

STATEMENT

OF

MAJGEN VAUGHN ARY

U.S. MARINE CORPS

STAFF JUDGE ADVOCATE TO THE COMMANDANT OF THE MARINE CORPS

BEFORE THE

RESPONSE SYSTEMS PANEL

ADULT SEXUAL ASSAULT CRIMES

PURSUANT TO SECTION 576

OF THE FY13

NATIONAL DEFENSE AUTHORIZATION ACT

25 SEPTEMBER 2013

FOR OFFICIAL USE ONLY
UNTIL RELEASED BY THE
RESPONSE SYSTEMS PANEL

Judge Jones and distinguished Panel members, thank you for inviting me to discuss the important issue of the role of the commander and sexual assault in the military. Sexual assault is clearly a serious problem faced by society, the Department of Defense, and the Marine Corps. The Commandant of the Marine Corps feels the same way. The Commandant's words and actions demonstrate his conviction that the fight against sexual assault is as important as the Marine Corps' ability to fight and win on the battlefield.

I believe this Response Systems Panel is the right concept at the right time to carefully and deliberately discuss complex issues such as the role of the commander in the military's sexual assault prevention and response efforts, and in the military justice system. As we study these issues, however, it is essential that we properly identify what is a problem and what is a solution. I believe, at times, there is a perception that our system of military justice is why we have a sexual assault problem. I do not believe that is true. We have a sexual assault problem, and military justice is one of many tools that will help us address the problem. There is room for improvement in our military justice system, but changes to military justice alone will not fix our sexual assault problem. At the core of an integrated, long-term approach to ending sexual assault should be strong leadership from our commanders in two areas: in sexual assault prevention and response; and in holding offenders accountable in a Constitutionally fair system of justice.

I intend to focus my testimony today on the second area of holding offenders accountable in a Constitutionally fair system of justice. I am aware that your panel has met and will meet with an impressive array of professionals, to include commanders, sexual assault prevention and response (SAPR) representatives, law enforcement officials, trial and defense attorneys, victim advocates, foreign military representatives, and scholars. I am also aware that you have been provided my previous testimony on this issue in front of the U.S. Commission on Civil Rights and the Senate Armed Services Committee. Today, I intend to share my perspective as the senior judge advocate in the Marine Corps about the role of the commander in military justice, and how we are executing the military justice under the current version of the Uniform Code of Military Justice (UCMJ). Although I will focus on military justice, I firmly believe that addressing sexual assault is a multi-disciplinary effort, so I will begin with some thoughts on the role of the commander in our sexual assault prevention and response efforts.

Preventing and caring for victims

Sexual assaults happen far too often, and in the past we have not always done as well as we should have to reduce the crime of sexual assault and to take care of victims when a sexual assault occurs. In early 2012, the Commandant realized that there was significant room for improvement and began attacking the issue in earnest. He formed an Operational Planning Team (OPT) led by a general officer, and personally selected a group of senior officers and enlisted Marines to analyze the problem of sexual assault in our ranks using the same planning processes we use to engage the enemy on the battlefield. The OPT led to the Commandant's Sexual Assault Campaign Plan in June 2012. The Campaign Plan is a commander-led, holistic approach to changing behaviors—the behavior of the Marines who might commit sexual assault, of the bystanders who can intervene to prevent sexual assault, and of the commanders, leaders, and professionals who respond to sexual assault.

To personally deliver the message of the Campaign Plan and ensure that Marines truly understand the need to change our culture regarding the prevention of and response to sexual assault, the Commandant traveled around the world speaking to his leaders in a series of Heritage Speeches. In these speeches, the Commandant discussed the special trust and respect that Marines have earned from the nation, and the responsibility today's Marines have in maintaining that trust and respect. The Commandant emphasized that no matter how successful we are on the battlefield against our nation's enemies, the Marine Corps could lose all of that respect if we do not take care of our fellow Marines – America's brothers and sisters, sons and daughters, fathers and mothers. The Commandant made it clear that sexual assault is not acceptable and that he would not tolerate it. He directed his Marines to learn more about the situations that may lead to sexual assault, to prevent those situations from occurring, and, if a sexual assault does occur, to embrace the victim and provide that Marine the support he or she needs. The specific components of the Campaign Plan are covered in my previous testimony to the United States Commission on Civil Rights and the Senate Armed Services Committee, and have been submitted to this Panel for the record.

