proposal to Amend the Uniform Code of Military Justice*, 3 WM. & MARY BILL RTS. J. 629, 647 (1994).

⁴³ H.G. Reza, *Navy Official Criticizes Handling of Tailhook Cases*, L.A. TIMES, June 19, 1993, at 1.

⁴⁴ See, e.g., Juliette Kayyem, *Military Justice System a Self-Inflicted Casualty in Terror War*, CHRISTIAN SCI. MONITOR, Feb. 23, 2004, at 9, available at <http://www.csmonitor.com/2004/0223/p09s02-cogn.html>; Brad Knickerbocker, *How Just is U.S. Military Justice?*, CHRISTIAN SCI. MONITOR, Mar. 5, 2001, at 1, available at <http://www.cs>

including a 2002 *U.S. News & World Report* article concluding that “[m]ilitary courts are stacked to convict.”⁴⁵ Fairly or unfairly, such perceptions may damage injustice; may harm morale, recruiting, and retention; and may diminish the respect that servicemembers receive from society. Eliminating the possibility that servicemembers must stand trial on baseless charges will help maintain confidence in the military justice system—both inside and outside the armed forces.

IV. HISTORY OF UNWARRANTED PROSECUTIONS

Unfortunately, the issues addressed above are not merely theoretical. In recent years, widely publicized and politically sensitive military criminal investigations have resulted in decisions to refer charges to court-martial, contrary to an investigating officer’s finding that the evidence did not support prosecution. Both individuals and the services themselves have suffered the consequences.

During the 1990s, sexual politics became a central component of public and congressional discourse on military issues.⁴⁶ To a lesser degree, this has continued to the present day. One element of this debate—both a cause and a consequence—has been a series of high-profile sex-crimes investigations.⁴⁷ Much of the discussion of these events has been necessary and appropriate. At the same time, the politically sensitive nature of the issues threatened the fair and impartial handling of sexual assault cases. A decision to prosecute, regardless of lack of evidence, could be hailed as “sending a message” that certain behavior would not be tolerated. A decision not to prosecute, regardless of lack of evidence, might be criticized as “business as usual.”

monitor.com/2001/0305/p1s1.html; Kelly Patricia O’Meara, *How Just is Our Military Justice?*, INSIGHT, May 14, 2001, at 22; Warren Richey, *Making a Case for and Against Military Justice*, CHRISTIAN SCI. MONITOR, Dec. 12, 1996, at 1, available at <http://www.csmonitor.com/1996/1212/121296.us.us.2.html>. But see Michael Hill, *Military Justice*, BALT. SUN, Jan. 26, 2003, at 1C.

⁴⁵ Edward T. Pound et al., *Unequal Justice*, U.S. NEWS & WORLD REP., Dec. 16, 2002, at 19.

⁴⁶ See, e.g., Thomas Ricks, *Latest Battle for the Military is How Best to Deal With Consensual Sex*, WALL ST. J., May 30, 1997, at A20; see also Madeline Morris, *By Force of Arms: Rape, War, and Military Culture*, 45 DUKE L.J. 651 (1996).

⁴⁷ Although sex crimes were particularly prominent, they were not the only aspects of military justice to come under scrutiny during this period. Other high-profile investigations included the shoot-down of an Army Blackhawk helicopter by two Air Force F-15 fighters in Iraq in 1994, the collision of a Marine Corps aircraft with an Italian cable car in 1998, and the 2000 collision of the USS Greenville with the Japanese vessel Ehime Maru. See Matthew Brelis & Stephen Kurkjian, *Confronting the Enemy Within: Safety in the U.S. Armed Forces Since 1979*, BOSTON GLOBE, June 8, 1997, at A1; Daniel Williams & Sarah Delaney, *Italians Incensed By Verdict; Retribution Sought for Tragedy in Alps*, WASH. POST, Mar. 6, 1999, at A1. More recently, attention has focused on prosecutions related to terrorism, such as the prosecution of Army Captain James Yee. See Rennie Sloan, *Army Postpones Chaplain’s Hearing*, L.A. TIMES, Dec. 10, 2003, at A25.

This section examines four occasions in which significant political and media pressure was brought to bear on the convening authority, and in which Article 32 failed to prevent prosecutions on the basis of questionable evidence. In three of these occasions, convening authorities referred charges to court-martial despite a contrary recommendation by the investigating officer. In the fourth instance, Aberdeen Proving Ground, a rash of overcharging suggests that the Article 32 process itself may have been influenced by political and media pressure. In all four occasions, the perceived legitimacy of the military justice system suffered.

A. *The 1991 Tailhook Symposium*

On September 8, 1991, the Tailhook Association, a group dedicated to promoting naval aviation, wrapped up its annual convention at the Las Vegas Hilton. In the following days, a number of women reported that naval officers attending the convention had sexually assaulted them.⁴⁸ Particularly shocking was the revelation of a “gauntlet,” a hallway lined with naval officers who groped the women attempting to pass.⁴⁹ The Navy immediately launched an investigation of the incident, a process that would include several agencies and last more than a year.⁵⁰ However, the environment surrounding Tailhook was not conducive to a thorough and impartial investigation of the charges. Media frequently portrayed the Tailhook investigation as a battle for women’s rights, in which victory would be measured by the number of prosecutions.⁵¹

An early target of the investigation was Commander Gregory E. Tritt, whom Navy investigators suspected of participating in the “gauntlet” and of assaulting Ensign Kim Ponikowski.⁵² Proposed charges included assault, conduct unbecoming, making a false official statement, and failure to stop subordinates from assaulting women in the hallway.⁵³

⁴⁸ H.G. Reza, *Women Accuse Navy Pilots of Harassment*, L.A. TIMES, Oct. 30, 1991, at 1.

⁴⁹ *Id.*

⁵⁰ See generally Office of Inspector Gen., U.S. Dep’t of Def., Report of Investigation: Tailhook ‘91 (1993).

⁵¹ Newspaper headlines during the period implied criticism of what was perceived to be too small a number of criminal charges, particularly for serious offenses. See, e.g., Dan Weikel & Gebe Martinez, *Just 1 Tailhook Marine Faces Assault Charge*, L.A. TIMES, July 26, 1993, at 1; Richard A. Serrano, *Only 3 in Tailhook Case Facing Assault Charges*, L.A. TIMES, Aug. 17, 1993, at 1.

⁵² WILLIAM H. MCMICHAEL, *THE MOTHER OF ALL HOOKS: THE STORY OF THE U.S. NAVY’S TAILHOOK SCANDAL* 10 (1997).

⁵³ *Id.* at 173.

