Protect Our Defenders' Written Statement
Response Systems to Adult Sexual Assault Crimes Panel
November 7-8, 2013 Hearing on Victims' Services

Dear Madam Chairwoman and distinguished members of the panel,

Thank you for providing us with the opportunity to speak to this panel about an issue that is of deep concern to us and to this country.

We look forward to discussing the current experience faced by victims as they navigate the military justice system, and presenting what we believe should be changed so that victims have a better experience and better result – a more effective justice system.

We come here today on behalf of survivors of rape, sexual assault, and harassment within the military who have reached out to us in hopes of finally being heard. For decades, these cases have been swept under the rug, and victims have been silenced, pushed out, and left to pick up the shattered pieces of their lives. The Veteran's Administration (VA) reports that in FY 2010 veterans diagnosed with Military Sexual Trauma visited VA facilities a total 696,250 times to seek care related to sexual trauma. Additionally, it is estimated that 40 percent of homeless female veterans suffer from MST.

Through veterans and service members – survivors – sharing their stories, and through our peer support program and pro bono legal network, we have learned the extent of the broken system and the bias and conflict of interest many leaders have while administering the military justice system related to these cases. POD was founded on the simple notion that our service men and women deserve a professional and unbiased justice system equal the system afforded to the civilians they protect.

While the majority of the men and women who serve this nation do so with honor and good intention, a minority fails to live up to that standard. For too long the institution and its leaders have tolerated and even protected those who fail. Consequently victims do not feel safe coming forward nor do they think they are likely to achieve justice. Victims are too often persecuted while perpetrators fail to be prosecuted.

While leaders in the military and in congress have been aware of this growing epidemic for decades, the progress has been minimal at best. The military justice system still protects the often higher-ranking perpetrator over the lower ranking victim. Service members do not yet enjoy a professional, fair, and objective system based on evidence and the rule of law.

Military readiness is adversely affected by the ongoing epidemic of sexual assaults in our armed forces. As stated by Air Force Chief of Staff General Mark Welsh, "[Sexual assault] just has the potential to rip the fabric of your force apart. I think it is doing that to a certain extent now." The arbitrary administration of justice has undermined trust in the system. This issue is fundamentally about force protection and should be treated with the same level of priority.

As retired Lt. General Claudia Kennedy, the first female to reach the rank of three-star in the United States Army, recently said: *"After carefully thinking about this issue, I believe the Defense Department's time to solve the problem on its own has expired.... Having served in leadership positions in the US Army, I have concluded that if the military leadership hasn't fixed the problem in my lifetime, it's not going to be fixed without a change to the status quo. The imbalance of power and authority held by commanders in dealing with sexual assaults must be corrected. There has to be independent oversight over what is happening in these cases. Simply put, we must remove the conflicts of interest in the current system."*

This panel has an opportunity to help end this cycle of empty promises and half measures that have characterized the "effort" around this issue since the Tailhook scandal in the early 1990's. We hope you will seize it.

In the sections below, we have outlined our positions including response to the questions given to us by this panel, and, to the extent possible, have put forth our suggestions for practical implementation of the recommended changes. We look forward to speaking to these issues directly and addressing any lingering questions the panel may have.

Dispelling Myths About the Prevalence and Severity of Sexual Assault and Unwanted Sexual Contact

In an effort to oppose long-overdue and crucial reforms to the military justice system, some have tried to cast doubt on the DoD's own statistically valid, survey-based estimates of rape, sexual assault and other sexual crimes within the military. The misinformation circulated in the media, before congress and in statements before this panel regarding the prevalence and severity of unwanted sexual contact in the military must be addressed. Incorrect information causes confusion and misunderstanding and distracts from the focus on the critical issues before us.

In 2012, 26,000 service members experienced unwanted sexual contact, a 35 percent increase from 2010, according to the Workplace and Gender Relations Survey of Active Duty Members (WGRA) conducted by the Department of Defense. The WGRA is an anonymous biannual, web-based survey, used to evaluate sexual harassment and sexual assault in the U.S. Armed Forces. The Defense Manpower Data Center (DMDC), the statistical arm of the Department of Defense (DOD) conducts the surveys.

Contrary to the claims of critics, the above statistic does not include sexual harassment, which refers to unwanted and repeated experiences of crude or offensive behavior, unwanted sexual attention, and/or sexual coercion. According to the WGRA, nearly a quarter of women and 1 in 20 men reported experiencing sexual harassment in 2012, a rate that is unchanged from 2010.

