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STATEMENT

OF

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SUBCOMMITTEE ON PERSONNEL

HEARING:

“SEXUAL ASSAULT IN THE MILITARY”

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Chairman Gillibrand, Ranking Member Graham, and Members of the Subcommittee, thank you for the opportunity to testify here today.

The Department is determined to combat and prevent sexual assault in the military. The men and women who put their lives on the line to protect this country must be assured that they have the opportunity to serve without fear of sexual assault. Sexual assault in the military is not only an abhorrent crime that does enormous harm to the victim, but it is also a virulent attack on the discipline and good order on which military cohesion depends. We must combat this scourge with all the resources at our disposal. Secretary Hagel has made it crystal clear to the senior military and civilian leadership of the Department that combatting this blight is a major priority for him, and that he demands results.

The Department is in the process of implementing a multi-faceted effort to address sexual assault in the military. In the legal arena, my office, along with the Judge Advocates General (JAGs), the Joint Service Committee on Military Justice (JSC) are working to improve the Department's legal policies pertaining to sexual assault. These efforts are designed to make our judicial, investigative, and support structures more efficient, effective, and responsive to the rights and needs of victims, while preserving the rights of the accused.

As an initial matter, the Department has taken decisive steps to ensure that no victim must deal with the aftermath of a sexual assault alone. Under the leadership of the Sexual Assault Prevention and Response Office (SAPRO), we have established a comprehensive system of victim care and support, including sexual assault response coordinators (SARCs), victim advocates, and a victim witness assistance program. This means that every victim has access to a network of professionals who can ensure that they receive the treatment they need and assistance in the military justice process. Recent policy changes have created a victim-advocate legal privilege so that victims can communicate candidly with victim-advocates assisting them through the process, without fear that their words could be taken out of context and be used against them.

The military also allows victims of sexual assault to file a "restricted report," which cannot be used to institute a criminal investigation, but which does trigger the provision of all the support services intended to help that victim become a

survivor. Ensuring the availability of support services to all victims is certainly the right thing to do, and, in addition, by providing those services, we hope to empower the victim to change the restricted report into an unrestricted report, and thereby help bring the perpetrator to justice. In December 2011, we instituted a policy that permits victims who file unrestricted reports of sexual assault to request an expedited transfer, removing the victim from proximity to the alleged perpetrator and protecting them from potential harassment.

In the fall of 2011, the Under Secretary of Defense for Personnel and Readiness also directed each service to expand the scope of legal assistance available to the victims of crime, including sexual assault. Pursuant to that directive, the Services now provide victims of sexual assault with legal advice on military justice issues, specifically including (1) the military justice process, (2) restraining orders, and (3) the different reporting options available to victims of sexual assault.

The Department also recently authorized the United States Air Force to implement a pilot program that assigns Special Victims Counsel (or SVC) to victims who report a sexual assault. Special victims' counsel are experienced attorneys who may advocate on behalf of the victim to commanders, convening authorities, staff judge advocates, trial counsel, and to the extent authorized by the Manual for Courts-Martial, military judges. Although the pilot has been operational for just two months, I understand that a number of victims have already sought assistance from such counsel.

We need to evaluate the program's effectiveness and to resolve questions concerning the proper role of special victims' counsel in the military justice system. Determining the proper role for special victims' counsel in the adjudication of sexual assault offenses is critical to ensuring that this expansion of victims' rights does not have unintended consequences that could hinder the pursuit of justice. To that end, I have tasked the Joint Service Committee — military justice experts from the Judge Advocates General of the Navy, Air Force, Army and Coast Guard, and the SJA to the Commandant of the Marine Corps— with evaluating the Air Force Pilot Program, including the authorities, procedures, and guidance regarding the detail of such counsel.

Evaluating the various initiatives directed at increasing the level of support to victims in the legal process will help us determine which program, or combination of programs, works most effectively. Lessons learned can inform additional changes to Department and military legal policies, as appropriate.

In addition to expanding direct assistance to victims, the Department has also implemented changes to how sexual assault and related offenses are prosecuted. For example, the Department now limits the initial disposition authority for the most serious sexual assault offenses to Special Court-Martial Convening Authorities who are officers of the grade O-6 and above (colonels and Navy captains). This ensures that only senior experienced commanders, with ready access to the advice of judge advocates, have authority over these important cases. It also reduces the likelihood that the convening authority will have any pre-existing direct involvement with any of the parties.

Other important initiatives are also in the process of being implemented. The Military Departments are aggressively developing special victim capabilities to assist in the investigation and prosecution of sexual assault cases. These capabilities include assigning experienced and specially trained prosecutors and investigators to sexual assault cases. These cases can be complicated, and can raise difficult issues. Handling those cases effectively requires well-trained and well-resourced investigators and counsel.

The Department also recently assessed the practicability and advisability of extending the protections afforded by the Crime Victims' Rights Act to victims involved in cases tried by court-martial. Based on that review, DoD Directive 1030.01, "Victim and Victim Witness Assistance," which was modeled after the Victim Rights and Restitution Act of 1990, will be updated to ensure that victims have the ability to be heard during public proceedings and that proceedings are not unreasonably delayed. Additionally, the Department continues to study what procedures are used to enforce a victim's rights in different jurisdictions to determine best practices for possible implementation within the military justice system.

