

## Response Systems Panel

Public Meeting - September 24, 2013

The Response Systems to Adult Sexual Assault Crimes Panel (RSP) is a federal advisory committee within the Department of Defense (DoD) operating pursuant to Section 576(a) of the National Defense Authorization Act for Fiscal Year 2013, the Federal Advisory Committee Act of 1972, The Government in Sunshine Act of 1976, and other appropriate federal regulations. The RSP held a public meeting on September 24th, 2013, from 9:38 a.m. to 5:45 p.m. at the U.S. District Court for the District of Columbia, 333 Constitution Avenue NW, Washington, D.C., 20001.

### Participating Panel Members:

Honorable Barbara S. Jones – Chair  
Honorable Elizabeth Holtzman  
Brigadier General (ret.) Malinda Dunn  
Colonel (ret.) Holly Cook  
Professor Elizabeth Hillman  
Vice Admiral (ret.) James Houck  
Brigadier General (ret.) Colleen McGuire  
Mr. Harvey Bryant  
Ms. Mai Fernandez

### Participating Response Systems Panel Staff Members:

Colonel Patricia Ham, USA, Staff Director  
Lieutenant Colonel Kyle Green, USAF, Staff Counsel

### Other Participants:

Ms. Maria Fried, Designated Federal Officer

### Presenters:

Professor Chris Behan, Southern Illinois University School of Law  
Professor Geoffrey Corn, South Texas College of Law  
Professor Victor Hansen, New England School of Law  
Professor Rachel VanLandingham, Stetson University College of Law  
Lord Martin Thomas of Gresford QC  
Professor Michel Drapeau, University of Ottawa  
Professor Amos Guiora, University of Utah College of Law  
Professor Eugene Fidell, Yale Law School (telephonically)  
Major General Blaise Cathcart, Judge Advocate General of the Canadian Armed Forces  
Major General Steve Noonan, Deputy Commander, Canadian Joint Operations Command  
Air Commodore Paul Cronan, Director General, Australian Defence Force Legal Service  
Commodore Andrei Spence, Commodore Naval Legal Services, Royal Navy, United Kingdom

Brigadier (ret) Anthony Paphiti, former Brigadier Prosecutions, Army Prosecuting Authority,  
British Army  
Senator Kirsten E. Gillibrand (New York)  
Senator Claire McCaskill (Missouri)

## PANEL MEETING

At 9:38 a.m., Ms. Maria Fried, Designated Federal Officer, opened the meeting. Colonel Patricia Ham, RSP Staff Director, and the Hon. Barbara Jones, RSP Chair, provided opening comments. Chairwoman Jones discussed the meeting's focus and agenda, and she provided summaries of three August preparatory sessions conducted by members of the Panel. Chairwoman Jones indicated that she had previously requested that the Secretary of Defense establish subcommittees in three areas in order to better organize the Panel, and that those subcommittees had been established. She announced each subcommittee and its corresponding chair. The meeting was recorded and transcribed by a court reporter. A copy of the transcript is appended to these minutes and is incorporated by reference.

### Professor Chris Behan, Southern Illinois University School of Law

Professor Behan spoke regarding his research and publications surrounding the central role of the commander to the military justice system. He specifically addressed the threat of sexual assault to good order and discipline in the military, and acknowledged the devastating effect of sexual assault on the efficiency of the armed forces. Professor Behan noted that a responsive justice system is necessary, but that prevention of sexual assault should be the ultimate goal. Professor Behan noted that the commander should remain at the center of the military justice system, and referred the Panel to his previously submitted statement and materials.

### Professor Geoffrey Corn, South Texas College of Law

Professor Corn began his comments to the Panel by addressing concerns about legislation proposed by Sen. Kirsten Gillibrand. He noted that removal of the commander from the military justice system may have unintended adverse effects on the efficacy of legal support to military operations. Professor Corn addressed the presence of judge advocates throughout American military operations, and suggested that removal of the commander from the military justice process could harm the relationship between judge advocates and commanders in an operational setting. Professor Corn also noted that the role of a military prosecutor should be distinguished from that of a civilian prosecutor, not compared. He further referred the Panel to his prepared statement.

### Professor Victor Hansen, New England School of Law

Professor Hansen gave a brief overview of his perspective on the role of the commander in the military justice process. He noted that he submitted prepared materials to the Panel, and that those materials should be reviewed for detailed analysis. Professor Hansen discussed the central role of the commander in the maintenance of good order and discipline, and that a commander should have the authority to meet that responsibility. Professor Hansen specifically

recommended against removing commanders from acting on certain types of offenses. Professor Hansen referenced the recent Article 32 investigations regarding a sexual assault allegation at the Naval Academy to illustrate the complexity of such cases. He noted that regardless of the charging authority, facts of individual cases remain complicated. Professor Hansen asked the Panel to consider the size of the U.S. armed forces compared to other nations, and the volume of disciplinary actions conducted by commanders. He explained that current legislative proposals suggest that a centralized office will manage all courts-martial, and that this expectation is impractical. Professor Hansen concluded that the exercise of a commander's military justice authority is a core element of command.

