



**Report of the Role of the  
Commander Subcommittee**  
to the Response Systems  
to Adult Sexual Assault Crimes Panel

**May 2014**

*The Response Systems Panel has not yet considered or deliberated on the contents of this report.*

# X. STATEMENT OF SUBCOMMITTEE MEMBER ELIZABETH L. HILLMAN

I join the parts of the Role of the Commander Subcommittee Report that address the importance of broad-gauge efforts to reduce the incidence of rape and sexual assault. Such efforts include researching and implementing proven strategies to prevent assaults and enhance public confidence in the military justice system. I also concur with the Report's recommendation that widespread confusion about "restricted" reporting, an option available to victims of sexual assault who are active-duty service members, should be corrected with clarification and education. The recommendations that accompany those sections of the Report are likely to complement existing efforts and improve the military's response to sexual assault.<sup>1</sup>

I have already written, in a separate statement appended below, about why I believe requiring convening authorities to exercise prosecutorial discretion violates basic procedural fairness and undermines the legitimacy of military justice. By recommending that the authority to prosecute remain within the command structure, the Subcommittee rejects the premise that independent and impartial prosecutors should decide on the charges filed at courts-martial, as they do in U.S. state and federal criminal courts, in our allies' national military justice systems, and in international criminal courts.

I write now to explain why I decline to join most of the Subcommittee's final report. Commanders play a powerful and distinctive role in the armed forces, a role not fully acknowledged in the Subcommittee Report. The command structure of the armed forces enforces obedience, rewards sacrifice, and prioritizes the mission, each of which can discourage reporting of sexual assaults. Likewise, the distinctive demographics of the armed forces, which tilt toward youth, are 85% male, and until very recently included only those lesbian and gay service members who were willing to serve in fear of criminal prosecution and social ostracism, make military sexual assault different from sexual assault in civilian workplaces and institutions.<sup>2</sup> When the dust settles after this most recent round of criticism and reform, commanders will—again—be left to solve a set of problems that they cannot manage alone, however deep their commitment and integrity.

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1 In particular, I concur in Recommendations 4 through 12, 14, 21, 24, 27, and 30. See REPORT OF THE ROLE OF THE COMMANDER SUBCOMMITTEE TO THE RESPONSE SYSTEMS TO ADULT SEXUAL ASSAULT CRIMES PANEL, Abstract of Subcommittee Recommendations and Findings (May 2014) [hereinafter SUBCOMMITTEE REPORT].

2 OFFICE OF THE DEPUTY ASSISTANT SECRETARY OF DEFENSE FOR MILITARY COMMUNITY AND FAMILY POLICY, 2012 DEMOGRAPHICS: PROFILE OF THE MILITARY COMMUNITY 19, 36 (Exhibits 2.08. Gender of Active Duty Members, 2.36. Age of Active Duty Members), available at [http://www.militaryonesource.mil/12038/MOS/Reports/2012\\_Demographics\\_Report.pdf](http://www.militaryonesource.mil/12038/MOS/Reports/2012_Demographics_Report.pdf); Defense Manpower Data Center, "Active Duty Military Personnel by Service Rank/Grade: December 2013 (Women Only)" ("Table of Active Duty Females by Rank/Grade and Service"), at <https://www.dmdc.osd.mil/appj/dwp/reports.do?category=reports&subCat=milActDutReg>; see also DEPARTMENT OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY, FISCAL YEAR 2012, Vol. I, at 81–89 (May 2013) (Exhibit 18: Age of Victims in Completed Investigations of Unrestricted Reports, FY12; Exhibit 28: Age of Victims Making Restricted Reports, FY12; and Exhibit 21: Age of Subjects in Completed Investigations of Unrestricted Reports, FY12), available at [http://www.sapr.mil/public/docs/reports/FY12\\_DoD\\_SAPRO\\_Annual\\_Report\\_on\\_Sexual\\_Assault-VOLUME\\_ONE.pdf](http://www.sapr.mil/public/docs/reports/FY12_DoD_SAPRO_Annual_Report_on_Sexual_Assault-VOLUME_ONE.pdf).