From the beginning, however, the Navy's case against Tritt was weak. Ensign Ponikowski could not identify him.⁵⁴ The one witness who placed him near the gauntlet had been drunk, and his testimony was inconsistent with Ensign Ponikowski's.⁵⁵ The investigating officer (IO), Commander Larry McCullough, recommended dropping the assault charges against Tritt altogether.⁵⁶ Nevertheless, Vice Admiral Paul Reason rejected the recommendation and referred the assault charges to court-martial.⁵⁷ Reason would later admit that he had not read McCullough's entire report, although he claimed to be familiar with it.⁵⁸

The case against Lieutenant Cole Cowden proceeded in similar fashion. On January 14, 1992, the Navy charged Cowden with assault and conduct unbecoming an officer and gentleman.⁵⁹ The Article 32 hearing, however, revealed little to suggest that Cowden had committed a crime. The "victim" testified that she did not believe she had been assaulted; that "[e]veryone was joking, laughing, and having a good time"; and that the idea of using her name to prosecute Cowden was "absurd."⁶⁰ Although a second witness claimed that Cowden had assaulted her, she quickly admitted to a series of lies to Navy investigators.⁶¹ As a result, Commander McCullough recommended that the conduct unbecoming charge be handled administratively. He found the assault charge totally without merit and recommended withdrawing it altogether.⁶²

Lieutenant Damien Hansen, an assistant prosecutor on the Cowden case, agreed with McCullough's assessment and advised against court-martial. Hansen believed that a Cowden court-martial would be a frivolous prosecution; he was concerned not only with the poor chance of success, but with the ethical implications of pursuing the charge as well. Hansen prepared a memorandum to his superiors expressing these concerns.⁶³ Within days, he was removed from the case.⁶⁴ Once again,

⁵⁴ *Tailhook Cases May Turn Shaky*, THE PLAIN DEALER (Cleveland, Ohio), July 12, 1993, at 7A.

⁵⁵ MCMICHAEL, *supra* note 52, at 170.

⁵⁶ *Id.* at 172. However, McCullough also recommended referral of the charges for conduct unbecoming, false statement, and failure to stop others.

⁵⁷ *Id.* at 173.

⁵⁸ *Id.* at 191.

⁵⁹ *Id.* at 139.

⁶⁰ *Id.* at 142-43.

⁶¹ *Id.* at 145.

⁶² *Id.* at 145-46.

⁶³ *Id.* at 146-47.

⁶⁴ At the time of the investigation, both prosecution and defense functions were part of the Naval Legal Services Office in Norfolk, Virginia. Beginning in 1996, the Navy separated prosecutors and defense attorneys into separate commands. Dave Mayfield,

Admiral Reason rejected the IO's recommendation and referred the charges to court-martial.⁶⁵

Subsequent events suggest that the Article 32 investigations failed to protect Cowden and Tritt from charges that were completely unsupported by evidence. In the Cowden case, the military judge disqualified the prosecuting attorney for exceeding "the permissible bounds of his official role as a legal advisor" and ordered a review of the Article 32 investigation.⁶⁶ The reviewing officer recommended dismissal of all charges, and this time Reason concurred.⁶⁷ In the Tritt case, the military judge found that improper command influence tainted the investigation and ordered dismissal of the charges, finally bringing the ordeal to a close.⁶⁸

The U.S. Court of Military Appeals later offered a scathing critique of the tactics that characterized the Tailhook investigations:

The assembly-line technique in this case that merged and blurred investigative and justice procedures is troublesome. At best, it reflects a most curiously careless and amateurish approach to a very high-profile case by experienced military lawyers and investigators. At worst, it raises the possibility of a shadiness in respecting the rights of military members caught up in a criminal investigation that cannot be condoned.

.....
The confusion of investigative and justice functions incident to this exercise had the potential for jeopardizing this prosecution.⁶⁹

Tailhook demonstrates Article 32's weakness in the face of scandal. The pretrial investigations of Tritt and Cowden, although apparently thorough, failed to prevent the referral of charges based on scant evidence. The fact that Admiral Reason admitted to failing to completely read one of the reports suggests that the decision to prosecute may have been a foregone conclusion.

Tailhook also demonstrates the danger inherent in an institutional response to scandal. Under intense scrutiny, the Navy first acted to protect itself. The Secretary of the Navy and Chief of Naval Operations

Navy Offers Young Sailors a Legal Ace, VIRGINIAN-PILOT (Norfolk, Va.), July 27, 1997, at B1.

⁶⁵ MCMICHAEL, *supra* note 52, at 147-48.

⁶⁶ *Id.* at 219.

⁶⁷ *Id.*

⁶⁸ *Id.* at 285.

⁶⁹ *Samples v. Vest*, 38 M.J. 482, 487 (C.A.A.F. 1994) (footnote omitted). Lieutenant David Samples, the third officer to be court-martialed in connection with Tailhook, had sought writs of mandamus and prohibition from the Court of Military Appeals (now the Court of Appeals for the Armed Forces) to require the trial judge to find that prosecutors had given Samples a de facto grant of transactional immunity. *Id.* at 482. The court denied Samples relief, but strongly rebuked the prosecution for its handling of the case. *Id.* at 486-87.

had both attended Tailhook '91, together with a number of general and flag officers of the Navy and Marine Corps.⁷⁰ The Navy initially *under-reacted* to the scandal, creating the appearance of obstruction and cover-up.⁷¹ As criticism of the response mounted, the service flip-flopped to the opposite extreme and *over-reacted*, by identifying a handful of junior officers for prosecution, despite insufficient evidence. This response—to protect the service and its leadership at the expense of the rank and file—is always a threat when scandal breaks. It is critical to the continual legitimacy of the military justice system that it protect servicemembers from being sacrificed in the name of institutional self-preservation.

Finally, Tailhook shows the real consequences of a decision to prosecute without probable cause. Tritt, exhausted and angered by the experience, retired from the Navy shortly thereafter.⁷² Cowden's promotion to lieutenant commander was delayed while awaiting a court-martial that never happened, and he was temporarily suspended from flying.⁷³ At least one Navy prosecutor was forced to confront a serious ethical dilemma. Meanwhile, the perception of a witch-hunt severely damaged morale throughout the Navy, particularly among aviators.⁷⁴ Resenting the system's failure to protect its own, many experienced and talented officers left the Navy altogether, at great cost to the Navy in both money and experience.⁷⁵

B. Aberdeen Proving Ground, 1996–1997

In November 1996, allegations surfaced that Army drill sergeants had raped, assaulted, or sexually harassed trainees at Aberdeen Proving Ground, Maryland.⁷⁶ The scope of the charges increased rapidly—by May 1997, twelve drill sergeants faced criminal charges in the incident.⁷⁷

As the scandal at Aberdeen unfolded, Tailhook was still very much in the public eye. Consequently, there was tremendous pressure on senior leaders at Aberdeen to respond aggressively. Congressional

⁷⁰ Office of Inspector Gen., U.S. Dep't of Def., Report of Investigation: Tailhook '91 (1993).

⁷¹ See generally MCMICHAEL, *supra* note 52.

⁷² *Id.* at 191, 322.

⁷³ *Id.* at 219.

⁷⁴ Sam J. Tangredi, *Regaining the Trust*, U.S. NAVAL INST. ON PROC., May 2001, at 38.

⁷⁵ James Webb, U.S. Sec'y of the Navy, Address at the Naval Institute Annual Conference (Apr. 25, 1996), available at <http://www.jameswebb.com/speeches/navalinstaddress.htm>.

⁷⁶ Jay Apperson et al., *Two Aberdeen Army Trainers Charged in Rape of Recruits*, BALT. SUN, Nov. 8, 1996, at 1A.

