

21. (ALL) Please provide all views memos on any pending legislation affecting military justice or the investigation, prosecution, and adjudication of sexual assault offenses in the military.

DOD	<p>DOD SAPRO: The Sexual Assault Prevention and Response Office has not provided views memos on any pending legislation affecting military justice or the investigation, prosecution, and adjudication of sexual assault offenses in the military.</p>
CJCS	<p>CJCS provided the following memos:</p> <ul style="list-style-type: none"> • Letter from BG Gross to Judge Jones dated Oct. 15, 2013 addressing question from Sept. 25, 2013 panel question regarding the role of the commander and differentiating the military to police organizations. Letter also addressed issues with international comparative analysis. (Pg. 9-7 of attachment) • Letter from Admiral Winnefeld to Sen. Gillibrand, dated July 29, 2013, in response to her June 29, 2013 letter and Chairman Levin’s July 23, 2013 letter. (Pg. 10-13) • Memo for SecDef from CJCS dated Aug. 5, 2013 recommending review of mandatory/min sentences and sentencing guidelines to be studied by RSP (Pg. 14) • Memo for SecDef from CJCS dated Aug. 5, 2013, recommending DOD GC conduct a holistic review of UCMJ (Pg. 15) • Letter from BG Gross to Sen. Inhofe dated July 19, 2013 to address allied MJ systems (Pg. 16-17) • Letter from Admiral Winnefeld to SASC Chairman Carl Levin dated July 23, 2013 with Services’ statistical information and conviction rates (Pg. 18-19) • Letter from GEN Dempsey to Sen Inhofe dated May 20, 2013 concerning his personal views regarding changes to Art. 60 (pages 20-23) • GEN Dempsey’s statement before SASC regarding pending sexual assault legislation, dated June 4, 2013 (Pages 24-26) • Letter from Admiral Winnefeld to Sen. Inhofe, dated May 17, 2013, concerning Art. 60 and role of commander (Pages 27-28)
USA	<ul style="list-style-type: none"> • The following views letters are provided by separate cover: <ul style="list-style-type: none"> • Memo to Service Secretaries, signed by Secretary of Defense Hagel, dated 8 April 2013 • Letter to Senator Levin, signed by Admiral Winnefeld, dated 23 July 2013 • Letter to Senator Levin, signed jointly by LTG Flora Darpino and other service TJAGs, dated 28 October 2013 • Letter to Senator Inhofe, signed jointly by LTG Flora Darpino and other service TJAGs, dated 28 October 2013 • Letter to Senator Graham, signed by LTG Dana Chipman, dated 23 July 2013 • Letter to Senator Levin, signed by BG Richard Gross, dated 19 July 2013

Narrative responses have been consolidated by the Response Systems Panel (RSP). Please forgive formatting errors in text and data. Source documents for narrative responses can be obtained by contacting the RSP.

- The Department of the Army's views concerning pending legislation were solicited by the Office of the Secretary of Defense (OSD) and were provided to OSD for evaluation and consideration by the Secretary of Defense in the preparation of the Statement of Administration Policy (SAP). The views letters were collected by OSD for consideration from each of the branches of the armed forces for the creation of a single statement of policy by the Secretary of Defense. The individual views letters requested by OSD were not intended to be the official position of the Department of the Army, but rather input to a much larger comprehensive policy statement by our governing agency and Secretary. The Office of the Secretary of Defense is the appropriate source of subordinate agency views letters, with the exception of the one provided below.

- With regards to the Second/Third Tranche of FY15 NDAA DOD Legislative Proposals for Army Review - OLC 118-159 (S: 22 Oct Proposal #159 / 24 Oct BPC Proposals / 29 Oct for All Other), specifically the following:

SEC. ____. REVISION TO REQUIREMENTS RELATING TO DEPARTMENT OF DEFENSE POLICY ON RETENTION OF EVIDENCE IN A SEXUAL ASSAULT CASE TO ALLOW RETURN OF THE VICTIM'S PERSONAL PROPERTY UPON COMPLETION OF LEGAL PROCEEDINGS. (019)

(a) FORMS OF EVIDENCE RELATING TO SEXUAL ASSAULTS THAT MUST BE RETAINED.—Section 586(c) of the National Defense Authorization Act for Fiscal Year 2012 (Public Law 112-81; 125 Stat. 1435; 10 U.S.C. 1561 note) is amended in paragraph (4)(A), by striking “physical evidence and forensic evidence” and inserting “forensic evidence in a Sexual Assault Forensic Examination (SAFE) Kit”.

(b) LENGTH OF TIME FORENSIC EVIDENCE IN A SAFE KIT MUST BE RETAINED.—Paragraph (4)(A) of such section, as amended by subsection (a)(2), is further amended by inserting after “not less than five years” the following: “, except that an item of forensic evidence in the kit that is the victim’s personal property does not have to be retained after the completion of any legal proceedings arising from the sexual assault”.

The U.S. Army Criminal Investigations Command (CID) recommended was that the Army concur with comment. With the comment concerning the term used in the legislature says "legal proceedings." That would imply some type of judicial action. But since sexual assaults cover everything from inappropriate touching to a penetrating offense, not all of the allegations go through a judicial or "legal proceeding." Many of the lesser offenses are handled through nonjudicial punishment or adverse personnel actions. So we would recommend that the term "legal

Narrative responses have been consolidated by the Response Systems Panel (RSP). Please forgive formatting errors in text and data. Source documents for narrative responses can be obtained by contacting the RSP.

	proceedings" be deleted and the phrase "legal or other adverse action proceedings" be inserted in its stead.
USAF	Tab 11 "RFI Q21 memos" contains two AF TJAG memoranda to Senator Graham (24 July 2013). Further, DoD is currently composing a consolidated DoD proposal for any future changes to Article 60. As such, it would be premature for the Air Force to share its analysis of Article 60 proceedings.
USN	The Navy appends the following document to its response <input type="checkbox"/> Letter to Senator Graham 24 July 13
USMC	The Marine Corps appends the following documents to its responses: <ul style="list-style-type: none"> • MajGen Vaughn Ary's written statement for his testimony before the United States • Commission on Civil Rights, January 7, 2013 • MajGen Vaughn Ary's written statement for his testimony before the SASC Subcommittee on Personnel, 13 March 2013 • Gen James Amos' letter to Senator Inhofe, 15 May 2013, • Gen James Amos' letter to Senator Levin and Senator Inhofe, 17 May 2013, • Gen James Amos' written statement for his testimony before the SASC, 4 June 2013
USCG	The Coast Guard has not prepared any independent views memos on pending legislation affecting military justice.

Narrative responses have been consolidated by the Response Systems Panel (RSP). Please forgive formatting errors in text and data. Source documents for narrative responses can be obtained by contacting the RSP.



THE ASSISTANT SECRETARY OF DEFENSE
WASHINGTON, DC 20301-1300

LEGISLATIVE
AFFAIRS

JUN 07 2013

The Honorable Carl Levin
Chairman
Committee on Armed Services
United States Senate
Washington, D.C. 20510-6050

Dear Mr. Chairman:

Thank you for your letter requesting the Department's views on S.967, the "Military Justice Improvement Act of 2013," a bill to modify various authorities relating to procedures for courts-martial under the Uniform Code of Military Justice (UCMJ). Though the Department shares the goal of improving the Military Justice System, the Department opposes this bill because it would make fundamental, yet piece-meal changes to military justice. Making such changes without adequate study creates unacceptable risk; our ability to hold offenders appropriately accountable might be compromised, diminishing the ability of commanders to protect the service members under their command. Further, the bill could undermine commanders' ability to maintain good order and discipline, cause inefficiency, and increase costs and manpower requirements in a time of austere budgets.

By eliminating the important role currently served by commanders, this bill alters core tenets of U.S. military justice that have been in place since the founding of the nation. Notwithstanding the exemption for some offenses, the bill would affect most significant criminal prosecutions in the military justice system. The Department believes that any new proposed system must be studied to ensure that it can be implemented as envisioned and that it satisfies the needs of the military to maintain good order and discipline and accommodates the requirement that military justice be portable throughout the world. In the National Defense Authorization Act for FY 2013, Congress mandated the establishment of an independent panel to study how to improve the effectiveness of the investigation, prosecution, and adjudication of crimes involving adult sexual assault. Congress explicitly tasked this panel, which has now been established, to assess "legislative initiatives to modify the current role of commanders in the administration of military justice and the investigation, prosecution, and adjudication of adult sexual assault crimes." We recommend that this panel be allowed to complete its work before a determination is made that fundamental changes to the military justice system, such as those included in this bill, are necessary or desirable. In fact on May 6, Secretary Hagel called upon the panel to accelerate its review and provide final recommendations to him within 12 months of the panel's first meeting.

The Department believes that any proposal to remove a commander from serving as general court-martial convening authority must be carefully studied. Today, the troops understand that when they commit an offense, they will be held accountable by a commander in

their chain of command. The purpose of military law embodied in the Manual for Courts-Martial is to provide a fair and equitable system of accountability that promotes justice, assists in maintaining good order and discipline in the armed forces, and promotes efficiency in the military establishment, thereby strengthening the internal security of the United States. The commander is responsible for the welfare and discipline of all service members in their command. However, under this proposal, commanders will be removed from the courts-martial process and replaced by judge advocates who would be unfamiliar with the command or its troops. This proposed change in the ability of commanders to discipline their troops could lead to a breakdown in the authority and vital bond of trust between a leader and those being led and the sense of responsibility and accountability of a commander. More, not less, command involvement and accountability are essential elements in solving the Department's sexual assault crisis. We are committed to developing new methods to hold commanders appropriately accountable for instilling a command climate that rejects any form of sexual assault or harassment, and for responding quickly and appropriately to every allegation of such an act.

The removal of commanders from serving as general courts-martial convening authorities would also have significant collateral consequences on many administrative processes, including administrative discharges, command-directed investigations, and claims. Many administrative processes in the Department designate the position of general courts-martial convening authority as the decision maker for that process. In the current context, this designation refers to a senior officer in the chain of command. The elimination of these officers from being a general court-martial convening authority would require a complete revision of regulations governing all of these administrative processes in order to keep decision making with respect to these administrative processes in the chain of command. *This would include rewriting DoD, Military Department, and Service level regulation to reflect this change, consuming much time, effort, and expense.*

The proposal would require the establishment of new offices and billets for the judge advocates who would make court-martial referral decisions (referral judge advocates) and their staffs, *and additional staff for the new convening authorities who would be designated by the Service Chiefs. The establishment of new offices would require an increase in funding and manpower requirements, in a time of very austere personnel and budget cuts.*

The proposal would also cause inefficiency. Under this proposal, investigators and trial counsel would have to keep the new referral judge advocates informed, while also keeping the affected command's staff judge advocate informed. Trial counsel would receive direction from both the staff judge advocate and the referral judge advocate, which risks inconsistencies given their different functions, perspectives, and requirements. Additionally, convening authorities would be staff officers with no connection to the affected command.

Although the Department shares the view that service members who commit sexual assault must be held appropriately accountable, regardless of their service records, the Department believes that it is important to study the commanders' consideration of the accused's character and military service when making an initial disposition decision before making changes. In the military, it is expected that troops with bad records will be dealt with more severely than those with good records when an offense is committed. Looking at the entire

military justice system through the prism of sexual assault could lead to changes that are inappropriate for the vast majority of cases. We anticipate that the independent panel will review this issue.

Under this proposed legislation, a judge will be required to hold an Article 39(a) session no later than 90 days after a decision is made to try a case by court-martial regardless of the individual circumstances, the availability of the parties, or the cost. The Department opposes this amendment. The provision could have the unintended effect of putting prosecutions at risk.

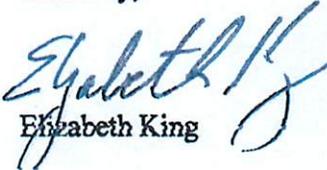
The Department supports the proposal requiring commands to forward immediately reports of alleged sexual offenses involving members of the military to criminal investigative agencies. This is consistent with existing regulations. The IG DoDI 5505.18 requires that "[a]ll Unrestricted Reports of sexual assault (and attempts) against adults will be immediately reported to the MCIO, regardless of the severity of the allegation." The SAPR DoDI 6495.02, reaffirms this in requiring "[a] unit commander who receives an Unrestricted Report of an incident of sexual assault shall immediately refer the matter to the appropriate MCIO. A unit commander shall not conduct internal command directed investigations on sexual assault (i.e., no referrals to appointed command investigators or inquiry officers) or delay immediately contacting the MCIOs while attempting to assess the credibility of the report."

Regarding Article 60 of the UCMJ, the Department has submitted a legislative proposal to Congress to amend Article 60, and believes that its proposal addresses the concern with Article 60 while ensuring fair treatment.

The Office of Management and Budget advises that, from the standpoint of the Administration's program, there is no objection to the presentation of this letter to the committee for consideration.

Thank you for your continued support of the men and women who serve our nation.

Sincerely,


Elizabeth King

cc:
The Honorable James M. Inhofe
Ranking Member

000213

ENCLOSURE C



OFFICE OF THE LEGAL COUNSEL
TO THE CHAIRMAN OF THE JOINT CHIEFS OF STAFF
PENTAGON ROOM 2D938
WASHINGTON, DC 20310-9999

15 October 2013

The Honorable Barbara Jones
Response Systems to Adult Sexual Assault Crimes Panel
875 N. Randolph Street
Arlington, VA

Dear Madame Chair,

During our testimony before the Response Systems to Adult Sexual Assault Crimes Panel (RSP) on 25 September, a panelist queried whether the missions of the military and the police were sufficiently similar so as to justify holding members of the military criminally accountable within a system that mirrors the civilian criminal justice system, which we use to hold police accountable. I am writing this letter to help clarify and explain the primary reasons that the application of civilian justice to police forces is an inapt analogy as applied to the commander-centric military justice system.

Even before the passage of the *Posse Comitatus* Act, there have been strict delineations between the military and the police and the laws governing conduct within both institutions. Strict divisions regarding the use of military force, as distinguished from police force, result from a recognized distinction in our society between the two types of organizations. The major distinctions between the two types of organizations fall along three lines: 1) the nature of the organizational hierarchy; 2) tools, weaponry and levels/types of violence; and 3) international accountability and international law.

The primary concern of the military services regarding any proposal to remove commanders from the military justice system, which would necessarily make the system mirror civilian justice systems more closely, is the commander's prerogative over the discipline of the unit. The military has always been organized with the commander retaining the utmost authority over the unit, to ensure its operational readiness and discipline such that the unit may perform the riskiest and most violent of tasks. While law enforcement personnel do risk life and limb in maintaining societal order, the police are never literally ordered to sacrifice their lives for the greater good; however, our service members know that their individual desire to survive is subordinate to the survival of the Nation. The scale of police maneuvers is also typically much smaller than the scale of military maneuvers, which often involve thousands of personnel having to be trained, ready, equipped, and disciplined enough to move in concert with one another over extended periods of time, unlike anything asked of police units within the United States.

There are many structural ways in which the police's rank system and vertical hierarchy are distinguishable from a military organization. Police unions are the foremost example of the bargaining power and the ability of rank-and-file police officers to lobby or appeal to their leadership. Nothing akin to a union exists within the military, nor should it – such an organization would degrade readiness and the hierarchy upon which so much depends within the

1- RSP RFI #21
Enclosure C

military. Military members are criminally liable for refusal of orders or failure to maintain the standards of the organization. The military is regulated in all aspects of life – there is no military equivalent to an “off duty” police officer. The police, on the other hand, are held to civilian standards established within the criminal law, and thus are appropriately held accountable through the civilian justice system. Police officers can walk away from the job – service members cannot. One instructive example is Hurricane Katrina: when the New Orleans police department was unwilling and unable to protect the city (by some accounts, an estimated one-third deserted the city), the National Guard had to step in.

The second point of differentiation between the police and the military is the different tools afforded and tasks required by each institution. The police are limited to small arms, and employ force in small units, operating at most in potentially lethal operations involving small arms at the squad-sized level. Some riot control operations may be greater in scope, involving platoon-sized elements, but typically police only utilize non-lethal force under those scenarios.

The lowest level command with operational planning capability and convening authority within the military is the battalion-level (roughly 1,000 troops) for ground forces and a comparably high level of complexity for sea and air units. In any organization, the need for a superior’s control over his or her unit increases substantially as the size, lethality, and complexity of the unit and its operations all increase. Military life is strict. The standards set, especially in terms of criminal liability, are higher than any civilian equivalent. The person holding the bar the highest within the military is the commander, not the prosecutor.

Finally, international law adds substantial considerations to the need for a specialized system of accountability within the military. Under the law of war, the commander is responsible for the potential Law of Armed Conflict violations of his or her unit. No such proxy liability exists within any police force for the superior of a misbehaving subordinate. Military operations are also inherently international and expeditionary in nature. Any criminal system of accountability must be equally flexible and deployable. The commander necessarily travels with his or her command, whereas prosecutors are often not co-located with the unit. Police, on the other hand, are inherently local, and operate within demarcated boundaries, never employing force in a way that would implicate the international Law of Armed Conflict.

The use of force in a combat scenario varies significantly from justified employment of force in a civilian capacity in a number of ways. Self-defense rules of engagement also differ in their application to the U.S. military and the police. Some foreign governments interpret self-defense rules to constrain activity nearly as strictly as law enforcement self-defense rules of engagement. However, the U.S. military, as a matter of necessity, uses a broader definition of self-defense that does not apply to law enforcement. The international law of war, not domestic civilian statutes, governs all offensive operations conducted abroad. Existing civilian law paradigms cannot be applied to the military with respect to appropriate use of force, nor does expertise exist among civilian law enforcement or prosecutors to handle these cases. By contrast, the civilian justice system has a robust capability to manage the law enforcement profession.

Much was made by the international representatives to the RSP about a distinction they perceive between disciplinary and criminal matters. Such a distinction was drawn within their respective services because of the reforms imposed on their systems – the distinction was created due to the reforms; it was not a natural division that was recognized *ex ante*. Stating that such a distinction exists within their system does not make it inevitable, a best practice, or applicable to the American military. Much of the U.S. military system of accountability rests on criminal liability specifically for inherently military crimes. For troops to follow orders, especially risky orders, they must have faith that the commander who gave the order is as responsible for their execution as the subordinate. If the commander and the chain of command do not have authority over discipline and criminal liability associated with such orders, they risk troops second-guessing the commander when doubt arises as to the prosecutor's perspective on such orders.

Despite the *Posse Comitatus* Act, certain communities within the military do learn to operate within a law enforcement paradigm, and they must distinguish between the military standards to which they are held and appropriate performance of law enforcement duties. The Coast Guard is not bound by the *Posse Comitatus* Act, but they recognize a difference between law enforcement personnel and high-end maritime security operations personnel and train them differently. Military police are educated to operate in both a military and law enforcement paradigm – and they also are trained in distinguishing between the two.

Ultimately, our society has chosen a system of governance that holds the police to a civilian standard, maintaining civil order without being militarized. The converse is also true: we do not want a military that has been weakened to resemble a police force. These distinctions between the two types of organizations preclude us from making meaningful comparisons between the appropriate level of accountability for police and for our military.

I very much welcome the opportunity to provide comments to the panel on this question, or any other topic, that would help inform the important work that you are doing. Thank you again for your thoughtful questions, and your interest in helping create a system of accountability within the military that holds us to the highest and most appropriate of standards.



Richard C. Gross
Brigadier General, US Army
Legal Counsel to the Chairman
of the Joint Chiefs of Staff



THE VICE CHAIRMAN OF THE JOINT CHIEFS OF STAFF
WASHINGTON, D.C. 20318-9999

12 September 2013

The Honorable Kirsten E. Gillibrand
Senator
Russell Senate Office Building Suite 478
United States Senate
Washington, DC 20510

Dear Senator Gillibrand.

This letter is in response to your July 29, 2013 letter, which followed up on a letter that I sent to Chairman Levin on July 23, 2013. In your letter, you requested information from the military services regarding sexual assault cases in which civilian authorities either did not pursue a full investigation or formally declined to prosecute. Enclosed is our response to your information request.

The four enclosures provide submissions from each of the services to the questions posed in your letter. The responses address the questions in case synopsis format. Included for your review as well are all available promulgating orders or results of trial for completed cases. Each of the services has confirmed that records of trial for completed cases are also available for your consideration, as you requested.

The enclosed cases illustrate commanders' continuing interest in prosecuting cases involving sex crimes—they are a scourge on our society, and we have no tolerance for them. Even in cases where civilian authorities are unwilling or unlikely to act, our commanders consistently insist on going forward in order to achieve accountability, both for the victim and in the interest of military discipline. I fear, however, that the number of prosecutions in these types of cases may well decline if the very commanders who have a vested interest in accountability are stripped of their power to deal with allegations regarding personnel in their units, in favor of detached independent prosecutors.

None of the services' submissions represent the totality of cases that involve civilian declination. Civilian declinations are not tracked as such; therefore, this is a sample, sourced by the services, of representative cases they chose to prosecute that the civilian community declined. The services also do not keep statistics regarding sexual assault cases involving military personnel prosecuted by civilian authorities. If a case was reported through the military system in any way, even if it was not tried by the military, it would be reflected in the DoD Sexual Assault, Prevention and Response Annual Report and its enclosures, available at www.sapr.mil.

The information contained in the enclosures is extremely sensitive, and we ask that it will be treated as such. Though some services declined to include ongoing cases, others have included abbreviated synopses of those cases. Jurisdictional discussions and collaboration are ongoing at every military base across the country, and we would never want to jeopardize the relationship of trust that we have built with civilian authorities.

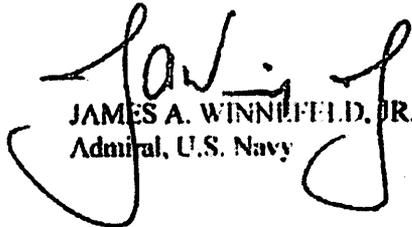
2 - RSP ~~Enclosure~~ 21C

100035

The Chairman and I are interested in educating and informing Congress as much as possible on these matters in an open and transparent way. To that end, we propose that the Army, who provided the majority of the case synopses—and/or any of the other services—meet with you and your staff to answer any questions about individual cases and to discuss generally how civilian declinations work in practice across the United States.

Thank you for your continued interest in this important topic. The fact that cases such as those represented in the enclosures exist at all troubles us deeply. We are committed to ensuring that we are doing everything we can to prevent sexual assault in the military, and when it does occur, to ensure that we are succeeding at supporting victims and holding perpetrators accountable. Commanders are instrumental to these efforts, which directly impact their units: we must not disempower them in the fight against sexual assault.

Sincerely,



JAMES A. WINNIE, JR.
Admiral, U.S. Navy

Enclosure C

100036

KIRSTEN E. GILLIBRAND
NEW YORK
SENATOR

RUSSSELL SENATE OFFICE ON MILITARY
AFFAIRS
WASHINGTON, DC 20540-3164
202-224-4611

COMMITTEES:
ARMED SERVICES
ENVIRONMENT AND PUBLIC WORKS
AGRICULTURE
SPECIAL COMMITTEE ON AGING

United States Senate

WASHINGTON, DC 20510-3205

July 29, 2013

Admiral James A. Winnefeld, USN
Vice Chairman of the Joint Chiefs of Staff
Office of the Joint Chiefs of Staff
The Pentagon
Washington, DC 20318-9999

Dear Admiral Winnefeld,

I am writing to you with regard to the letter you sent to Chairman Levin on July 23, 2013, as a follow-up to the testimony that you and General Dempsey provided the Senate Armed Services Committee during your July 18, 2013, re-confirmation hearing.

I would like to better understand the claims that you are making based on the 93 cases cited in your testimony and letter and would appreciate it if you could provide additional information so that I and other Senators can properly evaluate the data.

1. For each case in which military prosecution followed civilian declination, what was the *precise* interaction between civilian and military prosecutors or staff judge advocates? Please forward copies of all documents that memorialize that interaction.
2. In the letter, what does the phrase "declined to prosecute" entail? Does it only reference instances where the civilians outright refused to prosecute? Or, do the numbers listed include cases in which:
 - (a) the civilians agreed to drop charges based on a request by the military;
 - (b) the military decided to prosecute before the civilians were ready to make a decision; or
 - (c) there were other situations whereby the civilians might have prosecuted if the military were not going to address the situation?

In any of these cases did the military request that the civilians defer or withdraw prosecution for any reason?

Please specify the number of cases by service for each.

3. Of the cases that were prosecuted by the military, what were the precise charges on which military convictions were obtained? Were they Article 120 charges of sexual assault, lesser included offenses, a collateral charge, or a combination thereof?
4. What were the recommendations of the Article 32 investigating officer and SJA in each case in which a civilian DA declined to prosecute, and did the commander agree or disagree with this recommendation? Which cases were referred for trial contrary to the recommendation of Article 32 investigating officers or SJAs? In how many of the cases to which you referred was the Article 32 investigating officer a judge advocate?

FORM 08/01 (REV. 11/02) PAPER

Enclosure C

100037

5. What were the adjudged sentences in each case? What became of the findings and sentences on appellate review by the service Courts of Criminal Appeals and U.S. Court of Appeals for the Armed Forces, if any of those cases have been decided by those courts?
6. Of the cases prosecuted, did the convening authorities set aside any guilty findings or modify any sentence under Article 60, and if so, which ones and why?
7. How many sexual assault cases involving military personnel did civilian authorities prosecute during the same two-year period covered by the data you cited? If any, what were the results? Did the military prosecute any of the same cases by court-martial, handle through non-judicial punishment, or administrative separation? If so, what was the specific disposition?
8. Of the cases mentioned, how many victims were on active duty and how many victims were civilians?

Finally, please make available the Records of Trial and Allied Papers for each of the completed cases reflected in the data cited in your letter; all correspondence between SJAs/MPs/CID, or other military investigators, and local prosecutors for all DA-declined cases; and the names and contact information of all civilian DAs who declined to prosecute (with the accused's name).

Admiral, I know that we share the same desire to ensure that our men and women in uniform have a safe work environment and that those who break the law are punished. I would appreciate your providing this information in a timely manner, given the high level of Senate interest on this subject.

