



April 25, 2019

Chairman Thom Tillis
113 Dirksen Senate Office Building
Washington, DC 20510

Ranking Member Kirsten Gillibrand
478 Russell Senate Office Building
Washington, DC 20510

Chairman Tillis and Ranking Member Gillibrand,

Thank you again for the concern and leadership you have shown on the issue of sexual assault and rape in our armed services. The hearing you held last month was another example of the Senate's vital oversight of this scourge. Chairman Tillis, during the hearing you asked several questions of other witnesses concerning the experience of our allies who have moved away from the commander controlled criminal justice system to an independent prosecutor-based system. I don't believe you received a comprehensive answer to your question, and I wanted to bring to your attention the testimony on that very issue before the Response Systems Panel (RSP).

During a hearing, the RSP heard from eight witnesses concerning their country's experiences after moving from a commander-controlled military justice system to a prosecutor-based system. I believe the testimony can be fairly described as glowing and overwhelmingly positive. In particular, the RSP heard from both commanders and lawyers in Australia, Canada, the United Kingdom, and Israel, and I have provided the attached comprehensive summary of the testimony that highlights the fact that our allies unanimously believe the changes have improved military justice. Below, I have included a few of examples from the testimony:

Air Commodore Paul Cronan, Director General, Australian Defence Legal Service, testified, "these reforms have undoubtedly had a significant and positive impact on efficacy, impartiality, and perceived fairness of Australia's military justice system. This is a fact confirmed by a number of subsequent independent reviews..."

Lord Martin Thomas testified that commanders are pleased with the reforms and that "they were simply unaware of any discontent at all within the services over the removal of the CO's powers." He concluded, "it is believed that the incidence of sexual assault in the Royal Navy has been severely diminished by steps that we have taken."

Professor Amos Guiora, retired Israel Defense Forces commander and JAG echoed these conclusions. "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.” He also noted, “the uptick in high profile prosecution of sexual assaults in Israel has clearly implicated the willingness of soldiers, men and women alike to come forward.”

Major General Steve Noonan, Canadian Joint Operations Commander, testified, “At no time did I feel our soldiers, Canadian soldiers, were less disciplined than those from other countries, nor more hesitant to execute their assigned tasks. That is to say, the Canadian military justice system worked in the theater of operations. In my view that is the highest compliment I can give it.”

Air Commodore Cronan summed up the impact of the reforms in Australia by reading from an independent review of the Australian system. “The military justice system is delivering and should continue to deliver impartial, rigorous, and fair outcomes. Enhanced transparency and enhanced oversight is substantially more independent from the chain of command, and is effective in maintaining a high standard of discipline both domestically and in the operational theater.”

The testimony is thorough and demonstrates that our allies have improved their justice systems by removing commanders from the prosecution process. While some commanders were opposed to reform, they now support the changes and believe it has strengthened their authority and improved the system. The consensus is that commanders do not feel disempowered or disenfranchised and the process is viewed as more fair to both the accused and the victim.

After many years of our allies having a prosecutor-based system, I am unaware of any movement to reverse course and return the authority to commanders in any of these countries. The great debate we are having here on the role of command is simply not occurring in the countries that have reformed their military justice process. That should tell us something. Moreover, contrary to the assertions of Lt Gen Rockwell during the hearing, I am unaware of any evidence that the reforms have made things worse on the issue of sexual assault.

I hope this information proves useful to you and the other members of the Subcommittee, and I am happy to answer any questions you may have.

