

Preliminary Analysis: Legislation to Amend Title 10, US Code, in Matters of Sexual Assault in the Military

The following points are a preliminary analysis of legislation sponsored by Sen. Martha McSally (R-AZ) on matters related to sexual assaults in the military. Section numbers below refer to the original legislation, not sections in the proposed National Defense Authorization Act (NDAA) for 2020. Overall, this proposed bill would make some positive improvements, and it is better than legislation sponsored several times by Sen. Kirsten Gillibrand (D-NY). However, Sections 104, 201, and 401 (underlined below) need improvements as noted before the NDAA for 2020 legislative language is finalized.

1. Vocabulary - In general, throughout the legislation, words like "victim," "assailant," or "perpetrator" should be preceded by the word "alleged." A simpler way to identify parties without prejudice would be to refer to them as "the accuser" and "the accused."

2. Sec 104: Why would the DoD ask civilian colleges to help develop "best practices" to prevent sexual assaults (SAs) when their handling of such cases has been abysmal? For years, some civilian colleges have operated like kangaroo courts in SA cases, and the Department of Education has taken steps to restore rights of due process with new guidelines different from those imposed in previous years. Complex SA cases should be under the purview of local prosecutors. When civilian colleges try to handle them and they violate due process rights of alleged assailants, often they are sued, and they lose.

Furthermore, the military academies have something at their disposal that is not available to civilian colleges: criminal prosecution. All military academy cadets are subject to the UCMJ, and SA cases are handled in the criminal justice system, not some administrative court designed to appease the #MeToo movement. The legislation calls for studies on "prevention and reduction," punishing or adjudicating, which seems like an invitation to throw more money at RAND and other contractors or advocates whose previous recommendations have not improved SA problems.

3. Sec. 201: Requires notifying "alleged victim" of "key" or "significant" events in connection with the investigation prosecution, and confinement of the alleged perpetrator, with appropriate documentation. We would amend this to create an exception when such notice would compromise, hinder, or obstruct an ongoing investigation or prosecution. Sometimes "alleged victims" become reluctant and recant allegations, even in the face of convincing forensic evidence, or they stop cooperating in pushing the case forward. When this happens, sharing "key" or "significant" developments could be counterproductive to the cause of justice.

We don't have a problem with paragraph (b), calling for documentation of the alleged victim's "expressed preference" for prosecution, provided that the language is not interpreted to require the government to abide by the alleged victim's preferences.

4. Sec 401: Adds a punitive article to the UCMJ punishing "sexual harassment." While the proposed language requires that the conduct be connected to the military work setting, it does apply on-duty and off-duty. Problems could arise with the definition of "sexual harassment" -- a difficult term to pin down in the civil employment discrimination context for years. When is a request for a date an "unwelcome sexual advance" under the proposed statute? Similarly, "comment of a sexual nature" and "gesture of a sexual nature" may be in the eye of the beholder, and the language is too broad and vague to give fair notice as to what is and what is not criminal behavior. Conduct that is sexually abusive and harassing

should be criminalized, but there needs to be more precision in language defining the offense. The Due Process clause requires that the criminal law, even in the military, give the accused fair notice of prohibited conduct.

Because of the vagueness inherent in terms like “comment of a sexual nature” and “gestures of a sexual nature” the proposed statutory definition runs the risk of failing even the deferential standard of *Parker v. Levy*.¹ Furthermore, the prefatory term “unwelcome” means that conduct toward one person may be perfectly acceptable while the same conduct toward another could be criminal. Placing the definition of what is and what is not criminal behavior in the subjective perception of the alleged victim is problematic, to say the least. Not only does such a term place the criminal nature of the conduct clearly in the perception of a third party, the accused cannot know whether any given conduct is criminal until after the fact when the person to whom it is directed classifies it as “unwelcome.”

Rather than leaving “unwelcome” undefined, it might be wise to specify that conduct or speech that a reasonable person in the position of the accused knew or should have known would be unacceptable in the military setting in which it occurred is prohibited. This would lessen the subjectivity of the definition and, perhaps, save it from overbreadth and vagueness. Obviously, there will be conduct at both extremes that virtually all would agree would be either criminal behavior or not. On the criminal end of that spectrum the conduct would, most likely, arise to threatening, coercive, intimidating, and assaultive behavior that would easily fall under Art. 134 or other punitive articles and pass the *Parker v. Levy* standard. Thus, such behavior is already punishable.

Where the line is between those offenses and the new offense of “sexual harassment” is impossible to discern, which raises the “void for vagueness” problem. Statutes have been declared unconstitutional under the Due Process Clause if they failed to provide “fair notice” of what conduct is criminalized. If the proposed law is passed as written, the first time it is applied the accused will challenge it as unconstitutional under the Due Process clause and likely will win. It seems prudent to try and address the problem before enacting the bill, getting it right now rather than having it struck down later.

June 10, 2019

* * * * *

Prepared by the Center for Military Readiness, an independent public policy organization that reports on and analyzes military/social issues. CMR is grateful to Campbell Law School Professor Emeritus William A. Woodruff, a retired Army Colonel and former Judge Advocate General for his assistance in preparing this preliminary analysis. More information is available at www.cmrlink.org.

¹ The Supreme Court held in *Parker v. Levy*, 417 U.S. 733 (1974), that Articles 133 and 134, UCMJ, were not unconstitutionally vague because of the unique context of the military setting. On the facts of *Parker*, it was quite apparent that CPT Levy’s conduct in counselling enlisted men not to comply with orders to deploy to Vietnam was “prejudicial to good order and discipline” and in the military setting there was fair notice that such conduct was prohibited. The same argument could be made for sexual harassment arising in the military that impacts the military workspace. The problem is, however, that the conduct in *Parker* that passed the “void for vagueness” doctrine was clearly military-specific. An officer who counsels enlisted men to disobey the lawful orders of their superiors is, obviously, crossing the line. The line is not so clear when trying to determine permissible interaction between two adults and impermissible speech or conduct between those same two adults.