Sincerely,

Kirsten E. Gillibrand

Kirsten E. Gillibrand
United States Senator

Enclosure C

100038



FOR OFFICIAL USE ONLY

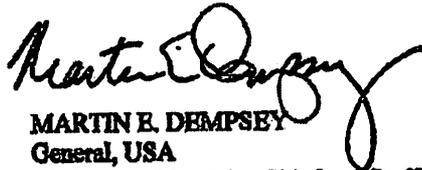
OFFICE OF THE CHAIRMAN OF THE JOINT CHIEFS OF STAFF
WASHINGTON, DC 20318-9000

CM-0209-13
5 August 2013

MEMORANDUM FOR SECRETARY OF DEFENSE

SUBJECT: (U) Recommendation of the Joint Chiefs of Staff with respect to Mandatory Minimum Sentences/Sentencing Guidelines in Sexual Assault Cases

1. (FOUO) The Joint Chiefs of Staff (JCS) recently met again on the topic of Sexual Assault Prevention and Response. During those discussions, we focused on whether the Uniform Code of Military Justice (UCMJ) should be amended to include mandatory minimum sentences for more serious sexual assault crimes. In addition, we discussed instituting sentencing guidelines in the military justice system, similar to those found in the civilian federal criminal justice system. We concluded both ideas merit further study, understanding that either change to the UCMJ would require legislation.
2. (U) The UCMJ currently contains mandatory minimum sentences for three offenses only: spying in a time of war (Article 106); premeditated murder (Article 118(1)); and murder during the commission of certain offenses (Article 118(4)). Most or all State criminal codes, as well as the federal criminal code, contain minimum sentences for many more felony-level crimes, to include sexual assault crimes. In addition, the federal system has federal sentencing guidelines that set out a uniform sentencing policy for individuals convicted of felonies and serious misdemeanors, based primarily on two factors: the conduct associated with the offense; and the defendant's criminal history. The federal system also has a probation office that conducts extensive background investigations and prepares presentencing reports prior to sentencing, which often occurs months after conviction.
3. (FOUO) It was the sense of the JCS that mandatory minimum sentences would only be appropriate in the more serious sexual assault crimes, i.e., Article 120 (Adult) and 120b (Child) offenses involving penetration.
4. (FOUO) Accordingly, the JCS and I recommend that you direct the 576 Response Systems Panel to study both ideas for potential adoption in the military justice system. The Panel should also consider the possible second and third order effects of mandatory minimum sentences, including the potential for fewer convictions in close cases, the possible unwillingness of offenders to enter into pretrial agreements, and reduced victim reporting and/or participation where the victim knows the offender and believes the mandatory punishment is excessive.


MARTIN E. DEMPSEY
General, USA
Chairman of the Joint Chiefs of Staff

FOR OFFICIAL USE ONLY

3 - RSP RCP/SAFE C

100039



FOR OFFICIAL USE ONLY

OFFICE OF THE CHAIRMAN OF THE JOINT CHIEFS OF STAFF

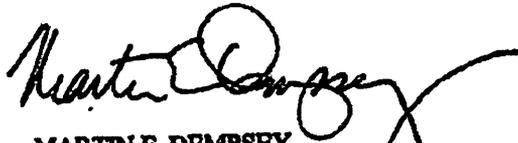
WASHINGTON, DC 20310-0000

CM-0210-13
5 August 2013

MEMORANDUM FOR SECRETARY OF DEFENSE

SUBJECT: (U) Recommendation of the Joint Chiefs of Staff with respect to a Holistic Review of the Uniform Code of Military Justice

1. (FOUO) During a recent Tank session on Sexual Assault Prevention and Response, the Joint Chiefs of Staff (JCS) discussed the current state of the military justice system.
2. (FOUO) The U.S. Armed Forces operated under the Articles of War from 1775 until 1950. In 1950, President Truman signed the first Uniform Code of Military Justice (UCMJ) into law. We noted that the last comprehensive review and update of the UCMJ took place in 1984. Much has changed since then, to include the end of the Cold War, the successful integration of the All-Volunteer Force, and the enactment of the Goldwater-Nichols Act of 1986. The JCS concluded that, given the changes in the force and society since 1984, a DOD-led holistic review of the UCMJ and the military justice system would be appropriate.
3. (FOUO) Accordingly, the JCS and I recommend that you direct the Department of Defense General Counsel to conduct a comprehensive, holistic review of the UCMJ and the military justice system. This proposal should not be taken to signal a sense among the JCS that the UCMJ has proved inadequate to its purpose, or as a measure intended to forestall criticism of the manner in which any case or cases are handled within the military justice system. The review is solely intended to ensure that our system most effectively and efficiently does justice consistent with due process and good order and discipline. The JCS recognizes that such a review would be broader than the work ongoing with the 576 Response Systems Panel and that the Services will need to support this holistic review by providing military justice experts for extended periods of time.


MARTIN E. DEMPSEY
General, USA
Chairman of the Joint Chiefs of Staff

FOR OFFICIAL USE ONLY

4 - RSP RFI#21

Enclosure C

100040



OFFICE OF THE CHAIRMAN OF THE JOINT CHIEFS OF STAFF

WASHINGTON, DC 20318-9999

July 19, 2013

Honorable James M. Inhofe
Ranking Member
United States Senate
Committee on Armed Services
Washington, D.C. 20510

Dear Senator Inhofe:

Yesterday at the reconfirmation hearing for General Dempsey and Admiral Winnefeld, and earlier at the recent Senate Armed Services Committee hearing on sexual assault, several Senators had questions about our allies' military justice systems. As you know, most or all of our allies have removed commanders as convening authorities and use independent military or civilian prosecutors to make charging decisions. General Dempsey has spoken with many of his counterparts on this topic, and I recently met with legal advisors from the United Kingdom, Canada, Australia, New Zealand, the Netherlands, and Germany and conducted a survey of their military justice systems. I am writing to outline what we have discovered so far.

From these conversations and research, we've learned quite a few things, some of which General Dempsey mentioned at his reconfirmation hearing. First, no allied country changed its system in response to sexual assault crimes specifically or the rights of victims generally. In most cases, commanders were removed as convening authorities to better protect the rights of the accused, often in response to decisions by domestic courts and/or the European Court of Human Rights (human rights treaties usually have a requirement for an "independent and impartial" tribunal). In contrast, the U.S. Supreme Court has repeatedly upheld the Uniform Code of Military Justice (UCMJ) and the U.S military justice system as consistent with the Constitution and federal law.

Second, none of the allies surveyed could draw a correlation between their new system and any increased (or decreased) reporting by victims of sexual assault. There was no statistical or anecdotal evidence that removing commanders from the charging decision had any effect on victims' willingness to report crimes. Similarly, we found no studies by our allies that examined the impact of the changes on prosecution rates, conviction rates, or processing times, although generally their cases now take longer.

The scope and scale of our allies' caseloads are vastly different. None of our allies handle the volume of cases the US military does (e.g., one ally only tried 75-80 courts-martial last year); this is likely due to the greater size of the U.S. armed forces in comparison.

5 - RSP Enclsug C

100041

One critical feature of our justice system is its expeditionary nature—the ability to administer justice anywhere in the world our forces deploy. By law, most of our allies cannot conduct courts-martial in deployed environments; those whose systems allow it rarely do so in practice and often are incapable of doing so. Practical impediments include the short lengths of their combat tours, the small numbers of forces deployed, and the availability of defense counsel, judges, and court personnel in theater.

We also discovered that the allied systems we surveyed generally maintained two roles for commanders. First, their systems generally allow commanders to conduct disciplinary proceedings, often called summary proceedings or summary trials, for minor military offenses. These summary proceedings are somewhat analogous to our nonjudicial punishment proceedings under Article 15 of the UCMJ or our summary courts-martial. Often, prior coordination (and/or approval) is required with the independent prosecutor before proceeding. Second, our allies' commanders generally retain the responsibility and authority to make recommendations to the independent prosecutor; however, these recommendations are advisory only and not binding.

Finally, of the six allies we surveyed, four countries maintained military justice systems with independent military prosecutors and military courts-martial (the UK; Canada; Australia; and New Zealand) and two countries surveyed had civilian prosecutors, with cases tried in civilian court (Germany and the Netherlands). Five of the countries (all but Germany) indicated that the changes in their systems resulted in the process slowing down and taking longer.

Thank you for the opportunity to share this information with you and the committee. This is an extremely important issue to all of us, and I appreciate the open lines of communication on this topic. If you need any more information or have any questions, I would be happy to provide more detail.

Sincerely,



Richard C. Gross
Brigadier General, US Army
Legal Counsel to the Chairman
of the Joint Chiefs of Staff



THE VICE CHAIRMAN OF THE JOINT CHIEFS OF STAFF
WASHINGTON, D.C. 20318-9999

23 July 2013

The Honorable Carl Levin
Chairman
Committee on Armed Services
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

As General Dempsey and I stated during our reconfirmation hearing, the military services have investigated and prosecuted a number of sexual assault cases after civilian authorities either did not pursue a full investigation or formally declined to prosecute. The Army and Marine Corps statistics we cited are below, as well as additional statistics from the Navy and Air Force. The statistics cover the last two years.

U.S. Army. Commanders exercised jurisdiction in 49 sexual assault cases that local civilian authorities declined to pursue.

- o 32 of these cases were tried by court-martial, resulting in 26 convictions—an 81% conviction rate
 - o 25 of the 26 (96%) convicted were sentenced to confinement and a punitive discharge or dismissal from the military
 - o Six accused were acquitted of sexual assault charges
- o Two of the accused were administratively discharged in lieu of trial by court-martial under other than honorable conditions
- o 15 cases are still in the pre-trial phase of the military justice system

U.S. Marine Corps. Commanders exercised jurisdiction in 28 sexual assault cases that local civilian authorities declined to pursue.

- o All 28 cases were tried by court-martial
- o 16 cases resulted in convictions—a 57% conviction rate

U.S. Navy. Commanders exercised jurisdiction in six sexual assault cases that local civilian authorities declined to pursue.

- o Three cases were tried by court-martial, resulting in one conviction—a 33% conviction rate
- o Three cases are still in the pre-trial phase of the military justice system

U.S. Air Force. Commanders exercised jurisdiction in ten sexual assault cases that local civilian authorities declined to pursue.

- o All ten cases were tried by court-martial, resulting in nine convictions—a 90% conviction rate

6 - R3P REL #21
Enclosure C

100043

- o Seven of the nine (78%) convicted were sentenced to confinement and/or a punitive discharge or dismissal from the military

I believe these statistics demonstrate the personal ownership commanders take in the discipline of their units—even in the face of often challenging circumstances.

In one case, for example, two soldiers engaged in sexual intercourse with a victim who was substantially incapacitated by alcohol. When questioned, both soldiers lied to civilian law enforcement. A civilian investigator accused the victim of lying, and concluded as much in the official report. After local authorities declined to prosecute, military investigators opened a case, located additional victims, and discovered evidence indicating that the soldiers had conspired to obstruct justice. Both soldiers were convicted by a court-martial, sentenced to confinement, and punitively discharged.

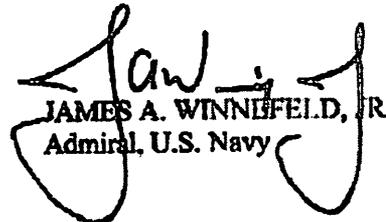
Another case involved a soldier's rape and forcible sodomy of his 10-year-old autistic step-daughter. Lacking physical evidence and a statement from the accused, civilian authorities declined to prosecute. Military investigators opened a case and located a key piece of evidence that corroborated the victim's allegations against the soldier. A court-martial convicted the soldier, sentencing him to 35 years confinement and a dishonorable discharge.

In cases like these and others, which independent authorities declined to pursue, commanders recognized the need to hold service members accountable for their crimes both for the sake of justice, and to preserve good order and discipline.

You also asked whether, conversely, civilian authorities have prosecuted cases that the military services did not pursue. The services currently do not track that information. However, after querying the field, the Army, Navy, and Air Force have responded that they have no recollection of cases in which commanders declined to prosecute, or a court-martial ended in an acquittal, and civilian authorities subsequently prosecuted. From time to time, civilian authorities prosecute cases that the military could prosecute, but that is the result of informal discussions regarding which system is better suited to handle the case rather than a result of a service formally declining prosecution.

I appreciate your energetic support for our determined efforts to eliminate the insider threat of sexual assault, and your continued concern for and support of our men and women in uniform.

Sincerely,


JAMES A. WINNIEFELD, JR.
Admiral, U.S. Navy



CHAIRMAN OF THE JOINT CHIEFS OF STAFF

WASHINGTON, D.C. 20310-9999

May 20, 2013

Honorable James M. Inhofe
Ranking Member
United States Senate
Committee on Armed Services
Washington, D.C. 20510-6050

Dear Senator Inhofe:

Thank you for your May 3, 2013 letter regarding Secretary of Defense Hagel's decision to direct the Acting DoD General Counsel to prepare a legislative proposal that revises Article 60 of the Uniform Code of Military Justice (UCMJ). Specifically, you requested my personal and professional views concerning a variety of outcomes which you've stated may result from this proposed revision.

I consider the legislative proposal a well-crafted, refined, and purposeful revision of Article 60 that does not undercut the role of a convening authority. It preserves the convening authority's role where it is most needed—sentencing—by retaining the ability to modify sentences based on circumstances often unique to the armed forces. Also, the proposal maintains the convening authority's ability to set aside court-martial findings of guilt for a narrow group of qualified offenses, providing flexibility to adjudicate those offenses in an alternate fashion.

I do believe that reasonable changes to the military justice system, such as the Secretary's proposed Article 60 revision, ensure the UCMJ remains vibrant and fair to the accused and to victims. The proposed revision does not limit the current role of appellate courts, access to defense counsel, or significant post-trial involvement by convening authorities.

I have also received a letter from you and Senator Levin dated May 9, 2013, requesting my personal views on four other legislative proposals, and have attached my response as an addendum to this letter. In brief, however, my primary concern when reviewing all the recent legislative proposals remains the role of the commander. Importantly, the commander's role in the military justice process is long-standing and essential to the effectiveness of our joint force. Our commanders are responsible for the efficiency of their units first, but more broadly, it is in their hands that the defense of the Nation rests. Because of the tremendous responsibility placed in commanders, they must also have broad authority to enforce discipline and execute their duties. This is a foundational element of the military justice system. The central imperative in commanders' responsibility to accomplish their assigned missions, in peacetime and in war, is the good order and discipline of the men and women they lead. A message that commanders cannot be trusted to mete out discipline will undermine this responsibility; removing commanders from the military justice process would convey just such a message.

Despite my firm stance on the role of the commander, I remain committed to working with Congress, Secretary Hagel, and the Service Chiefs to make other revisions to the UCMJ as

7 - RSP RFI #21
Enclosure C

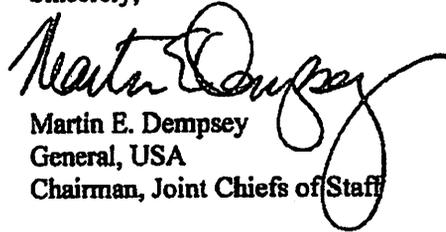
100045

- 2 -

necessary. I assure you that any future revisions or proposals will receive my personal attention and that my recommendations will always be thorough, candid, and honest.

Your continued concern for and support of our men and women in uniform are appreciated.

Sincerely,

A handwritten signature in black ink, appearing to read "Martin E. Dempsey", written in a cursive style. The signature is positioned above the typed name and title.

Martin E. Dempsey
General, USA
Chairman, Joint Chiefs of Staff

Enclosure C

100046

ADDENDUM

S.538. To amend Article 60, UCMJ

As written, this proposed legislation will unduly restrict the authority of the commander. Amending Article 60, UCMJ, to prohibit the convening authority from dismissing any charge or specification by setting aside a finding of guilty, or from changing a finding of guilty to a charge or specification to a finding of guilty to an offense that is a lesser included offense, would unduly restrict the convening authority's ability to prevent undue hardship in certain important circumstances. Rather than entirely precluding the convening authority from dismissing any findings of guilty, the convening authority should retain the discretion to dismiss minor offenses under appropriate circumstances, such as preventing an accused from the burden of a felony conviction when found guilty of minor misconduct, but acquitted of major offenses. Examples of such minor offenses include underage drinking, adultery, and brief absences without leave, which on their own would not normally be adjudicated by courts-martial.

S.548, the "Military Sexual Assault Prevention Act of 2013"

I find merit in certain aspects of this legislation such as the prohibition of any person convicted of rape, sexual assault, forcible sodomy, or incest from serving in the U.S. Armed Forces; requiring administrative discharge for those convicted of the most serious sexual offenses (rape, sexual assault, forcible sodomy, or attempts to commit those offenses); and requiring a commanding officer who receives a report of a sexual-related offense to either submit the report to a senior officer or refer the report to the appropriate office of special investigation within 24 hours. I do recommend further study by the Response Systems Panel created by Section 576 of the National Defense Authorization Act (NDAA) for Fiscal Year 2013 (FY13), especially in regards to the legislation's proposal to raise the initial disposition authority for the most serious sexual offenses occurring under a training command to a general or flag officer and the establishment of policy to dispose of the most serious sexual offenses by court-martial rather than non-judicial punishment or administrative action. Any review of the military justice system should be a holistic review, however, focused on the entire justice system and how any proposed changes might affect military justice as a whole, not solely in the context of sexual assault.

S.871, the "Combating Military Sexual Assaults Act of 2013"

I find merit in certain aspects of this legislation but recommend further study by the Response Systems Panel created by Section 576 of the NDAA for FY13. Although I support the goal of providing a robust support program for victims of a sexual assault, I am not certain, without further study, that it will be of benefit to the victim for the "Special Victims' Counsel" to be a judge advocate. I also find merit in some of the proposed "enhanced responsibilities" of the Director of the Sexual Assault Prevention and Response Office within the Department of Defense (DOD). Finally, although I am not opposed to establishing additional protections for trainees, as the legislation proposes, I again urge further study to examine the possible second- and third-order effects of the significant changes proposed.

The "Military Justice Improvement Act of 2013" (not yet introduced)

As written, this proposed legislation will unduly restrict the authority of commanders.

Section 2. Modification of authority to determine to proceed to trial by court-martial on charges on offenses with authorized maximum sentence of confinement of more than one year. This modification removes the determination whether to try such charges by court-martial from a commanding officer. Commanders are responsible for accomplishing assigned missions in peacetime and war, and paramount to this responsibility is the good order and discipline of the men and women they lead. Good order and discipline is essential to military efficiency and effectiveness. Removing commanders from the military justice process sends the message to everyone in the military that there is a lack of faith in the officer corps and the serving commanders. Conveyance of a message that commanders cannot be trusted will only serve to undermine good order and discipline.

Section 3. Modification of Manual for Courts-Martial to eliminate factor relating to character and military service of the accused in rule on initial disposition of offenses. The character and military service of the accused are just two of many factors a commander should continue to consider in deciding how to dispose of an offense. These factors enable the commander to make warranted, appropriate, and fair decisions that are within his/her discretion.

Section 4. Modification of officers authorized to convene General and Special Courts-Martial. This modification removes the authority of commanding officers to convene General and Special Courts-Martial and places the authority in an office established pursuant to this legislation. This new office would also have the responsibility to detail judges and members to courts-martial. The proposed legislation radically alters the principal tenet of the military justice system that has served the Nation's security since its founding: the central role commanders play in enforcing orders and executing assigned missions. The authority to convene General and Special Courts-Martial is simply vital if we are expected to field disciplined, ready forces. It provides commanders authority commensurate with their responsibilities and duties. While Congress has modified the UCMJ from time to time, it has never removed commanders from the military justice system. The consequences of such a decision would be far-reaching and extraordinarily damaging to the Nation's security.

Enclosure C

100048

SENATE ARMED SERVICES COMMITTEE

**STATEMENT OF
GENERAL MARTIN E. DEMPSEY, USA
CHAIRMAN
JOINT CHIEFS OF STAFF
BEFORE THE SENATE ARMED SERVICES COMMITTEE
PENDING LEGISLATION REGARDING SEXUAL ASSAULTS IN THE MILITARY
JUNE 4, 2013**

SENATE ARMED SERVICES COMMITTEE

8 RSP RFI #21
Enclosure C

100049

Chairman Levin, Ranking Member Inhofe, members of the committee, thank you for giving us this opportunity to discuss our commitment to eliminating sexual assault from the Armed Forces of the United States.

The risks inherent to military service should never include the risk of sexual assault. Sexual assault is a crime that demands accountability and consequences. It betrays the very trust on which our profession is founded.

The Joint Chiefs and our Senior Enlisted Leaders are committed to correcting this crisis. We are acting swiftly and deliberately to change a culture that has become too complacent. We know that lasting change begins by changing the behaviors that lead to sexual assault.

The Joint Chiefs have spent the last year leading a campaign focused on prevention, investigation, accountability, advocacy, and assessment – all as part of our enduring commitment to the health of the force. The additional actions recently directed by Secretary of Defense Hagel serve to strengthen our efforts.

We can and must do more. We must protect victims while preserving the rights of the accused. We must prevent and respond to predatory and high-risk behaviors. We must ensure a professional work environment predicated on dignity and respect.

And, we must be open to every idea and option to accelerate meaningful, institutional change.

Legal reform has been and should continue to be part of this campaign. Previously, we elevated initial disposition authority in certain cases to O-6 commanders with Special Court-Martial Convening Authority. More recently, I

endorsed Secretary Hagel's proposed amendments to Article 60 of the Uniform Code of Military Justice.

Should further reform be needed, I urge that military commanders remain central to the legal process. The commander's ability to preserve good order and discipline remains essential to accomplishing any change within our profession. Reducing command responsibility could adversely affect the ability of the commander to enforce professional standards and ultimately, to accomplish the mission.

Of course, commanders and leaders of every rank must earn trust to engender trust in their units. Most do. Most do not allow unit cohesion to mask an undercurrent of betrayal. Most rise to the challenge of leadership even under the most demanding physical and moral circumstances.

Our men and women in uniform have within them the moral courage needed to change course and reaffirm our professional ethos. Working together, we can and will restore trust within our Force and with the American people. Thank you.



THE VICE CHAIRMAN OF THE JOINT CHIEFS OF STAFF
WASHINGTON, D.C. 20318-9999

CM-00127-13
17 May 2013

Honorable James M. Inhofe
Ranking Member
United States Senate
Committee on Armed Services
Washington, D.C. 20510-6050

Dear Senator Inhofe:

Thank you for your May 3, 2013, letter requesting my personal and professional views on the Secretary of Defense's decision to direct the Acting DoD General Counsel to prepare a legislative proposal that revises Article 60 of the Uniform Code of Military Justice (UCMJ).

Let me begin by stating I am a firm believer that commanders are responsible for the good order and discipline of their units. A central component of ensuring that responsibility is their personal involvement in the military justice process. Commanders must have the authority to hold those under their command accountable for misconduct and have the ability to quickly and visibly take action. Commanders' personal ownership of discipline in their unit deters others under their command from committing misconduct, and it provides justice to and support for members who have been victimized. Removing commanders from the military justice process – even if limited to only major crimes – should only be considered with caution lest we erode the trust and confidence our service members must have in their commanders to lead them to be effective, combat-ready troops.

Secretary Hagel's proposed legislation was drafted by the Acting DoD General Counsel and was thoroughly reviewed by each Service's General Counsel and Judge Advocate General, and the Staff Judge Advocate to the Commandant of the Marine Corps. Additionally, the Joint Chiefs of Staff provided recommendations to the Secretary. Importantly, the Secretary's proposed revisions do not remove the commander from the military justice system. Rather, they reasonably limit one aspect of a convening authority's responsibility in post-trial court-martial action—the power to dismiss any finding of guilt adjudged at a court-martial.

Prior to passage of the Military Justice Act of 1968, a convening authority was required, with staff judge advocate assistance, to review each court-martial for both legal and factual sufficiency before taking action on the findings and sentence. Key provisions of the 1968 Act improved the professionalism of court-martial practice, including the right of an accused to be represented by an attorney at trial and the requirement for independent military judges to preside over general and special courts-martial. With these changes in place, the convening authorities' post-trial responsibilities were limited in 1983 when they were no longer required to take action on the findings of a court-martial.

The Secretary's proposed revisions to Article 60 further refine that limitation by precluding convening authorities from dismissing findings of guilt or reducing an adjudged

9 - RSP RFI 21

Enclosure C

100052

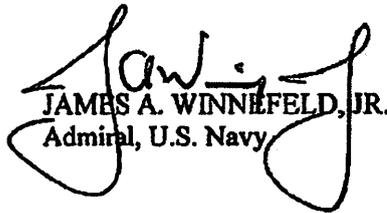
finding of guilt to a lesser included offense, except in the case of qualifying minor offenses. Rather than undermining the leadership of our commanders, disrupting an effective military justice system, or working against the rights of junior enlisted personnel—or any other Service member—the Secretary's proposed revision provides the convening authority the discretion to remove the weight of a felony-level conviction for a minor offense and substitute it with more appropriate punishment when a Service member is acquitted of major crimes.

I also concur with the proposed requirement for a convening authority to provide a written explanation of any action to modify the findings or sentence adjudged by a court-martial. This requirement should not have a chilling effect on convening authorities making decisions they believe are necessary in the best interest of justice. Senior military officials and commanders make important decisions every day, and are often called upon to explain those decisions. Explanations come in all forms, from after action reports to decision memos memorializing the rationale for disciplining an employee. In fact, until passage of the Military Justice Act of 1983, the law required a convening authority to provide written explanation of a decision on post-trial action which conflicted with the advice of the staff judge advocate. I trust that convening authorities who make decisions they believe are in the best interests of justice will not be uncomfortable with explaining their reasoning. Further, I do not believe that requiring a convening authority to explain a decision to dismiss a finding of guilt for a minor offense or to reduce the sentence adjudged at a court-martial could create the basis for a successful appeal of a court-martial conviction. A convening authority can only decrease an adjudged punishment, therefore, the likelihood of any successful appeal for taking favorable action that benefits an accused is highly remote.

I am aware that several senators have or will introduce other legislative proposals addressing sexual assault response and prevention efforts in the military. I am open-minded about these well-intended proposals, particularly should they only apply to the most serious crimes. However, these proposals should be studied thoroughly to ensure that they do not undermine the critical role of commanders in enforcing good order and discipline or have other unintended consequences. Moreover, they should be evaluated, along with the efficacy of recent legislative changes, by the Response Systems to Adult Sexual Assault Crimes Panel established by Section 576 of the National Defense Authorization Act for Fiscal Year 2013. This independent body of experts from outside the military will have the opportunity to carefully study the proposals, provide its best advice on their strengths and weaknesses, and recommend other best practices to be implemented or enhanced.

I appreciate your continued concern for and support of our men and women in uniform.

Sincerely,


JAMES A. WINNEFELD, JR.
Admiral, U.S. Navy

Enclosure C

100053



THE VICE CHAIRMAN OF THE JOINT CHIEFS OF STAFF
WASHINGTON, D.C. 20318-9999

23 July 2013

The Honorable Carl Levin
Chairman
Committee on Armed Services
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

As General Dempsey and I stated during our reconfirmation hearing, the military services have investigated and prosecuted a number of sexual assault cases after civilian authorities either did not pursue a full investigation or formally declined to prosecute. The Army and Marine Corps statistics we cited are below, as well as additional statistics from the Navy and Air Force. The statistics cover the last two years.

