Comments of Philip D. Cave, CDR, JAGC, USN (Ret.) before the U.S. Commission on Civil Rights, 2013 Statutory Enforcement Report and Briefing on Sexual Assault in the Military, hearing 11 January 2013.

I have been invited to talk about military sexual assault cases from the perspective of the accused and the defense. I thank you for this opportunity. My remarks are my own and should not be attributed to others, including organizations with which I am associated.

My primary focus is directed toward false allegations. This is a topic that must be faced and addressed in any reasoned discussion of sexual assaults in the military. Those who bring up this topic are often accused, at times vilified as rape apologists. I would suggest it is important to move past such *ad hominem's* as politicized rhetoric rather than discussion of the issues. And of course those who challenge the idea of false accusations have not themselves been the subject of a false allegation and all of its attendant adverse personal, career, and family consequences.

Overall the military justice system is considered to be a good one. There are areas of the system that are significantly more protective of an accused's rights than in the civilian community. An example would be the Article 32, UCMJ, 10 U. S. Code §832, preliminary investigation. It would be incorrect to call the Article 32 a military version or equivalent of a grand jury. An accused has the right to be present, have counsel appointed and present, cross-examine witnesses, call witnesses of their own, and to make a statement. It is here that an accused's first hope of dismissal of charges happens. The investigating officer (IO) makes only a recommendation. Over the years it was fairly common for the convening authority to accept the IO's recommendations, even in sexual assault cases. For some convening authorities giving the case to an Article 32 investigator could be viewed as cover. But, the perception today, if not the reality is that a sexual assault case is more likely to go to trial despite unfavorable recommendations from an IO. The decision appears to have gone from, "let's hear what the IO has to say," to "let's give it to a jury." The question then becomes whether (more) false or extremely weak cases get into the court-martial process.

Over the last five to seven years it has been increasingly apparent to an accused going into a sexual assault case that he is presumed guilty, that he must prove his innocence, and that

background politics may play an important role in how a case is to be resolved. That more guilty people are convicted and punished could in fact be the right and appropriate result. The greatest fear, especially those in leader or supervision roles is that of being falsely accused.

> Just as there continues to be strong resistance to the fact that some children (for a variety of reasons) lie about having been sexually molested or assaulted, the judicial system, mental health practitioners, and the public at large are reticent to accept that some women (and men) lie about having been raped. However, there is ample evidence that adults lie about virtually anything, including grave matters that have serious consequences for others.

Bruce Gross, False Rape Allegations, 11 Ann. Am Psychotherapy 45 (2008).

The research and study of false sexual assault allegations is spotty and inconclusive in many ways. Part of the problem is to define what is or is not a false allegation. Those of which we can feel most certain to be false are those where the complaining witness admits the falsity. Although, there is a caution that recanting is not enough, and the possibility of recantation has become another of the rape myths. Here are some examples.

Eugene J. Kanin, False Rape Allegations, 23(1) Arch. Sex. Behav 81 (1994)(41%, providing an alibi, seeking revenge, and obtaining sympathy and attention.). David Lisak, Lori Gardinier, Sarah C. Nicksa and Ashley M. Cote, False Allegations of Sexual Assault: An Analysis of Ten Years of Reported Cases, 16 Violence Against Women 1318 (2010)(2-10%). C. P. McDowell, False allegations. 11 For. Sci. Digest, No. 4, December 1985 (A review of 556 rape accusations filed against Air Force personnel found that 27% of women later recanted. Then 25 criteria were developed based on the profile of those women, and then submitted to three independent reviewers to review the remaining cases. If all three reviewers deemed the allegation was false, it was categorized as false. As a result, 60% of all allegations were found to be false. Of those women who later recanted, many didn't admit the allegation was false until just before taking a polygraph test. Others admitted it was false only after having failed a polygraph test.). Of interest in this piece is the use of the polygraph, something that is almost never done with

current sexual assault cases. The accused will be polygraphed or offered a polygraph, but never the complaining witness.

