

Response Systems Panel on Military Sexual Assault
Subcommittee on the Role of the Commander

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I write separately to explain why I stand apart from my colleagues on the issue of whether convening authorities should retain prosecutorial discretion. I believe we should vest discretionary authority to prosecute rape and sexual assault in the same people on whom federal, state, and many respected military criminal justice systems rely: trained, experienced prosecutors.

For decades, military sexual assault scandals have been a regular source of national embarrassment.¹ Senior military officers testified repeatedly, and convincingly, before our Panel and Subcommittees about the imperative to “get to the left of the problem,” not to wait until the next incident to respond but instead make immediate changes to break the cycle of scandal, apology, response, and recurrence.² They, and many other witnesses, asserted that the only way to prevent military sexual assault is to attend to the “big picture” factors—cultural, social, demographic, environmental—that enable it to occur.³ We heard no evidence that the military justice system is any worse than civilian jurisdictions at responding to rape and sexual assault.⁴ We did, however, see proof that rape and sexual assault continue to occur at too high a frequency in the armed forces, despite distinctive elements of military service that should curb their prevalence. These elements include the elevation of honor and sacrifice above personal gain, the greater degree of surveillance in military life, the higher ethical standards that service members must embrace, and the military’s ability to select its members from among those who are eligible to serve.

¹ See, e.g., U.S. COMMISSION ON CIV. RTS., SEXUAL ASSAULT IN THE MILITARY: 2013 STATUTORY ENFORCEMENT REP. 2 (Sept. 2013), available at http://www.usccr.gov/pubs/09242013_Statutory_Enforcement_Report_Sexual_Assault_in_the_Military.pdf; CENTER FOR AM. PROGRESS, TWICE BETRAYED: BRINGING JUSTICE TO THE U.S. MILITARY’S SEXUAL ASSAULT PROBLEM 7-10 (Nov. 2013), available at <http://www.americanprogress.org/wpcontent/uploads/2013/11/MilitarySexualAssaults.pdf>.

² See, e.g., *Transcript of RSP Public Meeting* 34-35, 50 (Sept. 25, 2013) (testimony of Major General Steven Busby, U.S. Marine Corps).

³ See, e.g., *Transcript of RSP Public Meeting* 30-31 (Nov. 7, 2013) (testimony of Major General Gary S. Patton, Director, Department of Defense Sexual Assault Prevention and Response Office, noting recent initiatives “aimed at advancing culture change, which we see as a necessary condition to reducing sexual assault in the military”); Written Statement of General Mark A. Welsh, III, Chief of Staff, U.S. Air Force, to House Armed Services Committee at 3 (Jan. 23, 2013), available at <http://docs.house.gov/meetings/AS/AS00/20130123/100231/HHRG-113-AS00-Wstate-WelshG-20130123.pdf> (describing recent training and personnel initiatives motivated by need for cultural change); *Transcript of RSP Public Meeting* 183-84 (Sept. 24, 2013) (testimony of Major General Steve Noonan, Deputy Commander, Canadian Joint Operations Command, describing policies implemented to effect behavioral change).

⁴ The report of the Comparative Systems Subcommittee will elaborate on these issues.

Rape and sexual assault pose distinctive challenges in the U.S. military, which remains predominantly male and marked by imbalances of power among the individuals who serve.⁵ We entrust our military with the legitimate use of force to support and defend our country and Constitution against all enemies, a duty it bears in part by drawing on a history of war and military successes in which sexual violence has unfortunately been commonplace.⁶ Commanders must overcome this by leading a cultural shift toward greater respect for gender equality and legitimate avenues for sexual expression, away from a norm that celebrates only aggressive male sexuality. This shift is no slight change in course. It is a sea change, albeit one that is underway.⁷

If commanders remain focused on implementing this change, they will continue to improve the confidence of survivors of rape and sexual assault in the military's ability to respond. Survivors, and their families and communities, will be able to trust that assailants with stellar military records or mission-essential skills will not be protected from legitimate prosecution.⁸ They will realize that reprisals from fellow service members are not an inevitable consequence of reporting a sexual assault. And all service members will know that attitudes that denigrate women and gay men will not be tolerated—both because they violate regulations and because they create conditions in which sexual assault is more likely.