U.S. Army. Commanders exercised jurisdiction in 49 sexual assault cases that local civilian authorities declined to pursue.

- 32 of these cases were tried by court-martial, resulting in 26 convictions—an 81% conviction rate
 - 25 of the 26 (96%) convicted were sentenced to confinement and a punitive discharge or dismissal from the military
 - Six accused were acquitted of sexual assault charges
- Two of the accused were administratively discharged in lieu of trial by court-martial under other than honorable conditions
- 15 cases are still in the pre-trial phase of the military justice system

U.S. Marine Corps. Commanders exercised jurisdiction in 28 sexual assault cases that local civilian authorities declined to pursue.

- All 28 cases were tried by court-martial
- 16 cases resulted in convictions—a 57% conviction rate

U.S. Navy. Commanders exercised jurisdiction in six sexual assault cases that local civilian authorities declined to pursue.

- Three cases were tried by court-martial, resulting in one conviction—a 33% conviction rate
- Three cases are still in the pre-trial phase of the military justice system

U.S. Air Force. Commanders exercised jurisdiction in ten sexual assault cases that local civilian authorities declined to pursue.

- All ten cases were tried by court-martial, resulting in nine convictions—a 90% conviction rate

- o Seven of the nine (78%) convicted were sentenced to confinement and/or a punitive discharge or dismissal from the military

I believe these statistics demonstrate the personal ownership commanders take in the discipline of their units—even in the face of often challenging circumstances.

In one case, for example, two soldiers engaged in sexual intercourse with a victim who was substantially incapacitated by alcohol. When questioned, both soldiers lied to civilian law enforcement. A civilian investigator accused the victim of lying, and concluded as much in the official report. After local authorities declined to prosecute, military investigators opened a case, located additional victims, and discovered evidence indicating that the soldiers had conspired to obstruct justice. Both soldiers were convicted by a court-martial, sentenced to confinement, and punitively discharged.

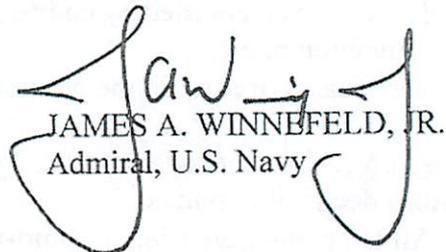
Another case involved a soldier's rape and forcible sodomy of his 10-year-old autistic step-daughter. Lacking physical evidence and a statement from the accused, civilian authorities declined to prosecute. Military investigators opened a case and located a key piece of evidence that corroborated the victim's allegations against the soldier. A court-martial convicted the soldier, sentencing him to 35 years confinement and a dishonorable discharge.

In cases like these and others, which independent authorities declined to pursue, commanders recognized the need to hold service members accountable for their crimes both for the sake of justice, and to preserve good order and discipline.

You also asked whether, conversely, civilian authorities have prosecuted cases that the military services did not pursue. The services currently do not track that information. However, after querying the field, the Army, Navy, and Air Force have responded that they have no recollection of cases in which commanders declined to prosecute, or a court-martial ended in an acquittal, and civilian authorities subsequently prosecuted. From time to time, civilian authorities prosecute cases that the military could prosecute, but that is the result of informal discussions regarding which system is better suited to handle the case rather than a result of a service formally declining prosecution.

I appreciate your energetic support for our determined efforts to eliminate the insider threat of sexual assault, and your continued concern for and support of our men and women in uniform.

Sincerely,


JAMES A. WINNEFELD, JR.
Admiral, U.S. Navy

Honorable Carl Levin
Chairman
United States Senate
Committee on Armed Services
Washington, D.C. 20510-6050

Dear Senator Levin:

Yesterday at the reconfirmation hearing for General Dempsey and Admiral Winnefeld, and earlier at the recent Senate Armed Services Committee hearing on sexual assault, several Senators had questions about our allies' military justice systems. As you know, most or all of our allies have removed commanders as convening authorities and use independent military or civilian prosecutors to make charging decisions. General Dempsey has spoken with many of his counterparts on this topic, and I recently met with legal advisors from the United Kingdom, Canada, Australia, New Zealand, the Netherlands, and Germany and conducted a survey of their military justice systems. I am writing to outline what we have discovered so far.

From these conversations and research, we've learned quite a few things, some of which General Dempsey mentioned at his reconfirmation hearing. First, no allied country changed its system in response to sexual assault crimes specifically or the rights of victims generally. In most cases, commanders were removed as convening authorities to better protect the rights of the accused, often in response to decisions by domestic courts and/or the European Court of Human Rights (human rights treaties usually have a requirement for an "independent and impartial" tribunal). In contrast, the U.S. Supreme Court has repeatedly upheld the Uniform Code of Military Justice (UCMJ) and the U.S military justice system as consistent with the Constitution and federal law.

Second, none of the allies surveyed could draw a correlation between their new system and any increased (or decreased) reporting by victims of sexual assault. There was no statistical or anecdotal evidence that removing commanders from the charging decision had any effect on victims' willingness to report crimes. Similarly, we found no studies by our allies that examined the impact of the changes on prosecution rates, conviction rates, or processing times, although generally their cases now take longer.

The scope and scale of our allies' caseloads are vastly different. None of our allies handle the volume of cases the US military does (e.g., one ally only tried 75-80 courts-martial last year); this is likely due to the greater size of the U.S. armed forces in comparison.

One critical feature of our justice system is its expeditionary nature--the ability to administer justice anywhere in the world our forces deploy. By law, most of our allies cannot conduct courts-martial in deployed environments; those whose systems allow it rarely do so in practice and often are incapable of doing so. Practical impediments include the short lengths of their combat tours, the small numbers of forces deployed, and the availability of defense counsel, judges, and court personnel in theater.

We also discovered that the allied systems we surveyed generally maintained two roles for commanders. First, their systems generally allow commanders to conduct disciplinary proceedings, often called summary proceedings or summary trials, for minor military offenses. These summary proceedings are somewhat analogous to our nonjudicial punishment proceedings under Article 15 of the UCMJ or our summary courts-martial. Often, prior coordination (and/or approval) is required with the independent prosecutor before proceeding. Second, our allies' commanders generally retain the responsibility and authority to make recommendations to the independent prosecutor; however, these recommendations are advisory only and not binding.

Finally, of the six allies we surveyed, four countries maintained military justice systems with independent military prosecutors and military courts-martial (the UK; Canada; Australia; and New Zealand) and two countries surveyed had civilian prosecutors, with cases tried in civilian court (Germany and the Netherlands). Five of the countries (all but Germany) indicated that the changes in their systems resulted in the process slowing down and taking longer.

Thank you for the opportunity to share this information with you and the committee. This is an extremely important issue to all of us, and I appreciate the open lines of communication on this topic. If you need any more information or have any questions, I would be happy to provide more detail.

Sincerely,



Richard C. Gross
Brigadier General, US Army
Legal Counsel to the Chairman
of the Joint Chiefs of Staff



The Honorable James M. Inhofe
Ranking Member
United States Senate
Committee on Armed Services
Washington, DC 20510-6510

28 OCT 2013

Dear Senator Inhofe,

This responds to your October 15, 2013, letter seeking our views on the ability of the Services to implement the attached draft legislative proposal. We have chosen to write in unison as our concerns about the legislative proposal are shared across the Services. We are joined in this response by the Judge Advocate General of the Coast Guard, the Coast Guard being similarly affected by revisions to the Uniform Code of Military Justice (UCMJ). In fact, as currently drafted, the legislative proposal stands to affect the Coast Guard more acutely by precluding all Coast Guard officers from convening general courts-martial to try any offenses under the UCMJ.

The UCMJ is a composite of interconnected statutes that form our military justice system. Fundamental changes to the system's framework, such as those proposed by the draft legislation, cannot be undertaken without a comprehensive assessment of the broader effects those changes may have on the system as a whole. Enactment of the legislative proposal would require extensive statutory amendments and implementing executive orders. Without careful study of the proposal's effects, additional statutory changes, and significant revisions to the Rules for Courts-Martial through implementing executive orders, implementation of the draft legislation poses considerable risk to the stability of the military justice system. The legislative proposal could, for example, place convictions at risk for appellate reversal, much like what occurred following the 2006 revisions to Article 120, UCMJ. The following paragraphs illustrate some of the most significant concerns.

The proposal effectively establishes two parallel systems of justice: the status quo is purportedly maintained for military-specific and misdemeanor-type offenses, while for felony-type offenses, the legislative proposal creates a new office headed by an O-6 judge advocate to make case disposition decisions. However, the UCMJ is not neatly divided between misdemeanors and felonies as civilian systems are. For example, Article 134 includes both misdemeanor and felony level offenses, yet the proposed amendment indiscriminately prescribes the same treatment for all Article 134 offenses, without regard to the nature of each specified offense. The result is a mismatch between the offense and the judicial structure for handling the offense.

As a related matter, the legislative proposal fails to establish the process for disposition of cases in which the two systems intersect, i.e., in cases involving multiple offenses that fall into both systems. Such cases arise quite frequently in our practice. On its face, the legislative

200394

proposal would result in parallel prosecutions for such cases, doubling the prosecution's caseload. The alternative is for one system to take the case in its entirety, which could give rise to jurisdictional problems given the proposed legislation's explicit provisions and would further erode a commander's authority over good order and discipline. In fact, the legislative proposal actually removes almost every military commander's authority to convene general courts-martial for members of their command, even for military-specific offenses. So, for example, the Division Commander of an infantry Soldier or Marine who refused an order to engage the enemy could not refer charges against his or her subordinate for trial by court-martial.

We are also concerned about the effect of the legislative proposal on the commander's ability to employ non-judicial disciplinary measures in instances of minor misconduct involving "included" offenses. A primary disciplinary tool presently available to commanders is Article 15, UCMJ, non-judicial punishment (NJP). NJP is the mechanism used by commanders to immediately hold service members accountable for misconduct of a nature and degree that does not warrant a criminal prosecution and conviction. Summary courts-martial provide another disciplinary tool to address minor misconduct; the summary court-martial is a trial but does not ordinarily result in a civilian conviction because of diminished due process rights for the accused. A service member has the right to demand trial by court-martial in lieu of either NJP (unless assigned to a vessel) or summary court-martial. This means that for cases sent back to the accused's commander for action because the O-6 judge advocate determines court-martial is not warranted, a service member's subsequent decision to invoke his right to demand trial by court-martial effectively removes the case from the commander's purview because the commander cannot convene a special or general court-martial. The legislative proposal is unclear as to what, if any, courses of action remain available to the commander.

As in the federal and state criminal justice systems, the military justice system uses plea bargaining to encourage judicial economy. The draft legislative proposal limits our ability to efficiently and effectively plea bargain. The increased complexity and ambiguity of separate trial systems, and the complicated interactions and division of authority between the convening authority and O-6 judge advocate, will introduce significant uncertainty into the process. Plea bargaining under this system will be less efficient, more cumbersome, and more expensive. The result will almost certainly be fewer plea bargains and more contested trials, which on many occasions is inconsistent with a victim's desire to avoid testifying at trial if a just result can be otherwise reached.

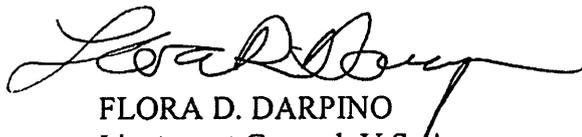
The draft legislative proposal fails to address an essential jurisdictional requirement for all general courts-martial, which are the military courts with authority to adjudge dishonorable discharges and confinement for more than one year. Specifically, before a case can be referred to trial by general court-martial, Article 32, UCMJ, requires a pretrial investigation (unless waived by the accused). The legislative proposal fails to make clear whether a pretrial investigation remains a statutory requirement and, if so, who has the authority to appoint an investigating officer to conduct that investigation. Additionally, the legislative proposal fails to address whether Article 34 staff judge advocate pretrial advice is still required prior to referral to general court-martial. These gaps in the legislative scheme create the possibility that an appellate court would overturn court-martial convictions.

This legislative proposal also raises constitutional due process concerns regarding the selection of court-martial personnel. It appears that it intends to give a single office the authority to appoint prosecutors, defense counsel, judges, and members (the military equivalent of jurors), to try each case. Appellate litigation might invalidate such a consolidation of power in one office. Additionally, the legislative proposal does not indicate how court members will be detailed; instead, the proposal references two unrelated articles of the UCMJ that address detailing of trial and defense counsel and military judges. Even if the proposal referenced only the articles that cover detailing military judges and trial and defense counsel, it would still face constitutional challenges.

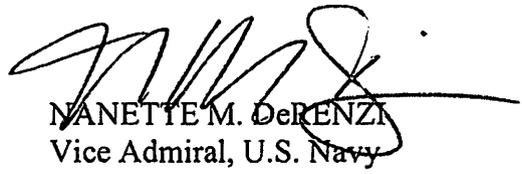
Finally, the legislative proposal provides that implementation of the new system will be cost-neutral. Based on our input as to how each service would implement this proposal, the Department of Defense office of Cost Assessment & Program Evaluation determined that the additional personnel required by this proposal would cost the government an additional \$113 million per year. The requirement for full-time O-6 judge advocate disposition authorities and the requirement that they be outside the chain of command exceeds the existing personnel inventory of the Services and does not consider the administrative support required for the creation and maintenance of these new duties. Implementing the draft legislative proposal on a cost-neutral basis would significantly impact other capabilities. While standing up entirely new offices that require O-6 judge advocate leaders with substantial military justice training creates baseline administrative costs, the more pressing concern for our communities is the cost in terms of diverted expertise we require elsewhere. The requirement for full-time O-6 judge advocates to serve as disposition authorities necessarily removes these officers from critical billets as military judges, senior prosecutors and defense attorneys, and staff judge advocates for our senior commanders, and the development of an adequate pool of replacement judge advocates is a process that will take years to complete.

In sum, we have grave concerns about this draft legislative proposal and we thank you for the opportunity to provide these comments. As leaders of our respective legal communities we must continue to ensure the effective administration of military justice within our Services. The draft legislative proposal puts that important end state in jeopardy. We are grateful for your continued interest in ensuring that our justice system holds offenders appropriately accountable, protects the due process rights of the accused, provides justice to victims, and maintains the highest standards of discipline.

Sincerely,



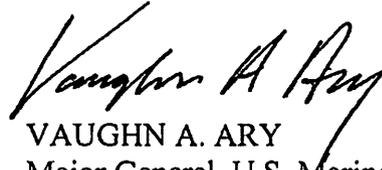
FLORA D. DARPINO
Lieutenant General, U.S. Army
Judge Advocate General of the Army



NANETTE M. DeRENZI
Vice Admiral, U.S. Navy
Judge Advocate General of the Navy



RICHARD C. HARDING
Lieutenant General, U.S. Air Force
Judge Advocate General of the Air Force



VAUGHN A. ARY
Major General, U.S. Marine Corps
Staff Judge Advocate to the
Commandant of the Marine Corps



FREDERICK J. KENNEY
Rear Admiral, U.S. Coast Guard
Judge Advocate General of the Coast Guard



The Honorable Carl Levin
Chairman
United States Senate
Committee on Armed Services
Washington, DC 20510-6510

28 OCT 2013

Dear Senator Levin,

This responds to your October 15, 2013, letter seeking our views on the ability of the Services to implement the attached draft legislative proposal. We have chosen to write in unison as our concerns about the legislative proposal are shared across the Services. We are joined in this response by the Judge Advocate General of the Coast Guard, the Coast Guard being similarly affected by revisions to the Uniform Code of Military Justice (UCMJ). In fact, as currently drafted, the legislative proposal stands to affect the Coast Guard more acutely by precluding all Coast Guard officers from convening general courts-martial to try any offenses under the UCMJ.

The UCMJ is a composite of interconnected statutes that form our military justice system. Fundamental changes to the system's framework, such as those proposed by the draft legislation, cannot be undertaken without a comprehensive assessment of the broader effects those changes may have on the system as a whole. Enactment of the legislative proposal would require extensive statutory amendments and implementing executive orders. Without careful study of the proposal's effects, additional statutory changes, and significant revisions to the Rules for Courts-Martial through implementing executive orders, implementation of the draft legislation poses considerable risk to the stability of the military justice system. The legislative proposal could, for example, place convictions at risk for appellate reversal, much like what occurred following the 2006 revisions to Article 120, UCMJ. The following paragraphs illustrate some of the most significant concerns.

The proposal effectively establishes two parallel systems of justice: the status quo is purportedly maintained for military-specific and misdemeanor-type offenses, while for felony-type offenses, the legislative proposal creates a new office headed by an O-6 judge advocate to make case disposition decisions. However, the UCMJ is not neatly divided between misdemeanors and felonies as civilian systems are. For example, Article 134 includes both misdemeanor and felony level offenses, yet the proposed amendment indiscriminately prescribes the same treatment for all Article 134 offenses, without regard to the nature of each specified offense. The result is a mismatch between the offense and the judicial structure for handling the offense.

As a related matter, the legislative proposal fails to establish the process for disposition of cases in which the two systems intersect, i.e., in cases involving multiple offenses that fall into both systems. Such cases arise quite frequently in our practice. On its face, the legislative

000005

200398

proposal would result in parallel prosecutions for such cases, doubling the prosecution's caseload. The alternative is for one system to take the case in its entirety, which could give rise to jurisdictional problems given the proposed legislation's explicit provisions and would further erode a commander's authority over good order and discipline. In fact, the legislative proposal actually removes almost every military commander's authority to convene general courts-martial for members of their command, even for military-specific offenses. So, for example, the Division Commander of an infantry Soldier or Marine who refused an order to engage the enemy could not refer charges against his or her subordinate for trial by court-martial.

We are also concerned about the effect of the legislative proposal on the commander's ability to employ non-judicial disciplinary measures in instances of minor misconduct involving "included" offenses. A primary disciplinary tool presently available to commanders is Article 15, UCMJ, non-judicial punishment (NJP). NJP is the mechanism used by commanders to immediately hold service members accountable for misconduct of a nature and degree that does not warrant a criminal prosecution and conviction. Summary courts-martial provide another disciplinary tool to address minor misconduct; the summary court-martial is a trial but does not ordinarily result in a civilian conviction because of diminished due process rights for the accused. A service member has the right to demand trial by court-martial in lieu of either NJP (unless assigned to a vessel) or summary court-martial. This means that for cases sent back to the accused's commander for action because the O-6 judge advocate determines court-martial is not warranted, a service member's subsequent decision to invoke his right to demand trial by court-martial effectively removes the case from the commander's purview because the commander cannot convene a special or general court-martial. The legislative proposal is unclear as to what, if any, courses of action remain available to the commander.

As in the federal and state criminal justice systems, the military justice system uses plea bargaining to encourage judicial economy. The draft legislative proposal limits our ability to efficiently and effectively plea bargain. The increased complexity and ambiguity of separate trial systems, and the complicated interactions and division of authority between the convening authority and O-6 judge advocate, will introduce significant uncertainty into the process. Plea bargaining under this system will be less efficient, more cumbersome, and more expensive. The result will almost certainly be fewer plea bargains and more contested trials, which on many occasions is inconsistent with a victim's desire to avoid testifying at trial if a just result can be otherwise reached.

The draft legislative proposal fails to address an essential jurisdictional requirement for all general courts-martial, which are the military courts with authority to adjudge dishonorable discharges and confinement for more than one year. Specifically, before a case can be referred to trial by general court-martial, Article 32, UCMJ, requires a pretrial investigation (unless waived by the accused). The legislative proposal fails to make clear whether a pretrial investigation remains a statutory requirement and, if so, who has the authority to appoint an investigating officer to conduct that investigation. Additionally, the legislative proposal fails to address whether Article 34 staff judge advocate pretrial advice is still required prior to referral to general court-martial. These gaps in the legislative scheme create the possibility that an appellate court would overturn court-martial convictions.

This legislative proposal also raises constitutional due process concerns regarding the selection of court-martial personnel. It appears that it intends to give a single office the authority to appoint prosecutors, defense counsel, judges, and members (the military equivalent of jurors), to try each case. Appellate litigation might invalidate such a consolidation of power in one office. Additionally, the legislative proposal does not indicate how court members will be detailed; instead, the proposal references two unrelated articles of the UCMJ that address detailing of trial and defense counsel and military judges. Even if the proposal referenced only the articles that cover detailing military judges and trial and defense counsel, it would still face constitutional challenges.

Finally, the legislative proposal provides that implementation of the new system will be cost-neutral. Based on our input as to how each service would implement this proposal, the Department of Defense office of Cost Assessment & Program Evaluation determined that the additional personnel required by this proposal would cost the government an additional \$113 million per year. The requirement for full-time O-6 judge advocate disposition authorities and the requirement that they be outside the chain of command exceeds the existing personnel inventory of the Services and does not consider the administrative support required for the creation and maintenance of these new duties. Implementing the draft legislative proposal on a cost-neutral basis would significantly impact other capabilities. While standing up entirely new offices that require O-6 judge advocate leaders with substantial military justice training creates baseline administrative costs, the more pressing concern for our communities is the cost in terms of diverted expertise we require elsewhere. The requirement for full-time O-6 judge advocates to serve as disposition authorities necessarily removes these officers from critical billets as military judges, senior prosecutors and defense attorneys, and staff judge advocates for our senior commanders, and the development of an adequate pool of replacement judge advocates is a process that will take years to complete.

In sum, we have grave concerns about this draft legislative proposal and we thank you for the opportunity to provide these comments. As leaders of our respective legal communities we must continue to ensure the effective administration of military justice within our Services. The draft legislative proposal puts that important end state in jeopardy. We are grateful for your continued interest in ensuring that our justice system holds offenders appropriately accountable, protects the due process rights of the accused, provides justice to victims, and maintains the highest standards of discipline.



FLORA D. DARPINO
Lieutenant General, U.S. Army
Judge Advocate General of the Army

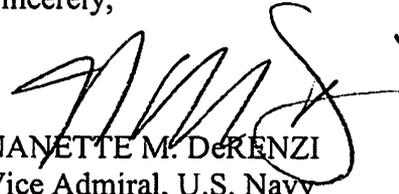


RICHARD C. HARDING
Lieutenant General, U.S. Air Force
Judge Advocate General of the Air Force



FREDERICK J. KENNEY
Rear Admiral, U.S. Coast Guard
Judge Advocate General of the Coast Guard

Sincerely,



NANETTE M. DERENZI
Vice Admiral, U.S. Navy
Judge Advocate General of the Navy



VAUGHN A. ARY
Major General, U.S. Marine Corps
Staff Judge Advocate to the
Commandant of the Marine Corps

200401



SECRETARY OF DEFENSE
1000 DEFENSE PENTAGON
WASHINGTON, DC 20301-1000

APR 08 2013

MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS
CHAIRMAN OF THE JOINT CHIEFS OF STAFF
ACTING UNDER SECRETARY OF DEFENSE FOR PERSONNEL
AND READINESS
CHIEFS OF THE MILITARY SERVICES
ACTING GENERAL COUNSEL OF THE DEPARTMENT OF
DEFENSE
ASSISTANT SECRETARY OF DEFENSE FOR LEGISLATIVE
AFFAIRS

SUBJECT: Article 60 of the Uniform Code of Military Justice

I am committed to ensuring that the men and women of the U.S. Armed Forces are free from the threat of sexual assault. Alongside efforts to prevent sexual assault in the first place, we must respond fairly, swiftly, appropriately, and systematically to allegations of sexual assault. Victims must have access to appropriate care and treatment, feel secure enough to report this crime without fear of retribution, and be assured that all allegations of sexual assault will be fully investigated. In addition, offenders must be held appropriately accountable for these crimes.

One of the most important tools in our efforts to combat sexual assault and other crimes in the military is our system of military justice. To ensure that our military justice system remains fair and credible, and that commanders have the tools that they need to promote good order and discipline, we must periodically assess whether prudent changes are warranted.

On March 12, 2013, I directed the Department of Defense Acting General Counsel, after consultation with the Secretaries of the Military Departments, to provide an initial assessment of whether changes should be considered to Article 60 of the Uniform Code of Military Justice (UCMJ). Article 60 prescribes the authority of a convening authority to take action on the results of a court-martial. I have reviewed the assessment of the Acting General Counsel and the recommendations from the Joint Chiefs of Staff and direct the following actions:

First, the Acting General Counsel of the Department of Defense, in coordination with the Secretaries of the Military Departments, shall prepare a legislative proposal that would amend Article 60 to eliminate the discretion of the convening authority to change the findings of a court-martial except for certain minor offenses that would not, in and of themselves, ordinarily warrant trial by court-martial. In this circumstance, the convening authority should retain the authority to set aside and dismiss one or more specifications or findings of guilt with respect to the minor offense(s) and impose an alternate form of accountability (*e.g.*, non-judicial punishment or adverse administrative action) that is more appropriate for the minor offense.



200402

Second, the legislative proposal shall require the convening authority to explain in writing any modification made to court-martial sentences, as well as any changes to findings involving minor offenses.

These changes should apply to all courts-martial, not solely to courts-martial for sexual assault offenses. The convening authority's post-trial discretion with regard to sentencing should be preserved. The Service Secretaries, the Joint Chiefs of Staff, and the Service Judge Advocates General support these changes.

We must ensure that our military justice system is fair, provides justice, and enhances good order and discipline. The actions directed by this memorandum seek to improve military justice and our ability to accomplish our mission.

Thank you.

A handwritten signature in black ink, appearing to read "Craig R. Hines", with a horizontal line underneath.

cc:
Deputy Secretary of Defense
Chief of the National Guard Bureau
Assistant to the Secretary of Defense for Public Affairs



DEPARTMENT OF THE ARMY
OFFICE OF THE JUDGE ADVOCATE GENERAL
2200 ARMY PENTAGON
WASHINGTON, DC 20310-2200

July 23, 2013

The Honorable Lindsey Graham
Committee on Armed Services
United States Senate
Washington, DC 20510

Dear Senator Graham:

Thank you for the opportunity to address why I oppose removing commanders from the disposition of allegations of sexual assault and other serious offenses. For 33 years, I have served alongside and advised commanders at every level of the Army in peace, stability operations, humanitarian operations, counterterrorism operations, and for the last 12 years, sustained combat operations. One enduring truth remains: Soldier discipline is the foundation of a trained, focused force capable of accomplishing any mission. Soldier discipline is built, shaped and reinforced over a Soldier's career by commanders with authority – the authority to address criminal behavior quickly, visibly and locally. From my perspective administering the military justice system at its highest level, I am convinced that command authority, particularly in the context of military justice, remains absolutely critical to ensuring the integrity of the force.

First, the commander's central role in the disposition of offenses is essential to command authority. The commander is necessarily vested with that authority because he or she is personally responsible for all that goes on in a unit – health, welfare, safety, morale, discipline, training, and readiness to execute a mission in peace and war. The Uniform Code of Military Justice (UCMJ) is the vehicle by which commanders can maintain good order and discipline in the force. Command authority is the most critical mechanism for ensuring discipline and accountability, cohesion and the integrity of the force. Increased commander involvement and accountability, not diminution thereof, is essential to continuing the culture change already ongoing. Only a commander can both direct that the fight against sexual assault and harassment is the Army's primary mission, and hold those accountable who fall short of achieving that mission.