The WGRA is sent out to a random sample of active duty personnel, the responses are analyzed and, using statistical techniques, extrapolated to draw conclusions about the military at large. The techniques used by the WGRA are considered best practice survey methodologies, as laid out by the American Association for Public Opinion Research, and

are like those commonly used by organizations such as the Census Bureau, the Bureau of Labor Statistics, and most pubic polling organizations.[1]

While the WGRA does not precisely measure rates of "sexual assault" as defined in the criminal code, it does measure acts that approximate those UCMJ crimes ranging from Aggravated Sexual Contact to Rape. The survey also measures crime rates in the broader category of "unwanted sexual contact" (USC). The crimes explicitly encompassed by "unwanted sexual contact" include only serious, non-consensual sexual criminal acts.

Critics often describe USC as overly broad. It has been publicly claimed that USC could even refer to, "someone looking at you sideways and saying something about how nice you look in a sweater."[2] This is not correct. The WGRA defines USC as, "intentional sexual contact that was against a person's will or which occurred when the person did not or could not consent, and includes completed or attempted sexual intercourse, sodomy (oral or anal sex), penetration by an object, and the unwanted touching of genitalia and other sexually-related areas of the body." This definition is provided to all respondents before they answer any questions about USC.

This definition of USC was expanded in the 2006 WGRA *in order to be consistent with updates to the Uniform Code of Military Justice* (UCMJ) and was drafted with the assistance of military attorneys. It is not meant to be a perfect representation of sexual assault crimes in the UCMJ, which range from rape to aggravated sexual contact, but to refer to the broader legal range of sexual victimization in an understandable way.

The WGRA breaks down USC into types of nonconsensual activity—of those who reported USC, 68 percent of women and 49 percent of men reported at least one experience of attempted or completed nonconsensual sexual intercourse, oral sex, or anal sex. Thirty-two percent of women and 51 percent of men experienced unwanted sexual touching that did not go so far as an attempted or completed sex act.

The definition is clear and the numbers are statistically sound. We must focus on addressing the epidemic by reforming the justice process and improving the culture, rather than debating the severity of the problem, which former Secretary of Defense Leon Panetta described as an "epidemic."

Convening Authority

Based on the DoD's own data and our experience of dealing with survivors, too often commanders and others in the chain of command (CoC) of the accused or victim are conflicted and either biased or perceived to be biased in favor of the often higher ranking and therefore more valued and respected service member who perpetrates these crimes. In addition, commanders' role as convening authorities is a collateral duty and they may not be well prepared for the task.

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[1] http://www.sapr.mil/public/docs/research/WGRA_Survey_Fact_Sheet.pdf ; full methodology: http://www.dod.mil/pubs/foi/Personnel_and_Personnel_Readiness/Personnel/2012WGRA_Statistical_Methodology_Report_Final.pdf

[2] MSNBC: Senator Claire McCaskill on Morning Joe (June 20, 2013) http://www.nbcnews.com/id/3036789/#52262734

It is argued that the General Courts Martial (GCM) Convening Authority (CA) must be retained in the chain of command of the accused, less the commanders somehow lose their ability to maintain the respect and discipline of their troops. Having recently participated in the Global Seminar on Military Justice Reform at Yale it was abundantly clear that our allies faced no such loss of confidence or ability to control their troops as they removed commanders from the responsibility of CA. In fact, last month before this Panel, the Director-General of the Australian Defence Force Legal Service, Paul Cronan, spoke to this very concern. He said that Australia had faced the same set of arguments from military leaders in the past, and argued that "It's a little bit like when we opened up [to] gays in military in the late '80s…There was a lot of concern at that time that there'd be issues. But not surprisingly, there haven't been any."

In reality a very small percentage of commanders hold the GCM CA responsibility. There has never been a cogent argument put forward to explain why assigning CA to someone outside of the chain of the accused would be so corrosive to the respect and authority of individual commanders. They would retain a very powerful set of tools with which to directly reward or discipline their subordinates, such as special court martial convening authority and non-judicial punishment.

Removing Convening Authority (CA) from the chain of command of the accused and the victim is a necessary step toward creating a climate where victims can feel safe coming forward and trust that they will be given a fair shot at justice. Contrary to what the military has argued, there is no need for commanders in the chain of either the victim or the accused to have the primary role in prosecution and adjudication decisions. This change is vital to creating an independent, transparent, and accountable system, which will give legitimacy to the process, and lead to greater trust in the system as a whole.

Removing CA from the chain is also important to eliminating the possibility or even the appearance of Unlawful Command Influence (UCI). On one hand, commanders are being told to prosecute cases more aggressively; on the other hand, if they appear overly zealous or speak out publicly on the need to prosecute rapists, their words and actions can be used on appeal to overturn a successful conviction. Through the UCI defense, military judges have actually endorsed the argument made by victims and advocates; that commanders do fail to act objectively, and allow their own personal opinions about a case to influence the justice process.