We believe the Campaign Plan and the Commandant's Heritage Briefs are making a difference by increasing the amount of trust victims have in the Marine Corps to appropriately address reports of sexual assault. No matter how much we say we care about sexual assault victims, the ultimate gauge of our efforts is whether those victims are willing to come forward

and take advantage of all of the different avenues of assistance available in the Marine Corps. As of September 17, 2013, for Fiscal Year 2013, the Marine Corps has seen a 71% increase in total sexual assault reporting (restricted and unrestricted) over the previous year. We believe that this increased reporting reflects increased trust in the Marine Corps and its ability to care for victims. While several factors could contribute to the increased number of reports, certain patterns demonstrate that some of the increased reporting reflects increased trust. For example, approximately ten percent of those reports relate to alleged crimes committed before the Marine entered active duty. Separate from those ten percent, approximately an additional fifteen percent of those reports relate to alleged crimes committed over one year ago. These latent reports demonstrate that the Marines today are more willing to report allegations of sexual assault than they were just one year ago. This reflects increased trust that a commander-led system of military justice will treat them with dignity and respect, and hold offenders accountable.

This dramatic increase in reporting over the past year requires a corresponding increase in our ability to provide superior victim services. The Commandant has positioned the Marine Corps to succeed in that respect. The Commandant instituted an “8-day brief,” which requires a victim’s commander to provide a report to the first general officer in the chain of command within eight days of an unrestricted report. This report serves short-term and long-term functions. In the short term, it acts as a checklist, ensuring that the commander provides every available service to the victim. It also gives the general officer awareness of potentially troubling trends in his or her command regarding behavior or criminal activity. In the long-term, the 8-day brief provides broader trend analysis to the Marine Corps in general. Every quarter, the Marine Corps Sexual Assault Prevention and Response office briefs the Assistant Commandant of the Marine Corps on trends uncovered in the previous quarter’s 8-day Briefs. Based on these trends, commanders are able to refocus training, awareness, and law enforcement efforts where they are needed most.

Currently, the Marine Corps is in the process of fielding two new initiatives that significantly improve past practices in the areas of victim care. The first initiative is the Sexual Assault Response Team (SART). The SART is a collaboration between Naval Criminal Investigative Service (NCIS), prosecutors, medical, and other entities, designed to facilitate a multi-disciplinary approach to victim care, reduce re-victimization, and to provide a holistic response that extends beyond the boundaries of any one response service. The SART provides a

surge response capability after an unrestricted report of sexual assault and will also conduct quarterly reviews of regional trends in victim services.

The second initiative currently being fielded is the Marine Corps's Victim Legal Counsel Organization (VLCO). The VLCO is our implementation of the Secretary of Defense's (SecDef) August 14, 2013 directive to establish a special victim advocacy program. The VLCO will provide competent and professional representation to victims of sexual assaults. The VLCO, which will begin to provide legal advice to victims on 1 November 2013, will be a functionally independent organization led by a Colonel judge advocate. Judge advocate majors experienced in military justice matters will supervise four regional VLCOs; and nine company grade judge advocates will serve as Victim Legal Counsel (VLC) across the globe.

The VLCO program recognizes that no matter how successful our prevention and response efforts are, eventually some victims will enter the military justice process. Our VLCO program will work closely with our SAPR and its highly trained Sexual Assault Response Coordinators (SARC) and Victim Advocates (VA). VLCs will not replace our SARCs and VAs, but will instead act as force multipliers, providing specialized knowledge on the military justice process to a victim, including an explanation of the stress and challenges of a criminal trial. A VLC will also represent a victim's privacy interests in the areas of Military Rule of Evidence 412 (the "rape shield"), medical and personal privacy, and administrative issues such as a request for the transfer of the victim or the accused out of the unit during the criminal investigation and potential court-martial.

