

**NOT FOR PUBLICATION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

**STATEMENT OF
VICE ADMIRAL JOHN G. HANNINK, U.S. NAVY
JUDGE ADVOCATE GENERAL
BEFORE THE
SUBCOMMITTEE ON MILITARY PERSONNEL
OF THE
HOUSE ARMED SERVICES COMMITTEE
ON
EXAMINING THE ROLE OF THE COMMANDER IN SEXUAL ASSAULT
PROSECUTIONS
APRIL 2, 2019**

**NOT FOR PUBLICATION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

Chairwoman Speier, Ranking Member Kelly, thank you for the opportunity to speak with you about my perspectives on the role of the commander in the adjudication of sexual assault cases.

I will address three topic areas. First, I will outline the process within which Navy commanders make disposition decisions on sexual assault cases. Second, I will describe the experience and training of these commanders. Third, I will offer observations to help you assess whether removing commanders from their role is likely to result in decreasing the prevalence of sexual assault, increasing the reporting of sexual assault incidents, or improving case disposition decisions.

The Process for Investigating and Adjudicating Sexual Assault Cases

A. Reporting

Victims of sexual assault have many ways to report. If desired, they can confidentially report the incident as a “restricted report,” which may be made to a Sexual Assault Response Coordinator, a Victim Advocate, a Deployed Resiliency Counselor, or a medical provider. Restricted reporting is intended to allow a victim to access medical care and other services without requiring that law enforcement be made aware of the report.

Victims may also submit an “unrestricted report.” Unrestricted reports may be made to the same entities that can receive restricted reports. In addition, unrestricted reports can be submitted directly to law enforcement organizations (Naval Criminal Investigative Service (NCIS) or base security), to an inspector general, to a chaplain, to someone in their chain of command. Any report of sexual assault that comes to a commander’s attention must be treated as an unrestricted report and must be provided to NCIS. Commanders have no authority to ignore a report of sexual assault.

B. Investigation

Reports of sexual assault must be investigated by NCIS, which is an independent investigative organization that reports to the Secretary of the Navy. Commanders are required to cooperate in any NCIS investigation, and have no authority to direct how NCIS Special Agents conduct the investigation, collect evidence, or scope the investigation.

C. Prosecution Review

The Navy Judge Advocate General's Corps has nine Region Legal Service Offices (RLSOs), each with a Trial Department that provides independent prosecution support to NCIS and to commanders in their respective geographic 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 an 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. Victim input on disposition is solicited and included for consideration by the RLSO and the disposition authority. The RLSO PMR provides an outline of the case and offers an in-person 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 judge advocate); in other cases, the PMR may be signed by the Senior Trial Counsel.

The RLSO objective is to ensure the disposition authority decision is informed by a thorough and independent prosecutor's assessment. Because the RLSOs report directly to the Deputy Judge Advocate General, commanders have no authority to control the RLSO case assessment or recommendation.

D. The Disposition Decision

RLSO recommendations are not binding on the disposition authority. In addition to the prosecutor's assessment, SAIDAs consult a Staff Judge Advocate (SJA). This SJA, whether or not a member of the SAIDA's staff, can help the SAIDA understand the prosecutor's assessment and also bring in perspectives that may be offered by the Victims' Legal Counsel (in addition to the RLSO's consideration of the victim's input as part of the PMR process) or a defense counsel for the person accused.

Since 2015, the UCMJ has restricted court-martial jurisdiction for the most serious sexual assault offenses – those involving penetration – to a general court-martial. 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, 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. 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 SJA, prior to deciding whether to refer charges to a general court-martial. Article 34, Uniform Code of Military Justice (UCMJ) provides that a convening authority may not refer charges to a general court-martial unless the SJA advises in writing that there is probable cause to believe the accused committed the offense charged. Further, convening authority decisions not to refer charges involving penetrative sexual assault are subject to higher level review under provisions instituted by the fiscal year 2014 NDAA. If the SJA recommends referral and the general court-martial convening authority declines to refer such a charge, the Secretary of the military department must review the case. And if the SJA recommends not referring a charge and the convening authority agrees, the case must be reviewed by the next superior commander authorized to convene general courts-martial.

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, an administrative separation board for enlisted personnel, 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.