#### Professor Rachel VanLandingham, Stetson University College of Law

Professor VanLandingham outlined three points in her remarks. She noted that the commander should remain integral in the charging decision, that decisions regarding prosecution should be made jointly by a commander and a judge advocate, and that those decision should rest on ethical principles and standards of prosecution which she believes are missing under the current military justice model. Specifically, Professor VanLandingham recommended that 11 factors found in Rule for Courts-Martial 306(b) be explained and elaborated. Professor VanLandingham directed the Panel to her written submissions, but concluded by noting the unique nature of the military justice system and the integral the role of the commander in that system.

#### Lord Martin Thomas of Gresford QC

Lord Thomas is the chair of the Association of Military Advocates in the United Kingdom. Lord Thomas reviewed the evolution of the removal of the commander from the British military justice system. He noted that the British Parliament abolished the role of the convening authority and established an independent prosecuting authority in 1996. He highlighted subsequent law changes that further reduced the commander's authority, culminating in 2006 with the abolition of the commanding officer's power to dismiss serious charges. Lord Thomas described the importance of fairness in service discipline and the issues that may result from perceptions of unfairness. He described the effectiveness of the United Kingdom's Director of Service Prosecutions, which is able to operate objectively while accounting for the importance of maintaining military discipline. Lord Thomas further stated that he believes victims are more likely to report offenses when they have confidence and trust in a criminal justice system.

#### Professor Michel Drapeau, University of Ottawa

Professor Drapeau spoke about the Canadian military justice system and the role of the commander in prosecutions. He first distinguished what he noted as "disciplinary offenses" from "criminal offenses," nothing the difference between military-specific offenses or typical criminal acts. Professor Drapeau noted that while disciplinary offenses must be addressed in order to maintain good order and discipline, criminal offenses should focus on victim care, deterrence, and sanctioning of the offender. Professor Drapeau discussed civilian appellate review as a touchstone of due process in any military case. Professor Drapeau does not believe that victims can find confidence in a system where the commander has absolute authority to dismiss charges.

Professor Amos Guiora, University of Utah College of Law

Professor Guiora served for 19 years as a judge advocate with the Israeli Defense Forces. Professor Guiora explained that under the Israeli system, the commander has no authority in the charging or prosecuting of misconduct, as that authority rests solely with the judge advocate. The Judge Advocate General is the commander of all Israeli judge advocates. Israeli judge advocates serve in one unified command and do not work directly for a non-legal commander. Professor Guiora noted that this construct protects the justice system from any undue influence by military commanders. Professor Guiora believes the insulation of judge advocates from the influence of military commanders contributes to both effective prosecution and good order and discipline.

Professor Eugene Fidell, Yale Law School (telephonically)

Professor Fidell first asked the Panel to consider recommending changes, if any, to the UCMJ as a whole, rather than simply addressing changes to improve sexual assault prosecution. Professor Fidell then addressed the Article 32 investigation, referencing a recent Baltimore Sun article following a high-visibility Article 32 investigation surrounding sexual assault allegations out of the United States Naval Academy. Professor Fidell recommended that Article 32 be amended to allow for a simple probable cause hearing. Professor Fidell further asked the Panel to consider confining the subject matter jurisdiction of military courts to military-specific offenses.

Question and Answer from the Panel to the Presenters

Chairwoman Jones opened the discussion for questions from the Panel members to the presenters. The Panel members asked questions about whether changing the role of the commander in the military justice process would change the relationship with the judge advocates, about the relationship between command authority in combat and a commander's prosecutorial authority, and logistical concerns about removing the commander from the military justice process.

The Panel recessed for lunch.

After re-convening, Major General Blaise Cathcart, Judge Advocate General of the Canadian Armed Forces; and Major General Steve Noonan, Deputy Commander, Canadian Joint Operations Command were called to present information to the Panel.

Major General Blaise Cathcart, Judge Advocate General of the Canadian Armed Forces

Major General Cathcart gave an overview of the development of Canadian military justice legislation. He explained the independent nature of the military police, investigative services, and servicing judge advocates – all separate from the chain of command. Commanders maintain the ability to make a recommendation to try a case by court-martial, but an independent Director of Military Prosecutions (DMP) makes the ultimate decision regarding whether to proceed to

trial. If charges are preferred by the DMP, an independent court-martial administrator convenes a court, to include a randomly selected panel to serve as jurors. If an accused is found guilty, members of the chain of command are called during sentencing to address the impact of those offenses on the unit. The Canadian military has made several changes to sexual assault prosecutions. The term “sexual assault” addresses a wide range of sexual conduct. Sexual assault charges cannot go to summary disposition, but must be referred to court-martial. The Canadian system continues to recognize the commander’s role as crucial to good order and discipline in the military. The system is designed to support the needs of the command while respecting victim’s rights and preserving due process and constitutional protections.

