Senate Armed Services Committee
Questions for the Record
Hearing on 06/04/2013, #13-44.2
"To receive testimony on pending legislation regarding sexual assaults in the military."
Witnesses:
Panel #1: Dempsey, Odierno, Greenert, Amos, Welsh, Papp, Chipman, DeRenzi, Harding, Ary, Kenney, and Gross;
Panel #2: Martin, Coughlin, King, and Leavitt; and
Panel #3: Parrish, Bhagwati, Altenburg, and Morris

Senator Carl Levin

Comparison with Military Justice Systems of Certain U.S. Allies—**Altenburg Responses**

1. General Chipman, Admiral DeRenzi, General Harding, General Ary, Admiral Kenney, and General Altenburg, the United Kingdom, Canada, Australia, Germany, and Israel have changed their military justice systems to significantly reduce the role and authority of military commanders. Have you examined the military justice systems of these allies? If so, how do they differ from the military justice system in the U.S. military?
    a. General Chipman?
    b. Admiral DeRenzi?
    c. General Harding?
    d. General Ary?
    e. Admiral Kenney?
    f. General Altenburg?

A. All are different from U.S. Military Justice —and all are different from each other in multiple ways. United Kingdom, Canada, Australia, and Israel are Common Law countries; Germany is a Civil law country. Common law and civil law traditions influence national military justice systems. The greatest difference between the named countries' military justice systems and the U.S. system is that the U.S. system retains the Commander's role as Convening Authority. The other countries have placed prosecutorial decision making with attorneys--military attorneys in most instances, civilian attorneys in others. When comparing other nations' military justice systems with a view toward possible change, it is prudent to analyze and compare force end strength, prosecution, conviction, and sentencing statistics and compare them to U.S. military justice statistics. Although statistics from U.S. allies are limited, it is clear that the U.S. military justice system prosecutes more sex offenses per capita and produces more convictions than the allies. Please see also my response to Question 5. Reliance on the Australian system is especially dubious. Revisions to the Australian Military Justice system in October 2007 were subsequently declared unconstitutional by Australia's highest court. The court decision caused considerable disarray and confusion for the Australian military. This reinforces the importance of thoughtful, fully researched studies and committee hearings before effecting significant change to the UCMJ.

2. General Chipman, Admiral DeRenzi, General Harding, General Ary, Admiral Kenney, and General Altenburg, what is your understanding of the historic basis for these differences?
    a. General Chipman?
    b. Admiral DeRenzi?
    c. General Harding?
    d. General Ary?

e. Admiral Kenney?
f. General Altenburg?

A. I understand that the United Kingdom, Australia, and Canada modified their Military Justice systems in response to complaints that the then-existing systems failed to protect adequately the rights of defendants. The basis for the complaints varied among the nations, but all included lack of transparency generally and lack of independence from the command. These are the same complaints about the U.S. Military Justice System in the 1940s that led to the development and passage by Congress of the UCMJ in 1950 to replace both the Articles of War and Articles for the Government of the Navy. Other complaints in the 1960s regarding lack of fairness led, after considerable study and analysis, to the 1968 UCMJ amendments. In the case of the United Kingdom, two decisions by the European Court of Human Rights, *Findlay v United Kingdom*, [1997] ECHR 8; (1997) 24 EHRR 221, and *Grieves v United Kingdom*, [2003] ECHR 688; (2004) 39 EHRR 2, dictated that their Military Justice system be modified to afford greater protection to military personnel accused of crimes. The Canadian system was reformed after the Supreme Court of Canada's decision in *R. v. Généreux*, [1992] S.C.R. 259, which held that the Canadian court-martial system violated accused service members' rights under the Canadian Charter of Rights and Freedoms. The Australian system was modified by the Parliament in 2006 after extensive research and analysis by special government entities. Unlike the courts requiring change in countries such as the UK and Canada, the United States Supreme Court has specifically upheld the U.S. military justice system in decisions like *Parker v. Levy*, 417 U.S. 733, 743 (1974) (upholding the constitutionality of Articles 133 and 134, UCMJ and finding that the military is "a specialized society separate from civilian society" with "laws and traditions of its own [developed] during its long history."); *Middendorf v. Henry*, 425 U.S. 25 (1976) (upholding summary courts-martial proceedings); *Solorio v. United States*, 483 U.S. 435 (1987) (upholding courts-martial jurisdiction over military members for other than-service related offenses and requiring only military status for jurisdiction); *Weiss v. United States*, *Weiss v. United States*, 510 U.S. 163 (1994) (rejecting constitutional challenges to the appointment of military judges by the service Judge Advocates General and Due Process Clause challenge to military judges' lack of fixed terms of office); and *Loving v. United States*, 517 U.S. 748 (1996) (rejecting constitutional challenge to the military death penalty procedures).