⁷⁷ Scott Wilson, *APG Case Exposes Screening Flaws, Too*, BALT. SUN, May 5, 1997, at 1B.

leaders took a strong interest in the investigation, specifically targeting the installation's leadership. Senator Barbara Mikulski of Maryland called for Senate hearings into the allegations, noted that "[t]he role of the base commanders must be examined,"⁷⁸ and demanded that wrongdoers be "severely" punished.⁷⁹ Major General John E. Longhouser, the convening authority, was well aware of the potentially explosive nature of the investigation,⁸⁰ and the Aberdeen leadership in turn pressured subordinate commanders to come down hard.⁸¹

In the case of Staff Sergeant Delmar Simpson, "coming down hard" seems to have been appropriate. In April 1997, Simpson was convicted of eighteen specifications of rape, as well as numerous other offenses.⁸² Charges were also being referred against a number of other Aberdeen drill sergeants. In contrast to the solid case against Simpson, prosecutors seemed to have scant evidence to support the more severe sexual misconduct charges against the other defendants.

For example, an adultery charge against Staff Sergeant Nathanael Beach was referred to general court-martial.⁸³ Before trial, however, the Army announced that Beach would not face court-martial after all, but would instead receive nonjudicial punishment.⁸⁴ Beach's commander acquitted him of all charges with respect to sexual misconduct.⁸⁵

Staff Sergeant Herman Gunter was also charged with a number of sex offenses, including rape. The convening authority dismissed the rape charges, but referred seventeen other counts.⁸⁶ However, only hours before the court-martial was to begin, prosecutors withdrew two charges

⁷⁸ Paul W. Valentine & Martin Weil, *General Approves Aberdeen Courts-Martial; Mikulski Urges Joint Chiefs Chairman to End "Culture of Silence,"* WASH. POST, Nov. 27, 1996, at A12.

⁷⁹ *United States v. Simpson*, 55 M.J. 674, 682 (A. Ct. Crim. App. 2001).

⁸⁰ Longhouser testified that he discussed the emerging scandal, the likely media response, and the similarity to Tailhook with a number of other general officers. Scott Wilson, *Defense in Rape Case Says Army Disregarded Accused Sergeant's Rights*, BALT. SUN, Apr. 2, 1997, at 4B.

⁸¹ *See Simpson*, 55 M.J. at 681.

⁸² *Id.* at 674.

⁸³ *Captain, Two Sergeants to Face Court-martial in Sex Case*, ORLANDO SENTINEL, Nov. 27, 1996, at A14.

⁸⁴ Lisa Respers, *Aberdeen Soldier Won't Face Court-Martial in Sex Scandal*, BALT. SUN, Feb. 20, 1997, at A13.

⁸⁵ Tom Bowman, *Sergeant Innocent of Most Charges: Beach Acquitted of Sexual Misconduct, Assault at Aberdeen*, BALT. SUN, Mar. 22, 1997, at 1B. Beach was found guilty of soliciting a trainee's help with a research paper, and pleaded guilty to violating a no-contact order. *Id.*

⁸⁶ Jackie Spinner, *Rape Charges Dropped Against Drill Sergeant*, WASH. POST, May 24, 1997, at B5.

that Gunter had intimidated a trainee into having sex with him.⁸⁷ The court-martial acquitted Gunter of indecent assault and adultery. He was convicted only of three counts, arising from attempts to hug and kiss a trainee and trying to obstruct the investigation.⁸⁸

In a third case, Sergeant First Class William Jones was scheduled for a July 8 court-martial on charges that included indecent assault.⁸⁹ However, on the day of the court-martial, prosecutors requested a continuance for further investigation. When it was denied, they were unable to proceed.⁹⁰ Charges against Jones were dropped and never reinstated; he was administratively separated with a reprimand.⁹¹

These examples show a pattern in which sexual misconduct charges survived "screening" by the Article 32 investigation, yet failed to stand up when faced with an independent test. Although the above drill sergeants clearly violated lesser provisions of the U.C.M.J., there seems to have been little evidence to support more serious charges. Nevertheless, the investigating officers almost universally recommended referral.

The circumstances surrounding the investigations suggest that they were less than thorough. In one case, that of Sergeant First Class William Moffett, the Article 32 officer denied a defense request to delay the hearing by several days so that Moffett's alleged victims could testify in person, rather than by telephone. Asked about the decision, the investigating officer said that he had received orders "to get it done as soon as possible."⁹² A military judge, finding that the denial prejudiced Moffett's ability to present a defense, ordered a new investigation.⁹³ As in the above cases, the charges against Moffett failed to hold up, and he was eventually permitted to resign in lieu of court-martial.⁹⁴

Moreover, it was publicly known that Army criminal investigators had pressured women to claim that they had been assaulted. Several trainees admitted having consensual sex with drill instructors, but claimed that CID agents had pressured them to say that the sex was

⁸⁷ Paul W. Valentine, *Army Drops "Sex-by-Fear" Charges Against Aberdeen Drill Sergeant*, WASH. POST, Aug. 15, 1997, at A15.

⁸⁸ *Army Drill Sergeant Acquitted of Sex Offenses, Convicted on Obstruction, Behavior Counts*, FORT WORTH STAR-TELEGRAM, Aug. 16, 1997, at 12.

⁸⁹ *Charges Withdrawn as APG Sergeant Faces New Allegations*, BALT. SUN, July 9, 1997, at 6C.

⁹⁰ Paul W. Valentine, *Army Stops Aberdeen Trial To Do Further Investigating*, WASH. POST, July 9, 1997, at B7.

⁹¹ Paul W. Valentine, *Aberdeen Sergeant Loses Rank, Pay in Sex Scandal*, NEW ORLEANS TIMES-PICAYUNE, Oct. 29, 1997, at A12.

⁹² Spinner, *supra* note 86.

⁹³ *Id.*

⁹⁴ Paul W. Valentine, *Two Drill Sergeants Receive Discharges: Aberdeen Sergeants Avoid Trials*, WASH. POST., Aug. 19, 1997, at D1.

forced. According to these soldiers, the agents promised reassignments and immunity from prosecution for violating the policy against fraternization.⁹⁵ This should have cast doubt on the credibility of the more serious accusations.

It is clear that there was a gross breakdown in discipline at Aberdeen, as well as serious criminal behavior by some drill sergeants. However, it also appears that several drill sergeants were charged with serious sex crimes (rape or indecent assault) despite evidence that they were at most guilty of fraternization, adultery, or disobeying orders. The fact that these charges were hastily withdrawn before they could be tested on the merits—in some cases on the day of trial—calls into question the quality of the pretrial screening process. In light of the intense congressional pressure and the rush to dispose of cases, it seems doubtful that the Article 32 investigations of Beach, Gunter, Jones, and Moffett truly produced an independent and accurate assessment of the charges.

The impact of the Aberdeen prosecutions has extended well beyond those accused. Eager to avoid a repeat of Tailhook, the Army conducted a worldwide investigation of its training facilities.⁹⁶ A number of senior officers were forced into retirement as their sexual histories were placed under a microscope.⁹⁷ Once again, events called into question the ability of the military to investigate in a fair and impartial manner.⁹⁸ At Aberdeen itself, soldiers reported that they were “walking on eggshells,” and that male leaders were afraid that an unwelcome order to a female subordinate might result in criminal charges.⁹⁹ Five years later, this fear was still apparent on the installation.¹⁰⁰

⁹⁵ Jackie Spinner & Dana Priest, *Women Say Army Agents Bullied Them; Five Allege Investigators Urged Sex Accusations*, WASH. POST, Mar. 12, 1997, at B1; *Women Say Army Investigators Tried to Coerce Rape Allegations*, DALLAS MORNING NEWS, Mar. 12, 1997, at 1A.

