

Prepared Statement of Christopher W. Behan, Associate Professor of Law, Southern Illinois University School of Law

Judge Jones and Members of the Panel:

I appreciate the opportunity to be with you here in Washington, DC, to discuss the role of the commander in the American military justice system. Commanders have played a central role in our military justice system from its inception to the present day. I am a proponent of a command-centric military justice system in which commanders—with the advice of seasoned judge advocates who are part of the commander's staff—have ultimate responsibility for the following roles and responsibilities: the sole exercise of prosecutorial discretion; the ability to convene and staff courts-martial, including the selection of panel members; funding the administration of military justice within their commands; and the exercise of limited clemency powers that do not include the ability to set aside the findings or reduce the sentence of a court-martial other than pursuant to plea agreements. In the past, I have written about the central importance of the commander's role in the American military justice system, and I refer the board to the materials I submitted earlier in the summer on that topic.

The crisis of sexual assault within the military poses a grave threat to good order and discipline. To be sure, the military is a microcosm of a civilian society in which sexual assaults are prevalent, underreported and frequently unpunished in both state and federal court systems. But the military is different from civilian society and should be held to higher standards regarding sexual assault. In particular, every sexual assault in which one servicemember victimizes another violates the trust and camaraderie that should exist between brothers and sisters in arms, degrades the effectiveness and efficiency of our fighting forces, and leaves—eventually—a devastated veteran in its wake. This is so regardless of the genders of the perpetrators and the victims.

Solving this problem will require an integrated effort that includes a cultural transformation within the armed forces, education and training to recognize and prevent sexual assaults, structural and organizational changes to reduce the opportunities for predators to commit sexual assaults, improved procedures for reporting and investigating alleged sexual assaults, and a justice system that properly balances the interests of victims and the rights of criminal defendants in reaching just and correct outcomes. A military justice system that provides for the *ex post facto* vindication of victims and effective prosecution of offenders is an important part of the solution, but it is by no means the entire solution. The true challenge is to significantly reduce the number of sexual assaults that occur in the first instance.

Congress has rightly called into question whether military leaders have shown the proper focus, commitment and ability to end this crisis. As this board works to complete its report and make its recommendations, it is important to keep in mind that no plan to resolve the crisis will succeed without the active involvement of military commanders in all phases of the problem, from prevention to punishment. In my view, this necessitates keeping the commander at the center of the military justice system, and in particular, ensuring that the commander has sole prosecutorial discretion over all categories of offenses in the military justice system and the continued ability to convene, staff and fund courts-martial.

Many individuals and groups have suggested that removing the commander's influence from the military justice system altogether will improve the system considerably. They point to changes made in the military justice systems of some of our closest allies, who have removed both prosecutorial discretion and the ability to convene and administer courts-martial from commanders. These changes have primarily occurred in the wake of court decisions interpreting treaty obligations and changes in national charters of rights and freedoms. While I do not question the legal necessity or wisdom of what any of our allies have done with their military justice systems, I do think it is important to point out that similar changes are not constitutionally required in our system. With respect to military justice, the foundational constitutional principles have never been amended or changed: Congress has responsibility to create rules governing the armed forces under Article I of the Constitution, and the President has the authority to

implement the military justice system in his role as Commander in Chief under Article II. Despite many well-argued efforts in the past one hundred years to divest commanders of military justice powers, Congress has maintained a command-centric military justice system, recognizing that good order and discipline—not justice for its own sake—is the primary mission of the military justice system. Moreover, given the tremendous deference the Supreme Court has traditionally shown to Congress's exercise of its Article I authority over the military justice system, we are unlikely ever to see a court decision mandating the removal of commanders in order to bring our military justice system into alignment with those of our close allies.