Second, removal of the commander from the disposition decision is a solution in search of a problem. Removing commanders from their central role as convening authority will, in my professional judgment, not increase the prosecution or reporting rates for sexual assaults. Both statistical and anecdotal evidence establish that Army commanders prosecute sexual assaults at a rate favorable to civilian jurisdictions. Victims tell us, in decades of surveys and sensing sessions, that the top reasons they chose not to report a sexual assault involved the loss of privacy and the shame and embarrassment that these crimes can engender in a victim. Victims also tell us that they fear retaliation – not from their commanders – but from the perpetrators and their peers. As in civilian society, victims who report a sexual assault are subjected to a cultural response from their peers that questions or even degrades the victim. Commanders with full authority, however, can protect victim privacy and respond to any retaliation directed toward the victim.

200404

Third, comparisons to our allies and their military justice systems are misplaced. There is no single model from our allies regarding the role of the commander. Although most of these forces have reduced the role of the commander, none have removed it entirely. None of our allies implemented these changes in response to concerns about victims of sexual assault; changes were made – in most cases forced – by court rulings that the military justice systems did not adequately protect the rights of accused Soldiers. There is no statistical or empirical evidence that establishes that the system changes have increased the reporting or prosecution of sexual assault. Most critically, our allies lack the scope and scale of our operations. For example, in 2005 the U.S. had over 220,000 service members in the CENTCOM area of operations, while our largest ally, the United Kingdom, deployed approximately 9,600 to those locations. Correspondingly, over 10 years the Army alone tried 953 courts-martial in the CENTCOM theater while the United Kingdom tried none. While a centralized or more civilianized system might work for a force one-tenth our size that does not try cases in a deployed environment, that same system could cripple our current abilities to try courts-martial quickly and visibly wherever our units are sent.

Our system works best when there is a healthy dialogue between commanders and judge advocates in disposing of an allegation of misconduct. Commanders understand best the needs of good order and discipline, while judge advocates can expertly guide the range of disposition options. In the Army, we have increased that expertise by fielding special victim prosecutors and sexual assault investigators who have increased the caliber of our sexual assault advocacy across the board. That remains the best way forward. It is a solid foundation and one that we believe will resonate with the Response Systems Panel that must be allowed to deliberately examine our system, as the Congress directed last year. We will continue to prosecute where we can, but only a comprehensive approach that includes education, prevention, training, and holding commanders accountable will bring about the change in culture we seek.

Sincerely,



Dana K. Chipman
Lieutenant General, United States Army
The Judge Advocate General

August 30, 2013

The Honorable Carl Levin, Chairman
The Honorable James M. Inhofe, Ranking Member
United States Senate Committee on Armed Services
SR-228 Russell Senate Office Building
1st and C Streets, NE
Washington, DC 20510

Dear Chairman Levin and Senator Inhofe:

We urge that S. 967, the “Military Justice Improvement Act of 2013” not be included by amendment in S. 1197, the Fiscal Year 2014 National Defense Authorization Act. The proposed changes to the Uniform Code of Military Justice (UCMJ) in S. 967 would weaken a criminal justice system that prosecutes aggressively, cares for victims of crimes, and protects fully the constitutional rights of those accused of crimes. The changes directed by S. 967 will compromise the combat readiness of our Armed Forces to defend the nation—a readiness that depends on units that are disciplined, cohesive, and well led.

Commanders’ central role in the administration of military justice has evolved since 1950 as the role of military lawyers increased so that commanders at every level work closely with military lawyers to ensure the exercise of appropriate prosecutorial discretion. Commanders today are meticulously trained in their military justice responsibilities by military lawyers before—and throughout—every command assignment. At higher levels of command, training by military lawyers focuses especially on the quasi-judicial responsibilities inherent in Convening Authority duties. There simply is no civilian equivalent to these responsibilities and authority, just as there is no civilian equivalent to the gravity attached to preparing and leading our Nation’s men and women in armed conflict.

The proposition by some that “non-lawyers” (commanders) should not decide issues that lawyers usually decide in the civilian sector does not account for the unique responsibilities, training, education, and experiences of military commanders who have Convening Authority responsibilities. Commanders are responsible for everything their units do or fail to do. The interwoven responsibilities of command and convening authority enhances commanders’ ability to create and maintain disciplined, combat ready units--accountable to the Commander-in-Chief and to the American people. We served with and advised commanders at every level of our Military Departments throughout our many years of service. The dialogue between commanders and judge advocates is constant, candid, and productive. Judge Advocates advise commanders on legal issues, legal responsibilities, and statutory authority while commanders provide judge advocates with insight into morale and disciplinary needs directly related to combat readiness and unit cohesion. Commanders who fail to recognize that the bias and discordance generated by sexual assault seriously undermines combat readiness and unit cohesion should never command at any level.

Two hundred and thirty-eight years of courts-martial practice prove the proposition that military justice is key to discipline and readiness. The intersection of a skilled warrior-leader and highly trained judge advocate analyzing allegations of crime together to determine appropriate disposition is a near ideal collaboration of leader and experienced technical expert.

The success of our Armed Forces in war is a direct result of our culture and systems of discipline that generate a focused, deliberate, and formidable warrior ethos. The martial qualities that enable operational success are not creatures of happenstance. They are the product of an environment established and reinforced by commanders that maintains the balance between that ethos and the discipline critically needed to conduct combat operations in a legal and moral way.

The comparison to the Military Justice systems of allies fails to appreciate the unique breadth and complexities of U.S. military operations worldwide. No other nation has assumed a comparable responsibility. Since World War II, the United States has deployed or stationed hundreds of thousands of troops around the globe. Even today, excluding troops in Afghanistan, there are over 100,000 Soldiers, Sailors, Airmen, Marines, and Coast Guardsmen deployed or stationed overseas. This fact makes the responsibilities of command – and the critical need to maintain good order and discipline – that much more complex and challenging for commanders. Removing the authority of commanders to deal with some of the most serious criminal offenses in these circumstances severely undermines those who bear ultimate responsibility for whatever their units do or fail to do.

Our Allies' decisions to reduce commanders' military justice responsibilities have been based on the perceived or real lack of due process protections for military personnel accused of crimes. In contrast, the U.S. Congress' oversight and periodic UCMJ amendments, together with commanders' and judge advocates' effective exercise of their military justice responsibilities over generations of time ensure that the U.S. military justice system is a model for all criminal justice systems. This model is especially crucial to the U.S.; even our best allies do not have fighting forces with the diversity, discipline, and worldwide reach of the American military. We need to heed the lesson provided by the challenges the Australian military is experiencing with their disciplinary system caused by not well-considered changes five years ago to their military justice system.

S. 967 would create more change in the administration of military justice than the combined effects of the 1950, 1968, and 1983 military justice legislation. All three of the named major UCMJ legislative acts were preceded by years of careful and considered analysis by Department of Defense officials, officials of the military departments, multiple commissions and panels, and extensive congressional hearings. Today's haste to fix the perceived problem could require years of corrective action.

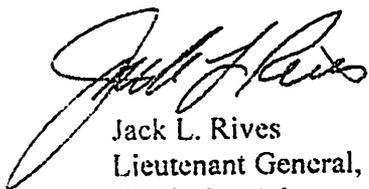
For example, the most recent modification of the UCMJ was the well-intended 2007 legislation addressing sexual assault. The 2007 legislation modified the sexual assault statute, Article 120, UCMJ, in an effort to modernize the UCMJ with a progressive, offender-focused statute. The statute, as modified, was held to be unconstitutional within three years. Congress modified Article 120 again in 2012 to correct the unanticipated consequences of the 2007 legislative change. Because of the rush to modify the UCMJ in 2007, prosecutors now must consider carefully the date of an offense to determine which of the three versions of Article 120 are applicable to the case under consideration.

The delicately balanced UCMJ, essential to good order and discipline of the U.S. Armed Forces, should undergo careful study and extensive congressional hearings whenever substantive

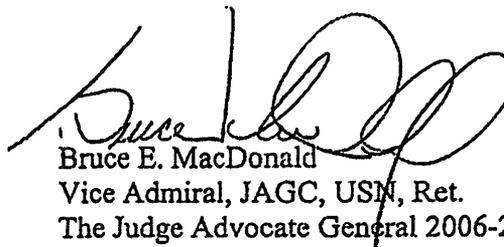
changes are contemplated. We are concerned that S. 967 is among several proposed bills that address the issue of sexual assault in the military, yet S. 967 is the only bill that would completely transform the military justice system. Of deepest concern to us is that this legislation, which goes far beyond the issue of sexual assault, has not received the thoughtful analysis and careful consideration that preceded all previous major UCMJ legislation.

The 2013 National Defense Authorization Act, Section 576, provided for the appointment of the Response Systems to Adult Sexual Assault Crimes Panel to conduct an independent review and assessment of the systems used to investigate, prosecute, and adjudicate offenses under Article 120, UCMJ for the purpose of developing recommendations concerning how to improve those systems. In addition, the Defense Legal Policy Board (DLPB) recently issued a subcommittee report on military justice in combat zones. DLPB could be yet another entity to analyze military justice, especially as regards sexual assault, and make recommendations regarding potential changes to the UCMJ. Expert, professional panels like these will be able to assess the changes of the last several years that addressed sexual assault in the military in order to determine whether to recommend further changes to the UCMJ. We recommend that in addition to reports from such entities there be extensive congressional hearings before further substantive changes to the UCMJ are considered. Careful study protects the rights of all parties involved, including the victims.

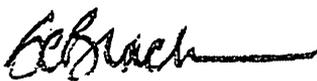
Thank you for your key leadership on this very important issue. We reaffirm our resolve that commanders of United States forces remain of vital importance to the administration of military justice, especially when fulfilling roles as Convening Authorities.



Jack L. Rives
Lieutenant General, USAF, Ret.
The Judge Advocate General 2004-2010



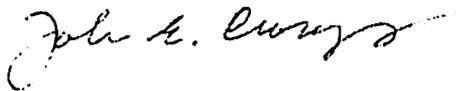
Bruce E. MacDonald
Vice Admiral, JAGC, USN, Ret.
The Judge Advocate General 2006-2009



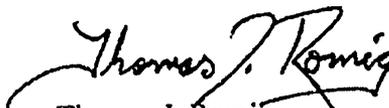
Scott C. Black
Lieutenant General, USA, Ret.
The Judge Advocate General 2005-2009



James E. McPherson
Rear Admiral, JAGC, USN, Ret.
The Judge Advocate General 2004-2006



John E. Crowley
Rear Admiral, USCG, Ret.
The Judge Advocate General 2003-2006



Thomas J. Romig
Major General, USA, Ret.
The Judge Advocate General 2001-2005



Donald J. Guter
Rear Admiral, JAGC, USN, Ret.
The Judge Advocate General 2000-2002



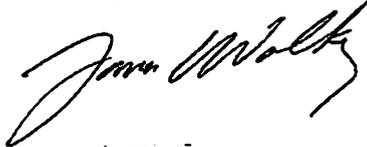
Bryan G. Hawley
Major General, USAF, Ret.
The Judge Advocate General 1996-1999



Michael J. Nardotti, Jr.
Major General, USA, Ret.
The Judge Advocate General 1993-1997



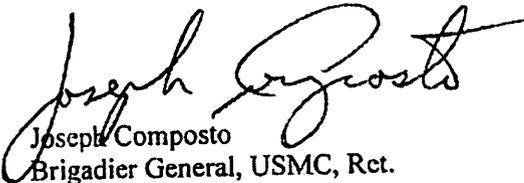
Harold Erick Grant
Rear Admiral, JAGC, USN, Ret.
The Judge Advocate General 1993-1997



James C. Walker
Brigadier General, USMC Ret.
SJA to the Commandant 2006-2009



Kevin M. Sandkuhler
Brigadier General, USMC, Ret.
SJA to the Commandant 2001-2006



Joseph Composto
Brigadier General, USMC, Ret.
SJA to the Commandant 1999-2001



Theodore G. Hess
Brigadier General, USMC, Ret.
SJA the Commandant 1996-1999



DEPARTMENT OF THE NAVY
OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON NAVY YARD
1322 PATTERSON AVENUE SE SUITE 3000
WASHINGTON DC 20374-5066

IN REPLY REFER TO

July 24, 2013

The Honorable Lindsey O. Graham
Committee on Armed Services
United States Senate
Washington, DC 20510

Dear Senator Graham:

Thank you for the opportunity to provide my position on current legislative proposals to remove commanders from the decision-making process for serious offenses under the Uniform Code of Military Justice (UCMJ). We share a common goal of eliminating sexual assault and other serious crimes from our ranks, providing adequate victim care and support, and ensuring offenders are held appropriately accountable. The right solution is one that responds to the problem and is properly tailored to avoid harmful second- and third-order effects. Most importantly, any legislative solution must account for both the critical role that commanders play in military justice and the due process rights of the accused. While I am receptive to legislative proposals that assist the military in confronting the challenge of sexual assault, proposals that seek to remove commanders from military justice may prove counterproductive to our efforts to respond effectively to allegations of sexual assault.

Effective, permanent change in our military must be implemented through commanders. The authority of the commander is the bedrock of our military structure. Commanders are responsible and accountable for the safety, health and welfare of their people; commanders must have authority commensurate with this responsibility, and that includes the authority to maintain good order and discipline. This authority is critical to the integrity and effectiveness of our fighting forces. Removing disciplinary authority over serious offenses denies commanders a vital enforcement tool to ensure a safe workplace, to maintain a healthy command climate promoting dignity and respect for all, and to field a force ready to execute the mission successfully – at sea and ashore, in peace and at war.

Some of the legislative efforts to eliminate or diminish the authority of the commander in the military justice system are premised on a belief that an independent decision-maker will encourage greater numbers of victims to come forward or will increase the number of offenders who are held accountable. Service members must be confident in our reporting process, and we must be sensitive to victims who fear that reporting an offense will lead to retaliation or stigmatization. The data suggest that victims choose not to report crimes of sexual assault for many reasons. Some may feel shame or embarrassment; others may feel that the accountability process will cause even greater trauma. Still others are concerned with retaliation; however, the retaliation they fear is typically from perpetrators and peers, not commanders. Removing the commander from the disciplinary decision-making process does not address this concern and may, in fact, exacerbate it. This conclusion is consistent with the experience of our allies, who have seen no correlation between victim reporting and their military justice systems. Regardless

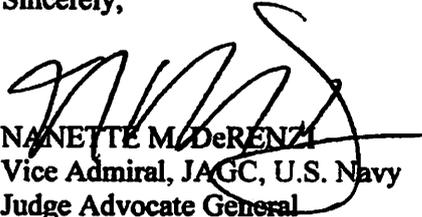
of who makes decisions to prosecute cases, commanders retain the responsibility to work proactively with victims in their commands to ensure they receive the care and support they require. That support includes providing medical treatment, victim advocacy and counseling assistance; facilitating expedited transfers upon request; issuing military protective orders; and, offering logistical and other support to assist the victim through the course of the investigation and military justice proceedings.

Today, commanders make informed disciplinary decisions with the advice of experienced Navy judge advocates who review investigative reports, assess the strength of each case, and make charging recommendations. Removing the commander from the decision-making process is, therefore, not likely to result in an increased rate of prosecution. In fact, contrary to the assumption that underlies the current legislative proposals, removing the commander from the decision-making process might result in fewer prosecutions and reduced confidence in our system. Unlike an independent judge advocate, commanders have a vested interest in the judicial process as a tool to further good order and discipline, and are therefore less likely to make disposition decisions based purely on the likelihood of conviction. The commander's interest is in the process, not necessarily the result. In my experience, commanders take their responsibility seriously and are committed to eradicating sexual assault, protecting the due process rights of the accused, and holding offenders appropriately accountable.

We must ensure that proposed changes to the military justice system do not adversely impact the interests of justice, the rights of crime victims, and the rights afforded the accused. This is particularly important as we consider legislative proposals that seek to fundamentally alter the structure of the current military justice system. To maintain the proper balance of these interests and ensure the system remains constitutionally sound and responsive, changes to the military justice system must be made with care, deliberation, and focused study. To that end, the Response Systems Panel created by Section 576 of the FY13 National Defense Authorization Act should be given the opportunity to complete its independent assessment of the systems used to investigate, prosecute, and adjudicate sexual assaults before legislating changes of this magnitude.

We remain committed to ensuring the military justice system works fairly, guarantees due process, maintains good order and discipline, provides justice to victims of crimes, and is accountable. I look forward to working with Congress on appropriate changes to the UCMJ that further these objectives. I am willing and ready to assist Members of Congress in understanding how various pieces of proposed legislation may help, or perhaps hinder, our efforts in this challenge. Thank you for the opportunity to provide my views.

Sincerely,



NANNETTE M. DeRENZI
Vice Admiral, JAGC, U.S. Navy
Judge Advocate General

400403

STATEMENT
OF
MAJGEN VAUGHN ARY
U.S. MARINE CORPS
STAFF JUDGE ADVOCATE TO THE COMMANDANT OF THE MARINE CORPS
BEFORE THE
SENATE COMMITTEE ON ARMED SERVICES
SUBCOMMITTEE ON PERSONNEL
HEARING:
“SEXUAL ASSAULT IN THE MILITARY”
MARCH 13, 2013

FOR OFFICIAL USE ONLY
UNTIL RELEASED BY THE
COMMITTEE ON ARMED SERVICES
US SENATE

Chairman Gillibrand, Ranking Member Graham, and Members of the Subcommittee, thank you for the opportunity to testify here today.

The Department of Defense (DoD), and specifically the Marine Corps, has made significant changes to the process of litigating sexual assault cases, and continues to make tremendous progress in providing services and care vital for victims of sexual assault. We have taken a holistic approach to combating sexual assault in the Marine Corps, by implementing a number of initiatives to improve our ability to respond to allegations across the entire spectrum of a case, from initial reporting through trial and post-trial matters. We continue to support Congress's effort to study the progress that has been made through the independent reviews and assessments directed by the Fiscal Year 2013 (FY13) National Defense Authorization Act (NDAA).

My testimony will address two major topics. The first major topic is the progress of the military's initiatives to combat sexual assault. Our military leaders are constructively focused on the important issue of sexual assault. As a result, our provision of victim services has improved and our provision of legal services has undergone significant change. In the Marine Corps, the Commandant's Sexual Assault Campaign Plan, including a complete reorganization of the Marine Corps legal community, highlights the proactive stance we have taken in addressing this matter. The independent reviews and assessments directed by the FY13 NDAA provide an opportunity for us to evaluate these changes and determine where additional reform is needed. The second topic of this testimony is an overview of the military justice process as it exists today following the many changes that have been made over the past few years. This overview will highlight the success we are having in four areas essential to reducing the incidence of sexual assault: prevention, investigation, victim services, and prosecution. It will also detail the ongoing efforts to make constant improvements in each of these areas.

The Progress of Current Sexual Assault Initiatives in the Military

In the area of sexual assault, the Marine Corps today is significantly different than it was just one year ago, and one year from now it will look significantly different simply based on our implementation of current initiatives and legislative requirements. We anticipate that these changes will have positive effects on the prevention of and response to sexual assault, to include more professional investigation, prosecution, and defense of sexual assault cases.. Initial feedback, whether empirical or anecdotal, indicates that we have improved the legal processes related to the prosecution and defense of sexual assault cases, and we are expecting continued improvement. Prior to discussing the specific improvements to the litigation of Marine Corps sexual assault cases, it is important to first analyze the recent legislative and policy changes affecting this area.

Legislative changes

The FY12 NDAA made several changes to the area of sexual assault. Most notable are the reform of offenses relating to rape, sexual assault, and other sexual misconduct under the Uniform Code of Military Justice; the addition of 10 U.S.C. § 1565b providing victims of sexual assault access to legal assistance and the services of Sexual Assault Response Coordinators

(SARC) and Sexual Assault Victim Advocates (VA); the addition of 10 U.S.C. § 673 providing for the consideration of applications for permanent change of station or unit transfer for members on active duty who are the victim of a sexual assault or related offense; and four other sections on sexual assault prevention and response.

On June 28, 2012, a new version of the Uniform Code of Military Justice (UCMJ) sexual assault statute, Article 120, took effect. The statute it replaced was the 2007 version of Article 120, which completely rewrote the original Article 120 statute to model it on the federal scheme for sexual assault. Among other things, the 2007 statute made it very difficult to prosecute alcohol-facilitated sexual assaults, one of the most common types of sexual assaults found in the military. The 2012 statute adopted an “offender-centric” scheme that focuses on offenders’ actions, and not the behavior of the victim, to determine culpability. Military trial and appellate courts are just beginning to use the new statute, and it will take time to acquire measures of effectiveness for the new statute.

The FY13 NDAA contains twelve specific sections related to sexual assault,. The provisions cover all aspects of sexual assault, to include training, prevention, investigation, and prosecution. Most notably, the FY13 NDAA directs the Secretary of Defense to establish two independent panels to review and assess the UCMJ and judicial proceedings related to sexual assault cases.

One of the most important parts of the FY13 NDAA is the Act’s acknowledgement, in creating these two independent panels, that changes to military justice involving just one subset of crimes, or changes that significantly alter the role of the commander in military justice, should be carefully studied. I cannot overstate my agreement with this principle. I believe a thoughtful and well-researched comparison of military and civilian jurisdictions will provide valuable information for you to make decisions about the efficacy and viability of the military justice system and the role of the commander. I believe the role of the commander in all aspects of military justice is best addressed through deliberate study by the FY13 NDAA-mandated panels.

Section 576 of the FY13 NDAA creates two panels that will “conduct an independent review and assessment of the systems used to investigate, prosecute, and adjudicate crimes involving adult sexual assault and related offenses.” Both panels will specifically address the role of the commander in military justice. The first panel, the Response Systems Panel (RSP), may last for up to eighteen months and will contain five members selected by the Secretary of Defense, and two members selected by both the Senate and House Armed Services Committees. Specific tasks for the RSP include: an assessment of the strengths and weaknesses of the UCMJ in prosecuting sexual assaults; a comparison of military and civilian systems, to include best practices for victim support; the assessment of advisory sentencing guidelines for sexual assaults; a comparison of the training level of military prosecutors and defense counsel compared to Federal and State court systems; an assessment of military court-martial conviction rates with Federal and State courts; an assessment of the roles and effectiveness of commanders at all levels in preventing and responding to sexual assaults; an assessment of the strengths and weaknesses of proposed legislative initiatives to modify the current role of commanders in the administration of military justice; and an assessment of the adequacy of systems to support and protect victims. The second panel, the Judicial Proceedings Panel (JPP) will convene upon completion of the

RSP and last for up to six months. It will contain five members, two of whom must have served on the RSP. The JPP will use the information collected and analyzed by the RSP to complete the following tasks: make recommendations regarding proposed reforms to the UCMJ; review and evaluate the adjudication of sexual assault offenses by the military in criminal and administrative fora, including the punishments determined; identify trends in punishment by courts-martial compared to Federal and State courts; review and evaluate sexual assault court-martial convictions that were reduced or set aside on appeal; review instances when prior sexual conduct of an alleged victim was considered at an Article 32 hearing; review instances when the prior sexual conduct of an alleged victim was introduced by the defense at a court-martial; assess trends in training of military prosecutors and defense counsel; monitor the implementation of the FY13 NDAA requirement for a special victim prosecution capability; and monitor the recent Secretary of Defense decision to withhold initial disposition authority to a higher level of command for certain sexual assault offenses.

Department of Defense changes

Independent of Congressional action in the area of sexual assault, the Secretary of Defense has made numerous changes in the areas of sexual assault reporting, investigation, and disposition. On April 20, 2012, the Secretary of Defense issued a memorandum withholding initial disposition authority for certain sexual assault offenses to the O-6 Special Court-Martial Convening Authority (SPCMCA) level (a disposition authority that previously could have been exercised by O-5 SPCMCAs). On October 1, 2012, the Defense Sexual Assault Incident Database (DSAID) became fully operational. DSAID originated from an FY09 NDAA requirement for a centralized, case-level database that collected and maintained information regarding sexual assaults involving members of the Armed Forces. On January 22, 2013, the DoD Inspector General (IG) informed the services' senior judge advocates that he intended to issue a survey of sexual assault victims to better understand the effectiveness of current support programs and to help guide improvements to them. On January 25, 2013, Department of Defense Instruction (DoDI) 5505.18 "Investigation of Adult Sexual Assault in the Department of the Defense" was published. DoDI 5500.18 specifically requires Military Criminal Investigative Organizations (MCIO) to investigate all adult sexual assaults. On February 28, 2013, the DoD IG released its Investigative Oversight Report "Evaluation of the Military Criminal Investigative Organizations' Sexual Assault Investigation Training." This report recommended an MCIO working group to review the continuum of sexual assault investigation training at the entry, refresher, and advanced levels.

Service-level changes

Internal to the Marine Corps, there have been four major developments in the last year that will improve the administration of military justice. The first development began in June 2012, when the Commandant issued his Sexual Assault Prevention and Response Campaign Plan, a three-phase strategy developed by an Operational Planning Team (OPT) whose members the Commandant personally selected. Chaired by a general officer and comprised of highly respected senior officers and enlisted Marines, the OPT used the same planning techniques and processes we use to engage the enemy on the battlefield. The OPT aggressively analyzed the problem of sexual assault in our ranks, looking for solutions across the wide spectrum of

prevention and response. The resulting Campaign Plan is a commander-led, holistic approach that improves our ability to prevent and respond to sexual assaults. Our goal is to change behaviors—the behavior of Marines who might commit sexual assault, bystanders who can intervene and prevent sexual assault, and commanders, leaders, and professionals who respond to sexual assault. In a November 2012 interview, the Commandant said, “Classes are being held, not by a 21-year-old corporal, but the General Officer, the Colonel, and the Sergeant Major. So this is a fight. It won’t be won this year or next. Will we get there? We’re part of society. But, we are determined to eradicate sexual assault in the Marine Corps. It’s a personal thing with me.”

To personally deliver the message of the Campaign Plan and ensure that Marines truly understand the need to change our culture regarding the prevention of and response to sexual assault, the Commandant traveled around the world speaking to his leaders in a series of Heritage Speeches. In these speeches, the Commandant discussed the special trust and respect that Marines have earned from the nation, and the vast responsibility Marines of today have in maintaining that trust and respect. The Commandant emphasized no matter how successful we are on the battlefield against our nation’s enemies, the Marine Corps could lose all of that respect if we as Marines did not take care of our fellow Marines – America’s brothers and sisters, sons and daughters, fathers and mothers. The Commandant made it clear that sexual assault is not acceptable and that he would not tolerate it. He directed his Marines to learn more about the situations that may lead to sexual assault, prevent those situations from occurring, and if a sexual assault did occur, to embrace the victim and provide that Marine the support they needed. Attachment A contains a summary of the Commandant’s Campaign Plan initiatives and requirements.