The research and study groups in allied nations may well have been modeled on similar groups in the U.S. created to research and study Military Justice before Congressional action in 1950, 1968, and 1983. There was extensive research and analysis by military and civilian experts in the United States especially in connection with the Vanderbilt Commission, the Doolittle Commission, and the Forrestal (Morgan) Commission. Review of the findings and recommendations of commissions, other studies, and extensive Congressional hearings led to passage of the UCMJ in 1950. The current proposal to remove commanders from Military Justice decision making is more far reaching and significant than all the changes of the other three major pieces of legislation (1950, 1968, 1983) taken together. I respectfully submit that the permutations and unintended consequences of such an historic change should be evaluated carefully by special committees of experts, military and civilian. The recently appointed Response Systems Panel, established by section 576 of the National Defense Authorization Act, 2013, is but one example of a group whose final report should be reviewed and analyzed before legislation is considered to change in so profound and fundamental ways the U.S. Military Justice system. Finally, it is noted that victims' rights, sexual assault offenses, or considerations other than protecting defendants had nothing to do with changing the Military Justice systems in any of the named countries.

3. General Chipman, Admiral DeRenzi, General Harding, General Ary, Admiral Kenney, and General Altenburg, have you discussed the administration of military justice with your counterparts in these countries? If so, what did you learn from these discussions?
    a. General Chipman?
    b. Admiral DeRenzi?
    c. General Harding?
    d. General Ary?
    e. Admiral Kenney?
    f. General Altenburg?

A. I have discussed these matters with several UK military attorneys. I have not discussed these matters with military attorneys from the other countries. Some of my UK colleagues approve of the changes mandated by the European Court of Human Rights. They perceive no detriment to the UK military as a result of the changes. Others confided that they believe the changes are negatively affecting the capabilities of their military. Objections included the time away from units and installations to attend civilian courts as witnesses and the perceived lack of unit control by commanders. No one would address objections for record. All noted that neither sexual assault cases nor victims' rights had any role in the development of changes to their Military Justice system.

4. General Chipman, Admiral DeRenzi, General Harding, General Ary, Admiral Kenney, and General Altenburg, have you discussed the impact of their systems on sexual assaults and reporting of sexual assaults?
    a. General Chipman?
    b. Admiral DeRenzi?
    c. General Harding?
    d. General Ary?
    e. Admiral Kenney?
    f. General Altenburg?

A. I have not, but recent assessments in Australia available to the public have emphasized that the lack of military involvement in investigations and prosecutions of military personnel are a primary cause of sex offense victims' failure to report hundreds of sexual crimes within Australian units. Please see also my response to Question 5.

5. General Chipman, Admiral DeRenzi, General Harding, General Ary, Admiral Kenney, and General Altenburg, are you aware of any studies of the systems of justice of these allies to assess their effectiveness and impact on sexual assaults and reporting of sexual assaults as compared to the more traditional model like that of the United States?
    a. General Chipman?
    b. Admiral DeRenzi?
    c. General Harding?
    d. General Ary?
    e. Admiral Kenney?
    f. General Altenburg?