It is also important to note the significant differences between the United States military and our allies that have changed their military justice systems. Our forces literally span the globe, operating in countries with diverse legal systems and approaches to justice, subject to Status of Forces Agreements that impose varying obligations and responsibilities on commanders with respect to military justice. Our expeditionary military requires a system that works aboard ships, on well-established military bases in countries with strong democratic traditions, on temporary bases in countries with legal systems hostile to ours, and on forward operating bases in combat zones. In every one of these circumstances, the responsibility for good order and discipline rests entirely on the commander, not the legal staff. The commander alone is ultimately accountable and must bear the external and internal consequences of misconduct by servicemembers.

In the United States itself, our forces are based throughout a federal system in which every state has a different criminal justice code, and in which both local prosecutors and the military justice system often have co-equal jurisdictional rights over certain offenses. A crime committed by a servicemember in Watertown, New York or Yuma, Arizona might register as nothing more than a blip on the military justice radar in Washington, DC, yet have a profound impact on the relationship between a community, a military base and a command. Local commanders and their staff judge advocates frequently negotiate with local district attorneys regarding who will actually investigate, process and try a case; very often, there is a high level of cooperation between the military justice system and the local criminal justice system regardless of who actually tries the case. The ability to and flexibility to maintain good order and discipline in light of local conditions is an essential requirement of our military justice system.

In addition, we have an integrated military that includes active component, reserve component and National Guard troops. Criminal jurisdiction over these troops depends on their duty status under the United States Code and also, in the case of the National Guard, state military justice codes. Local issues and political concerns inevitably play a role in military justice decisions, particularly those involving National Guard troops. These concerns are part and parcel of the commander's role in maintaining good order and discipline, regardless of whether the commander is active, reserve or National Guard.

The Uniform Code of Military Justice works because it is designed as an instrument to help commanders maintain good order and discipline. It is but one tool among many in the accomplishment of that objective, and military lawyers, like all other specialized staff officers in the military, exist primarily in order to help commanders fulfill their responsibilities. It is a unified system in which all aspects of the case from investigation to approval of court-martial findings are the ultimate responsibility of the commander.

Total removal of the commander from the American military justice system would irrevocably alter its character, diminish its utility to commanders, and, if replaced by centralized military justice systems such as those adopted by some of our allies, degrade its flexibility and ability to adapt to local conditions, both internationally and domestically. A partial removal of the commander from the system, such as that suggested in the Military Justice Act of 2013 (MJIA 2013), would create chaos and prove to be a significant disruption to both the discipline and justice functions of the UCMJ.

The MJIA 2013 dis-integrates the Uniform Code of Military Justice by creating a bifurcated military justice system in which a centralized cadre of senior military prosecutors will exercise effective control over offenses arising under Articles 92, 118-132 and 134 of the Uniform Code of Military Justice, while commanders continue to exercise control over offenses arising under Articles 83 to 91, 93-117, and 133.<sup>1</sup> Although the Senate Armed Services Committee cut the MJIA 2013 from the National Defense Authorization Act for FY 2014 (NDAA 2014), its sponsor, Senator Gillibrand of New York, has promised to offer the MJIA 2013 as an amendment to the NDAA 2014 when that bill is on the full Senate floor for a vote. The proposed amendment to the NDAA 2014 adds Articles 92 and 134 to the list of offenses over which commanders would retain their prosecutorial discretion and convening authority.<sup>2</sup>

Quite apart from the impact of divesting a commander of prosecutorial discretion and the authority to convene and staff courts-martial for certain offenses, the MJIA 2013 and Senator Gillibrand's proposed amendments to the NDAA 2014 present several practical difficulties that could seriously disrupt the efficient administration of military justice.

First, the proposals create a bifurcated military justice system. In this system, the commander is able to bring charges and convene courts-martial for what the drafters evidently consider to be purely military offenses, including everything from desertion and unauthorized absences (Articles 85 and 86) to dueling (Article 114), malingering (Article 115), provoking speech and gestures (Article 117) and offenses under Articles 92, 133 and 134. The proposals withhold command prosecutorial discretion and court-martial convening authority for serious common law offenses such as murder (Art. 118), rape (Art. 120), larceny (Art. 121) and assault (Art. 128). Prosecutorial discretion and the ability to convene courts-martial for these serious offenses is given to senior military attorneys who will be appointed by the Secretaries of the military departments.

