

LAW PROFESSORS' STATEMENT ON  
REFORM OF MILITARY JUSTICE\*

June 7, 2013

The attention of the American public has not in recent memory been as focused on military justice as it is now. This is the result, most immediately, of the disturbing number of sexual assaults and other forms of sexual misconduct that have been in the news and the subject of closely-watched hearings in Congress. Other recent high profile cases such as those of Private Manning, Major Hasan, Lieutenant Behenna, and Staff Sergeant Bales have contributed to the current level of public interest.

Thoughtful legislative proposals are under consideration as a result of the sexual assault issue. As teachers of law, including military justice, and in some cases as military veterans, we encourage Congress to continue to focus on these matters in keeping with its constitutional power "To make Rules for the Government and Regulation of the land and naval Forces." Although we have differing views in some respects, there is important common ground among us on key propositions. We respectfully bring these to the attention of the Senate and House of Representatives.

1. The issues arising from the incidence of sexual assault in the armed forces are critical. Some of them are peculiar to the sexual assault context; others are

structural and apply to all offenses under the Uniform Code of Military Justice. We do not believe structural changes will cure all of the problems that have come so forcefully to public attention, but unless structural changes are made, we are concerned that our military personnel will not be receiving the kind of justice they deserve. Public confidence will also not be served. That is particularly disturbing given the Nation's reliance on an All-Volunteer Force.

2. Congress should take the time needed to make a careful study of these issues, but it should not use study as a substitute for action. Further hearings are needed, and promptly. These should include more balanced witness lists than the panels that testified before the Senate Armed Services Committee on June 4, 2013. Witnesses should include crime victims, psychologists, civilian and military defense counsel, and subject matter experts from other countries that have grappled with the kinds of military justice issues the United States is confronting. Mindful as we are of the importance of affording legislators an opportunity to express their own views, substantial time should be allotted to permit meaningful examination of the witnesses, including follow-up questions, since that is the primary purpose of conducting hearings.

3. The procedural suggestions noted in the preceding paragraph should also be applied by the Independent Panel established by Section 576 of the National Defense Authorization Act for Fiscal Year 2013.

4. Congress should be alert to and skeptical of assertions in favor of the status quo that are either

conclusory or circular. Testimony that is vague or cumulative should be challenged.

5. A separate legal regime should not be established for the adjudication of sexual offenses. The UCMJ is supposed to be uniform. It is unfortunate enough that there are inter-service variations on some aspects of the administration of military justice, but it would be wasteful, confusing, and potentially counter-productive to carve out any particular punitive article for an essentially separate process.

6. Commanders play a decisive role in military operations and must likewise play a central role in reducing sexual assault and maintaining good order and discipline generally. That role, however, need not extend to the relatively narrow and thoroughly legal arena of criminal prosecution. Contemporary norms of procedural justice require that attorneys, not commanding officers, make decisions to prosecute. As a result, we recommend that the decision to prosecute a member of the armed forces for criminal conduct (as opposed to minor disciplinary offenses) be made by an independent prosecutor outside the chain of command. Commanders – like the victim and the accused – should be afforded an opportunity to express their views to such an official if they wish, provided they do so in writing.

7. Personnel should be detailed to serve as court-martial members (jurors) by a court-martial administrator rather than a commander, to avoid concerns about jury-stacking and unlawful command influence.

8. Court-martial findings and sentences should not be subject to post-trial review, approval or adjustment by commanders. Legal issues should be addressed by military judges and the existing appellate military courts. Clemency should be provided by the service clemency and parole boards, the record-correction boards, and the President.

9. All court-martial convictions and sentences should be subject to review by the service courts of criminal appeals.

10. All persons convicted by courts-martial should have the right to seek review by the Supreme Court of the United States following exhaustion of other appellate remedies.

11. Military judges in each service should have uniform statutory terms of office of at least four years' duration in order to ensure their independence and reduce the unjustifiable inter-service disparities that currently exist.

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