A. I am generally aware that other countries are assessing the effects of changes in the administration of Military Justice since the mid-1990s. Years ago I discussed with several colleagues the effect of the European Court of Human Rights decisions, but I have not discussed with anyone the effect on sexual assault specifically because the changes to Military Justice were completely unrelated to

specific crimes, but rather were related to protections and individual rights of accused persons. I believe that there is greater awareness in all nations of the insidious effect of sexual assault on societies generally and militaries specifically, but I also believe that when it becomes a political issue the likelihood of careful, studied analysis generating thoughtful change that considers permutations and unintended consequences is lessened substantially. Change to Military Justice in this country and by the U.S. Congress has always been preceded by extensive study and analysis. An exception was the 2006 amendment to Title 10, Section 920 [National Defense Authorization Act for Fiscal Year 2006, Pub.L. No. 109–163, div. A, tit. V, § 552(a)(1), 119 Stat. 3136, 3257 (2006)], the UCMJ sexual assault statute, which Congress then had to modify yet again in 2011 [National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 541, 125 Stat. 1298 (2011)] because permutations and unanticipated consequences were not considered thoroughly before its 2006 passage.

Much of the critical discussion about military disposition of sex offenses has relied on statistics to argue that the Uniform Code of Military Justice should be amended. The total number of military sex crimes has been widely debated. The data in the following paragraphs responding to Question Five were provided to me by Professorial Lecturer in Law Lisa M. Schenck, Associate Dean for Academic Affairs, The George Washington University Law School in Washington, DC. This information is extracted from Professor Schenck's draft Fact Sheets, July 19, 2013. In FY 2012, DoD investigators referred 1,714 sex offense investigations to DoD commanders for consideration of disciplinary action against military subjects. 302 DoD military personnel were tried by courts-martial for sexual assault offenses, resulting in a prosecution rate of 18% (302 cases tried divided by 1,714 cases referred by investigators) and 79% (238 convicted divided by 302 tried) were convicted. The rate per thousand of DoD personnel tried by courts-martial for sexual assault offenses was .22 (302 tried by court-martial/1,388,000) and the conviction rate per thousand was .17 (238 convicted/1,388,000).

UNITED KINGDOM (UK)

In FY 2012, the active duty strength of the U.S. Department of Defense (DoD) was eight times as large as the UK active duty forces total of 175,940. An average of 101 UK military sexual assaults and rapes were investigated by the police each year from 2005-2010; an average of 53 serious sex offenses cases (52% of investigated cases) were referred to the UK Special Prosecuting Authority (SPA) from 2007 to 2010. From 2005 to 2010, the UK tried an average of 2.3 sex offenses per year; the UK annual prosecution rate per thousand is .013. The rate per thousand of prosecution of DoD sex offenses is 17 times higher than the UK.

Another perspective on the prosecution rate is based on the number of investigations referred by police for a disposition decision. The UK court-martial prosecution rate by this metric is 4.3% (2.3 cases prosecuted divided by 53 cases referred by investigators to the UK SPA). The U.S. Department of Defense prosecution rate for sex offenses is 18%, or four times higher.

The UK changed to a system of centralized prosecutions handled by military lawyers after decisions by the European Court of Human Rights. The modified system was designed to protect the rights of the accused from and avoid any perception of an overbearing chain of command intent on achieving unjust convictions. The UK change in charging and referral authorities had nothing to do with increasing prosecution rates for crime in general or sex offenses in particular. With an average of less than three sex offense prosecutions per year by courts-martial and more than 100 sex offenses investigated annually, the UK model does not appear to be a framework that the United States Armed Forces should adopt.

CANADA

From April 1, 2009 to March 31, 2010, nine Canadian military personnel were referred to court-martial with sexual assault charges: five were found not guilty; two were withdrawn; two were found guilty; and both of those who were convicted received sentences that included confinement. One received 20 months confinement for sexual assault, and one received 3 months for sexual interference and other offenses.