Shifting the CA out of the chain of the accused and the victim would increase the real and perceived fairness of the system towards both the accused *and* the victim. In the Naval Academy case, counsel for both the victim and the accused filed motions alleging that Superintendent VADM Michael Miller, the Convening Authority, is biased against their client. Regardless of the commander's rationale, because of his personal connections, political pressures, and inherent conflicts of interests, the possibility exists that a commander's judicial actions will be perceived as unfair against someone, and this perception is a threat to unit morale and trust in the commander. Removing CA from the chain of command will increase the expectation and reality that justice will be blind.

The high-profile case at Aviano Air Base provides a rare insight into a commander's inherent bias in favor of a high-ranking perpetrator over a civilian victim. Due to the brave victim coming forward and the resulting public outcry, General Franklin felt compelled to publicly explain his deeply flawed reasoning for setting aside the sexual assault conviction of Lt. Col. Wilkerson. (*See* attached letter from Lt. Gen. Franklin.)

His explanation was widely criticized by Republican and Democratic members of congress. "Franklin clearly substituted his own independent judgment for that of the convened fact-finding panel," said Rep. Michael Turner (R-OH), a member of the House Armed Services Committee. "This [Franklin's explanation] letter, is filled with selective reasoning and assumptions from someone with no legal training," said Senator Claire McCaskill (D-MO).

Franklin expressed his belief in the innocence of the accused, stating that by all accounts he was "a doting father and husband." In addition, recently released FOIA emails between Franklin and other senior officers shows that Lt Gen Franklin was overly invested in seeing that Wilkerson get his clearance reinstated, get a good assignment next tour, and get promoted.

Franklin took this action in spite of pleas (shown in these emails) from Brig Gen Scott Zobrist, commander of the 31st Fighter Wing at Aviano—the base where Wilkerson was assigned—urging Lt Gen Franklin to not set aside Wilkerson's sentence. In a Feb. 19, 2013 email, Zobrist wrote, "That [setting aside adjudged sentence] would be absolutely devastating in so many ways that I cannot even begin to consider it." "Having Wilkerson back on active duty at Aviano, even for one day, would... have a huge negative impact on morale, send a very negative message about how seriously we take sexual assault in the AF, and potentially call into question the effectiveness of our UCMJ system in general."

Although Franklin's actions caused Secretary Hagel to agree with the need to remove the ability for CAs to set aside a conviction, the right to completely reduce the sentence will still be in place. There is little doubt that if the DoD's recommended changes had been in place in this circumstance, Franklin would still have moved to drastically reduced Wilkerson's sentence.

Assigning the GCM CA to a selected individual outside the accused or victim's chain of command with the appropriate seniority, temperament and intellect, who by virtue of their selection would be devoid of even the appearance of conflict or bias, would increase victims' expectation that their case would be pursued appropriately, and would strengthen their faith that the outcome would be more fair and just. More confidence in the system would lead to more reports, prosecutions, and convictions. Therefore we would have fewer serial predators and fewer attacks in the military.

Reporting and Investigation Processes

While the military touts seemingly endless ways in which a victim can report, the fact is that those victims who want to come forward are often directed not to report or are dissuaded from doing so. They are often inappropriately threatened that they will be charged with collateral misconduct and, if they do go forward, are targeted with a barrage of minor infractions designed to facilitate drumming them out of the service.

It should be a crime for superiors to direct a victim not to report or to attempt to have a report withdrawn.

The investigators assigned to the case, should be required to immediately notify and begin collaborating with prosecutors as they conduct their investigation and gather evidence. Additional attention should be paid to improving training, controls, and facilities to protect the chain of evidence, particularly the very fragile evidence related to sexual offenses. There is a history of evidence getting lost, tampered with, or even fabricated.

In a recent example, we received a request for assistance from an Army Reserves member who was sexually assaulted in 2008. In 2011, she reported the assault, but would not provide the name because of her assailant's close friendship with her command. According to the victm, during her Line of Duty investigation, a form (provided to POD) from her civilian doctor was falsified, removing any mention of a sexual assault while on active duty. Her doctor denied having ever seeing the form that contained his signature, much less filling it out or signing it, and has since provided the appropriate information and a signed statement certifying that he did not sign the former version. Had she not noticed this discrepancy on her own, she would have been denied the care she urgently needs in order to cope with the assault. In addition, to the victim's knowledge, there has been no investigation as to who falsified the document.

