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**Written Statement to the
Section 576 Response Systems Panel**

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Opening

Members of the Committee, thank you for the opportunity to speak to you today about sexual assault prevention and response within the Air Force. This topic is extremely important to us.

We are fully committed to supporting victims of sexual assault, while we do everything humanly possible to eradicate this crime from our service. Our Acting Secretary, the Honorable Eric Fanning, and our Chief of Staff, General Mark Welsh, are fully committed to eliminating sexual assault within our ranks. Our efforts will drive increased reporting of sexual assaults, hold more offenders accountable as they become known, and drastically reduce the number of sexual assaults in the Air Force.

We believe that our sexual assault challenge, like all challenges we faced in the past and will face in the future, is best overcome by staying rooted to our core values – integrity, service, and excellence—and acting on those values. Integrity, service and excellence require respect for others and honoring their right to be free from sexual assault. At the same time, those same core values obligate us to protect Airmen, our Airmen, from becoming victims of this crime. This is the responsibility of not only the commander, the SARC, and the staff judge advocate – but of every Airman. But one thing is certain; we cannot meet our obligation to eliminate sexual assault from our ranks without full, unconstrained participation by commanders.

UCMJ and the Commander

Therefore, I want to discuss the importance of commanders in our military justice system.

Commanders are responsible for executing the Commander in Chief's intent in preparing to defend the Nation and, when called upon, to win America's wars. Throughout our history, the United States has fought and largely won its wars because it brought four key components to each armed conflict. Those four elements are the best people, the best training, the best equipment, and the fourth element that binds together the other three: discipline. Commanders must have a disciplined force if they are to succeed in combat.

As General George Washington famously stated in 1757, "Discipline is the soul of the Army. It makes small numbers formidable; procures success to the weak and esteem to all." That was his formula that General Washington used to win our independence. He assured his commanders had criminal disposition authority over their subordinates and, thus, could enforce military discipline. Every member of that Army then, and our Armed Forces today, knows that he is

accountable 24/7, on and off duty, to his commander. That formula ... that truth ... the best people, training, equipment and discipline... still applies today and is our best approach to national defense.

The Commander, teamed with his or her staff judge advocate, is the most important part of the military justice system, which is an essential tool we use to instill discipline inside our military force. Out-sourcing enforcement of standards to faraway lawyers diminishes the authority of commanders and cannot, despite its best effort, achieve optimal military discipline.

Curiously, some have advocated removing commanders as criminal disposition authorities under the UCMJ, sending a confusing message to our rank and file that you can trust your commander to send you into battle, where his or her decisions may cause you to pay the ultimate price, the sacrifice of your life on the altar of freedom, but you cannot trust your commander to hold your fellow Airmen accountable for his crime against you. This message is more than just confusing and counter-intuitive; it degrades Airmen's trust and confidence in their commanders and, in turn, degrades military discipline.

Furthermore, when it comes to command climate, there is no substitute for the Commander's informed judgment on the particular circumstances and stresses placed upon the service member or on the commander's unit. And importantly, there is also no better person to hold accountable for that climate than the commander. As part of that assessment of accountability for the unit's climate, commanders should be held accountable for failing to appropriately hold their subordinates accountable for the commission of crimes, such as sexual assault.

The drafters of the Uniform Code of Military Justice understood this. With the support, experience, and testimony of great commanders, such as Gen Dwight D. Eisenhower, Congress passed the UCMJ to serve two purposes: to achieve both justice with fairness and to foster good order and discipline. Justice and discipline are neither mutually exclusive nor conflicting concepts; rather, both are complementary and mutually supportive. In an all-volunteer force, you cannot achieve one without the other. To out-source criminal disposition decisions is to succumb to the unsupported, frankly irresponsible belief that justice can be pursued by someone other than the commander, while the commander, with his disciplinary tools thus constrained, can pursue his or her responsibility to establish and maintain the best disciplined forces in defense of the Nation.

A commander's responsibility under the UCMJ is not an additional duty, but instead, it is woven into the DNA of command, an indispensable element of his authority and a critical tool to achieve his mission. If a Commander cannot be trusted to discipline troops and do so in a firm and fair way, he or she cannot be trusted to lead troops into combat. It is crucial for our Airmen to have no doubts about who will hold them accountable for mission performance and adherence to standards, 24/7, on and off duty.

To achieve both justice and discipline, the authors of the Uniform Code of Military Justice were nothing short of brilliant in teaming the commander with a staff judge advocate. The Commander-SJA team adopts the best of the civilian District Attorney model with the need of the commander to be seen by his subordinates holding offenders accountable for criminal violations. The SJA, like his civilian District Attorney counterpart, reviews reports of criminal investigations and, using his legal education and criminal trial experience, drafts well-suited criminal charges for the commander to prefer.

