



## POD 2015-2016 Policy Priorities

Structural reform is central to fixing the broken military justice system, improving the culture and climate within the military, and ensuring that our service members are given access to blind justice equal to the system they have pledged their lives to protect. We support changes to create a fair, impartial, and objective system of justice including giving professional military prosecutors, rather than untrained, conflicted and often biased commanders, the decision to prosecute. And, we offer the following suggestions for fixing additional points of failure in the system and improving justice for our troops.

Give Victims Right to Interlocutory Appeal for MRE 513 and 412 rulings.

### **2015 PROGRESS UPDATE**

- **The 2016 NDAA includes a provision amending Article 6b which clarifies that victims may petition the Court of Criminal Appeals for a writ of mandamus to seek enforcement of their rights under MRE 412 (the “rape shield” rule), MRE 513 (the psychotherapist-patient privilege), MRE 514 (advocate-victim privilege), MRE 615 (right not to be excluded from court proceedings), or any other right under that section, and that victims subject to an order to sit for a deposition may petition to quash the order. Under this new provision, petitions by victims are required to be given priority by the court.**

**POD will continue to press for a more robust appellate mechanism for victims to seek enforcement of all of their rights.**

Congress should establish that victims have the right to interlocutory appeal to challenge adverse MRE 513 (psychotherapist-patient privilege) and MRE 412 (rape shield) rulings, and orders to sit for a deposition despite being available for trial, along with any other rights under the Article 6b (the military’s Crime Victims’ Rights Act). Victims should have access to interlocutory appeal in line with the rights of civilian victims under the Crime Victims Rights Act. 18 USC 3771(d)(3) to protect their rights. This would help ensure victims’ privacy and privileges are not infringed upon before the issue becomes moot by the court reviewing or turning over the records, or taking other actions that violate their rights.

Expand Eligibility for Special Victims’ Counsel to Civilians, DoD Employees, and Former Dependents

### **2015 PROGRESS UPDATE**

- **The 2016 NDAA expands SVC services to civilian employees of the Department of Defense, with approval from the Secretary of Defense.**

The court-martial process is unlike any other criminal process in the country. It is confusing enough for service members, but for civilians with little or no ties to the military, the system can be impossible to understand. The military often seeks jurisdiction over cases involving non-military victims, and these survivors should not be denied the protections that have been put in place to guard against the military's abusive practices.

This lack of protection is particularly stark for two groups: DoD employees and military spouses. DoD employees receive the same sexual assault training as service members, but some of the fundamental protections covered in these trainings are not afforded to them because of their employment status. For a group who works side-by-side with military members, the unavailability of legal representation is inexcusable. For military spouses and who have been abused, the situation may be especially dire. Under current policy, military spouses may lose eligibility if they divorce their service member spouse in the midst of the criminal process. In this case, **they are essentially forced to choose between keeping their attorney and seeking a divorce from their rapist.** Every victim deserves legal representation and support during the confusing and often traumatic court-martial process, and the military has a duty to protect all victims who are subject to this system as the result of a rape or assault by a service member.

Ensure Military Rules of Evidence Governing Confessions are Consistent with Federal Law to Allow Admissions by Assailants

### **2015 PROGRESS UPDATE**

- **After the holding in *Adams*, POD proposed legislative language to Senator Gillibrand to ensure military law on confessions was consistent with civilian federal law. The 2016 NDAA contains a provision requiring the President to modify MRE 304(c), which addresses confessions, to conform with the rules of civilian federal courts. The most recent proposed executive order contains the required language modifying MRE 304(c).**

On 27 April 2015, CAAF overturned a conviction for a crime the accused fully confessed to having committed in the case of *United States v. Adams*. A sharply divided court held the MRE 304(c) required every "essential fact" in a confession to be corroborated by independent evidence before that portion of a confession could be used as evidence against an accused. This holding marked a sharp departure from previous law that only required sufficient corroboration to guarantee the trustworthiness of a confession. In such a case, the entire confession would be admissible to provide the facts and details of the accused's conduct. Now, the government must corroborate each essential fact or those facts will be excluded from evidence. The dissenting opinion correctly concluded that the majority's holding is "unworkable" and will preclude the government from "using the confession to fill in essential facts that might not otherwise be known to the government." The majority's

holding is inconsistent with Supreme Court jurisprudence concerning admissions of confessions and will result in criminals escaping justice for crimes they have fully admitted to committing. The majority's holding is based on the language of 304(c) which departs significantly from federal law. 304(c) must be amended to bring it in line with federal law, which requires only that sufficient corroboration exist to guarantee the trustworthiness of a confession.