From April 1, 2009 to March 31, 2010, Canada tried 56 courts-martial (most of their disciplinary proceedings are summary trials, which are for minor disciplinary problems, similar to nonjudicial dispositions under Article 15, Uniform Code of Military Justice). The Canadian court-martial rate per thousand for all offenses was .8 (56/70,000). The Canadian sex offense prosecution rate per thousand was .10 (7/70,000), and the conviction rate was .03 (2/70,000). The Canadian conviction rate was 29% (2/7). The DoD rate per thousand for sex offense convictions was six times higher than Canada's.

Some DoD general courts-martial jurisdictions have tried more courts-martial, obtained more convictions, tried more sexual assault cases, obtained more sexual assault convictions, and sent more sexual assault perpetrators to confinement than the entire Canadian armed forces, even though those jurisdictions have substantially fewer assigned personnel than Canada. For example, Fort Hood, Texas has 45,000 active duty military personnel, compared to Canada's 70,000. In FY 2011, Fort Hood prosecuted 115 courts-martial (including 18 sex offenses), resulting in 112 convictions (including 13 sex offense convictions--the number of convictions is higher if cases are included where the accused was acquitted of a sex offense but convicted of other offenses). In FY 2012, Fort Hood prosecuted 121 courts-martial (including 26 sex offenses), resulting in 114 convictions (including 21 sex offense convictions). More important, in FY 2011, 10 military personnel were sentenced to more than one year of confinement; in FY 2012, 17 military personnel were sentenced to more than one year of confinement. In sum, Fort Hood by itself in FY 2012, tried 3.7 times (26/7) as many sex offenses by courts-martial as the entire Canadian military and obtained ten times (21/2) as many sex offense convictions, and sentenced 17 times (17/1) as many sex offenders to confinement.

AUSTRALIA

Australia's military justice system has been in turmoil for several years. The Australian Parliament modified their military justice system in 2006 to make it more like the systems in the United Kingdom and Canada. The goal was to increase the "appearance of fairness" for the accused (not to enhance justice for victims or to increase prosecutions). The Australian Government implemented the changes on October 1, 2007 by replacing general and restricted courts-martial and trial by a Defense Force Magistrate (DFM) with trial by a military tribunal (the Australian Military Court (AMC)) for the specific purpose of increasing protections for the accused. DFM and restricted courts-martial have identical jurisdiction and authority. Their sentencing authority is limited to a maximum of six months confinement, or half the punishment authority of a U.S. special court-martial. An Australian general court-martial, like a U.S. general court-martial, may impose up to the maximum authorized punishment for the specific offense.

The Australian Parliament created the Office of the Director of Military Prosecutions (DMP) effective June 12, 2006. The Director is a Brigadier; DMP has 14 prosecutor positions. The DMP prosecutes in-service offenses at proceedings before courts-martial or a DFM, and seeks the

consent of the Directors of Public Prosecutions to prosecute cases where there is overlapping jurisdiction.

On August 26, 2009, the High Court of Australia invalidated the provisions establishing the AMC, *Lane v. Morrison*, [2009] H.C.A. 29. The Parliament responded by enacting the *Military Justice (Interim Measures) Act (No 1) 2009* and *Military Justice (Interim Measures) Act (No 2) 2009*, re-establishing the pre-2007 regime of DFM, restricted courts-martial, and general courts-martial. The invalidation of the original system and uncertainty regarding its replacement created greater challenges to the Australian military's efforts to achieve good order and discipline.

An Australian military sexual abuse scandal led the Australian Minister for Defence Stephen Smith, in April 2011, to announce two important reviews of sexual abuse in the Australian military—one review by the Australian Human Rights Commission, and another by a private sector law firm retained by the government. The law firm review found that once the military passed the investigation and prosecution of serious sex offenses to the civilian sector, the military virtually washed their hands of the matter and withdrew from the process. The law firm review collected 775 complaints; a 2012 follow-up review generated 2,410 complaints of sexual abuse or harassment. Australia is embroiled in a massive review of their handling of sexual assault allegations.