There is no evidence to support the notion that removing commanders from the UCMJ process and replacing them with anyone outside the chain of command will improve the system. The evidence shows that Air Force commanders and their SJAs agree on the appropriate disposition in over 99% of cases where the SJA recommends trial by court-martial.

From 1 Jan 10 to 23 Apr 13, Air Force commanders declined to prosecute charges, which their SJA recommended for trial, in only 22 of 2,511 criminal cases, which equals less than 1% of the time. Further, the SJA who advises a commander to prefer a court-martial, has the authority to go to a superior commander in the chain of command seeking preferral if the immediate commander refuses to prefer charges. In 10 of those 22 cases that I just cited, a superior commander determined it appropriate to prefer charges. Therefore removing commanders from this Commander-SJA disposition team will make a difference in less than 1% of sexual assault cases. We need to find 99% solutions, rather than 1% solutions, to combat the crime of sexual assault.

Commanders benefit from a judge advocate's advice – what the law requires, what the evidence will support, the likely outcome – and lawyers benefit from the leader's perspective on the impact of the infraction in their unit. The Commander-SJA team is highly successful in attaining the twin goals of justice and discipline.

Proponents of removing commanders as UCMJ disposition authorities believe that relieving commanders of this duty will remove an impediment to victims reporting sexual assault. There is simply insufficient evidence to support this opinion. Our surveys reveal that there are many reasons why victims do not report sexual assaults; however, these surveys do not show that victims' distrust of their commander is one of the principle reasons they do not report sexual assaults. The surveys show that fear of retaliation and of being ostracized is a reason some victims do not report their sexual assaults. However, the surveys do not make clear what the source of that fear is. In future surveys, we must be careful to ask victims, who do not report the crime because they tell us they fear retaliation, what the exact source of their fear is – whether, for example, they fear co-workers, or supervisors, or commanders.

Moreover, in June of 2012, the Secretary of Defense directed that the UCMJ initial disposition authority for sexual assault cases must be a commander, who possesses Special Court-Martial Convening Authority and holds the grade of O-6 or higher. In the Air Force, that commander is most often a wing commander. There is no evidence that victims mistrust their wing commanders to handle sexual assault charges. In fact, our prosecution rate for sexual assault in the last year following the Secretary's elevation of disposition authority to wing commanders demonstrates that victims have much reason to trust wing commanders. In the last year, following the Secretary of Defense's order elevating UCMJ disposition authority over sexual assault cases, the Air Force's overall prosecution rate for sexual assault cases has risen by 300 percent. This is a clear indication to victims that wing commanders do not sweep sexual assault cases under the rug or have reason to believe they might.

Air Force Programs Related to Sexual Assault

Senior Trial and Defense Counsel

To improve the quality of Air Force responses to sexual assault cases, we improved the staffing and training of our prosecutors and defense counsel, who litigate sexual assault cases. Last year we designated eight of our senior trial counsel as special victims' trial counsel and focused their practice on sexual assault prosecutions. Since April of last year, these eight attorneys have prosecuted more than 106 sexual assault cases and participated in over 80 Article 32 hearings for sexual assaults. They are highly qualified, highly experienced, and extremely effective in prosecuting sexual assault cases. Further, we have sent 28 of our trial counsel to the Air Force Office of Special Investigation's Sexual Crimes Investigations Training Program to foster awareness in our prosecutors on the intricacies and new techniques of investigating these complicated cases and to build seamless teamwork between the investigators and the prosecutors.

We have a similar training program for senior defense counsel, to assure Airmen accused of crimes are afforded the same constitutional protections as their civilian counterparts. We have also begun training our prosecutors, defense counsel, and SJAs on neurobiological responses to trauma, often exhibited by sexual assault victims.

By providing the very best training and experience to both of prosecutors and defense counsel in sexual assault cases, we ensure that truth is rarely, if ever, a casualty in litigating sexual assault cases.

Special Victims' Counsel

To succeed in combating our sexual assault challenge, we must build trust and confidence among Airmen who are sexually assaulted by other Airmen. Victims of sexual assault must believe that their privacy can be protected and that they can regain a sense of control in their lives. At the same time, we cannot succeed in encouraging victims to cooperate in prosecuting offenders if they believe they will be re-victimized by our court-martial process.

In January 2013, the Air Force created and staffed the Nation's first large scale effort to provide attorneys to victims of sexual assault. This new initiative, effective 28 January, called the Special Victims' Counsel (SVC) Program, is unique among federal agencies in providing large scale legal representation and advocacy to victims of sexual assault. It has greatly improved the quality of support we provide victims of sexual assault and has enjoyed great success.