The Marine Corps of today is much different than the Marine Corps of early 2012 in the area of sexual assault prevention and response. Under the leadership of the Commandant and our commanders, Marines are changing their attitudes and creating an environment of trust, dignity and respect that is responsive to the needs of sexual assault victims and encourages them to report. When they do report, they are provided world-class victim services. There is still more to do, but we are moving in the right direction and have momentum on our side. At the same time, the Department of Defense is experiencing massive changes, and even more proposed changes, in the administration of military justice, almost all of which have been generated by increased attention to the problem of sexual assault. Military justice will play an important part in fighting sexual assault, but we must keep in mind that it is only a supporting effort in our fight to rid the ranks of sexual assault.

Offender accountability – the role of the commander in military justice

Military justice generally

Military justice has always been, and should remain, a commander-driven system. The UCMJ is a carefully crafted *system* of military justice that addresses the unique requirements of a worldwide deployable military force. For those unfamiliar with the UCMJ, some of the procedures and requirements do not exactly parallel the more familiar civilian criminal justice system. But these differences are not a sign of a broken system, they are the sign of a *different* system. While the UCMJ is not perfect, we have a mechanism in place to continually improve it. We conduct annual reviews of the UCMJ, and its accompanying procedural and evidentiary rules, to ensure they keep pace with legal developments and the needs of the military. Each year, the Congress and the President make changes to the military justice system to make it more effective and fair, but these changes have always maintained its core foundation as a commander-driven system of military justice.

This continuous, evolutionary change in military justice is healthy and necessary, but revolutionary change, on the other hand, should only be made when the system is at a point of failure. I do not believe the military justice system is at such a point. On the contrary, I think many aspects of our military justice system are working very well and are significantly assisting us in our fight against sexual assault. This success does not mean I accept the status quo. In fact, some of our current success is related to recent improvements to our military justice system, and I believe there is more we can still do.

Our Commanders use the military justice system to reinforce their message that they cannot and will not tolerate sexual assault. By sending cases to trial, there is a strong and valuable message of specific and general deterrence. A swift, fair system of justice will go a long way to preventing crime, including sexual assault. However, improved prosecutions alone will not solve the problem of sexual assault. Preventing sexual assaults from occurring in the first place is a much bigger issue that will take the continued focus and dedication of the Commandant and his commanders engaging with Marines at all levels. When despite these prevention efforts a sexual assault occurs, then it is those same commanders who must have the authority to hold criminals accountable.

The role of the commander

In the military, commanding officers never delegate responsibility and accountability for anything their unit does or fails to do. When a commander fails at his or her mission, he or she is held accountable by a superior commander. This enforcement mechanism is part of how we ensure discipline and obedience to orders. Likewise, when a Marine in a commander's unit fails to accomplish a mission, or worse yet commits a crime, that commander must have the authority to hold that Marine accountable. This concept of commanders holding criminals accountable is critical to an effective military unit, which is why commanders must be at the center of the military justice system. Commanders bring unique perspective to military justice because they are responsible for their units' good order and discipline, for taking care of their Marines, and for building a culture of dignity, honor, and mutual trust. They bring that perspective to bear on the decisions they make within the military justice system. When their commanders have convening authority, Marines know that they can and will be held accountable for failing to act like a responsible and honorable Marine. Removing such authority undermines the ability of commanders to enforce the standards they set.

But saying commanders need the authority to hold criminals accountable does not and should not end the discussion. Sexual assault is the bridge to victim care and offender accountability. Commanders therefore first need to focus on increasing the reporting of sexual assaults. Once reports are made, commanders need the appropriate resources, training, and support to make appropriate military justice decisions. Recent changes by the SecDef and the Commandant help to ensure that we are increasing reporting, and have the right commanders making the initial disposition decisions in sexual assault cases and that they have the resources to carry out their decisions.

The first thing a commander must do to hold offenders accountable is to create an environment of dignity and respect that will encourage victims to report allegations of sexual assault. Victims of sexual assault will not report what happened to them if they do not trust the person to whom they are reporting. In the Marine Corps, we emphasize in our training that victims have great flexibility in choosing a reporting option in order to ensure they choose the option that is most comfortable to them. It would be extraordinarily stressful if a victim could only report to his or her commanding officer. We offer victims nine different options for making a report, eight of them involving someone other than the victim's actual commander. Aside from

their commander, victims can report to a SARC, a victim advocate, a chaplain, a healthcare professional, a law enforcement official, a judge advocate, a sexual assault hotline, or anyone in their chain of command (this could simply be their squad leader). These options make it less intimidating for a victim to report. With these choices reinforced by commanders' efforts to encourage victims to come forward, we have more opportunities to give victims the care they need and to hold offenders accountable. The 71% increase in reporting in the Marine Corps over the last year shows that we are succeeding with this first step toward accountability.