⁹⁶ See Paul Richter, *U.S. Army Sex Scandal Grows in Germany*, L.A. TIMES, Feb. 21, 1997, at A1.

⁹⁷ Ironically, this included Major Gen. Longhouser. An anonymous caller to an Army hotline—established because of events at Aberdeen—accused Longhouser of adultery, prompting his resignation. Dana Priest, *Two-Star General at Aberdeen to Retire at Lower Rank*, WASH. POST, Jun. 3, 1997, at B1.

⁹⁸ See Wilson, *supra* note 30. Most serious were perceptions in the black community, including leaders of the NAACP and Congressional Black Caucus, that the Army deliberately targeted black soldiers for prosecution. See Scott Wilson, *Two More Aberdeen Sergeants Charged: NAACP Says Cases Against Black Soldiers Involve Prejudice*, BALT. SUN, Mar. 26, 1997, at 1C.

⁹⁹ *Rank and File, Like Army Itself, Feel Strain of Sex Bias*, ST. LOUIS POST-DISPATCH, Sept. 13, 1997, at 19.

¹⁰⁰ The author attended a briefing given by the garrison commander and command sergeant major of Aberdeen Proving Ground in 2002. According to the command sergeant major, preventing incidents of fraternization with trainees was his “number one priority.”

C. The United States Military Academy, 1996–1997

In October 1996, United States Military Academy Cadet James Engelbrecht was charged with the rape of a fellow cadet during an off-campus party.¹⁰¹ The Article 32 officer recommended against court-martial, suggesting instead that Engelbrecht receive administrative sanctions for improper behavior. Lieutenant General Daniel Christman, the Academy's superintendent, rejected the recommendation.¹⁰² According to an Academy spokesman, Christman made his decision "because of the seriousness of the charges."¹⁰³ Engelbrecht would go to court-martial.

After deliberating for five hours, the panel acquitted Engelbrecht of rape and committing an indecent act.¹⁰⁴ According to Engelbrecht's attorneys, the complaining witness's testimony had been riddled with inconsistencies. "When your case consists of a person who says 'I don't recall what I didn't recall,' you've got problems," added attorney James Fitzgerald.¹⁰⁵

West Point officials denied that political concerns had influenced the decision to refer court-martial charges against Engelbrecht.¹⁰⁶ Others, however, including Engelbrecht's family and attorneys, disagreed. "Engelbrecht and the woman were secondary," another of Engelbrecht's attorneys said after acquittal. "It was clear to everybody that they didn't want to be seen as covering up anything."¹⁰⁷

The decision to prosecute Engelbrecht is troubling. Christman's explanation—that the seriousness of the charge justified court-martial—misses the point. If the seriousness of the charge were the primary factor in the decision to prosecute, everyone accused with a serious offense would stand trial, regardless of the evidence. It is unlikely that Christman—who holds a law degree—meant to endorse such an extreme result. In light of the fact that the Aberdeen scandal was still very much in the public eye, it seems probable that the decision to refer the charges to court-martial—and to cause Engelbrecht to face the risk of life in

Protecting the installation—including the stockpiles of chemical weapons located at the Edgewood Chemical Activity—was the second priority.

¹⁰¹ *Cadet Charged With Rape*, WASH. POST, Nov. 1, 1996, at A2.

¹⁰² Fred J. Aun, *Cadet is Cleared of Raping Another at Party in Sussex*, STAR-LEDGER (Newark, N.J.), Jan. 25, 1997, at 11.

¹⁰³ *Id.*

¹⁰⁴ Frank Bruni, *Cadet From Conroe Acquitted of Raping Classmate*, HOUS. CHRON., Jan. 25, 1997, at 29.

¹⁰⁵ Holly Coryell, *Cadet's Attorney Sees No Grounds for Court-Martial*, THE RECORD (Hackensack, N. J.), Jan. 27, 1997, at A4.

¹⁰⁶ *Lawyer for Cadet Faults West Point*, ST. LOUIS POST-DISPATCH, Jan. 27, 1997, at 6A.

¹⁰⁷ *Id.*

prison—was simply an effort to avoid a similar scandal.¹⁰⁸ As a result, the perceived legitimacy of the military justice system sustained yet another blow.

D. The Air Force Academy, 2003–Present

In January 2003, an Air Force Academy cadet contacted U.S. Senator Wayne Allard and claimed that she had been raped at the Academy. The cadet also asserted that Academy leaders had refused to investigate her complaint.¹⁰⁹ By late February, at least eighteen current and former cadets had made similar allegations. Secretary of the Air Force James Roche vowed that the Air Force would “come down with a strong hammer.”¹¹⁰

It was immediately apparent that the investigation would take place under a political microscope. On February 27, Secretary Roche declared that the Inspector General of the Air Force would review every case of alleged sexual assault or rape.¹¹¹ Shortly thereafter, U.S. Representative Tom Tancredo raised the stakes even higher. Although the investigation had scarcely begun, Tancredo demanded that the Academy’s superintendent and commandant of cadets resign, saying: “The fact they are there is a disgrace.”¹¹² Tancredo also demanded “dramatic, decisive remedies,” and encouraged Secretary Roche to convene courts-martial.¹¹³ Within three weeks, the Air Force reassigned four of the Academy’s top leaders.¹¹⁴

The new leadership got the message. By late April, the Academy announced that it was convening Article 32 hearings for four cadets in connection with two alleged sexual assaults.¹¹⁵ Meanwhile, members of Congress continued to weigh in on the process. “The fact that the Air Force is pursuing these two cases is significant,” said a spokesperson for Senator Allard.¹¹⁶ One of the alleged victims retained her own attorney,

¹⁰⁸ Aun, *supra* note 102. “Some observers of the court-martial suggested that Christman pressed for the trial in order to avoid having West Point’s image tarnished by accusations of a rape cover-up.” *Id.*

¹⁰⁹ Tillie Fong, *Academy Rape Faces Scrutiny*, ROCKY MTN. NEWS (Denver), Feb. 14, 2003, at 30A.

¹¹⁰ Bill McAllister, *Shock to AFA Culture Vowed*, DENV. POST, Feb. 26, 2003, at A1.

¹¹¹ Judy Graham, *Air Force Cadets Warned Over Rapes*, CHI. TRIB., Feb. 28, 2003, at 1.

¹¹² Bill McAllister & Erin Emery, *Tancredo Calls for AFA Heads*, DENV. POST, Mar. 6, 2003, at A1.

¹¹³ *Id.*

¹¹⁴ Richard A. Serrano, *Air Force Will Replace Four Top Academy Officers*, L.A. TIMES, Mar. 26, 2003, at A1.

¹¹⁵ Erin Emery, *AFA Cadets Face Assault Charges*, DENV. POST, Apr. 23, 2003, at A1.