History tells us that commanders do not always “drive cultural change in the military.”<sup>3</sup> Racial minorities, women, and lesbians and gay men entered the ranks of the military only after overcoming extreme resistance from military leaders and winning protracted civil rights battles. Attorneys like the late Robert L. Carter, a veteran, civil rights leader, and U.S. District Court judge, would be surprised at the assertion that racial integration was led, not resisted, by commanding officers. While working for the NAACP Legal Defense and Education Fund, Judge Carter argued *Burns v. Wilson*, a 1953 Supreme Court case rejecting the habeas corpus petitions of African American soldiers sentenced to death at court-martial for rape and murder. Military justice was marked by racial disparities long after President Truman’s 1948 order mandating equality of treatment for all races.<sup>4</sup>

When I was a first lieutenant in the Air Force in the spring of 1993, I listened to General Merrill A. McPeak, then the Air Force Chief of Staff, respond to a question about female pilots flying combat missions by stating that he was personally opposed to service women flying bombers or fighters but would reluctantly follow the law if it changed.<sup>5</sup> His comment implied that informal resistance to formal equality was acceptable, even expected, among Air Force leaders. Likewise, the actions of many commanding officers before, during, and after “don’t ask/don’t tell,” the legal regime that banned service by gays and lesbians who failed to hide their sexual orientation from 1993 until 2011, do not reveal a corps of senior leaders eager to embrace equal opportunity.<sup>6</sup> Social and cultural change within the U.S. armed forces is a complex historical phenomenon that has not been driven primarily by command.

The Subcommittee Report’s description of the measures that each branch of service takes to ensure commanders are qualified (referred to as “grooming”), and can be removed if necessary, does not resolve the problem created by placing excessive legal authority in the chain of command.<sup>7</sup> No matter how rigorous the selection and vetting process for command, it cannot guarantee unbiased, impartial commanders.<sup>8</sup> Giving commanders authority over criminal prosecution and an extensive “quasi-judicial” role, in addition to their many other mission-related responsibilities, exacerbates the impact of inevitable failures of command.<sup>9</sup>

3 SUBCOMMITTEE REPORT, Part II, Section A.

4 *Burns v. Wilson*, 346 U.S. 137 (1953); see also JAMES E. WESTHEIDER, *FIGHTING ON TWO FRONTS: AFRICAN AMERICANS AND THE VIETNAM WAR* (1997); BERNARD C. NALTY, *STRENGTH FOR THE FIGHT: A HISTORY OF BLACK AMERICANS IN THE MILITARY* (1989); MORRIS J. MACGREGOR, *INTEGRATION OF THE ARMED FORCES 1940-1965* (1981). Racism in military justice was a primary challenge of civil rights leaders throughout the 1950s, '60s, and '70s.

5 See Eric Schmitt, *Women Ready to Fly for Navy, or Flee It*, N.Y. Times (Apr. 23, 1993); see also Evelyn Monahan, *A Few Good Women: America's Military Women from World War I to the Wars in Iraq and Afghanistan* (2010); The Women's Research & Education Institute (WREI), “Women in the Military & Women Veterans,” at <http://www.wrei.org/WomeninMilitary.htm>.

6 AARON BELKIN, *HOW WE WON: PROGRESSIVE LESSONS FROM THE REPEAL OF “DON’T ASK, DON’T TELL”* (2011); RANDY SHILTS, *CONDUCT UNBECOMING: GAYS & LESBIANS IN THE U.S. MILITARY* (1994).

7 SUBCOMMITTEE REPORT, Part VIII, Section A; see also *id.* at n.1 (collecting statutes requiring “exemplary conduct” of commanding officers).

