

**NOT FOR PUBLICATION  
UNTIL RELEASED BY THE  
SENATE ARMED SERVICES COMMITTEE**

**STATEMENT OF  
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JUDGE ADVOCATE GENERAL  
BEFORE THE  
SUBCOMMITTEE ON PERSONNEL  
OF THE  
SENATE ARMED SERVICES COMMITTEE  
ON  
MILITARY SERVICES' PREVENTION OF AND RESPONSE TO SEXUAL ASSAULT  
MARCH 6, 2019**

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## ***Introduction***

Chairman Tillis, Ranking Member Gillibrand, distinguished members of the subcommittee; thank you for the opportunity to testify today about our continued efforts to combat sexual assault in the armed forces.

Six years ago one of my predecessors – Vice Admiral Nan DeRenzi -- testified before this subcommittee about the Navy's multi-faceted approach to address awareness and training, prevention, victim response, and investigation and accountability.

In this statement, I will provide an update focused on the roles judge advocates have within the Navy's framework for sexual assault prevention and response (SAPR). This statement will:

- Note the Navy's continued efforts related to training and prevention;
- Outline aspects of the Navy JAG Corps organization that enhance our capabilities related to court-martial litigation;
- Provide an update on the Victims' Legal Counsel Program;
- Describe the current process by which disposition decisions are made on sexual assault reports; and,
- Emphasize our desire to learn and adapt, to improve our ability to serve the Navy, its commanders, and its Sailors.

## ***Training and Prevention Efforts***

The Navy continues to require annual SAPR training for all personnel. This training is provided in a face-to-face format, and uses video-based scenarios and vignettes to facilitate understanding and to prompt discussion among Sailors. Training is often enhanced by the presence of Sexual Assault Response Coordinators, Deployed Resiliency Counselors, and Victim Advocates. This and other SAPR training is reviewed in the Office of the Judge Advocate

General to ensure consistency with the Uniform Code of Military Justice, and with Department of Defense and Navy definitions and policies. From a military justice perspective, such review ensures potential court-martial members receive accurate training and minimizes the chance that errors in training material can adversely impact a court-martial prosecution. In fiscal year 2018, the Office of the Judge Advocate General reviewed 28 packets of material ranging from advertising posters to interactive plays and outside speaker presentations.

Beyond annual training, the Chief of Naval Operations has established a Culture of Excellence campaign to combat a range of destructive behaviors, including harassment and sexual assault. This effort seeks to use data from a number of sources to understand trends, conduct root cause assessments, and identify key protective and risk indicators. It also aims to develop a behavioral learning continuum to identify prevention touch points across a Sailor's career.

### ***Organizational Construct***

*Military Justice Litigation Career Track (Litigation Track)*. The Navy JAG Corps established the Litigation Track in 2007 to improve the overall quality of court-martial litigation. Creation of the Litigation Track recognized that criminal litigation skills are perishable, and that repeated tours in military justice-related billets are required to develop the experience and competence needed to litigate complex cases, to serve as military judges and preside over courts-martial, and to train and supervise more junior attorneys in developing litigation skills.

Selection into the Litigation Track occurs by a competitive board process. To be considered, judge advocates must have served a minimum of four years on active duty and demonstrated exceptional aptitude for litigation. The selection process includes review of in-court experience and assessments by supervisors, military judges, and other Litigation Track officers.

Once in the Litigation Track, judge advocates begin as “Specialist I,” and based upon continued development can apply to subsequent selection boards for designation as “Specialist II” or “Expert.”

At the close of fiscal year 2018, there were 81 Litigation Track officers – just under 10% of the Navy JAG Corps’ officers. At any given time, the vast majority of these Litigation Track attorneys serve in billets for prosecutors, defense counsel, victims’ legal counsel, and trial or appellate military judges. During their careers, many will serve as both prosecutor and defense counsel, giving them a balanced basis for understanding the strengths and weaknesses of cases. Each year, some Litigation Track officers are detailed to assignments outside the career track, such as sea duty onboard aircraft carriers, Staff Judge Advocate billets, and assignment to post-graduate studies. These assignments develop judge advocates as naval officers and legal professionals by broadening their Fleet perspective or providing advanced training in litigation skills and processes.

