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**The United States Commission on Civil Rights**

**January 11, 2013**

**MILITARY JUSTICE 101**

The modern military justice system, in existence since the 1950's, is well equipped to meet the challenge of sexual assault in the Army. A modern, comprehensive criminal statute, combined with trained commanders and qualified investigators and prosecutors, with a fully resourced justice system provides all the tools necessary to hold offenders accountable, protect due process rights of accused Soldiers and provide support and justice for victims. In the Army, our professional and independent investigative and prosecutorial functions form the basis for the model of a modern Special Victims Capability.

First, I would like to provide some basic information about our system. The military justice system, based on the Uniform Code of Military Justice (UCMJ), is a mature system that has criminal jurisdiction over all military personnel. It is separate from civilian systems but, in practice, is only marginally different than any other criminal justice system that you would find in any civilian jurisdiction in this country in terms of procedural requirements and due process considerations. The military justice system was established as a separate system because of the worldwide deployment of military personnel, the need for a system that can be responsive to the unique nature of military life and the combat environment, and the need to maintain

discipline in the force. Though instituted with a draft Army in 1950, the UCMJ remains relevant to our all-volunteer force. [Tab A, MLR Article, *50<sup>th</sup> Anniversary of the UCMJ*, J. Cooke].

Ultimate authority in our system is vested in the commander for very important reasons. The commander is responsible for all that goes on in a unit – health, welfare, safety, morale, discipline, training, and readiness to execute the mission. The commander’s ability to punish quickly, visibly, and locally is essential to maintaining discipline in units. The Uniform Code of Military Justice ensures that commanders can maintain good order and discipline in the force.

This unique role of the commander has raised questions in two areas: why do we allow a non-lawyer to make disposition decisions in a criminal justice system? And can a commander improperly influence the military justice process? Our system addresses these concerns through training, the role of the Judge Advocate, and other procedural safeguards. First, the commanders who make these disposition decisions do not go into this process blindly, nor execute their authority in a vacuum. They are trained in their responsibilities under the Uniform Code of Military Justice from the day that they are commissioned and throughout their careers. Second, commanders have at their disposal judge advocates to provide advice and counsel. Judge Advocates are an integral part of the military justice system, and they serve as command legal advisors, prosecutors, defense counsel, and military judges. Judge advocates are trained to analyze evidence to determine if there are sufficient facts to support allegations, and to make recommendations to commanders on disposition. Third, there are a variety of procedural safeguards that ensure commanders make evidence-based disposition decisions, particularly in regard to sexual assault allegations. These include the ability of senior

commanders to pull an allegation from a subordinate and the monitoring agencies at each installation such as the Sexual Assault Review Board. The ultimate procedural safeguards are written into the UCMJ in Article 37, which prohibits unlawful command influence, and the oversight authority vested in the civilian judges of the Court of Appeals of the Armed Forces.

### **DISPOSITION: OPTIONS AND AUTHORITY**

Commanders have a wide range of disposition options available to them, from four levels of court-martial, nonjudicial punishment, punitive administrative discharge, adverse administrative action, imposing nonpunitive measures to taking no action. The particular level of disposition is based on the nature and circumstances of each offense. This toolbox of disposition options allows Commanders to address the entire spectrum of sexual misconduct, from the precursor behaviors of verbal harassment up to and including a forcible rape. Civilian systems do not provide a corresponding range of disposition options. In my opinion, “lower level” misconduct does not reach the often higher prosecutorial threshold of some District Attorneys [Tab B, Levels of Court-Martial; maximum punishments].

Given the unique nature of sexual assault allegations, disposition authority for the penetrative offenses (rape, sexual assault, forcible sodomy and attempts to commit these crimes) has been withheld to Brigade Commanders, Colonels with 18-22 years of experience in the Army, and significant training and experience in executing their authority and duties under the Uniform Code of Military Justice. These senior officers also have dedicated legal advisors. Disposition authority for the non-penetrative sexual assault offenses, including wrongful touches, is withheld by regulation to Battalion Commanders, Lieutenant Colonels with 15-20 years of experience [Tab C – Withhold policy, AR 600-20 extract].

## **SEXUAL ASSAULT STATUTES UNDER THE UCMJ**

The punitive articles of the Uniform Code of Military Justice, including Articles 120 and 125, criminalize a broad range of sexual misconduct. Article 120 is a modern, offender-focused statute that recognizes constructive force as it exists in the unique hierarchy of the military. The statute also provides the ability to prosecute drug and alcohol facilitated sexual assaults like many other states with progressive statutes. Other Articles of the UCMJ criminalize behaviors that have been identified as precursors to sexual assault such as sexual harassment and indecent language. This enables Commanders to hold potential offenders accountable for what is considered non-criminal behavior in the civilian justice system [Tab D– Article 93, UCMJ; AR 600-20 extract – Sexual Harassment].

## **ACCOUNTABILITY PROCESS FOR SEXUAL ASSAULT ALLEGATIONS**

I believe that the investigative and prosecutorial arms of our system provide an independent, professional process for accountability. All unrestricted sexual assault allegations in the Army, from an unwanted touch over the clothing to forcible rape, are referred to the Army Criminal Investigation Division (CID). There, specially trained criminal investigators, independent of the command, are free to pursue their investigations without interference. CID agents receive some of the best and most extensive training in sexual assault investigations of any investigative agency, including their initial training, annual refresher training, and their in-depth 80-hour Special Victim Unit Investigation Course. Further, CID has hired civilian sexual assault investigators (SAIs) to supervise their SVUs and sexual assault investigative teams. The sexual assault investigators bring, on average, 16 years of experience and expertise from civilian police agencies and other Federal law enforcement agencies. [Tab E – CID Training Program].