Dr. Lisak's study apparently concludes there are 2-10% false rape allegations – showing how much we don't know. We have heard 2%, the lower number offered by advocates against sexual assault. That is meant to minimize the number. I believe this was raised in "The Invisible War." In that movie the producers discussed a DOD report from 2010 in which more than 3200 sexual assault allegations were made. That means, using Dr. Lisak's numbers anywhere from 64 to 320 of those allegations could have been false. That possibility *could* account for the lower number of accused's prosecuted and convicted.

In 1996 two Marines reported to the base hospital emergency room that they had been raped in the barracks. They showed rope burns around their wrists from having been tied. Two Marines were arrested and placed in the Brig for pretrial confinement pending court-martial. About a week later an ER corpsman returned from leave and his co-workers lost no time in catching him up on the news. He realized he had relevant information and went to the Naval Criminal Investigative Service (NCIS). He told NCIS that as he was leaving the ER at the end of his shift (and was going on leave the next morning) he saw two women in the hospital parking lot running their hands around each other's wrists. He thought nothing of it at the time. NCIS reinterviewed the two complaining witnesses. They confessed that they had made a false report and had faked the injuries.

The two Marines were released from pretrial confinement. They were later administratively disciplined and discharged from the Marine Corps for having sex in the barracks. No adverse actions were taken against the Marines who falsely accused them.

A question must be, how many others are there like this. The Marines in the example above were fortunate that there was a witness who came forward. This is a significant question in situations where the charges are frequently a "she said, he said," situation where there is alcohol involved which compromises memory, inhibitions, and actions.

When asked "Why did you lie?" the two Marines said that they were smoking outside the barracks the next morning when the two Marines they'd had consensual sex with came walking out. They heard one of the Marines say to the other, "*Now you know*

what it's like to have sex with a fat chick." That was the motive for the false accusation.

Advocates for victims will rightly tell us that it is not always easy for the victim of a sexual assault to make a complaint. There are numerous understandable reasons for this. But, it must also be an accepted fact that it is easy to make a *false* complaint. This is especially true in the politically charged atmosphere surrounding the current topic of discussion. A false accuser is quite unlike the victim of sexual assault but can appear to be and will be treated as a victim.

Advocates will say, prosecutors will argue to the court, "Why, why would she do this? Why would she put herself through this if it weren't true? Why would she come and testify and expose herself as a witness if this were not a true allegation?" These are the most potent questions that a defense counsel and an accused must answer. As my example above illustrates -- revenge for a seemingly minor offense can be a powerful motivator to lie.

The principle motivations to lie include: protecting a marriage or other relationship. When a person goes to a party, has lowered inhibitions due to alcohol, and has sex, what does she tell her husband, fiancée or boyfriend the next day? -- "I was raped." What does an accuser say when the topic of her previous nights sex is bragged about and talked about in the unit and among co-workers, as to her reputation? -- "I was raped, I'm a victim, not a "ho."" What does an accuser who is in trouble from her supervisor say? -- "I was sexually assaulted by him, I am a victim, you can't discipline me now." What does an accuser say when there is fraternization and underage drinking with an instructor, and they are both in trouble? -- "I was raped." What does an accuser who is in training and sets her sights on having sex with one or more instructors say when they are caught? -- "I was raped," or "I was assaulted." What does the accuser say when she finds out about the other woman and is not satisfied about the potential divorce settlement or the child custody arrangements? -- "I was raped," or "I was sexually assaulted."

My first example of one of many false complaints I and my colleagues face is intended to show an apparently silly and minor reason. There are other cases and research into false complaints may well expose other such seemingly ridiculous motivations.

A few years ago a client was accused of raping his co-workers wife while she was passed out drunk on her bed. The allegation, not unusual, stemmed from a night of heavy drinking by all involved. It was the husband who first raised the issue of rape. He alleged that he saw the accused assaulting his wife while she was passed out drunk on their bed. The wife said she didn't remember much of what happened because she was so drunk. And it became apparent that much of what she claimed was related to her by her husband afterwards when she reported the alleged crime. The husband was himself admittedly drunk.

As is common in these cases we had requested the appointment of an expert to talk about the effects of alcohol on memory and other factors related to the effects of alcohol on a person's ability to engage in behaviors. The prosecution denied the request so shortly before trial we had a hearing with the judge. The judge ordered the expert assistance. Because of the timing, the trial which was scheduled to begin the next week was delayed.