Too often victims face errant medical diagnoses such as Personality or Adjustment Disorder as a means to flush them out. For example, we recently received a request for assistance from a young service member who is fighting a medical discharge due to a personality disorder diagnosis after reporting a sexual assault. After receiving an expedited transfer to get away from his assailant, he was denied a request to be cross-trained in order to continue serving. Instead, a doctor who had been seeing him for less than three months diagnosed him with a personality disorder. In the narrative recommending his medical discharge, his commander and doctor erroneously referenced an incident in which the service member had supposedly held a gun to his head and said "I might as well kill myself now" after being told his shift schedule was being changed. However, this allegation is false and is being used against him to disqualify him from service. In fact, the unit commander who received the initial report of the incident in question wrote a signed letter stating that not only was there never any report of the Airman pulling his weapon as alleged, it would have been impossible, because he had been de-armed and at the time was not being issued a weapon. Despite this evidence, the commander has used this information to continue forward with the medical discharge on the grounds of a Personality Disorder. At just 20 years old, this has the potential to severely inhibit his options for the future.

These are just two examples of the ways in which victims who report are wrongfully pushed out of the military without the proper care and designation.

The pervasive occurrence of retaliation after reporting regularly described to POD is validated in the most recent DoD SAPRO report, which found that sixty-two percent of women who filed an unrestricted report experienced administrative, professional, or social retaliation afterwards.

Yet another example of this comes from a former soldier who was chaptered out in 2013, with an Adjustment Disorder, who was denied the opportunity to report and was threatened with the charge of Adultery if she did come forward. She stated,

> *"I was medically discharged on Dec 27, 2012. I was on my second deployment doing missions in Iraq when I was initially harassed and finally raped... to this day I play it over in my head...wondering why I didn't do enough to protect myself... When I tried to talk to my squad leader I got shut down and reminded that he was a Senior NCO and I was NOT to be talking sh.t about him like that... I waited til we got back down to [location] and spoke with my platoon SFC and Lt., I thought for sure they had my back. I then got told if I say another word to ANYONE about it than I was going to be charged with Adultery and get an AR 15 for it... I shut down inside, I was lead Vic in Convoy and kept hoping to hit an IED after that... (I told my roommate, she got moved away after speaking out) Again I get shut down with threats... started getting put on BS details...they won… In May, 2012 I was sent back to the states over injuries sustained on a mission and tried to pursue it then, I told my squad leader at the time... and the next thing ya know I get told they are chaptering me on an adjustment disorder... I write all this to you so that you can attempt change. I am one of the 'Unreported statistics' but not without trying... He is free and able to do it again as long as he wears the Uniform, the Uniform represents a Protective Shield if you're a rapist with rank."*

In addition to formalizing reporting and investigating procedures and processes, victims should have access to a Special Victims' Counsel before they decided whether to make an unrestricted report. The military should more aggressively investigate incidents of tampering with evidence and falsifying documents to protect the accused or to incriminate or disparage the victim's ability or performance.

Preferral of Charges Process

The preferral step is crucial and often dysfunctional. Preferral is the point at which someone formally accuses a military member of violating the UCMJ. While under the UCMJ anyone may prefer charges, traditionally the accused's immediate commander prefers charges. The commander may delay or resist taking this step, making it difficult to go forward or forcing investigators or prosecutors to seek someone who is willing to buck the attitude of the accused's immediate commander.

There is no need for anyone other than the prosecutor to make the decision that there is sufficient evidence whether to go forward into the Article 32 process.

Prosecutor's Roles

Based on the available evidence, prosecutors should have the responsibility and authority to decide whether to go forward to an Article 32 hearing, refer a case to the appropriate Special Court Martial Convening Authority, remand to a lower level commander or simply dismiss the charges. Commanders, almost without exception are not properly trained and experienced as prosecutors are to make a judgment based on the available evidence as to

the merits of the case and whether it should go forward to an Article 32 hearing as a step toward General Court Martial.

Defense Right to Interview the Victim Before the Court Martial

In contrast to the civilian justice process, The UCMJ and RCM have been interpreted to require victims to submit to multiple often-abusive interviews with defense counsel and even forensic psychologists. In most civilian jurisdictions, the defense may request an interview with the victim. However, they do not have the right to force the victim to submit to pretrial interviews. For example, in Georgia a prosecutor must inform witnesses of the right not to meet with defense attorneys, however the defense does have the right to receive a copy of the victim's statements, along with all of the other evidence the prosecution is required to provide to the defense.

One survivor, raped in 2013, recently contacted us and described the harrowing experience of this interview process. At the time, she was in the midst of a transfer, and she offered the defense a telephone interview, just as she had done with trial counsel. Defense counsel refused her request, and mandated that she speak to them the moment she arrived at her new base. She did—after nearly 17 hours of travel. Without an attorney present, before the trial had even begun, defense counsel then questioned her for 7 hours, going so far as to have her lift up her shirt so that they could see how her pants fit. This survivor describes the experience as *"embarrassing, harassing, and demoralizing,"* and it is difficult to imagine what the purpose of such an interview might have been other than to intimidate the victim.