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Relevant Testimony of Allies Before the Response Systems Panel

On 24 September 2013, the following witnesses appeared before the Response Systems Panel to testify about their country's experiences after moving from a commander-based military justice system to a prosecutor-based system:

- **Major General Blaise Cathcart**, Judge Advocate General of the Canadian Armed Forces.
- **Major General Steve Noonan**, Deputy Commander, Canadian Joint Operations Command.
- **Air Commodore Paul Cronan**, Director General, Australian Defence Legal Service.
- **Commodore Andrei Spence**, Commodore Navy Legal Services, Royal Navy.
- **Brigadier (Ret) Anthony Paphiti**, former Brigadier Prosecutions, Army Prosecuting Authority
- **Lord Martin Thomas**, Gresford QC, British attorney with significant court-martial experience.
- **Prof Amos Guiora**, University of Utah College of Law and retired commander and JAG in Israel Defense Forces.
- **Prof Michel Drapeau**, University of Ottawa and retired Canadian colonel with significant command experience.

The complete testimony may be found here:

http://responsesystemspanel.whs.mil/public/docs/meetings/20130924/24_Sep_13_Day1_Final.pdf

Testimony Extracts

LORD THOMAS:

British Attorney and Politician with significant court-martial experience

COMMANDERS OPPOSED MILITARY JUSTICE REFORM:

The debates show that **the retired field marshals and chiefs of staff** in the House of Lords **strongly opposed these changes. They said that they eroded the status and authority of the commanding officer.**

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PERCEIVED UNFAIRNESS HARMS DISCIPLINE:

A modern non-conscript professional military with increasing demands for skills and aptitudes, which are very marketable in the wider world, must concern itself both with recruitment and retention. Service discipline is, of course, an essential part of military life, but both for new entrants and for those who are making their careers in the services. **It must be and be seen to be fair. Perceived unfairness leads to discontent, poor morale, and indiscipline.**

Pages 43-44

ATTORNEYS BETTER SUITED TO ENSURE JUSTICE:

The subjective decisions of commanding officers, even with the assistance of legal advisors, cannot hope to achieve the consistency and parity in every unit across all the services. And it seems from these panel hearings that the U.S. Defense Department is now largely persuaded insofar as the Article 60 power is concerned. In my country and in my Parliament, **lawyers may not be too popular, but we do have the training to be objective, to assess facts to come to conclusions on set principles of law, and to deal with individuals with parity.** This, I believe, is the success of the Director of Service Prosecutions in his department in the United Kingdom. He does not operate in some remote and arcane legal world. He is required to take account both of the effect of a prosecution on operations and of the importance of maintaining military discipline.

Pages 44-45

BENEFITS OF INDEPENDENT PROSECUTOR BASED SYSTEM:

The existence of a **prosecuting authority independent of the chain of command does mean that complaints** across the board **will be taken seriously, that the fear of retaliation or of a blighted career has lessened, that anonymity and special measures**

when desired can be ensured, and that perpetrators -- perpetrators -- particularly of a senior rank, cannot expect any favors.

Pages 45-46

VICTIM CONFIDENCE WILL INCREASE:

If victims have confidence and trust in a system independent of the chain of command, they are more likely, in my view, to report offenses. On the other hand, the present discretion of the U.S. commanding officer to dismiss serious allegations of sexual assault must be a disincentive.

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PUBLIC HAS A RIGHT TO EXPECT A FAIR SYSTEM:

But finally, the military are the servants of the public, and the 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.

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BRITISH COMMANDERS PLEASED WITH REFORM:

I would make that point as well that nobody is suggesting that the commander should lose disciplinary powers in the military sense. It's when he becomes involved in the criminal process that the objection is made. What has happened in the United Kingdom was expressed by the Director of Service Prosecutions, Bruce Houlder. And in an email to me, he said that **COs are rather pleased about the changes that are taking place and that they no longer have to make the difficult decisions about certain cases, weighing up competing interests, nor are they open anymore to having their ears bent on the question of the choice available to them.** And they have more important things to do than chasing errant soldiers and wasting time on paperwork.

Pages 71-72

NO COMMAND OBJECTIONS/PROBLEMS IN UK AS A RESULT OF REFORM:

So I was expecting to hear from the Ministry of Defense that there were objections to the changes within the military from commanding officers and from those in the chains of command.