About a week later the husband approached the client and told him that he (the husband) had to come forward and tell the truth. It turns out that the husband and the complaining witness wife lied in their statements to CID and at the Article 32, UCMJ, hearing. There was no rape. The husband admitted that both he and the wife were awake and engaged in sexual activity themselves. The husband said the client was present, but that essentially any events in the bedroom were consensual. There was no DNA evidence of the client on the wife's body, her clothing, or the bedding, only that of the husband. It appears the husband and wife were afraid to be in trouble for potentially engaging in a threesome. The sexual assault allegations were dropped from general court-martial, the client was given a summary court-martial and an other than honorable conditions discharge for other misconduct. His wife with their baby daughter left him and they were divorced. Nothing happened to either of the complaining witnesses.

The prosecutor said he didn't believe the recantation and thought that the victims didn't want to "go through the hassle," so they concocted (lied) in a story about threesomes. That thought is consistent with a developing recantation myth. Who would make up such a lie about a threesome to justify a lie about a false rape. This case highlights a rape myth that a recantation of sexual assault is always itself false not the initial report, and is thus corroborative of a true account. It is true that an actual victim may recant at some point. The

victim fears the process going forward. The recantation myth has the potential to crop up during sexual assault training. Unlike the example I have given above, the truth of a recantation is often difficult to discern.

When there is a recantation the prosecutor will threaten the complaining witness with prosecution for their now allegedly false statements and complaint. This can be a powerful motivator even when the allegation is false and the recantation true.

What do you say to the judge or Members (jury) when the prosecutor argues the common theme, “why would she put herself through this, appear before you, . . . ? As noted above, the complaining witness is stuck. If the allegation is true, then the prosecutor’s argument is valid. But the counter argument always remains. “She is lying now and she has been forced to appear because of a threat of prosecution for lying to investigators and perjury in her Article 32 testimony,” or words to that effect. Combined with a motive to lie, the defense can at times successfully counter the allegations.

A Marine is in trouble for adultery and underage drinking with a staff NCO instructor, what does she do? Initially she admits to adultery as consensual sex and denies underage drinking. But later she is told that she will face summary court-martial for her actions. What does she do? Shortly after she attends sexual assault training. What does she do?

She alleges she was raped. Not only does she allege rape, but her comments and statements now begin to mimic the language used in that training on how to recognize and address sexual assault. The “victim” adopts the language of the trainers and experts. The adoption of the professional language does not mean that the victim is and has been lying. But the change in word choice to describe events is of concern. The concern being improper coaching.

The SSgt W case is an example of several points: the complaining witness who is also in trouble, how sexual assault training may be a roadmap on perfecting a sexual assault allegation, an argument against removing commanders from the prosecute or not role, as well as issues with the sexual assault training.

> A military lawyer [Article 32 investigating officer] who evaluated the case told SSgt W’s commander they

didn't have enough evidence to go to trial on sexual assault charges. The prosecutor even agreed. But the Marines ignored the advice.

In SSgt W’s case, the accuser initially denied having sex with him when her commander questioned her.

After SSgt W confessed to adultery and urged her to tell the truth, she admitted having an affair with him. At that point, she said in a sworn statement that she and SSgt W had picked up "protection" before heading to a hotel. She denied drinking any alcohol.

Three months later [after being advised of disciplinary action], she changed her account again, saying SSgt W had plied her with hard liquor before taking her to the hotel. While they were watching TV on the bed, she said, "he all of a sudden rolled on top of me."

"I don't think I said anything," she said in a statement. "I just remember my clothes coming off and I accepted it was happening."

The woman said she realized she'd been raped after attending anti-sexual assault classes. She notified the lawyer who was defending her against adultery charges. The woman also told her estranged husband.

When a military lawyer, known as an investigating officer, reviewed her allegations, he recommended that the Marines drop the aggravated sexual assault charge.

Not only had the accuser's story changed, friends said she'd told them the sex had been consensual and that *she would do it again* because she thought her husband was cheating on her (emphasis added). [At trial the defense brought out that she did in fact do it again, several days after the alleged rape.]

