

Written Statement of: Professor Victor Hansen New England Law Boston

For: U.S. Commission on Civil Rights Briefing on Sexual Assault in the Military

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Thank you for the opportunity to speak on this very important issue of sexual assault in the military. This is an issue of critical importance for many reasons, but above all, this is an important issue if we are to ensure good order and discipline within the military and if we are to continue to recruit and retain an effective fighting force. Soldier on soldier crimes have a particularly acute impact on unit morale and cohesion because such crimes undermine the trust that service members must have in each other and in the chain of command. No crime undermines this essential trust and confidence more than sexual assaults within the ranks and this is particularly true when the perpetrator holds a position of authority over the victim and where these crimes are not investigated or punished by the chain of command. It is certainly impossible to completely eradicate these crimes; however, in my opinion comparisons to incident rates for these kinds of crimes on college campuses or among the civilian population in general which some have made, are misplaced. Our military has a unique mission and we ask a great deal of our service members. We have a special and critical obligation to protect all of them from these crimes in exchange for the selfless sacrifice that we ask of them.

The military has moved effectively on many fronts to better address this problem. First, I believe the statutory reforms over the past few years to Article 120 of the Uniform Code of Military Justice dealing with sexual assault are significant. Not only have they clarified the law in this area, but they have given commanders additional tools to more effectively punish a broader range of sexual assault crimes.

Increased emphasis on tracking and reporting incidents of sexual assault over the past few years is also an important and positive development. The attention that senior military and civilian leaders and Congress have placed on how these crimes are reported, investigated, and punished sends an important message that these are serious issues and that commanders at all levels are expected to pay attention and take action when appropriate.

Finally, the military's recognition that sexual assault cases can be particularly difficult to effectively prosecute and the Army's efforts to hire experts to train and assist less experienced military attorneys in the prosecution and defense of these cases is an important development. It is recognition that any efforts to address this issue must not undermine basic rule of law protections that are at the core of our military justice system.

In spite of these positive efforts, there remains a persistent problem of "under-detection." This under-detection problem was most recently seen in the cases arising at Lackland Air Force Base, but this is just the latest in a line of cases that stretch back to Aberdeen Proving Ground, all of the service academies and to other military bases. In these under-detection cases the perpetrators were often able

to assault multiple victims over many months without being detected and without the victims reporting the assaults. None of the important reforms to date are specifically designed to address this problem of under-detection.

There are many reasons for under-detection, but I believe one of the most important and as of yet unaddressed reasons is that military commanders lack sufficient cultural and legal incentives to aggressively prevent and suppress this misconduct. Invariably when these cases come to light the military and civilian leadership state that the solution to these problems rests with the military leadership and the chain of command. I agree. And in order to ensure that the leadership addresses these issues, more must be done to incentivize commanders to prevent and suppress these crimes. The changes I propose involve both a cultural shift within the military and clearer statutory guidelines.

There is often a cultural tendency within the military to gloss over any specific command failings and leadership shortcomings that could have contributed to an atmosphere that allowed these crimes to continue undetected for weeks or months. When the military finally does address leadership failings it often sends confusing and contradictory messages. The situation at Lackland provides an example. Lt. Col. Mike Paquette, commander of the 331st Training Squadron, where nine of the 17 accused instructors were assigned, and Col. Glenn Palmer, who commanded the 737th Training Group, were both relieved of command after the allegations came to light. The Air Force used characteristically cryptic language in announcing the actions stating only that the leadership had lost confidence in these two commanders. Col. Eric Axelbank, the head of a training wing at Lackland, was not relieved of command, however, he stepped down from his command much earlier than his initially assigned change of command. The general commanding all of the Air Force's training command stated only that removal from command can be something as simple as "we think that we need a different set of skills in the position or we've lost confidence in the commander to execute their duties."

These comments and this response are not unique to Lackland or to the Air Force. There exists within the military a culture against fully investigating and clearly identifying the command failings which may have contributed to the under-detection of these sexual assault crimes. The failure to fully investigate and identify these command failings sends a mixed message both to the service members and to other commanders. They are left to wonder what further actions could or should be taken to detect, prevent, and suppress these crimes. When the response to command failings by senior officials is unclear, commanders are uncertain as to how to prioritize the many demands on their time to ensure that they place sufficient and appropriate attention to these issues. If, as the military claims, the solution to these problems rests with the military leadership, then that leadership must be much clearer in addressing command failings. The leadership culture must change.

In addition to these cultural changes, I believe there must be specific statutory changes to the Uniform Code of Military Justice to further incentivize commanders to investigate, prevent, and suppress these crimes. There is a doctrine that exists within the customary international law known as command responsibility. This doctrine was developed after World War II in large part due to the efforts of the United States to hold enemy military commanders accountable for the law of war violations committed by the forces under their command. Since that time, the doctrine has been codified in a

number of international treaties and in military codes throughout the world. As of yet, this doctrine has not been fully incorporated into U.S. domestic law within the UCMJ. Article 92 addresses dereliction of duty and is the primary statutory mechanism within the code to hold a commander criminally accountable for his command failings.

As currently formulated, Article 92 is inadequate. Under Article 92, all that is required of a commander is to avoid willful failures and achieve a level of competency that is somewhere above simple negligence or culpable inefficiency. A commander cannot be held accountable under this provision even if he did not do everything feasible or even reasonable to investigate, prevent or suppress these crimes. As long as the commander's failures were not negligent, culpably inefficient, or willful he is not derelict in his duties. By contrast, under international law a commander is required to do everything in his power that is reasonable to prevent, suppress, or punish law of war violations.

Current U.S. law which only requires a commander not to be negligent or culpably inefficient does not sufficiently incentivize the commander to investigate, prevent, and punish sexual assault crimes. At a minimum, in order to appropriately incentivize commanders Article 92 should borrow the legal standard developed under the doctrine of command responsibility and specifically require the commander to do all that is reasonable within his power and authority to investigate, prevent and suppress sexual assault crimes within the ranks.

This change and clarification in the law will have several benefits. First, it will provide commanders with a needed incentive to make the detection and prevention of sexual assault within the ranks a top priority. Commanders are tasked with any number of important responsibilities and duties. At the top of that list must be the responsibility to establish and maintain a command climate where every service member is valued and protected and where conduct that undermines the trust and confidence that is essential to good order and discipline will not go undetected. Second, it will send a powerful message to commanders that their responsibility in this area requires more than taking action when they become aware of possible allegations. They have an affirmative duty as commanders to take all necessary and reasonable actions to prevent and investigate sexual assault crimes. Failure to do so could subject the commander to criminal sanctions. Finally, this change will help create a cultural shift in the military towards fully investigating and clearly identifying the command failings which may have contributed to the under-detection of sexual assault crimes within the ranks.

The military cannot continue on the one hand to claim that the solution to this problem rests with the chain of command, while on the other hand fail to investigate commanders and in appropriate circumstances hold commanders accountable when their failings contribute to sexual assault within the ranks. Thank You