And I was surprised to discover that having consulted with Lord Astor of Haver, the Undersecretary of State, that **they were simply not aware of any discontent at all within the services over the removal of the CO's powers. So the change in the United**

Kingdom has been affected without any difficulties that have surfaced. And certainly there has been nothing in Parliament on that issue so far as I'm aware. Well, I can confirm there has been no -- nothing expressed in Parliament on the removal of the CO's powers in this regard.

Pages 72-73

COMMANDERS DO NOT NEED CRIMINAL AUTHORITY TO ENSURE DISCIPLINE:

I don't see that it is necessary for the commander to exercise that investigation and punishment function in order to ensure proper discipline in action.

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LEADS TO PARITY:

I'm hearing to my right seem to suggest that the purpose of maintaining the CO's position is to enhance his status as a wise leader, and to improve his status to be seen to be a fair decision maker. But, of course, it may diminish his status if he's seen to be an unfair decision maker when it comes to prosecution.

And you can have a situation where in one regiment, the CO is thought to be very strict, and in the other regiment he's seen to be very weak. How does that help? **Why don't we have an independent** -- well, we do have an independent in Britain -- **who achieves parity across the whole system?**

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HAS LED TO CONFIDENCE/DIMINISHED INCIDENTS OF SEXUAL ASSAULT:

What is necessary is to have a system, which is seen to be fair and independent to create a climate in which complainants will come forward more willingly to make their complaints, and by their so doing and by the knowledge that they will so do, diminishing those who are likely to be perpetrators of sexual assaults at some future. So it's all a question of building up a climate of confidence in the system, which will result ultimately in the diminishing of sexual assault. We believe, and I think one of our representatives will say that, that in the Royal Navy, the problem has been tackled. Complaints by young men, of course, are possibly more difficult than by young women. We position that it has been tackled, and the – **it is believed that the incidence of sexual assault in the Royal Navy has been very severely diminished by steps that have been taken.**

Pages 108-109

Professor Drapeau

University of Ottawa, Retired colonel from Canadian Forces after 34 years and extensive command experience.

ALL NATO ALLIES HAVE ALREADY REFORMED:

It is not as if Canada is not aware of the significant reforms to military law that have taken place over the past two decades around the world. After all, **each of our NATO European allies**, as well as other countries with which we share a common law legal heritage, **have already successfully modernized their structures, standards, and best practices and protocols for their military justice system.**

Pages 47-48

CRIMINAL JUSTICE MUST BE VICTIM FOCUSED:

First, for disciplinary offenses, the focus must be on meeting the needs of the military, particularly the chain of command, in order to enforce discretion and rehabilitate offenders before returning them to military duty. And second, **for criminal offenses, however, the focus must be on the delivery of victim-centered service by deterring and mitigating crimes, as well as sanctioning those who violated laws with criminal penalties so as to increase the safety of vulnerable members of society.**

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PROSECUTOR CONTROLLED JUSTICE ENHANCES VICTIM CONFIDENCE:

The time has come to recognize that the functioning of a military penal system must be completely untrammelled by the executive or the chain of command. **Until this is done, many victims of sexual assault serving in the military may lack confidence in the administration of military justice, enough at least to dissuade them from reporting these crimes. Who can blame them?**

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REFORM IN CANADA HAS NOT HURT COMMANDERS:

I can't remember a single commander at various levels saying that, in fact, this has somehow diminished his ability to exercise his command and the quality of his command, or the quality of his leadership. I would suggest it would be the reverse.

Pages 73-74

EVEN IN COMBAT PROSECUTION DECISION SHOULD NOT BE MADE BY THE COMMANDER:

I have commanded myself in the past. I cannot see what the interest of a commander would be. **Even in combat**, if one of his soldiers is accused of sexual assault, murder, torture, a major crime, **why would he want to continue to be involved in any aspect of prosecution of as opposed to putting it into the hands of the proper authorities that would prosecute this and see this to come to trial? If for no other reason, he also owes a duty to both his unit and other people under his command, particularly if the victim is residing from within.** So why would he want to take a role and lose an objectivity that he may have, impartiality, and is focus on delivering the mission? I just can't make it.