The commander nonetheless rebuffed the lawyers' advice, pursuing nine charges against SSgt W that ranged from aggravated sexual assault to indecent language. SSgt W’s possible fate changed from expulsion from the military to 30 years in prison.

> Prospective jurors reported that they'd been taught that a woman can't consent to sex after only a single drink. The judge instructed them to ignore the training. One juror, a Marine staff sergeant, nonetheless said he couldn't reconcile his prior training with the new instructions.
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> "It's just integrity, sir," the staff sergeant told the judge, a trial transcript shows. "I can't agree with it."
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> The judge dismissed the staff sergeant, and SSgt W subsequently was convicted of adultery, which is illegal in the military. Although the judge managed to eject the juror who admitted a conflict, *the question lingers whether jurors in other trials may retain their erroneous lessons* (emphasis added).
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> Earlier this year, an Air Force enlisted man at Joint Base McGuire-Dix-Lakehurst in New Jersey was accused of sexually assaulting an intoxicated woman. Military jurors revealed that they, too, had been taught that any amount of alcohol rendered a woman substantially incapacitated and hence incapable of consenting.

This myth of one drink has been a persistent problem in military sexual assault training. It is quite possible that there is a person who would be incapacitated after one alcoholic drink. But that would depend on the alignment of a significant host of factors about the person's alcohol intake, type of alcohol, time period over which the drink was taken, health, physical condition, medications, and physique.

A needed reform for those falsely accused. Before moving beyond false sexual assault allegations we should discuss a potential remedy for those falsely accused.

When military law enforcement begins a sexual assault investigation they will identify their report by the name of the suspect. This is what is known euphemistically as "being titled." Once titled the person is then identified in various criminal and law enforcement data bases as a suspect. Army CID does note that, "Titling an individual or entity is an operational rather than a legal decision. The acts of titling and indexing are administrative procedures and shall not

connote any degree of guilt or innocence."[1] While that is a correct statement, that is not always the realistic effect of being titled. For example, the mere fact of being titled can adversely affect a security clearance. A security clearance may be needed as a condition of service, especially for officers. As the case progresses the data is updated to reflect a status. For example a conviction, the charges of which convicted, and the sentence. However, for those falsely accused who have charges dismissed they remain titled. Colonel Patricia Ham's article is somewhat dated, but gives a reasonable explanation of the process. See (then) MAJ Patricia A. Ham, The CID Titling Process – Founded or Unfounded?, The Army Lawyer, August 1998.[2]

When a Soldier is accused of a sexual assault he will be "flagged." *See* Army Regulation 600-8-2, Suspension of Favorable Personnel Actions (AR 600-8-2).[3] The other Services have similar procedures to put the person on "legal hold." The person cannot transfer, cannot be promoted, can receive a personal award or decoration. The person is often moved from their current duties. All of this will have a negative effect on their future career, even if the charges are found to be false and dropped, or there is an acquittal.

In the process of investigating a case there will be talk in the unit, with a consequent negative impact on their service-reputation. While the suspect is given a no-contact order, the witnesses rarely are, and they will continue to gossip among themselves and with others. Families are affected. Those falsely accused who are married may encounter marital problems.

Congress and DOD should consider a part-remedy for those falsely accused, and possibly those acquitted of sexual assault – an expungement of all information from all military databases and service records, and every effort to restore the person to their situation prior to the allegations. Recommendations have been made to create a database of military personnel against whom sexual assault allegations have been made. A purpose of the database is to have a history should there be more sexual assault allegations against that person in the future. There need not be an objection to retaining information about those falsely accused or acquitted, *so long as* the database was

[1] http://www.cid.army.mil/Documents/FOIA/AMEND%20Criteria%20CID.pdf, http://www.cid.army.mil/documents/FOIA/Privacy%20Act%20Request%20to%20Change%20Record.pdf
[2] Available at, http://www.loc.gov/rr/frd/Military_Law/pdf/08-1998.pdf
[3] Available at, http://www.apd.army.mil/pdffiles/r600_8_2.pdf

strictly limited to law enforcement who are currently investigating a sexual assault involving the same person.

