

STATEMENT OF

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BEFORE THE

RESPONSE SYSTEMS PANEL

ON

ADULT SEXUAL ASSAULT CRIMES

PURSUANT TO SECTION 576

OF THE FY13

NATIONAL DEFENSE AUTHORIZATION ACT

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Judge Jones and distinguished members of the Panel, thank you for the opportunity to testify before this Panel to outline the Navy's efforts to confront the challenge of sexual assault and to provide my view on the role of the commander in these efforts. As Congress considers sweeping structural changes to the military justice system, your independent assessment of existing systems and processes, as well as ongoing accountability initiatives, will ensure that any changes to the military justice system will not adversely impact the interests of justice, the rights of crime victims, or the due process rights of the accused.

On behalf of the Honorable Ray Mabus, Secretary of the Navy, and Admiral Jonathan Greenert, the Chief of Naval Operations, I want to assure you that the Navy is committed to eliminating the crime of sexual assault in our ranks. Beyond the immeasurable toll on individual victims, sexual assault is an existential threat to our core values and directly impacts operational readiness and unit cohesion. This is rightfully recognized as a leadership issue, not merely a legal issue. Exemplifying this commitment, the Navy implemented a multi-faceted, commander driven approach to address awareness and training, prevention, victim response, and accountability.

Before addressing the Navy's efforts in the context of the Panel's statutory mandate, I would like to reiterate my view that the military justice system is sound overall. As I stated previously on the record, however, there are areas where improvement is necessary and I welcome the opportunity to work with the Response Systems Panel and Congress in this process. It is worth emphasizing that the military justice system must be fair not only to victims of sexual assault, but also to those accused of committing sexual assault or other crimes under the Uniform Code of Military Justice (UCMJ). While the current focus on victims of sexual assault is understandable and appropriate, it is essential that our responsibility to protect the rights of those accused of criminal misconduct – a fundamental aspect of American jurisprudence – not be lost in the debate.

The military justice system must be fair, effective and efficient – and perceived as such. There is risk in making major changes to the military justice system based on the outcomes of specific cases without evaluating the possible impact on all of the types of cases we adjudicate. Changes to our system must be evaluated against their intended objective and properly tailored to avoid harmful second- and third-order effects.

My meetings with Members of Congress and their staffs make clear that we share a commitment to solve the problem of sexual assault in the military.

AWARENESS & PREVENTION TRAINING

The Panel is tasked with assessing the roles and effectiveness of commanders at all levels in preventing sexual assaults and responding to reports of sexual assaults. The Navy began a sustained effort to improve our prevention of and response to sexual assault three years ago when Secretary Mabus held an all Flag and General Officer summit to address sexual assault. This marked the beginning of a comprehensive training and awareness campaign focused on bystander awareness training, leadership training, and training to the Fleet.

In October 2011, the Navy began teaching Bystander Intervention to our enlisted Sailors to motivate and mobilize Sailors to act when they see, hear, or otherwise recognize signs of an inappropriate or unsafe situation in order to prevent harm to another person.

In 2012, the Navy developed and implemented a dynamic and interactive training program for officers and Navy leaders entitled Sexual Assault Prevention and Response Training for Leaders, or SAPR-L. This training, for Navy personnel in pay grades E-7 and above, was specifically developed to focus leaders on sexual assault, and to help them better understand the complex dynamics of this crime and the negative behaviors that can foster inappropriate conduct. SAPR-L training has been completed across the Fleet.

Sexual Assault Prevention and Response Training for the Fleet (SAPR-F) was developed for all Sailors in the grade of E-6 and below with a focus on bystander intervention, responsible decision-making, core values, and responsible use of alcohol. The intent of this training is to empower Sailors to recognize and assume personal responsibility to stop inappropriate behavior. SAPR-F training was delivered to all Sailors in the Navy earlier this year and continues for the nearly 40,000 new Sailors who enlist every year.

Additionally, the Department developed mandatory SAPR training for all civilian employees entitled “Sexual Assault Prevention: One Team, One Fight.” The training addresses bystander intervention, reporting options and resources for civilian employees, and the impact of sexual assault on victims, commands and mission accomplishment. All training is expected to be completed by October 1, 2013.

