

**WRITTEN STATEMENT OF LIEUTENANT GENERAL FLORA D. DARPINO**

**THE JUDGE ADVOCATE GENERAL, UNITED STATES ARMY**

**FOR THE RESPONSE SYSTEMS PANEL**

1. Over the past decade, the Army has achieved substantial, meaningful progress in the prevention, response and accountability for sexual assault and sexual harassment. Far from resistant to change, the Services have been aggressively developing programs and policy to address all aspects of this crime. With the drawdown in Afghanistan after a decade of conflict, senior leader focus has become critical to the momentum of the Army's efforts.
2. Senior leaders understand the full scope and scale of the issue – sexual assault and sexual harassment in our forces is not a problem that can be easily solved and put aside. It is a crime that erodes our readiness and is predominantly affecting our youngest, newest, and most vulnerable Soldiers requires a sustained, aggressive and permanent effort. Two-thirds of the Army's sexual assault allegations involve junior enlisted victims and offenders, with alcohol a factor in approximately 70% of those cases. This demographic data not only informs our prevention and education efforts – it tells the Army that this is a problem that will renew itself each year with 65,000 new recruits which can ONLY be dealt with through commanders charged with changing the climate and held accountable to affect that change.
3. Initially, the Army's focus was on prevention and response with the 2004 stand-up of the Sexual Assault Prevention and Response (SAPR) Programs and the implementation of restricted reporting. This initial effort has evolved into a comprehensive program, funded with over \$50 million for the past two fiscal years, fielding a capability of over 11,000 personnel, deployable and available 24 hours a day, to meet all the needs of victims. The services available to victims have multiplied exponentially, while rapid changes in policies have developed critical victim response elements such as new reporting options, expedited transfers, a victim-advocate privilege, installation oversight boards at which senior commanders and staff review each individual case, and, most recently, victim counsel. The education aspect of the program, now encompassing the precursor behaviors of sexual harassment, saturates Soldier training from the first days of initial entry training to senior leader forums. Focused on bystander intervention and linked to Army values that bond Soldiers as a team, the training is interactive, progressive, and tailored for every level of Soldier from recruits to drill sergeants to all levels of command.
4. As the victim care and response programs evolved, the Services focused next on accountability efforts. The new Article 120, passed in 2007, is a comprehensive, progressive and offender-focused sexual assault statute that recognizes constructive force as it exists in the unique hierarchy of the military. Since then, it has undergone 2 revisions and our criminal system has adjusted with it. Other articles of the Uniform Code of Military Justice (UCMJ)

criminalize behaviors that have been identified as precursors to sexual assault, such as sexual harassment and indecent language. This enables commanders to hold potential offenders accountable for what may be considered non-criminal behavior in the civilian justice systems.

5. In 2009, the Army also recognized the need for improved training and resources for the prosecution of these crimes, initiating the Special Victim Prosecutors (SVP) in the Judge Advocate General's Corps and the Sexual Assault Investigators (SAI) in the Criminal Investigative Division (CID). The SVPs are hand-selected at the Department of the Army level for their expertise in the courtroom and their ability to work with victims. Prior to assuming their duties, SVPs complete a specially-designed, intensive training program that includes the career prosecutor course offered by the National Association of District Attorneys and an on-the-job opportunity with a Special Victim Unit at a major metropolitan civilian community. SAIs, civilians with significant prior experience in investigating these crimes, are similarly selected and trained. Together, these professionals work only special victim cases, developing an expertise that is unprecedented in our forces. As the SVP program evolved to its current status of 23 regionally-placed attorneys working hand-in-hand with the SAIs, the Army revamped the training we provide to all of our prosecutors and defense counsel. Highly Qualified Experts, with decades of experience in the civilian sector, transformed our curriculum into the synchronized, integrated career model we have today for both the defense and prosecutors' bar. Courses are taught by experts from the civilian sector alongside our most experienced trial advocates. Training is managed not only at the local level, but are now tracked centrally by our assignments branch with the implementation of Additional Skill Identifiers for levels of military justice experience.

