

September 15, 2014

Article 120 and Affirmative Consent

In previous public comment, the Panel has heard remarks concerning the different types of rape statutes, ranging from affirmative consent laws to various degrees of force based statutes. Service Women's Action Network (SWAN) believes that replacing the current force based Article 120 with an affirmative consent rape law would be beneficial to the military at the service member, leadership and institutional level.

An affirmative consent based sexual assault statute is not a radical shift in the legal theory. It represents an attempt to bring the laws regarding rape in line with the rest of the legal system. In modern jurisprudence, force has been removed from all theft offenses except robbery and rape. (Rape being defined as the theft of sexual autonomy). Nearly half of all states have adopted some degree of a consent based rape law, the most recent instance is the passage of an affirmative consent rape law by the California legislature for college campuses in accordance with a recommendation from the 2014 White House Task Force To Protect Students From Sexual Assault.

In a military context, affirmative consent -- also known as the Negotiation Model -- would better support two of the primary things a good Article 120 is designed to do: Protect good order and discipline by minimizing coercion among seniors and subordinates; and protect service members by minimizing the misinterpretation of body language among peers. This "Yes Means Yes" type of law would require individuals to treat their sexual partners with respect and dignity by securing mutual, unambiguous consent for intimate acts. The military is one of the only places in our society that has both a well-documented problem regarding sexual assault *and* a controlled environment where the actors in question voluntarily submit themselves to a rigorous life of authority, discipline and respect. These three elements make the military's adoption and implementation of an affirmative consent rape law ideal.

One of the strongest arguments for an affirmative consent based statute in the context of pervasive military sexual assault is the effect that it will have on the overall culture of the military by changing the behavior of troops, particularly in a social or dating situation. This is the type of "acquaintance" assault scenario most often seen in the military where "he said, she said" is the norm. (Note that a shift to a consent based statute will be unlikely to deter the "stranger danger" rape scenario. A perpetrator who waits in a dark alley to sexually assault a random victim is unlikely to be swayed by a legal construct that requires that he ask permission first, and respect the answer given; in fact, such an individual is not likely to be deterred by any legal construct at all.)

For service members, an affirmative consent law encourages troops to engage in more mature, professional and rational behavior by ascertaining and respecting the wishes of their prospective sexual partners. It is the best way to recognize legally that sexual partners are equal partners in any physical interaction and that their input into the relationship is equally valid. The need to create this type of mature and professional environment will become increasingly important as the military continues to integrate women into previously restricted occupational fields.

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For leaders and commanders, an affirmative consent law creates a bright shining line which is the hallmark of good military training. Sexual assault prevention training can be a challenge for commanders, it is like nailing Jell-O to a wall -- it sometimes has a hard time sticking. An affirmative consent law provides a built in mechanism for better training by creating a positive standard for troops to train to and at the same time enabling leaders to better hold troops accountable by ensuring consistent enforcement of misconduct and prosecution of criminal acts. In terms of prevention, Yes Means Yes “sticks” by creating a mindset where service members know first and foremost that if the parties do not affirmatively consent, the ensuing sexual contact is by definition a violation of the UCMJ.

Finally, for the institution, an affirmative consent law would create enough substantive changes in training, prevention and individual behaviors that it would improve the overall culture of the military. Even the United States Supreme Court has recognized that sexual intimacy is a center point of relationships, and that intimate relationships are fundamental to our society and culture. A social structure that encourages partners to play an equal role in sexual relationships by establishing a communicative system that clearly and unambiguously determines whether sex is actually desired by their partner is surely a step in the right direction. The effects of this communication and behavior will do far more than just reduce the incidence of rape and sexual assault in the military, it will vastly improve the prevailing sexually hostile work environment and the significant toxic climates found in many units, and thereby create a more disciplined, cohesive and mission-capable force.

Original source material, further analysis of and support for the above can be found at:

- Major Jennifer S. Knies, *Two Steps Forward, One Step Back: Why the New UCMJ's Rape Law Missed the Mark, and How an Affirmative Consent Statute Will Put It Back on Target*, 2007 Army Law. 1 (August 2007)
- Michelle J. Anderson, *Negotiating Sex*, 78 S. Cal. L. Rev. 1401 (2005)
- Nicholas J. Little, *From No Means No To Only Yes Means Yes: The Rational Results Of An Affirmative Consent Standard In Rape Law*, 58 Vand. L. Rev. 1321 (2005)