What other challenges beyond false allegations face a military member accused of sexual assault.

You should believe the victim. Law enforcement, commanders, those in sexual assault training are told that they must believe the victim. This of course assumes the complaining witness is a victim. This is a valid response from a medical and psychological perspective. A victim should not be re-traumatized. Such a response is necessary for any mental health provider to establish and maintain a therapeutic relationship with a new client. However, this is a problem each accused and counsel must deal with at trial.

The believe-the-victim mantra can infect the criminal investigative process, commander's perceptions, and prosecutor's perceptions and actions. The result can be poorly investigated charges (which can hurt the prosecution as well as the defense), false accusations not being challenged early enough to avoid damage to an innocent accused, a poor prosecution, and an unfair trial. Some effects are deliberate, others less so.

When investigators, prosecutors, and Members (jury) are taught to believe the victim, this leads to a problem of confirmation or investigator bias. There is ample research on the effect of confirmation bias, including in law enforcement. I tell potential clients:

> Generally investigators engage in what is called confirmation bias. They will hunt down and search out evidence they think will convict you. They will not hunt down something that helps you or hurts their case. They will ignore information that might be helpful to you, even going to the extent of leaving that helpful information out of their reports. The prosecutors who frequently fail to independently verify the case will then proceed based on an incomplete and biased law enforcement report of investigation.

Certainly investigators and prosecutors deny this possibility but exist it does. When investigators and prosecutors follow this thinking they will be surprised at trial.

If the examiner (or interviewer) has a prior belief or expectation then two potential psychological biases arise.

“Cognitive confirmation bias,” is a tendency to seek out and interpret evidence in ways that fit existing beliefs – such as ‘he did it.’ “Behavioral confirmation bias,” commonly referred to as the self-fulfilling prophecy, is a tendency for people to unwittingly procure support for their beliefs through their own behavior. *See* Lisa J. Steele, The Defense Challenge to Fingerprints, 40(3) CRIM. L. BULL. 2004, citing to Nickerson, Confirmation Bias: A Ubiquitous Phenomenon in Many Guises, 2 Rev. Gen. Psych. 175-220 (1998); Snyder, Motivational Foundations of Behavioral Confirmation, 25 Advances in Experimental Soc. Psych. 67-114 (1992); Zuckerman, Knee, Hodgins & Miyake, Hypothesis Confirmation: The Joint Effect of Positive Test Strategy and Acquiescence Response Set, 68 J. Personality & Soc. Psych. 52-60 (1995); Christian A. Meissner, Saul M. Kassin, "He's Guilty!": Investigator Bias in Judgments of Truth and Deception, Law and Human Behavior, Vol. 26, No. 5 (Oct., 2002), pp. 469-480.

Numerous studies have demonstrated that people generally give an excessive amount of value to confirmatory information, that is, to positive or supportive data. The "most likely reason for the excessive influence of confirmatory information is that it is easier to deal with cognitively." Gilovich, Thomas., How We Know What Isn't' So: The Fallibility of Human Reason in Everyday Life, (New York: The Free Press, 1993).

Recently I represented an officer accused of a sexual assault. During the Article 32 investigation a potential witness was identified through defense examination of the complaining witness. After the hearing this was discussed with the prosecutor. The prosecutor was asked if they would pursue the lead as to the witness. The answer was, “No, we believe our victim, so we aren’t investigating further.” The defense did seek out the witness who did have information helpful to the defense. But, but as it turned out, the witness also had information that would be helpful to the prosecution.

Expert assistance. Access to defense expert assistance can be a problem for all cases, not just sexual assault allegations. Potential defense experts include, forensic psychologists, Sexual Assault Nurse Examiners (SANE), toxicologists, DNA experts, psycho-sexual examiners and treatment providers. These experts would be necessary to consult on potential testimony from the same type of prosecution expert.

Under Article 46, UCMJ, 10 U. S. Code §846, an accused has the right to equal access to witnesses and evidence, including

expert assistance if necessary, without a showing of indigency. *United States v. Garries*, 22 M.J. 288 (C.M.A. 1986).