6. The most critical element of this institutional effort, however, is the focus of commanders. Returning from a decade of war, our senior leaders recognized the need to fully address the change in culture that is required. The Army, like the other Services, has moved aggressively to hold commanders accountable for setting a command climate that encourages reporting, deplores conduct that degrades or harasses individuals, and provides a safe environment, free of retaliation, for victims after they come forward. Policy changes to Officer Evaluation Reports, command climate surveys, and the on-going development of metrics to measure objective requirements set for commanders in the processing of allegations and in victim response, will ensure that commanders are held to the highest standard. All the while, the military justice system continues to protect the rights of the accused.

7. Commander legal training has always been an aspect of professional development, beginning with the quasi-judicial role Second Lieutenants occupy as platoon leaders and progressing in available authorities with each assignment. Legal authorities and responsibilities are taught at every level of professional military education. The officers entrusted with the disposition of sexual assaults, withheld to the O-6 (Colonel) Special Court Martial Convening Authority, are required to attend Senior Officer Legal Orientation courses at the Judge Advocate General's Legal Center and School with a focus on the proper handling of sexual assault allegations. General officers, who will serve as convening authorities, are offered one-

on-one instruction in legal responsibilities, again with a focus on sexual assault. Commanders are tasked with caring for the morale, welfare and safety of all their Soldiers, victim and accused, and they take this Soldier duty seriously.

8. In June 2013, the Chief of Staff of the Army held a summit with his 4, 3 and select 2 star-command teams to spend two days talking only about sexual assault and making clear that his number one priority is the elimination of sexual assault in our ranks. Amid conflicts world-wide, General Odierno remains committed to this effort, not only directing multiple new initiatives including a victim advisory panel and an in-depth examination of the training and selection of Sexual Harassment/Assault Response and Prevention (SHARP) personnel, but by personally holding listening sessions with Soldiers and victims on the issue of sexual assault at every installation he visits.

9. This commander focus on all aspects of sexual assault – prevention, response and accountability – has had success that can be objectively measured and evaluated. Although the unique aspects of Army culture, the range of tools available in our system, and the scope and scale of our cumulative efforts are unmatched in any community, we can look to civilian society and to our allied forces for benchmarks in our progress. The Army compares very favorably, and has made substantial progress, in reporting and prosecution of sexual assault crimes, while protecting the rights of the accused.

10. For reporting, command emphasis has generated a steady rise in the “propensity to report” calculated by the Army Research Institute Gender and Relations Survey. This Army survey, administered in 2012 to a larger population using an accepted gender survey, concludes that female Soldiers reported penetrative sexual assaults (rape, sexual assault, forcible sodomy and attempts to commit) at a rate of 54% and contact offenses (abusive sexual contact, aggravated sexual contact) at a rate of 42%. Due to our sustained efforts, this represents a dramatic increase from the 2009 survey propensity to report of 28%. The survey data is corroborated by a corresponding increase in the raw number of reports. Fiscal Year 2013 data indicates that all the Services, including the Army, will see unprecedented rises in reporting by over 40% from the 2012 rates. I believe this encouraging data reflects increased trust from victims in the chain of command and traction for our efforts.

11. Another survey, the Department of Defense 2012 Workplace and Gender Relations Survey, supports the conclusion victims’ failure to report does not have to do with concerns of retaliation. The overwhelming reason victims (70%) do not report is because they “. . . do not want anyone to know.” Interestingly, the next two reasons also deal with privacy concerns, not retaliation. When the survey digs deeper, the vast majority of victims (70%) actually state they “would feel free to report sexual assault without fear of reprisal to a large extent.” In other words, privacy is the overriding concern – not fears of retaliation.

12. Civilian communities do not conduct the same type of focused research on specific populations, but advocacy groups estimate that rapes and sexual assaults are reported at rates that range from 5-46%, depending on the population surveyed. Note that universities and

colleges, whose age range is comparable to ours, fall at the lowest end of that scale, with reporting rates estimated in the single digits while the Army's reporting rates are on the high end or above the average reporting in the civilian sector.