### Give Special Victims' Counsel Explicit Authority to Represent Victims for Collateral Misconduct and Retaliatory Proceedings

#### **2015 PROGRESS UPDATE**

- **The 2016 NDAA authorizes SVCs to advise and assist victims in any complaint against the government, including IG complaints and communications with Congress.**

Victims too often find themselves facing adverse action as a result of reporting a sexual assault. For instance, a victim might have revealed that they were engaged in underage drinking prior to the attack, or their performance may suffer as a result of ostracism, lack of support, or trauma-related physical and psychological symptoms. In other cases, they may simply be retaliated against for reporting a favorite member of the unit. This can result in court-martial proceedings, non-judicial punishment, or other administrative punishments such as a Letter of Reprimand (LOR) or separation procedures.

While service members are entitled to defense counsel to assist them with formal proceedings, often the Special Victims Counsel is in the best position to advocate. SVCs have an established relationship with the victim, have had a chance to develop trust and rapport, and may be better equipped to highlight mitigating factors related to the assault. **In all cases of collateral misconduct, victims should have the option of retaining their SVC as primary or secondary defense counsel, in addition to their current SVC duties.** Further, collateral misconduct and retaliation should be listed as specific areas for which SVCs are authorized to provide legal representation and assistance.

### Provide SVCs with Needed Case Documentation

SVCs are often hindered from providing adequate representation because they are not guaranteed basic access to investigative records, motions, or filings during a court-martial, even when such documentation relates directly to the victim's rights. Further, the type and timeliness of access to documentation that SVCs receive can vary dramatically between judges and legal offices, adding an additional level of unpredictability to judicial proceedings. **Victims and victims' attorneys must have timely and thorough access to all records they require to represent their client and protect their rights.**

### Require DoD to Establish a Uniform Process for Tracking and Addressing Retaliation

**Two-thirds of victims who report a sexual assault experience retaliation from their peers and chain of command.** However, while retaliation was formally made a crime under the FY14 NDAA, **the military does not have a centralized or uniform process for tracking or addressing claims of retaliation.** In order to fully understand the scope of this issue and the adequacy of its response services, DoD should create a central database to track official reports of reprisal, the results of investigations, and any disciplinary and/or corrective action taken as a result. In order to ensure appropriate oversight, such information should be available to Congress and the public.

Further, DoD's efforts to combat retaliation are fundamentally inadequate. Currently, victims' only options are to file an IG complaint, seek assistance from a member of Congress, or report to their commander. However, these options are not sufficient, timely, or appropriate. **Over the past decade, the IG has not substantiated a single case of sexual assault-related retaliation.** In addition, **in cases where the chain of command is involved in either social or professional retaliation (as in most retaliation cases), this system would allow abusers to investigate themselves.** Finally, victims should not have to seek relief from harassment or other criminal behavior from a member of Congress - this should be a matter of last resort.

**Victims of sexual assault should have an accessible resource on base where they can make a protected report of reprisal.** In addition, Congress must act to **strengthen military whistleblower protections**, which have failed to adequately protect victims of sexual assault who report a criminal act. This reform should include changing the burden of proof for IG investigations to that used by civilian IG's, and it should involve expanding the definition of prohibited personnel actions (e.g. to include launching a retaliatory investigation). Finally, because many incidents of retaliation are urgent, **any investigative or adjudicatory authority must be able to seek a stay on any adverse actions pending an independent investigation.**