Prior to the implementation of the Litigation Track, the Navy typically assigned relatively junior judge advocates (i.e., senior O-3s/junior O-4s) to fill Senior Trial Counsel (STC) and Senior Defense Counsel (SDC) billets. The positions of STC and SDC were filled from a pool of officers who rotated through a variety of different substantive legal experiences unassociated with litigation. With typically one prior litigation tour, these attorneys assumed responsibility for an entire prosecution or defense office, to include all aspects of investigation, charging recommendations or defense strategies, motions practice, and courtroom arguments.

The Navy JAG Corps found itself detailing relatively inexperienced counsel to senior litigation positions for a confluence of reasons: officers were traditionally counseled that they needed a diverse career path to promote; officers viewed other career paths (e.g., national security law or environmental law) as being more promising; and “born litigators” saw no clear

future for themselves in the Navy, instead choosing to leave for civilian positions with U.S. Attorney's Offices, Federal Public Defender Offices, the Department of Justice, District Attorney of Public Defender offices, or private practice. As a consequence, our STC and SDC were "generalists" rather than specialists, junior in paygrade, and relatively inexperienced given the gravity of their duties.

In 2019, the Navy is reaping the benefits of our Litigation Track initiative. A key aspect of the Track is cultivating senior litigators who can assume leadership positions and then supervise and mentor junior officers. Officers who were selected for the Litigation Track in 2007 and 2008 have matured into senior officers, providing a nucleus of litigation expertise – we now have 13 O-6s and 25 O-5s in the Track. At all nine prosecution commands, the STC is a Track officer; and at commands serving the largest fleet concentration areas, the STC is an O-5, supported by two O-4 Litigation Track officers. The Litigation Track also benefits Sailors who are accused of crimes or who are victims. At all four defense commands, the SDC is a Litigation Track officer, and each command has at least one other Track officer as well. The Victims' Legal Counsel Program has two billets designated for Litigation Track officers, and currently five such officers serve as Victims' Legal Counsel.

Created in 2010, the Trial Counsel Assistance Program (TCAP) and the Defense Counsel Assistance Program (DCAP) provide training to trial and defense counsel worldwide, both in established courses and in Mobile Targeted Training, which responds to emergent issues in a particular geographic area or judicial circuit. Equally important, TCAP and DCAP provide real-time assistance in individual trials and vital reach-back resources for litigators throughout the enterprise. A critical aspect of the Litigation Track, both TCAP and DCAP are staffed by Track officers recognized as being experienced and proficient litigators.

Finally, the Litigation Track also benefits our judiciary. Currently, 12 of the 13 Navy military trial judges are Litigation Track officers; all 12 have extensive experience in the courtroom, both as litigators themselves and as supervisory counsel.

*First Tour Judge Advocate Program.* The Navy JAG Corps established the First Tour Judge Advocate Program in 2012 to provide first-tour officers exposure to the primary legal practice areas of judge advocates in a more structured manner. Under the program, new judge advocates spend six months providing legal assistance to Sailors and family members and an additional six months learning to advise Navy commanders – most often as part of a Command Services Department or as an Assistant Staff Judge Advocate. Judge advocates also spend one year as either an assistant prosecutor or defense counsel, working on court-martial cases under close supervision of more senior attorneys. Under this system, more senior attorneys are responsible for taking the lead role in cases, and more junior attorneys can hone litigation skills and learn about the military justice and administrative processes before becoming “core” prosecutors, defense counsel, or Victims’ Legal Counsel in subsequent assignments.

*Region Legal Service Offices (RLSOs) and Defense Service Offices (DSOs).* The Navy’s prosecution offices are aligned under nine RLSOs, and the defense counsel offices are aligned under four DSOs. Both RLSOs and DSOs report to Commander, Naval Legal Service Command (a flag officer). This construct places both on an equal footing for personnel and resources needed to ensure quality representation. This construct also means that RLSO prosecutors who review Naval Criminal Investigative Service (NCIS) investigations and provide prosecution recommendations to Navy convening authorities do so from an independent prosecutor’s perspective. I will discuss later the process by which Navy prosecutors tie in with NCIS, Staff Judge Advocates, and commanders who make disposition decisions.