> Courts-martial must not only be just, they must be perceived as just. The requirement of Article 46, UCMJ, for equal access to witnesses and evidence secures that just result and enhances the perception of fairness in military justice. Where the Government has found it necessary to grant itself an expert and present expert forensic analysis often involving novel or complex scientific disciplines, fundamental fairness compels the military judge to be vigilant to ensure that an accused is not disadvantaged by a lack of resources and denied necessary expert assistance in the preparation or presentation of his defense.

United States v. Lee, 64 M.J. 213, 218 (C.A.A.F. 2006).

Of course the requirements to obtain expert assistance can present a Catch-22 situation. The defense has the burden to show that there is more than the "mere possibility of assistance from a requested expert." *United States v. Lloyd*, 69 M.J. 95, 99 (C.A.A.F. 2010). In order to request an expert you must know what the expert will do and say. The Court of Appeals for the Armed Forces has adopted a three-pronged test for compelling expert assistance to the defense. (1) Why is the expert needed? (2) What would expert accomplish for the defense? and (3) Why is defense counsel unable to gather and present the evidence that the expert assistant would be able to develop? *United States v. Ford*, 51 M.J. 445, 455 (1999), *quoting United States v. Gonzalez*, 39 M.J. 459, 461 (1994). This is a problem applicable in any case and is not limited to sexual assault cases. However, the potential remedy may be the same. Make resources available to the defense through an organization specific to representing an accused. There has been significant attention to the creation of special victim’s prosecutors and provision of expert assistance to the prosecution. Yet nothing is said about similar support to an accused to ensure a fair trial. Article 46, UCMJ, as discussed above can be viewed as an equal access to justice rule. However, congressional and DOD efforts so far have done much to create a potential for imbalance. Such an imbalance serves to fodder to those who would disparage the U.S. military justice system as a model of fairness around the world.

The problem is partly the method by which defense experts are requested. Under current rules the defense must submit a written request and justification to the Convening Authority via the Trial Counsel (prosecutor). *See* Rule for Courts-Martial

703(d), Manual for Courts-Martial, United States (2012) (MCM).[4] There is no stove-pipe organization for the funding of defense experts and other resources, the defense is almost totally reliant on DOD for support. The trial counsel can then comment on whether the defense request should be approved, having in the process gained potential important information on the defense case. Many times a request is denied. Denials are because the defense hasn't given enough justification, and because there is "no money." The prosecution does not have to go through this process for government employed experts and will usually be provided whatever expert assistance is necessary, more so with the various pressures to create additional resources to support prosecutions. The prosecution is required, but almost never follows the defense required procedure if spending money for a non-government employee. The UCMJ is a system where the defense is funded by the same entities that are to prosecute the person. Such a imbalance in resources further negates the actual and perceived fairness of the military justice system. There is some good news for the defense bar. The Services have hired highly qualified experts for the defense in the same manner they are hired for the prosecution.

The fear of unlawful command influence. The carcinoma of unlawful command influence was one of the prime motivating factors for passage of the first iteration of the UCMJ.[5] Command influence can come in many forms. Commanders have attempted to stack "juries," they have attempted to dissuade witnesses from testifying favorably for an accused, they have punished an accused in retaliation for exercising a right, and they have given public statements that intrude upon an accused's right to a fair trial.

> In announcing his findings, the military judge stated: . . . Undue and unlawful command influence is the carcinoma of the military justice system, and when found, must be surgically eradicated.

United States v. Gore, 60 M.J. 178, 184 (C.A.A.F. 2004).

McClatchy Newspapers reports about an instance of perceived, if not actual attempted command influence affecting a significant number of recent Marine Corps sexual assault prosecutions.