#### Allow Victim Participation in Non-Judicial and Administrative Punishment Proceedings

In 2014, criminal charges were filed in just 38% of reported sexual assaults. For many cases, instead of facing a criminal charge, the perpetrator faces non-judicial punishment or an administrative separation board. Currently, victims must be invited into these proceedings, and they are barred from knowing the outcome of the case, even when the perpetrator is disciplined for causing them direct harm. **Victims should have the right to submit a statement or other relevant information for consideration during these proceedings, and should be entitled to learn of any punishment their assailant receives.**

#### Improve System for Maintenance and Access to Investigatory and Court-Martial Records

### **2015 PROGRESS UPDATE**

- **The 2016 NDAA requires the services to maintain investigation records, including agent case notes, for 50 years.**

Storage of investigatory and court-martial records is haphazard and inconsistent across the Services. Depending on the outcome of a case, records may be kept in any number of locations, from the legal office of a base to a central repository. Further, **a verbatim record of trial is only prepared in cases that end in conviction--for all other offenses, no transcript is even prepared, making it impossible for the public to see what occurred during public proceedings.** Only in some cases are records even digitized. In addition, according to a 2013 IG report, criminal investigative organizations like **the Naval Criminal Investigative Service (NCIS) routinely destroy investigative notes within a few years,** making it impossible for IG or the public to provide appropriate oversight over military criminal investigations.

The military should implement a standardized process for preparing and maintaining records from courts-martial, including transcripts of proceedings, exhibits, and all other relevant documentation, regardless of the end result of the trial. Investigative records, including case notes, should also be maintained indefinitely. Finally, **in order to ensure that the military justice system is as transparent as the civilian justice system, the DoD should create an online document system that is open to the public that contains records from all court-martial and appellate proceedings.**

#### Provide Victims with Limited Immunity for Collateral Misconduct Charges

The specter of punishment for collateral misconduct has a chilling effect on survivors and allows sexual predators to remain hidden in the ranks. **According to DoD itself, “[c]ollateral misconduct ... is one of the most significant barriers to reporting assault.”<sup>1</sup> When victims engage in minor infractions related to the assault, they are often threatened with disciplinary action, sometimes by the assailant as a tool used to silence them, and many survivors who do come forward find their careers destroyed.**

**Where evidence of minor misconduct is obtained as the result of a victim or witness’s own report of sexual assault, these individuals should be extended immunity from criminal, non-judicial, and administrative punishments.** Such minor misconduct should include issues such as alcohol-related misconduct, adultery, or fraternization.

Similarly, in the aftermath of an assault, temporary lapses in performance are common as survivors struggle to cope with a painful and traumatic event. Some survivors struggle to concentrate on daily tasks, socialize with peers, or even just arrive to work on time. While sometimes this response will develop into a mental health condition, more often, short-term support and accommodations can help service members recover and excel in the military. By retaining qualified service members in the service, the military can avoid the cost of retraining new members and will actually improve good order and discipline.

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<sup>1</sup> 47 U.S. Dep’t of Def., Instr. 6495.02, Sexual Assault Prevention and Response (SAPR) Program Procedures encl. 5, ¶ 7.a (Mar. 28, 2013), available at: <http://www.dtic.mil/whs/directives/corres/pdf/649502p.pdf>.

**DoD should provide a moratorium on adverse personnel actions against victims of sexual assault for minor misconduct for a period of time after a report.** In addition, DoD regulations should emphasize commanders' role in supporting survivors of sexual assault and should clarify commanders' ability to use their discretion in disciplinary matters involving survivors.

#### Include Sexual Harassment and All Sexual Assault Data in Annual SAPRO Reports

The annual SAPRO Report is intended to inform lawmakers and the public about the handling of sexual misconduct in the Armed Forces. However, **this report contains significant gaps solely based on the status of the victim.** If a child, intimate partner, or spouse is sexually assaulted, these cases are excluded from the report, making it impossible to determine if the military is handling these cases appropriately.