### *Victims' Legal Counsel Program*

Perhaps the most important change to the military justice system over the past six years has been the Victims' Legal Counsel (VLC) Program (in the Army and Air Force, this is known as Special Victims Counsel (SVC)). Originally an Air Force initiative, the SVC/VLC concept quickly gained support and was enacted by the Fiscal Year 2014 National Defense Authorization Act and implemented by the Secretary of Defense on August 14, 2013. It provides eligible victims of a sexual offense with a dedicated attorney to help them understand the investigation and military justice process, safeguard their legal rights and interests, and obtain additional support in accessing resources that may assist in recovery. Victims' Legal Counsel complement the care and support victims receive from Sexual Assault Response Coordinators, Victim Advocates, and in the case of domestic sexual violence, Family Advocacy Program personnel.

The Navy's VLC Program currently includes 33 judge advocates stationed at 23 locations around the world, all led by an O-6 Chief of Staff and a senior civilian Deputy Chief of Staff. The VLC Program's Chief of Staff reports directly to Commander, Naval Legal Service Command, ensuring equal organizational standing with the Chiefs of Staffs for RLSOs and DSOs. This arrangement keeps the VLC Program visible to Navy JAG Corps leadership, and ensures prompt consideration of policy matters and resource needs. We seek to maximize the opportunity for meaningful connections between VLC and their clients. Our actions include establishing a new VLC office in Sigonella, Italy, based on feedback from commanders in that region; adding billets to places where high demand for VLC services was noted, including Japan and Norfolk; and issuing smart phones to enable counsel-client communication by live video and text.

All VLC candidates are vetted for professional experience, maturity, and judgment, and all candidates are personally interviewed by Commander, Naval Legal Service Command and by me.

Approved officers serve as VLC for at least one two-year assignment, and many continue to serve a third year.

All VLC must complete the Special Victims' Counsel Certification Course offered by the Army or the Air Force. VLC also attend specialized courses such as Prosecuting Special Victims Cases, Representing Child Victims, and the National Crime Victim Law Institute. In addition to outside training and monthly internal training, the VLC Program holds an annual training symposium, bringing together attorneys and administrative support staff for instruction and discussion covering areas such as vicarious trauma, child victims, developments in the military justice system, veterans' benefits for victims of sexual violence, and litigation strategies.

During fiscal year 2018, Navy VLC provided legal support to 1,890 sexual offense survivors (930 of whom were new clients during fiscal year 2018), and had an average of 1,070 open cases. VLC participated in approximately 490 military justice and administrative proceedings, and conducted 676 outreach briefs to approximately 28,000 active duty and civilian personnel.

### ***The Role of Judge Advocates in the Investigation and Disposition Process***

Each Commanding Officer, Executive Officer, and Senior Enlisted Leader in the Navy is trained in person by a judge advocate on the Military Rule of Evidence 514 privilege, retaliation, sexual assault initial disposition authority, and case disposition reporting requirements should a sexual assault allegation involve a member of their command, whether as perpetrator or victim. These commander-focused responsibilities include the formal reporting of sexual assault reports, providing victim advocate support, processing requests for expedited transfer, and issuing military protective orders when appropriate. All commanders who have an open, unrestricted report of sexual assault from a victim assigned to their unit attend a monthly multidisciplinary sexual assault



case management meeting to obtain updates on case information and then personally relay this information to the victim. This monthly meeting also assesses and refers for appropriate action all reports of retaliation, ostracism, maltreatment, or reprisal from a victim, witness, or first responder in conjunction with a report of sexual assault.

The JAG Corps' nine RLSOs each have a Trial Department that provides independent prosecution support to NCIS and to Convening Authorities in their respective areas of responsibility. A Special Victim Investigation and Prosecution (SVIP)-trained prosecutor is assigned in every Special Victim Crimes (SVC) case, either as lead counsel, assistant counsel, or supervisory counsel. Assignment occurs within the first 24 to 48 hours of report of the SVC case to the RLSO. NCIS is required to notify the local RLSO within 24 hours of the report of a SVC case, and within 48 hours, the NCIS Case Agent is required to collaborate with a SVIP-trained prosecutor. The assigned prosecutor maintains a close relationship with the investigating agents, and tracks all active cases through an internal case management system database.