¹¹⁶ *Id.*

who described his role as ensuring “that the prosecution is doing what it can to effectively use the legal system against the perpetrators.”¹¹⁷

Cadet Douglas Meester was charged with rape and forcible sodomy.¹¹⁸ However, the case against Meester presented serious flaws. The complaining witness testified that she did not say “no” during the alleged attack.¹¹⁹ She also told investigators that she could see why Meester thought that the sex was consensual.¹²⁰ As a result, the investigating officer, Major Todd McDowell, recommended against court-martial.¹²¹ Nevertheless, on June 30, 2003, Brigadier General John Weida, the new Academy commandant, decided to refer the charges against Meester.¹²² Senator Allard immediately hailed the decision. “That’s what needs to happen,” an Allard spokesman said. “The judicial process needs to be executed regardless of the outcome.”¹²³

The outcome did nothing to allay concerns that the charges against Meester did not fit the facts. After spending nearly a year with a rape charge (and a possible sentence of life imprisonment) hanging over his head, Meester was allowed to plead guilty to the relatively trivial offenses of conduct unbecoming, dereliction of duty, and committing an indecent act. He received a fine and a reprimand.¹²⁴ The disparity between the initial charges and the final disposition suggest overcharging—something that effective pretrial screening could have prevented.

Meester’s prosecution raised public questions about the integrity of the Air Force leadership,¹²⁵ including allegations by Meester’s counsel that Air Force leaders deliberately decided to prosecute Meester in order

¹¹⁷ *Id.*

¹¹⁸ Erin Emery, *Rape Court-Martial Set at AFA*, DENV. POST, July 3, 2003, at B1.

¹¹⁹ *Id.*

¹²⁰ Pam Zubeck, *Air Force Rape Case Tossed Out*, THE GAZETTE (Colo. Springs, Colo.), Aug. 8, 2003, at 1.

¹²¹ Erin Emery, *AFA Investigator: Drop Rape Case*, DENV. POST, May 25, 2003, at B2.

¹²² Dick Foster, *Air Force Cadet Will Go to Trial in Rape Scandal*, ROCKY MTN. NEWS (Denver, Colo.), July 3, 2003, at 6A.

¹²³ Jon Sarche, *Cadet’s Court-Martial in Rape Case Hailed as a First Step*, PHILA. INQUIRER, July 4, 2003, at A9.

¹²⁴ Erin Emery, *Cadet Cuts Deal; Rape Charge Dropped*, DENV. POST, June 9, 2004, at A1.

¹²⁵ Pam Zubeck, *AFA Rules Cadet Must Stand Trial*, THE GAZETTE (Colo. Springs, Colo.), July 3, 2003, at A1 (“The clear message that’s been sent to the new leadership at the academy is that we fired your predecessors even when they didn’t do anything wrong because they didn’t take this seriously enough Put yourself in Weida’s shoes. Which side are you going to err on?”); Editorial, *The Scapegoat*, ROCKY MTN. NEWS (Denver, Colo.), June 10, 2004, at 44A (“Memo to Weida: If you’re going to make an example of someone, it helps if he actually is guilty. Otherwise you appear to be a creature of public relations with no regard for genuine justice.”).

to appease Senator Allard.¹²⁶ The case further demonstrates the risk that political and media pressure will influence the charging decision, and the need for a more effective method of screening charges in order to protect the accused.

V. ARTICLE 32, ITS CIVILIAN EQUIVALENTS, AND THE SCREENING FUNCTION

The Article 32 investigation serves several functions. One is to provide the convening authority with adequate information to determine how to dispose of the case.¹²⁷ A second function is to provide the defense with discovery.¹²⁸ Article 32 generally serves these functions very well, and in these respects is superior to its civilian counterparts.¹²⁹ However, the U.C.M.J.'s legislative history also shows that Article 32 was intended to protect the accused from baseless charges.¹³⁰ Military courts have also stressed this purpose.¹³¹ In its present form, Article 32 does not and cannot meet this objective.

Although it is not entirely clear how frequently convening authorities disregard an IO's recommendation, it is clearly not limited to the instances discussed above. A 1974 survey of Army lawyers showed that most experienced judge advocates believed that convening authorities rejected the IO's findings at least some of the time.¹³² In the most experienced segment—officers who had experience with more than 100 Article 32 investigations, and who had held a management position in a staff judge advocate office—only 26.7% believed that

¹²⁶ Erin Emery, *Dismissal Urged for Rape Charge Facing Cadet*, DENV. POST, Apr. 18, 2004, at B6. The defense claimed that Weida had met with Secretary Roche in the days after the Article 32 hearing, after which Roche sent an e-mail saying, "Take that Sen. Allard. Look at the vigor with which the Air Force is prosecuting." *Id.*

¹²⁷ See generally 1 GILLIGAN & LEDERER, *supra* note 32, § 9-10.00, at 350 (discussing purposes of the Article 32 investigation).

¹²⁸ *Id.*

¹²⁹ See sources cited *supra* notes 3–5.

¹³⁰ 1 GILLIGAN & LEDERER, *supra* note 32, § 9-10.00, at 351.

¹³¹ *E.g.*, United States v. Samuels, 10 C.M.A. 206, 212 (C.M.A. 1959) ("[Article 32] . . . stands as a bulwark against baseless charges.").

¹³² Major William O. Gentry, *The Article 32—A Dead Letter?* 28–32 (April 1974) (unpublished thesis, The Judge Advocate General's School) (on file with University of Virginia Law Library). Similarly, 53.3% of the most experienced group believed that recommendations were followed in a majority of cases. *Id.* at 32. Of the next group in the survey (officers with significant experience but who had not served at least one year in a management position), 60% believed that recommendations were followed in "almost all cases"; 40% answered in a majority of cases. *Id.* Despite the differences in responses among the two groups, it seems that most experienced Army lawyers were aware of at least some occasions in which the convening authority rejected the investigating officer's recommendation.

recommendations were followed in “almost all cases.”¹³³ This suggests that rejection of the IO’s recommendation is not infrequent.

Clearly, the current Article 32 does not ensure effective pretrial screening, which raises two additional questions. First, how successful are the comparable civilian equivalents? Second, what can be done to enhance Article 32’s screening function? The following section examines civilian screening devices and finds that they are generally no better at protecting the accused than Article 32. It concludes with recommended revisions to Article 32 that would increase its effectiveness in screening charges against servicemembers.

A. Screening in the Civilian Criminal Justice System

In theory, the civilian criminal justice system requires the government to demonstrate probable cause to a neutral body—either a grand jury or a judicial officer—before a charge can proceed to trial.¹³⁴ Ethical guidelines also officially prevent civilian prosecutors from bringing baseless charges.¹³⁵ In reality, however, the effectiveness of civilian screening devices is questionable. Moreover, civilian prosecutors are subject to many of the same influences as their military counterparts—the desire for career advancement, pressure from superiors, and concern for public approval.

The grand jury is the older (and more controversial) of the two civilian screening devices. In addition to its investigatory function, it ostensibly protects citizens from unwarranted prosecution.¹³⁶ Although evidence varies,¹³⁷ the overall picture suggests that the grand jury is little more than a rubber stamp.¹³⁸ In the federal criminal system, for

¹³³ *Id.* at 31–32.

¹³⁴ *E.g.*, U.S. CONST. amend. V (grand jury); CONN. CONST. art. I, § 8(a) (judicial officer). There is no constitutional right to a grand jury in military prosecutions. U.S. CONST. amend. V (“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 . . .*”) (emphasis added).

¹³⁵ *See supra* notes 33–35, 37 and accompanying text.

¹³⁶ *See, e.g.*, *United States v. Calandra*, 414 U.S. 338, 343 (1974) (citing *Branzburg v. Hayes*, 408 U.S. 665, 686–87 (1972)).