Sexual harassment in the military is shockingly pervasive and vastly underreported. In FY 2013, the military received just 1,366 reports of sexual harassment, compared to over 5,000 reports of sexual assault. Meanwhile, research shows that nearly 1 out of every 11 service members experience sexual harassment every year. **Sexual harassment is a key risk factor of sexual assault and rape, and in order to finally combat this crisis, we must address sexual misconduct and discrimination at all levels.**

So that the public and Congress can adequately oversee this issue, DoD should release information on reports of sexual assault involving children, intimate partners, and spouses, as well as reports of sexual harassment, in its annual SAPRO reports. This information should include the number and type of report, the outcome of investigations, and any disciplinary and/or corrective action taken as a result of the report.

#### Establish System for Enforcement of Sex Offender Registration

##### **2015 PROGRESS UPDATE**

- **The Military Sex Offender Reporting Act of 2015 requires the Department of Defense to ensure military sex offenders are registered with the National Sex Offender Registry. POD stood with Congresswoman Jackie Speier and Congressman Mike Coffman as they fought to close the loophole that allowed sex offenders to return to civilian society without registering.**

The harm and devastation of military sexual assault is not isolated to our service members, but impacts all Americans. **DoD's current system for tracking sex offenders it releases from service is broken, and has allowed convicted predators to disappear into our neighborhoods and operate without suspicion.** The military does not currently track convicted offenders serving in its ranks, and it lacks jurisdiction to ensure that military offenders register with civilian authorities upon their release. It is critical that Congress pass legislation to ensure that DoD is properly identifying and tracking these predators and to ensure that registration requirements are properly enforced. This should include requiring DoD to create and maintain its own sex offender database.

### Impose Strict Liability Standard Under Article 120 for Trainers Who Have Sex With Trainees

From the first day of basic training, trainees are taught to follow every order from their instructor. This creates an enormous power imbalance, with trainees expected to ask permission even to use the bathroom or make a phone call. In this environment, **it is impossible for trainees to freely consent to sexual relations with instructors.**

However, this is exactly the argument used in court case after court case, from Lackland Air Force Base to the Army's Fort Leonard Wood, where multiple instructors were found guilty of sexual misconduct with trainees.

**Although military policies prohibit sexual contact between trainers and trainees, this regulation holds both trainers and trainees responsible. This produces a chilling effect on victims who might otherwise be willing to report.** The Air Force's own internal report on Lackland has acknowledged this, finding that "trainees are afraid any relationship with an [instructor] will be construed as consensual and they themselves will be charged with violating the [Uniform Code of Military Justice]." To address this serious issue, Congress should impose a strict liability standard under Article 120 for trainers who have sex with trainees. Rather than inappropriately focusing on the victims' consent, this approach would acknowledge the extreme power imbalance between trainers and trainees, encourage reporting, and help hold many serial offenders accountable.

### Provide Victims with Access to the Article 32 Report

Victims of sexual assault should have access to the Article 32 hearing report at the same time that defense counsel receives a copy. This is needed to ensure transparency of the court-martial process, to help the victim and their SVC prepare for trial, and to ensure that victims can make an informed decision about whether they wish to move forward in the court-martial process.

### Establish Sentencing Guidelines Based on Federal System and Eliminate "No Punishment" Option.

#### **2014 PROGRESS UPDATE**

- **The 2014 NDAA established a mandatory minimum sentence of dismissal for officers and dishonorable discharge for enlisted members convicted of rape, sexual assault, and forcible sodomy for offenses committed after 24 June 2014.**

**POD will continue to pursue more sentencing guidelines.**

There are currently no minimum sentencing guidelines in the military justice system, which has led to extraordinarily disparate sentences among cases and on installations around the world—for which the circumstances do not warrant such divergence. In

addition, military judges instruct juries that sentencing options include “no punishment at all,” even for crimes such as rape, or only a fine, reprimand, restriction, hard labor, forfeitures, confinement, or a punitive discharge. They additionally tell members to start from the bottom (most lenient) of the potential punishments and work their way up. These recommendations distort the deliberative process and skew sentencing substantially in favor of the accused. The panel members also make these decisions in a vacuum and are not allowed to know what other juries or judges have given for similar convictions—giving the members no frame of reference on sentencing.

