

# Chapter Eleven:

# ADDITIONAL VIEWS OF PANEL MEMBERS

## Response Systems Panel on Military Sexual Assault

Separate Statement of Elizabeth L. Hillman & Harvey Bryant

June 22, 2014

Congress created the Response Systems Panel to make an independent assessment of the military's response to sexual assault. Perhaps no other aspect of military operations has generated worse outcomes in recent decades than military leaders' efforts to reduce and punish sexual assaults. The Panel's assessment revealed many improvements already in place and other areas in which changes should be made. Removing prosecutorial discretion from the chain of command, however, is not among the changes recommended by the Panel. We write separately because it should be.

Court-martial convening authorities, a small and high-ranking part of the military's command structure,<sup>1</sup> should no longer control the decision to prosecute sexual assault cases in the military justice system. The Panel's recommendation that the authority to prosecute remain within the command structure of the military is based on the testimony of high-ranking commanders and attorneys within the U.S. military. It neglects the words of survivors of sexual assault, rank-and-file service members, outside experts, and officers in our allies' militaries. They tell us that the commander as prosecutor creates doubt about the fairness of military justice, has little connection to exercising legitimate authority over subordinates, and undermines the confidence of victims.<sup>2</sup> Preserving command authority over case disposition, pre-trial processes, and post-trial matters prevents commanding officers from acting assertively to deter and punish military sexual assault.<sup>3</sup> It also undermines the rights of both victims and accused service members, all of whom deserve an independent and impartial tribunal.

Command authority in military justice has already been reduced significantly over time.<sup>4</sup> It will be further limited through recently enacted changes.<sup>5</sup> The United Kingdom, Canada, Australia, and many other countries have already ended command control of courts-martial.<sup>6</sup> When these nations proposed replacing convening authorities with experienced and trained prosecutors, opponents of reform voiced concerns about the deterioration of command similar to those articulated by some U.S. military leaders and accepted by our colleagues on the Panel.<sup>7</sup> Yet no country with independent prosecutors has reported any of the dire consequences forecast by those opposed to prosecutorial independence.<sup>8</sup>

Maintaining the status quo on this issue was often justified on the basis that there was no evidence changing it would increase victim reporting.<sup>9</sup> But increasing victim reporting rates, while an important goal, is not the only or even primary goal and benefit of having prosecutors and judges make, respectively, prosecutorial and judicial decisions rather than convening authorities. Even the suggestion of a pilot program to test the

premises advanced on both sides of the issue, which would presumably result in evidence as to the efficacy of a change, was met with resistance.<sup>10</sup>

Requiring commanders to exercise prosecutorial discretion and perform judicial functions hinders their ability to respond vigorously and fairly to sexual assault.<sup>11</sup> It also exacerbates the negative impact of inevitable failures of commanders to fairly and objectively act as prosecutors and judges.<sup>12</sup> It rejects the independent prosecutors on whom every other criminal justice system –U.S. state and federal criminal courts, our allies’ military courts, and international criminal courts –relies. As a result, the U.S. military justice system will continue to operate outside the constraints of 21<sup>st</sup>-century norms for fairness and transparency in criminal justice.<sup>13</sup> We dissent.