Pages 80-81

PROSECUTOR BASED SYSTEM ENHANCES CONFIDENCE:

...when you have these systems whose purpose in life and training and resources is the application of law in a fair and universal way, that you can have an increased sense of confidence that those who become victims of crimes, many of them our sons and daughters serving in uniform, can have a sense of confidence into the justice system. **Not the command system, the justice system, that if and when reported, and we know there is a wide disparity between the number reported and the number of presumed assaults, then these can be brought to prosecution.**

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CANADA DOES NOT HAVE EMPIRICAL DATA:

And that's the issue, and on which **there is no empirical evidence**, at least not from our country. We cannot tell you how much there is and how much difference this has made. I presume it has, but that's it. We cannot -- I cannot provide this kind of evidence.

Pages 96-97

COMMANDERS SHOULD NOT CONTROL CRIMINAL SYSTEM:

My position is quite clear. **The chain of command -- the entire chain of command should be taken out of anything but the disciplinary system. Any criminal offenses should be left to the military justice system.**

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Professor Guiora

Law Professor, University of Utah, retired Lt col from Israel Defense Forces, served 19 years both as a JAG and commander

IN ISRAEL, JAGs HAVE AUTHORITY OF CRIMINAL PROCESS:

And it's obvious to all of us that the Israeli system is profoundly different from the current American system.

The primary difference relates to "the balance of power" between the commander and the judge advocate. In short, **while serving as judge advocate** to the Navy and Home Front command in the IDF, **I was solely entrusted with the decision to order the filing of an indictment against a soldier or officer.** Simply put, **the commander was granted no authority in the matter whatsoever.** While I notified the commander of my charging decision and was open to his input, the decision was exclusively mine in consultation with my own commander, the Judge Advocate General.

Pages 51-52

NECESSARY TO PREVENT UNDUE COMMAND INFLUENCE:

The decision in Israel to create a system whereby indictment decisions are an exclusive bailiwick of the JAG reflects a profound belief in the system and also, I think, in the country that **the separation between judge advocates and commanders is necessary in order to prevent undue command influence.**

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MINIMIZES COMMAND INFLUENCE

While commanders understandably express reservations as to their lack of role in the decision making process, **the system, from my perspective, properly and effectively minimizes command influence in the criminal process to maintain**

and to ensure full accountability and impartiality in meting out justice.

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REFORM HAS LED TO SIGNIFICANT INCREASE IN CONFIDENCE:

But the fact that there's been indeed public prosecutions with enormous media visibility **has significantly enhanced the trust that Israeli Defense Forces soldiers feel in reporting instances of sexual assaults and harassment.** 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.

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REFORM HAS WORKED:

...third point is public trust, and precisely because of the concern of undue command influence, at least in Israel, **the principle of minimizing the command influence and ensuring legal reasoning, legal objectivity by the JAG has**, I think, from my perspective reflecting back, **has effectively worked in Israel.**

Pages 56-57

HAS LED TO VICTIMS COMING FORWARD:

One, as I mentioned earlier, **the uptick in high profile prosecution of sexual assaults in Israel has clearly impacted the willingness of soldiers, men and women alike, to come forward.** And the other was a law passed by the parliament in 1997, which imposed on the commanders an immediate duty to report any cases of sexual assaults. And it imposed on them the duty to report immediately.

And then, to Professor Hansen's comment, in Israel in the IDF, commanders still have responsibility for disciplinary matters. **There's a distinction between criminal matters which go to the JAG and disciplinary matters which go to the commander.**

Pages 70-71

AS A COMMANDER, NEVER FELT UNDERMINED:

I also was a commander, and I never felt in any way undermined when I had soldiers who committed crimes and the JAG, not me, but another JAG determined their fate.