The active duty strength of the U.S. Department of Defense (DoD) In FY 2012 was 1,388,028 (24 times larger than the Australian active duty force of 56,856). In 2009, 2011, and 2012, Australia averaged 47 military trials; however, most were DFM hearings or restricted courts-martial. In 2011 there were but 5 Australian general courts-martial, and in 2012, only 1. In comparison, DoD completed 2,510 general and special courts-martial in FY 2012, including 1,183 general courts-martial and 1,327 special courts-martial, plus another 1,346 summary courts-martial. A U.S. soldier who commits a serious sex crime is far more likely to receive a general court-martial and substantial confinement from that court-martial than an Australian soldier who commits the same offense. The entire Australian military justice system prosecuted an average of three felony-level prosecutions the last two years; it seems unwise to apply the Australian model to the U.S. system that prosecutes approximately 400 times as many felony-level cases.

ISRAEL

Unfortunately, the data from Israel is less complete. The following table provides the report and indictment information from 2008 to 2012. The reports include some minor sex conduct that in the United States would be viewed as non-criminal sexual harassment.

Military Sex Offense Reports and Indictments in Israel						
	2008	2009	2010	2011	2012	Average
Reports	318	363	Unknown	583	Unknown	
Indictments	28	26	20	14	27	23

The Israeli active duty population is 176,500 or 4 times as large as the active duty population of Fort Hood. (Also noteworthy, women comprise 33% of the Israeli Defense Forces; in contrast, women make up approximately 15% of active duty DoD personnel.) Yet Fort Hood has approximately the same number of sex offense prosecutions as the entire Israeli forces (Fort Hood averaged 22 sex offense trials in FY 2011 and 2012; Israel averaged 23 indictments from 2008 to

2012). If the goal is to prosecute more sex offenses, the Israeli system seems not to be the model for DoD to emulate.

6. General Chipman, Admiral DeRenzi, General Harding, General Ary, Admiral Kenney, and General Altenburg, in your view, do the U.S. military and military justice systems share the features of the foreign systems that led them to reduce the role on authority of military commanders in the military justice system?

a. General Chipman?
b. Admiral DeRenzi?
c. General Harding?
d. General Ary?
e. Admiral Kenney?
f. General Altenburg?

A. **No. The U.S. Military Justice system has evolved effectively since 1950. The rights of U.S. military personnel paralleled, and exceeded in many respects, the rights of U.S. citizens accused of crimes in civilian jurisdictions, local, state, or federal. Subsequent changes (1968, 1983) to the U.S. Military Justice system threaded the challenge of incremental "civilianization" while retaining the flexibility and vigor that reinforces discipline and combat readiness with an array of disciplinary options, procedures, and protections that satisfied the military, Congress, most critics, and the rank and file. The other nations did not protect their military personnel in similar fashion and ultimately were forced, in at least two cases (the United Kingdom and Canada) by judicial decision, to modify their Military Justice systems. The U.S. Supreme Court, in contrast, has on numerous occasions upheld the constitutionality of the U.S. Military Justice system and its efficacy. The cases prosecuted in Iraq and Afghanistan since 2001 reflect the importance of the commander's role in Military Justice—especially expeditionary courts-martial. During Operation Desert Storm in 1991, courts-martial were conducted at the most forward maneuver brigade base camp assault positions less than 3 miles south of the Iraqi-Saudi Arabian border. Trials conducted two days before the February ground assault reinforced discipline, enhanced morale, and were a signal event in demonstrating the system's combination of flexibility, responsiveness, and commitment to fairness and due process. Transporting defense lawyers and judges to forward assault locations was considered important to overall combat readiness. Trials were also conducted in Iraq immediately after the February 28 ceasefire. In one of the cases, the military trial judge had conducted motions hearings with counsel and the defendant in the Kingdom of Saudi Arabia in February and then the Emirate of Kuwait in early March before the trial itself later that month in the Republic of Iraq near Basra while U.S. forces conducted operations there. The contested case with officer and enlisted court members in a combat zone less than 20 days after combat operations demonstrated that the UCMJ must—and can--meet the National Security demands of the nation without compromising the essentials of justice.**