The Navy Judge Advocate General's Corps (JAG Corps) was and remains actively involved in the development and delivery of the Navy's dynamic training and awareness programs. Judge advocates also ensure Navy leadership is fully trained on how to respond to an allegation of sexual assault. As participants on SAPR-L training teams, judge advocates trained commanding officers, executive officers and command master chiefs (our senior enlisted leaders) on their roles in sexual assault investigations, their responsibilities to support victims and protect the rights of alleged offenders. They also informed the leadership teams of changes to the UCMJ Article covering sexual assault (Article 120) as well as the Secretary of Defense policy elevating initial disposition authority for cases involving rape, sexual assault, forcible sodomy and attempts to commit those offenses to an officer in the pay grade of O-6 or above with special court-martial convening authority. These training efforts are in addition to the individual advice judge advocates continue to provide to their commanders on a daily basis.

VICTIM REPORTING

Sexual assault deterrence will be enhanced when Sailors know that all allegations of sexual assault will be investigated. Service members will report sexual assaults, which will then be investigated, when they are confident in our reporting process. To grow this confidence, we must be sensitive to victims who fear that reporting an offense will lead to retaliation or stigmatization. Data suggest that victims choose not to report crimes of sexual assault for many reasons. Some may feel shame or embarrassment; others may feel that the accountability process will cause even greater trauma. Still others are concerned with retaliation; however, the retaliation they fear is typically from perpetrators and peers, not commanders.

Regardless of the reason for not reporting, the Navy is committed to improving reporting. There are several ways for Sailors to make reports at all commands – afloat or ashore, and inside or outside the victim's command. As you are aware, victims can make confidential restricted reports. In such cases, an investigation is not initiated; the command is notified that an assault has occurred with no identifying information on the victim or suspect. Victims can make restricted reports to Sexual Assault Response Coordinators (SARCs), Victim Advocates (VAs), medical personnel, or by contacting the DoD SafeHelpline by phone or online 24 hours per day, 7 days a week. SARCs, VAs, and SafeHelpline personnel ensure victims understand their reporting options and available resources. Victims who make restricted reports will still receive

medical treatment, including a Sexual Assault Forensic Examination, counseling services, victim advocacy support, chaplain support, legal assistance and -- beginning in November 2013 -- an assigned Victims' Legal Counsel (VLC) as they desire.

Our preference, of course, is for a victim to make an unrestricted report, which allows commanders to take appropriate accountability actions. But the decision rests with the victim. Victims who wish to make an unrestricted report can use the reporting options listed above, or can file a report with the Naval Criminal Investigative Service (NCIS) or contact base police, masters at arms, shore patrol, local law enforcement, members of the command, judge advocates or command leadership. A victim can make a restricted report and later change to an unrestricted report.

In FY11, the Navy had 550 reports of sexual assault, of which the vast majority -- 408 -- were unrestricted. In FY12, the Navy received 726 reports, of which 527 were unrestricted, representing a 32% increase in total reports. We expect to see a marked increase in FY13. I believe increased reporting is a positive trend that indicates awareness of and confidence in reporting processes, enhanced education and victim care, and awareness of our efforts to hold offenders appropriately accountable.

VICTIM RESPONSE

The Panel is also tasked with assessing the adequacy of support and protection provided to victims throughout all phases of the investigation, prosecution and adjudication of adult sexual assault crimes. The Navy is dedicated to ensuring victims of sexual assault receive proper and timely support and protection, to include medical treatment, counseling, and legal assistance. The Navy recently hired 66 full-time credentialed SARCs, 66 full-time credentialed VAs, and will assign 21 SARC-certified deployed Resiliency Counselors to all big deck ships to ensure continuous victim care while deployed. These civilian professionals will augment the more than 3,000 active-duty command VAs, and will work with specially-trained NCIS investigators and JAG Corps prosecutors to form the core of our special victim capability.

On the legal front, the Navy is implementing a VLC program. Navy will dedicate 30 judge advocates with military justice experience to provide eligible victims of sexual assault with legal support. The primary mission of the VLC Program will be to provide legal counsel and, as appropriate, advocacy for victims. Navy VLCs will help protect victims' rights through the

investigative and adjudicative stages of the military justice system. VLCs will also assist SARCs and VAs in the successful execution of their duties. VLC duties will include explaining the investigative and military justice processes; advocating the victim's rights and interests; and, when appropriate, appearing in court on the victim's behalf. The legal support VLCs provide to victims will complement and augment the support provided by victim advocates and SARCs.

The Navy also offers victims who make an unrestricted report of sexual assault the option to request an expedited transfer to another command or duty station. Other protection measures available to victims include the issuance of a military protective order against the accused prohibiting further contact with the victim and, in appropriate cases, pretrial confinement of the accused.