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Major General Noonan

Deputy Commander, Canadian Joint Operations Command

CANADIAN COMMANDERS COMFORTABLE WITH REFORM:

My intent is simply to inform the Panel that **as an operational commander, I'm very comfortable with where we have evolved to**, recognizing the continued key role of the

commanding officer in the system, and the latitude that the system still provides for us to maintain good order and discipline, two key elements of operational effectiveness.

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COMMANDERS STILL ENGAGED WITH VICTIM CARE:

Further, it's also important to note that **as a commanding officer, I would ensure that the victim receives the proper medical and other support that is required in those circumstances.**

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INDEPENDENT PROSECUTORS STRENGTHEN COMMANDERS

In terms of the role of the commanding officer in the court martial process, in sensitive matters, like an alleged sexual assault, we believe it is in the best interest of the chain of command, the accused, and the complainant to have an independent investigator assess the evidence and lay charges, an independent prosecutor determine whether or not to proceed, and an independent court martial administrator convene a court martial. All of these actors, in my view, strengthen my role in the chain of command as those under my command can be confident in the real and perceived independence of the military justice system.

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REFORMS WORKED IN DEPLOYED ENVIRONMENT:

As part of the chain of command, I've also used the military justice system in various operational theaters, the most recent being in Afghanistan. I've commanded men and women from the early 1990s in combat arms roles in active theaters of operations. As you may know, the Canadian force is integrated such that women can enroll in any Canadian armed forces occupation, including combat arms, and serve in any environment -- Army, Navy, Air Force. From the operator's perspective, the ability I had as a Canadian task force commander to instill discipline in the Canadian context did not appear to me any different than my American and British colleagues, along whose side I fought.

Pages 169-170

CANADIAN SOLDIERS DISCIPLINED/WILLING TO EXECUTE MISSION:

At no time did I feel that our soldiers, Canadian soldiers, were less disciplined than those from other countries, nor more hesitant to execute their assigned tasks. That is to say, the Canadian military justice system worked in the theater of operations. In

my view, that is the highest compliment I can give it.

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COMMANDERS ABLE TO FOCUS ON PREVENTION

This allows the chain of command to focus our efforts to establish conditions, what we call left of the event or prior to the event, before they occur, and then set the conditions for an independent third party or parties to work the issue in a perceivable unbiased and standardized manner.

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Major General Cathcart:

Judge Advocate General of the Canadian Armed Forces

THE SYSTEM WORKS FOR ACCUSED AND VICTIM:

...the feedback that we get also through other sources, like the chain of command and medical folks as well indicates that there seems to be a sense that the system is working for victims and accused in those circumstances. But as far as hard numbers, we haven't tracked them from the start, and we're not currently tracking them in that sense.

Pages 181-182

Air Commodore Cronan

Director General , Australian Defence Legal Service

REFORMS HAVE MADE A SIGNIFICANT IMPACT

These reforms have undoubtedly had a significant and positive impact on the efficacy, impartiality, and perceived fairness of Australia's military justice system. This is a fact confirmed by a number of subsequent independent reviews of the effectiveness of the 2003 and 2006 reforms.

Pages 226-227

INDEPENDENT REVIEW PROVES REFORMS ARE WORKING:

As a result of **their independent review**, they **concluded that the reforms had been effective, and that as a result of the reforms, "The military justice system is delivering and should continue to deliver impartial, rigorous, and fair outcomes. Enhanced transparency and enhanced oversight is substantially more independent from the chain of command, and is effective in maintaining a high standard of discipline both domestically and in the operational theater."**

REVIEW PRAISES REFORMS:

Pages 227-228

...the Street-Fischer review nonetheless commented very positively on the independence of the military discipline system from the chain of command.