The second development was the Commandant’s complete reorganization of the Marine Corps legal community. Previously, legal centers were decentralized and operated independently of each other. They were also limited to their own organic capability to address cases in their geographic location, regardless of complexity. Based on an analysis of the growing complexity of case types on the court-martial docket, to include sexual assaults, the Commandant directed a regionalized model that could better leverage training and experience to provide the proper level of expertise on the most complex courts-martial, regardless of location. This reorganization had an immediate and tremendously positive impact on the ability of judge advocates to prosecute complex cases and is discussed in more depth below in the section on courts-martial.

The third development in the last year involved two statutory modifications of the authority of Staff Judge Advocate to the Commandant of the Marine Corps (SJA to CMC). The first statutory change involved the supervisory authority of the Staff Judge Advocate to the Commandant of the Marine Corps (SJA to CMC). The FY13 NDAA modified 10 U.S.C. § 5046 to codify the SJA to CMC’s authority to provide legal advice to the Commandant and supervise the Marine legal community. Prior to this statutory change, the SJA to CMC exercised this authority as delegated to him by regulation. In the second statutory change, 10 U.S.C. § 806 was modified to grant the SJA to CMC inspection and supervisory authority over the administration of military justice within the Marine Corps. These statutory changes recognize the unique nature of the Marine Corps as a second service within the Department of the Navy

and make the SJA to CMC accountable for ensuring military justice services are meted out efficiently, professionally, and effectively.

The fourth development of the last year involved improvements in the ability to provide transparency and visibility of courts-martial cases to all levels of command. During FY12, the Marine Corps began a Case Management System (CMS) pilot program with the U.S. Navy. The Judge Advocate General of the Navy (JAG) determined that CMS presented the best way forward in order to meet a Congressionally-mandated requirement for the entire department to use a single case tracking system. Based on the JAG's input, the Secretary of the Navy selected CMS as the departmental case tracking system. At the close of FY12, the Marine Corps and the Navy were working hand-in-hand to ensure that the CMS expansion will be completed by July 2013, the deadline set by Congress.

Overview of the Marine Corps' Military Justice Process for Sexual Assaults

An allegation of sexual assault

When a Marine alleges that he or she is a victim of sexual assault, that allegation triggers a comprehensive system of required victim and legal responses. Commanders, law enforcement, victim advocates, and judge advocates are all required to comply with their statutory and regulatory responsibilities in order to respond to victims' needs and determine appropriate offender accountability.

Victim Response. In accordance with Marine Corps Order (MCO) 1752.5A, "Sexual Assault Prevention and Response (SAPR) Program," a sexual assault victim has the option of filing a restricted or unrestricted report. A restricted report affords military victims of sexual assault the option to make a confidential report to specified individuals (SARC, VA, Uniformed Victim Advocate (UVA), counselors, and healthcare providers) without requiring those officials to report the matter to law enforcement or initiate an official investigation. Individuals making restricted reports can also utilize the full-range of victim services received by victims who make unrestricted reports. Filing an unrestricted report requires that all suspected, alleged, or actual sexual assaults made known to command or law enforcement be submitted for formal investigation. An unrestricted report is the first "trigger" for a variety of victim and legal responses.

Following an unrestricted report, a Commander is required by MCO 1752.5A to take a number of initial steps. These steps include ensuring the physical safety and emotional security of the victim; determining if the victim desires/needs any emergency medical care; notifying the appropriate MCIO, as soon as the victim's immediate safety is ensured and medical treatment is provided; to the extent practicable, strictly limiting knowledge of the facts or details regarding the incident; taking action to safeguard the victim from any formal or informal investigative interviews or inquiries, except those conducted by the appropriate MCIO; ensuring the SARC is notified immediately; collecting only the necessary information (e.g. victim's identity, location and time of the incident, name and/or description of offender(s); advising the victim of the need to preserve evidence (by not bathing, showering, washing garments, etc.) while waiting for the arrival of representatives of the MCIO; ensuring the victim understands the availability of victim

advocacy and the benefits of accepting advocacy and support; asking if the victim needs a support person, which can be a personal friend or family member, to immediately join him or her; immediately notifying a VA for the victim; asking if the victim would like a Chaplain to be notified and notify accordingly; determining if the victim desires/needs a "no contact" order or a Military Protective Order, DD Form 2873, to be issued, particularly if the victim and the accused are assigned to the same command, unit, duty location, or living quarters; ensuring the victim understands the availability of other referral organizations staffed with personnel who can explain the medical, investigative, and legal processes and advise the victim of his or her victim support rights; and listening/engaging in quiet support of the victim to assure the victim that she/he can rely on the commander's support.

After making an unrestricted report, a Marine can request an expedited transfer. In accordance with the Commandant's Letter of Instruction on submitting and processing these expedited transfer requests, commanding officers "shall... expeditiously process a request for transfer of a Marine who files an unrestricted report of sexual assault. Every reasonable effort shall be made to minimize disruption to the normal career progression of Marines who seek transfer..." The letter further mandates expedited processing timelines, establishes a presumption in favor of transferring the Marine requesting transfer, and establishes a process to appeal a denial of that request to a general officer. This process allows a victim to request assignment to a different unit for his or her physical and/or mental well-being. Since February 28, 2012, 57 Marines have requested expedited transfer and all but one of the requests have been approved. The one Marine who was denied an expedited transfer was temporarily assigned to a service school when she requested the expedited transfer. The commander was able to return the Marine to her parent unit, which effectively accomplished the goal of separating her from the alleged offender.

At this early stage of the process, the Marine Corps also requires commanders of victims to submit an "8-day brief" to the first general officer in their chain of command, which provides general officers with valuable data about any trends in sexual assaults in their command and ensures all relevant victim services are being provided.

This past year, the Marine Corps also implemented 10 U.S.C. §1565b, which makes legal assistance, assistance by a SARC, and assistance by a sexual assault victim advocate available to victims of sexual assault. Additionally, 10 U.S.C. §1565b requires that victims of sexual assault be informed of the availability of such services as soon as practicable after the victim reports the sexual assault. The Marine Corps uses legal assistance attorneys to provide victims information about the following areas: (1) the Victim and Witness Assistance Program (VWAP), including the rights and benefits afforded the victim, such as the victim advocate privilege; (2) the differences between the two types of reporting in sexual assault cases (restricted and unrestricted); (3) the military justice system, including the roles and responsibilities of the prosecutor, defense counsel, and investigators; (4) services available from appropriate agencies or offices for emotional and mental health counseling and other medical services; (5) the availability of and protections offered by civilian and military protective orders; and (6) eligibility for and benefits potentially available as part of the transitional compensation program. Additionally, prosecutors will explain to victims how their privacy is protected under the military rape shield rule, Military Rule of Evidence (M.R.E.) 412.

In addition to the new counseling provided by legal assistance attorneys, the Marine Corps is also increasing the quality and professionalism of victim advocate services available to victims of sexual assault. Per the FY12 NDAA, all SARCs, VAs, and UVAs are mandated to complete 40 hours of specialized victim advocacy training, as part of the new credentialing requirements for Sexual Assault Prevention and Response (SAPR) personnel. This initiative reinforces the Marine Corps ability to ensure that SAPR personnel remain well equipped to establish a close and supportive relationship with victims, and to help victims understand their legal and privacy rights.

In response to another FY12 NDAA requirement, in FY13, the Marine Corps will hire 47 full-time civilian SARC and VA billets (25 SARCs and 22 VAs). The 25 new SARCs will greatly augment our current staff of 17, giving us a total of 42 full-time SARCs by the end of FY13. The 22 new VAs will be exclusive to the SAPR branch, and will augment the existing 42 VAs who are supported by the Family Advocacy Program. In addition, there are currently 67 Command SARCs and 813 UVAs across the Marine Corps. These new SARC and VA positions represent a move from part-time collateral duty billet holders to a professionalized cadre of victim service providers. The Marine Corps will also establish Sexual Assault Response Teams (SART), which is a collaboration with the Naval Criminal Investigative Service (NCIS), legal, medical, and other entities, designed to facilitate a multi-disciplinary approach to victim care, reduce re-victimization, and to provide a holistic response that extends beyond the boundaries of any one response service. The SARTs will also conduct quarterly reviews of regional trends in victim services.

Determining Offender Accountability. DoD Instruction 5505.18, dated 25 January 2013, directs MCIOs, including NCIS, to initiate investigations of all offenses of adult sexual assault of which they become aware that occur within their jurisdiction, regardless of the severity of the allegation. When NCIS initiates a sexual assault investigation, it will also investigate threats against the sexual assault victim, to include minor physical assaults and damage to property. If an adult sexual assault allegation is referred to another agency (e.g., local law enforcement or the Marine Corps Criminal Investigative Division), the reason for the referral must be fully documented in an investigative report that identifies the agency and states whether the MCIO will be involved in either a joint investigative or monitoring capacity. This Instruction also provides minimum training standards for the primary MCIO investigator assigned to conduct an investigation of sexual assault and provides standards for records maintenance.

The Marine Corps is working with the Navy to increase Sexual Assault Forensic Examination (SAFE) accessibility and the Sexual Assault Nurse Examiner capability. In addition, NCIS is utilizing the Adult Sexual Assault Program (ASAP), a surge team response to adult sexual assault cases to increase efficiency and expedite the handling of cases. Members of ASAP will receive comprehensive sexual assault training.

Investigation referred to a colonel commander for a disposition decision

On April 20, 2012 the Secretary of Defense (SecDef) issued a memorandum withholding initial disposition authority (IDA) in certain sexual assault offenses to the colonel, O-6, SPCMCA level. The SecDef withheld the authority to make a disposition decision for penetration offenses, forcible sodomy, and attempts to commit those crimes. This withholding of IDA to a Sexual Assault Initial Disposition Authority (SA-IDA) also applies to all other alleged offenses arising from or relating to the same incident, whether committed by the alleged offender or the alleged victim (i.e., collateral misconduct). On June 20, 2012, the Commandant expanded this withholding to include not just penetration and forcible sodomy offenses, but all contact sex offenses, child sex offenses, and any attempts to commit those offenses. The Marine Corps also made it clear that in no circumstance could the SA-IDA forward a case down to a subordinate authority for disposition. For example, if a Marine was initially accused of a non-consensual sex offense, along with orders violations and adultery, but the NCIS investigation did not substantiate the non-consensual sex offense, the SA-IDA would still be required to make the disposition decision on the remaining non-sexual assault offenses, even if those types of offenses were of the type normally handled at lower levels of command. The result is that the USMC now has a smaller group of more senior and experienced officers making disposition decisions for all sexual offense allegations and any related misconduct.

In accordance with Rule for Court-Martial (RCM) 306(c), prior to trial, a convening authority (the SA-IDA for sexual assaults) may dispose of charged or suspected offenses through various means: "Within the limits of the commander's authority, a commander may take the actions set forth in this subsection to initially dispose of a charge or suspected offense," by taking (1) no action, (2) administrative action, (3) imposing nonjudicial punishment, (4) disposing of charges through dismissal, (5) forwarding charges to a superior authority for disposition, or (6) referring charges to a court-martial.

Before making a decision regarding the initial disposition of charges, the convening authority must confer with his or her staff judge advocate (SJA), whose primary duties are to provide legal advice to commanders. In the Marine Corps model for providing legal services, the provision of legal services support (i.e. trial and defense services, review, civil law, legal assistance) is completely divorced from the provision of command legal advice. Practically, this means the commander's SJA is not affiliated with the prosecutors who evaluate the evidence in the case and recommend whether to take a case to trial. Effectively, this ensures the commander and his SJA receive impartial advice (in addition to information from NCIS) in order to make an appropriate and well-informed disposition decision in accordance with RCM 306.

If a commander decides to proceed with charges against an alleged offender, the commander will file a request for legal services with the Legal Services Support Section (LSSS) or Legal Services Support Team (LSST) that services his or her command. Before a case can go to a felony-level trial, a general court-martial, the commander must first send the case to an Article 32 investigation.

According to Article 32, UCMJ, "[n]o charge or specification may be referred to a general court-martial for trial until a thorough and impartial investigation of all the matters set forth therein have been made." A general court-martial may not proceed unless an Article 32 investigation has occurred (or the accused has waived it). Unlike a grand jury under Federal

Rule of Criminal Procedure 6, the proceeding is not secret and the military accused has the right to cross-examine witnesses against him or her.

RCM 405 governs the conduct of the Article 32 investigation and states in its discussion that “the investigating officer should be an officer in the grade of major... or higher or one with legal training... and may seek legal advice concerning the investigating officer’s responsibilities from an impartial source.” As a matter of regulation in the Marine Corps, for a case alleging a sexual assault, the Article 32 investigating officer (IO) must be a judge advocate who meets specific rank and experience requirements, in accordance with Marine Corps Bulletin (MCBul) 5813, “Detailing of Trial Counsel, Defense Counsel, and Article 32, UCMJ, Investigating Officers.” MCBul 5813 was published on 2 July 2012 and ensures that judge advocates who are detailed as trial counsel (TC), defense counsel (DC), and Article 32 IOs possess the appropriate expertise to perform their duties.

Once the Article 32 investigation is complete, the IO makes a report to the convening authority that addresses matters such as the sufficiency and availability of evidence; and that more importantly, contains the IO’s conclusions whether reasonable grounds exist to believe that the accused committed the offenses alleged and recommendations, including disposition. Although the rules of evidence generally do not apply at an Article 32 investigation, it is important to note that the evidentiary rape shield and all rules on privileges do apply, providing a level of protection for the victim.

The convening authority again receives advice from his or her staff judge advocate, and then decides how to dispose of the charges and allegations. Prior to making a disposition decision, convening authorities take the victim’s preference into consideration. If the commander decides to move forward, he or she may refer the charges to a general court-martial or a lesser forum.

Court-martial

Alcohol facilitated acquaintance sexual assaults are one of the most difficult criminal offenses to prosecute, regardless of jurisdiction. Within the military, they are also the most common type of sexual assaults that our investigators and prosecutors confront. Our analysis of ways to improve sexual assault prosecutions uncovered a broader overall trend in military justice. We noticed an increase in complex and contested cases as a percentage of our total trial docket. We realized that our historical model of providing trial services needed to be revised to better handle these complex cases, many of which involve sexual assault. The Commandant, as an example of the importance of the commander in the administration of military justice, therefore directed us to reorganize our legal community into a regional model that gives us the flexibility to better utilize the skills of our more experienced prosecutors. Practically speaking, our new regional model, which became fully operational on October 1, 2012, allows us to place the right prosecutor, with the appropriate training, expertise, supervision, and support staff, on the right case, regardless of location.

The legal reorganization greatly increases the legal expertise (based on experience, education, and innate ability) available for prosecuting complex cases. The reorganization

divided the legal community into four geographic regions — National Capital Region, East, West, and Pacific. These regions are designated Legal Service Support Areas (LSSA) and are aligned with the structure of our regional installation commands. Each LSSA contains a LSSS that is supervised by a colonel judge advocate officer-in-charge. Each LSSS contains a Regional Trial Counsel (RTC) office that is led by an experienced lieutenant colonel litigator whose extensive experience provides effective regional supervision over the prosecution of courts-martial cases. This new construct provides for improved allocation of resources throughout the legal community and ensures that complex cases, such as sexual assaults, are assigned to experienced counsel who are better suited to handle them.

While the Marine Corps does not specifically identify “special victim prosecutors,” this capability resides in the RTC offices through the use of Complex Trial Teams (CTT). The CTT is assembled for specific cases and may contain any or all of the following: a civilian Highly Qualified Expert (HQE), experienced military prosecutors, military criminal investigators, a legal administrative officer, and a paralegal. The civilian HQE has an additional role training and mentoring all prosecutors in the region. The HQEs are assigned to the RTCs and work directly with prosecutors, where they will have the most impact. HQEs report directly to the RTC and provide expertise on criminal justice litigation with a focus on the prosecution of complex cases. In addition to their principal functions of training and mentoring prosecutors, the HQEs also consult on the prosecution of complex cases, develop and implement training, and create standard operating procedures for the investigation and prosecution of sexual assault and similarly complex cases. The criminal investigators and the legal administrative officer in the RTC office provide a key support role in complex prosecutions. Historically, a prosecutor was individually burdened with the coordination of witnesses and experts, the gathering of evidence, background investigations, and finding additional evidence for rebuttal, sentencing, or other aspects of the trial. These logistical elements of a trial are even more demanding in a complex trial; the presence of criminal investigators and the legal administrative officer allow Marine Corps prosecutors to focus on preparing their case.

To support our prosecutors further, we created a Trial Counsel Assistance Program (TCAP) at our Judge Advocate Division Headquarters. Our TCAP consolidates lessons learned from throughout the Marine Corps and provides training and advice to our prosecutors in each region. The TCAP provides specialized training through regional conferences focused on the prosecution of sexual assaults. These training events include speakers on law enforcement techniques, victim and offender typology, expert witnesses, forensics, and the art of persuasion. Our reserve judge advocates, who are experienced criminal prosecutors, are made available to mentor our active duty judge advocates either during trainings or on specific cases.. Our TCAP also coordinates on a regular basis with the DoD Sexual Assault and Prevention Office to ensure Marine Corps initiatives meet DoD requirements. To ensure an adequate level of experience and supervision not only at the headquarters level, but also in each LSSS and LSST, we more than doubled the number of field grade prosecutors we are authorized to have on our rolls from 11 to 25. We also specifically classified certain key military justice billets to require a Master of Laws degree in Criminal Law.

As I mentioned earlier, any change I recommend to the Marine Corps’ system of dealing with sexual assault must carefully balance our ability to prosecute sexual assaults with our ability

to defend Marines accused of sexual assault. As concerned as I am that I have well-trained and competent prosecutors, I am equally concerned that each Marine accused receives a constitutionally fair trial that will withstand the scrutiny of appeal. To that end, last year we established the Marine Corps Defense Services Organization (DSO), which placed all trial defense counsel under the centralized supervision and operational control of the Chief Defense Counsel (CDC) of the Marine Corps. This change was designed to enhance the independence of the Marine Corps DSO and the counsel assigned to it, while enhancing the efficiency and effectiveness of available services. The DSO also established a Defense Counsel Assistance Program (DCAP) to provide assistance and training to the DSO on sexual assault and other cases.

During the court-martial process, special care is taken to ensure that the rights and interests of victims continue to be protected. The M.R.E. provides the same protections as our Federal and State courts against the humiliation, degradation and intimidation of victims. Under MRE 611, a military judge can control the questioning of a witness to protect a witness from harassment or undue embarrassment. More specifically for sexual assault cases, the military's "rape shield" in MRE 412 ensures that the sexual predisposition and/or behavior of a victim is not admissible absent a small set of well-defined exceptions that have survived extensive appellate scrutiny in federal and military courts (the exceptions listed in MRE 412 are identical to the exceptions listed in Federal Rule of Evidence 412). In addition, victims also have the protection of two special rules on privileges. Under MRE 513, a patient (victim) has the privilege to refuse to disclose, and prevent another person from disclosing, a confidential communication between the patient and a psychotherapist. Under MRE 514, the military has created a "Victim advocate-victim privilege" that allows a victim to refuse to disclose, and prevent another person from disclosing, a confidential communication between the victim and a victim advocate in a case arising under the UCMJ. These two evidentiary privilege rules ensure that victims have a support network they are comfortable using and that they do not have to fear that their efforts to improve their mental well-being will be used against them at a court-martial.

Convening Authority's Clemency Power

I am aware that the discretion of a convening authority under Article 60 is an issue of extreme importance to you based on the recent Air Force case. In that case, the convening authority dismissed a sexual assault offense after setting aside a guilty finding that was voted on by a panel of officer members. A commander setting aside a finding is atypical, and even rarer in cases involving sexual assault offenses. In order to assess the manner in which today's convening authorities exercise their clemency power, a 2007 Naval Law Review article examined 807 Navy and Marine Corps special and general courts-martial convened between 1999 and 2004. The author found that Convening Authorities exercised clemency in only about 4% of the cases, and in only about 2% of the cases that were convened in 2003 and 2004. A review of the Marine Corps cases over the past two fiscal years revealed similar results. Of the 967 general and special courts-martial cases in FY11 and FY12 that resulted in convictions, findings of guilty were disapproved in only 5 cases—less than 1% of the total amount of cases. None of the findings of guilty were disapproved for sexual assault offenses. More specifically, in FY12, for 115 general courts-martial (GCM) and 285 SPCMs, no guilty findings were set

aside for GCMs and 1 guilty finding was set aside for a SPCM. In FY11, for 154 GCMs and 413 SPCMs, findings were set aside in 3 GCMs and 1 SPCM.

A key reason for the Article 60 clemency authority involves situations where an accused faces multiple offenses at a general court-martial, and the most serious offense results in an acquittal. For example, an accused might face a general court-martial for the offenses of sexual assault, adultery, and violating an order on underage drinking. If the accused is acquitted of the sexual assault, he is left with a felony conviction for adultery and underage drinking. Standing alone, those two offenses are often handled at a lower misdemeanor forum, a special court-martial, or with administrative measures. In this type of situation, the convening authority may use his authority under Article 60 to dispose of the lower-level offenses in a more appropriate forum.

The Article 60 clemency authority is also closely linked to the sentencing aspect of a court-martial. Article 60 provides the authority to modify the sentence of a court-martial, which is a key component of the guilty plea process. In our military justice system, an accused can submit a pre-trial agreement asking for sentencing protection in exchange for his or her plea of guilty. However, even if the plea agreement is approved, the military judge or members are unaware of the protection contained in the agreement and will sentence the accused in a manner they feel appropriate based on the relevant evidence and facts and circumstances of the case. After the sentence is announced in court, the sentencing limitations agreed to by the convening authority will be honored in the post-trial process, pursuant to the convening authority's clemency power under Article 60. If the convening authority lacked this power, there would be no incentive for an accused to plead guilty, which would greatly hinder judicial economy and slow down the adjudication of the entire court-martial docket.

Article 60 interfaces with key aspects of the UCMJ and serves an important role in maintaining a commander's ability to ensure a fair court-martial process. It is not a stand-alone section of the UCMJ that can be easily severed without significant effects on other key portions of the military justice system. Therefore, modifications to Article 60 should involve a thorough analysis by the RSP and JPP.

Conclusion

The Marine Corps' ability to successfully prosecute and defend sexual assaults has never been stronger. We are succeeding in carefully balancing the commander's responsibility to maintain good order and discipline, the constitutional rights of the accused, and our obligation to protect and care for victims. Congress plays an important role in overseeing the proficiency and fairness of our military justice process. To this end, we are implementing many of the institutional changes Congress directed in the past two years. As you consider potential additional action in the area of sexual assault, I believe your establishment of the RSP and the JPP in the FY13 NDAA provides us the best chance to work together to make well-reasoned assessments and recommendations for any future reforms.

Attachment A

Sexual Assault Campaign Plan Summary

When we talk about preventing sexual assault, the Commandant uses the phrase “get to the left of the problem.” That means using training, policies, and initiatives to help us stop sexual assault before it takes place. In step with the Campaign Plan, our Sexual Assault Prevention & Response (SAPR) Office implemented large-scale Corps-wide training initiatives, utilizing a top-down leadership model. The dominant message in SAPR’s training model is for leaders to foster a climate where misconduct or crime—especially sexual assault—is not tolerated. SAPR training remains unequivocal in its assertion, however, that the inherent duty of preventing sexual assault belongs ultimately to Marines of every rank. The Campaign Plan was executed in three Phases, each with different goals.

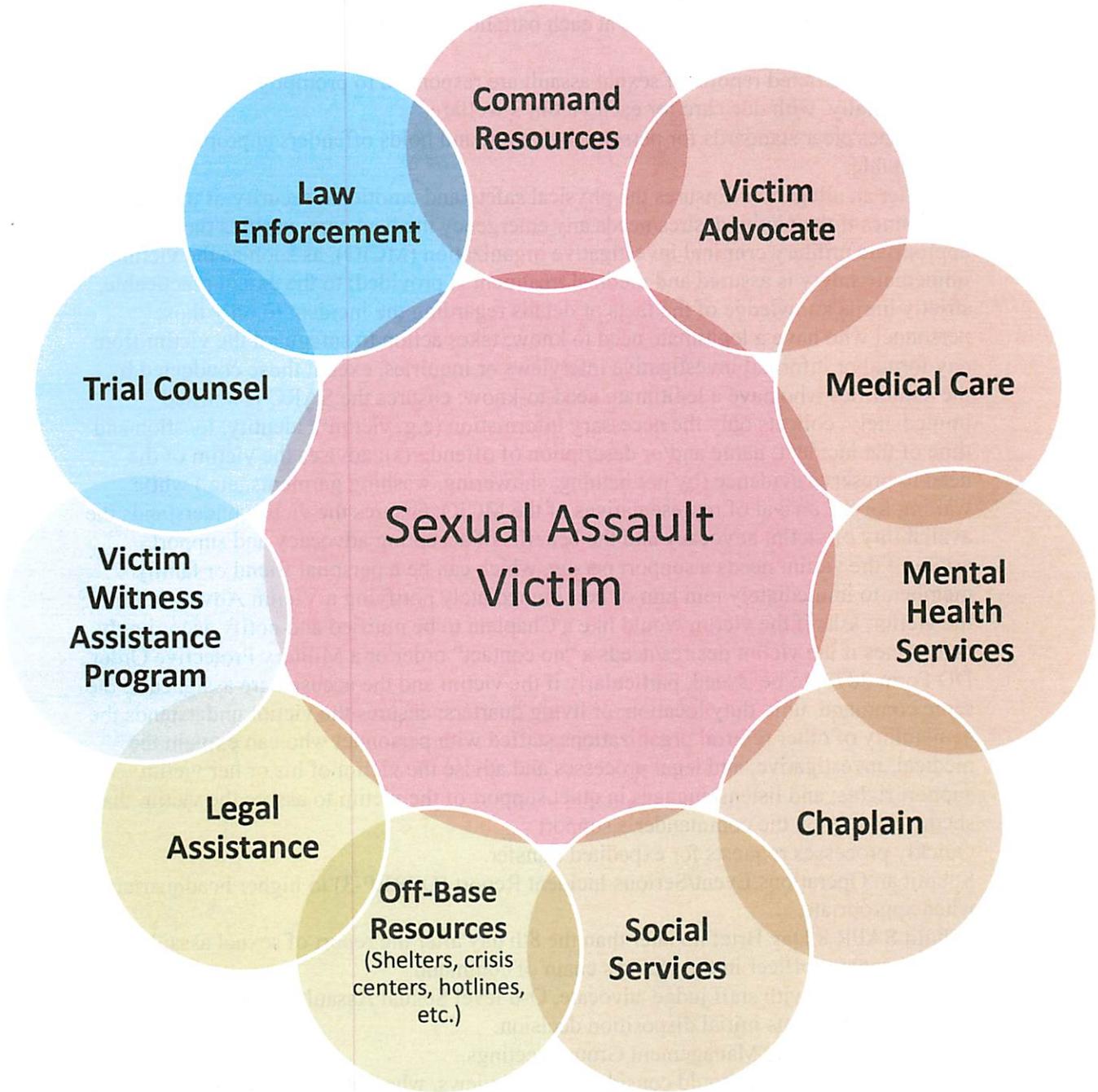
Phase I of the Campaign Plan, the “Strike” phase, focused on significantly increasing the quality and quantity of prevention-based training. It began with the publication of a CMC White Letter (a personal communication from the Commandant reserved for important issues) in May 2012. This White Letter was addressed to all Marines and charged them with creating an environment and command climate in which every Marine is treated with dignity and respect, and all Marines—whether victims or witnesses—are encouraged to report allegations of sexual assault. In July 2012, the Commandant directed every Marine general officer to attend a two-day SAPR General Officer Symposium (GOS), at Marine Corps Base Quantico. This two-day training event included subject matter experts who spoke on topics relevant to prevention, the use of alcohol as a weapon, inadvertent victim blaming, and dispelling myths. A similar symposium was held in August 2012 for all Marine Sergeants Major. Building on the momentum of these personal interactions with his leaders, the Commandant also directed three focused training initiatives on sexual assault. The first initiative was Command Team Training for commanders and their senior staff. This consisted of one and one-half days of training presented in the form of guided discussion, case studies, Ethical Decision Games (EDGs), and SAPR Engaged Leadership Training. The second initiative was “Take a Stand” training for all non-commissioned officers. Comprised of videos, mini-lectures, guided group discussions, and activities, this training was geared toward establishing a positive command climate that encourages Marines to intervene, to “step up and step in,” to prevent sexual assault among fellow Marines. The third training initiative was “All Hands Training,” required for all Marines and attached Navy personnel in the form of informal lectures, guided discussions, and EDGs. Presented by Commanding Officers, Sergeants Major and leaders across the Corps, “All Hands Training” relayed the Commandant’s message that he “expects Commanding Officers, Officers-in-Charge, and senior enlisted to spare no effort in changing the prevailing conditions and attitudes that are allowing this crime to happen among our ranks.” The Commandant also traveled around the world between the spring and fall of 2012 speaking to Marine leaders about “who we are” as Marines and what it means to uphold the integrity of the title “Marine.” Although these “Heritage” speeches discussed a variety of issues, a main focus was the Commandant’s personal interest in changing behavior so that we prevent sexual assaults from occurring, and if they do occur, that Marines are comfortable and confident enough in their leadership and the military justice system to report an allegation of sexual assault.

