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To: Response Systems Panel

24 September 2013

Judge Jones and Members of the Panel:

Thank you for once again allowing me to offer my views on this important matter, and for including me in a panel of such distinguished colleagues. I share what I know is our collective admiration for the contribution you will undoubtedly make to the improvement of military justice in the United States, and for your devotion to the interests of both justice and military readiness.

To that end, I reiterate my conviction that I (and many others) consider the fundamental change to military justice proposed by Senator Gillibrand extremely unsound. In my opinion, it is empirically unjustified, very likely will produce the exact opposite effect those who support the proposal seek to achieve, and a change that will produce a genuine risk of negative second order effects that will undermine the efficacy of legal support to military operations. I therefore believe the commander must retain a prosecutorial role to ensure that our system continues to be one that produces *military justice*, and not merely *justice in the military*. I believe our system is designed to, and must, produce more than merely justice in the civilian sense; it must link the accomplishment of justice to the interests of good order and discipline, and ultimately a commander's confidence that the military unit he is responsible to lead into combat is ready to meet this challenge. This is a much more complex "end state" for a system designed to respond to allegations of criminal misconduct than the civilian criminal justice system. Accordingly, I believe it is the central and essential role of the commander in the process of dispensing justice in such cases that is at the core of true military justice.

I do, however, believe that our system can and should be strengthened. After extensive discussions with Professor VanLandingham and many other highly respected colleagues versed in the issues related to reform of the military justice system, I recommend that you propose transforming the existing informal commander/legal advisor (JAG) joint prosecutorial decision-making process into a mandatory requirement. Such a transformation will enhance the disposition of military justice while preserving the role of the commander in the justice process. There are two primary reasons for this recommendation. First, it leverages the collective

expertise of both the commander and the military lawyer, ensuring the broadest possible perspective of interests is factored into prosecutorial decisions. Second, it mitigates the risk of arbitrary prosecutorial decision-making by enabling each of these joint decision-makers to offset improper influences on each other. I also believe this is the exact process that *de facto* occurs today, and has produced prosecutorial outcomes that, when assessed from a totality perspective (and not by isolating aberrational cases), more credible outcomes than in the civilian system. Furthermore, like Professor VanLandingham, I strongly believe that if this joint decision-making process is formalized, it must extend to all offenses, and not merely one category of offenses. Limiting this change to only one category of offense would implicitly indict the credibility of all other military prosecutions.

I also believe that shifting prosecutorial discretion to the JAG exclusively will undermine the efficacy of legal support to military operations. Never in our history have military lawyers been so comprehensively integrated into the battle command process. Indeed, our operational law model is an icon many other armed forces aspire to emulate. With legitimacy a core tenet of joint military operations, it would be strategic folly to jeopardize the progress made over the past decades in developing a culture where the military lawyer plays a central role in the planning, execution, and oversight of military operations. The role of the “operational lawyer” today is not primarily the result of doctrine, or of a mandate to provide legal support to operations; it is primarily the result of the trust and confidence commander’s and their operational staffs vest in the military lawyer. That trust and confidence blossoms from a garrison relationship that is forged through the routine and essential commander/JAG interaction on military justice matters, interaction that will inevitably be diluted if it is the JAG who is solely responsible for prosecutorial decisions.

This aspect of the relationship between military justice, the commander, and the JAG, reveals that the continuing attempts to compare military to civilian justice is akin to comparing apples to hand grenades. Nothing in the civilian justice system or the responsibilities of a District Attorney genuinely compares to the responsibilities of a commander to ensure the military unit is ready to meet the challenges of combat operation. Nor does a District Attorney enjoy anything like the relationship that must exist between the JAG and the battle staff to ensure legitimate and legally sound operational execution. Unlike the civilian system, it is the commander, and not the prosecutor, who has the greatest understanding of the “community” and the impact of crime on that community, for in the military that “community” is the military unit. The almost total consensus that the commander must retain a role in exercising

prosecutorial discretion that exists among both senior military lawyers (those who have actually advised a General Court-Martial convening authority on a prosecutorial decision) and former senior commanders is a powerful indication of the truly unique nature of the military community and why this necessitates this command role.

Implementing a joint prosecutorial decision-making process will enhance the actual and perceived legitimacy of the military justice system, increase the probability that meritorious allegations of criminal misconduct are disposed of appropriately and that service-members are protected from overzealous prosecutorial decisions for frivolous allegations, and that senior commanders are engaged when a case is sufficiently controversial to produce discord among the commander and her JAG.

Thank you, and I look forward to answering your questions.