BRIEF OPENING STATEMENT

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MEETING OF THE RESPONSE SYSTEMS PANEL ON SEXUAL ASSAULT
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I appreciate the opportunity to address the panel on what I consider extremely important matters. I do so from the perspective of a lawyer in practice 38 years, including service as a Marine Corps Chief Prosecutor, Chief Defense Counsel, Special Court-martial trial judge, Staff Judge Advocate, General Court-martial trial judge, and as an artillery battery commander (in combat), and an infantry battalion commander (in peacetime). I have practiced military law throughout my career as a lawyer – on active duty and as a civilian attorney, and have been the co-chairman of the Military Law Committee of the National Association of Criminal Defense Lawyers for seventeen years. I hold the military justice system in the highest regard, and, as a lawyer and judge, have always striven to improve it in every assignment. I also have the perspective of a combat arms commander. I have spoken far and wide on the merits of the military justice system to civilian audiences, and what I see happening today alarms me that the fairness and the justice of the UCMJ may be crippled in response to criticism leveled for some real and some imaginary faults.

As a matter of an opening statement, let me be brief, describing proposals which will make good changes to the UCMJ, and those that will result in changes that will be detrimental to the fair administration of justice in the Armed Forces.

A. Proposals that will improve the UCMJ:

1. Keeping better records.
2. Prohibiting accession of candidates with convictions for felony sexual offenses.
3. Whistle blower protection.
4. Removal of consensual sodomy as an offense.
5. Elimination of the requirement for the defense asking permission of the prosecution for production of witnesses.

6. Permitting a petition for certiorari to the United States Supreme Court after the Court of Appeals for the Armed Forces denies review.

B. Those who write the law cannot create an environment where the "rights of the alleged victim" override the presumption that the accused is innocent and the burden of proof is on the prosecution. The following proposals may cause that result:

1. Creating two separate justice systems for the Armed Forces.
2. Creating unworkable processes in the courtroom, such as the role of the "victim's counsel."
3. Stripping commanders of the authority they need to maintain discipline – in a fair manner.
4. Importing mandatory minimum sentences into the military justice system. Civilian systems have had horrible problems with mandatory minimums.
5. SAPR training is creating unlawful command influence. Potential members (jurors) are being told that:

   one drink means no consent possible;

   everyone convicted should get the maximum sentence;

   80% of sexual assault claims are true
6. Major problem – "victim's counsel" – starting with the title – no one should be referred to in the courtroom as a "victim" until a jury or judge finds such. What role does this counsel play in the courtroom? What ethical duty does this counsel have? Report it if counsel

determines the "client" is lying, or committed a crime, such as ingestion of illegal drugs? Withdraw? What? Attorney-client relationship?

7. If you want to adopt civilian practices, such as the grand jury system, let's go all the way – require unanimous verdicts of 12 at trial for a GCM conviction.

8. Article 32 is a safeguard. I would require all Investigating Officers be trained judge advocates (lawyers). If you want to import grand jury characteristics, use the equivalent of a grand jury no-bill. If the IO finds no probable cause, the case must be dismissed.

9. Do not eliminate the Article 32 hearing. Both sides are helped by it – they evaluate their cases. Only truly close cases go on to trial. Weak government cases are dismissed, and weak defense cases lead to plea agreements.

10. No need for separate non-commander convening authority. In reality, a convening authority relies on a lawyer to help make that decision – the SJA. Rarely does a commander fail to follow his or her SJA's advice.

C. Some final thoughts:

1. Sexual crimes are horrible – in civilian life and in the military.

2. To me a "fair trial" and a "successful prosecution" is one where the truth is reached. One could gather the proponents of some of these changes equate "successful prosecution" with "conviction."

3. After WWII, Congress felt the need to protect the rights of servicemembers, in large part from unlawful command influence, e.g. Article 31(b) rights many years before Miranda; Article 32; qualified counsel in every case; right to appeal.

4. None of the proposed changes should be made before comprehensive public Congressional hearings are held.

5. Some have said they would fear for the safety of a daughter and would recommend she not serve in the Armed Forces. If all of these proposals became law, the parents of a son should fear their son would not be treated fairly if he were accused of the easily made charge of a sexual offense, and that he could go to jail for something he did not do because the deck would be so stacked against him. This would cause the parents to recommend he not serve in the Armed Forces.

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