The defense should not have a right to interview the victim before the actual Court Martial proceeding.

Article 32 Preliminary Hearings

Article 32 hearings should be reformed to more closely resemble the civilian justice system's 5.1 preliminary hearing process, with the additional requirement that victims cannot be forced to testify, and should function solely as a probable cause hearing. This would limit the role of the preliminary hearing to simply determining whether or not there is enough evidence to find probable cause and therefore refer the case to General Court Martial. The defendant and his or her counsel would not be present, and would not be allowed to call witnesses or present evidence, but would have the right to receive a record of the hearing. The victim would not be forced to testify, and would not be subject to cross-examination.

Today Article 32 hearings have evolved into mini-trials, which are used by the defense to harass, exhaust and confuse victims to the point they risk contradicting their own testimony, and pressure them to the degree that they often decide to no longer participate in the judicial process. Not only are victims not represented or protected by their own counsel, they are often forced to endure Military Rules of Evidence (MRE)412 hearings regarding their personal sexual history before the Article 32, and again before the actual court martial.

As strictly probable cause hearings, JAGs, qualified as military judges, should preside over the hearings. The prosecutor should present the case. Defense counsel should be allowed to present, but not to challenge the admissibility of evidence presented by the prosecution. Victims' statements should be allowed into evidence, with the victim testifying in person only voluntarily, if at all. MRE 412 evidence should not be allowed during the Article 32 process.

The JAG presiding over the Article 32 preliminary hearing should then, based on the evidence presented, determine whether there is Probable Cause to go forward to a GCM, in which case a Convening Authority, not in the chain of the accused or the victim, should be assigned to convene and oversee the necessary GCM.

Today Article 32 hearings can last for days, during which the victim is forced to testify for hours and subjected to rigorous cross-examination, often carried out with the objective of intimidating, confusing, and exhausting the witness. Additionally, the Investigating Officer (IO) presiding over the hearing is not required to be a military judge, and is not allowed to rule on objections, thereby giving defense attorneys' unbridled control of the questioning process. After a traumatic Article 32 hearing, a significant number of victims decline further participation in the process. This has the effect of significantly reducing the number of cases that actually make it to courts-martial, again letting perpetrators off the hook and leaving other service members vulnerable to future attacks.

In addition to restructuring the Article 32 preliminary hearing, MRE 412 needs to be changed to ensure that evidence relating to victims' prior sexual history and sexual orientation is not admissible during Article 32 process. During courts-martial, MRE 412 provides that a military judge must determine whether the evidence regarding the victim's sexual history and sexual orientation is admissible, and exclude everything else. During Article 32 hearings, IOs vary on how they interpret their role in determining the admissibility of MRE 412 evidence. This often leads to a victim's private sexual history being exposed in open court, regardless of whether a military judge would later exclude it from trial. Furthermore, the Convening Authority, currently a commander, has the ability to review this sensitive information, which, even if determined to be irrelevant, might still color the CA's view of the case and bias them against the victim.

Barring admission of MRE 412 evidence at preliminary hearings will ensure that victims of rape and sexual assault are not subjected to multiple hearings on their prior sexual history and sexual orientation, which often discourages victim from participating in the prosecution of their perpetrator. (For a review of MRE412's history and analysis of how it is currently being applied, *see* attached POD letter to President Obama Regarding Proposed Changes to MRE 412.)

It is not surprising that, according to USAF Lt General Richard Harding, of the few victims who dare to report, approximately 30 percent "walk[ed] away and refuse[ed] to cooperate before they got to the courthouse door;" many refusing to go forward with a court-martial after suffering abuse during the Article 32 hearings.

The failures of the Article 32 hearing are exemplified in the case of one Senior Airman who came to use recently. She was raped in 2010 by her boyfriend at the time and attempted to report the offense through a SARC, who refused to file a report because they were trying to 'protect' her. In 2011, she filed an unrestricted report with OSI, and the case went to an Article 32 hearing in 2012, after which charges were dismissed due to the IO's inexcusably biased report.

Rather than determining probable cause, the IO instead appeared to play the role of defense counsel, disparaging the victim's character despite evidence of an assault. For instance, the IO began his report by asking why the she would wait so long before filing a report, despite the fact that most victims in the military never report. He further asks how a rape could occur within a romantic relationship, despite the fact that the UCMJ dismisses even marriage as a defense for sexual assault. Two separate witnesses appear to corroborate her allegations, detailing her distraught behavior following an incident with a male in her dorm. The IO, however, simply dismisses their testimony, concluding she was "overly melodramatic."