Congress should mandate the establishment of minimum sentencing guidelines, modeled upon the well-established civilian federal system. These guidelines provide a reasonable framework, while still allowing an appropriate degree of flexibility in setting individual sentences based on the specific circumstances.

Allow Victim Impact Statements With Full “Allocution” Rights.

### **2015 PROGRESS UPDATE**

- **In June 2105, the President signed an executive order modifying Rules for Court-Martial 1001(A), giving victims the right to make a statement before the court during sentencing without being subject to cross-examination.**

**POD will continue to advocate for allowing victims to provide input on an appropriate sentence.**

Right now a victim testifying in sentencing is limited in what he or she can say (they cannot talk about the sentence) and is subject to cross-examination by defense. On the other hand, the accused can say almost anything and is not subject to cross-examination.

Congress needs to clearly establish that victims in the military have the right to full allocution at sentencing. Changes should be made to Article 42 (oaths) and RCM 1001 (scope of victim impact statement) to clarify that these rights are not limited in scope.

Mandate a Military Justice Track for All Services to Allow JAG Officers to Specialize in Criminal Justice.

Currently in the military, attorneys change roles every 2-3 years and over time hold a broad spectrum of job responsibilities. This fosters professional inconsistency and dilutes courtroom expertise. Particularly for sexual assault cases, there is a need for prosecutors with substantial training and experience in order to be effective. Constant changes in assignments forces attorneys who may have been serving non-litigation billets to suddenly take on complex criminal cases or even serve as judges. The Navy has already successfully implemented such a career track with its JAG Corps. Creating a litigation track will allow prosecutors, who prefer and are good at military justice roles, to continue to practice in criminal law, while remaining competitive for promotion. The military should not be



allowed to maintain a commitment to mediocrity in the litigation of sexual assault cases as currently exists in multiple services.

#### Make Panel Member Selection Random.

Currently military members are hand selected by the convening authority (the commander) to serve in the jury pool from which some are selected to serve on the jury panel. The military should follow the civilian structure and implement a random, balanced process to select the jury pool for each trial—with the caveat that members remain superior in rank. This would remove the commander’s hand from the jury box and eliminate conflict and bias as well as the specter of unlawful command influence. Commanders could be provided authority to excuse individuals from the jury pool, whose current tasks are crucial to the overall mission of the command and must not be interrupted by the court martial process.

### **ACHIEVEMENTS**

#### Codify Right to In-Court Representation for Special Victims’ Counsel Program

- **The National Defense Authorization Act for 2015 (NDAA) codified the role of Special Victims’ Counsel to include *representation* in court.**
- **This change is crucial to SVC’s abilities to advocate for their clients in court to protect their rights.**

Victim representation by a full-service attorney is essential to prepare for Article 32 hearings, object during pre-trial hearings, file motions under Military Rules of Evidence (“MRE”) 513 and 412 to protect against unwarranted intrusion into mental health and sexual histories, meet with defense counsel, etc.

While DOD has established a victims’ counsel program across all forces, and the military’s highest court, the Court of Appeals for the Armed Forces (CAAF), has ruled that victims’ counsel can represent victims in court, the role of these attorneys is still being defined and tested. There is confusion on this issue because of language in the FY14 NDAA that conflicts with the Secretary of Defense’s directive implementing the then existing 10 USC §1044e. The Secretary’s August 14, 2013 directive states that, “Secretaries of the Military Departments shall establish a special victim’s advocacy program best suited for that Service that *provides legal advice and representation* to the victim throughout the justice process” (emphasis added). In contrast, language passed in FY14 NDAA contradicts this directive, and suggests that Congress intended for victims’ counsel to have a far more limited role. In Sec. 1731, it states:

“(B) An *assessment regarding whether* the roles, responsibilities, and authorities of Special Victims’ Counsel to provide legal assistance under section 1044e of title 10, of alleged sex-related offenses *should be expanded to include legal standing to*

*represent the victim during investigative and military justice proceedings in connection with the prosecution of the offense” (emphasis added).*

The FY14 NDAA language is a step back in the effort to ensure that victims have adequate legal support, and detracts from the effectiveness of the SVC program.