ACCOUNTABILITY AND JAG CORPS CAPABILITY

The Panel is also tasked with assessing the strengths and weaknesses of the investigation, prosecution and adjudication of alleged sexual assaults under the UCMJ. All allegations of sexual assault (from penetration to contact offenses) are referred to NCIS for investigation. NCIS agents are specially trained to conduct adult sexual trauma investigations. Seamless coordination with NCIS is essential, and so over this past year the JAG Corps conducted a pilot program with two NCIS Sexual Assault Task Forces to ensure early collaboration and ongoing multidisciplinary review of cases at the senior trial counsel and supervisory special agent level. Each task force consists of a small group of special agents assigned to sexual assault allegation investigations. The task forces meet weekly to review case progression and monthly with the senior regional prosecutor and installation SARCs. This multi-disciplinary approach allows investigators, prosecutors, and sexual assault prevention and response personnel to troubleshoot sexual assault investigations, prosecution, and victim care issues as they arise. It also promotes early cooperation between stakeholders to improve the quality of practice and serves as the model for our special victim capability. The program quickly expanded and is now being employed in other Navy geographic regions, tailored to the size and scope of each region's area of responsibility.

Navy JAGs are involved from the beginning of the sexual assault investigation, as outlined above, and throughout the entire court-martial process - as Investigating Officers at Article 32 pretrial investigation hearings, prosecutors, defense attorneys, and military judges .

Navy JAG involvement is so intrinsic to the process that it is critical they have sufficient military justice experience and expertise in order to ensure the highest level of advocacy in sexual assault litigation.

In 2007, to improve the overall quality of Navy court-martial litigation, the JAG Corps established the Military Justice Litigation Career Track (MJLCT). JAG Corps officers apply for designation as military justice specialists or experts based on their litigation experience. Military Justice Litigation Qualified (MJLQ) officers are detailed to lead trial and defense departments at each of our nine Region Legal Service Offices and four Defense Service Offices, which provide Navy prosecutors and defense counsel, respectively. These officers provide proven experience in the courtroom, personally conducting, adjudicating, or overseeing litigation in sexual assault and other complex cases. As a result of this year's personnel assignment cycle, we increased the rank of our senior trial counsel at our three largest fleet concentration areas to O-5.

Many MJLQ officers also serve as military and appellate judges and in leadership positions. The capstone position of the MJLCT is the Chief Judge of the Department of the Navy. This officer is one of four Assistant Judge Advocates General and is eligible for promotion to the rank of rear admiral (lower half) (O-7) upon retirement. This position promotes vitality and career progression to Flag rank for Navy judge advocates with significant military justice expertise. The MJLCT program increases the experience levels of trial and defense counsel and leverages that experience to enhance the overall effectiveness and professionalism of our criminal litigation practice.

Additionally, in 2010, the Navy established Trial Counsel and Defense Counsel Assistance Programs. These separate programs are led by experts in military justice who provide direct support to prosecution and defense counsel. The Navy's Trial Counsel Assistance Program (TCAP) provides high-quality advice, assistance, support and resources for trial counsel (the Navy's court-martial prosecutors) worldwide through every phase of the court-martial process. TCAP counsel may be detailed to serve as trial counsel or assistant trial counsel and have been so detailed in several high visibility cases, to include five sexual assault cases. The TCAP Director is an O-5 MJLQ expert and is a former Naval Legal Service Office commanding officer and military judge. The TCAP Deputy Director is a GS-15 expert who specializes in sexual assault prosecution and victims' rights. A former state prosecutor with extensive experience, she previously served as the Director of the National Center for the Prosecution of

Violence Against Women and is a noted author in the field. TCAP is also staffed with an O-4 MJLQ specialist with several years of litigation experience, who just completed his Master of Laws Degree in Trial Advocacy, and a Highly Qualified Expert (HQE) with expertise in the area of child abuse.

During the past three years, TCAP provided on-site assistance visits, delivering trial advocacy training and prosecution process assessments to all nine Region Legal Service Offices worldwide. Further, to improve efforts between prosecutors, NCIS agents, military investigators and other military justice stake-holders, including Sexual Assault Response Program contributors, TCAP personnel conducted outreach training using a multi-disciplinary approach through Mobile Training Teams to instruct special agents, trial counsel, and paralegals on best practices in sexual assault investigation and prosecution. TCAP staff also conducted advanced family and sexual violence training at the Federal Law Enforcement Training Center and training on alcohol-facilitated sexual assault at the Army JAG Legal Center and School and Air Force Keystone conference. TCAP personnel are frequent instructors at the Naval Justice School, including the Trial Counsel Orientation, Basic Trial Advocacy, Intermediate Trial Advocacy, Senior Trial Counsel, Litigating Complex Cases, Sexual Assault Investigation and Prosecution, and Prosecuting Alcohol Facilitated Sexual Assault courses. TCAP also coordinates training and advice closely with Marine Corps TCAP and leverages expertise from other services, including Army TCAP, HQEs, sexual assault investigators, and Special Victim Prosecutors.

