May 27, 2016

Response to the Pentagon's Continued Attempts to Mislead Congress

On April 18, 2016, both Protect Our Defenders (POD) and the Associated Press (AP) released separate reports that revealed that Admiral James Winnefeld, then the Vice Chairman of the Joint Chiefs of Staff, provided misleading testimony to Congress on the military's handling of sexual assault cases that he claimed had been "refused" by civilian prosecutors and were then prosecuted at the "insistence" of commanders. Citing these cases, Adm. Winnefeld warned Congress that if commanders lost the ability to send cases to court-martial, fewer victims would have their day in court.

On May 26, 2016, the Department of Defense (DoD) provided a response to Congress claiming both POD and the AP either misunderstood or misinterpreted the services' documents and the military justice process. Nowhere in their response does the DoD defend the accuracy of Adm. Winnefeld's claims, or provide any further evidence to support them.

Rather than POD misunderstanding the process, it was Adm. Winnefeld and the DoD itself which fundamentally misrepresented the military's process for handling sexual assault cases to Congress in an effort to support DoD's claim that commanders are tougher than prosecutors on sexual assault.

The response from the Secretary of Defense seeks to rebut POD's report on five main issues:

Issue 1: "Deferred" vs. "Declined" Cases

In their response, the DoD claims that the military does not differentiate between "deferred" and "declined" cases. However, this claim directly contradicts Adm. Winnefeld's testimony, and the DoD itself often uses this distinction.

In his testimony, Admiral Winnefeld claimed that the referenced cases were examples of sexual assaults that civilian prosecutors had "refused" to prosecute, after which commanders "insisted" they go to trial. This clearly describes a situation of a case having been "declined," which is very different from cases where civilians would have prosecuted, but instead relinquished jurisdiction to the military at its request or due to issues making it difficult or impossible for the civilians to prosecute the case (deferred).

- In cases where the civilian authorities lacked jurisdiction or the accused's conduct was not a crime in that state, Adm. Winnefeld's testimony characterized them as "refusals" by a civilian prosecutor - a clearly inaccurate depiction. Further, because Adm. Winnefeld specifically referred to civilian prosecutors in his testimony, POD differentiated between deferrals and declinations at investigatory vs. prosecution levels. Adm. Winnefeld was comparing the actions of commanders to prosecutors,

and counting cases that apparently never reached the civilian prosecutor as "refusals" by a civilian prosecutor.

- In his follow-up letter, Adm. Winnefeld himself differentiates deferrals from declinations to defend the practice of the military giving jurisdiction over service members to civilian jurisdictions. He stated: "From time to time, civilian authorities prosecute cases that the military could prosecute, but that is the result of informal discussions regarding which system is better suited to handle the case rather than a result of a service formally declining prosecution" - in other words, a deferral.

- Case summaries provided to POD by the Marine Corps (USMC) differentiated between cases that had been "declined" by civilian authorities and those that had been "deferred" - for example, one case was described as "deferral…because alleged victim was a service member and because the military was able to more appropriately charge indecent act (indecent exposure)." (Source: USMC case five). Contrary to the DoD's claim that that the services do not distinguish between declinations and deferrals, the records provided show that they in fact do. It would appear the those in DoD are unaware of DoD's own practices.

- The Secretary's response openly admits that cases that the DoD characterized to Congress as "refusals" were, in fact, often cases of collaboration or the mutual determination that the military's jurisdiction was the more appropriate. In referring to DoD's use of the term "declined" the letter states: "This terminology declination is used regardless of the underlying reason for civilian authorities' decision not to pursue a case, whether for lack of evidence, a determination that one venue has a preferable punishment, the availability of charges, resource constraints, or other reasons."

Issue 2: What Constitutes a Sexual Assault Case

In his testimony, Adm. Winnefeld continually referred only to "sexual assault cases" and "perpetrators." The clear implication of Adm. Winnefeld's testimony was that the cases provided to Congress were exclusively cases where the military prosecuted sexual assault crimes. In reality, many case summaries did not include an allegation of sexual assault. In others the accused was never charged with a sexual assault offense or had all sexual assault charges dismissed at trial.

In its response, the DoD emphasized that it treats any case involving a sexual assault allegation as a sexual assault case, regardless of the actual charges brought. The DoD cannot claim credit for prosecuting an individual for sexual assault if in fact that person was never prosecuted for sexual assault.

With no mention of lesser or other charges, Adm. Winnefeld's testimony strongly implied that all prosecutions were for sexual assault, which the DoD's own letter refers to as "Article 120, 120b, 125 for forcible sodomy, or Article 80 for an attempt to commit such an offense." The DoD's own annual report on sexual assault also differentiates

between cases with sexual assault charges vs. those with only collateral misconduct charges - a distinction Adm. Winnefeld's testimony failed to make. The documents provided by the DoD show that approximately 1 in 4 USMC and Army cases ultimately did not include an accused being tried for a sexual assault - a finding ignored in the DoD's response.

