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before the
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Hearing on Sexual Assault in the Military
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Congress enacted two major revisions of the statutes criminalizing military sexual offenses over the last seven years. A study of those revisions and the military's experience implementing them sounds at least four cautionary notes for any subsequent efforts to further reform the military justice system's handling of sex crime allegations.

Cautionary Note 1: Insufficiently vetted changes to the statutes and regulations governing military sex crimes can be counterproductive.

The National Defense Authorization Act for Fiscal Year 2006[2] fundamentally reformed the military criminal justice system's sex offense statutes. Congress passed that act without holding any public hearings. The statute proved to have major defects that produced substantial difficulties in prosecuting sexual assault cases while also impeding the military justice system's efficiency.

Military trial and appellate courts have expressed their concerns over the 2006 legislation's deficiencies. For example, the trial judge in *United States v. Payton*,[3] offered this description of the 2006 UCMJ amendments: "Unfortunately, it makes all of our lives difficult, because anybody who reads it would realize that Article 120 on its face is almost incomprehensible and is probably the most poorly drafted and poorly enacted Article in the UCMJ — probably in the history of the UCMJ." Just last month, the Army Court of Criminal

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[1] The views and opinions expressed in this testimony are those of the author and do not reflect the official policy or position of any agency of the U.S. government.
[2] Pub. L. No. 109-163, 119 Stat. 3136 (2006). This statute applies to military sex offenses between October 1, 2007 and June 28, 2012.
[3] No. ACM 37699, General Court-Martial convened by Commander, 29th Air Force (AGSC) R. at 96 (May 27, 2009).

Appeals also expressed its frustration over the 2006 military sex crime amendments: "The inherent difficulties associated with interpretation of this particular statute are manifest . . . ."[4]

Some convictions under the 2006 legislation have been overturned because the statute's text was susceptible to an unconstitutional application. Most prominently, the Court of Appeals for the Armed Forces' 2011 decision in *United States v. Prather* held that "the burden shifts found in Article 120(t)(16), UCMJ, when an accused raises the affirmative defense of consent to a charge of aggravated sexual assault by engaging in sexual intercourse with a person who was substantially incapacitated . . . results in an unconstitutional burden shift to the accused."[5] The court also concluded that "the second burden shift in Article 120(t)(16), UCMJ, which purports to shift the burden of the government once an accused proves an affirmative defense by a preponderance of the evidence, constitutes a legal impossibility."[6] Some convictions were overturned due to these statutory deficiencies[7] and other challenges to convictions under the 2006 version of Article 120 continue to percolate through the military justice system. Even some prosecutions in which challenges to the statute's language were ultimately rejected were nonetheless delayed by interlocutory appeals challenging various aspects of the statute.[8] The statute suffered from other deficiencies as well, such as failing to provide that parental

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[4] *United States v. Rice*, __ M.J. __, No. ARMY 20100678, 2012 WL 6598782, at 7 (A. Ct. Crim. App. Dec. 18, 2012).
[5] *United States v. Prather*, 69 M.J. 338, 339-40 (C.A.A.F. 2011). In the interest of full disclosure, I note that I was an appellate defense counsel in the *Prather* case.
[6] *Id*. at 340.
[7] *See id*. at 345; *United States v. Cheeseman*, 70 M.J. 127 (C.A.A.F. 2011) (summary disposition).
[8] *See*, *e.g*., *United States v. Neal*, 67 M.J. 675 (N-M. Ct. Crim. App. 2009), *aff'd*, 69 M.J. 42 (C.A.A.F.), *cert. denied*, 131 S. Ct. 121 (2010); *United States v. Crotchett*, 67 M.J. 713 (N-M. Ct. Crim. App. 2009).

compulsion could satisfy the force element for rape of a child[9] and defining peeping Tom offenses in a manner that excluded surreptitiously watching or videorecording someone dressed in his or her underwear.[10]

By conducting a major overhaul of the military's sex crime statutes without sufficient study and input from a broad array of constituencies, Congress impeded rather than enhanced the prosecution of sexual offenses in the military. In fact, the 2006 legislation proved to be so problematic that Congress overhauled it again in 2011.

Cautionary Note 2: It is too early to evaluate the effectiveness of recent substantial changes in the statutes and regulations governing military sex offenses and the procedures for handling them.

