

June 26, 2014

Military Justice Review
Office of General Counsel
1600 Defense Pentagon, Room 3B747
Washington, DC 20301-1600

Dear Sir/Madam:

I am pleased to respond to DOD Deputy General Counsel Paul S. Koffsky's request for advice or recommendations on ways to improve the military justice system, for consideration by the Military Justice Review Group (MJRG).

The National Women's Law Center has long had concerns about the operation of the military justice system and these concerns have only been increased by the system's handling of sexual assault crimes. A strong and impartial military justice system is essential to preventing and responding not only to sexual assault but to all serious crimes. In particular, we recommend improvements in two areas: (1) moving decision-making on whether and how to prosecute serious offenses, like sexual assault, out of the chain of command, and (2) strengthening the role of the special victims' counsel.

1. PROSECUTORIAL DECISIONS SHOULD BE MADE BY TRAINED, EXPERIENCED MILITARY PROSECUTORS

Survivors of sexual assault in the military tell us they lack confidence in the system. They believe their complaints will not get a fair hearing, that the perpetrator will not be held accountable and that they will suffer reprisals. We have personally heard of far too many instances in which their fears have been justified. To cite just one statistic: in 2012, 62 percent of the women who reported to a military authority that they had been sexually assaulted suffered some form of retaliation.

An independent, objective and non-biased system of military justice is essential to prevent sexual assault and other crimes. Research has shown that the decision to commit sexual assault and other crimes is influenced by the perpetrator's calculation of possible "costs," including legal consequences. Until perpetrators see that they will be held accountable for their acts, there is little chance that the number of sexual assaults will decrease significantly. Until survivors of sexual assault have confidence in the military justice system, there is little chance that the number of reports of sexual assault will increase significantly.

Although the FY 2014 NDAA contained some provisions to improve the military justice system, including by limiting the authority of commanders to overturn court martial convictions, those provisions do not go far enough. Commanders still have nearly complete authority over how these often-complicated cases are handled in circumstances in which they may have both the victim and the perpetrator in their command. Nowhere else in our system of justice does one individual – particularly one with an inherent conflict of interest – have this authority. A military justice system should be just that – a *justice* system.

The Center supports the proposed Military Justice Improvement Act (MJIA), which would reform the military justice system by moving the decision-making on whether and how to prosecute serious offenses, like sexual assault, out of the chain of command and give these decisions to trained, experienced military prosecutors. Such a change would strengthen, not weaken, the authority of commanders. Although commanders typically receive advice from judge advocates under the current system, they do not typically have legal training themselves. But the system requires them to make legal

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judgments, with potentially adverse consequences for all concerned if they make the wrong judgments. This is like asking a commander without flight training to fly a fighter jet or a commander without medical training to perform surgery. It is hard to see how putting a commander in such a position enhances the respect and authority the commander seeks and is due from those in his or her command.

Similarly, it is hard to see how requiring that legal decisions be made by individuals with legal training undercuts a commander's authority in other realms. Equally important, particularly when it comes to sexual assault, there are critical areas in which a commander has expertise that can and should be brought to bear. Separating military justice decision-making from the chain of command will make it possible for commanders to concentrate on improving the climate in their commands to help prevent sexual assaults. They can model the behavior they expect from those they command. This is the leadership job that commanders should be called upon to do and the job for which they have particular expertise.

We urge the MJRG to recommend that prosecutorial decision-making responsibility be removed from commanders and given to military prosecutors, as provided in the MJIA. This would go a long way to ensuring a strong, independent and impartial military justice system that is essential to preventing sexual assault and other serious crimes.

2. THE ROLE OF SPECIAL VICTIMS' COUNSEL SHOULD BE STRENGTHENED

The Special Victims' Counsel (SVC) program, started as a pilot in the Air Force and expanded to other Services, is now mandated by Congress to support survivors of sexual assault and protect their rights in the military justice system. Although the program is still in its early stages, the indications are that it is providing valuable services to survivors. This is a promising start. But the MJRG should examine closely the rights and responsibilities of the special victims' counsels to ensure that they can fully represent the survivors who are their clients. In particular, certain aspects of SVC representation should be clarified, including to ensure that an individual may secure SVC representation at the earliest possible time (including before deciding whether to file a restricted or unrestricted report), that the duration of the representation extends so long as a client's interests are at issue, and that the SVC has access to documentary and other evidence relevant to the client's rights. In addition, there are issues regarding continuity of representation and the SVC's ability to present arguments and evidence to those who are the decision-makers at all levels of the military justice system. Although MRE 412 gives survivors a "reasonable opportunity" to attend evidentiary proceedings and be heard, survivors should have a right to do so and that right should be broadly interpreted to permit SVCs to provide both oral and written submissions.

Please let me know if you have any questions. Thank you very much.

Sincerely,



Nancy Duff Campbell
Co-President

xc: Paul S. Koffsky