What is puzzling about the proposal is that it leaves commanders with prosecutorial discretion and command control over a number of serious criminal offenses. These include the wrongful use, possession and distribution of controlled substances (Article 112(a)), as well as numerous offenses under Articles 133 or 134. Article 134 encompasses a wide variety of serious criminal misconduct that also happens to be prejudicial to good order and discipline and/or service-discrediting. Some of the more serious Article 134 offenses include assault with intent to commit murder, manslaughter, voluntary manslaughter, rape, robbery or sodomy (Manual for Courts-Martial Part IV, para. 64); bribery and graft (MCM Part IV, para. 66); child endangerment (MCM Part IV, para. 68a.); child pornography offenses (MCM Part IV, para. 68b.); negligent homicide (MCM Part IV, para. 85); pandering and prostitution (MCM Part IV, para. 97); reckless endangerment (MCM Part IV, para. 100a.); kidnapping (MCM Part IV, para. 92); and soliciting others to commit an offense (MCM Part IV, para. 105). Furthermore, Article 134 also provides for the assimilation of federal and state criminal laws under appropriate circumstances, a sophisticated exercise of legal reasoning and discretion.

If a commander cannot be trusted to exercise proper prosecutorial discretion over a rape case, it makes little sense to give him control over child pornography or assimilated crimes cases. And yet the proposed amendments to the NDAA 2014 do just that.

Furthermore, the proposal does not speak to the inconvenient reality that many of the offenses taken away from the command occur in conjunction with those retained by the command. For example, it is not difficult to imagine a scenario in which a servicemember on an unauthorized absence kidnaps and rapes or otherwise sexually assaults another servicemember. Two of those offenses—unauthorized absence and kidnapping—fall within the military justice purview of the command. One—the sexual assault—does not. The Manual for Courts-Martial, reflecting

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<sup>1</sup> See S. 967, The Military Justice Improvement Act of 2013, sec. 2 (hereinafter MJIA 2013). See also Senator Gillibrand Proposed Amendments to NDAA 2014, S. 1197, sec. 568(a)(2) (hereinafter Proposed Amendments).

<sup>2</sup> The senator's proposed amendment to the NDAA 2014 adds Article 92 offenses and Article 134 offenses to the commander-driven part of the military justice system. See Proposed Amendments, sec. 568(a)(2).

current practice in both state and federal criminal justice systems, states a preference for bringing all known charges against an accused at one time.<sup>3</sup> In a bifurcated system, one could imagine turf battles regarding which convening authority has the greatest interest in bringing the case to trial, who will staff the case, and who will be in charge of selecting members and convening the court-martial.

Second, even as the proposals create a bifurcated military justice system, they do not fund it or staff it. Instead, the proposals specifically require the use of “personnel, funds, and resources otherwise authorized by law,” and forbid interpreting the proposal to authorize additional personnel, personnel billets or funds to discharge the duties required.<sup>4</sup> In practical effect, this means a reconfiguration of already-scarce military justice resources among the different services. Installation or unit staff judge advocates would not be able to exercise prosecutorial discretion or convene courts-martial, because the senior military lawyers assigned to exercise prosecutorial discretion and convene courts-martial cannot come from the same chain of command as the victim or accused.<sup>5</sup> Thus, it will be necessary to create regional or centralized organizations to carry out these justice functions. Inevitably, these organizations will cannibalize active-duty billets in the field, requiring senior leaders, support staff, and junior officers to try cases.

The proposed amendments say nothing about who will pay for investigators, expert witnesses and other necessary resources. Traditionally, these expenses are funded from the convening authority’s operations funds. There are no provisions in the proposals to sweep funds from commanders in the field in order to pay a central military justice organization to administer military justice instead of them for certain categories of offenses.