- 1 See, RSP Report, Page 22 (providing the number of convening authorities across the branches of Service). Given that women make up fewer than seven percent of flag officers in the U.S. military, despite being 15 percent of servicemembers overall today, means that not only are very few, high-ranking officers making decisions, almost all of those decisions are being made by men. See Defense Manpower Data Center, “Active Duty Military Personnel by Service Rank/Grade: April 2014,” *at*, <https://www.dmdc.osd.mil/appj/dwp/reports.do?category=reports&subCat=milActDutReg> (reflecting the latest number of women in each Service, by rank, and the percentage of those who are female within the total force.). This is particularly problematic given the fact that service women are victims of sexual assault at higher rates than their male counterparts. See U.S. DEP’T OF DEF., SAPRO, DEPARTMENT OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY, FISCAL YEAR 2013, EXHIBIT 17 at 90 (Apr. 15, 2014) available at [http://sapr.mil/public/docs/reports/FY13\\_DoD\\_SAPRO\\_Annual\\_Report\\_on\\_Sexual\\_Assault.pdf](http://sapr.mil/public/docs/reports/FY13_DoD_SAPRO_Annual_Report_on_Sexual_Assault.pdf). (illustrating the gender of victims in completed investigations of unrestricted reports in fiscal year 2013, with 86 percent being female and 14 percent male).
- 2 See *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); *Transcript of RSP Public Meeting* 71–73 (Sept. 24, 2013) (testimony of Lord Martin 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 Paul Cronan); *id.* at 253–55 (testimony of Commodore Andrei Spence, Naval Legal Services, Royal Navy, United Kingdom); *id.* at \_58, 61, 68–69, 93–94 (testimony of Professor Eugene Fidell, Yale Law School).
- 3 The Panel also rejected the Comparative Systems Subcommittee’s recommendations that military judges be involved earlier in the criminal justice process and adjudge sentences upon conviction, both of which would enhance fairness while re-aligning the responsibilities of commanders in military justice. See REPORT OF THE COMPARATIVE SYSTEMS SUBCOMMITTEE TO THE RESPONSE SYSTEMS TO ADULT SEXUAL ASSAULT CRIMES PANEL (May 2014) [hereinafter CSS REPORT TO RSP], Annex, *infra*, Recommendations 43A – F and 54 at 28–30, 36, 180–188, 221–228 (recommending the military judge be available at the time of pretrial confinement to rule on issues raised by victims, trial counsel, or defense counsel, including presiding over the Article 32 hearing with a binding decision regarding probable cause, and serving as the sole sentencing authority, thereby eliminating military panel member sentencing).
- 4 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 <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”).
- 5 See, e.g., FY14 NDAA, PUB. L. No. 113–66, § 1702(b), 127 Stat. 672 (2013) (precluding convening authorities from dismissing or modifying convictions for qualifying sexual assault offenses and requiring them to explain in writing any sentence modification); *id.* at § 1705 (requiring dishonorable discharge or dismissal for certain sex offenses when found guilty for such offenses at a general court-martial), *id.* at § 1708 (eliminating character and military service of accused as factor commanders should consider in deciding how to dispose of an offense), *id.* at § 1744 (requiring review of decisions of convening authority not to refer sexual assault charges to trial by court-martial).
- 6 See L. LIBR. OF CONG., MIL. J.: ADJUDICATION OF SEXUAL OFFENSES 4–5, 55–58 (July 2013); *Transcript of RSP Public Meeting* 38–42 (Sept. 24, 2013) (testimony of Lord Martin Thomas); *id.* at 223 (testimony of Air Commodore Paul Cronan); *id.* at 156–58 (testimony of Major General Blaise 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 two very recent examples of this accelerating trend, see the IACHR response to Colombia's attempt to expand military jurisdiction and 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](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>.
- 7 See *Transcript of RSP Public Meeting* 41 (Sept. 24, 2013) (testimony of Lord Martin Thomas 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).
  - 8 See *Transcript of RSP Public Meeting* 71-73 (Sept. 24, 2013) (testimony of Lord Martin 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 Paul Cronan); *id.* at 253-55 (testimony of Commodore Andrei Spence, Naval Legal Services, Royal Navy, United Kingdom).
