Statement prepared for

"Sexual Assault in the Military Part Three: Context and Causes"

Hearing before the Subcommittee on National Security and Foreign Affairs,
House of Representatives, Committee on Oversight and Government Reform
June 25, 2009

Elizabeth L. Hillman
University of California Hastings College of the Law
200 McAllister Street
San Francisco, CA 94102
(415) 581-8862, hillmane@uchastings.edu, FAX (415) 565-4865

I thank the Subcommittee for inviting me to contribute to the ongoing discussion over the critical topic of sexual violence within the U.S. armed forces. The sexual harassment, coercion, and assault of U.S. servicemembers by their comrades-in-arms is but a fraction of the global incidence of military sexual violence, but it is an especially troubling phenomenon for many reasons. The American military has access to greater resources in terms of training and education than many other military forces, yet it has not been able to stop the outbreak of scandal after scandal of military-on-military sexual assault. Moreover, the U.S. government and its military aspire to preserve the dignity and promote the fair treatment of servicemembers across lines of gender and military rank, an aspiration thwarted by the persistence of sexual exploitation and assault within the services.

Military-on-military sexual violence—the type of sexual violence that most directly disrupts operations, harms personnel, and undermines recruiting—occurs with astonishing frequency even in the American armed forces of today. The U.S. military has responded with a campaign to prevent and punish military-on-military sex crimes. This campaign, however, has made little progress, partly because of U.S. military law, a special realm of criminal justice dominated by legal precedents involving sexual violence and racialized images. By promulgating images and narratives of sexual exploitation, violent sexuality, and female

subordination, the military justice system has helped to sustain a legal culture that reifies the connection between sexual violence and authentic soldiering.

The U.S. military has not overlooked the problem of rape, nor have civilian leaders dismissed it. Commanders, members of Congress, legal reformers, and educators have devoted significant resources to a troubling, if limited, subset of military sexual violence: military-on-military sexual assault. Rapes and other sexual violence committed by servicemembers against fellow troops have generated outrage, media coverage, and political response, but no end to the litany of soldier-on-soldier 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.

Much, then, has already been done to attempt to reduce the prevalence of military-on-military rape. The military criminal code governing sexual assault has been overhauled, the policies that set the tone for the investigation and prosecution of rape have been rewritten, and the cultural norms that encouraged sexual exploitation and the degradation of women have been undermined with training and education. Yet this generation of change has seemed to make little progress toward reducing the harms of military-on-military sexual violence. Both the root problem (sexual violence) and its military corollaries (bad publicity, compromised operations, poor physical and mental health among veterans and servicemembers) seem invulnerable to even the most ambitious legal reform.

My study of U.S. military law reconsiders the lost cause of legal reform by examining intra-military sexual crime and law since the Vietnam War. I believe that military sexual violence has been, and continues to be, so central to military legal precedent that it has both shaped the substance of military law and strengthened through repetition the image of some men as sexually violent predators and women as sexual victims. Because of the dramatic and well-publicized extent of military-on-military sexual violence, it has become normalized in military culture, even as changes in military demographics, law, and policy have raised awareness of and punishments for military sexual violence. Sexual violence has, in short, become a primary context for military law; most landmark opinions in the annals of military justice involve crimes of sexual violence. These cases of rape, sexual assault, and domestic violence have had profound collateral consequences as well as direct implications for substantive military law. They have created an impression of female vulnerability and male dominance, lessened the standards of accountability to which servicemembers are held, and reinscribed racist assumptions about sexual predators. In short, legal narratives of sexual violence have become an increasingly prominent discourse through which military norms of gender relations, power dynamics, and individual vulnerability are articulated.

Although we often think of war as the most relevant context for the making of military law, rape and domestic violence have been at least as salient as armed conflict in the construction of U.S. military legal precedent. Sexual violence is so anchored in military law and culture that new codes, new commanders, and new demographics have failed to dislodge it. In a distressing paradox, the repetitive narratives of military sexual violence that appear at courts-martial and in the appellate record do more than subject criminals to punishment and vindicate victims. They also disempower women and routinize male sexual dominance, making the military legal system—which is responsible for prosecuting virtually all military-on-military sexual violence—a part of the problem as well as part of the solution to military sexual violence. The attention that military-on-military rape is again attracting has created another opportunity to ameliorate the tragedy of military sexual violence. For these efforts to be effective—for this *not* to be a lost cause yet again—reformers must reckon with the central place of sexual violence in military legal culture and work to overcome the presumptions that it has made.

Since the Vietnam War, law enforcement personnel, health care professionals, and scholars from many academic disciplines have studied the problem of sexual violence in and around the U.S. armed forces. Sex scandals and crimes in the armed forces have also attracted media scrutiny, self-study by the military, and government funding. Taken together, the statistical data, high-profile scandals, and medical and sociological literature reveal that military-on-military sexual violence remains a profound threat to the morale and welfare of U.S. servicemembers. They also suggest that while officials have tried to reckon with the problem, institutional responses have been largely ineffective.

Military law and policy surrounding sexual violence still have room to improve, but there is no doubt that the rhetoric of military leaders and the reality of substantive changes in statutes, doctrines, training, and policy demonstrate a genuine interest in reducing sexual violence within the ranks. Commanders have tried to create a culture that respects victims of sexual assault, offers preventive education and services to families, encourages investigation and prosecution, and in general embraces many of the "best practices" recommended by civilian advocates of rape prevention and amelioration of domestic violence. Yet after decades of legal and policy reform, military-on-military sexual violence remains a devastating health, morale, and welfare problem. Neither the aggressive criminal prosecution of high-profile incidents of sexual assault nor the attempt to reshape a culture that made light of, and in some instances encouraged, sexual exploitation have managed to stop the widespread occurrence of military-on-military rape.