Major General Steve Noonan, Deputy Commander, Canadian Joint Operations Command

Major General Noonan began his remarks by concurring with Major General Cathcart and noting that as an operational commander, he is content with his role in the Canadian military justice process. Commanders under the Canadian system still have a role in informing the investigative process, seeking legal advice, and victim care. The Canadian forces are fully gender integrated, and men and women may enroll in any occupational specialty. Major General Noonan noted that he noticed no difference in his ability to maintain good order and discipline from his Allied colleagues while deployed to Afghanistan. He opined that the Canadian military justice system was fully functional in supporting command needs and maintaining good order and discipline, preserving the rights of the accused, and addressing sexual assault and other crimes.

The Panel members conducted a question-and-answer session, led by Chairwoman Jones. The Panel clarified the role of the commander, jurisdiction of Canadian courts-martial overseas, and mandatory referral to court-martial of certain offenses.

Air Commodore Paul Cronan, Director General, Australian Defence Force Legal Service

Air Commodore Cronan previously provided Powerpoint slides that he referenced throughout his presentation. Air Commodore Cronan discussed key differences between the American and Australian military justice systems by outlining a brief history of the Australian system and reforms, explaining differences in definitions and jurisdictional alignment, and relayed Australian Defence Force initiatives to combat sexual assault, which the Australian Defence Force defines as “rape and attempted rape.” All other sexually based offenses are defined as “other sexual offenses.” Air Commodore Cronan pointed out that notably, in order for the Australian Defence Force Legal Services to take jurisdiction over a serious crime, they must have the consent of the civilian authorities who would also have jurisdiction.

The Panel members conducted a question-and-answer session, led by Chairwoman Jones. Questions included topics such as the judge advocate’s relationship with the operational force, bases for reform to the Australian military justice system, and an anecdotal opinion on a commander’s role in the justice process.

Commodore Andrei Spence, Commodore Naval Legal Services, Royal Navy, United Kingdom; and Brigadier (ret) Anthony Paphiti, former Brigadier Prosecutions, Army Prosecuting Authority, British Army

Commodore Spence presented an overview of British military operations and the complexities of justice in joint operations. He explained that commanders still retained control of disciplinary offenses and some criminal offenses specifically outlined in legislation. Commodore Spence explained the investigative process and the commander's role in tracking and reporting those investigations. Commodore Spence closed his remarks by discussing the impact of removing the commander from military justice on the commander's ability to maintain good order and discipline.

Brigadier (ret) Anthony Paphiti walked the Panel through the history of the British military justice system and reforms over the last thirty years, including a shift from a command-based military justice system to an independent legal officer acting as convening authority. He cited several specific cases which both led to and affirmed reforms. Brigadier (ret) Paphiti discussed combating undue command influences, public confidence in the system, and explained that the reforms were not limited to sexual assault crimes. Brigadier (ret) Paphiti also referenced his previously provided materials to the Panel.

Question and Answer from the Panel to the Presenters

Chairwoman Jones opened the discussion for questions from the Panel members to the presenters. Questions revolved around the impact of reforms on sexual assault reporting and prosecutions, how effective the prosecution forces are throughout Britain, and whether any sort of preliminary or probable cause hearing was conducted prior to trial.

Senator Kirsten E. Gillibrand (New York)

Sen. Gillibrand relayed the stories of a number of victims with whom she had been in contact, discussing the challenges victims in the U.S. military have faced in the past and continue to face. She discussed commentary from supporters of the Military Justice Improvement Act, and a loss of trust in command decision-making regarding sexual assault allegations. Sen. Gillibrand highlighted the military justice systems of the Allies who presented to the Panel and concerns about the continuing role of the command in victim care.

The Panel members conducted a question-and-answer session, led by Chairwoman Jones. Questions focused the role of the commander in criminal prosecutions, judge advocate independence in prosecution, command accountability, and overall military culture and climate. The Panel also asked questions about additional reforms to the Article 32 investigation and post-trial clemency authority under Article 60, UCMJ, in addition to the commander's role.

Senator Claire McCaskill (Missouri)

Sen. McCaskill discussed her common goals of victim care and better prosecution, and addressed issues of commander accountability and command climate. She noted that none of the Allies who presented could cite the removal of commanders from the military justice system as a basis for increased reporting. Sen. McCaskill noted that her priorities were victim care and command accountability.

The Panel members conducted a question-and-answer session, led by Chairwoman Jones. Questions centered on legislative initiatives for victim care and protection from the perpetrator, commander accountability initiatives, proposed changes to Article 32, commander's role in panel selection, and how to better improve reporting.

The Designated Federal Officer closed the public meeting at 5:45 p.m.

I hereby certify, to the best of my knowledge, the foregoing minutes are accurate and complete.

A handwritten signature in cursive script that reads "Barbara Jones". The signature is written in black ink and is positioned above the printed name and title.

Barbara Jones  
Chair  
Response Systems to Adult Sexual Assault Crimes Panel