Phase II of the Campaign Plan, the “implementation” phase, focuses on customizing the Phase I SAPR training, along with improving the Marine Corps’ response capability. Phase II began on November 10, 2012 and will last for six to twelve months. Training is being developed that is specific to different phases of military education, such as delayed entry accession programs, Recruit Depots, entry-level schools, Primary Military Education (PME) schools, Commanders and Senior Enlisted Courses, officer PME schools, and the pre-deployment environment. Annual training requirements are also being customized in a manner specific to grade. This building block approach will ensure training remains fresh and in accord with a Marine’s knowledge and experience. Phase II also implemented changes in how to respond to sexual assaults, which I will discuss in the next section.

Phase III of the Campaign Plan is conditions-based. Most notable among these conditions is the assessed success of Phases I and II, and the integration of other programs into a holistic, truly sustainable effort.

Attachment B

AGENCIES, ENTITIES, AND INDIVIDUALS WHO INTERACT WITH A SEXUAL ASSAULT VICTIM OVER THE DURATION OF A SEXUAL ASSAULT CASE



The entities in blue (Law Enforcement, TC, and VWAP) do not provide victim services; however, they are tasked by statute and regulation with providing information to victims over various stages of a case.

Attachment B

- Commanders (MCO 1752.5B(draft); MCO 1754.11; MCO 5800.14(draft); Sexual Assault Campaign Plan 2012; MCO 3504.2; MARADMIN 317/09; MARADMIN 372/12; MARADMIN 624/12; HQMC Letter of Instruction, dtd 28 Feb 2012)
 - Appoints at least two SAPR UVAs at each battalion, squadron, or equivalent level command; appoints a VWAC.
 - Ensures unrestricted reports of sexual assault are responded to promptly and professionally, with due care for each victim's welfare.
 - Establishes clear standards for personal behavior, and holds offenders appropriately accountable.
 - Just after an allegation: Ensures the physical safety and emotional security of the victim; determines if the victim desires/needs any emergency medical care; notifies the appropriate military criminal investigative organization (MCIO), as soon as the victim's immediate safety is assured and medical treatment is provided; to the extent practicable, strictly limits knowledge of the facts or details regarding the incident to only those personnel who have a legitimate need to know; takes action to safeguard the victim from any formal or informal investigative interviews or inquiries, except those conducted by the authorities who have a legitimate need-to-know; ensures the SARC is notified immediately; collects only the necessary information (e.g. victim's identity, location and time of the incident, name and/or description of offender(s)); advises the victim of the need to preserve evidence (by not bathing, showering, washing garments, etc.) while waiting for the arrival of representatives of the MCIO; ensures the victim understands the availability of victim advocacy and the benefits of accepting advocacy and support; asking if the victim needs a support person, which can be a personal friend or family member, to immediately join him or her; immediately notifying a Victim Advocate for the victim; asks if the victim would like a Chaplain to be notified and notify accordingly; determines if the victim desires/needs a "no contact" order or a Military Protective Order, DD Form 2873, to be issued, particularly if the victim and the accused are assigned to the same command, unit, duty location, or living quarters; ensures the victim understands the availability of other referral organizations staffed with personnel who can explain the medical, investigative, and legal processes and advise the victim of his or her victim support rights; and listens/engages in quiet support of the victim to assure the victim that she/he can rely on the commander's support
 - Quickly processes requests for expedited transfer.
 - Submit an Operations Event/Serious Incident Report (OPREP-3) to higher headquarters when appropriate.
 - Submit SAPR 8 Day Brief no later than the 8th day after the report of sexual assault to the first general officer in the victim's chain of command.
 - After consulting with staff judge advocate, O-6 level Sexual Assault Initial Disposition Authority documents initial disposition decision.
 - Attend monthly Case Management Group meetings.
 - Convening Authorities should consider victims' views, when offered, prior to acting on a pretrial agreement.
 - Process offenders for administrative discharge if no discharge awarded at court-martial after conviction for a sexual assault offense.

Attachment B

- **Sexual Assault Response Coordinator (SARC), Victim Advocate (MCO 1752.5B(draft); MCO 1754.11)Victim Advocate**
 - Sexual Assault Prevention and Response (SAPR) Victim Advocate provides integrated response capability & system accountability for awareness, prevention and response training, and care for adult sexual assault victims. Facilitates victim care by coordinating medical treatment, including emergency care, & tracking the services provided to victims of sexual assault from initial report through final disposition and resolution. Serves as central point of contact within a command.
 - Family Advocacy Program (FAP) Victim Advocates and Clinical Counselors provide short-term clinical treatment services to eligible beneficiaries who are involved in child abuse and domestic abuse. Provide comprehensive victim advocate assistance and support to victims of domestic abuse and sexual assault, to include the development of a safety plan, and other services similar to SAPR.
SARC submits a report into the Defense Sexual Assault Incident Database (DSAID).

- **Medical (BUMEDINST 6310.11; MCO 1752.5 B(draft))**
 - Provides medical treatment, including emergency care, in a timely manner. Emergency care shall consist of emergency medical care and the offer of a sexual assault forensic examination (SAFE) consistent with the DoJ protocol and should refer to DD Form 2911, “DOD Sexual Assault Medical Forensic Examination Report” and accompanying instructions; and medical intervention to prevent loss of life or undue suffering resulting from physical injuries internal or external, sexually transmitted infections, pregnancy, or psychological distress.
 - Provides follow-on medical care, to include psychological counseling.

- **Chaplain (SECNAVINST 1730.9; SECNAVINST 1730.10; MCO 1752.5B(draft))**
 - Facilitates access to the SAPR program at the individual’s location.
 - Provides faith-based counseling, mentoring and spiritual direction based on theologically derived truths. They also deliver relational counseling which is based on the trust gained through a shared experience of military service and characterized by confidentiality and mutual respect.
 - Commanders and chaplains are required to honor the confidential relationship between service personnel and chaplains.

- **Law Enforcement (DoDI 5500.18; DoDD 6495.01; DoDD 6400.1; SECNAVINST 5430.107)**
 - Military criminal investigative organizations (MCIOs) will initiate investigations of all offenses of sexual assault of which they become aware.
 - When an MCIO initiates a sexual assault investigation, it will also initiate and conduct subsequent investigations relating to suspected threats against the sexual assault victim, to include minor physical assaults and damage to property.
 - In cases of child sexual assault, coordinates with Child Protective Services.

Attachment B

- Trial Counsel/Support Staff (MCO 1752.5B(draft); MCO 1754.11; MCO 5800.14(draft); JAGINST 5800.7F)
 - Identifies victims in a case prior to preferring charges and ensures each individual receives a DD Forms 2701-2704.
 - Ensures that victims are notified of their rights and provided information concerning the criminal justice process. Contacts the applicable VWACs to ensure that proper support and resources are provided.
 - Ensures notification to the victim of various stages and milestones throughout the military justice process.
 - Ensures victim's views concerning prosecution and plea negotiations are obtained and forwarded to the convening authority prior to the signing of any pretrial agreement.
 - Informs victims of the opportunity to present evidence to the court at sentencing.
 - Informs victims and witnesses of basic information about the post-trial process.
 - Confers with victim to determine whether he/she wants to receive information about confinement status of accused.
 - Consults with convening authority and staff judge advocate and provides military justice advice, including the likelihood of prevailing in a prosecution at court-martial.
 - Ensures results of trial are forwarded to chain of command, SJA, VA, SARC, NCIS.
- VWAP (MCO 5800.14(draft))
 - Reduces the trauma, frustration and inconvenience experienced by victims and witnesses of crime; informs victims of their statutory rights; and, assists victim and witness understanding of the military justice process.
- Legal Assistance Attorney (10 USC 1565b; DoD (P&R) Memo on Legal Assistance for Victims of Crime)
 - Provides legal assistance support as authorized by law and regulation.
 - Provides victims information regarding their rights under the VWAP and applicable law and regulation, such as:
 - The rights and benefits afforded a victim; the military justice system; the ability of the government to compel cooperation and testimony; the contempt power of the court; protections offered by civilian and military restraining and protective orders.
 - When requested by a victim, contacts the creditor of a victim who is subjected to serious financial strain caused by the crime(s) or by cooperation in the investigation or prosecution of an offense.
- Off-Base Resources
 - Shelters, crisis centers, hotlines, etc.
- Social Services
 - Workplace safety, childcare, house, etc.

**Testimony of MajGen Vaughn Ary,
Staff Judge Advocate to the Commandant of the Marine Corps
to
The United States Commission on Civil Rights
on
Sexual Assault in the Military**

January 11, 2013

Members of the Commission, thank you for the invitation to speak with you today about our efforts to combat sexual assault in the Marine Corps. I am eager to discuss what the Commandant of the Marine Corps is doing personally to lead the charge in the fight to eliminate sexual assault within our ranks. In the area of sexual assault, the Marine Corps today is significantly different from just one year ago. In 2012, the Commandant directed systemic and dramatic changes in our sexual assault prevention and response capabilities. The Commandant is changing our culture, and personally leading the way.

Commanders have always been responsible for readiness, unit cohesion, and morale. The Commandant understands that commanders are responsible for the safety of all Marines, victim care and services, and ensuring the fair trial of an accused. He also realized commanders could do better in these areas when it came to sexual assault. In June 2012, the Commandant issued his Sexual Assault Prevention and Response Campaign Plan, a three-phase strategy developed by an Operational Planning Team (OPT) whose members the Commandant personally selected. Chaired by a general officer and comprised of highly respected senior officers and enlisted Marines, the OPT used the same planning techniques and processes we use to engage the enemy on the battlefield. The OPT aggressively analyzed the problem of sexual assault in our ranks, looking for solutions across the wide spectrum of prevention and response. The resulting Campaign Plan is a commander-led, holistic approach that improves our ability to prevent and respond to sexual assaults. Our goal is to change behaviors—the behavior of those who might commit sexual assault and those who respond to it. This change began with the Commandant. In a November 2012 interview, the Commandant said, “Classes are being held, not by a 21-year-old corporal, but the General Officer, the Colonel, and the Sergeant Major. So this is a fight. It won’t be won this year or next. Will we get there? We’re part of society. But, we are determined to eradicate sexual assault in the Marine Corps. It’s a personal thing with me.”

My testimony today will be grouped around three key areas: prevention, response, and the future.

Prevention

When we talk about preventing sexual assault, the Commandant uses the phrase “get to the left of the problem.” That means using training, policies, and initiatives to help us stop sexual assault before it takes place. In step with the Campaign Plan, our Sexual Assault Prevention & Response (SAPR) Office implemented large-scale Corps-wide training initiatives, utilizing a top-down leadership model. The dominant message in SAPR’s training model is for leaders to foster a climate where misconduct or crime—especially sexual assault—is not

tolerated. SAPR training remains unequivocal in its assertion, however, that the inherent duty of preventing sexual assault belongs ultimately to Marines of every rank. The Campaign Plan was executed in three Phases, each with different goals.

Phase I of the Campaign Plan, the “Strike” phase, focused on significantly increasing the quality and quantity of prevention-based training. It began with the publication of a CMC White Letter (a personal communication from the Commandant reserved for important issues) in May 2012. This White Letter was addressed to all Marines and charged them with creating an environment and command climate in which every Marine is treated with dignity and respect, and all Marines—whether victims or witnesses—are encouraged to report allegations of sexual assault. In July 2012, the Commandant directed every Marine general officer to attend a two-day SAPR General Officer Symposium (GOS), at Marine Corps Base Quantico. This two-day training event included subject matter experts who spoke on topics relevant to prevention, the use of alcohol as a weapon, inadvertent victim blaming, and dispelling myths. A similar symposium was held in August 2012 for all Marine Sergeants Major. Building on the momentum of these personal interactions with his leaders, the Commandant also directed three focused training initiatives on sexual assault. The first initiative was Command Team Training for commanders and their senior staff. This consisted of one and one-half days of training presented in the form of guided discussion, case studies, Ethical Decision Games (EDGs), and SAPR Engaged Leadership Training. The second initiative was “Take a Stand” training for all non-commissioned officers. Comprised of videos, mini-lectures, guided group discussions, and activities, this training was geared toward establishing a positive command climate that encourages Marines to intervene, to “step up and step in,” to prevent sexual assault among fellow Marines. The third training initiative was “All Hands Training,” required for all Marines and attached Navy personnel in the form of informal lectures, guided discussions, and EDGs. Presented by Commanding Officers, Sergeants Major and leaders across the Corps, “All Hands Training” relayed the Commandant’s message that he “expects Commanding Officers, Officers-in-Charge, and senior enlisted to spare no effort in changing the prevailing conditions and attitudes that are allowing this crime to happen among our ranks.” The Commandant also traveled around the world between the spring and fall of 2012 speaking to Marine leaders about “who we are” as Marines and what it means to uphold the integrity of the title “Marine.” Although these “Heritage” speeches discussed a variety of issues, a main focus was the Commandant’s personal interest in changing behavior so that we prevent sexual assaults from occurring, and if they do occur, that Marines are comfortable and confident enough in their leadership and the military justice system to report an allegation of sexual assault.

Phase II of the Campaign Plan, the “implementation” phase, focuses on customizing the Phase I SAPR training, along with improving the Marine Corps’ response capability. Phase II began on November 10, 2012 and will last for six to twelve months. Training is being developed that is specific to different phases of military education, such as delayed entry accession programs, Recruit Depots, entry-level schools, Primary Military Education (PME) schools, Commanders and Senior Enlisted Courses, officer PME schools, and the pre-deployment environment. Annual training requirements are also being customized in a manner specific to grade. This building block approach will ensure training remains fresh and in accord with a Marine’s knowledge and experience. Phase II also implemented changes in how to respond to sexual assaults, which I will discuss in the next section.

Phase III of the Campaign Plan is conditions-based. Most notable among these conditions is the assessed success of Phases I and II, and the integration of other programs into a holistic, truly sustainable effort.

Response

The second main area of my testimony today deals with responding to sexual assault when it does occur. It is important to note that when we talk about responding, there are actually two things we are responding to, the victim and the alleged crime. Each of these requires separate processes, involving different goals, personnel, procedures, and burdens.

Victim Response

In terms of victim response, the Marine Corps pursued several victim care initiatives in Fiscal Year 2012 (FY12). We believe these initiatives dramatically increased victim care and are the most effective use of the resources we have available to assist victims. Our Victim Advocates are well equipped to establish a close and supportive relationship with victims, and to help them understand the supportive services that are available. Our first major initiative was based on the realization that our prior approach of using part-time Uniformed Victim Advocates could be improved by professionalizing the job and hiring trained civilian professionals in our Sexual Assault Response Coordinator (SARC) and Victim Advocate (VA) billets. In FY13 we will hire 25 full-time civilian SARCs and 22 civilian VAs, strengthening SAPR presence and allowing for more consistent and thorough quality assurance measures throughout the Marine Corps. These civilian hires must have a four-year degree in behavioral health or social sciences, and have three years of experience in their civilian field of expertise or equivalent qualifications. In addition, they will also receive SAPR's military-specific victim advocacy training, which was approved by the National Advocacy Credentialing Program. Spanning a total of 40 hours, the SAPR training discusses every aspect of the Marine Corps SAPR program.

The Marine Corps is also improving how we provide victim services. Phase II of the Campaign Plan focuses on implementing a regional Sexual Assault Response Team (SART) model. The SART will provide comprehensive victim care that extends outside the boundaries of any one response service (i.e., medical, legal, counseling, etc.). With the overall goal of correcting the sometimes fragmented approach to victim care, SARTs will work towards reducing the number of times victims must repeat their stories and provide a more holistic response to all victims. The Marine Corps is working with The Navy Bureau of Medicine and Surgery (BUMED) and the NCIS Adult Sexual Assault Program (ASAP) as we build SART teams regionally. The ASAP utilizes a team response to adult sexual assault cases to increase efficiency and the expeditious handling of cases. Members of ASAP will receive dedicated sexual assault training from the Special Agent Basic Training to the Supervisor levels.

Other victim care initiatives included the continued enhancement and promotion of the 24/7 Sexual Assault Help Lines, established at every Marine Corps installation, along with detailed procedures for the expedited transfer of victims from their units upon their request. Additionally, on October 1, 2012 we transitioned to the full use of the Defense Sexual Assault

Incident Database (DSAID), which will standardize data to support planning and evaluation of training and prevention activities, the creation of new programs and policies, increasing the effectiveness of response efforts, and ensuring compliance with policy.

In addition to the victim advocate systems already in place, the Marine Corps also implemented 10 U.S.C. §1565b, which makes legal assistance, assistance by a SARC, and assistance by a sexual assault victim advocate available to victims of sexual assault. Additionally, 10 U.S.C. §1565b requires that victims of sexual assault be informed of the availability of such services as soon as practical after the victim reports the sexual assault. The Marine Corps uses legal assistance attorneys to provide victims information about the following areas: (1) the Victim and Witness Assistance Program (VWAP), including the rights and benefits afforded the victim, such as the victim advocate privilege; (2) the differences between the two types of reporting in sexual assault cases (restricted and unrestricted); (3) the military justice system, including the roles and responsibilities of the prosecutor, defense counsel, and investigators; (4) services available from appropriate agencies or offices for emotional and mental health counseling and other medical services; (5) the availability of and protections offered by civilian and military protective orders; and (6) eligibility for and benefits potentially available as part of the transitional compensation program. Additionally, prosecutors will explain to victims how their privacy is protected under the military rape shield rule, Military Rule of Evidence (M.R.E.) 412.

Legal Response

In terms of the legal response to an alleged sexual assault, the Marine Corps has just executed a major overhaul in the way we prosecute complex cases. When I discussed a culture change earlier, I mentioned that we are changing the behavior of individual Marines, but we have also changed the organization of our legal community. Our analysis of ways to improve sexual assault prosecutions uncovered a broader overall trend in military justice. We noticed an increase in complex and contested cases as a percentage of our total docket. We realized that our historical model of providing trial services needed to be revised to better handle these complex cases, many of which involve sexual assault. The Commandant directed us to reorganize our legal community into a regional model that gives us the flexibility to better utilize the experience and supervision of our more experienced prosecutors. Practically speaking, our new regional model, which became fully operational on October 1, 2012, allows us to place the right prosecutor, with the appropriate expertise, supervision, and support staff, on the right case, regardless of location.

Our legal reorganization greatly increases the experience, training, and expertise available for prosecuting complex cases like sexual assaults. We reorganized our community into four geographic regions—National Capital Region, East, West, and Pacific. These regions are designated Legal Service Support Areas (LSSA) and are aligned with the structure of our regional installation commands. Each LSSA contains a Legal Services Support Section (LSSS) that is supervised by a colonel judge advocate officer-in-charge. Each LSSS contains a Regional Trial Counsel (RTC) office that is led by an experienced lieutenant colonel litigator. Within the RTC is a Complex Trial Team (CTT) that gives us a special victims prosecution capability. The CTT contains a civilian Highly Qualified Expert (HQE), two experienced military prosecutors,

military criminal investigators, a legal administrative officer, and a school-trained paralegal. The civilian HQE is an experienced civilian prosecutor who provides training and mentoring for all prosecutors in the region. Our HQEs are assigned to the actual trial shops, working directly with prosecutors, where we believe they will have the most impact.

The two military prosecutors in the CTT are selected based on experience, training, and demonstrated ability as successful litigators. To augment the experience they already bring to the billet, we are beginning to send these prosecutors to the Army's two-week course for sexual assault investigators at Fort Leonard Wood to help them better understand the most current techniques used to investigate sexual assault. The CTT prosecutors will either prosecute complex cases themselves, or train and assist other counsel in the region with complex cases. The criminal investigators and the legal administrative officer in the CTT provide a key support role in complex prosecutions. Historically, a prosecutor was individually burdened with the coordination of witnesses and experts, the gathering of evidence, background investigations, and finding additional evidence for rebuttal, sentencing, or other aspects of the trial. These logistical elements of a trial are even more demanding in a complex trial; the presence of criminal investigators and the legal administrative officer allow our prosecutors to focus on preparing their case.

To support our prosecutors further, we created a Trial Counsel Assistance Program (TCAP) at our Judge Advocate Division Headquarters. Our TCAP consolidates lessons learned from throughout the Marine Corps and provides training and advice to our prosecutors in each region. The TCAP provides specialized training through regional conferences focused on the prosecution of sexual assaults. These training events include speakers on law enforcement techniques, victim and offender typology, expert witnesses, forensics, and the art of persuasion. We also use our reserve judge advocates who are experienced criminal prosecutors in their civilian jobs to teach and mentor our active duty judge advocates during these conferences and in specific cases. To ensure an adequate level of experience and supervision not only at the headquarters level, but also in each LSSS, we also more than doubled the number of field grade prosecutors we are authorized to have on our rolls from 11 to 25. We also specifically classified certain key military justice billets so that billet holders must possess a Master of Laws degree in Criminal Law.

Although the focus of my presentation so far has been on the prosecution of sexual assaults, I must carefully balance our ability to prosecute sexual assaults with our ability to defend Marines accused of sexual assault. As concerned as I am that I have well-trained and competent prosecutors, I am equally concerned that each Marine accused receives a constitutionally fair trial that will withstand the scrutiny of appeal. To that end, we recently reorganized the previously decentralized defense bar within the Marine Corps into the Marine Corps Defense Services Organization (DSO) under the centralized supervision of the Chief Defense Counsel (CDC) of the Marine Corps. This change was designed to enhance the independence of the Marine Corps DSO while also enhancing the efficiency and effectiveness of the superb defense counsel services that Marine defense counsel have always provided Marines and Sailors. Like the prosecution, the DSO has focused heavily on sexual assault cases to ensure each case is handled professionally, zealously, and effectively.

In addition to the organization, staffing, and training changes we have recently made to improve our ability to prosecute complex cases, we have also elevated the authority level required to dispose of an alleged sexual assault. On April 20, 2012 the Secretary of Defense (SecDef) issued a memorandum withholding initial disposition authority in certain sexual assault offenses to the O-6 special court-martial convening authority (SPCMCA) level. The SecDef withheld the authority to make a disposition decision for penetration offenses, forcible sodomy, and attempts to commit those crimes. The Commandant of the Marine Corps expanded the scope of the SecDef's withhold policy to cover penetration *and* contact sex offenses, all child sex offenses, and attempts to commit such offenses. The Marine Corps also made it clear that in no circumstance could the Sexual Assault Initial Disposition Authority (SA-IDA) forward a case down to a subordinate authority for disposition, regardless of the disposition decision the SA-IDA felt was appropriate.

The Future

I firmly believe that our efforts in the areas of victim services, legal reorganization, the continued training of criminal lawyers, and the elevation of the initial disposition authority will improve our ability to prosecute sexual assault offenses in military courts-martial. All of these changes allow us to remain a commander-driven system of military justice, while ensuring proficiency in the litigation of complex cases. We must keep in mind, however, that these changes have not been made in a vacuum. In June 2012, a new UCMJ Article 120 took effect, but the implementing guidance for this new statute has not yet been approved in an Executive Order. Additionally, we have a new rule of evidence dealing with a victim advocate privilege. These statutory and evidentiary changes will significantly impact sexual assault courts-martial. I look forward to the next year; I believe all of these changes, internal and external to the Marine Corps, will go a long way to eradicating sexual assault in our ranks. However, with regard to the rules and regulations that govern a commander's handling of sexual assault, I caution against a system of perpetual change. We need to give these changes a chance to work, before we negate or contradict them with more changes. I believe we need time for all of the recent changes I have mentioned to reach their full potential.

Again, I thank you for the opportunity to speak with you today about how we handle sexual assault in the Marine Corps. The Commandant is aggressively attacking sexual assault with initiatives in the areas of prevention and response. We are eager to have the chance to implement these changes fully, collect lessons learned, and refine our efforts to eliminate sexual assault from our ranks.