8 Two examples in just the last few weeks reveal that screening and training is not enough to forestall conduct that makes high-level commanders seem entirely unprepared to adjudicate sexual assault cases fairly. See Craig Whitlock, *Disgraced Army General, Jeffrey A. Sinclair, Gets \$20,000 Fine, No Jail Time*, WASH. POST (Mar. 20, 2014) (reporting on sentence following conviction at court-martial for sex offenses of brigadier general who had been deemed an up-and-coming star), available at [http://www.washingtonpost.com/world/national-security/disgraced-army-general-jeffrey-a-sinclair-receives-fine-no-jail-time/2014/03/20/c555b650-b039-11e3-95e8-39bef8e9a48b\\_story.html](http://www.washingtonpost.com/world/national-security/disgraced-army-general-jeffrey-a-sinclair-receives-fine-no-jail-time/2014/03/20/c555b650-b039-11e3-95e8-39bef8e9a48b_story.html); Craig Whitlock, *Navy Reassigns ex-Blue Angels Commander after Complaint He Allowed Sexual Harassment*, WASH. POST (Apr. 23, 2014) (reporting on complaint that former commander of elite naval aviation squadron and president of Tailhook Association created 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).

9 SUBCOMMITTEE REPORT, Part II, Section B.

The Subcommittee Report narrates a history of modern military justice that elides the contested nature of that history and overstates the degree of consensus about the origins and progress of reform in military justice, and in military institutions overall.<sup>10</sup> The Subcommittee was not asked to write a history of military justice and heard almost no testimony about it.<sup>11</sup> Legal reform within the military justice system has frequently provoked resistance and backlash, as has social change.<sup>12</sup> The report’s review of Supreme Court cases under the UCMJ omits key precedents<sup>13</sup> and dismisses as mere coincidence the fact that nearly every case it cites involves military sexual assault or domestic violence.<sup>14</sup> A selective history of military justice does not help to illuminate the impact of the military’s command structure on rape and sexual assault in the contemporary armed forces.

Sexual assault is a different problem in the military than in civilian life in part because the coercive nature of command makes sexual exploitation both easier to commit and easier to hide. Service members are introduced to a culture of obedience and hierarchy from the start of their military service, a culture enforced by law and custom that defines their speech, their dress, their pay—even who can serve as a member of court-martial panel.<sup>15</sup> This deference to authority undermines the autonomy of service members, who often live and work in close proximity, creating more opportunity for sexual harassment and assault. Service members who wish to be “good soldiers” and support their commands may find it more difficult to resist pressure for unwanted sexual acts from peers, be less willing to come forward if their harassers or rapists are superior officers, and be disinclined to report if disclosure might embarrass or impair the effectiveness of their units.<sup>16</sup> The far-reaching legal authority of commanding officers, presented as a solution to military sexual assault in the Subcommittee Report, is also a problem, for commanders and victims alike. Fear of exercising unlawful command influence may deter commanders from making forceful statements about the wrongfulness of sexual harassment and assault. Deference to authority may make victims less likely to report superiors for misconduct and more likely to sacrifice their own well-being in favor of protecting the reputations of their peers and branches of service.

Yet the Subcommittee Report states that “sexual violence in the military is no different” than among civilians.<sup>17</sup> This simply cannot be true. Only service members can be tried for crimes if they fail to obey the order of

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10 For a half-dozen of the many alternative views on this history, see, e.g., WILLIAM T. GENEROUS, *SWORDS AND SCALES: THE DEVELOPMENT OF THE UNIFORM CODE OF MILITARY JUSTICE* (1973); JOSEPH W. BISHOP, JR., *JUSTICE UNDER FIRE: A STUDY OF MILITARY LAW* (1974); EUGENE R. FIDELL & DWIGHT H. SULLIVAN, EDs., *EVOLVING MILITARY JUSTICE* (2002); ANDREW J. BACEVICH, *THE NEW MILITARISM: HOW AMERICANS ARE SEDUCED BY WAR* (2005); 140:3 *DAEDALUS* (Summer 2011: The Military Issue); and THOMAS E. RICKS, *THE GENERALS: AMERICAN MILITARY COMMAND FROM WORLD WAR II TO TODAY* (2012).

11 Before the Subcommittee was formed, the RSP heard from Colonel (Retired) Fred Borch. See generally Transcript of RSP Public Meeting 187-221 (June 27, 2013).