The IO even used the victim's own testimony against her—not just her words, but her demeanor as well. Because she responded differently to questioning from the trial counsel than from the defense, the IO concluded "she seemed to be trying to portray the right affect for a rape victim." Victims are rarely perfect witnesses or react in a certain way. To pick apart a victim's emotional responses in this way should not be the role of the presiding officer at a probable cause hearing. The bias of this IO demonstrates this inherent lack of objectivity, purpose, or victim protections in Article 32 proceedings. In order for victims like this Senior Airman to find justice, hearings must be limited to probable cause, military judges alone should act as IO's, and victims must have the option not to testify.

Victim Representation

Victims should be represented by legal counsel to advise them on their legal options, protect their rights, avoid inappropriate questions, etc., throughout the process, beginning prior to filing the initial unrestricted report and continuing throughout the investigation, preliminary hearings (including Article 32, and MRE 412, 513 and 514), Courts Martial and post trial processes.

The United States Air Force Special Victims' Counsel (SVC) program should be consistent with the holding in *LRM v. Kastenberg*. The Rules for Court Martial (R.C.M.s) should be amended to make it clear that SVCs can advocate for the victim in pre- and post-trial decisions. While the Court of Appeals for the Armed Forces (CAAF) opinion in *LRM v. Kastenberg* held that victims have a right to be heard *through legal counsel*, the court left the discretion with trial judges to enforce this right. Unfortunately, we are already seeing victims' counsel being unduly and improperly limited at the trial level. Victims' attorneys are being barred from participating in the Article 32 even when MRE 412 matters arise. In some cases, they are being shut out of the courtroom for entire trials, other than when the victim is testifying. They are being denied discovery, even that which pertains to MRE 412 and 513 (the military rule of evidence pertaining to a victims' mental health and medical records), and they are being excluded from pre-trial hearings and meetings, even those

discussing matters directly pertaining to the victim. These are just a few of the examples we know of that result in insufficient protections for victims during hearings that directly affect their rights.

We recently spoke with a victim who was shut out of the courtroom along with her SVC, who was denied the ability to represent her during courts-martial proceedings. In the case of this victim, defense counsel—with the support of trial counsel—successfully moved to have the victim and her SVC excluded from all proceedings. The standard for excluding victims/witnesses under MRE 615 Sec. 5 and the Crime Victims' Rights Act (CVRA) allows exclusion *only* when there is *clear and convincing evidence* that the victims' testimony would be materially altered. This standard was not even discussed in the military judge's ruling. Even when the judge allowed limited testimony on the matter under MRE 513, he denied the victim and her SVC from properly asserting privilege and fully being heard on the matter. As a result, the victim's mental health records were admitted without due consideration of the victim and without allowing her to be heard through her counsel. This case exemplifies the ways in which victims and their counsel have been shut out of the process and hindered by military judges, including during significant hearings where they had an interest in protecting the victims' privacy rights. There must be more clearly delineated rights for victims' counsel and the victims they represent. In addition, Congress must reinforce the CAAF ruling and codify victims' legal right to be heard.

Collateral Misconduct

The threat and risk to victims that they might be charged with collateral misconduct because of the situation or incidents around the attack they are reporting or considering reporting is a thorny issue. Misconduct runs a broad range from very minor to more serious repercussions. Blanket immunity would provide fertile grounds for defense counsel to argue perceived motive for the victim to lie. Yet it must be recognized that within the military, fear of being charged with collateral misconduct often prevents a victim from coming forward and is sometimes specifically used as a threat by the perpetrator, even after ordering the underage victim to drink or commit other misconduct. All too often victims will report an assault (restricted or unrestricted) only to find themselves charged with a related but lesser offense, such as adultery or making a false official statement, before an investigation has even begun.

For example, Senior Airman Cierra Bridges faced an administrative discharge after reporting sexual harassment and assault. She had been sexually harassed for years by fellow service members, she suffered a hostile work environment in which she was sent graphic photos, subjected to sexual comments, and, eventually sexually assaulted by a fellow service member. After reporting, she was reprimanded and disciplined for collateral, minor misconduct by the same people who were harassing her. Eventually, her command initiated paperwork to separate her from the service she loves. The most offensive part is that her offenders were let off with only written reprimands. Only after her parents wrote to members of Congress and the Air Force Times published a story on her case was the action to separate her dropped. *See* Attached: Air Force Times Articles on SrA Bridges.

When minor misconduct has occurred, such as underage drinking, fraternization, UA/AWOL, etc., which directly relate to a rape or sexual assault investigation, the priority should be addressing the felony offense. The prosecutors should be granted the authority to make the decisions regarding immunity for collateral misconduct on a case-by-case basis. They are clearly the most qualified and in the best position to balance the conflicting issues related to the seriousness of the conduct in question, the importance of the testimony, how it may be perceived at trial, etc.