Although commanders must lead the way in changing military culture, they are neither essential nor well-suited for their current role in the legal process of criminal prosecution. Command authority in military justice has already been reduced significantly over time.⁹ It will be further limited through recently enacted

⁵ DEF. MIL. DATA CENTER, 2012 WORKPLACE AND GENDER RELATIONS SURVEY OF ACTIVE DUTY MEMBERS: TABULATIONS OF RESPONSES 18, available at http://www.dod.mil/pubs/foi/Personnel_and_Personnel_Readiness/Personnel/WGRA1201_TabVolume.pdf.

⁶ Written Statement of Elizabeth L. Hillman to the U.S. Commission on Civil Rights at 5 (Jan. 11, 2013) (quoting Elizabeth L. Hillman, *Front and Center: Sexual Violence in U.S. Military Law*, 37 POL. & SOC'Y 101 (2009)), available at <http://www.eusccr.com/Hillman%20statement.pdf>.

⁷ See, e.g., *Transcript of RSP Public Meeting* 31-32, 50 (Nov. 7, 2013) (testimony of Major General Patton, noting recent Service directives that commands with more than 50 members be assessed on command climate, including sexual assault prevention and response, within 120 days of assumption of command, and annually thereafter); *Transcript of Role of the Commander Subcommittee Meeting* 209-20 (Nov. 20, 2013) (testimony of Lieutenant General Howard Bromberg, U.S. Army, as to new requirements of reviews of command climate survey results and of sexual assault criteria on Officer Evaluation Reports); H.R. 3304, § 1721, 113th Congress: National Defense Authorization Act for Fiscal Year 2014 (2013) (requiring tracking of compliance of commanding officers in conducting organizational climate surveys); Written Statement of General Mark A. Welsh, III, Chief of Staff, U.S. Air Force, to House Armed Services Committee at 2 (Jan. 23, 2013) (discussing discipline of commanders at Joint Base San Antonio-Lackland following recent leadership failures). *But see* Craig Whitlock, *Behavior by Brass Vexes Military*, WASH. POST, Jan. 27, 2014, at A1.

⁸ The report of the Victim Services Subcommittee will help us assess the best ways to address these issues.

⁹ See, e.g., Press Release, "Secretary Panetta Remarks on Capitol Hill" (Apr. 17, 2012) (announcing elevation of convening authority in sexual assault cases), available at

changes.¹⁰ Yet the Uniform Code of Military Justice continues to require that convening authorities exercise prosecutorial discretion. This mixture of roles, in which a convening authority must both protect the overall well-being of a unit and ensure that unit's mission is accomplished as well as decide whether a specific factual context warrants prosecution, creates a conflict that cuts in different directions, all unhealthy. For example, commanders who speak out assertively on the importance of prosecuting sexual assaults risk undermining the legitimacy of any later court-martial convictions by exerting unlawful command influence, "the mortal enemy of military justice."¹¹ Or consider, in light of the heightened attention now directed toward military sexual assault, defense counsel's well-founded concern that convening authorities under pressure to demonstrate high rates of prosecution will order courts-martial to go forward regardless of the strength of the evidence.¹² Removing the convening authority from the charging process would address these concerns while freeing commanders to zero in on the changes in culture that are our best hope for sustainable improvement in sexual assault prevention and response.

The decision to prosecute is among the heaviest burdens we place on attorneys in public service; the ethics of the prosecutor are among the most powerful and most studied in the legal profession.¹³ Whether there is sufficient

http://www.defense.gov/transcripts/transcript.aspx?transcriptid=5013; Transcript of RSP Public Meeting 194-97 (June 27, 2013) (testimony of testimony of Fred Borch, Regimental Historian, U.S. Army Judge Advocate General's Corps, describing judicialization of military justice system); United States v. Stombaugh, 40 M.J. 208, 211 (C.M.A. 1994) (extending prohibition of unlawful command influence of Article 37, UCMJ, to anyone acting with "mantle of command authority").

¹⁰ See, e.g., H.R. 3304, § 1702, 113th Congress: National Defense Authorization Act for Fiscal Year 2014 (2013) (precluding convening authorities from dismissing or modifying convictions for sexual assault offenses and requiring them to explain in writing any sentence modification); *id.* at § 1705 (requiring discharge or dismissal for certain sex offenses and trial for such offenses by general court-martial), *id.* at § 1708 (eliminating character and military service of accused as factor relevant to initial disposition of offenses), *id.* at § 1744 (requiring review of decisions of convening authority not to refer sexual assault charges to trial by court-martial contrary to recommendation of staff judge advocate).