In the Navy and Marine Corps, all unrestricted reports of sexual assault must be immediately reported to the NCIS. Department of Defense Instruction (DoDI) 5505.18 "Investigation of Adult Sexual Assault in the Department of the Defense," dated January 25, 2013, directs NCIS to initiate investigations of all offenses of adult sexual assault of which they become aware that occur within their jurisdiction, regardless of the severity of the allegation. The requirement that NCIS investigate all unrestricted reports of sexual assault ensures commanders receive a professional and independent collection of the facts of every sexual assault allegation. The law enforcement investigation and commander's disposition decision are documented for complete transparency. This means that commanders cannot "sweep an allegation under the rug."

When NCIS initiates a sexual assault investigation, it will also investigate threats against the sexual assault victim, to include minor physical assaults and damage to property. If an adult sexual assault allegation is referred to another agency (e.g., local law enforcement or the Marine Corps Criminal Investigative Division), the reason for the referral must be fully documented in an investigative report that identifies the agency and states whether the MCIO will be involved in either a joint investigative or monitoring capacity. This Instruction also provides minimum training standards for the primary MCIO investigator assigned to sexual assault investigations and provides standards for records maintenance.

As a result of recent policy changes, only a colonel SPCMCA or higher can make a disposition decision once the law enforcement investigation is complete. On April 20, 2012 the Secretary of Defense (SecDef) issued a memorandum withholding initial disposition authority (IDA) in certain sexual assault offenses to the colonel, O-6, SPCMCA level. The SecDef withheld the authority to make a disposition decision for penetration offenses, forcible sodomy, and attempts to commit those crimes. This withholding of IDA to a Sexual Assault Initial

Disposition Authority (SA-IDA) also applies to all other alleged offenses arising from or relating to the same incident, whether committed by the alleged offender or the alleged victim (i.e., collateral misconduct).

Marine Corps military justice

On June 20, 2012, the Commandant expanded the SecDef's SA-IDA withholding to include not just penetration and forcible sodomy offenses, but all contact sex offenses, child sex offenses, and any attempts to commit those offenses. The result is that the USMC now has a smaller group of more senior and experienced officers making disposition decisions for all sexual offense allegations and any related misconduct. In addition, the SA-IDA receives legal advice from his or her staff judge advocate (SJA), whose primary duty is to provide legal advice to the commander, and the prosecutors who would take the case to court-martial. In the Marine Corps model for providing legal services, the provision of legal services support (i.e. trial and defense services, review, civil law, legal assistance) is completely separated from the provision of command legal advice. Practically, this means the commander's SJA is not affiliated with the prosecutors who evaluate the evidence in the case and recommend whether to take a case to trial. Effectively, this ensures the commander and his SJA receive impartial and independent advice from two different sources outside of the commander's control—law enforcement (NCIS) and Marine prosecutors—in order to make an appropriate and well-informed disposition decision.

Once a decision is made to take a sexual assault case to trial, the Marine Corps is well prepared to effectively prosecute and defend the case. As part of his Campaign Plan, the Commandant recognized that the Marine Corps needed a specialized group of prosecutors who possessed the requisite training and experience necessary to handle complex cases like sexual assault. The Commandant therefore directed a complete reorganization of the Marine Corps legal community into a regionalized model that could better leverage training and experience to provide the proper level of expertise on the most complex courts-martial, regardless of location. Practically speaking, our new regional model, which became fully operational on October 1, 2012, allows us to place the right prosecutor, with the appropriate training, expertise, supervision, and support staff, on the right case, regardless of location.

