

Prepared Statement
of
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Regarding

Jurisdiction, Investigation, and Prosecution
of Sexual Assault and Harassment
in the National Guard

Before the

House Armed Services Committee
Military Personnel Subcommittee

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Sexual Assault Prevention and Response, Sexual Harassment, and Office of Compliance and Accountability Statement for HASC

Chairwoman Speier, Ranking Member Gallagher, and honorable members of the Subcommittee, thank you for inviting me to testify before you today. Sexual assault and sexual harassment in the military both damages our people and diminishes our readiness. Every corner of the Department of Defense (DoD) struggles with this issue. The nature of the National Guard, with its unique Constitutional structure, requires a different approach to combatting sexual assault and sexual harassment. Over the past year, we have taken significant steps to reduce—with the intent to ultimately eliminate—sexual assault and sexual harassment in the National Guard.

The National Guard: Balancing State and Federal Authorities

While primarily federally funded and regulated while in a Title 32 status, the National Guard exists primarily as a non-Federalized force. Our research and investigations show the majority of sexual assaults that do occur happen when a National Guard member is not in a federalized status, hence not subject to the Uniform Code of Military Justice. We follow DoD policy that prohibits commanders in all components, including the National Guard, from using their own resources to conduct investigations of military sexual assault. Commanders must refer unrestricted reports of sexual assault to military criminal investigative organizations (MCIOs).¹ The first of those unique things about the National Guard I will highlight is that, unlike the Active and Reserve components, the National Guard does not have criminal jurisdiction over its members, and does not have MCIOs.² Thus, the authority to investigate and prosecute sexual assault crimes committed by National Guard members rests with the myriad of state

¹ DoDD 6495.01 and DoDI 6495.02, SAPR Programs and Procedures.

² Active and Reserve component members of the U.S. Army and Air Forces serve in a Title 10, U.S. Code status at all times. They are subject at all times to the Uniform Code of Military Justice (UCMJ), a statutory system of criminal jurisdiction that authorizes military criminal investigation and prosecution of military members. Only those National Guard members who are in a federalized status are subject to the UCMJ. There is no National Guard-wide equivalent to the UCMJ. Some states have adopted a state-specific version of the UCMJ that comports with that state's criminal laws.

and local law enforcement entities, and state and local prosecutors, within the 54 states, territories, and the District of Columbia.

When an unrestricted report of sexual assault is made by a member of the National Guard, our commanders refer the report to local law enforcement entities for investigation. It is then up to the discretion of local law enforcement officials whether or not to investigate or to prosecute. If local law enforcement does not investigate, Guard victims and commanders would have no clear means to engage in fact finding, given the prohibition against commanders conducting investigations using their own resources, without the creation of something specific to the National Guard.

The Office of Complex Investigations

To close this troubling gap in investigative ability, under the authority of the National Defense Authorization Act for Fiscal Year 2013 (Public Law 112-239), the National Guard created the National Guard Bureau (NGB) Office of Complex Investigations (NGB-CI or OCI), which gives the Adjutants General the capability of requesting an administrative investigation.³ Now, upon request, OCI conducts administrative investigations of sexual assault, makes findings based on a preponderance of evidence standard, and prepares reports of investigation. Findings may be used by Adjutants General for all appropriate purposes in accordance with state law and federal regulation.

OCI provides the 54 Adjutants General with a neutral, centralized investigative capability equally available to all states and territories to fill the gap created by not having MCIOs. The investigators who are assigned to OCI are either permanent civilian personnel or selected from volunteers throughout the entire National Guard and placed on orders at NGB. Investigators attend an 80-hour Special Victim's Capability Course at the U.S. Army Military Police School, the same course attended by MCIO personnel, where they receive specialized training in techniques to investigate sexual assault allegations.

³ National Defense Authorization Act for Fiscal Year 2013 (PL 112-239), section 573, mandated Service Secretaries establish special capabilities for the investigation and prosecution of sexual assault.

Since its inception in 2013, OCI has investigated more than 800 cases. They average approximately ten requests from the Adjutants General a month, and manage a caseload of 100 to 150 cases. In 2021, I appointed Brigadier General Charles M. Walker, an experienced general officer and federal judge, to lead the newly-reorganized OCI with greater transparency, credibility, and independence. Under Brigadier General Walker's leadership, OCI investigators have traveled 360,000 miles and spent more than 1,200 days TDY to interview nearly 1,300 witnesses, despite the challenges of a global pandemic. They eliminated the existing case backlog, and have helped sexual assault survivors get the results they need.

OCI is only a part of the overall solution. OCI is not a law enforcement or criminal investigation asset, and an OCI administrative investigation is not a substitute for a criminal investigation. The most severe result of an administrative investigation and subsequent disciplinary process is, in most cases, an administrative discharge from the National Guard under other than honorable conditions.⁴ An OCI administrative investigation is not a substitute for a criminal investigation, but it does provide commanders with a resource for offender accountability. Law enforcement entities have superior investigative tools to OCI (including the ability to respond more promptly, and the ability to obtain subpoenas), as well as the authority for criminal investigation.