12 See, e.g., JONATHAN LURIE, *MILITARY JUSTICE IN AMERICA: THE U.S. COURT OF APPEALS FOR THE ARMED FORCES, 1775-1980* (2001); JONATHAN LURIE, *PURSUING MILITARY JUSTICE: A HISTORY OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES, 1951-1980* (1992).

13 See, e.g., *Reid v. Covert*, 345 U.S. 1 (1957), a hard-fought case in which the Air Force lost its effort to exert military jurisdiction over the dependent wife of a service member for a domestic murder committed overseas. For an alternate reading of service connection cases and Supreme Court review of military cases, see DIANE H. MAZUR, *A MORE PERFECT MILITARY: HOW THE CONSTITUTION CAN MAKE OUR MILITARY STRONGER* (2010).

14 Elizabeth L. Hillman, *Front and Center: Sexual Violence in U.S. Military Law*, 37 *Pol. & Soc’y* (2009) (explicitly addressing significance of so many court-martial appeals involving cases of intimate partner and sexual violence for evolution of military justice and capacity of military justice system to address sexual assault), available at <http://www.eusccr.com/Hillman%20statement.pdf>.

15 10 U.S.C. § 825 (UCMJ art. 25).

16 DEPARTMENT OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY, FISCAL YEAR 2012, Vol. II, Annex A, at 101-25 (May 2013), available at [http://www.sapr.mil/public/docs/reports/FY12\\_DoD\\_SAPRO\\_Annual\\_Report\\_on\\_Sexual\\_Assault-VOLUME\\_TWO.pdf](http://www.sapr.mil/public/docs/reports/FY12_DoD_SAPRO_Annual_Report_on_Sexual_Assault-VOLUME_TWO.pdf).

17 *Id.* at second sentence of Part IV.

a superior, skip a day of work, or speak out against a superior.<sup>18</sup> Only service members can be prosecuted for disobeying an order not to drink alcohol in the barracks if they report a sexual assault that occurs in the midst of such drinking.<sup>19</sup> Civilians who suffer a sexual assault can often leave behind a job, supervisor, or even apartment or house, while service members in comparable situations could face severe consequences for abandoning a post or military quarters. Civilians are rarely in situations as vulnerable to authority and abuse as are military recruits in training, or cadets at the service academies, both of whom have too often been the target of sexual assaults.<sup>20</sup> Prescriptions for reducing and responding to military sexual assault must not sidestep these relevant differences.

