RECORD VERSION

STATEMENT BY

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ON OVERSIGHT: SEXUAL ASSAULTS IN THE MILITARY

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The commander is indispensable to the military justice system because the only reason for a military justice system is the maintenance of good order and discipline. Removing this tool – or entrusting it to lawyers with no leadership responsibility – would diminish the authority of command and the quality of the force. We so often talk about command as a sacred trust that we can forget both the noun and the adjective: it really is *trust*, the rightful burden of leadership placed on commanders by our history, laws, and tradition; and it really is *sacred* because the leaders are the servants of those they lead – a responsibility that translates to caring for the led with an intensity and comprehensiveness that has no civilian equivalent.

We have the most robust military justice system in the world, not only because we are the world's most powerful military, but because we are the world's best led, most disciplined, and most ethical force. Leaders do not lead primarily out of fear or fear of consequences – but they need to have available to them an array of consequences to justly and swiftly address misconduct. Commanders' responsibility under the UCMJ is not one more additional duty but is woven into the mantle of command, part of who they are, an indispensable element of their authority and their commitment to mission and people.

I speak from the perspective of a judge advocate privileged to have served 27 years on active duty, most of them in or near the courtroom. I followed my time in uniform with two years' service as the civilian chief of advocacy for the Army, responsible for implementing the special victim prosecutor program and the training and development of prosecutors and defense counsel. My greatest concern is that the committee understands how the system really works – how closely commanders and lawyers are tied together so that it does not impose a remedy that does not fix the problem.

In every unit at all levels of our military, commanders consult their judge advocates on the full array of disciplinary options – a uniquely rich continuum that runs from "admonishment" (getting in the face of a subordinate quickly to correct an error) through a range of administrative and nonjudicial measures, all the way to the felony-level general court-martial. I know that there are captains and lieutenants across the services who have developed practices similar to what I did as a young prosecutor, keeping a copy of the punitive articles of the UCMJ and the discussion to R.C.M. 401 (which explains all of the factors, many peculiar to the military, that leaders should consider in deciding whether to punish and how to calibrate that punishment) under the glass on my desk to be able to talk through not just the possible offenses but the rationale behind selecting a disciplinary choice. The leaders benefit from a judge advocate's best advice – what the law requires, what the evidence will support, the likely outcome – and we lawyers benefit from the leader's perspective on the impact of the infraction in their unit, factors that might not be as obvious or intuitive to us at our remove. As one of many examples, after a few years as a prosecutor I was evaluating a case involving a soldier

who drowned after horseplay among buddies on a boat on a cold German lake. It was a true tragedy – friends whose conduct got out of control – but the brigade commander whom I advised, nearing his 30th year in the Army, explained to me why, in the Transportation Corps, his soldiers had to be "on" regarding safety at all times, and that the tragedy was more profound because it reflected such a departure from that mindset. Such commander-lawyer collaborations happen all day every day across our military, a seamless and collaborative dialogue meant to bring the appropriate discipline in each individual case. And of course these conversations occur with particular care and urgency regarding sexual misconduct, especially when the victim is a military member and even more so when in the same unit.

Besides the constant advice, the law requires a commander to obtain the written advice of his senior legal advisor, the staff judge advocate, on several matters, including jurisdiction and the availability of evidence, before he can send a case to a general court-martial; in this pivotal circumstance the lawyer holds the keys to the courtroom, and a commander is disabled from convening a general court-martial without that independent advice. Therefore, the suggestion that increased lawyer involvement would mean better preparation and trial of sexual misconduct might not appreciate the extent to which lawyers already are involved in the preparation and development of a case, not to mention their actual authority, as in their pretrial advice for a general court-martial.

These are among the unique features of the military justice system, many of them stemming from the demands placed on service members and leaders for which there is no civilian equivalent – disciplinary measures that can be administered with justice and efficiency around the world during wartime and peace. Because it is an instrument of command, however, the system also carries the potential to be distorted by command influence or control, a risk well known to most observers of and participants in the system. In addition to all my years in the courtroom I also served as the chief of criminal law for the Army's largest group of prosecutors, and the deputy staff judge advocate and staff judge advocate in different combat divisions. In my years as the chief of the criminal law department at the Army's law school I not only taught judge advocates but rising battalion, brigade and division commanders as they prepared for their judicial roles. On many occasions I took difficult cases of sexual misconduct, as well as child sexual abuse, to commanders. In many instances there was no guarantee of conviction but there was a strong reason to try the case and we were able to develop the victim's confidence. In all instances the commanders underwrote risk and took the cases to trial; I have no doubt that many of these cases would not have been tried by civilian courts either because of lack of resources or concern about acquittal. I know from my direct experience that in many of these instances the local civilian jurisdiction that could have tried the case, in places as disparate as Oklahoma, Panama, Korea, New York, and Germany, was pleased to have the military take the chance on the case. It was also essential that the command brought those

cases, signifying the leadership's interest in service members' conduct whether on or off duty, on the installation or off. This should be taken into account in considering how confusing it would be to set apart a category of offenses, such as sexual misconduct or common law crimes, from the rest of the offenses under the UCMJ. A commander's unitary authority to attack all criminal misconduct is essential to his effectiveness and to the military's and society's expectations of the commander. The Supreme Court recognized the wisdom of the military's ability to attack all such misconduct in *Solorio v. United States*, 483 U.S. 435 (1987) when it removed the service connection requirement from military prosecutions; Congress should honor that analysis in refusing to fragment accountability and responsibility for addressing service member misconduct.