Our new regional model is based on designated Legal Service Support Areas (LSSA). Each LSSA contains a LSSS that is supervised by a colonel judge advocate. Each LSSS contains a Regional Trial Counsel (RTC) office that is led by an experienced lieutenant colonel litigator

whose extensive military justice background provides effective regional supervision over the prosecution of courts-martial. While the Marine Corps does not specifically identify “special victim prosecutors,” this capability resides in the RTC offices through the use of Complex Trial Teams (CTT). The CTT is assembled for specific cases and may contain any or all of the following: a civilian Highly Qualified Expert (HQE), experienced military prosecutors, military criminal investigators, a legal administrative officer, and a paralegal. The civilian HQE has an additional role of training and mentoring all prosecutors in the region. The HQEs are assigned to the RTCs and work directly with prosecutors, where they will have the most impact. HQEs report directly to the RTC and provide expertise on criminal justice litigation with a focus on the prosecution of complex cases. In addition to their principal functions of training and mentoring prosecutors, the HQEs also consult on trial strategy and tactics for prosecuting sexual assault and other complex cases, and create standard operating procedures related to the investigation and prosecution of these complex cases. The criminal investigators and the legal administrative officer in the RTC office provide a key support role in preparing complex prosecutions.

To support our prosecutors further, we took steps to enhance training, better maintain corporate knowledge and raise experience levels among our prosecutors. We created a Trial Counsel Assistance Program (TCAP), which consolidates lessons learned from throughout the Marine Corps and provides training and advice to our prosecutors in each region. The TCAP provides specialized training through regional conferences focused on the prosecution of sexual assaults. These training events include speakers on law enforcement techniques, victim and offender typology, expert witnesses, forensics, and the art of persuasion. We also started to leverage our reserve judge advocates, who are experienced criminal prosecutors. They are made available to mentor our active duty judge advocates either during training or for specific cases. To ensure an adequate level of experience and supervision not only at the headquarters level, but also in each LSSS and LSST, we more than doubled the number of field grade prosecutors we are authorized to have on our rolls from 11 to 25. We also specifically classified certain key military justice billets to require a Master of Laws degree in Criminal Law. By taking these steps, we have significantly improved our ability to prosecute complex cases – particularly sexual assault cases.

As I mentioned earlier, though, any change to the Marine Corps’ system of dealing with sexual assault must carefully balance our ability to prosecute sexual assaults with our ability to

defend Marines accused of sexual assault. As concerned as I am that I have well-trained and competent prosecutors, I am equally concerned that each Marine accused receives a constitutionally fair trial that will withstand the scrutiny of appeal. To that end, we also established the Marine Corps Defense Services Organization (DSO) in 2011, which placed all trial defense counsel under the centralized supervision and operational control of the Chief Defense Counsel (CDC) of the Marine Corps. This change was designed to strengthen the independence of the Marine Corps DSO and the counsel assigned to it, while enhancing the efficiency and effectiveness of available services. The DSO also established a Defense Counsel Assistance Program (DCAP) to provide assistance and training to the DSO on sexual assault and other cases.

Legislative proposals

One of the RSP's tasks is to study the strengths and weaknesses of proposed legislative initiatives to modify the current role of commanders in the administration of military justice and the investigation, prosecution, and adjudication of adult sexual assault crimes. As I stated earlier, I support evolutionary change that improves our system of military justice. When we do make changes, however, we must be careful that each change is made to address a specific correctable deficiency, and not made simply for the sake of making a change. We must also be mindful that it takes time for any criminal justice system to assimilate major changes and generate useful feedback to validate the change. If revolutionary change is proposed, we must be sure evolutionary change is not working. Right now, evolutionary change is just beginning to show signs of success.

Looking back at the last three years, it is worth noting that our system of military justice is in the middle of executing a remarkable amount of change. Included in this change was a complete revision of the substantive law defining sexual assault. The 2012 statute adopted an "offender-centric" scheme that focuses on offenders' actions, and not the behavior of the victim, to determine culpability. We are just beginning to acquire measures of effectiveness for the new statute. Looking at the current proposed legislation from the Senate and the House, it is very likely that the FY14 NDAA will contain or require approximately thirty changes related to sexual assault and military justice. Combined with the changes of the last three years, this is a staggering amount of evolutionary change for one particular class of offenses. We should embrace these changes if they improve our ability to prosecute and defend cases, and protect

victims. We must also fully assess the effects of these changes before implementing more revolutionary and fundamental changes to the military justice system. Replacing a commander-driven system of justice with a lawyer-driven model is revolutionary, not evolutionary, and will do more harm than good.