DEPARTMENT OF THE NAVY
HEADQUARTERS UNITED STATES MARINE CORPS
3000 MARINE CORPS PENTAGON
WASHINGTON, DC 20350-3000

May 15, 2013

The Honorable James H. Inhofe
United States Senate
Washington, DC 20510

Dear Senator Inhofe,

Thank you for your letter of May 3, 2013 requesting my views on the proposed changes to Article 60 of the Uniform Code of Military Justice (UCMJ). Your letter and detailed questions reflect your longstanding support for our military and your understanding of the central role the commander holds in our system of military justice and in the execution of our duties as warfighters. I appreciate the opportunity to share my views on these matters.

On May 7, 2013, the Secretary of Defense submitted proposed legislation to Congress that would modify the commander's authority to take action on the findings and sentence of a court-martial during the post-trial phase. Specifically, the legislation would limit the commander's ability to act on the findings of a court-martial to a certain class of "minor offenses," and also require a written explanation for any action taken on the findings or the sentence of a court-martial. I support these proposed modifications for three reasons.

First, I believe the proposed modifications are reasonable adjustments to a specific phase of the court-martial process that has changed significantly since its inception. The commander's broad authority under Article 60 was established during a time when the key participants of the trial—the prosecutors, defense counsel, and military judges—were not professional lawyers, and when there was not a comprehensive system of appellate review. The complete discretion of the commander under that system prevented miscarriages of justice, provided for the expedient correction of legal errors, and permitted the granting of clemency in certain cases. The professionalization of our court-martial practice and the addition of multiple layers of appellate review justify reducing the commander's broad authority to take action on the findings in cases not involving "minor offenses." I believe the Secretary of Defense's proposal properly excludes the right class of cases that would be left to the appellate review process for the correction of legal error and/or clemency. Similarly, I believe that a commander, based on his or her specific needs for good order and discipline, should retain the ability to take action on the findings of "minor offenses" identified in the proposal.

Second, the proposal would improve the transparency of the military justice system. When the commander does believe it is necessary to take action under Article 60, that action should be as transparent and visible as every other aspect of the court-martial. The proposed requirement for a written explanation for any Article 60 action ensures accountability and fairness and will preserve the trust and confidence servicemembers and the public have in our military justice system.

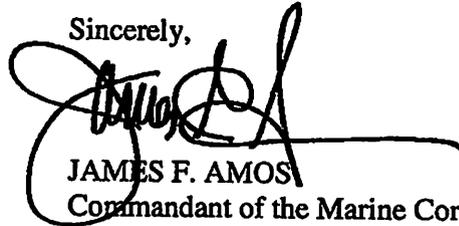
Third, and most importantly, the proposal would preserve the central role of the commander in our military justice system. I share your concerns that the debate surrounding Article 60 may lead to curtailing the commander's authority in other areas of the UCMJ. While this debate is healthy, we must recognize the need for a commander to have the personal

responsibility and authority to enforce good order and discipline, as well as the law. In May of 2012, I wrote a personal letter addressed to "All Marines" regarding sexual assault; I told them that "[o]ur greatest weapon in the battle against sexual assault has been and will continue to be decisive and engaged leadership." Decisive leadership must include the ability of the commander to personally hold Marines criminally accountable for their actions.

As we all strive to improve our ability to respond to sexual assault, we must ensure the military justice process is not only fair and just, but perceived to be so by the American people and the men and women who serve in uniform. To that end, I believe that we should give the Response Systems Panel, created by Section 576 of the FY13 National Defense Authorization Act, the opportunity to complete its independent assessment of the systems used to investigate, prosecute, and adjudicate sexual assaults prior to implementing further changes to the commander's role in military justice.

Thank you again for the opportunity to provide my views. If I may be of additional assistance, please let me know.

Sincerely,

A handwritten signature in black ink, appearing to read "James F. Amos", with a long horizontal flourish extending to the right.

JAMES F. AMOS
Commandant of the Marine Corps

USMC 021
683



DEPARTMENT OF THE NAVY
HEADQUARTERS UNITED STATES MARINE CORPS
3000 MARINE CORPS PENTAGON
WASHINGTON, DC 20350-3000

May 17, 2013

The Honorable Carl Levin, Chairman
The Honorable James H. Inhofe, Ranking Member
United States Senate
Washington, DC 20510

Dear Senator Levin and Senator Inhofe,

Thank you for your letter of May 9, 2013 requesting my views on specific proposed changes to the Uniform Code of Military Justice (UCMJ) regarding sexual assault in the military. You asked me to comment on four specific legislative proposals: S.538 (To amend Article 60, UCMJ); S.548 (Military Sexual Assault Prevention Act of 2013); S.871 (Combating Military Sexual Assault Act of 2013); and the yet to be introduced Military Justice Improvement Act of 2013.

I appreciate the opportunity to share my views on these legislative proposals. I believe there is merit in the current review of our military justice system and I will not hesitate to support changes in the military justice process that improve our ability to hold Marines appropriately accountable for their actions. Last year, as part of my Sexual Assault Campaign Plan, I directed a complete reorganization of our legal community which greatly increased our ability to prosecute and defend sexual assaults and other complex cases through the use of Complex Trial Teams (CTT). These CTTs also provide us the Special Victim Capability required by Section 573 of the FY13 National Defense Authorization Act.

The success we have already seen from our legal reorganization reaffirms my belief that the fundamental structure of the UCMJ, centered on the role of the commander as convening authority, is sound. A commander is responsible and accountable for everything that happens in his or her unit. This awesome responsibility of leading our Nation's sons and daughters must be matched with the authority to hold accountable Marines who fail to maintain our high standards or violate the law. This authority is the commander's most effective tool in deterring criminal behavior and serves as the enforcement mechanism for our Sexual Assault Prevention and Response efforts. Victims need to know that their commander holds offenders accountable, not some unknown third-party prosecutor. This personal involvement of our commanders in the accountability process is the only way for our military to bring about the culture change necessary to eradicate sexual assault.

The commander's role in sexual assault prevention and response goes beyond military justice. Commanders have three main duties related to sexual assault. First, they must prevent sexual assaults from occurring by fostering a culture of dignity and respect for all of our Marines. Second, they must respond appropriately when a sexual assault does occur. This will encourage victims to report a sexual assault because they can be confident that they will not

400431

suffer any negative consequences from their reporting, and that the allegations will be fully investigated.

The third responsibility of a commander is offender accountability—the specific area of focus in the legislative proposals you cite. Because I feel strongly that the commander must be the person who enforces the law, I am concerned that proposals to alter or remove the commander's role have the potential to create unforeseen second and third order effects. Very few portions of our *system* of military justice are “stand-alone” items that can be neatly replaced. If we make unsynchronized or sweeping structural changes to portions of our military justice system, we risk upsetting the careful balance between the need for swift justice and the constitutional rights of an accused.

I strongly recommend that any proposals to restrict or limit the role of the commander be submitted to the Response Systems Panel (RSP) and Judicial Proceedings Panel (JPP), created by Section 576 of the FY13 National Defense Authorization Act. Those Panels, along with the Joint Service Committee (JSC) on Military Justice, will carefully examine the second and third order effects of these proposed changes.

Based on my concerns listed above, I offer the following specific comments on the legislative proposals you cited:

S.538 (To amend Article 60, UCMJ).

In separate correspondence responding to your May 3, 2013 letter, I provided you my detailed thoughts on the Secretary of Defense's legislative proposal involving Article 60. I reaffirm my support for the Secretary of Defense's proposal as a recommended alternative to S. 538. I believe it is important for a commander to retain the authority to take post-trial action on the findings for minor offenses. I also believe that requiring a written explanation for any post-trial action improves the transparency of our military justice system.

S.548 (Military Sexual Assault Prevention Act of 2013).

I generally agree with the following sections of this proposal:

- Sec 2 – Prohibition on service in the Armed Forces by individuals who have been convicted of a sexual offense. I support the concept of preventing the accession of convicted sex offenders, which is currently Marine Corps policy. Additionally, current Marine Corps policy requires mandatory separation *processing* for any Marines convicted of sexual offenses, but not the automatic separation required by this proposal. I would support this new proposal creating a statutory requirement to automatically separate a servicemember on active duty who is convicted of rape, sexual assault, forcible sodomy, or an attempt to commit one those offenses.
- Sec 4 – Policy of the United States on disposition of charges involving certain sexual misconduct offenses under the Uniform Code of Military Justice through courts-martial. This proposal makes it an official policy that certain sexual assault offenses shall be disposed of by court-martial, vice non-judicial punishment or administrative

action, and requires written justification when a commander does not follow that policy. I agree that a court-martial is normally the forum used for sexual assault offenses, but I believe the word “justification” should be changed to explanation. There are circumstances, such as victim preference, when a convening authority may choose to handle an offense at an alternative forum.

- Sec 5 - Command action on reports by members of the Armed Forces of sexual offense involving members. This proposal requires commanders to report allegations of sexual assault to the next higher commander and the applicable military criminal investigative office (MCIO) within twenty-four hours. Current Marine Corps policy is to make these reports immediately.
- Sec 6 - Inclusion and command review of information on sex-related offenses in personnel service records of members of the Armed Forces. This proposal requires placing a record of any substantiated complaint of a sex-related offense in a servicemember’s record. Current Marine Corps regulations require the inclusion in a Marine’s service record of any adverse material as long as specific due process requirements are met. I support this proposal to the extent that it creates a statutory requirement for this current practice.
- Sec 7 - Collection and retention of records on disposition of reports of sexual assault.
- Sec 8 - Retention of certain forms in connection with restricted reports on sexual assault involving members of the Armed Forces.

I have concerns about implementing the following sections of this proposal without further study on potential harm from second and third order effects:

- Sec 3 - Persons who may exercise disposition authority regarding charges involving certain sexual misconduct offenses under the Uniform Code of Military Justice.
 - This proposal elevates the sexual assault initial disposition authority (SA-IDA) for sexual assault offenses to the O-7 level for offenses that occur in a “training command.” This proposal also elevates the SA-IDA for sexual assault offenses to the O-6 level for offenses that occur outside of training commands. I believe the Secretary of Defense’s 2012 memorandum withholding the SA-IDA to the O-6 special court-martial convening authority level is an appropriate and effective policy and that more time is needed to fully evaluate the effects of that policy before modifying it or making it a statutory requirement.

S.871 (Combating Military Sexual Assault Act of 2013).

I generally agree with the following sections of this proposal (I will not comment on Sec 6, related to the National Guard, because it is inapplicable to the Marine Corps):

- Sec 3 - Enhanced Responsibilities of Sexual Assault Prevention and Response Office (SAPRO) for DoD Sexual Assault Prevention and Response Program. This proposal establishes DoD SAPRO “as the single point of authority, accountability, and oversight for the sexual assault prevention and response program.” I agree with this concept in principle, but I believe the proposal should include language that

specifically precludes the DoD SAPRO from establishing policies or rules related to the functional performance of duties by the law enforcement and judge advocate communities.

I have concerns about implementing the following sections of this proposal without further study on potential harm from second and third order effects:

- **Sec 2 - Special Victims' Counsel for Victims of Sexual Assault Committed by Members of the Armed Forces.** I am concerned that this proposal creates a distinct and separate group of counsel outside of the established system of legal assistance attorneys who currently provide advice to sexual assault victims. I believe the Air Force's pilot program on this issue will eventually provide enough information to make a decision on a possible statutory requirement for this position. At this time, however, I believe the Marine Corps' use of victim advocates, Sexual Assault Response Coordinators, trial counsel, and legal assistance attorneys provides the appropriate amount of care, guidance, and information to sexual assault victims. Additionally, the JSC is currently studying this exact issue for the Department of Defense's General Counsel.
- **Sec 4 - Disposition and other Requirements for Rape and Sexual Assault Offenses under the Uniform Code of Military Justice.**
 - This proposal elevates the SA-IDA for sexual assault offenses to the O-7 level. I believe the Secretary of Defense's 2012 memorandum withholding the SA-IDA to the O-6 special court-martial convening authority level is an appropriate and effective policy and that more time is needed to fully evaluate the effects of that policy before modifying it or making it a statutory requirement.
 - This proposal also elevates the SA-IDA to a superior authority if the original SA-IDA has direct supervisory authority over the accused. Under current practice, in situations where there is a demonstrated conflict of interest, the SA-IDA can forward the matter to a higher authority, or that higher authority can withhold disposition authority for that specific case.
- **Sec 5 - Prohibition on Sexual Acts and Contact Between Certain Military Instructors and Their Trainees.** This proposal removes consent as a possible defense in any sexual interaction between "drill instructors" and Marines undergoing "basic training." I believe this proposal is unnecessary in light of currently available charging options. Also, this proposal would most likely invite Constitutional challenges that could lead to protracted litigation and possibly convictions reversed on appeal. Current regulations prohibit sexual activity between instructors and trainees and violations are punishable under Article 92 of the UCMJ (with a maximum punishment of dishonorable discharge, two years confinement, total forfeitures of pay, and reduction to E-1). Additionally, Article 120 could be charged in those cases when an instructor used his or her position of authority to place a trainee in fear that some wrongful action would happen to the trainee if he or she did not consent to sexual activity.

Military Justice Improvement Act of 2013.

I generally agree with the following sections of this proposal:

- Sec 6 - Modification of Authorities and Responsibilities of Convening Authorities in Taking Actions on the Findings and Sentences of Courts-Martial. This proposal is similar to S. 538. As I previously mentioned, I support the Secretary of Defense's proposal regarding Article 60 as a recommended alternative to S. 538.
- Sec 7 - Command Action on Reports on Sexual Offenses Involving Members of the Armed Forces. This proposal requires commanders to immediately report allegations of sexual assault to the next higher commander and the applicable military criminal investigation office (MCIO). This is consistent with current Marine Corps policy.

I have concerns about implementing the following sections of this proposal without further study on potential harm from second and third order effects:

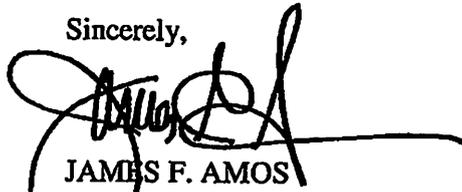
- Sec 2 - Modification of Authority to Determine to Proceed to Trial by Court-Martial on Charges on Offenses with Authorized Maximum Sentence of Confinement of More Than One Year. This proposal creates a non-commander Felony IDA, with the exception of certain listed military-specific offenses. This Felony IDA would be an experienced O-6 judge advocate with significant trial experience. The Felony IDA's disposition would be binding. I strongly object to this proposal because it completely removes the commander from the disposition decision. As previously discussed, I believe it is essential for the commander to make this decision in order to properly deter future criminal behavior and establish a healthy command climate. Additionally, under this proposal, I believe fewer difficult cases would be referred to trial because a judge advocate would simply consider the burden of proof in a case, and not be concerned with the need to refer a case to court-martial because of the effect it would have on good order and discipline. Lastly, experienced judge advocates (both trial counsel and staff judge advocates) are deeply involved in the process by advising a commander in the disposition decision; commanders do not make this decision alone.
- Sec 3 - Modification of MCM to Eliminate Factor Relating to Character and Military Service of the Accused in Rule on Initial Disposition of Offenses. This proposal would eliminate the commander's ability to consider the accused's character and military service when making an initial disposition of an offense. I believe this is a dramatic change that would have a detrimental effect on good order and discipline and cause Marines to lose faith in their commander. For example, consider a case of a Marine with four combat tours, a Purple Heart, and post-traumatic stress disorder who wrongfully abuses prescription narcotics. A commander should be able to consider that Marine's character and military service in deciding if the appropriate disposition of that offense is court-martial or adverse administrative action.

- **Sec 4 - Modification of Officers Authorized to Convene General and Special Courts-Martial.** This proposal statutorily removes all convening authorities at the division level and below and replaces them with a new authority at the Service Chief level. The Service Chiefs would create a centralized prosecution office that would convene courts-martial, and detail both members and military judges. I strongly object to this proposal because it completely removes the commander from the military justice process.
- **Sec 5 - Deadline for Empaneling of Jury Members for General and Special Courts-Martial.** This proposal would reduce the current 120-day speedy trial requirement to 90 days. I do not believe there is any demonstrated need to make this change, especially when considering the time it takes to properly prosecute a complex case.
- **Sec 8 - Advisory Council on Military Justice Reform.** This proposal creates a council on military justice reform that includes military victims of sexual assault. I believe this council duplicates the effort of the RSP, JPP, JSC, and the Code Committee established under Article 146, UCMJ. I agree the opinions of recent victims are extremely valuable in evaluating the effectiveness of our current military justice system, but I do not see a need to make them members of a formal council. I believe existing organizations and reviews have the proper tools to thoroughly consult with these victims to gain valuable insight on the victim perspective of the military justice system.

Thank you again for the opportunity to provide my views. My specific comments on the detailed provisions of the legislative proposals you cited have been purposely brief. I do not believe all of these proposals can be completely and adequately analyzed in a single correspondence. Rather, they require continued engagement and critical study to avoid lasting harm to the efficacy of the military justice system.

I am personally committed to eradicating the scourge of sexual assault within our ranks, and I look forward to working with Congress to improve victim care and our ability to hold Marines appropriately accountable for their actions.

Sincerely,



JAMES F. AMOS
Commandant of the Marine Corps

Not public until released by the
Senate Armed Services Committee

STATEMENT OF
GENERAL JAMES F. AMOS
COMMANDANT OF THE MARINE CORPS
BEFORE THE
SENATE ARMED SERVICES COMMITTEE
ON
SEXUAL ASSAULT PREVENTION AND RESPONSE
4 JUNE 2013

Not public until released by the
Senate Armed Services Committee



GENERAL JAMES F. AMOS

COMMANDANT OF THE MARINE CORPS



On October 22, 2010 General James F. Amos assumed the duties of Commandant of the Marine Corps. General Amos was born in Wendell, Idaho and is a graduate of the University of Idaho. A Marine Aviator, General Amos has held command at all levels from Lieutenant Colonel to Lieutenant General.

General Amos' command tours have included: Marine Wing Support Squadron 173 from 1985-1986; Marine Fighter Attack Squadron 312 – attached to Carrier Air Wing 8 onboard USS Theodore Roosevelt (CVN-71) – from 1991-1993; Marine Aircraft Group 31 from 1996-1998; 3rd Marine Aircraft Wing in combat during Operations IRAQI FREEDOM I and II from 2002-2004; II Marine Expeditionary Force from 2004-2006; and Commanding General, Marine Corps Combat Development Command and Deputy Commandant, Combat Development and Integration from 2006 to 2008. Additional operational tours have included Marine Fighter Attack Squadrons 212, 235, 232, and 122.

General Amos' staff assignments have included tours with Marine Aircraft Groups 15 and 31, the III Marine Amphibious Force, Training Squadron Seven, The Basic School, and with the MAGTF Staff Training Program. Additionally, he was assigned to NATO as Deputy Commander, Naval Striking Forces, Southern Europe, Naples, Italy where he commanded NATO's Kosovo Verification Center, and later served as Chief of Staff, U.S. Joint Task Force Noble Anvil during the air campaign over Serbia. Transferred in 2000 to the Pentagon, he was assigned as Assistant Deputy Commandant for Aviation. Reassigned in December 2001, General Amos served as the Assistant Deputy Commandant for Plans, Policies and Operations, Headquarters, Marine Corps. From 2008-2010 General Amos was assigned as the 31st Assistant Commandant of the Marine Corps.

Introduction

Sexual assault is criminal behavior that has no place in our Corps and my institution is aggressively taking steps to prevent it. Over the past twelve months, we have attacked sexual assault and have seen encouraging, and in some areas, measurable improvements in three specific areas – prevention, reporting, and offender accountability. There is more work to do, much more work, but we are seeing indicators that tell us we are on the right track.

Leadership is an essential element of our profession. We must be cautious, however, with changes that will undercut a Commanding Officer's ability to ensure obedience to orders. When Commanding Officers lose the ability to take action under the Uniform Code of Military Justice (UCMJ), we risk losing the enforcement mechanism needed to maintain the world's most effective fighting force.

My written testimony is composed of three main sections. First, I will discuss the importance of the military Commanding Officer generally. Any discussion of the role of the Commanding Officer in the military justice process must start with overall responsibilities and duties of a Commanding Officer to fight and win on the battlefield. Second, I will speak to the progress we have experienced in the last year under our Campaign Plan in the areas of prevention and response. Central to this discussion is the importance of top-down, Commanding Officer leadership that will bring about the culture change necessary to end sexual assaults, and the preconditions that lead to it in our Marine Corps. Finally, I will discuss our new Complex Trial Teams (CTT) that came online and began prosecuting complex cases in October 2012.

The Role of the Commanding Officer

Sexual Assault Prevention within our ranks is ever front and center in my mind and at the top of my priorities. Our senior officers and Staff Non-Commissioned Officers have steadfastly focused on making the necessary changes to prevailing conditions and attitudes to create the environment that the American people not only expect but demand from their Marines. Sexual assault is a crime against individual Marines that reverberates within a unit like a cancer undermining the most basic principle we hold dear -- taking care of Marines. Our unit Commanding Officers are our first line of action in implementing aggressive policies and changing the mindset of the individual Marine.

The Commanding Officer of every unit is the centerpiece of an effective and professional warfighting organization. Marine Commanding Officers are chosen through a rigorous selection process, based on merit and a career of outstanding performance. They are entrusted with our greatest asset, the individual Marine. Commanding Officers are charged with building and leading their team to withstand the rigors of combat by establishing the highest level of trust

throughout their unit. Unit Commanding Officers set the command climate, one in which the spirit and intent of the orders and regulations that govern the conduct of our duties will be upheld. There are a number of leadership styles, but the result of any of them must be a group of Marines and Sailors that have absolute trust in their leaders, a level of professionalism derived from competence and confidence. Trust in the Commanding Officer and fellow Marines is the essential element in everything we do. Developing this trust, dedication, and esprit de corps is the responsibility of the Commanding Officer. Commanding Officers do this by setting standards, training to standards, and enforcing standards. This defines the good order and discipline required by every Marine unit. Marines expect this.

Whether it is rewarding success or correcting failure, the Commanding Officer remains the common denominator. Commanding Officers may delegate certain tasks, but they can never delegate their accountability for their unit. This is the essence of good order and discipline. A unit with good order and discipline meets and exceeds standards, works together to continually improve, follows orders, trains new members, expects constant success, seeks challenges, and does not tolerate behavior that undermines unit cohesion.

As the nation's Crisis Response Force, the Marine Corps must be ready to answer the nation's call at a moment's notice. Accordingly, good order and discipline is required at all times...wherever a unit is and regardless of what that unit has been tasked to do. Commanding Officers cannot delegate this responsibility.

I have repeatedly referred to these duties as maintaining the "spiritual health" of the Marine Corps from a holistic sense. This theme was the genesis of the 27 briefings the Sergeant Major of the Marine Corps and I delivered to Marines all around the world last year. My intent was to re-emphasize the heritage of our Marine Corps...who we are, and who we are not. Our heritage is one that is guided by our principles of Honor, Courage and Commitment and described by our motto...Semper Fidelis – Always Faithful.

I expect Marines to have a unified sense of moral and righteous purpose, to be guided by what I refer to as "true north" on their moral compass. I will aggressively pursue and fight anything that destroys the spiritual health of the Marine Corps and detracts from our ability to fight our Nation's wars. That includes sexual assault. A single sexual assault in a unit can undermine everything that a Commanding Officer and every Marine in that unit has worked so hard to achieve.

After more than 43 years of service to our nation, it is inconceivable to me that a Commanding Officer could not immediately and personally – within applicable regulations – hold Marines accountable for their criminal behavior. That is the sacred responsibility of Commanding Officership. I expect to be held accountable for everything the Marine Corps does

and fails to do. That is my task under U.S. law. I, in turn, will hold my Commanding Officers accountable for everything their units do and fail to do.

Commanding Officers never delegate responsibility and accountability, and they should never be forced to delegate their authority. We cannot ask our Marines to follow their Commanding Officer into combat if we create a system that tells Marines to not trust their Commanding Officer on an issue as important as sexual assault. In May of 2012, I wrote a personal letter addressed to “All Marines” regarding sexual assault; I told them “*[o]ur greatest weapon in the battle against sexual assault has been and will continue to be decisive and engaged leadership.*” My opinion has not changed.

While our efforts in confronting sexual assault have been expansive, they have not eliminated this behavior from our ranks. I have been encouraged by our progress, but I acknowledge today, as I have told Members of Congress in previous testimony, that we have a long way to go. Changing the mindset of an institution as large as the Marine Corps always takes time, but we remain firmly committed to removing sexual assault from our Corps. We continue to work to ensure that our leaders gain and maintain the trust of their Marines, as well as ensuring that Marines can likewise trust their chain of command when they come forward. We are not there yet. Where the system is not working as it should, we are committed to fixing it, and to holding commanders accountable for what is happening in their units. I pledge that we will work with Congress, as well as experts in the field, as we eliminate sexual assault with our ranks.

I have reviewed the current legislative proposals related to sexual assault and military justice, and I believe there is much merit in many of the proposals. We should continue to engage in a serious debate about the best way to administer military justice. I want to specifically identify some encouraging trends in prevention, response and offender accountability. I believe these are based on substantial changes made in our SAPR Campaign Plan, and in the complete legal re-organization of our trial teams, both instituted mid-year 2012. These changes are showing measurable improvements and demonstrate that a Commanding Officer-led model of military justice can be successful. My service will continue to work tirelessly in our fight to bring about the culture change that will combat sexual assault.

Prevention and Response

Our Sexual Assault Prevention and Response Campaign Plan was launched a year ago with the stated purpose of reducing – with the goal of eliminating – incidents of sexual assault through engaged leadership and evidenced based best practices. Essential to this goal, as stated, is the Commanding Officer’s responsibility to establish a positive command climate, reflecting our core values of Honor, Courage and Commitment. Commanding Officers must instill trust

and confidence that offenders will be held accountable and that victims receive the supportive services that preserve their dignity and safety. Sexual assault is an under-reported crime both inside the military and out, with an estimated 85%-90% of sexual assaults remaining unreported according to the Department of Defense. We must ensure, for those Marines who do come forward, that we provide the support they need with compassion and determination. Last year we saw a 31% increase in reporting, which speaks directly to the confidence that Marines have in their Commanding Officer and the Marine Corps. Reporting is the bridge to victim care and accountability remains the final litmus test for measuring our progress in our mission to eradicate this crime from our ranks. This sharp increase in reporting from last year is continuing into this year; I fully expect that we will exceed the rate of reporting of last year. I realize that on the surface an increase in reporting can be viewed as a negative outcome, however, I view it as an encouraging sign that our victims' confidence in our ability to care for them has increased markedly.