The National Defense Authorization Act for Fiscal Year 2012[11] – which was passed by Congress on December 15, 2011 and signed into law by President Obama on December 31, 2011 – included another substantial revision of the military's sex crime statutes. Those statutory revisions apply to acts committed on or after June 28, 2012. Proposed implementing regulations have been published in the *Federal Register* but, as of December 25, 2012, are not yet in effect.[12]

Additionally, on April 20, 2012, the Secretary of Defense adopted an important revision to the regulations governing disposition of many sex crime allegations.[13] Effective June 28, 2012, the disposition authority for allegations of rape, sexual assault, forcible sodomy, and attempts to commit any of those offenses – as well as any other criminal allegations arising from

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[9] *See United States v. Valentin*, No. NMCCA 201000683, 2012 WL 1788131 (N-M. Ct. Crim. App. May 17, 2012), *aff'd in part, rev'd in part on other grounds*, 71 M.J. 400 (C.A.A.F. 2012).
[10] *See Rice*, 2012 WL 6598782.
[11] Pub. L. No. 112-81, 125 Stat. 1298 (2011).
[12] *See* 77 Fed Reg. 64854 (Oct. 23, 2012). The comment period on the proposed implementing regulations closed on Dec. 24, 2012. *See* 77 FR 66074 (Nov. 1, 2012).
[13] Secretary of Defense Memorandum, Withholding Initial Disposition Authority Under the Uniform Code of Military Justice in Certain Sexual Assault Cases (Apr. 20, 2012), *available at* http://www.dod.gov/dodgc/images/withhold_authority.pdf.

the same incident against either the alleged perpetrator or victim – was reserved to no less than a special court-martial convening authority in the grade of O-6 or higher.

Given these substantial revisions – some implemented six months ago and others not yet in effect – earlier statistics and anecdotes concerning the military's handling of sexual assault cases are of limited value. The newly revised system warrants careful study. But it is too soon to label the new system – which is not yet fully in effect – either a success or a failure.

Cautionary Note 3: The military justice system is not the exclusive forum for trying sexual assault allegations arising in the United States.

The military justice system, as established and revised by Congress and implemented by the Executive Branch, is a command-directed system. While Congress implemented major reforms to the military justice system in 1950[14] and 1968[15] as well as, to a lesser extent, in 1983,[16] it has retained the military commander's central role, including that of deciding what charges to bring against a subordinate and the type of forum that should be used to resolve those charges. Commanders' military justice authority is an important tool in their ability to maintain a disciplined and effective fighting force capable of accomplishing their assigned missions. As the Preamble to the *Manual for Courts-Martial* observes, "The purpose of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States."[17]

Some proposed reforms of the military justice system's handling of sexual assault offenses have suggested moving the authority to decide whether to prosecute military sex crimes

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[14] Uniform Code of Military Justice, Pub. L. No. 81-506, 64 Stat. 107 (1950).
[15] Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335.
[16] Military Justice Act of 1983, Pub. L. No. 98-209, 97 Stat. 1393.
[17] Preamble, ¶ 3, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.).

from commanders to lawyers. Such a transfer of authority would be inconsistent with the manner in which the United States' military justice system has operated since General George Washington used it to maintain discipline in the Continental Army. Caution should be exercised before adopting such a radical departure from the American system of military justice.

Caution is also warranted because, in reality, a lawyer-controlled system is currently available to exercise prosecutorial discretion over virtually every sex offense allegedly committed by a service member in the United States. The military's jurisdiction over common-law offenses committed in the United States is not exclusive. A service member who commits an offense off-base or even on board a base that is not an exclusively federal enclave may be tried by the relevant state's criminal justice system instead of, or even in addition to, the military. A service member who commits a sexual offense on base – whether the base is governed by concurrent state and federal jurisdiction or exclusively federal jurisdiction – may be tried in United States district court instead of by a court-martial.[18] Thus, in almost any instance in which a military commander chooses not to prosecute a service member accused of committing a sexual offense in the United States, a civilian prosecutor can still try the alleged offender. So