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NO PROBLEMS FROM REFORMS:

But I think it's fair to say that as a result of the 2006 reforms where we took the convening authority out of play and passed that role to the Director of Military Prosecutions, we were then -- our legal court certainly **didn't notice any discernible problems with morale or any difficulties that we found as a result of that system.**

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REFORMS NOT BECAUSE OF SEXUAL ASSAULT SO NO DATA:

Not that I'm aware of, and the reason I say that is the 2003 and the 2006 reforms, somewhat like my Canadian colleagues, **were not targeted at sexual assault matters** particularly, but rather behind it was what was perceived to be an improvement in terms of impartiality in fairness across the discipline system across all ranges of offenses, not just specifically sexual assault. **So there were no particular statistics** that I'm aware of that are tied to that particular matter.

Pages 237-238

REFORM WAS NEEDED TO IMPROVE FAIRNESS:

Certainly there was a perception, rightly or otherwise, that the pre-2006 system where the convening authority of the pre-2003 system where the convening authority had all of those multiple roles in our court martial system, that **looking at it through the lens of impartiality, fairness, that whether it be in reality or one of perception, that those elements needed to be and should be improved.**

And the reason behind that sits I think both within the military and also the external Australian public looking on, **that our people in uniform deserved the best discipline system that we had to offer them, and improving fairness and impartiality was part of that process.**

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NO COMPLAINTS BY COMMANDERS IN AUSTRALIA:

CONGRESSWOMAN HOLTZMAN: **Have you had any complaints from commanders? Are you aware of complaints from commanders** that the changes have undermined their ability to lead their troops?

AIR COMMODORE CRONAN: **I've been in the ADF since 1985**, so it's too long to remember, but I've sort of spent a fair bit of time in both systems, I guess, the pre- and post-2006 systems. **And I think it was fair to say when the reforms came in 2006, there was a -- there was certainly, I think, a certain degree of uncertainty amongst our commanders, that there was a sense of loss of control over that element of the discipline system.**

But as time moved on, it's accepted, and I am not aware of any concerns that our commanders have in relation to the way our system works. If you'll ask them, I think they would say that having an independent legally qualified military director of prosecutions whose separate from the chain of command, who answers to no one other than the Chief of Defense Force in an administrative sense, is a fair and impartial way of doing business.

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NO NEGATIVE EFFECT ON COMMANDERS IN AUSTRALIA:

what's the effect on command of our changes? How do they view it? **Do they feel disempowered, disenfranchised? I have to say that the simple answer to that is no.**

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NO COMPLAINTS:

There was not one case, to my knowledge, which actually included a query or a **commander feeling that his position had been undermined** because suddenly he'd had a group of offenses, and I characterize these deliberately -- my deliberation -- as not just purely sexual offenses, but all of those under Schedule 2, and that ranges from murder to manslaughter to a whole heap of other things -- drug offenses and what have you. There was not one mention of that in our review,

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COMMANDERS RELIEVED TO NOT HAVE PROSECUTION AUTHORITY:

I think probably that their anecdotal evidence to me suggests actually that **there is a degree of relief that commanders are not having to deal with what are sometimes exceptionally technical legal issues**, albeit they'll always have legal advice. But actually it is just that; it's legal advice. The command decision is theirs, of course, if they have it in those. So I think that in that respect, **I think many COs actually**, not as an abrogation, but actually unqualified lawyers and **having to make an ultimate decision, I think that they feel more comfortable that it's being dealt with by professionals who actually know the intricacies and the technicalities of the offenses and the law with which they're concerned with.**

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Commodore Spence:

Commodore Naval Legal Services, Royal Navy, UK

NO SPECIFIC SEX ASSAULT STATISTICS DUE TO LOW RATE IN ROYAL NAVY

I can't say that it has. The incident rate -- the incidence rate was -- has been historically low for as long as I've been in service, which is nearly 30 years. In the Royal Navy, we've not had -- we've never had a great incidence of what I would term, as serious sexual offenses. There have steady stream of the lower level sexual forgive me, been a offending.

But, no, there hasn't. There's just no discernible. And if I can summarize it in this way, **we don't keep specific statistics on just that type of offending because it actually -- its significance in terms of statistical significance is just so very low.**

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