  - 9 See RoC REPORT TO RSP, Annex, *infra*, at 112; *Transcript of RSP Public Meeting* 232-233, 235 (Jan. 30, 2014) (Hon. Barbara S. Jones reading the draft of the majority of the Panel's initial assessment for deliberations); *Transcript of RSP Public Meeting* 105 (Sept. 24, 2013) (Hon. Barbara S. Jones "[O]ur interest in empirical evidence such as this flows from the rationale that is out there behind making the change to the role of the commander in our military. And the rationale, or at least the primary one, is that it will increase the confidence of victims and will increase reporting. And so, to some extent it's obviously important for us to see whether there is, in fact, that empirical connection."); *id.* at 89 (testimony of Professor Vanlandingham); *id.* at 238 (Air Commodore Paul Cronan); *id.* at 347-349 (testimony of Senator Claire McCaskill); *Contra Transcript of RSP Public Meeting* 55 (Sept. 24, 2013) (testimony of Professor Guiora, "I would suggest that that increased sense of confidence is directly related, at least in Israel, to the forceful prosecution policy implemented by the JAGs who are, again, not in the chain of command."); *id.* at 317-318, 332 (testimony of Senator Kirsten Gillibrand)
  - 10 *Transcript of RSP Public Meeting* 299-304 (Jan. 30, 2014) (discussion of a pilot program by the Panel members). *Transcript of RSP Public Meeting* 176-181 (testimony from Commander William Dwyer, U.S. Coast Guard, General Edward Rice, U.S. Air Force, Lieutenant Colonel Kevin Harris, U.S. Marine Corps and Major General Steven Busby, U.S. Marine Corps); *Transcript of RSP Public Meeting* 372-374 (Sept. 24, 2013) (Mr. Bryant asking Senator McCaskill if a pilot program would give more confidence in the proposed changes rather than requiring them to implement reforms immediately).
  - 11 See, e.g., the impact of unlawful command influence on commanders, *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 The Panel's Report describes the uniqueness of command and the care with which commanders are "groomed" to make disposition decisions. No matter how rigorous the selection and vetting process for command, it cannot guarantee unbiased, impartial commanders, and it cannot make convening authorities into experienced prosecutors. Two recent examples demonstrate that some of these high ranking commanders engage in sexual misconduct themselves. See Alan Blinder, *General in Sex Case to Retire With a 2-Rank Demotion*, *Jeffrey Sinclair to Receive Benefits, but at a Lower Level*, *NEW YORK TIMES* (June 20, 2014) (explaining the sentence for an Army brigadier general convicted at court-martial for maltreatment and adultery will include retirement benefits, but at a different rank due to his "pattern of inappropriate and at time illegal behavior both while serving as a brigadier general and a colonel) *available at* [http://www.nytimes.com/2014/06/21/us/general-in-sex-case-jeffrey-sinclair-to-retire-with-a-2-rank-demotion.html?\\_r=0](http://www.nytimes.com/2014/06/21/us/general-in-sex-case-jeffrey-sinclair-to-retire-with-a-2-rank-demotion.html?_r=0); Craig Whitlock, *Navy Reassigns ex-Blue Angels Commander after Complaint He Allowed Sexual Harassment*, *WASH. POST* (Apr. 23, 2014) (reporting on a complaint that a former commander of the elite naval aviators and president of Tailhook Association created a permissive environment in which pornography, lewd behavior, and hazing were common), *available at* [http://www.washingtonpost.com/world/national-security/navy-investigates-ex-blue-angels-commander-after-complaint-he-allowed-sexual-harassment/2014/04/23/be42211e-cb0f-11e3-95f7-7ecdde72d2ea\\_story.html](http://www.washingtonpost.com/world/national-security/navy-investigates-ex-blue-angels-commander-after-complaint-he-allowed-sexual-harassment/2014/04/23/be42211e-cb0f-11e3-95f7-7ecdde72d2ea_story.html).
  - 13 See CSS REPORT TO RSP, Annex, *infra*, Recommendations 10-B, 10C, 13, 43-A to F Rec 46, at 15, 17, 28-30, 36, 83-86, 90-92, 180-188, 192-194, 221-229) (highlighting the primary differences between military justice system and civilian practices and recommending changes be considered in the following areas: (1) immunity for victims' minor collateral misconduct, (2) shifting the unfounding decision from the commander to the prosecutor and investigator, (3) plea bargaining process to mirror the agreement between the defendant and prosecutor, (4) increasing the role of the military judge to align with most federal and State judges who control cases earlier in the process and usually act as the sole sentencing authority in the justice system, and (5) abandoning unitary sentencing, all to increase confidence in the system, as well as transparency and fairness of decisions).

Additional Statement

by

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The recommendations of this panel cannot be understood in isolation. Fighting sexual assault in the military depends in the end on instilling among all service members respect for others as equals. This goal, however, cannot be realized as long as women are still not treated equally in the military. Yes, much progress has taken place, but until women share fully in the responsibilities of military service in terms of the roles they are allowed to fill and the positions they hold, the message will be sent by the armed forces themselves that women are not equally capable and deserving of respect. This must change, and change quickly.