Good Military Character or Good Soldier Defense

The Good Military Character (GMC) defense should be eliminated from consideration at the merits phase of a courts-martial in all but uniquely military offenses such as disobeying an order. There is no civilian equivalent. It encourages witnesses to choose sides rather than only address the relevant facts regarding the case. Commanders and senior officers often use the opportunity to testify as to the accused perceived character to send messages in favor of the defendant. For example, they are allowed to make assertions such as "Do you think I would be testifying for him if I thought he was guilty?" This defense tends to turn the trial into a popularity contest and there is no scientific basis to conclude that because they have done well at their day job, they are not guilty of a felonious crime. Furthermore people who become officers or NCOs have obviously displayed traits that could be termed good military character or have been regarded as good soldiers or they would not have been promoted in the first place. We do know that officers and NCOs commit criminal acts including sexual offenses.

One heartbreaking example of the way in which this often plays out in real life is the case of a Sergeant who also recently reached out to us. This victim, a former medic, has devoted 15 years of her life to the Army, only to be forced out early after reporting a sexual assault. According to her, in 2012, while deployed to Afghanistan, an NCO from another company raped her. She reported the assault the very next day. During the court-martial, her rapist was allowed to use his 12 years of military experience to argue that he was a "great soldier." The defense cited his history of tours in combat, described awards he had won, and brought in witnesses from his unit and chain of command to attest to his character—even though none of them had seen or could speak to the assault. Despite a stream of inconsistent statements by the accused to investigative authorities, and despite a rape kit that proved his DNA has been found inside of her, her rapist was acquitted. As a direct result of the Good Military Character defense, her rapist had the opportunity to ask the jury to find him not guilty based not on the facts of the case but, instead, *because he has a stellar military career*. The victim asks, *"Because he's a great soldier, that shows that he's not a rapist?"*

Sentencing Procedures

Currently sentences are extremely inconsistent and devoid of any relationship to the severity of the crime. Military CM panels are notorious for light sentences, often swayed by their concern for the accused and their family and guided by mandatory instructions that list alternatives including no incarceration, extra duty and even no punishment at all, while failing to include a statement of the maximum punishment allowed under the UCMJ.

Sentencing guidelines, modeled upon the existing civilian criminal justice sentencing structure should be established. And, military judges should pronounce the sentence, not the jury panel.

Post-Trial Review Process

The convening authority should not be allowed to overturn a conviction or reduce the sentence pronounced at trial. Any clemency procedures should be elevated to a higher authority, and clemency should be granted only after all available appeals have been exhausted.

Military clemency processes should be modeled upon the civilian equivalents, under which the authority is assigned to Governors or the President. In the case of the military, this power should be vested in either the Chiefs of Staff or the Secretary of Defense.

Proposed changes to the clemency process currently pending approval in the House and Senate drafts for the FY14 National Defense Authorization Act do not go far enough. While Congress, with the backing of DoD, is set to abolish the Article 60 authority to completely overturn a sentence, the CA would retain the authority to lessen a sentence—including to no punishment.

In the Aviano case, Lt. General Franklin, who did not attend the trial and has no legal training, was allowed to set aside a jury verdict—acting against the advice of his SJA. He made this decision based on a clemency packet that included information that had been excluded from trial for being untrue or irrelevant, as well as letters from the assailant's supporters that were blatantly subjective and biased against the victim. Although Franklin claims that he read the trial record, there is currently no requirement under Article 60 of the UCMJ that requires this; nor was he required to be convinced beyond a reasonable doubt of Wilkerson's guilt. Even though Wilkerson had the right to automatic appellate review of his case, Franklin took unilateral action to ensure that he could never be held accountable. While Sec. Hagel has moved to take the authority to set aside a conviction away from the CA, the right to reduce a sentence remains, which can be used to reduce a sentence and remove the requirement that the convicted perpetrator be listed on a sex offender database.

Currently, there is no requirement under the UCMJ that a CA must consider a victim's input during clemency. As the Aviano case demonstrates, victims who come forward to report their assaults can be forced to go through the entire adjudication process only to have their rapist's commander overturn the assailant's conviction and reinstate him or her into the force. The victim, Kim Hanks, endured 8 months of investigations, hearings, and a jury trial, only to have it wiped away with the stroke of a pen.

Any post trial review process that is retained, should require the CA to consider any matters submitted by the victim prior to action. If the CA decides to grant any reduction or clemency against the victim's wishes, they should be required to personally inform the victim of their decision.

Under the UCMJ, CAs are often advised by Staff Judge Advocates who have minimal military justice experience. Moreover, these SJAs do not serve in the role of prosecutors. In fact, a trial counsel is prohibited from acting as an SJA.

