Prepared Statement of Professor Rachel VanLandingham

To: Response Systems Panel

24 September 2013

Judge Jones and Members of the Panel:

Thank you for the opportunity to participate in your mandated examination of the U.S. military justice system, and thank you to Stetson University College of Law for providing a specific grant for my research regarding prosecutorial discretion in the military. Thank you also for this panel's efforts to improve the fair administration of justice in the military, and specifically to reduce and mitigate the very real problem of sexual assault in the military.

I will expand upon three brief points in these prepared remarks. First, my belief that the commander should remain an integral component of the criminal charging decision within the military; second, that such decisions, regarding all offenses under the Uniform Code of Military Justice (UCMJ), should be jointly made by both the commander and their judge advocate (military lawyer); and third, that such decisions should rest upon a clear and comprehensive set of ethical principles and standards of prosecution, which heretofore have been missing within the military justice system.

Regarding the last point about ethical standards, the philosophical expression "every difference should make a difference" is applicable. Wholly transferring prosecutorial authority from the commander to their lawyer per Senator Gillibrand, or requiring commander's prosecutorial "no bill" decisions to be elevated per Senator Levin, could likely leave much of the status quo in place, unless and until substantive and robust ethical guidelines regarding just how to make these decisions are provided to whomever the decision-maker may be. The Department of Justice provides detailed standards that aim to normatively constrain and guide their attorneys' great prosecutorial power; in contrast, the military, whose commanders and lawyers transfer frequently among assignments and may lack significant prosecutorial experience, has functioned with no equivalent, leading to potentially arbitrary and inconsistent dispositions. The Department of Defense is long past due in developing detailed dispositional touchstones as to what is an appropriate case to prosecute, and train its decision-makers on the same. In that regard, the eleven unexplained factors found in Rules for Courts-Martial 306(b)'s discussion section need to be significantly elaborated; replacing "character and good service of accused"

with the more appropriate "person's history with respect to criminal activity," and an explanation as to why and how the latter may be a consideration, would be a good start.

Separately, my support of a dualistic prosecutorial process, one that requires the agreement of both a military lawyer and the traditional commander as convening authority, rests on structural, operational, and practical grounds. While further elaboration is found in other materials I submitted to this panel jointly with my colleague Professor Corn, the uniqueness of the U.S. military as an organization bears emphasizing. Unlike any other public or private entity in the United States, (and even unlike the world's other militaries whose operational footprints and tempo, never mind defense expenditures, are vastly eclipsed by that of the United States), the U.S. military's organizational model firmly places the archetypal commander at the center of achieving success on and off the battlefield. Reposing great responsibility for human lives and vast resources in these individuals, which none of the current legislative proposals recommend limiting, necessarily and logically means giving them the appropriate tools to manage such responsibilities.

In that vein, vesting sole prosecutorial discretion in the 1950's military commander was seemingly appropriate to help ensure good order and discipline. But today's prosecutorial authority, wielded to help lead our immensely professional All Volunteer Force, should maximize the legal expertise now resident in all levels of the military, and be the product of a required consensus decision by lawyer and commander. Such a sound decision-making process should not be limited to sexual assault or other serious common-law crimes. All prosecutorial decisions in the military are essentially legal, with serious ramifications for victims and accused, as well as are (often intangibly), also linked to good order and discipline. Therefore, all prosecutorial decisions should benefit from the synergy of a "two heads are better than one" approach.

In closing, as mentioned previously and further discussed in my submitted law review article, this joint decision-making process should operate within clear parameters of what is an appropriate case for prosecution. Such parameters should result from the training and application of clearly articulated ethical standards, similar to those used to channel prosecutorial discretion with the U.S. Attorney's offices across the country, but tailored for the military.

Thank you, and I'm happy to further discuss any of these points.