[4] The Manual for Courts-Martial is published by the President using his power to make rules under Article 36, UCMJ, 10 U. S. Code §836.
[5] Legislative history of the UCMJ, available at, http://www.loc.gov/rr/frd/Military_Law/UCMJ_LHP.html

> [Commandant of the Marine Corps, General] Amos used his tour to stress his own strong feelings about the 348 reported sexual assaults in the Marine Corps last year. In a roughly 75-minute talk intended for every Marine non-commissioned officer and officer, the career aviator demanded tougher punishment for those accused of sexual misconduct.
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> "Why have we become so soft?" Amos asked in a speech April 19 at Parris Island.
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> He further described himself as "very, very disappointed" in court-martial boards that don't expel those who misbehave sexually, and he denounced as "bullsh*t" claims that many sexual assault allegations amount to second thoughts from individuals who initially consented.
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> "I know fact from fiction," Amos declared, a transcript of his April 19 speech shows. "The fact of the matter is 80 percent of those are legitimate sexual assaults."[6]
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> And:
> "My lawyers don't want me to talk about this, but I'm going to anyway," he said May 23 at California's Camp Pendleton, according to a defense legal filing. "The defense lawyers love when I talk about this, because then they can throw me under the bus later on and complain about unlawful command influence."
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> Which they are. Unlawful command influence (UCI) has been called "a mortal enemy of military justice." At least two military judges, including the chief judge of the Navy-Marine Corps Trial Judiciary, have found that Amos' comments create the appearance of UCI and are making key rulings that favor the defense at trial.

The words and actions of political representatives are not subject to command influence dismissal motions at court-martial. But in today's highly charged arguments about sexual assault in the military there can be an impact. We have seen this effect or potential effect in such highly publicized cases arises from

[6] An observer could of course imply that a significant 20% are not.

the war in Iraq and Afghanistan: Abu Ghraib, Hamdaniyah, for example.

Instructors and recruiters. The recent events at Lackland Air Force Base have brought attention – again – to instructors and recruiters. What about women recruits or trainees who target the recruiter or instructor for sex. I am not aware if there are complete statistics on this phenomena. How many times does this happen and they get caught, so now the sexual activity becomes a sexual assault allegation?

A few years ago at an Army training base two trainees were targeting instructors for sex. Three instructors received various levels of discipline for violating fraternization and sex with trainee's rules, and one instructor's case was dismissed during the trial process. To their credit the two women admitted that they wanted to have sex and stated that it was purely voluntary.

Changes to the law that can adversely affect the fairness or constitutionality of a military trial. Some years ago the Department of Defense was required to report on the UCMJ and the potential for changes in regard to sexual assaults. They did so. *See* Sex Crimes and the UCMJ: A Report for the Joint Service Committee on Military Justice, [7] A conclusion was:

> After a thorough review, the subcommittee members were unable to identify any sexual conduct (that the military has an interest in prosecuting) that cannot be prosecuted under the current UCMJ and MCM. Based on this determination, the subcommittee unanimously concluded that change is not required. A majority of the subcommittee believed that *the rationale for significant change was outweighed by the confusion and disruption that such change would cause* (emphasis added).

Report at 1. The report and conclusion was prescient.

Despite the cautions and the useful suggestions for some change the Congress went ahead with a wholesale change to Article 120, UCMJ, 10 U. S. Code §920. Consequently;

[7] Available at, https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=5&sqi=2&ved=0CE4QFjAE&url=http%3A%2F%2Fwww.dod.mil%2Fdodgc%2Fphp%2Fdocs%2Fsubcommittee_reportMarkHarvey1-13-05.doc&ei=xgnRUJfqL-zH0AGx3IC4DQ&usg=AFQjCNEgdzAmerb0mJCtw8rOFOCvIizWhQ

> The politically attractive but poorly understood legal changes have incited courtroom confusion, judicial frustration and constitutional conflict. Extensive interviews and a McClatchy review of thousands of pages of court documents and internal studies find a congressionally caused crisis of military justice that few civilians know anything about.
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> The rewritten sexual assault law puts judges "in an impossible position," the top military appellate court warned. Military lawyers find it "cumbersome and confusing," a Pentagon task force noted. It leads to "unwarranted acquittals," Defense Department officials added. And some judges call it unconstitutional.[8]

As of June 2012, the Congress has sought to correct Article 120 with new legislation. My sense is it will take a little time to see how the new provisions are applied, how they are working, and whether there have been new issues and errors built into them.

