

Prepared Statement of Professor Victor Hansen

To: Response Systems Panel

24 September 2013

Judge Jones and Members of the Panel:

Thank you for the opportunity to address you on the important issue of the commander's role in military justice. As you know, military justice has been a topic of intense interest among the services, the media, the public and Congress. The role of the military commander in our system has been a topic of particular interest and this is an area that myself and others have considered for some time. In my brief prepared remarks I want to touch on just a few points.

First, I believe that there are a number of areas where the commander's involvement in the court-martial process can be reduced or eliminated without adverse impacts on good order and discipline. I have written on this topic and I know you have my materials available to you so I would simply refer you to that material for a more detailed analysis.

I do think, however, that any reforms to this aspect of military justice should not ignore the important role that the commander must exercise in order to maintain good order and discipline within the unit. Military justice is a tool of the commander and reforms must not ignore this fundamental principle.

I do not support legislative reforms that would remove the commander from making the charging/referral decision in courts-martial either for a subcategory of offenses or more generally. Such an approach would take away from the commander one of the most important tools of command and the commander would be left with the responsibility but not the authority to maintain good order and discipline within the unit. I also disagree with those who advocate for these changes specifically in sexual assault cases because I do not believe these changes would have a significant impact on the military's ability to effectively prosecute these cases and hold offenders accountable while protecting victims.

One need look no further than the recently completed Article 32 hearing involving allegations of rape and sexual assault at the Naval Academy to see the complexity of these cases. Nothing about the factual complexity of this case would change by having a prosecutor, rather than the commander make the charging and referral decision. I fear that Congress and the public would see reforms to remove the commander from the charging decision as a panacea, when I believe such changes are likely to have little impact. Legislative proposals assume too much when they attribute underreporting solely to a command driven system.

Additionally, removing the commander from this system will make it more difficult to hold commander's accountable for their command failings because we have now taken an important tool away from the commander to ensure good order and discipline. In the Naval Academy case important questions need to be asked of all levels of command about the command environment among the cadets and the alleged culture of silence. Commanders who failed in their responsibilities to address this environment need to be held accountable. I believe removing the commander from the charging decision is a step in the wrong direction.

It is also important for this panel to consider the practical realities of reforms that would remove the commander and establish a centralized prosecutors office to make charging decisions. One must be careful about comparisons with courts-martial systems in other countries with much smaller services, many fewer courts-martial, and no similar expeditionary mission. In 2012 there were 725 general courts-martial, 465 special courts-martial, and 473 summary courts-martial tried in the Army. In addition there were 34,772 impositions of nonjudicial punishment. Given these numbers, I believe it is impractical to think that one or even a few very senior prosecutors could manage the volume of cases and give each the individual focus required. The likely result is that these decisions would be delegated down to more junior JAG officers who have less legal training than senior JAGs and less experience than senior military commanders.

Beyond these practical concerns, the commander is accountable for taking all reasonable and necessary measures to ensure good order and discipline and certain obligations are non-delegable. These include disciplining subordinates and understanding both the context of misconduct and its impact on order and discipline within the unit. These represent the core functions of command and I believe it would be both unwise and ineffective to remove that responsibility from the commander.