In making disposition decisions, commanders are aided by the non-binding disposition guidance issued by the Secretary of Defense pursuant to Article 33, UCMJ, as amended by section 5204 of the Military Justice Act of 2016 (fiscal year 2017 NDAA). The disposition guidance provides factors for consideration related to the disposition of charges, and several are worthy of specific note. First, consultation with a judge advocate is encouraged in every case (and, by

separate regulation, is required in all penetrative sexual assault cases pursuant to the Secretary of Defense's Memorandum of 20 April 2012). Second, the guidance clearly states that probable cause must exist for each charge referred to a court-martial. This protects the accused by ensuring commanders and judge advocates consider whether the probable cause threshold is met before a court-martial prosecution proceeds. Third, the guidance provides a list of factors that should be considered related to the "interests of justice and good order and discipline." Broadly grouped, these factors encourage a commander to consider, in consultation with a judge advocate:

- Whether admissible evidence will likely be sufficient to obtain and sustain a conviction in a trial by court-martial, input from law enforcement agencies involved in the case, and the truth-seeking function of a court-martial.
- In cases involving a victim under Article 6b, UCMJ, the views of the victim as to disposition, the extent of harm caused to the victim, and the availability of the victim and other witnesses to testify.
- The accused's criminal history or history of misconduct, the probable sentence or other consequences to the accused of a conviction, and the impact and appropriateness of alternative disposition options with respect to the accused's potential for continued service and the responsibilities of the command with respect to justice and good order and discipline.
- The mission-related responsibilities of the command; whether the offense took place in wartime, combat, or contingency operation; the nature, seriousness, and circumstances of the offense and the accused's culpability in connection with the offense; and the effect of the offense on the morale, health, safety, welfare, and good order and discipline of the command.

The guidelines also identify inappropriate considerations including political pressure to take or not take specific actions in a case, the possible effects of the disposition determination on their own career or personal circumstances, and personal feelings concerning the accused, or any victim or witness in the case.

Review of the above guidance in relation to the military justice system shows the important role of commanders, who have the fundamental responsibility of ensuring good order and discipline within their units.

Experience and Training of the Commanders Involved

Under guidance issued by the Secretary of Defense, only commanders in the rank of O-6 and who are authorized to convene special courts-martial are authorized to make an initial disposition decision in a penetrative sexual assault case. The authority to convene general courts-martial is even more limited, generally held by flag officers in command. In the Navy, most general courts-martial are convened by Navy Region Commanders.

These officers are **experienced**. Generally, O-6s in command have between 20 and 30 years of military experience and have held command on more than one occasion, and flag officers have between 25 and 35 years of experience. They are used to working in teams. Promotion and command screening boards evaluate a prospective commander's past performance, character, personal conduct, and their ability to lead personnel from widely varying backgrounds.

Commanders are **specialty trained**. Each commander is required to attend Naval Leadership and Ethics Center's resident course for prospective commanding officers which focuses on communication skills, self-awareness, ethical standards, teamwork, and command climate to increase overall leadership effectiveness. All O-6 commanders are also required to

attend the Senior Leader Legal Course at the Naval Justice School, and many O-5 commanders also attend. All Region commanders receive Navy Sexual Assault Prevention and Response program training that includes a legal brief, program policy briefs, and orientation to the Chief of Naval Operations' Culture of Excellence campaign that combats a range of destructive behaviors, including harassment and sexual assault. Then, upon taking command, each commander is trained in person by a judge advocate and Sexual Assault Response Coordinator on 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.

Commanders are **constantly assessed and evaluated**. Within 120 days of assuming command, a Defense Organizational Climate Survey administered by the Defense Equal Opportunity Management Institute is conducted, with annual surveys of command climate thereafter. The survey results are reported to an immediate superior in command. Commanders are also constantly assessed by their warfare communities to ensure necessary certifications, capabilities, and readiness.

Considering the Role of the Commander in Sexual Assault Cases

When considering positive ways to reform military justice practice, and especially in considering what the role of the commander should be in military justice cases involving sexual assault allegations, some relevant questions are these: Would removing commanders' convening authority contribute to decreasing the prevalence of sexual assault in the military? Would it increase the reporting of sexual assault incidents? Would it improve case disposition decisions?