The proposals do not, however, relieve commanders of all responsibilities pertaining to military justice. They must still exercise prosecutorial discretion, convene and staff courts-martial for all the serious offenses left to them by the proposals. This will require senior leaders, support staff, and junior officers to try cases.

In an era of sequestration and financial austerity, we likely cannot afford to fund two sets of parallel military prosecutors and convening authorities. Because of duplication of functions and mission confusion, we will not have a “two for the price of one” situation if we cannibalize one to create the other. Instead, we may very well end up with two parallel systems working at cross-purposes with each other, chronically underfunded and fighting each other for resources and personnel.

Third, the proposals create potential personnel and command conflicts pertaining to the detail of panel members to courts-martial. Senator Gillibrand’s proposed amendments to the NDAA 2014 require the service secretaries to create offices that are responsible to convene courts-martial, detail military judges, and detail panel members.<sup>6</sup> The proposal is silent concerning where the panel members will come from. Will convening authorities nominate panels for use by these court-martial offices? Or will the offices broadly interpret their statutory authority to permit them to nominate and detail panel members regardless of their command affiliation? Either option could create problems: in the first option, commanders might shield subordinate commanders from serving on panels, instead nominating officers and non-commissioned officers whose chief qualification to serve on a panel is availability; in the second option, court-martial offices might detail highly qualified panel members without regard to operational assignments or duties, creating conflicts with multiple levels of command. One advantage of a unified system under command control is that the commander can emphasize the importance of military justice by assigning her best and brightest subordinates, including commanders and critical staff officers, to court-martial panel duty on *her* courts-martial. The incentive to do this is considerably diminished when the courts are being convened, and panel members detailed, by someone else.

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<sup>3</sup> See MCM, R.C.M. 307(c)(4) and 601(e)(2).

<sup>4</sup> Proposed Amendments, sec. 568B.

<sup>5</sup> Proposed Amendments, sec. 568A.

<sup>6</sup> Proposed Amendments, sec. 568A(c)(1)(A)-(C).

We cannot forget that human nature will inevitably complicate any efforts to administer a bifurcated military justice system from afar. Over time, the goals of military prosecution offices and commanders might well diverge from each other. Separated from the command, military prosecution officers will need to find ways to distinguish themselves on evaluation reports, and win/loss records might be one way to do that. This would create a disincentive to refer cases to trial that might jeopardize a winning record. In our current system, commanders regularly refer difficult sexual assault cases to courts-martial, relying on the connection between these offenses and good order and discipline to send a message that they take these offenses seriously, regardless of whether the trial will be a guaranteed win. In contrast, civilian prosecutors regularly decline to prosecute difficult cases—particularly he-said/she-said cases in which consent is the only contested issue—because they cannot justify expending their resources on cases they are not virtually certain to win. In my own military career, I had several experiences prosecuting or defending sexual assault cases that would never have made it trial in a civilian jurisdiction. Command involvement in the prosecution of these cases provides a necessary perspective that lawyers on their own simply do not have. Lawyers in the military are capable of a great many things, but they do not wear the mantle of authority or bear the burdens of command. If prosecution decisions are made outside the chain of command, in time the connection with the needs of the command will disappear, and the military justice system will have little relevance to the command.

Finally, the proposed amendments could create a perverse incentive for military justice matters in which commanders feel a diminished sense of responsibility because a distant set of judge advocates somewhere else is in charge of these things. This could erode the relationship between the military justice system and the command it is designed to serve.

If commanders are not involved in military justice, it might be just as well to civilianize the prosecution of all serious criminal offenses, passing them on to U.S. Attorneys' offices or state district attorneys. Commanders could then exercise disciplinary authority over purely military breaches of good order and discipline, similar to the systems employed by many of our allies.

In our military justice system, such a result is unthinkable.