To supplement the ongoing work of the SAPR program and leadership in the field, we chartered a task force in April 2012, which produced our SAPR Campaign Plan and fed my subsequent Heritage Briefs. My intention was to reinvigorate our SAPR efforts program and implement large-scale prevention initiatives across the Marine Corps. With a culture change, a renewed emphasis on engaged leadership, and the message that it is every Marine's inherent duty to step-up and step-in to prevent sexual assaults. The efforts of the Campaign Plan and my Heritage Briefs are aligned with the Secretary of Defense's five lines of effort: Prevention, Advocacy, Investigation, Accountability and Assessment. Currently we have seen an increase in reporting of sexual assaults that went unreported in the previous year. Initial feedback from the field indicates that the surge efforts inspired victims to come forward because the message received was the Marine Corps takes sexual assault seriously and that it will not be tolerated.

Our Campaign Plan is comprised of three phases. The first phase consisted of 42 initiatives across the Marine Corps, resulting in an unprecedented call to action to address the prevalence of sexual assault within our ranks. Initiating a top-down approach, the SAPR General Officer Symposium (GOS) was held 10-11 July 2012 for two full days of training, where every General Officer in our Corps came to Marine Corps Base Quantico. We did the same thing in August during our 2012 Sergeants Major Symposium. Specifically convened to address the prevention of sexual assault, the two-day training event for all Marine Corps General Officers included subject matter experts who spoke on topics relevant to prevention, including the effects of alcohol, inadvertent victim blaming, dispelling myths, and other related subjects. Ethical Decision scenarios were introduced. This video-based training initiative, involving sexual assault based scenarios, was designed to evoke emotion, stimulate discussion, and serve as another training tool that would resonate with Marines of all ranks. This renewed focus on senior leadership was deemed a critical turning point for the Marine Corps. According to the 2012 Workplace and Gender Relations Survey of Active Duty Personnel (WGRA), 97% of

Marines received training within the past 12 months, which was an increase from 2010. These training efforts remain ongoing, as approximately 30,000 new Marines are brought in annually. Sixty-two percent of the Marine Corps population is between the ages of 18 and 24 – a high risk demographic for sexual assault.

To further cement leadership engagement, Command Team Training was given to all Commanding Officers and Sergeants Major, and was designed to bring forth a desired end state in which all leaders through are proactively engaged on the problem of sexual assault within the Corps. The program consisted of one day of training presented in the form of guided discussion, case studies, Ethical Decision scenarios and SAPR Engaged Leadership Training. SAPR Engaged Leadership Training, specifically, provided command teams in-depth practical knowledge of their responsibilities, the importance of establishing a positive command climate, the process of Victim Advocate (VA) selection, critical elements of bystander intervention and prevention. Bystander intervention, an evidence-based practice, is a central focus of all of our training programs. The 2012 WGRA Survey showed that 93% of female and 88% of male Marines indicate that they would actively intervene in a situation leading to sexual assault. I am encouraged by that data. Command Team Training was completed by 31 August 2012.

In Phase I of the Campaign Plan, all SAPR training was revitalized and standardized Marine Corps-wide. Specific Phase I training initiatives included "Take A Stand" bystander intervention training for all Non-Commissioned Officers and SAPR training for every single Marine. To achieve long-term cultural change, this training will be sustained through re-crafting the curricula in all of our professional schools, customizing the training based on the rank and experience of the individual Marine.

The second phase of the Campaign Plan, Implementation, is presently underway. This phase is focused on victim care, with the major initiative being the creation of the Sexual Assault Response Team (SART). SARTs are multidisciplinary teams of first responders that are designed to respond proficiently to the many concerns of victims, ensuring efficient investigative practices, forensic evidence collection, victim advocacy and care. A SART will include, at a minimum, the following personnel: Naval Criminal Investigative Service (NCIS), Military Police, Sexual Assault Response Coordinator (SARC)/VA, Judge Advocate/Trial Counsel, mental health services representative and Sexual Assault Forensic Examiner. For those installations where an immediate SART response capability is not available, the SART can include; community representatives, local law enforcement, rape crisis centers, district attorneys, federal task forces, existing civilian SARTs, or nongovernmental organizations specializing in sexual assault. Each SART is coordinated by the installation SARC.

The SART initiative coincides with the parallel efforts to increase the number of SAPR personnel in the field and intensify the training requirements. All SAPR personnel now receive

40 hours of focused sexual assault advocacy training and go through an accreditation process administered by the National Organization for Victim Assistance (NOVA). The addition of credentialed subject matter experts in the field enhances our victim care capabilities. Forty-seven new fulltime positions have been added in support of the nearly 100 highly trained, full-time civilian SARCs and VAs and nearly 1,000 collateral-duty SARCs and Unit Victim Advocates (UVAs). SAPR personnel are handpicked by Commanding Officers and serve as the victim's liaison for all supportive services to include counseling, medical, legal, chaplain and related support.

Phase II, Prevention, efforts also include further development of the SAPR training continuum, encompassing bystander intervention training for junior enlisted Marines, the development of eight additional Ethical Decision Games and the implementation of customized SAPR training for all Marines.

Phase III, the Sustainment Phase, will focus on providing Commanding Officers at all levels the requisite support and resources to effectively sustain SAPR efforts and progress. It includes the initiative to support Marine Corps Recruiting Command's implementation of a values-based orientation program, focused on the "whole of character" for young adults who are members of the Delayed Entry Program and have not yet attended recruit training. In addition to sexual assault, the program will specifically address all non-permissive behaviors such as sexual harassment, hazing, alcohol abuse, and other high-risk behaviors that tear at the fabric of the Corps.

The efforts of our Campaign Plan and Heritage Briefs have had many positive effects to include an increase in reporting. The Marine Corps portion of the FY12 Annual Report shows a 31% increase in sexual assault reports involving Marines and shows that this spike occurred largely in the second half of 2012...coinciding with implementation of our Campaign Plan and training and education efforts. As previously stated, I view increased reporting is a positive endorsement of our efforts to deepen the trust and confidence in our leadership and response system, as well as speaks to the courage of those Marines most impacted by this crime. In time, and with continued focus, Marines will increasingly understand and see that we have put in place a response system that provides the necessary care for victims while holding offenders accountable.

The 2012 WGRA indicated a greater number of female Marines aware of the number of options available to them to include the DoD Safe Helpline, expedited transfers and restricted reporting. Seventy-seven percent of those females, who reported some form of unwanted sexual contact, also told us they had a positive experience with the advocacy support provided to them.

Reporting

A victim of sexual assault can initiate SAPR services through various avenues and have two reporting options: unrestricted and restricted reporting. For both, our goal is to connect victims with Victim Advocates, who serve as the critical point of contact for information and support. Victim Advocates will provide support from the onset of the incident to the conclusion of needed care.

Unrestricted reporting triggers an investigation by NCIS as well as notification of the unit Commanding Officer. To make an unrestricted report, victims have several access points. Options include calling the Installation 24/7 or the DoD Safe Helplines, making a report to a civilian Victim Advocate (VA), Uniformed Victim Advocate (UVA), Sexual Assault Response Coordinator (SARC), medical/healthcare provider, law enforcement, or the chain of command. A victim may also make a report to a legal assistance attorney or a chaplain. All access points are funneled to the Victim Advocate to track and support the victim. Victim Advocates ensure that a Sexual Assault Forensic Examination (SAFE) is offered to the victim, counseling and/or chaplain services are offered to the victim, and liaison services with legal assistance are initiated. Victims are counseled early on in the proceedings that legal assistance is available through a Victim Witness Liaison Officer who provides information and assistance through the legal phase of this continuum. In addition, Victim Advocates keep the victim informed throughout the continuum of services.

There are many instances where Commanding Officers are made aware of incidents of sexual assault by third parties. In those instances, Commanding Officers are obligated to contact NCIS to initiate an investigation, as they would for any report of a crime that is brought to their attention. These reports are classified as unrestricted reports and all SAPR services are offered to victims in those instances.

Sexual assault cases and the completed NCIS independent investigation are automatically elevated to the first O-6 in the chain of command who, in close consultation with their legal advisors, decides which legal avenue to pursue. This decision-making process also includes a discussion with the first General Officer in the chain of command to decide whether the case will be pulled up to his or her level.

Commanding Officers are responsible for providing for the physical safety and emotional security of the victim. A determination will be made if the alleged offender is still nearby and if the victim desires or needs protection. They will ensure notification to the appropriate military criminal investigative organization (MCIO) as soon as the victim's immediate safety is addressed and medical treatment procedures are in motion. To the extent practicable, a Commanding Officer strictly limits knowledge of the facts or details regarding the incident to only those

personnel who have a legitimate need-to-know. Commanding Officers are in the best position to immediately determine if the victim desires or needs a "no contact" order or a Military Protective Order issued against the alleged offender, particularly if the victim and the alleged offender are assigned to the same command, unit, duty location, or living quarters.

Victims are advised of the expedited transfer process and the possibility for a temporary or permanent reassignment to another unit, living quarters on the same installation, or other duty location. Commanding Officers ensure the victim receives monthly reports regarding the status of the sexual assault investigation until its final disposition.

The Defense Sexual Assault Incident Database (DSAID) is a central data system managed by the Department of Defense Sexual Assault Prevention and Response Office (DoD SAPRO). DSAID is a DoD-wide service requirement that allows for the standardization of data collection and management, which is critical for improving case oversight, meeting reporting requirements, and informing SAPR Program analysis, planning, and future efforts to care for victims. In addition to providing consistency across the services in reporting, DSAID is electronically linked to the data system used by Naval Criminal Investigative Services (NCIS), facilitating timely and accurate coordination within the investigative process. Full migration to DSAID was completed in October 2012.

In October 2012, the Marine Corps implemented SAPR 8-Day Briefs, an additional tool designed to guarantee leadership engagement at the onset of each case. For all unrestricted reports of sexual assault, the victim's Commanding Officer must complete a SAPR 8-Day Brief to ensure that victim care resources are being provided. 8-Day Briefs include the Commanding Officer's assessment and a timely way ahead, and are briefed within eight days to the first General Officer in the chain of command. The reports are briefed quarterly to the Assistant Commandant of the Marine Corps. The analysis of the data compiled utilizing SAPR 8-Day Briefs also provides us with a more immediate assessment and surveillance opportunity, helping us to identify trends to further inform our prevention and response efforts. A victim's Commanding Officer stays engaged in the process from beginning to end by attending monthly Case Management Group meetings and coordinating with the SARC to ensure the appropriate level of victim care and support are being provided.

Restricted reporting is another reporting option for victims. This option is a critical resource for those in need of support. Restricted reporting does not trigger an official investigation but does allow for confidentiality and time to process the impact of the incident without the visibility that comes with immediate reporting to law enforcement officials and Commanding Officers. Victims are able to get a Sexual Assault Forensic Examination (SAFE). Evidence recovered from a SAFE can be held for five years, should the victim opt to convert their report to an unrestricted status. Through a restricted report, victims can also receive general

medical treatment, counseling services, and the full support of the Victim Advocate and Sexual Assault Response Coordinator.

There are many reasons why a victim of sexual assault would not report an incident, the perceived stigma about being re-victimized remains a powerful deterrent to reporting for Marines. Restricted reports can be taken by specified individuals (i.e., SARCs, VAs/UVAs, or healthcare personnel). Restricted reporting allows those victims to take care of themselves emotionally and physically. Victims who make restricted reports often comprise the population who might otherwise remain silent. Restricted reporting increased by over 100% in the FY12 Annual Report and serves as an initial indicator that our messaging about the reporting options has been effective.

Assessment

The Marine Corps is developing ways to monitor victim care and services more closely through SARC engagement in an effort to improve and better utilize all resources available to victims and to help keep victims engaged in the process. A victim survey is being developed to accomplish that task and will assess all levels of services provided.

I have just recently approved and directed new Command Climate surveys. These surveys are mandatory within 30 days of a Commanding Officer taking command and also at the Commanding Officer's twelve-month mark in command. Giving Commanding Officers this tool and holding them accountable for the overall health and well-being of their command will help us mitigate the high-risk behaviors that tear at the fabric of the Corps. The results of the Command Climate surveys will be forwarded to the next higher headquarters in the chain of command. It is important to keep in mind however that the command climate surveys are just one assessment tool.

The Investigation

Before the Commanding Officer is confronted with a decision about what to do with an allegation, the Commanding Officer will receive significant advice and information from three different sources. By current Marine Corps practice, once NCIS is notified of a sexual assault, there is coordination between a prosecutor and the investigating agent(s). This practice enables unity between the investigative and prosecutorial functions of the military justice system. It also ensures that the Commanding Officer's evaluation of the alleged crime is fed by two distinct and independent professional entities – NCIS and the military prosecutor. Additionally, the Commanding Officer is advised by his Staff Judge Advocate (SJA) during this stage. The SJA is an experienced judge advocate, well versed in the military justice system, and able to advise the Commanding Officer on what actions to direct during the investigation, such as search authorizations.

As a critical component of our Campaign Plan, I directed that our legal community completely reorganize into a regional model, which gives us the flexibility to better utilize the skills of our more experienced litigators. Practically speaking, our new regional model, which became fully operational late last year, allows us to place the right prosecutor, with the appropriate training, expertise, supervision, and support staff, on the right case, regardless of location. These prosecutors not only represent the government at the Court-Martial, but they work with NCIS to develop the case and advise the Commanding Officer and his or her SJA about the status of the case.

I directed this reorganization because an internal self-assessment of our military justice docket uncovered an increase in complex and contested cases as a percentage of our total trial docket. We realized that our historical model of providing trial services needed to be revised to better handle these complex cases, many of which involved sexual assault. More specifically, within the alleged sexual assault cases, we noticed a significant number of alcohol associated sexual assaults, which are difficult cases to prosecute, thus I wanted our more seasoned trial attorneys available for use by our Commanding Officers.

The legal reorganization greatly increases the legal expertise (based on experience, education, and innate ability) available for prosecuting complex cases. The reorganization divided the legal community into four geographic regions — National Capital Region, East, West, and Pacific. These regions are designated Legal Service Support Areas (LSSA) and are aligned with the structure of our regional installation commands. Each LSSA contains a Legal Services Support Section (LSSS) that is supervised by a Colonel Judge Advocate Officer-in-Charge. Each LSSS contains a Regional Trial Counsel (RTC) office that is led by an experienced Lieutenant Colonel litigator whose extensive experience provides effective regional supervision over the prosecution of Courts-Martial cases. This new construct provides for improved allocation of resources throughout the legal community and ensures that complex cases, such as sexual assaults, are assigned to experienced counsel who are better suited to handle them. After our reorganization, we have increased the experience level in our trial bar by over 20% from the previous year.

The Marine Corp's "Special Victim Capability" resides in the RTC offices through the use of Complex Trial Teams (CTT). The CTT is assembled for a specific case and may contain any or all of the following: a civilian Highly Qualified Expert (HQE), experienced military prosecutors, military criminal investigators, a legal administrative officer, and a paralegal. The civilian HQE is an experienced civilian sexual assault prosecutor who has an additional role training and mentoring all prosecutors in the region. The HQEs are assigned to the RTCs and work directly with prosecutors, where they will have the most impact. HQEs report directly to the RTC and provide expertise on criminal justice litigation with a focus on the prosecution of

complex cases. In addition to their principal functions, the HQEs also consult on the prosecution of complex cases, develop and implement training, and create standard operating procedures for the investigation and prosecution of sexual assault and other complex cases. The criminal investigators and the legal administrative officer in the RTC office provide a key support role in complex prosecutions. Historically, a prosecutor was individually burdened with the coordination of witnesses and experts, the gathering of evidence, background investigations, and finding additional evidence for rebuttal, sentencing, or other aspects of the trial. These logistical elements of a trial are even more demanding in a complex trial; the presence of criminal investigators and the legal administrative officer allow Marine Corps prosecutors to focus on preparing their case.

Our Reserve Judge Advocates, who are experienced criminal prosecutors, are brought on active duty and made available to mentor our active duty Judge Advocates either during training or on specific cases. To ensure an adequate level of experience and supervision not only at the headquarters level, but also in each LSSS, we more than doubled the number of field grade prosecutors we are authorized to have on our rolls from 11 to 25. We also specifically classified certain key supervisory military justice billets to require a Master of Laws degree in Criminal Law.

The Disposition Decision

When NCIS completes its investigation, the Commanding Officer must make a disposition decision. Essentially, the Commanding Officer must decide if the case should go to Court-Martial or some lesser forum. There are two important points to cover at this stage. First is the type of Commanding Officer who is making this decision. Second is the process the Commanding Officer uses to make his or her decision.

On April 20, 2012, the Secretary of Defense (SecDef) issued a memorandum withholding Initial Disposition Authority (IDA) in certain sexual assault offenses to the Colonel, O-6, SPCMCA level. The SecDef withheld the authority to make a disposition decision for penetration offenses, forcible sodomy, and attempts to commit those crimes. This withholding of IDA to a Sexual Assault Initial Disposition Authority (SA-IDA) also applies to all other alleged offenses arising from or relating to the same incident, whether committed by the alleged offender or the alleged victim (i.e., collateral misconduct). On June 20, 2012, I expanded this O-6 level withholding to include not just penetration and forcible sodomy offenses, but all contact sex offenses, child sex offenses, and any attempts to commit those offenses.

My expansion of the scope of the SecDef's withhold of IDA is another example of the important role a Commanding Officer plays in military justice. I felt it was important for good order and discipline to make it clear to our Marines that all types of non-consensual sexual

behavior were worthy of a more senior and experienced Commanding Officer's decision. I also made it clear that under no circumstance could the SA-IDA forward a case down to a subordinate authority for disposition.

Before discussing the procedures our SA-IDAs use to make the initial disposition decision, I want to point out a specific Marine Corps policy on collateral misconduct by an alleged victim (e.g., underage drinking). Marine SA-IDAs are encouraged to defer adjudication of any alleged victim collateral misconduct until the more serious non-consensual sex offenses are adjudicated. This policy is specifically aimed at encouraging victim reporting and making the fairest decision regarding collateral misconduct at the most appropriate time.

In accordance with Rule for Court-Martial (RCM) 306(c), the SA-IDA for sexual assaults may dispose of charged or suspected offenses through various means: "Within the limits of the Commanding Officer's authority, a Commanding Officer may take the actions set forth in this subsection to initially dispose of a charge or suspected offense," by taking (1) no action, (2) administrative action, (3) imposing Non-Judicial Punishment, (4) disposing of charges through dismissal, (5) forwarding charges to a superior authority for disposition, or (6) referring charges to a Court-Martial.

Before making a decision regarding the initial disposition of charges, the Convening Authority must confer with his or her SJA. In the Marine Corps model for providing legal services, the provision of legal services support (i.e. trial and defense services, review, civil law, legal assistance) is completely divorced from the provision of command legal advice. Practically, this means the Commanding Officer's SJA is not affiliated with the prosecutors who evaluate the evidence in the case and recommend whether to take a case to trial. Effectively, this ensures the Commanding Officer and his SJA receive impartial advice (in addition to information from NCIS) in order to make an appropriate and well-informed disposition decision in accordance with RCM 306.

If a Commanding Officer decides to proceed with charges against an alleged offender, the Commanding Officer will file a request for legal services with the LSSS that services the command.

The Article 32 Investigation

Before a case can go to a General Court-Martial, the Commanding Officer must first send the case to an Article 32 investigation. According to Article 32, UCMJ, "[n]o charge or specification may be referred to a General Court-Martial for trial until a thorough and impartial investigation of all the matters set forth therein have been made." A General Court-Martial may not proceed unless an Article 32 investigation has occurred (or the accused has waived it).

Unlike a grand jury under Federal Rule of Criminal Procedure 6, the proceeding is not secret and the military accused has the right to cross-examine witnesses against him or her.

RCM 405 governs the conduct of the Article 32 investigation and states in its discussion that “the investigating officer should be an officer in the grade of major... or higher or one with legal training... and may seek legal advice concerning the investigating officer’s responsibilities from an impartial source.” As a matter of regulation in the Marine Corps, for a case alleging a sexual assault, the Article 32 investigating officer (IO) must be a Judge Advocate who meets specific rank and experience requirements, in accordance with Marine Corps Bulletin (MCBul) 5813, “Detailing of Trial Counsel, Defense Counsel, and Article 32, UCMJ, Investigating Officers.” MCBul 5813 was published on 2 July 2012 and ensures that Judge Advocates who are detailed as trial counsel (TC), defense counsel (DC), and Article 32 IOs possess the appropriate expertise to perform their duties.

Once the Article 32 investigation is complete, the IO makes a report to the Convening Authority that addresses matters such as the sufficiency and availability of evidence, and more importantly, contains the IO’s conclusions whether reasonable grounds exist to believe that the accused committed the offenses alleged and recommendations, including disposition. Although the rules of evidence generally do not apply at an Article 32 investigation, it is important to note that the evidentiary rape-shield law and all rules on privileges do apply.

Before deciding how to dispose of charges and allegations, the Convening Authority again receives advice from his or her SJA and then decides how to dispose of the charges and allegations. Prior to making a disposition decision, Convening Authorities also take the victim’s preference into consideration. Victim Advocates, SARCs, and the victim can express preferences to the trial counsel, who will communicate directly with the SJA and Convening Authority. If the Commanding Officer decides to move forward, he or she may refer the charges to a General Court-Martial or a lesser forum.

Court-Martial

Since the formation of our CTTs in October 2012, we have seen significant improvements in our ability to successfully prosecute Courts-Martial involving sexual assault offenses. After the first six months of our legal reorganization (October 2012-March 2013), we compared court-martial disposition data against the same six-month period from the previous year (October 2011-March 2012). Here are our main findings:

- A 77 percent increase in the number of cases involving sex offenses that went to Court-Martial (from 31 to 55). We attribute that significant increase to three main things: first, an improved investigative effort as a result of improvements in NCIS’ ability to investigate cases, along with the force multiplying effect of our embedded investigators;

second, the dedication of increased prosecution resources to complex cases; and three, increased reporting based on our Campaign Plan efforts.

- A 94 percent increase in the number of General Courts-Martial in cases dealing with sexual assault offenses (from 19 to 37).
- For General Courts-Martial involving sexual assault offenses, an 89.5% overall conviction rate, with 62.5% of those convictions for sexual assault offenses. In the 30 cases where there was a conviction for a sexual assault offense, 90% of the sentences included a punitive discharge. We also almost doubled the amount of sexual assault convictions receiving confinement in excess of five years (from 28.5% to 44%).
- Between the two six-month periods, there was an 18% increase in the conviction rate of charged sexual assault offenses.

Overall, the initial data from our legal reorganization shows that our CTTs are prosecuting more cases with better results. We expect this trend to continue and will closely monitor the statistics to identify any other relevant trends. This set of initial data also validates my belief that a Commanding Officer-based system of military justice can successfully prosecute complex cases if we are smart in how we dedicate the appropriate investigative and prosecutorial resources.

My focus to this point has been on the prosecution function within the Marine Corps. What must not be lost in our discussion of offender accountability, is the primary goal of justice in our courtrooms. I must ensure that each Marine accused receives a constitutionally fair trial that will withstand the scrutiny of appeal. To that end, in 2011 we established the Marine Corps Defense Services Organization (DSO), which placed all trial defense counsel under the centralized supervision and operational control of the Chief Defense Counsel (CDC) of the Marine Corps. This change was designed to enhance the independence of the Marine Corps DSO and the counsel assigned to it. The DSO also established a Defense Counsel Assistance Program (DCAP) to provide assistance and training to the DSO on sexual assault and other cases.

During the Court-Martial process, we take special care to ensure that the rights and interests of victims are protected. The Military Rules of Evidence (MRE) provides the same protections as our Federal and State courts against the humiliation, degradation and intimidation of victims. Under MRE 611, a military judge can control the questioning of a witness to protect a witness from harassment or undue embarrassment. More specifically for sexual assault cases, the military's "rape shield" in MRE 412 ensures that the sexual predisposition and/or behavior of a victim is not admissible absent a small set of well-defined exceptions that have survived extensive appellate scrutiny in federal and military courts (the exceptions listed in MRE 412 are identical to the exceptions listed in Federal Rule of Evidence 412). In addition, victims also have the protection of two special rules on privileges. Under MRE 513, a patient (victim) has the

privilege to refuse to disclose, and prevent another person from disclosing, a confidential communication between the patient and a psychotherapist. Under MRE 514, the military has created a “Victim advocate-victim privilege” that allows a victim to refuse to disclose, and prevent another person from disclosing, a confidential communication between the victim and a victim advocate in a case arising under the UCMJ. These two evidentiary privilege rules ensure that victims have a support network they are comfortable using and that they do not have to fear that their efforts to improve their mental well-being will be used against them at a court-martial.

Marine prosecutors, paralegals and NCIS investigators, along with full-time, professional, credentialed Sexual Assault Response Coordinators (SARCs) and Victim Advocates (VAs), provide individualized support to inform and enable victims to participate in the military justice process. The Marine Corps is in the process of hiring 25 full-time credentialed SARCs and 22 full-time credentialed VAs to augment the over 70 SARCs and 955 Uniformed and civilian VAs presently in the field. Hiring and credentialing are on track to be completed by October 2013.

Post-trial – the Convening Authority’s Clemency Power

On May 7, 2013, the Secretary of Defense submitted proposed legislation to Congress that would modify the Convening Authorities ability to take action on the findings and sentence of a Court-Martial during the post-trial phase. Specifically, the legislation would limit the Commanding Officer’s ability to act on the findings of a Court-Martial to a certain class of “minor offenses,” and also require a written explanation for any action taken on the findings or the sentence of a court-martial. I support exploring these proposed modifications for two reasons.

First, I believe the proposed modifications are reasonable adjustments to a specific phase of the Court-Martial process that has changed significantly since its inception. The Commanding Officer’s broad authority under Article 60 was established during a time when the key participants of the trial—the prosecutors, defense counsel, and military judges—were not professional lawyers, and when there was not a comprehensive system of appellate review. The professionalization of our Court-Martial practice and the addition of multiple layers of appellate review justify reducing the Commanding Officer’s broad authority to take action on the findings in cases not involving “minor offenses.” I believe the Secretary of Defense’s proposal properly excludes the right class of cases that would be left to the appellate review process for the correction of legal error and/or clemency. Similarly, I believe that a Commanding Officer, based on his or her specific needs for good order and discipline, should retain the ability to take action on the findings of “minor offenses” identified in the proposal.

Second, the proposal would improve the transparency of the military justice system. When the Commanding Officer does believe it is necessary to take action under Article 60, that action should be as transparent and visible as every other aspect of the Court-Martial. The proposed requirement for a written explanation for any Article 60 action ensures accountability and fairness and will preserve the trust and confidence service members and the public have in our military justice system.

Conclusion

I fully acknowledge that we have a problem and that we have much to do. We must protect our greatest asset – the individual Marine...they are and will always be the strength of our Corps. That said, I am determined to establish a culture that is intolerant of sexual harassment and sexual assault, one that promotes mutual respect and professionalism, and maintains combat readiness. I am determined to fix this problem and will remain fully engaged in developing solutions towards prevention efforts and maintaining our high standards of good order and discipline.