

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