7. General Chipman, Admiral DeRenzi, General Harding, General Ary, Admiral Kenney, and General Altenburg, would their models work for the U.S. military? Why or why not?

a. General Chipman?
b. Admiral DeRenzi?
c. General Harding?
d. General Ary?
e. Admiral Kenney?
f. General Altenburg?

A. No, in my professional opinion. First, the other nations' militaries are much smaller than the U.S. military. They're much smaller than even the most dramatic and extreme forecasts for a reduced U.S. military. The U.S. active duty force is 8 times larger than Israel's or the United Kingdom's,

20 times larger than Canada's, and 24 times larger than Australia's. Even taking into consideration their active duty strength being a fraction of the size of the U.S., their military justice systems are not nearly as active in the prosecution of serious crimes generally and sex offenses specifically. One large U.S. installation like Fort Hood prosecutes more felony-level cases annually than any of these four countries. Change to Military Justice must account for the enormous resources required. In a larger military, like ours, the resource implications are exponentially greater. Second, the other nations' militaries have neither the unique and diverse responsibilities that the U.S. imposes on its military nor the variety of deployable forces (five services, three components, 1,388,028 active duty members). The responsibilities include humanitarian relief, peacekeeping, combat operations on multiple continents simultaneously, special operations 24/7 worldwide, foreign military training missions worldwide, and training foreign militaries in the U.S. Third, none of the other nations' militaries deploys as many forces, as often, to as many locations as the U.S. military. All of these differences lead one to ask, "Why would the U.S. emulate another nation's Military Justice system?" We also do not emulate other nation's doctrine; we do not emulate other nation's rules of engagement—even allies. Our military is unique and requires the Military Justice system that suits it best, not one that merely copies dissimilar militaries that happen to be allies.

8. General Chipman, Admiral DeRenzi, General Harding, General Ary, Admiral Kenney, and General Altenburg, how would a requirement to prosecute serious cases, like sexual assault, in a civilian court rather than in a court-martial affect a commander's ability to maintain good order and discipline?
    a. General Chipman?
    b. Admiral DeRenzi?
    c. General Harding?
    d. General Ary?
    e. Admiral Kenney?
    f. General Altenburg?

A. Requiring the U.S. military to prosecute serious cases, like sexual assault or murder, in a civilian court rather than in a court-martial, would greatly diminish commanders' ability to ensure the combat readiness and combat effectiveness of their formations. More important, it would greatly diminish the ability of commanders to lead the change needed in the service culture regarding sexual assault. Only leaders can forge the change that will stop military personnel from pressuring victims. Commander responsibilities—especially U.S. commanders—are unlike the responsibilities of supervisors, bosses, CEOs, or even other military leaders. I led and managed the two largest judge advocate organizations in the U.S. Army that supported field units. I was the leader of those organizations for six years total, including combat and non-combat deployments with each. But I was not a commander; I was a staff officer with leadership responsibilities. Commanders are directly responsible and accountable to the country's elected leaders for the combat readiness and combat effectiveness of their units. Unit combat readiness includes weapons training, equipment maintenance, esprit, morale, teamwork, physical health, emotional health, and the trust in each other to die for each other that ensures combat effectiveness in defense of the nation. Command knows no counterpart in the civilian sector. Commanders' role in the U.S. Military Justice system is tied intrinsically to their ability to provide the discipline necessary to guarantee the combat readiness to defend the nation, no matter where deployed.