A stacked system, "the military justice system for rape and sexual assault cases is overwhelmingly weighted in favor of the criminal suspect". Sexual assault prosecution advocates at times argue that the military justice system is stacked against the victim. The military justice system is no different than other common law countries in providing for a presumption of innocence, a burden on the prosecution to prove guilt, not the accused to prove innocence, the right to counsel, and a robust system of due process guarantees. From the perspective of an accused the system is quite the opposite and is stacked against the accused. There are two "rules" which help to illustrate the example: Military Rule of Evidence 413 and the "rules" about alcohol.

Profiling. Under Military Rule of Evidence 412 (the "rape shield") profile evidence is not admissible to show anything about a complaining witness. However, under Military Rule of Evidence 413 profile evidence is admissible about an accused to help prove he committed the alleged offense. "Evidence of the accused's commission of one or more offenses of sexual assault is admissible and may be considered for its bearing on any matter to which it is relevant." Or, stated another way, he's done it before so he must have done it this time.

[8] Available at, http://www.mcclatchydc.com/2011/09/21/124823/flawed-new-rape-law-roils-military.html#storylink=cpy

In a forthcoming law review article, the authors posit:

> [L]egislators and judges have ignored the contrary psychological and criminological evidence. . . . This article examines the empirical support for the probative value of such [profile] evidence, revealing that current policy rests on bogus psychology and false empirical assertions. Rules 413-414 typify the regrettable seat-of-the-pants psychologizing on which evidence rule drafters rely too often[.]

See Orenstein, Aviva and Lave, Tamara Rice, Empirical Fallacies of Evidence Law: A Critical Look at the Admission of Prior Sex Crimes (September 7, 2012). University of Cincinnati Law Review, Forthcoming; Indiana Legal Studies Research Paper No. 209. Available at SSRN: http://ssrn.com/abstract=2143174 or http://dx.doi.org/10.2139/ssrn.2143174.

> [C]ontrary to public opinion, most sex offenders do not reoffend. Complicating matters further, the instruments that are used to predict who will re-offend make a lot of mistakes.

Tamara Rice Lave, Thinking Critically About How to Address Violence Against Women, 65 U. Miami L. Rev. 923, 927 (2011).

Professor Lave's work dovetails somewhat with developing research on the effectiveness of sex offender registration laws.

> [T]his study examined differences in sexual offense arrest rates before and after the enactment of New York State's Sex Offender Registration Act. Results provide no support for the effectiveness of registration and community notification laws in reducing sexual offending by: (a) rapists, (b) child molesters, (c) sexual recidivists, or (d) first-time sex offenders. Analyses also showed that over 95% of all sexual offense arrests were committed by first-time sex offenders, casting doubt on the ability of laws that target repeat offenders to meaningfully reduce sexual offending.

Sandler, Jeffrey C.; Freeman, Naomi J.; Socia, Kelly M., Does a watched pot boil? A time-series analysis of New York State's sex offender registration and notification law, Psychology, Public Policy, and Law, Vol 14(4), Nov 2008, 284-302.

> Our results correspond with a model in which community notification deters first-time sex offenses, but increases recidivism by registered offenders due to a change in the relative utility of legal and illegal behavior. This finding is consistent with work by criminologists suggesting that notification may increase recidivism by imposing social and financial costs on registered sex offenders and making non-criminal activity relatively less attractive.

Rockoff & Prescott, Do Sex Offender and Notification Laws Affect Criminal Behavior?, NBER Working Paper No. w13803, February 2008.

The effects of alcohol. Generally a complaining witness's level of intoxication is relevant. A specific offense includes sexual intercourse with a victim who is incapacitated by alcohol. However, an accused who may well be more intoxicated than the complaining witness may not use his intoxication as a defense. The relative states of intoxication, their effects in lowering inhibitions, and the effect on memory, have long been a subject of courtroom tussles in a significant number of cases.

Final thought. From an accused's perspective the current media and political attention to issues of sexual assault, along with changes in the law is all intended to "get convictions," regardless of how it is done. The accused's perception is that a fair trial is no longer a guarantee with the political pressures. Political expedience, fear of lawsuits, and ignoring the Constitution should not be allowed to trump the right to a fair trial and the presumption of innocence.