Issue 3: Conviction Rates for Sexual Assault Cases

The DoD criticized POD's analysis of convictions in two ways - first, by claiming POD excludes some military cases and, second, by claiming the report used a "narrow" definition of convictions. This response misrepresents POD's methodology. Although the POD report provides a detailed breakdown of conviction rates within cases that were actually declined by civilian authorities and then were actually tried for sexual assault, it also calculated overall conviction rates out of all cases provided by the services. However, to be consistent with Adm. Winnefeld's testimony, which implied all the convictions were for sexual assault, POD calculated sexual assault conviction rates based on the documents provided to us – revealing the Army sexual assault conviction rate to be 52% of cases and the true USMC rate to be 33%.

While convictions may have been obtained for offenses other than a sexual assault, this fact was not mentioned in Adm. Winnefeld's testimony or his follow-up letter. By the DoD's own admission, its higher rates (81% of Army cases and 57% of Marine Corps cases) also include convictions involving only non-sexual assault offenses. In contrast, Adm. Winnefeld's testimony clearly was intended to leave the impression that this high conviction rate was for the crime of sexual assault. For example, it would be disingenuous to have a case where the accused is charged with rape and making a false official statement, but only convicted of making a false official statement, classified as a successful sexual assault conviction.

Issue 4: Role of Commanders and Staff Judge Advocates in Prosecutions

In Adm. Winnefeld's testimony, he claimed that prosecutors are less willing to try sexual assault cases, and that the military would have "fewer prosecutions if we take prosecution decisions outside the chain of command." POD's analysis found no evidence of this claim. Military attorneys - including the Staff Judge Advocate (SJA) and trial counsel (military prosecutors) - supported prosecution in each case and in some cases were the ones to actively seek the case from civilian authorities.

In contrast to the representations made to Congress, the DoD failed to provide a single example of a commander seeking jurisdiction from a civilian jurisdiction. The DoD also does not provide any evidence of commanders prosecuting against the advice of an SJA or trial counsel within these cases.

- Rather than undermining POD's analysis, the DoD's response confirms what POD has consistently stated: it is legally impermissible for a commander to refer a case to a general court-martial without a finding from an SJA that charges are warranted by the

evidence. Commanders do not have the power unilaterally "insist" a case go to trial. (However, commanders may refuse to refer a case to trial against the advice of their attorneys.)

- POD's report addressed the limitations placed on commanders by Article 34 advice, which requires the SJA to advise the commander that charges are warranted by the evidence before the commander can refer the case to general court-martial. POD's report further discusses the ethical limitations on trial counsel, who cannot try a case if they believe it is not supported by the evidence.

- Adm. Winnefeld testified that these cases only went to trial because of a commander's "insistence," when, in reality, all evidence shows that military lawyers and investigators pursued these cases to ensure they were appropriately handled to the best of their ability within the command-controlled military justice system.

Issue 5: Sentencing

POD shares the DoD's concern with its wide disparities in sentencing and support efforts to standardize sentencing decisions. However, the DoD's acknowledgement that the current sentencing system needs to be changed and results in unjust and inconsistent punishments comes 65 years too late. The sentencing system is virtually unchanged from 1950, and, for decades, the commanders who control the justice system did nothing to address this unfair and ineffective system.

Case Information Was Sufficient to Debunk Pentagon's Claims

Contrary to what was claimed by Adm. Winnefeld in his testimony and suggested in his follow up letter, the records DoD provided clearly show that, in many of these cases, civilian prosecutors did not "refuse" to prosecute the case. Furthermore, neither the case documents provided to POD nor the DoD's latest response show any evidence to indicate any commander ever "insisted" a case go to trial. The DoD response's allegation that POD did not have sufficient information to evaluate Adm. Winnefeld's testimony is simply not true. The burden of proof remains on the DoD to demonstrate the veracity of Adm. Winnefeld's claims, and they have provided no additional information to contradict POD's and the AP's analysis.

Conclusion

The Department of Defense repeatedly accused Protect Our Defenders of misunderstanding the military justice process. Yet, they are the ones who mischaracterized this process to Congress in the first place. In his testimony before Congress, Adm. Winnefeld used incorrect information to argue that fewer sexual assault cases would go to trial if military prosecutors, rather than commanders, made prosecution decisions. POD's analysis of underlying case documents successfully debunked that false assertion. The DoD's response, like DoD's case summaries, fails to support the Pentagon's claims.