The Defense Counsel Assistance Program (DCAP) was created to support and enhance the proficiency of the Navy defense bar; provide experienced reach-back and technical expertise for case collaboration; and develop, consolidate and standardize resources for defense counsel. The office primarily supports the Navy trial defense bar with active cases. DCAP personnel are authorized to consult with detailed defense counsel through every phase of the court-martial process. Although not typically assigned as detailed defense counsel, DCAP personnel may be detailed to cases. The DCAP Director is an O-6 Select MJLQ expert and former military judge. The Director is supported by an O-4 MJLQ specialist and an HQE with significant litigation experience in criminal defense.

During the past three years, DCAP provided military justice policy advice and routinely coordinated with the defense services of the Army, Air Force, Marine Corps, and civilian defense organizations to maximize efficiency and capitalize on expertise. DCAP overhauled

Senior Defense Counsel training to focus on supervisory counsel responsibilities and sexual assault cases. DCAP personnel routinely present training during field assist visits, web seminars, and participate as instructors at a number of courses and seminars. DCAP works closely with civilian defense organizations to make use of the resources at federal and state public defenders' offices.

In 2012, the Navy JAG Corps hired three HQEs. One HQE is assigned to the headquarters level to enhance sexual assault litigation training, trial practice, and policy. She has nearly 20 years of experience prosecuting sex crimes, domestic violence, and human trafficking crimes. As part of the JAG Corps' Criminal Law Division, she coordinates with the Naval Justice School, TCAP and DCAP to ensure prosecutors and defense counsel receive specialized training on prosecuting complex sexual crimes, including the 2012 changes to UCMJ Article 120 and the intricacies of the rape shield provision under Military Rule of Evidence 412. The TCAP HQE has significant civilian criminal litigation and training experience to provide litigation assistance to prosecutors, especially on child abuse cases. The third HQE, assigned to DCAP, is a retired Marine Corps Lieutenant Colonel who completed two assignments as a military judge while on active duty and has over 15 years of civilian experience as an assistant federal public defender and preeminent civilian military criminal defense attorney.

The Naval Justice School (NJS), TCAP, DCAP, and the JAG Corps' Criminal Law Division coordinate specialized training for Navy prosecutors and defense counsel on litigating complex sexual assault crimes. For example, Prosecution of Alcohol-Facilitated Sexual Assaults is a week-long course taught in conjunction with AEquitas, the Prosecutor's Resource on Violence Against Women. It focuses on substantive aspects of prosecuting alcohol-facilitated sexual assaults and includes small-group practical exercises to hone skills such as conducting direct and cross examinations of sexual assault nurse examiners, toxicologists, victims, and the accused. NJS also supports Sexual Assault Prosecution and Investigation Mobile Training Teams for prosecutors and NCIS agents. Additionally, Defending Sexual Assault Cases provides defense counsel training on sexual assault litigation and is taught in conjunction with the Center for American and International Law. Finally, the Navy sends career litigators to civilian post-graduate schools to receive Master of Law degrees in litigation or trial advocacy.

To further refine the JAG Corps' litigation capabilities, in 2012 the Navy established an externship program and assigned two mid-level career officers to work in the sex crimes units in

the Office of the State Attorney in Jacksonville, Florida, and the San Diego District Attorney's Office in San Diego, California. These six-week clinical training externships enable officers to gain valuable practical experience and insight into how civilian prosecutor's offices manage a high volume of sexual assault cases.

LEGISLATIVE INITIATIVES

Even with the initiatives discussed above, there are areas where improvement is necessary, and some of that improvement may require legislative action. Although many proposals are under consideration, the following warrant specific examination: proposals to modify the current role of commanders in the administration of military justice; proposals regarding sentencing guidelines and mandatory minimum sentences; proposals making victims' counsel available to victims of sexual assault; and any potential proposals to Article 32 of the UCMJ.