I believe certain issues subject to pending legislation warrant further discussion. I will focus on changes that focus on the role of commander or represent revolutionary change. Specifically, I will address changes to the commander's role in disposing of cases, the Article 32 process, mandatory sentences, and the commander's role in the post-trial process.

The most dramatic proposed legislative change to our current system is to remove the commander from the initial disposition decision not just for sexual assault cases, but also for all offenses with an authorized maximum punishment over one year. With exceptions for some military-specific offenses, this proposal essentially creates a Felony Initial Disposition Authority (Felony-IDA), who will be a colonel judge advocate. Putting aside my previously expressed strong objections to removing a commander's authority to hold Marines accountable for criminal behavior, I have significant concerns that this proposed bifurcated system will significantly hinder the services' ability to provide a fair and efficient system of military justice.

Creating two parallel systems of military justice, each run by a completely different authority will create an inefficient system that will stress existing resources. Despite the proposal's attempt to create two classes of cases, practically, many courts-martial involve offenses from both categories. With two different jurisdictional authorities for these separate groups of offenses, there is a strong possibility for a duplication of effort in case research and preparation. Additionally, the Felony IDA itself is a billet that does not exist in the Marine Corps. If we were required to implement this specific proposal, the Marine Corps estimates that we will require nine extra colonel judge advocates, to act as Felony IDAs, along with forty additional legal billets. Lastly, the proposal creates a central headquarters-level court-martial office that is responsible for selecting jury members for each court-martial. In a worldwide system of justice, this procedural requirement will create significant delays.

While this proposal to limit a commander's initial disposition authority for certain cases attempts to increase victim trust in the military justice system, other legislative proposals accomplish the same intent without risking the fair and efficient administration of military justice. For example, Section 552 of the Senate Mark provides requires automatic oversight and

review by a superior authority of a commander's decision not to take a sexual assault offense to court-martial. Additionally, Section 541 of the Senate Mark codifies the regulatory requirement for mandatory investigation of all sexual assault offenses by independent military criminal law enforcement organizations.

Another key area of possible legislation is the Article 32 investigation. I believe that there is room for change in Article 32, but we must be very careful. The Article 32 investigation is a critically important phase of the court-martial process for the accused. Military defense attorneys do not have subpoena power or organic investigators; so the Article 32 process is the defense's first and best chance to begin preparing to defend the accused. With that said, I do think that it is worthwhile to re-examine certain aspects of the Article 32 investigation that sometimes make it resemble a "trial before a trial." These aspects include what witnesses are required to testify, the relationship between the investigation and the discovery process, and the application of the rape shield evidentiary rule during the investigation.

A third area of proposed legislation involves mandatory sentences for certain sexual assault offenses. These proposals seek to replicate similar provisions in state and federal law. However, the proposals ignore a key difference between civilian and military criminal justice systems. Civilian systems have comprehensive pre-sentencing reports prepared by probation offices, with sentencing often occurring months after a conviction. The UCMJ does not have similar sentencing offices, and the sentencing hearing occurs immediately after the findings portion of the court-martial. Before legislation is passed that simply adds a couple of mandatory minimum sentencing requirements, I believe there should be a more deliberate study of the military sentencing process in general.

The last area on which I will comment is the role of the commander in the post-trial clemency process under Article 60. After a deliberate review of Article 60 by military justice experts in the DoD, the SecDef proposed an evolutionary revision to Article 60 that significantly reduced the commander's clemency authority, while retaining the commander's role in the system. The SecDef's proposal has been included, with slight modifications, in both the House and Senate proposals to modify Article 60. I support the SecDef's proposal as a reasonable change that improves the overall administration of military justice.

Conclusion

The Marine Corps' ability to successfully prosecute and defend sexual assaults has never been stronger. The administration of military justice, however, is just one part of an integrated, multi-disciplinary fight against sexual assault. This fight is being led by our Commandant, and executed by commanders at all levels. The key indicator of success in our fight will be victims' increased trust in the Marine Corps' ability to care for them and hold their alleged offenders accountable. This increased trust will be first reflected with increased reporting of alleged sexual assaults. With a 71% increase in reporting in the past year, the results of the Commandant's Campaign Plan demonstrate the success of our commander-driven system of military justice. I look forward to continued evolutionary change to statutes, regulations, and policy that will lead to continued improvements in our fight against sexual assault.