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[18] Under 18 U.S.C. § 13, the Assimilative Crimes Act, anyone who commits a sex offense on board a vessel in the United States' territorial waters or on a base over which the federal government exercises concurrent or exclusive federal jurisdiction may be tried in United States district court, which will apply the criminal laws of the state in which the offense occurred. A memorandum of understanding between the Department of Justice and the Department of Defense provides that crimes committed by service members on military installations will generally be prosecuted by the military. *See* Dep't of Defense Dir. 5525.7, ¶ C.2 (Jan. 22, 1985), reprinted in *Manual for Courts-Martial, United States*, App. 3 (2012 ed.). Crimes committed off-base by service members will also be tried by the military if they are offenses that are "normally . . . tried by court-martial." *Id.*, ¶ C.2. But the memorandum recognizes that "[i]t is neither feasible nor desirable to establish inflexible rules regarding the responsibilities of the Department of Defense and the Department of Justice as to each matter over which they may have concurrent interest." *Id.*, ¶ B. The memorandum also states that it does not confer any rights on any individuals or entities. *Id.*, ¶ A. Thus, the Department of Justice maintains the authority to prosecute a service member for sex offenses allegedly committed on military installations in the United States that the military chooses not to prosecute.

without any changes to current law, civilian prosecutors can already exercise a check over a military commander's failure to prosecute an alleged sex offense. But in practice, it is often the military that is more willing to prosecute sexual assault cases than are state criminal justice systems; the military not infrequently tries off-base sexual assault allegations that state prosecutors declined to prosecute.

Cautionary Note 4: The military justice system is susceptible to unfairness resulting from political pressure.

All service members – male and female – have a civil right to serve without being subjected to unwanted sex acts. But another important civil right is that of criminal defendants in the military justice system to receive a fair trial. The politicization of the military sexual assault issue jeopardizes that right.

It is undoubtedly true that many service members who are accused of rape or other forms of sexual assault committed the crimes with which they are charged. It is also no doubt true that some service members are tried based on false allegations. And, in some instances, service members may be legally innocent of alleged sexual assaults because they had a reasonable and honest, even though mistaken, belief that their partner consented. The military justice system must fairly and accurately distinguish those service members who are innocent from those who are guilty. Politicization of the issue of sexual assault in the military threatens that goal.

For example, Marine Corps judges have held that the Commandant of the Marine Corps created the appearance of unlawful command influence in presentations he made to officers and senior noncommissioned officers concerning sex offenses. As McClatchy Newspapers reported in September 2012:

> The Marine Corps commandant wanted to snuff out rape in the ranks. However, his well-meaning but overly blunt talk instead complicated Marine

> sexual-assault cases worldwide and raised troubling questions about whether accused Marines will get a fair shake.
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> This week, for the second time in recent months, a Marine Corps trial judge found that Gen. James F. Amos' forceful remarks on sexual assault earlier this year presented the appearance of unlawful command influence.
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> Command influence can severely hinder the military justice system, where facts are found and fates determined by people who are drilled to obey their superiors.[19]

Military judges have reached similar conclusions in many more cases in the four months since McClatchy ran that article.

Any efforts to reform the military justice system should be made with sensitivity to the danger of unlawful command influence, which the Court of Appeals for the Armed Forces has called "the mortal enemy of military justice."[20] Protecting service members' right to serve without being sexually assaulted should not be achieved by sacrificing other service members' right to due process of law.

But unlawful command influence is not the only threat to the military justice system's fairness. Providing disproportionate resources to the prosecution compared to the defense can more subtly undermine due process. The military justice system is at risk due to this sort of imbalance, where Congress has earmarked funds for prosecution of sexual assault cases without ensuring that the defense receives any additional resources. Such imbalanced support for the prosecution appears to be a product of an overly politicized environment in which the military justice system currently operates. Politicization and justice rarely walk hand-in-hand.

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[19] Michael Doyle, *Tough talk by Marine Commandant James Amos complicates sexual-assault cases*, MCCLATCHY NEWSPAPERS (Sept. 13, 2012), *available at* http://www.mcclatchydc.com/2012/09/13/168410/tough-talk-by-marine-commandant.html.

[20] *United States v. Gore*, 60 M.J. 178, 178 (C.A.A.F. 2004).

Conclusion

Sexual assault in the United States military is a serious problem. But experience teaches us that adopting responses to that problem without sufficient study can do more harm than good. Both Congress and the Executive Branch have taken recent steps to address sex offenses in the military. The effects of those reforms should be studied thoroughly before any conclusions are drawn as to whether further statutory or regulatory changes are necessary or appropriate.