The Panel's mandate requires you to assess 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. The commander is responsible and accountable for everything that happens in his or her ship, squadron, or unit. Commanders are personally responsible for sustaining unit readiness, good order and discipline, and the safety and well-being of Sailors under their charge. Permanent, effective change must be implemented through our commanders. Several legislative proposals would modify the current role of commanders, including restricting a commander's authority to modify or disapprove findings at court-martial under Article 60, UCMJ. Although I remain staunchly committed to preserving the commander's authority over his or her Sailors, I support the Department of Defense proposed amendment to Article 60 to remove or limit a commander's authority to set aside the findings of a court-martial, except for qualifying offenses punishable by confinement for a period of two years or less. The Navy also supports requiring convening authorities to explain any action to modify a court-martial sentence.

Additionally, you have been directed to assess whether sentencing guidelines should be promulgated for use in courts-martial. A related matter is whether certain offenses should carry mandatory minimum sentences. The UCMJ currently contains mandatory minimum sentences for three offenses only: spying in a time of war (Article 106); premeditated murder (Article

118(1)); and murder during the commission of certain offenses (Article 118(4)). Most or all State criminal codes, as well as the federal criminal code, contain minimum sentences for many more felony-level crimes, to include sexual assault crimes. In addition, the federal system uses federal sentencing guidelines that set out a uniform sentencing policy for felonies and serious misdemeanors, based primarily on the conduct associated with the offense and the defendant's criminal history. The federal system includes a probation office that conducts extensive background investigations and prepares presentencing reports prior to sentencing, which often occurs months after conviction.

Sentencing guidelines and mandatory minimum sentences merit consideration for adoption in the military justice system. However, the possible second- and third-order effects of both concepts must also be considered, including the potential impact on plea agreement negotiations and findings in close cases, and the possible impact on victim reporting and/or participation in those cases where the victim knows the offender and believes the mandatory punishment is excessive.

Several proposals call for the establishment of victims' counsel. As discussed above, the Navy is implementing a VLC program to help protect victims' rights through the investigative and adjudicative stages of the military justice system. VLCs will also assist SARCs and VAs in the successful execution of their duties. VLC duties will include explaining the investigative and military justice processes; advocating the victim's rights and interests; and, when appropriate, appearing in court on the victim's behalf. Legislation consistent with the Navy's efforts and the direction of the Secretary of Defense would be welcome.

Finally, during my testimony before the Defense Legal Policy Board on January 22, 2013, I raised the issue of possible change to Article 32 of the UCMJ, which concerns pretrial investigations. Article 32 investigations are unique to military justice and involve an adversarial pretrial proceeding where an impartial investigating officer determines whether there is probable cause that the accused committed the alleged offenses and recommends to the Convening Authority whether to refer proposed charges for trial. The Article 32 hearing roughly equates to a preliminary hearing in civilian criminal law; however, the Article 32 investigation also serves as a discovery tool, and the accused is present with counsel and may cross examine witnesses. The Article 32 hearing procedures should be assessed for utility and potential modification,

subject to possible second- and third-order effects associated with any proposed change to the procedures.

As these and other proposals are assessed, we must ensure that changes to the military justice system do not adversely impact the interests of justice, the rights of crime victims, or the due process rights of the accused. Additionally, any legislation must retain the commander's authority over his or her Sailors. Commanders are responsible and accountable for the safety, health and welfare of their people; commanders must have authority commensurate with this responsibility, and that includes the authority to maintain good order and discipline. As the Chief of Naval Operations noted in his testimony before the Senate Armed Service Committee – *“Preventing and responding to sexual assault is not just a legal issue – it is a leadership issue. The performance, safety and climate of a unit begin and end with the commander.”* Removing disciplinary authority denies commanders a vital enforcement tool to ensure a safe workplace, to maintain a healthy command climate promoting dignity and respect for all, and to field a force ready to execute the mission successfully – at sea and ashore, in peace and in war.

I have been a commander. With great confidence, I entrust my attorneys and Legalmen to commanders worldwide every day. If I believed Navy commanders were not responsive to the needs of my people, or were part of the problem, then I would say so. I owe that to my people and I owe my candid assessment to you.

CONCLUSION

In summary, the Navy is actively engaged in sexual assault awareness and training, prevention, victim response, and accountability initiatives. We cannot train our way out of this problem, we cannot legislate our way out of this problem, and we cannot prosecute our way out of this problem. But we must continue to train, and we invite tailored legislation that helps prevent and respond to sexual assault and that enhances and improves the military justice system. The Navy's leaders remain steadfastly committed to eradicating sexual assault within our ranks and ensuring that sexual assault cases are processed through a fair, effective, and efficient military justice system. I look forward to taking your questions.