U.S. Commission on Civil Rights
Briefing re 2013 Statutory Report: Sexual Assault in the Military
Honorable Martin Castro, Chair
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I am grateful for the opportunity to address the Commission regarding sexual assault in the U.S. military. I applaud the Commissioners for taking up this contentious topic in the interest of improving equality of treatment in the armed forces. Sexual violence is a complex issue that sounds in criminal law, military discipline, employment discrimination, and mental and physical health. Our understanding of it has been greatly enhanced in recent years by the voices of advocates, the stories of survivors, and the research of scholars. Yet little progress has been made in reducing the incident rate, holding perpetrators accountable, or restoring public confidence in military justice.

My remarks focus on the potential for statutory reform and policy change, hoping to add context to the recommendations the Commission might make. Yet it may be that investing in social services, education, and health care could more effectively and quickly reduce the harms imposed by rape and sexual assault in the military. Accountability can only partly be measured by the extent of criminal prosecution and the rate of conviction. It also depends on encouraging broader shifts in how service members are trained, assigned, promoted, and disciplined outside the military justice system. Incentives that compel service members to respect the diversity and autonomy of everyone in a military uniform, regardless of gender, race, rank, or sexual orientation, are an essential part of any genuine effort to reduce sexual abuse and assault.

My research into this issue has led me to two broad conclusions. First, the United States is an outlier in the world in terms of how it prosecutes crime in its military, including rape and sexual assault.[1] Second, the U.S. armed forces cannot solve this vexing problem on their own.[2] Those conclusions lead me to suggest that significant legislative reform, coupled with ongoing commitment to cultural change within the military and effective provision of services to veterans who have suffered military sexual trauma, is needed. The two sections below elaborate these conclusions and my recommendation for civilian control of prosecutorial discretion in the military justice system.

The Exceptional Military Justice System of the United States. The U.S. has faced down its fair share of scandals and tragedies related to excessive violence in recent decades, including those related to crimes of war and those involving sexual assault. Other state militaries have faced similar challenges, but the U.S. model of addressing the crimes of service members has diverged from that of its sister nations:

> While other states have increasingly placed civilians in positions of authority within their military justice systems, most notably as judges and prosecutors, the United States has maintained its historical practice of relying on commanding officers, with the advice of staff judge advocates (senior military lawyers), to wield prosecutorial discretion and on military lawyers to serve as judges at courts-martial and military commissions. Military officers' resistance to civilianization of U.S. military justice has combined with civilian judicial deference to the U.S. military to insulate U.S. military justice from reforms common in other states.
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> Despite this divergence from worldwide military justice trends, the United States military has faced challenges similar to other state

[1] *See* Elizabeth L. Hillman, "Sexual Violence in State Militaries," pp. 421-35 in

[2] *See* Elizabeth L. Hillman, "Front and Center: Sexual Violence in U.S. Military Law," *Politics & Society* (Vol. 37 at p. 101, 2009) (hereinafter "Front and Center").

militaries in struggling to control military sexual violence. Military sex scandals began to appear in the U.S. regularly in 1991, when the Tailhook convention of naval aviators inaugurated the current era of military sexual violence. . . .

Unlike the global trend toward sharp restriction of military jurisdiction, particularly in the realm of alleged human rights violations by military personnel, the United States has expanded the jurisdiction of its military justice system in recent years. In 2006, the U.S. Congress expanded military jurisdiction to subject to court-martial "those serving with or accompanying an armed force in the field" during a "contingency operation" as well as during "a time of declared war." Intended to enhance the accountability of private military contractors, this change sought to ensure that crimes committed by contractors in theaters of conflict and occupation could be tried in U.S. courts. Prosecutions under this provision have been extremely rare, just as there have been a vanishingly small number of prosecutions under the related Military Extraterritorial Jurisdiction Act (MEJA). Yet the adoption of these jurisdiction-expanding statutes reflect high-level concern not only with the general misconduct of private military contractors, but with the sexual violence, sexualized torture, and other infamous human rights violations that contractors committed in Iraq and Afghanistan, including at Abu Ghraib. Congress was finally spurred to close a long-ignored gap in federal criminal jurisdiction because of a desire to increase state capacity to prosecute sexual violence. That capacity has not yet been fully utilized, as many critics have pointed out, but it exists only because of the pressure created on legislators by the existence of military-related sexual violence. . . .

Despite this progress, the U.S. military has stopped short of making more extensive sexual violence-related reform to its military justice system. While Department of Defense policies and statutory reform has been adopted, proposals for structural reform of how sexual violence is prosecuted under U.S. military justice have not taken hold. For example, specialized prosecution units for sexual assault have been used with success in some U.S. civilian jurisdictions and could be a model for special military sexual violence units. A legislative proposal that would remove prosecutorial discretion from commanders in favor of a dedicated civilian expert was introduced by Congresswoman Jackie Speiers in November 2011 and has attracted considerable support as well as ardent critics. Especially doubtful of this proposal are judge advocates and commanding officers, not least because they are accustomed to a system in which prosecutorial discretion rests in the hands of ranking military officers rather than with civilians.