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- 18 See 10 U.S.C. §§ 892, 885, 889, (UCMJ arts. 92, 86, 89) (defining, respectively, offenses of failure to obey order or regulation, absence without leave, and disrespect toward superior commissioned officer); see *also* 10 U.S.C. § 891 (UCMJ art. 91) (defining offense of insubordinate conduct as including when any warrant officer or enlisted member “treats with contempt or is disrespectful in language or deportment toward a warrant officer, noncommissioned officer, or petty officer while that officer is in the execution of his office”).
- 19 The impact of criminal liability for “collateral misconduct” is a major concern addressed by all three Subcommittees of the RSP. See SUBCOMMITTEE REPORT, Part VI, Section D; Part VII, Section B; see *generally* REPORT OF THE COMPARATIVE SYSTEMS SUBCOMMITTEE TO THE RESPONSE SYSTEMS TO ADULT SEXUAL ASSAULT CRIMES PANEL (May 2014); REPORT OF THE VICTIM SERVICES SUBCOMMITTEE TO THE RESPONSE SYSTEMS TO ADULT SEXUAL ASSAULT CRIMES PANEL (May 2014).
- 20 See U.S. AIR FORCE AIR EDUCATION AND TRAINING COMMAND, AETC COMMANDER’S REPORT TO THE SECRETARY OF THE AIR FORCE: REVIEW OF MAJOR GENERAL WOODWARD’S COMMANDER DIRECTED INVESTIGATION (Nov. 2012) (describing, *inter alia*, measures taken to hold commanders accountable following sexual assault investigation of military training instructors at Joint Base San Antonio-Lackland), *available at* <http://www.afpc.af.mil/shared/media/document/AFD-121114-029.pdf>; U.S. AIR FORCE, DEVELOPING AMERICA’S AIRMEN: A REVIEW OF AIR FORCE ENLISTED TRAINING (Aug. 2012) (report of General Woodward’s commander directed investigation at Joint Base San Antonio-Lackland), *currently available at* [http://responsesystemspanel.whs.mil/public/docs/meetings/Sub\\_Committee/20131120\\_ROC/20\\_Woodward\\_CDIREport.pdf](http://responsesystemspanel.whs.mil/public/docs/meetings/Sub_Committee/20131120_ROC/20_Woodward_CDIREport.pdf); see *also* Fred L. Borch, *Military Law and the Treatment of Women Soldiers: Sexual Harassment and Fraternization in the US Army*, in GERARD J. DeGROOT AND CORINNA PENISTON-BIRD, EDs., *A SOLDIER AND A WOMAN: SEXUAL INTEGRATION IN THE MILITARY* (2001) (describing, *inter alia*, command response to 1996-97 training environment misconduct at Aberdeen Proving Ground). For DoD SAPRO’s annual reports on sexual harassment and violence at the Military Service Academies, see <http://www.sapr.mil/index.php/annual-reports>; see *also* REPORT OF THE DEFENSE TASK FORCE ON SEXUAL HARASSMENT & VIOLENCE AT THE MILITARY SERVICE ACADEMIES (June 2005), *available at* [http://www.sapr.mil/public/docs/research/High\\_GPO\\_RRC\\_tx.pdf](http://www.sapr.mil/public/docs/research/High_GPO_RRC_tx.pdf); REPORT OF THE PANEL TO REVIEW SEXUAL MISCONDUCT ALLEGATIONS AT THE U.S. AIR FORCE ACADEMY (Sept. 2003), *available at* <http://www.defense.gov/news/Sep2003/d20030922usafareport.pdf>.

## SEPARATE STATEMENT DISSENTING FROM THE INTERIM REPORT OF THE ROLE OF THE COMMANDER SUBCOMMITTEE

January 30, 2014

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.<sup>1</sup> 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.<sup>2</sup> 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.<sup>3</sup> We heard no evidence that the military justice system is any worse than civilian jurisdictions at responding to rape and sexual assault.<sup>4</sup> 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.

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.<sup>5</sup> 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.<sup>6</sup> Commanders must overcome this by leading a cultural shift toward greater respect for gender

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](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.

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](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>.

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.<sup>7</sup>

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.<sup>8</sup> 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.<sup>9</sup> It will be further limited through recently enacted changes.<sup>10</sup> 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."<sup>11</sup> 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

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 <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).

will order courts-martial to go forward regardless of the strength of the evidence.<sup>12</sup> 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.<sup>13</sup> Whether there is sufficient 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.<sup>14</sup> Yet no country with independent prosecutors has reported any such dire consequences.<sup>15</sup> 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.<sup>16</sup> 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.<sup>17</sup> 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.<sup>18</sup> That goal is consistent

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- 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).
- 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



with the procedural fairness that both 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.<sup>19</sup> 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.

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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 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>.

- 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.").



# REPORT OF THE RESPONSE SYSTEMS TO ADULT SEXUAL ASSAULT CRIMES PANEL

June 2014

# Chapter Eleven:

# ADDITIONAL VIEWS OF PANEL MEMBERS

## Response Systems Panel on Military Sexual Assault

### Separate Statement of Dean Elizabeth L. Hillman & Mr. 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 21st-century norms for fairness and transparency in criminal justice.<sup>13</sup> We dissent.

- 1 See RSP Report, Page 74 (providing the number of convening authorities across the branches of Service). Given that women make up fewer than 7% of flag officers in the U.S. military, despite being 15% of Service members 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% being female and 14% male).
- 2 See *Transcript of RSP Public Meeting* 19 (Nov. 8, 2013) (testimony of Mr. Brian K. Lewis) (“[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 and 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, 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).