¹³⁷ *See* 1 WAYNE R. LAFAVE ET AL., *CRIMINAL PROCEDURE* § 15.3(b), at 301–04 (2d ed. 1999). The authors cite “no-bill” rates ranging from 20% to less than 2% in major American cities. *Id.* at 302 n.34. The effectiveness of screening is also by its very nature difficult to measure. A high rate of indictment may reflect the fact that prosecutors present only solid cases to the grand jury; it may also show that the grand jury is willing to indict the proverbial ham sandwich. Some observers argue that the rate of post-indictment dismissal for insufficient evidence is a more useful measure of the effectiveness of screening. *Id.* at 303.

¹³⁸ *See id.* at 302. The authors cite a 1988 Department of Justice study concluding that bindover and indictment rates in thirty American urban areas averaged 90% or greater. *Id.* at 302 n.34.

example, the grand jury indicts in over ninety-eight percent of cases.¹³⁹ Nor does the accused have significant procedural protections in the grand jury room. The government is not required to disclose exculpatory evidence to the grand jury,¹⁴⁰ normal rules of evidence do not apply,¹⁴¹ and the grand jury may base an indictment entirely on hearsay.¹⁴² These factors have caused many observers to conclude that the grand jury's ability to protect the accused is illusory.¹⁴³

A second civilian screening device is the preliminary hearing. In the federal system¹⁴⁴ and many states,¹⁴⁵ the defendant has a right—at least in some circumstances—to a judicial hearing to determine whether a charge is supported by probable cause. If the judge or magistrate finds no probable cause to believe that the offense has been committed, or that the defendant committed it, the charge is dismissed.¹⁴⁶

Like the grand jury, however, the preliminary hearing does not always live up to its potential as a screening device. There are wide disparities in dismissal rates at preliminary hearings, as well as disagreement about the significance of those disparities.¹⁴⁷ In the federal system and many states, prosecutors may circumvent the preliminary hearing altogether by directly indicting the defendant.¹⁴⁸ In other states, prosecutors may file an information directly with the trial court and bypass the preliminary hearing.¹⁴⁹ Only a handful of states maintain an absolute requirement that a judicial officer determine probable cause before the prosecution may continue.¹⁵⁰ Even the absolute right to a preliminary hearing may not entirely protect the accused from a determined prosecutor. In many jurisdictions, a finding that probable cause does not exist has no preclusive effect, and the state is free to bring the charge again.¹⁵¹

In addition, civilian prosecutors are no less susceptible to external influence than a court-martial convening authority; in fact, they may be

¹³⁹ *Id.* at 302.

¹⁴⁰ *United States v. Williams*, 504 U.S. 36 (1992).

¹⁴¹ FED. R. EVID. 1101(d)(2).

¹⁴² *Costello v. United States*, 350 U.S. 359 (1956).

¹⁴³ *See, e.g.*, Andrew D. Leipold, *Why Grand Juries Do Not (and Cannot) Protect the Accused*, 80 CORNELL L. REV. 260 (1995).

¹⁴⁴ FED. R. CRIM. P. 5.1.

¹⁴⁵ *See, e.g.*, ALA. CODE § 15-11-9 (LexisNexis 1995); COLO. REV. STAT. § 16-5-301 (2006); VA. CODE ANN. § 19.2-218 (2006).

¹⁴⁶ *See* sources cited *supra* notes 135–36.

¹⁴⁷ 4 LAFAVE ET AL., *supra* note 137, § 14.1(a).

¹⁴⁸ *Id.* § 14.2(c).

¹⁴⁹ *Id.* § 14.2(d).

¹⁵⁰ *See id.*

¹⁵¹ *E.g.*, ALA. CODE § 15-11-2 (LexisNexis 1995); *People v. Uhlemann*, 511 P.2d 609, 610 (Cal. 1973); *People v. Noline*, 917 P.2d 1256, 1267 (Colo. 1996).

more so. Prosecuting attorneys at the municipal and county levels are typically elected, and politics figure prominently in the appointment of United States Attorneys.¹⁵² As a result, there is a strong political incentive for prosecutors to win convictions, particularly in cases that are notorious in the community.¹⁵³ In one particularly outrageous example, a state prosecutor has even campaigned on an explicit promise to convict a particular defendant.¹⁵⁴

Given the incentive to win high-profile cases, the ability to circumvent the preliminary hearing, and the questionable effectiveness of the grand jury in screening, it seems that the civilian criminal justice system is no better than its military counterpart at protecting defendants from politically motivated prosecution. However, this is no excuse for the military system to rest on its laurels. On the contrary, military justice has often led the way in protecting the rights of criminal defendants,¹⁵⁵ and it should do so in this case as well. Recognizing that it is wrong to require a person to stand trial in the absence of probable cause, Congress should amend Article 32 accordingly.

B. Strengthening Article 32

Suggested changes to Article 32 have circulated for at least thirty years.¹⁵⁶ In 1973, Captain Lawrence J. Sandell proposed two such changes that Congress could adopt to strengthen Article 32 and affirm the fairness and progressivism of the military justice system.¹⁵⁷ First, an

¹⁵² Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125, 151–52 (2004).

¹⁵³ See *id.* at 153. See generally Kenneth Bresler, “I Never Lost a Trial”: When Prosecutors Keep Score of Criminal Convictions, 9 GEO. J. LEGAL ETHICS 537 (1996).

¹⁵⁴ See *State v. Hohman*, 420 A.2d 853 (Vt. 1980), *overruled by Jones v. Shea*, 532 A.2d 571 (Vt. 1987).

¹⁵⁵ Compare *Miranda v. Arizona*, 384 U.S. 436 (1966) (prohibiting unwarned questioning during “custodial interrogation”), and *Gideon v. Wainwright*, 372 U.S. 335 (1963) (recognizing the right to appointed counsel for indigent criminal defendants in certain prosecutions), with 10 U.S.C. § 831 (2000) (prohibiting any unwarned questioning that might tend to incriminate the accused), and 10 U.S.C. § 827 (2000) (establishing the right to detailed defense counsel in all general and special courts-martial). See generally Jack L. Rives & Steven J. Ehlenbeck, *Civilian Versus Military Justice in the United States: A Comparative Analysis*, 52 A.F. L. REV. 213, 221 (2002).

¹⁵⁶ There has been official, as well as academic, attention to the possibility of changing the role of the convening authority in referring charges; however, these suggestions have been rejected. See COMPTROLLER GEN., FUNDAMENTAL CHANGES NEEDED TO IMPROVE THE INDEPENDENCE AND EFFICIENCY OF THE MILITARY JUSTICE SYSTEM 40 (1978). The Cox Commission received input with respect to Article 32 but took no official position on proposed changes. NAT’L INST. FOR MILITARY JUSTICE, REPORT OF THE COMMISSION ON THE 50TH ANNIVERSARY OF THE UNIFORM CODE OF MILITARY JUSTICE 16 (May 2001), available at http://www.nimj.com/documents/Cox_Comm_Report.pdf.

¹⁵⁷ See Lawrence J. Sandell, *The Grand Jury and the Article 32: A Comparison*, 1 N. KY. ST. L.F. 25, 54 (1973).

independent authority should decide the issue of probable cause. Second, a finding of no probable cause should result in dismissal of the charge.