¹¹ *United States v. Thomas, 22 M.J. 388, 393 (C.M.A. 1986); see also Transcript of RSP Public Meeting 294 (Nov. 8, 2013) (testimony of Colonel Peter Cullen, Chief, U.S. Army Trial Defense Service) ("Increasingly, defense counsel must also confront and overcome instances of unlawful command influence in sexual assault cases. There is tremendous pressure on senior leaders to articulate zero tolerance policies and pass judgment on those merely accused of sexual assault. Even if command actions do not rise to the level of unlawful command influence, it contributes to an environment that unfairly prejudices an accused's right to a fair trial."); id. at 336-38 (testimony of Mr. Jack Zimmermann of Lavine, Zimmermann & Sampson, P.C., explaining how claims of unlawful command influence have arisen from recent training on sexual assault prevention and response).*

¹² See, e.g., *Transcript of RSP Public Meeting 276-77 (Sept. 25, 2013) (testimony of Major General Vaughn Ary, U.S. Marine Corps); id. at 277-78 (testimony of Rear Admiral Frederick Kenney, U.S. Coast Guard).*

¹³ See, e.g., *Transcript of RSP Public Meeting 117-25 (Sept. 25, 2013) (testimony of senior staff judge advocates describing ethics rules to which staff judge advocates are bound and on which they are trained); see also Robert H. Jackson, The Federal Prosecutor, 31 AM. INST. CRIM. L. & CRIMINOLOGY 3 (1940).*

evidence to support a criminal prosecution is a question of law and discretion. Senior judge advocates, licensed by the same authorities that license civilian attorneys and subject to the professional ethics codes of both civilian and military authorities, are every bit as capable of exercising that discretion as their civilian counterparts.

When some of our allies adopted legal reforms to replace convening authorities with experienced and trained prosecutors, opponents voiced concerns about the deterioration of command and disengagement from the problem of sexual assault that were very similar to those now raised by many U.S. military leaders.¹⁴ Yet no country with independent prosecutors has reported any such dire consequences.¹⁵ I see no reason to defer to predictions about the impact of this change over the pleas of survivors of sexual assault, many of whom consider an independent prosecutorial authority the cornerstone of any effective response to military sexual assault.¹⁶ Likewise, U.S. service members who face courts-martial deserve no fewer safeguards of an impartial and independent tribunal than service members of other countries with whom they often serve.¹⁷ The United Kingdom, Canada, Australia, and most other countries with well-regarded military justice systems have already ended command control of courts-martial to protect the rights of service members.¹⁸ That goal is consistent with the procedural fairness that both

¹⁴ See *Transcript of RSP Public Meeting 41* (Sept. 24, 2013) (testimony of Lord Martin Thomas of Gresford, QC, describing opposition of British commanders prior to reforms); *id.* at 240-41 (testimony of Air Commodore Paul Cronan, Director General, Australian Defence Force Legal Service, describing sense of uncertainty prior to reforms among Australian commanders).

¹⁵ See *Transcript of RSP Public Meeting 71-73* (Sept. 24, 2013) (testimony of Lord Thomas); *id.* at 73-74 (testimony of Professor Michel Drapeau); *id.* at 181-82 (testimony of Major General Blaise Cathcart, Judge Advocate General of Canadian Armed Forces); *id.* at 226-28, 236 (testimony of Air Commodore Cronan); *id.* at 253-55 (testimony of Commodore Andrei Spence, Naval Legal Services, Royal Navy, United Kingdom).

¹⁶ See, e.g., *Transcript of RSP Public Meeting 19* (Nov. 8, 2013) (testimony of Mr. Brian K. Lewis, Protect Our Defenders) (“[P]ossibly the biggest hurdle facing survivors of military sexual trauma is the continued involvement of the chain of command in prosecuting these crimes.”); *id.* at 52-54 (testimony of Ms. Sarah Plummer that “when you’re raped by a fellow service member, it’s like being raped by your brother and having your father decide the case”); see also *id.* at 44 (testimony of Ms. Ayana Harrell); *Transcript of RSP Public Meeting 324* (Nov. 7, 2013) (testimony of Ms. Nancy Parrish, President, Protect Our Defenders); *id.* at 333-36, 407-08 (testimony of Mr. Greg Jacob, Policy Director, Service Women’s Action Network); *Transcript of RSP Public Meeting 346-50* (Sept. 25, 2013) (testimony of Ms. Miranda Petersen, Program and Policy Director, Protect Our Defenders).

