

Military's Handling of Sex Assault Cases on Trial at Naval Academy Rape Hearing

By Melinda Henneberger and Annys Shin

After four days and more than 20 hours of relentless questions about her medical history and motivations, her dance moves and underwear, the 21-year-old midshipman who has accused three former Naval Academy football players of raping her pleaded on Saturday for a day off from testimony. It was granted by the hearing's presiding officer but not before the request triggered more skepticism from defense attorneys, who said the young woman was faking her exhaustion. "What was she going to be doing anyway?" asked Ronald "Chip" Herrington, one of the defense attorneys for Eric Graham, a 21-year-old senior from Eight Mile, Ala. "Something more strenuous than sitting in a chair? We don't concede there's been any stress involved." At a time when the military is under attack for how it handles sexual violence in its ranks, the proceedings underway at the Washington Navy Yard offer a case study on why women in uniform are so reluctant to report sexual assaults. The hearing highlights significant disparities between the way the military and civilian world treat accusers and the accused. As many as 26,000 service members said they were the targets of unwanted sexual contact last year, but only 3,374 incidents of sexual assault were reported, the Pentagon said in May. Those numbers were accompanied by several high-profile scandals this year, including the decision of an Air Force general to overturn the conviction of a fighter pilot on sexual assault charges and the arrest of the Air Force officer in charge of sexual assault prevention in the alleged groping of a woman outside a Crystal City bar. The result has been demands by some lawmakers to take sexual assault investigations and prosecutions out of the hands of the military chain of command — a proposal that is expected to be debated in the Senate this fall. Last month, Defense Secretary Chuck Hagel approved new regulations aimed at providing more support to alleged victims of sexual assault, standardizing how each service handles cases and making sure senior commanders learn about every reported incident. Hagel's reforms will require that every presiding officer at what is known as an Article 32 hearing — the legal proceeding underway in the Naval Academy rape case — be a lawyer. But that won't necessarily change how the accusers are treated during those hearings. An Article 32 is sometimes compared to a civilian grand jury proceeding because its purpose is to determine whether a trial, or court-martial in military parlance, is warranted. But legal experts say it differs in a number of ways, with looser procedural rules and open-ended cross-examinations that can be trial-like in nature and scathing in tone. Roger Canaff, a former prosecutor who has helped the military improve its handling of sexual assault cases, said no civilian court in any state in the country would allow the kind of questions that are routinely permitted at Article 32 hearings. The legal proceedings are so hard on women who allege sexual assault that "a lot of cases die there as a result," said Canaff, who now works at End Violence Against Women International. "You hear questions that would be highly objectionable in a court-martial or any civilian hearing."

Appearing on the witness stand in her dress white uniform, the midshipman has come under withering cross-examination from defense attorneys, who include both civilian and military

lawyers. (The Washington Post does not generally identify the alleged victims of sexual assault.) Some of their questions focused on the night of the alleged assault in April 2012 at an off-campus party, where, she testified, she had blacked out after finishing off a bottle of coconut rum. "Were you wearing a bra" to that party? asked Andrew Weinstein, an attorney for defendant Tra'ves Bush, 22, of Johnston, S.C. "Were you wearing underwear?" Weinstein demanded to know how often she lies — "at least once a day?" — and whether she "felt like a ho" the morning after the party. Lt. Cmdr. Angela Tang, another attorney for Graham, repeatedly asked the woman how wide she opens her mouth to perform oral sex. When prosecutors objected, Graham's attorneys argued that they were trying to show that oral sex required "active participation" on the part of the accuser, which would indicate consent. Evidence of participation by an alleged victim, which can include sexual positions, is a standard defense strategy in Article 32 hearings, said Lisa Windsor, a retired judge advocate. But that line of questioning probably would not be allowed in a Maryland courtroom, said Lisae Jordan, executive director of the Maryland Coalition Against Sexual Assault. "What is consensual is fair game for the defense," Jordan said. But questions about the accuser's oral sex technique "would likely be deemed irrelevant" and inflammatory. In some states, questions about whether the accuser was wearing a bra and underwear would not be admissible under rape shield laws. And Jordan doubted whether many Maryland prosecutors or judges would allow questions about whether the accuser "felt like a ho," which Windsor agreed served little legal purpose beyond "trying to discourage the victim from going forward." "The clever lawyer can easily intimidate the witness" in an Article 32 hearing, said retired Army Col. Lawrence Morris, a former military prosecutor and defense attorney, because the process is "much more favorable to the accused" than a civilian proceeding. The hearings are designed, Morris said, to prevent defendants from being "steam-rolled." Civilian grand juries have been criticized for being unfair to defendants. They convene in secret, often without the accused's knowledge. An Article 32 is open to the public. The grand jury hears evidence only from the prosecution, and no one confronts witnesses on behalf of the accused, although jurors can question them. In sexual assault cases, a grand jury can bring an indictment based on the testimony of detectives and without hearing from the alleged victim, Jordan said. By contrast, the Article 32 hearing in the Naval Academy rape case has focused exclusively on the memory, behavior and credibility of the accuser, not the accused. During a break in the hearing, the female midshipman's personal attorney, Susan Burke, was overheard telling military prosecutors that the defense questions had to be reined in: "This is harassment, and it has to stop!" But even when the presiding officer, Cmdr. Robert Monahan Jr., did sustain the prosecutors' objections — barring, for example, a question about whether she carried condoms in her purse — the tone of the cross-examination did not change. The young woman has repeatedly said that on the night of the party, she drank so heavily that she blacked out and only pieced together what had happened after seeing tweets and hearing rumors that she had had sex with Bush, Graham and the third defendant, Joshua Tate, a 21-year-old junior from Nashville, all of whom have denied any wrongdoing. She has said that after waking up the next morning in the "football house," where the party took place, she had no memory of being raped but that she did have consensual sex with a different football player. The woman, who is in her final year at the academy, has testified that she initially refused to cooperate with investigators, even after others who had heard the rumors reported them to authorities. She didn't "want the case to go anywhere," she said, because she was ashamed, afraid, and did not want to get anyone in trouble. On Thursday, the defense played a tape of a frantic phone call in which she begged one of the defendants to lie and tell investigators that nothing happened at the party. The hearing will continue Sunday and is expected to last several more days. After it ends, Monahan's nonbinding recommendation will be sent in a few weeks to the academy superintendent, Vice Adm. Michael Miller, who will decide whether to send the case to court-martial.