First, let's review where we came from and the evolution of the military justice system. This review is important to show how military justice has evolved from a system focusing on discipline to a system of justice. From the start, in 1775, the Army had a code of conduct identified as the Articles of War and the Articles for Government of the Navy. These were the codes setting forth the military justice system for the first 175 years, from 1775 to 1950.

The Armed Forces were made up mostly of poor, uneducated immigrants, and the military leadership relied on the threat of punishment to ensure discipline. Few of the procedures and protections of the civilian criminal justice system were in place. The framework of the military justice system was focused on obedience to the commander.

Few changes were made in this system until the composition of the military force changed. With World War II [1939-1945] came changes in the force and a broader exposure to the system. Sixteen million men and women were in the Armed Forces and nearly two million courts-martial were conducted. And with the implementation of the draft, a large force lion men andT(i)6

DoD studied sexual misconduct at the United States Military Academy and Naval Academy, and in 2008 the Defense Task Force on Sexual Assault in the Military Services (DTFSAMS) reviewed the Services. DoD implemented many changes to address prevention of, and response to, sexual assault, including restricted reporting and establishing Sexual Assault Response Coordinators and Victim Advocates. These changes also authorized victims to engage in privileged communications with Victim Advocates. There were no major changes made to the military justice system itself.

A major change to a specific criminal provision was the revision of punitive Article 120 addressing sexual assaults. The amendments resulted in a 2007 version and 2012 version—40 pages in the Uniform Code of Military Justice.

Then, in 2013, the media publicized and scrutinized three sexual assault cases (despite the fact that there were nearly 4,000 courts-martial): the Aviano case, where the convening authority overturned a rape conviction, a Naval Academy rape case involving football players, and the misconduct of a lieutenant colonel who was leading up the Air Force Sexual Assault Prevention and Response Office. Congress, DoD, and even the President responded to the media scrutiny with comments regarding ending the "epidemic" of sexual assault in the military services. President Obama told the press, "If we find out somebody's engaging in this stuff, they've got to be held accountable, prosecuted, stripped of their positions, court-martialed, fired, dishonorably discharged. Period."[1]

Then in 2013 there was a combined Congressional-DoD effort with appointment of the Response Systems Panel and in 2014 the Judicial Proceedings Panel. Also in 2013, DoD's Military Justice Review Group was established. All three of these groups were tasked with looking for changes to the military justice system. These groups, still in existence, are stand-alone committees. These groups run parallel reviews, focusing on certain are8(f)7(e8(t)-4(ai)5(al)5(l)-4(2(cha)-7(ai)5(al)5(l)-4(2(cha)-7-Tm[( )] TJETBT1 0 0 1 2

Forces. Over a period of 24 months, January 2013 to December 2014, members of Congress introduced over 40 bills to amend the Uniform Code of Military Justice. These included:

> National Defense Authorization Act (NDAA) FY 14 (enacted Dec. 2013). The provisions of this act concern sexual assault Title XVII, Sexual Assault Prevention and Response, and include 36 sections, with 16 military justice reforms. NDAA FY 15 (enacted Dec. 2014) included Title V, Military Justice, Including Sexual Assault and Domestic Violence Prevention and Response – 17 sections, 44 provisions, and 24 substantial revisions to the military justice system. Together, these National Defense Authorization Acts amended 36 UCMJ articles.
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> The NDAA for FY 15 codified the Special Victim Counsel requirement, along with seven pretrial process reforms including reforms impacting the Article 32 preliminary hearing such as requiring Judge Advocates as hearing officers and allowing victims the option whether to testify at those hearings. Those reforms also limited interviewing victims without Special Victim Counsel present and providing an opportunity for input from victims regarding whether the civilian or military should take jurisdiction and prosecute. These reforms also ensured review for decisions not to refer sexual assault cases . . . five trial process reforms were included in the NDAA for FY 15 – changing the Military Rules of Evidence (which usually correspond to the Federal Rules of Evidence). Mandatory minimum sentences, four post-trial process reforms—limiting convening authority clemency to minor offenses, and four criminal law reforms including extended statutes of limitations—are also included.

Getting to my third point: how is that working for the military? Well, we don't know. The attention on sexual assault may be warranted, but attributing the sexual assault problem to the military justice system is unfounded. And modifying the military justice system in its entirety in response is problematic.

Changing various provisions in the Manual for Courts-Martial must be done with a holistic approach and we must consider potential problems that may result with other provisions. This was a very structured system tied together with intricacies throughout the Manual for Courts-Martial. There is

no question that some of those changes are beneficial, the Special Victim Counsel, for instance. As for some changes, we do not know how they will impact cases—for example, unsworn statements from victims during presentencing proceedings and no clemency authority for convening authorities even if a legal error occurs—we cannot be sure.

What has been seen is that changes in the criminal statutes have caused confusion and in some cases, acquittals; some cases involve different versions of the statute: pre-2007, 2007, and 2012 versions.

Instructions on lesser-included offenses are onerous and confusing because the different types of sex offenses do not share the same elements; these lesser-included offenses must be charged for panels to receive the required options and instructions. And due to a broad criminal statute and fear of not prosecuting cases, the military is prosecuting cases that would not make it to court in the civilian sector.

Because of the comments from the President and DoD leadership, command influence is once again a legal issue due to the attitude that cases must be tried. In some cases, when pretrial hearing officers and staff judge advocates do not recommend going forward with the case, those cases are being tried and are ending in acquittals.

Victims are not required to testify at the pretrial hearings, and in some cases may not testify or may not be interviewed until they actually testify at trial. I am not sure that this is good, and in all likelihood it is not good for the government's case. These cases may also end in acquittals because the evidence at trial may not support the charges.

The military needs time to implement and adjust to these extensive changes in order to determine the effect on the system, the Services, and individual service members. These changes were not based on an educated, measured approach; rather, these extensive changes were a response to a cry for reform due to a perceived sexual assault epidemic.

In sum, we have covered a lot of ground in a half an hour. First, I described the 240-year-old military justice system and the modifications to that framework—a transition from a system where justice was swift, sure, and severe, to the DoD-led system, which evolved into a fair criminal justice system focused on individual rights.

We also discussed the response to sex offenses, the numerous review groups, and the extensive changes to the system from 2013 to the present.

Finally, we highlighted potential problems.

Change is not the problem. The problem is how we are making those changes