13. Our allied forces are a decade behind the U.S. military in measuring and studying reporting rates. What is clear is that any survey data available indicates that our allies have high rates of incident and issues with underreporting. In June 2013, the Australian Minister of Defence stated that initial analysis of the first of its kind gender relations survey concluded that only 20% of sexual assault victims reported the offense. In the United Kingdom, a survey conducted in 2006 found that 70% of female servicemembers experienced unwelcome sexual behavior. Of the 13% who reported experiencing a sexual assault, only 5% chose to report that assault to their command. A 2008 survey conducted on the Israeli Defense Forces found that 1 in 7 female servicemembers reported being sexually harassed. Regardless of the data, one conclusion that all our allies agree upon is that changes in the role of the commander in military justice had no effect on reporting or prosecution of sexual assault offenses. Conversely, I believe the command emphasis has positive effects on our reporting.

14. Looking at prosecution rates, the Army again compares favorably. There is no civilian or allied system subject to similar reporting requirements that allows us to make an "apples to apples" comparison. The military is required to report the disposition and punishment, as well as a synopsis of each offense with demographic data, for every unrestricted report of sexual assault. That information is available at <http://www.sapr.mil/index.php/annual-reports>. The data derived from that annual report indicates that when one looks at the penetrative offenses in which the Army had jurisdiction over the offender and a final disposition was made, commanders prosecuted rape at a rate of 56% and sexual assault (sleeping or incapacitated victim) at a rate of 59%. These rates are more than double the estimated average prosecution rates for civilian jurisdictions of 18-22%. We did so while also protecting an accused's right to a fair trial.

15. This favorable comparison is corroborated by other data found in the Annual Report to Congress. The report requires reporting of the disposition for cases in which a Soldier offender is prosecuted by civilian or foreign authorities. For the offense of rape, of the 68 cases in which a Soldier offender was prosecuted by civilian authorities, the civilian authorities dismissed the charges in 22 cases, prosecuted lesser non-sexual assault charges in 11 cases, prosecuted the sexual assault charges in 7 cases, and had 28 cases still pending. This would correlate to a 17% prosecution rate to the Army 56%. For the offense of sexual assault (sleeping or intoxicated victim), of the 37 cases in which a Soldier offender was prosecuted by civilian authorities, the civilian authorities dismissed the charges in 14 cases, prosecuted lesser non-sexual assault charges in 10 cases, prosecuted the sexual assault charges in 4 cases, and had 10 cases still pending. This would correlate to a 14% prosecution rate to the Army 59%.

16. Anecdotal data also corroborates the finding that Army commanders choose to prosecute sexual assault allegations that civilian jurisdictions have chosen not to pursue. The Army recently provided a non-exhaustive sampling of compelling individual stories of justice to the

Senate, identifying 79 cases in which victims of sexual assault were given their day in court because an Army commander chose to prosecute an off-post offense that the civilian authorities declined to prosecute. Those 79 cases resulted in a 78% conviction rate.

17. This is not a recent phenomenon, as commanders have always had an interest in prosecuting cases that is very different from the interests of a district attorney. In 2009, the Congressionally- appointed Defense Task Force on Sexual Assault in the Military, found that “Available data do not support the perception that judge advocates hesitate to try difficult cases. The military services prosecute many types of sexual assault cases that civilian prosecutors choose not to pursue.” The task force further concluded that “many sexual assault reports in the military involve inappropriate touching that in the civilian community might not be categorized as sexual assault offenses and, even if reported may not be further investigated” in civilian jurisdictions.

18. I would like to thank you again for the opportunity to testify before your panel. I am open to meaningful change for our military justice system. We can and should look to improve our practice and I welcome your ideas and the chance to engage in further discussion and analysis. However, I remain firm in my belief that the central role and authority of commanders in our system is essential to health, welfare and discipline of a military unit and essential to shaping the Soldier values and conduct that culture change requires. Discipline is Army business, not lawyer business.

19. It is my personal opinion, not the opinion I have been directed to give, that removal of the commander from this central role will not increase reporting or prosecution or improve victim response. Removal of the commander from this central role will, in my opinion, have a negative impact both on the commander’s authority to maintain a disciplined force and the commander’s ability to engage in military operations which could require kinetic force. I also personally believe that, despite the efforts I know the Army would make to operate a new parallel justice system as efficiently and fairly as possible, the change in responsibilities from commander ownership with the benefit of an experienced judge advocate to solely judge advocate administered would generate at best inefficiencies and, at worst, injustices. The medicine being prescribed may well end up killing the patient.