Our SVCs operate independently of the prosecution and the commander, establish attorney-client relationships, and zealously advocate on their clients' behalf...thereby protecting victims' privacy and helping preclude victims from feeling re-victimized by having to endure alone a complex, exhausting and often confusing criminal justice process.

For too long, our criminal justice processes have treated victims of sexual assault as if they were children, wards of the court, to be seen but rarely heard, expecting that somehow their privacy interest could be defended by the judges' and prosecutors' perfect knowledge and intuition of how best to protect victims' privacy interests. We accepted, incorrectly, as an article of faith that rape shield laws can be adequately explained to a victim of sexual assault by someone who does not represent the victim and with whom the victim does not enjoy protected, privileged communications. We believed, without challenge, that when victims of sexual assault concluded they were re-victimized by our criminal justice process, their anger and alienation were unavoidable.

SVCs join their client when their client is interviewed by AFOSI, prosecutors and defense counsel. They represent their clients' interests before convening authorities. SVCs advocate for their client's privacy before judges in MRE 412, 513 and 514 hearings. And significantly, a recent decision by the Court of Appeals for the Armed Forces in LRM v. Kastenbergh affirmed our SVCs have standing in a court-martial to represent their client's interest at times when our Military Rules of Evidence allow a victim the right to be heard.

Not surprisingly, the demand among victims of sexual assault for SVC representation has been high. As of 20 September, SVCs have represented 479 clients in 7 months. 92% of the Victims surveyed reported being "extremely satisfied" with their SVC's representation. SVCs have attended 81 Courts-Martial, 77 Article 32 hearings, and over 500 interviews with trial counsel, defense counsel and investigators. Further, 50% of restricted victims with an SVC converted their restricted report to an unrestricted report, compared to 13% and 15% in 2011 and 2012, respectively, before the creation of the SVC program.

The SVC Program helps us give the best care to those who report being victimized by sexual assault. It has proven to be the right thing to do, and it will have a positive and profound impact on our ability to combat sexual assault.

Air Force Position on Proposed Legislation Related to Sexual Assault

The UCMJ has a long and storied history beginning with the Articles of War in 1775. While the system has evolved with the unique needs of our country, one thing has remained constant for over 238 years: it is a system designed to meet commanders' needs to foster and maintain good order and discipline and to win our nation's wars. And it has done so very effectively.

Currently, there are many legislative proposals seeking to amend the UCMJ; some based on little evidence and seeking to change the UCMJ in ways that will make the military justice system nearly unrecognizable and much less effective in fostering good order and discipline.

One case has often been cited as the impetus for many of these proposals: The Lt Col James Wilkerson case, in which the General Court-Martial Convening Authority overturned a court-martial conviction for sexual assault. Wholesale repeal of UCMJ Article 60, the article involved in the Wilkerson case, in response to a single case is not a sound approach, particularly when lesser forms of change have yet to be tested.

Earlier this year, the Secretary of Defense proposed legislation which would place limits on commanders' authority to overturn any conviction. This is a significant step in appropriately limiting commander's authority to overturn convictions. Another positive step occurred in June 2012 when the Secretary of Defense elevated initial disposition authority for sexual assault cases across all military services. We expect these fundamental changes to produce significant results in our efforts to prevent and respond to sexual assault; however, the true impact will take time to assess.

One proposal, The Military Justice Improvement Act, would replace Commanders with an O-6 judge advocate as the convening authority over most cases. The Air Force does not support any legislation which would remove a commander from the process. As previously discussed, the importance of the commander role in maintaining good order and discipline of his or her Airmen is critical to maintaining mission capability and combat effectiveness. A judge advocate outside

the chain of command would not have the same impact. Creating a separate, external function for prosecutions risks negative consequences arising from constraining commanders' authority to hold Airmen accountable.

In short, command involvement must be holistic and empowered; it cannot be as effective if the most serious form of accountability, the authority to refer charges to a court-martial, is severed from command authority.

Closing

In closing, the men and women, who raised their right hand with pride and volunteered to serve this great Nation, became more than just Airmen ... they became part of our Air Force Family. We have a sacred obligation to provide a work environment that welcomes and celebrates their diverse backgrounds and contributions, and emphasizes the Air Force core values of integrity, service, and excellence, without which respect, trust and professionalism cannot thrive.

While we have a long way to go in eradicating this crime from our ranks, we remain committed to a zero-tolerance approach and have taken key steps in strengthening accountability and victim care.