Congress should codify the purpose of this program to establish the right to representation in law and authority of the SVC to actually have standing within the investigative and judicial processes. This is crucial to ensuring victims’ counsel can adequately advocate for their client’s rights.

#### Mandate Consultation With Victims’ Counsel During Scheduling of Proceedings.

- **The 2015 NDAA instructs the Secretary of Defense to establish policies and procedures designed to ensure that any counsel of a victim of a sexual offense is provided prompt and adequate notice of the scheduling of any hearing, trial, or other proceeding in connection with the prosecution of their case.**

The military judge must consider the availability of the SVC along with all relevant factors including the accused’s right to a speedy trial prior to scheduling any hearing. Legal offices are consistently failing to consult with Victims’ Counsel during the scheduling of hearings and courts-martial trials. Legal offices should be required to coordinate with victims’ counsel to ensure they are informed and can be adequately prepared.

#### Re-Write MRE 513 to Conform to Other Privileges Under Military Rules of Evidence (“MRE”) 502, 503 and 504.

- **The 2015 NDAA eliminated the “constitutionally required” exception to the Psychotherapist-patient privilege (MRE 513).**
- **This change raises the threshold needed in order to gain access to and use victims’ mental health records against them.**

MRE 513 should be re-written to give communications between patients and mental health professionals the same level of protection as those under the attorney-client, penitent-clergy, and spousal privileges. This would bring the military in line with thirteen states that have conformed their psycho-therapist-patient privilege to the model of attorney-client privilege, and offers the highest protection to victims of crime.

Existing proposals to conduct a study on the use of mental health records by defense during trial is an unnecessary delaying tactic and is misdirected. It is evident from the rulings routinely handed down by judges in military courts that this rule is being ignored and victim’s rights are being abused. The rule, in its current form, is being abused and is failing to serve its purpose: to guarantee victims of rape and sexual assault can access mental health care confidentially, without a risk that the contents of those sessions might be shared with defense counsel and their attacker. This change is necessary to keep faith

with the victims of sexual assault who must have confidence that their therapy is confidential.

In response to a recent article regarding mental health records being used in military trials, a member of the American Psychoanalyst Association Executive Council recently said: “Military defense lawyers’ attempts to search sexual assault victims’ psychotherapy records to ‘expose inconsistencies’ demonstrate an appalling misunderstanding of psychotherapy and the narratives that emerge from it. Far from the calculated, exquisitely targeted missiles that lawyers train on their opponents, the stories that patients tell in psychotherapy are full of self-doubt, shame and self-blame as a soul tries to reach a tolerable version of what really happened. To consider as evidence records based on these tentative descriptions, assertions and retractions seems to me to require a denial of everything we have learned in the past 50 years about how people experience trauma.”<sup>2</sup>

While trial courts routinely order disclosure of confidential psychotherapy communications, no military appellate court has ever reviewed the appropriateness of such disclosure, and the disclosures continue. The military appellate courts never have the opportunity to rule upon the issue because victims do not have any interlocutory appeal rights, the government has interlocutory appeal rights only upon the *exclusion* of evidence, and government appeal after an acquittal is barred by double jeopardy considerations.

#### Eliminate Good Military Character (“GMC”) Defense From Findings Phase of Trial.

- **The 2015 NDAA eliminated the Good Military Character Defense during the merits stage of courts-martial, explicitly excluding its use in sexual assault cases.**
- **This means an accused will no longer be able to use their military record to raise reasonable doubt to avoid justice.**

Currently defendants can use Good Military Character under MRE 404 as a complete defense to a charge of sexual assault. Today, if an accused presents evidence of his good military character, the military judge must instruct the jury that such evidence alone may raise reasonable doubt. There is no equivalent to this rule in the civilian criminal justice system.