An Article 32 investigating officer performs a quasi-judicial function.¹⁵⁸ Although not called upon to decide complex questions of law or rule on the admissibility of evidence,¹⁵⁹ the IO is responsible for decisions that in civilian life are left to a professional judge or magistrate.¹⁶⁰ As a result, the IO is held to standards similar to those set for a military judge.¹⁶¹ However, an IO is only required to have the rank of major (or lieutenant commander) or to have legal training.¹⁶²

A better approach, as recommended by Sandell, is to appoint a special court-martial military judge as the Article 32 investigating officer.¹⁶³ “This [practice] has the double advantage of providing an IO who is both legally trained and free from command control.”¹⁶⁴

Relying on military judges would also eliminate situations in which there is a potential for prejudice to the accused because of the IO’s contact or relationship with an interested party. For example, in *United States v. Davis*, the executive officer of the Philadelphia Naval Base was appointed as the IO, despite the fact that he also supervised and evaluated the attorney detailed as defense counsel.¹⁶⁵ In a second case, *United States v. Brunson*, the IO received legal advice with respect to the investigation from the trial counsel in the case; this error caused the convictions to be set aside.¹⁶⁶ More recently, in *United States v. Argo*, the convening authority’s staff judge advocate made improper ex parte contact with an IO and attempted to influence her conduct of the

¹⁵⁸ See *United States v. Brunson*, 15 M.J. 898, 901 (C.G.C.M.R. 1982) (stating that an Article 32 officer “must be viewed as a judicial officer” and is subject to ABA Criminal Justice Standards).

¹⁵⁹ *United States v. Samuels*, 10 C.M.A. 206, 213 (C.M.A. 1959).

¹⁶⁰ See *supra* notes 144–46 and accompanying text.

¹⁶¹ *United States v. Reynolds*, 24 M.J. 261, 263 (C.M.A. 1987).

¹⁶² MCM, *supra* note 7, R.C.M. 405(d)(1).

¹⁶³ See Sandell, *supra* note 157, at 54. This change would of course have personnel implications for the armed services, and might well require the appointment of additional military judges. It would also have the secondary effect of furthering the creation of a two-tiered military judiciary. Eventually, it may be desirable to establish a formal structure by which newly-appointed and junior military judges (O-4 and junior O-5) preside over Article 32 investigations and special courts-martial, while senior military judges (senior O-5 and O-6) preside over general courts-martial.

¹⁶⁴ *Id.* To fully achieve the second objective, Congress would have to implement additional reforms of the military judiciary. Under the current structure, military judges are appointed by and serve at the pleasure of the service’s Judge Advocate General. Some military judges have complained of attempts to influence their decision-making. See Lederer & Hundley, *supra* note 42. While an investigation by a military judge might not achieve the ideal of true independence, it would come significantly closer.

¹⁶⁵ 20 M.J. 61, 64 (C.M.A. 1985).

¹⁶⁶ 15 M.J. 898, 901 (C.G.C.M.R. 1982).

investigation.¹⁶⁷ Such tactics may be uncommon, but they clearly do occur. A military judge would be less susceptible to potential conflicts of interest, as well as attempts by an interested party to sway the investigation.

By having a military judge decide the issue of probable cause, Congress would enhance the quality and legitimacy of the findings. With that in mind, the Article 32 investigating officer should have the authority to dismiss outright any charge not supported by probable cause.¹⁶⁸ If the Article 32 investigating officer does find probable cause, he or she would relay that finding to the convening authority together with a recommendation as to the disposition of the charges, consistent with current practice.¹⁶⁹ The convening authority would retain the discretion to refer the charges to general court-martial or to decide on an alternate disposition.¹⁷⁰

C. Challenges to the Article 32 Officer's Findings

In cases of sufficient importance, the government might seek to challenge an Article 32 officer's finding of no probable cause. A revised Article 32 might accommodate this in one of two ways. The first approach would be to permit the government to appeal the decision. The federal system and some states permit prosecutors to appeal the dismissal of a charge for insufficient evidence.¹⁷¹ Typically, when a magistrate or lower court judge conducts the preliminary hearing, the prosecutor may appeal a dismissal to the trial court.¹⁷² In some states, prosecutors may also pursue the matter in the state's intermediate appellate court.¹⁷³

The equivalent under the U.C.M.J. might be to permit the government to seek review by a general court-martial military judge, or to bring an interlocutory appeal under Article 62.¹⁷⁴ However, such appeals would make little sense. The Article 32 officer's finding is

¹⁶⁷ 46 M.J. 454, 457 (C.A.A.F. 1997).

¹⁶⁸ See Sandell, *supra* note 157.

¹⁶⁹ See MCM, *supra* note 7, R.C.M. 405(e).

¹⁷⁰ See *id.* at R.C.M. 407. This discretion reflects the fact that the convening authority must consider other factors than the guilt or innocence of the accused—including military necessity, mitigating circumstances, and the interests of the command and/or community as a whole.

¹⁷¹ *E.g.*, 18 U.S.C. § 3731 (2000); HAW. REV. STAT. § 641-43 (2006); ME. REV. STAT. ANN. tit. 15, § 2115-A (2006); ALA. R. CRIM. P. 15.7(a).

¹⁷² See, *e.g.*, COLO. R. CRIM. P. 5(a)(4); State *ex rel.* Fallis v. Caldwell, 498 P.2d 426, 428-29 (Okla. Crim. App. 1972).

¹⁷³ See, *e.g.*, CAL. PENAL CODE § 871.5(f) (West Supp. 2006); COLO. R. CRIM. P. 7(h)(4).

¹⁷⁴ 10 U.S.C. § 862 (a)(1)(A) (2000).

essentially one of fact¹⁷⁵ and should be reviewed under a clearly erroneous standard. It is therefore hard to imagine a scenario in which a dismissed charge would be reinstated. An appeal would simply prolong the case, with little likelihood of a different outcome.

A better approach would be to allow the government the opportunity to refer the charge again. There is no constitutional bar to a second prosecution,¹⁷⁶ and such a practice would be consistent with the federal criminal system¹⁷⁷ and many state courts.¹⁷⁸ It is also possible to limit the ability to refer a dismissed charge (in order to prevent harassment of the accused or “shopping” for a more government-friendly IO). A simple fix would be to permit the convening authority to refer the charge again if he or she has a good faith belief that there is additional evidence that merits reconsideration.¹⁷⁹ The convening authority would then be required to order a new Article 32 investigation.

Of course, when the Article 32 officer does find probable cause, the accused may wish to challenge that finding. For the same reasons stated above, appellate review of the decision is inappropriate. If the convening authority decides not to refer a charge to general court-martial, the issue is moot.¹⁸⁰ Upon referral, the accused should be able to challenge the finding by means of a pretrial motion to dismiss.¹⁸¹ This would be similar to the current process for remedying a legal defect in the investigation or referral of charges¹⁸² but should be reviewed under a clearly erroneous

¹⁷⁵ MCM, *supra* note 7, R.C.M. 405(a).

¹⁷⁶ *United States ex rel. Rutz v. Levy*, 268 U.S. 390, 393 (1925).

¹⁷⁷ *See* FED. R. CRIM. P. 5.1(f).

¹⁷⁸ *See supra* note 151 and accompanying text.