More systemic reform in military justice overall would likely have a positive impact of the effectiveness of investigation and

> prosecution for military sexual violence as well. Centralization of prosecutorial authority would advance attempts to standardize and rationalize charging and sentencing in all military criminal prosecutions, not only those involving sexual violence. Given the frequency of allegations that commanders often fail to pursue claims of sexual assault, a high degree of institutional transparency would also improve the legitimacy of military justice by providing data to observers seeking to track the disposition of military cases. Yet U.S. military justice remains "opaque," according to Yale law school professor Eugene R. Fidell, in part because of "the decentralized character of the system, in which commanders around the world" control investigation and prosecution." Media coverage of military justice is likewise hindered by lack of access to update, coherent information. More robust theories of accountability for higher-ranking officers who neglect or condone military sexual violence would also advance the prosecution of military sexual violence. When considering the legal mechanisms of a system as singular as the United States military justice system is among contemporary military justice regimes, advocates of human rights would do well to consider reforms that would alter the entire system, not only those aspects that bear on the investigation and prosecution of military sexual violence.[3]

The U.S. Military's Record of Ineffectiveness. U.S. military leaders and judge advocates have not been able to solve this problem on their own, for a variety of reasons related to the special criminal justice system of the military and the nature of sexual assault itself. The practice of U.S. civilian leaders of deferring to military leaders' expertise in matters of military operations and personnel management is well-established and appropriate in some instances. But in the realm of rape and sexual assault in the military, self-government by commanding officers has been proven ineffective. Likewise, legislation that tinkers at the margins of military justice has failed as well.[4]

Note that the ineffectiveness of intra-military and legislative solutions is not for lack of trying:

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[3] Hillman, "Sexual Violence."

[4] For example, revisions of Article 120, the Uniform Code of Military Justice's sexual assault statute, have slowed and confused prosecutors, defense counsel, and court-martial panels, despite their intention to modernize an archaic military rape statute. *See* Hillman, "Sexual Violence."

Military sexual violence has not persisted simply because commanders have ignored the allegations of their troops or military institutions have failed to initiate reforms. Rape has long been a much noticed and harshly punished—in some circumstances—crime of American soldiers. Since the feminism of the 1970s and the Vietnam War transformed rape into an issue of profound public importance, civilian officials and military commanders alike have taken the problem especially seriously. Perhaps most important, the end of conscription and the integration of women into the armed forces have made military rape a threat to recruiting and to the morale and effectiveness of the all-volunteer force; today, women make up about one-sixth of military volunteers. . . .

Sexual violence is a fundamental problem in warfare and in military culture, both historically and in contemporary military operations. It is a problem, however, to which the U.S. armed forces have responded: with good-faith efforts to measure the damage, adapt law and policy, educate servicemembers and commanders, and prosecute criminals. But those responses have largely failed, in part because of resistance within military institutions to cultural change, but also because the very structure of law in which those reforms operated was built on cases that see women as vulnerable yet dangerous, soldiers as male and overpowering, and accountability as a slippery slope rather than a clear-cut principle. More aggressive criminal prosecution of military sexual violence through current models, which dramatically under-prosecute male-on-male assault, threatens to exacerbate this problem by portraying yet more women as victims and yet more soldiers as rapists.

Prosecuting soldiers who rape in civilian rather than military courts could help to break the link between war, military service, and sexual violence. Treating soldiers who rape just like civilians who rape would allow military criminal law to focus on peculiarly military crime—and would undermine the normalization of sexual violence in the identity and behavior of the American soldier. The answer lies not in failing to prosecute rape, but in realizing that the effectiveness of military justice as a tool to fight military rape and sexual assault has been compromised by the very prevalence of sexual violence in legal precedent. Deterrence and compensation for sexual violence must happen beyond criminal justice—in recruiting, training, assignment, promotion, and civil affairs—with the same energy and resources that now attend to investigation and prosecution.[5]

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[5] Hillman, "Front and Center."

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Criminal law is but one of the legal regimes in which rape and sexual assault in the military must be addressed, but it is critically important that the investigation and prosecution of alleged sexual violence be managed with care and rigor. The 2012 U.S. armed forces are a well-provisioned, well-educated, widely respected military force in which women play vital roles and sexual orientation is no longer grounds for dismissal or criminal prosecution – and yet rape within the ranks persists as both a grim reality and cultural trope. As a former military officer, I can't help but see military leaders' inability to stop the onslaught as an institutional failure of massive proportions within a profession that celebrates leadership, valorizes sacrifice, and serves as a path of opportunity for so many people. Bold action to change the way in which prosecutorial discretion is exercised in the military would be a step in the right direction.