It was not long ago that the military justice system was criticized by courts and commentators for insufficiently protecting the rights of accused soldiers; though it has rightly regained a reputation for balanced justice, it must maintain and earn that with each wave of our all-volunteer force. My first assignment as a judge advocate was as a defense counsel and the last job I sought in the Army was as its chief public defender, responsible for our 300 uniformed defense counsel around the world. There are several protections under the UCMJ that civilians would covet – including a broader privilege against self-incrimination, more liberal right to counsel, and much more liberal rules in its "grand jury" proceeding. Those protections also include Article 60, the authority of a commander who convened a court to disapprove the findings or sentence. While I agree that it is reasonable to require a commander to state his reasons for granting such relief – most any judicial officer anywhere carries a similar obligation of accountability – modifying or removing this authority still represents a reduction in service member protections without a compensating change elsewhere. The committee should be careful when making any change, however slight, in the carefully calibrated and long-developed balance between command interests and protection of service members – in a system in which any service member can swear out charges and where you can be sentenced to life in prison based on the votes of four members of a five-person jury. Still, the greatest worry of a service member suspected or accused of a crime is that the command can run the system in a way that keeps his ample rights and protections from taking flesh in the reality of the disciplinary process. These concerns would persist under a lawyer-run system, as the lawyers would work for and with commanders, and we must be most vigilant to keep unlawful influence from sprouting in informal ways, such as speech and conduct that can telegraph to leaders that they should dispose of cases in a certain manner or that would undermine an accused's sixth amendment right to a fair trial by intimidating potential witnesses or chilling the cooperation or candor of leaders or fellow service members. Soldiers trust our system, a hard-earned but evanescent confidence that is the product of generations of careful practice, backed by draconian sanctions for unlawful influence; if service members do not consider the system to be essentially fair it will forfeit its legitimacy and undermine the effectiveness of leaders and

the lawyers who advise them. All of which only reminds us of the inherent limitations of *any* justice system.

The military justice system certainly is an appropriate instrument for attacking sexual misconduct; moreover, the availability of nonjudicial and administrative measures means that it can attack "precursor" conduct short of sexual assault because it has tools unavailable to the civilian world. But military justice, like any justice system, is primarily reactive and blunt. It addresses conduct after it occurs. While general deterrence is an appropriate purpose for a justice system, and we should have confidence that a potential criminal calculates the consequences when contemplating criminal behavior, this focus on the consequence stage illustrates the inherent limitations of justice – and its dependency on culture more than anything to set society's standards. Our young volunteers come to us from a society that sends at best conflicting messages about human sexuality, with the edifying aspects and elements of responsibility and respect often buried under its dulling ubiquity and focuses on "consequence management." Our service members are the products of the values and examples set by moms and dads, schools and churches, movies and music. The military has an admirable history of being at the lead on social change – racial equality – and on behavioral change – alcohol and drugs; it recently proved its flexibility and fidelity to civilian leadership in implementing the gay rights policy. But all of those changes required education and leadership – and justice was but a component of it. It is equally true with sexual misconduct. We must candidly deal with the experiences and attitudes of those whom society entrusts to us and immerse them in a culture of team work, honor and respect, one reason that the emphasis on stinging consequences for sexual misconduct by leaders involved in basic training and the first duty station is especially important. Unlike some initiatives, there are multiple components to the effort against sexual misconduct because sexuality is unique in the human dynamic and especially tough to try because cases are heavily testimonial. When the military was concerned with chubby recruits it gave them extra PT and adjusted the recipe card for SOS. When it was concerned about drunken driving it cut off alcohol sales during the duty day and hit all ranks with mandatory reprimands for DUI. Mandatory drug testing caused drug use to plummet and sustained and credible testing kept it low. None of these measures eradicated the conduct but all of them brought it under control. Sexual misconduct involves a more profound reorientation of attitudes, and merits tough and just consequences – but also involves reducing the opportunities for misconduct by paying attention to the availability of alcohol, combined with virtually unsupervised living arrangements for large numbers of young, single people. Attention also should be paid to the pornography epidemic in society and strong evidence of its heavy consumption in the ranks.

To say that attacking this problem requires a bit of judicial humility does not mean reticence or a lack of ambition. The problem can be attacked with the same unity of effort that has

characterized prior successes, and the consequence portion of that continuum should always be scrutinized to ensure it is both just and fair. Society holds the military higher in esteem than almost any institution – and its ability to lead and manage social change is as much a part of that reputation as fighting with ethical ferocity. The military justice system is as old as our country but the UCMJ is only a little over 60 years old. As with many of my colleagues, I could suggest to you several changes I would make if I had the authority to do so – but they all must come about after careful study and anticipation of collateral consequences. Congress must answer the fundamental questions implicit in some of the legislation you are considering, including whether it is the system or the people employing it who are the greater concern and how you would measure change – do we think reports are not currently made that would be made? That cases would be tried that are not tried? More convictions? Harsher sentences? The system should not remain static, but Congress should require hard data on sexual misconduct, candor and clarity regarding living arrangements and supervision, study of cultural influences that our members bring with them as well as the culture they enter – and how the justice system enforces good order and discipline in a manner that is fair, swift, and just.