After receiving an investigation from NCIS, the prosecutor reviews the case and prepares a recommendation for the disposition authority. For cases involving penetrative sexual assault, the disposition authority – known as Sexual Assault Initial Disposition Authority (SAIDA) – must be an officer in the grade of O-6 who has Special Court-Martial Convening Authority.

The RLSO practice is to provide a written Prosecutorial Merit Review (PMR) to SAIDAs for each sexual assault case. In cases where the prosecutor recommends preferral of charges, the RLSO PMR provides an outline of the case and offers a verbal briefing on the case. If the prosecutor recommends not preferring charges, the PMR additionally describes the basis for that recommendation. PMRs that contain a recommendation not to prefer charges in cases involving penetrative sexual assault must be signed by the RLSO Commanding Officer (a command-

screened O-6); in other cases, the PMR may be signed by the Senior Trial Counsel. Victim input on disposition is solicited and included for consideration by the RLSO and the disposition authority. RLSO recommendations are not binding on the disposition authority. The objective is always to ensure the disposition authority decision is informed by a thorough and independent prosecutor's assessment.

After preferral of charges that may be tried at a general court-martial, a Preliminary Hearing Officer conducts an Article 32 preliminary hearing and submits a written report to the SAIDA for consideration, accompanied by comments and recommendations from the prosecutor. If the SAIDA determines that referral to a general court-martial is appropriate, the case is forwarded to the general court-martial convening authority with a recommendation for referral to a general court-martial. The general court-martial convening authority considers the report of the Preliminary Hearing Officer along with any endorsements and recommendations, as well as independent advice from his or her Staff Judge Advocate prior to taking any action.

If the SAIDA declines to forward penetrative sexual assault charges to the general court-martial convening authority, offenses other than penetrative sexual assault may be referred to a special court-martial, or disposed of through other administrative measures, such as nonjudicial punishment, and/or an enlisted administrative separation board, or a Board of Inquiry for officers. The SAIDA may also decline to take any punitive or administrative action in a case. Following conclusion of any sexual assault case, whether through the military justice process, administrative measures, or no action, the case disposition is recorded in a Sexual Assault Disposition Report, and the victim is notified.

### **Readiness to Learn and Adapt**

As outlined above, the past six years have included organization and process developments that enhance the Navy JAG Corps' ability to further the Navy's sexual assault prevention and response efforts. But we are not perfect. So we must be, and are, open to looking at where we can do better.

One example is an ongoing assessment of the Military Justice Litigation Career Track. This assessment is intended to see if any changes can better ensure the Litigation Track meets the needs of the Navy for military justice expertise in a variety of roles.

Another example is our desire to learn from the material published by Congressionally-directed reviews. These reviews began with the Response Systems to Adult Sexual Assault Crimes Panel, continued with the Judicial Proceedings Panel (JPP), and are now ongoing with the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (DAC-IPAD).

DAC-IPAD's Case Review Working Group plans to identify trends in investigations, identify factors that may affect commanders' disposition decisions, and assess whether those decisions were reasonable. This independent analysis of 2,069 investigations in which a Service member was accused of committing a penetrative sexual assault offense against an adult victim is the kind of detailed review – based on real cases – that can help answer the important questions, “How are we doing?” and “What changes should be considered?” Going further, results from DAC-IPAD and other information can be taken into account in future comprehensive reviews of the Uniform Code of Military Justice required by article 140, UCMJ. The first such review is in fiscal year 2021, with subsequent reviews taking place during fiscal year 2024 and every eight years thereafter.

### *Conclusion*

The Navy remains firmly committed to combating sexual assault. I am committed to equipping all members of the Navy JAG community, including enlisted personnel, our civilian staff, and judge advocates, with the tools needed to carry out our roles in this effort. I look forward to working with members of Congress to review our processes and ensure that we are doing this in a fair, effective, and efficient manner.