¹⁷ *Findlay v. United Kingdom*, 24 Eur. Ct. H.R. 221 (1997); see also *Cooper v. United Kingdom*, 39 Eur. Ct. H.R. 8 (2003); *Martin v. United Kingdom*, 44 Eur. Ct. H.R. 31 (2006); DEF. L. POL’Y BD., REP. OF THE SUBCOMM. ON MIL. J. IN COMBAT ZONES 187 ((separate statement of Board Member Eugene R. Fidell).

¹⁸ See L. LIBR. OF CONG., MIL. J.: ADJUDICATION OF SEXUAL OFFENSES 4-5, 55-58 (July 2013); *Transcript of RSP Public Meeting 38-42* (testimony of Lord Thomas); *id.* at 223 (testimony of Air Commodore Cronan); *id.* at 156-58 (testimony of Major General Cathcart), see also L. LIBR. OF CONG., *supra*, at 42-43 (noting that Israel adopted Military Justice Law in 1955, which vested prosecutorial discretion in independent Military Advocate General). Many other countries subject to the European Court of Human Rights have either eliminated convening authorities or radically reduced military jurisdiction, much like countries subject to the Inter-American Commission on Human Rights (IACHR), which has limited military jurisdiction to address human rights abuses. For but two very recent examples of this accelerating trend, see the IACHR response to Colombia’s attempt to expand military jurisdiction and

victims and alleged perpetrators of rape and sexual assault deserve from U.S. military justice.

Our Panel and Subcommittees heard, again and again, that the sexual assault problem in the military has given service members reason to pause when young people turn to them for advice about whether they should join the U.S. armed forces.¹⁹ That reluctance to allow our daughters and sons to embrace a life of service to our country is the real threat to U.S. military effectiveness at stake in this debate. An impartial and independent military justice system that operates beyond the grasp of command control would help restore faith that military service remains an honorable, viable choice for all.

Taiwan's abolition of military justice entirely, both in January 2014. See Inter-American Commission on Human Rights Press Release, "IACHR Expresses Concern over Constitutional Reform in Colombia" (Jan. 4, 2013), available at https://www.oas.org/en/iachr/media_center/PReleases/2013/004.asp; Amnesty International Public Statement, "Taiwan government must ensure the reform of military criminal procedure legislation lives up to its promise of greater accountability" (Jan. 13, 2014), available at <http://www.amnesty.org/en/library/asset/ASA38/001/2014/en/5c6a95be-d90c-4378-8a6c-d941c2a83cb4/asa380012014en.pdf>.

¹⁹ See, e.g., *Transcript of Role of the Commander Subcommittee Meeting 41* (Jan. 8, 2014) (testimony of Rear Admiral (ret.) Marty Evans, U.S. Navy); *id.* at 71-76 (testimony of Ms. K. Denise Rucker Krepp, former U.S. Coast Guard JAG and former Chief Counsel, U.S. Maritime Administration); *Transcript of RSP Public Meeting 72-75* (Nov. 8, 2013) (testimony of Ms. Marti Ribeiro, former U.S. Air Force staff sergeant); *id.* at 348 (testimony of Mr. Zimmermann); compare with, *Transcript of RSP Public Meeting 56* (Sept. 24, 2013) ("The fact that our system is predicated on the JAG making the decision in the context of minimizing command influence, I think, enables us as parents, at least in Israel, to sleep more soundly at night."); *id.* at 96-97 (testimony of Professor Drapeau, noting "increased sense of confidence that those who become victims of crimes, many of them our sons and daughters serving in uniform" have in Canadian military justice system after removal of convening authority from commanders); *id.* at 46 (testimony of Lord Thomas) ("[T]he public has the right to expect for their sons and daughters who enlist the same standards of fairness in the military system of justice as would be their entitlement in civilian life.").