Attempts to diagnose the reasons for the failure of cultural and legal reforms lead down several possible paths. The first, paved with good intentions and most heavily traveled by military reformers, is the path of the status quo. It sees the limited success of reforms to date as auguring well for future progress and presumes that improvement will be steady but incremental. The persistence of endemic military-on-military sexual violence, the very type of sexual violence about which military reformers are most concerned, suggests that adhering to this approach is likely to take too long, with its gains too often balanced by backlash, to satisfy either military leaders or human rights advocates. Another path, taken by those with little faith that military culture can be overhauled to value women and disavow sexual exploitation, is a dead end: it casts the link between military conquest and sexual dominance, and the volatile

soldierly mix of sexual deprivation and brutality, as too strong for even sex-integrated, modern militaries to break. This approach overstates the prevalence of military sexual violence and fails to account for its variation across geographic regions (reports of sexual violence seem to be more frequent at overseas than state-side duty stations, for example), military units (some units have been untouched by sexual violence scandals; others seem unable to avoid it), and periods of service (operational settings seems to trigger fewer reported incidents than periods of training). A third path descends into demographic analysis and criminal disposition. It contends that the volunteer army draws a disproportionate number of rape-prone men into uniform and blames military rape on wayward soldiers. This demographic (or "bad apple") theory of sexual violence has surfaced repeatedly in assessments of the prisoner abuse at Abu Ghraib by critics who see the problem as individual malfeasance, not institutional culture, and in laments about the military's declining standards and practice of granting waivers for recruits with criminal records. The demographic approach fails to account for the wide range of perpetrators of sexual violence across military ranks (it is not only low-ranking enlistees who commit rape and other acts of sexual violence) and ignores the military's own role in socializing its recruits.

Moreover, none of those paths reckons squarely with the uneven terrain beneath them: the landscape of military justice itself. Part of the reason that reform has failed is that sexual violence has played a primary role in reshaping not only the military criminal law of rape, but in molding the very structure of military justice. Sexual violence is the charged crime in a disproportionate number of Supreme Court precedents that underlie modern military law—even precedents that are most often cited for principles that have nothing to do with sexual assault. In addition to these Supreme Court cases involving military justice, sexual violence is the charge in many essential precedents of military appellate courts, precedents that govern issues not related to the crimes of rape or sodomy, but rather to the nature and practice of military justice. This means that descriptions and interpretations of violent, sexualized encounters, often involving a serviceman assaulting a woman and/or a family member, are the template not only for media coverage of modern courts-martial, but for the making of military law itself. Sexual violence is so central to military law that it has altered the internal parameters of military legal culture, strengthening – at least in the realm of military justice –the time-worn association

between soldiers and rape. Male sexual violence is a fundamental context for the precedents that military judges apply, that aspiring judge advocates study, that commanding officers reckon with. Its presence has affected the substance of military criminal law as well as the culture in which it is practiced. Sexual violence has become the fundamental context for key precedents in military law after World War II. Rape and domestic violence, not desertion or murder, are now at the core of military justice.

This argument does not suggest that aggressive prosecution of military-on-military sex crimes is misguided. Indeed, such prosecution is an essential element of any attempt to address this issue. But the pervasiveness of sexual violence in military precedent has collateral consequences that should be articulated, especially in light of the persistence of the problem in the face of conventional legal and social reform. Much like the history of war has influenced military law, training, and culture, the history of sexual violence has changed military law and culture, creating models of behavior and assumptions about sex and gender that work against contemporary efforts to end sexual violence. Rape, sexual assault, child sexual abuse, and domestic violence have affected both the substance of the law and military legal culture.

An expectation of both female vulnerability and male dominance runs through military stories of rape and domestic violence. This presumption exists outside the law as well, where it has been challenged, with limited success, by the revised training and educational programs noted above. And of course it exists as well in civilian communities. But in military courtrooms, in the lessons taught to aspiring judge advocates, and in the registers of military appellate reports, the message of women's vulnerability in the face of sexual assault sounds loud and clear. This vulnerability persists despite women's advancement in the military. Servicewomen's success in winning promotions, performing a wide variety of military duties, and overcoming hostility has apparently not resulted in reduced exposure to military sexual violence. No percentage of women in uniform, no matter how capable or accomplished, can easily overcome the message that women are uniquely rapable and men uniquely empowered to rape – especially when the most common incident of military sexual violence involves a male soldier raping a female soldier, frequently in the very context of military duty. Trying to craft a legal regime that embraces gender equality (or something approaching it) is much harder when that regime is

rooted in a context of rape, a hierarchical space in which women and men are demonstrably not equal. And when lawyers, judges, and commanding officers encounter military legal precedents, they also encounter stereotypes about race-based propensities and sexual predation—and, perhaps, take away a lesson about the harms of racial discrimination in a system of selective criminal investigation and prosecution.

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 crimes. It would also undermine the acceptance of violent sexual aggression as part of the identity and behavior of the American soldier. This approach does not suggest that rape go unpunished, but 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 military criminal justice—in recruiting, training, assignment, promotion, civil affairs, and civilian criminal law—with the same energy and resources that now attend to military investigation and prosecution.