A New Focus on Prevention

To be clear, the National Guard does not tolerate sexual harassment or sexual assault of any kind. The number one priority is prevention. To that end, the National Guard Bureau's efforts to reduce and ultimately eliminate sexual assault in the military is to establish a dedicated primary prevention workforce—a team of experts able to recognize risk and protective factors at the unit level across our geographically-dispersed population. The team will interact with National Guard leadership at all levels to support interventions and mitigate risk. As the Chief of the National Guard Bureau, I plan to eliminate sexual assault and harassment in the National Guard through accountability, leadership training, and by valuing leaders who confidently address

⁴ Where authorized by state law, a few states have used OCI reports of investigation as the basis for a court-martial.

these situations promptly, justly, and without hesitation, while empowering service members to intervene and act to prevent sexual harassment or assault.

Our prior efforts to prevent sexual assault can be enhanced with better data and more research. The National Guard Bureau is now taking an approach driven by the science of prevention. We are looking to build evidence-based policies, programs, and practices. All told, we are creating a comprehensive strategy, defining local prevention systems, fostering and reinforcing healthy climates, enhancing military community engagement, and addressing compliance deficiencies.

I also established a sexual assault prevention task force within the National Guard Bureau to identify actionable prevention tasks that could be shared with the field and executed at every level. The National Guard Bureau is currently implementing 19 recommendations from this internal task force, and more than 50 recommendations from the Secretary of Defense's Independent Review Commission (IRC) to Eliminate Sexual Assault in the Military.

We are also investing in personnel whose primary focus is preventing and responding to sexual assault. In 2012 the National Guard Bureau migrated from a contract-based Sexual Assault Prevention and Response (SAPR) Program and established the Sexual Assault Prevention and Response Division (NGB-J1-SAPR) as a permanent organization manned by full-time military and civilian employees. The state National Guards now also have in-house victim advocacy through sexual assault response coordinators and victim advocates providing crisis response, reporting options, access to medical care, and behavioral health counseling. The National Guard Bureau also established the Special Victim's Counsel Program to provide legal support and guidance for sexual assault victims.

Additionally, we are focusing on sexual assault prevention training, which includes general awareness, bystander intervention, defining consent, and tiered training with a

narrower audience focus. As a result of this training, we have seen an increase in both reporting⁵ and awareness.

In 2020, NGB-J1-SAPR established a Compliance and Accountability Branch to further standardize and enhance the oversight of SAPR policies, programs, training, and credentialing, and to expand the SAPR program knowledge base. This branch works with the states to improve data collection, provide trend analysis, and ensure data integrity. They also distribute quarterly scorecards to each state, providing leadership with a snapshot of data and metrics regarding sexual assaults in their states. Last year, we initiated in-person program assessments that identified program deficiencies, but also collected best practices to share across the National Guard.

Addressing Sexual Harassment

The IRC recommended an independent, trained investigator for sexual harassment and mandatory initiation of involuntary separation for all substantiated complaints.

Implementing that recommendation requires administering mandatory independent investigations. The investigators for this task will fall under NGB and will coordinate with the Adjutants General. These independent investigators will work with the specific state or territory to conduct the independent investigation, and make findings and recommendations. This will have the added benefit of increasing NGB's tracking and reporting ability, and enhancing the neutrality of both complainants and commands.

NGB-DEI manages sexual harassment and other Military Equal Opportunity (MEO) discrimination complaints across the National Guard. This office establishes policy and assigns responsibilities for implementing and maintaining a National Guard Discrimination Complaint Program for members in a non-Federalized status. This program is comprehensive and independent, involving several distinct offices and authorities. Since 2014, data collection and reporting on sexual harassment and discrimination has taken place at the state level. NGB-DEI began tracking the data,

⁵ National Defense Authorization Act for Fiscal Year 2021 (PL 116-283), section 539A, mandated the Secretary of Defense prescribe in regulations a safe-to-report policy that applies with respect to all members of the Armed Forces (including the Reserve Components). USD(P&R) issued implementation guidance for the department on 25 Oct 2021, and NGB is drafting guidance in consultation with the Departments of the Army and Air Force, and completion is anticipated in Spring 2022.

including at the national level, to better understand the problem and determine any trends.

A sexual harassment complainant is provided with personal guidance, a presumption their allegation is not without merit, the benefit of an inquiry and/or investigation, and right to an appellate hearing process through their chain of command. This process is comprehensive and designed to maximize the speedy and thorough administration of complaints while ensuring that all allegations of discrimination are policed and resolved.

Compliance with policy is a leadership function. National Guard personnel serving or employed in a non-Federalized status are subject to the command, control, and disciplinary authority of the Adjutants General of the states and territories, and the Commanding General of the District of Columbia, regardless of their work location. At the request of a state, NGB-DEI will conduct staff-assisted visits to review policies and procedures of their complaint process.

Conclusion

The National Guard is fully committed to addressing the many complex aspects of sexual assault and sexual harassment to provide a safe environment focused on dignity, respect, and compassion for our National Guard community. We will continue our integrated approach to improving our programs and making our National Guard a leader in preventing sexual assault and sexual harassment.