I believe that all of these changes will be instrumental in increasing the effectiveness of the military justice system as a venue for the prosecution of sexual assault.

A long-standing issue of concern is the significant role that commanders have in the administration of military justice generally, and specifically in cases involving allegations of sexual assault. The elevation of the initial disposition authority was one response to this concern, but the recent action of a convening authority to disapprove the findings and sentence, and to dismiss the charges of sexual assault and conduct unbecoming of an officer after a conviction by a court martial has underscored continued concern with the role of commanders. Article 60 of the Uniform Code of Military Justice (UCMJ) authorizes a convening authority, in his or her "sole discretion," to modify the findings and sentence of a court martial. The origin and history of the military justice system helps provide context necessary to understand this authority, and is a starting point for a searching and careful consideration of whether there should be adjustments to the existing system, and if so, how extensive those adjustments should be.

As described in the Preamble to the Manual for Courts-Martial, "the purpose of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States." Unique to this system is the authority of the military commander over those under his command and the need for portability in the administration of military justice throughout the world. The commander's role in the process of military justice has been directly tied to the need for maintaining discipline within the ranks, as commanders are accountable for the good order and discipline of the forces under their command and are ultimately responsible for what their units do or fail to do.

Commanders in the U.S. military have been responsible for the good order and discipline of their forces since the establishment of the United States. Congress enacted the UCMJ on May 5, 1950, in the aftermath of World War II, with the goal of balancing the need for good order and discipline against expanded due process rights designed to protect against the potential capricious exercise of authority by a commander. Although the UCMJ periodically has been updated to incorporate

additional protections of individual rights, Congress has preserved the central role of commanders. However, over the long history of the military justice system, the role of the commander has been narrowed to provide protections for the accused, making clear that the role of the commander is not immune from careful re-examination.

Ultimately, we must strive for a military justice system that impartially considers evidence, respects the rights of accused and victim alike, punishes the guilty, and reinforces military discipline. To be effective, members of the military must have confidence that the military justice system will treat both accused and victim fairly.

With that in mind, the Department has initiated a number of reviews to inform Congress and the Secretary of Defense regarding the advisability of additional changes to the administration of military justice.

Pursuant to the requirements of Section 576 of the National Defense Authorization Act for Fiscal Year 2013, the Department is currently in the process of establishing the Response Systems Panel. The Panel will be tasked with conducting an independent review and assessment of the systems used to investigate, prosecute, and adjudicate crimes involving sexual assault and related offenses, and to make recommendations on how to improve such systems.

In response to concerns about the broad discretion afforded a convening authority under article 60 of the UCMJ, Secretary Hagel directed me to ensure that the Panel's charge includes consideration of the role of convening authorities in the military justice process, including the authority to set aside a court-martial's findings of guilt. Reexamination of the way in which this authority is exercised is appropriate, and the Panel presents an excellent opportunity to solicit independent advice on the appropriate role of a convening authority in today's military justice system, which includes robust rights of appeal.

Pursuant to the direction of Congress, after the Response Systems Panel completes its review, the Department will also establish a Judicial Proceedings Panel to conduct an independent review and assessment of judicial proceedings conducted under the UCMJ involving sexual assault and related offenses. This

Panel will consider, among other things, the introduction by the defense of evidence of the victim's prior sexual conduct, the impact such evidence has on the outcome of cases, and a survey of court-martial convictions for sexual assault, including the number and description of instances when punishments were reduced or set aside upon appeal.

In addition to these efforts, I have directed the Joint Service Committee, as part of its 2013 Annual Review of Military Justice, to conduct a fact-gathering review of civilian jurisdictions' handling of sexual assault cases from the initial complaint to law enforcement through the prosecution process. This fact-finding report should complement and assist the efforts of both the Response Systems Panel and the Judicial Proceedings Panel.

As you can see, we have implemented a number of major initiatives in this area in the last several years, and we are studying a number of other initiatives that have been suggested by members of Congress, the public, and the military. As we move forward, it is worth recalling the caution of this Committee in 1983:

“[P]eriodic adjustments to the UCMJ which are justified, desirable and necessary [should be made]. ... But, ... it can be a ‘continuing and difficult task to balance the often competing interest of the maintenance of military discipline ... and the protection of an individual’s rights.’ Therefore, the Committee, the Congress and the Defense Department have always proceeded carefully and cautiously before recommending any changes to the rights and procedures embodied in the UCMJ.”

Proceeding with care and listening to all those affected by the military justice system, and to experts on the administration of justice under other systems, will ensure that changes to the administration of military justice are constructive and avoid any unintended negative repercussions.

But care and caution must not be an excuse for inaction, where further action is needed. Our men and women in uniform serve to protect us every day; they put their lives on the line for us, for this great country of ours. We owe them a military in which sexual predators have no part and sexual assault has no place. It is our duty to ensure that the victims of sexual assault find support, and we lawyers at

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this table have a special obligation to ensure that the military justice system works effectively to provide justice, in every case and to all involved.

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