¹⁷⁹ *Cf.* WIS. STAT. ANN. § 970.04 (West 1998) (permitting district attorney to file another complaint if new evidence is discovered after a defendant has been discharged); *Jones v. State*, 481 P.2d 169, 171–72 (Okla. Crim. App. 1971) (requiring prosecutor who wishes to refile to present new evidence to same magistrate, or, in his absence, to a second magistrate who must show deference to dismissal); *State v. Brickey*, 714 P.2d 644, 647 (Utah 1986) (holding that refile of a previously dismissed criminal charge violates state due process clause unless prosecutors have discovered new evidence). Other state limitations on prosecution following dismissal include requiring prosecutors to seek permission of the court, N.Y. CRIM. PROC. LAW § 170.50(3) (McKinney 1993), or to show a good-faith basis for a second prosecution. *People v. Walls*, 324 N.W.2d 136, 138–39 (Mich. Ct. App. 1982) (quashing warrant due to finding that second prosecution, with no new evidence, constituted harassment and violated defendant’s due process rights).

¹⁸⁰ *See* MCM, *supra* note 7, R.C.M. 405(a) (stating that the failure to comply with the requirements of a pretrial investigation has no effect if the charge is not referred to general court-martial).

¹⁸¹ This is the practice in some state courts. *See, e.g.*, IDAHO CODE ANN. § 19-815A (2004).

¹⁸² *See* MCM, *supra* note 7, R.C.M. 905(b)(1).

standard. Failure to challenge the Article 32 officer's finding in a pretrial motion would waive the issue.¹⁸³

D. Preserving the Record

Review of the IO's decision will also require the preservation of an accurate record. The Manual for Courts-Martial already provides that a court reporter may be detailed to an Article 32 hearing.¹⁸⁴ To ensure an accurate record, however, the rule should be amended to require a court reporter for all hearings. Another solution would be to tape record all Article 32 hearings, and to preserve a copy of the tape, together with any physical or documentary evidence in the case. If necessary, a court reporter could then transcribe a record for review by the trial judge or in a subsequent Article 32 hearing.

VI. A PROPOSED REVISED ARTICLE 32

Through incorporating these changes, a revised Article 32 would read as follows:

(b) . . . For each charge and specification, a military judge must determine whether there is probable cause to believe that the offense has been committed and that the subject of the investigation has committed the offense.

If probable cause exists as to any specification, the military judge must inform the convening authority and the accused. The military judge must also make a recommendation to the convening authority as to how to dispose of the case.

The military judge must dismiss any charge or specification that is not supported by probable cause.

Following a dismissal of a charge or specification under this Article, the convening authority may again refer the charge if there is reason to believe that there is additional evidence to justify doing so. The convening authority must then order a new investigation under this Article.

VII. CONCLUSION

It is wrong to prosecute without probable cause. The present Article 32 does not do enough to prevent this from happening. Congress should amend the Uniform Code of Military Justice to ensure that Article 32 requires an independent determination of probable cause before a charge may be referred to court-martial.

Given the breadth and aggressiveness of contemporary media coverage, it is clear that scrutiny of the military justice system is here to stay. Wars in Afghanistan and Iraq have dramatically increased the

¹⁸³ See *id.* at R.C.M. 905(c).

¹⁸⁴ *Id.* at R.C.M. 405(d)(3)(B).

attention focused on the armed services in general, and military justice in particular. New politically sensitive and increasingly visible scandals continue to emerge. Abuses at the Abu Ghraib prison damaged American diplomatic efforts throughout the world,¹⁸⁵ prompted calls for the Secretary of Defense to resign,¹⁸⁶ and brought criticism on the President himself.¹⁸⁷ Although a number of enlisted personnel were convicted in connection with the abuse, members of Congress have pushed for more senior personnel to be held criminally liable.¹⁸⁸

Meanwhile, the service academies remain in the spotlight. The Air Force Academy has continued to struggle with allegations of sexual assault. In June 2005, another cadet was court-martialed (and acquitted) on the basis of dubious evidence.¹⁸⁹ The process again raised questions about the Academy's ability to fairly investigate and prosecute sex crimes.¹⁹⁰ Later in 2005, the focus shifted to the allegations of religious bias and aggressive proselytizing.¹⁹¹ And in 2006, a former quarterback of the Naval Academy's football team was charged with, but acquitted of, the rape of a fellow midshipman (although he was convicted of two lesser charges).¹⁹² Whatever the issue of the moment, the academies will continue to receive close scrutiny.

These events—and others to come—will place tremendous pressure on court-martial convening authorities to satisfy demands for retribution. Some may choose to err on the side of caution—prosecuting anyone potentially connected with the scandal, whether or not that

¹⁸⁵ Edward Cody, *Iraqis Put Contempt for Troops on Display*, WASH. POST, June 12, 2004, at A1; Glenn Kessler, *At the Sea Island Summit, A Sea Change in U.S. Diplomacy*, WASH. POST, June 11, 2004, at A6.

¹⁸⁶ James Barron, *Citing a 'Shamed America,' Gore Calls for Rumsfeld, Rice, Tenet, and 3 Others to Resign*, N.Y. TIMES, May 27, 2004, at 26.

¹⁸⁷ See generally SEYMOUR HERSH, *CHAIN OF COMMAND: THE ROAD FROM 9/11 TO ABU GHRAIB* (2003).

¹⁸⁸ Steven Lee Myers & Eric Schmidt, *The Reach of War: Investigations; Wide Gaps Seen in U.S. Inquiries on Prison Abuse*, N.Y. TIMES, June 6, 2004, at 11. At least one senior U.S. commander was "reassigned" amid speculation that he was relieved in response to the scandal. Thomas E. Ricks & Bradley Graham, *U.S. Plans to Name a New Commander*, WASH. POST, May 25, 2004, at A1.

¹⁸⁹ Erin Emery, *Jury: Cadet Should Get Reprimand for Sex with Fiancee*, DENV. POST, June 5, 2005, at C4.

¹⁹⁰ *Id.* Kuster was convicted of committing an indecent act for having sex with his fiancée in a hotel room where other cadets were present. Kuster avoided confinement, but nevertheless has a federal conviction. In contrast, Kuster's fiancée received a reprimand, graduated from the Academy with distinction, and was commissioned as an Air Force officer. See also Dick Foster, *AFA Officer Raises Doubts of Fairness in Rape Trial*, ROCKY MTN. NEWS (Denver, Colo.), May 27, 2005, at 32A.

¹⁹¹ Mike Soraghan, *AFA Religion Debate Erupts in DC: House Democrats' Effort to Condemn Intolerance Leads to War of Words*, WASH. POST, June 21, 2005, at A5.

¹⁹² Bradley Olson & Andrea F. Siegel, *Mid Acquitted of Rape: Ex-Navy QB Is Convicted of Lesser Charges*, BALT. SUN, July 21, 2006, at 1A.

decision is supported by the evidence. In this environment, the lack of a truly independent probable cause hearing for military defendants will continue to cause injustice. It is more essential than ever that Congress remedy this flaw.

While the military justice system is likely no worse than its civilian counterparts at protecting the accused from unwarranted prosecution, “no worse” is not good enough. By amending Article 32, Congress can grant unsurpassed pretrial protection to the military defendant, and allow the military justice system to once again set the standard for justice and fairness. Such an improvement to the system will inspire the respect and confidence of those in and out of uniform. Americans—civilian and military—deserve no less.