Congress established the Response Systems to Adult Sexual Assault Crimes Panel (RSP) as an independent Federal Advisory Committee to assess, among other issues, whether

commanders should continue to exercise their convening authority role in the military justice system. In its June 2014 Report, the RSP stated that “[t]he evidence does not support a conclusion that removing authority to convene courts-martial from senior commanders will reduce the incidence of sexual assault or increase reporting of sexual assaults in the Armed Forces” (22).

In particular, the RSP looked at the experiences of our allies. Israel, Canada, Australia, and the United Kingdom’s militaries have each taken steps to remove aspects of convening authority from the chain of command, and none have seen a connection between those reforms and sexual assault reporting rates (Chair, Role of the Commander Subcommittee Memorandum for Members of the Response Systems Panel, 6 November 2013 at 3). To be clear, each of these countries removed such authorities from the chain of command over concern that their justice systems did not fully protect the rights of the accused. Nevertheless, the Commodore of Naval Legal Services Britain’s Royal Navy saw “no discernible” effect on sexual assault reporting despite Britain’s 1996 reforms removing convening authority review and prosecution authority from commanders, and subsequent civilianization of judgeships in 2006 (3). Israel, Canada, and Australia have each adopted variations on the independent prosecutor system (1-2), and yet none could identify discernible trends in how these actions affected reporting in the subsequent years (3-4). The Director General, Australian Defence Force Legal Service estimated that 80% of sexual assaults in their armed forces still went unreported between 2008 and 2011, following reforms to remove commanders’ convening authority in 2003 and 2006 (3-4).

For our military, I am inclined to seek the input of the constituents we are trying to reach: victims of sexual assault. In an effort to do so, I regularly consult with our Victims’ Legal Counsel Program (VLCP) leadership, who maintain awareness of the needs of the program’s

client base. Our VLCP leaders tell me that their clients have concerns that affect their decision whether to report, but commanders making disposition decisions is not significant among them. Victims are concerned about retaliation, which we have and must engage further with improved understanding, policies, and advocacy. Victims are concerned about safety, which we have vowed to ensure through monthly case oversight meetings, military protective orders, and expedited transfers. Victims are concerned with having to relive their trauma, which we aim to minimize by ensuring access to medical and mental health services and advocacy. Our VLCP leaders report that victims often do not realize that commanders make disposition decisions on cases when they choose to report; this is an education challenge to be sure, but it also shows that removing commanders from their role as convening authorities is unlikely to increase reporting.

The Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (DAC-IPAD) convened with the purpose of offering an independent analysis of how the military justice system handles penetrative sexual assault offenses against an adult victim. The DAC-IPAD Case Review Working Group released a report on March 27, 2019. In a thorough review of a 164-case sample from fiscal year 2017, a majority of the reviewers determined that the commander's disposition decision regarding the penetrative sexual assault complaint was reasonable in 95% of cases (DAC-IPAD Third Annual Report, March 2019, at 29). The report explains that the remaining 5% "do not necessarily constitute cases in which charges should have been preferred," or not preferred, if they had been preferred; "rather, the reviewers felt they would need to consider more information before they could adequately evaluate whether the disposition decision was reasonable... However, the committee felt that such an endeavor would be unnecessary, since review of the 164 cases from the random

sample reveals no sign of systemic problems with the reasonableness of commanders' decisions on whether to prefer charges in cases involving a penetrative sexual assault" (30).

DAC-IPAD's Case Review Working Group continues in its work 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?” This is especially vital as we execute the broad changes of the Military Justice Act of 2016 and seek to identify the impact that this law will have on sexual assault reporting and prosecution. 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. Legislation mandates that the first such review is to be conducted in fiscal year 2021, with subsequent reviews taking place during fiscal year 2024 and every eight years thereafter.

Readiness to Learn and Adapt

My focus as the Judge Advocate General is on implementing the comprehensive changes to the UCMJ that took effect on January 1, 2019. I am focused on the continued professionalization and development of our Victims' Legal Counsel Program, the Military Justice Litigation Career Track, and our Special Victim's Investigation and Prosecution capabilities. I am focused on driving down investigation and prosecution timelines through cooperation with NCIS. I am focused on contributing to the prevention of sexual assault by supporting the Chief of Naval Operations' Culture of Excellence initiatives and learning from other initiatives like the National Discussion on Sexual Assault to be held at the Naval Academy later this week. And I am ready

and willing to partner with any organization or entity to learn how we can enhance our effectiveness.