Current proposals to eliminate GMC include an exception if a defendant’s character is “directly tied to the alleged crime.” This exception is far too broad and leaves judges with too much discretion to ignore the rule. The GMC defense should be eliminated from the findings phase of courts-martial, with specific exceptions only in the instance of military-specific crimes<sup>3</sup> such as being AWOL or disobeying an order.

<sup>2</sup> [http://www.washingtonpost.com/opinions/mental-health-records-should-remain-off-limits/2014/02/17/cecfa094-972d-11e3-ae45-458927ccedb6\\_story.html](http://www.washingtonpost.com/opinions/mental-health-records-should-remain-off-limits/2014/02/17/cecfa094-972d-11e3-ae45-458927ccedb6_story.html)

<sup>3</sup> Offenses under sections 883-891, 893-917, and 933 of title 10, United States Code: Articles 83 fraudulent enlistment; 84 effecting unlawful enlistment, appointment, separation; 85 desertion; 86 absent without leave; 87 missing movement; 88 contempt towards officials; 89 disrespect toward superior commissioned officer; 90 assaulting, willfully disobeying superior commissioned officer; 91 insubordinate conduct toward warrant, noncommissioned, petty officer; 92 failure to obey order or regulation; 93 cruelty and

Ensure Article 32 Reform Passed in FY14 NDAA is Not Circumvented by Pre-Trial Depositions of Victims Requested by the Accused.

- **POD worked with Congress to include a provision in the 2015 NDAA that makes military deposition law consistent with federal law. Prior to the change, judges could only deny a deposition for good cause.**
- **In order to depose a victim prior to trial, a party must now demonstrate that, due to exceptional circumstances, it is in the interest of justice that the testimony be preserved for use at an Article 32 pre-trial hearing or court-martial, and cannot use a deposition to conduct pretrial discovery.**

Article 46 and Rules for Courts-Martial (“RCM”) 701 and 703 have been interpreted so broadly that, unlike most civilian jurisdictions, witnesses in military courts-martial are, as a rule, often subject to multiple pretrial interviews by Defense Counsel prior to trial. These interviews frequently serve no other purpose other than to allow Defense Counsel to fish for prior sexual history and create collateral impeachment material by hoping that the witnesses cannot maintain consistency over repeated interviews spanning months.

Congress passed reform to Article 46 in FY14 NDAA specifically to prohibit this type of abusive and unnecessary questioning of victims in pretrial interviews. Congress also reformed the Article 32 hearing process so that the focus of the inquiry will be whether there is probable cause to proceed to courts-martial and not the harassment of witnesses. A victim of sexual assault will have the right not to testify at an Article 32 hearing.

The Air Force Court of Criminal Appeals recently upheld a ruling ordering a victim to sit for an unlimited deposition prior to trial, after she had already submitted to over 5 hours of questioning by defense. This order is currently pending review at the Court of Appeals for the Armed Forces (CAAF).

Congress should follow the federal courts, which are clear: depositions may be taken only to preserve testimony for use at trial, except when the parties, by agreement, can take a deposition. Congress must make it explicitly clear that Defense Counsel cannot use depositions of victims as an end-run around these recent reforms.

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maltreatment of subordinates; 94 mutiny and sedition; 95 resisting apprehension, flight, breach of arrest, escape; 96 releasing a prisoner without proper authority; 97 unlawful detention; 98 noncompliance with procedural rules; 99 misbehavior before enemy; 100 subordinate compelling surrender; 101 improper use of countersign; 102 forcing safeguard; 103 captured, abandoned property; 104 aiding the enemy; 105 misconduct as prisoner; 106a espionage; 107 false official statements; 108 military property; loss, damage, destruction, disposition; 109 property other than military property of US; waste, spoilage, or destruction; 110 improper hazarding of vessel; 111 drunk or reckless operation of vehicle, aircraft, or vessel; 112 wrongful use, possession, manufacture or introduction of controlled substance; 113 misbehavior of sentinel or lookout; 114 dueling; 115 malingering; 116 riot; 117 provoking, speech, gestures; 133 conduct unbecoming an officer; 134 general article of the Uniform Code of Military Justice.