Litigation Career Path for JAGs Who Want to Specialize in Criminal Prosecution

As in civilian practice, criminal justice litigation should be recognized as a distinct specialty, requiring unique talents, interests, and knowledge. It tends to attract practitioners with a very different personality than those attracted to corporate law or even civil litigation.

In the military justice system, prosecutors and judges often come to their positions with limited criminal justice experience and those with special aptitude and interest in the field often must, after having gained valuable experience in criminal justice, rotate into other specialties to gain eligibility for advancement in rank.

The Navy has recently established a justice track designed to enable those who prefer and are particularly good at criminal justice legal work to specialize and continue to advance in rank within that specialty. Each of the other services should do likewise.

Under the UCMJ, CAs are often advised by Staff Judge Advocates who have minimal military justice experience. Moreover, these SJAs do not serve in the role of prosecutors. In fact, a trial counsel is prohibited from acting as an SJA.

How Specific Reforms Interrelate

The core set of reforms listed below, established together, would provide a coherent and fundamental improvement of the military justice system. They would work well together in an integrated manor. They include:

1. Giving prosecutors authority to decide whether to prefer charges and whether to go forward to trial,
2. Reforming the Article 32 hearing to limit it to determination of probable cause, no longer require victims to testify, and allow trained judges to decide whether probable cause exist to go forward to General court martial,
3. Reform Courts Martial processes to remove the Good Military Character defense except for uniquely military offenses, establish sentencing only by judges, and require sentencing according to uniform guidelines modeled on the federal civil justice system.
4. Removing the convening authority from the accused's chain of command, and
5. Clarifying that victims have the right to be represented by--and will have access to--legal counsel throughout each stage of the process; including reporting, investigation, prosecution, and adjudication.

Together these changes would effectively provide both victims and accused with a much greater expectation of blind and effective justice.

Conclusion

This epidemic of violent sexual crimes predates the recent wars and the increase of women in the military. According to DoD, men account for fifty-three percent of the victims of USC.

In addition to our recommendations to create a professional and impartial justice system, it is imperative military leaders urgently address the abusive, violent, and misogynistic traditions and behaviors toward women--a culture which denies male rape and blames or disbelieves victims. (*See* attached complaint by TSgt Jennifer Smith.)

The inherent bias and conflict of interest is embedded within this toxic system and culture. We recently heard from one active duty survivor, who explained it this way: *"If you are active duty military, they will go after you if you talk, that is pretty clear. If you get raped by your CO, it will be because you must have flirted, or you were trying to advance your career, and they will charge you with adultery because the CO is married… I would love to testify or make a public statement, but I would get attacked and it would not be safe… Women are getting systematically raped and blamed for it, it was because you wore make-up and wanted to work outside the home, you must have showered, or brushed your hair, what do you expect. It is systematic and they do not want to change things…you will get attacked and lose your job. If they want to know the truth, they need to be able to offer protection and keep the victim's identity private... No one will trust anyone with connections to the military, they have no credibility on this issue."*

At the heart of this debate is a question about the goal of the military justice system. Is it about expediency, or about justice? While we recognize that the military is in a unique position that is not always comparable to the civilian world, there are certain foundational principles of justice that are central to the identity of our nation and our citizens. These are the principles of equality, fairness, and blind justice. We cannot ask the young men and women of this country to sign up to die for those principles and simultaneously deny them these rights when victimized.

Military leaders have been given deference on this issue for too long. They have promised time and again to tackle this problem and eradicate it from the force. But they have failed.

For over 25 years, repeated scandals of sexual violence, cover up and abuse of authority in the military have come to light. The response is military leadership has investigated itself, committed to changing the culture, released reports and touted new reforms, all to no avail.

Whether that failure is due to refusal to address the core problem, a lack of prioritizing, a genuine lack of understanding of the scope of the crisis, or the devaluation of those who are victimized by this horrible crime, they have proved that they are not equipped to handle this issue on their own. In the meantime, tens—if not hundreds—of thousands of men and women have been victimized, and punished by the institution they lived to protect. It is time for our civilian leaders who created the UCMJ to reform it, and to enact meaningful reform that will ensure legitimacy, transparency, and equality back into the system. Only then will victims have a shot at achieving justice.

Attachments

(1) Letter by General Claudia Kennedy, U.S. Army Retired
(2) Lt. Col. Franklin's Letter of Explanation for Setting Aside Conviction
(3) Aviano Case – Select Franklin Emails
(4) Letter to President Obama re M.R.E. 412
(5) Air Force Times Articles on SrA Cierra Bridges
(6) Complaint by TSgt Jennifer Smith