The legal offices that provide advice and counsel to the criminal investigators, as well as to commanders, are made up of licensed attorneys who are trained and skilled in the practice of criminal law. In the Army, we employ Special Victim Prosecutors (SVP) to advise on and develop these cases. The objective of these collaborative criminal investigations, led by the SAI and the VP is the same as in any criminal investigation – to develop sufficient facts and evidence to allow a decision maker to make an appropriate decision. If the investigation reveals that there is sufficient evidence to support the allegation, that report is referred to the command for disposition.

When a commander determines that the allegations are supported by the evidence, the commander prefers criminal charges. For a general court-martial, the charges must first be referred to an investigation under Article 32 of the Uniform Code of Military Justice. The purpose of the Article 32 investigation is to have an independent officer review the case and determine if the charges are in the proper form, if there is sufficient evidence to support the charges, and whether a general court-martial is appropriate. Rules of evidence, including rape shield protections, apply in the Article 32 proceedings. SVPs and paralegal Victim Witness Liaisons work with victims from the day of the initial report and ensure that victims are prepared to testify. The Article 32 investigation officer makes a recommendation that informs the review and action of an intermediate-level Commander, a Colonel with between 20-25 years experience. From there, the case is forwarded to the Staff Judge Advocate who supports the General Court-Martial Convening Authority. Ultimately, the General Court-Martial Convening Authority decides whether the case will be referred to court for trial.

When a case is referred to court-martial, the parties to the trial and the process are similar to what one would see in a civilian criminal court. We have an independent military judiciary, made up of military lawyers who have extensive criminal law experience. It is their duty to be fair and impartial in overseeing trials, applying the law, and if applicable, determining guilt or innocence and imposing an appropriate sentence upon an accused soldier. An accused soldier is represented by a military defense counsel who zealously represents her client's legal interests. It is important to note that military defense counsel and military judges are assigned to separate organizations within the military, with command and performance rating chains that are separate from those of the prosecutors and convening authorities. Finally, the government is represented by a trial counsel, or prosecutor, whose mission is to present the evidence and argue the case against the accused on behalf of the United States.

#### **SPECIAL VICTIM PROSECUTOR PROGRAM**

As previously stated, for sexual assault cases in the Army, we have established a Special Victim Prosecutor program to develop and prosecute sexual assault and special victim cases. In 2009, the Secretary of the Army authorized 15 Special Victim Prosecutors to assume responsibility for all sexual assault and domestic abuse cases. As a result of the success of this program, in 2012, we increased the number of SVPs to 23. The SVPs have regional responsibilities. [Tab F – SVP Area of Responsibility Map]. These judge advocates are individually selected and assigned based on demonstrated court-martial trial experience, ability to work with victims and ability to train junior counsel. They complete a specially designed foundation and annual training program to elevate their level of expertise in the investigation and disposition of allegations of sexual assault and family violence. Their primary mission is to

develop and litigate special victim cases within their geographic area of responsibility. Their secondary mission is to develop a sexual assault and family violence training program for investigators and trial counsel in their area of responsibility. SVPs are involved in every sexual assault and special victim case in their assigned region. The SVPs work hand-in-hand with the SAI investigators throughout the process. They train together and, in some locations, SVPs and SAIs are co-located. As our program develops, we intend to strengthen and formalize the relationship to enhance the Army's accountability efforts. For example, one of our most senior SVPs will move to a new jurisdiction where he can not only prosecute the special victim offenses, but also teach at the military police school. Finally, in addition to working directly with victims in these cases, SVPs provide training, support and guidance to those professionals responsible for the physical, emotional and other needs of victims, including Victim Advocates (VAs), Sexual Assault Response Coordinators (SARCs) and Victim Witness Liaisons (VWLs). The SVP's also work closely with the local police, prosecutors and service providers. To provide continuity and develop expertise, we have assigned SVPs to 3- year tours and developed a strategy to assign former SVPs to positions that will utilize their skills. We are growing and developing a corps of Judge Advocates educated and experienced in the adjudication of these difficult cases. Looking to the future, we will expand and formalize the concept adding additional resources and personnel to establish a premier Special Victim Capability.

#### **HIGHLY QUALIFIED EXPERT ASSISTANCE**

At the same time the Army initiated the SVP program, we hired seven civilian Highly Qualified Experts (HQEs) to further enhance our ability to effectively investigate, prosecute and defend sexual assault and special victim cases. The HQEs bring a wealth of experience and trial

litigation expertise to our program. One HQE is assigned to the Criminal Law Department at the JAG school. His primary mission is to develop the curriculum on litigating sexual assault and special victim cases that we use to train our judge advocates. Three HQEs are assigned to our Trial Counsel Assistance Program to provide direct assistance to our Special Victim Prosecutors and other trial counsel in developing and litigating sexual assault and special victim cases. These dedicated professionals meet with victims, advise trial counsel, SVPs and Staff Judge Advocates on individual cases, assist in every phase of the prosecution of complex cases and train at conferences and outreaches. Their training includes the entire spectrum of first responders; including Judge Advocates, law enforcement, victim advocates, medical providers, and victim services providers for the Army and all other services. Two HQEs are assigned to our Defense Counsel Assistance Program to provide direct assistance to military defense counsel representing soldiers in sexual assault and special victim cases [Tab G – TCAP/LCS HQE bios].

#### **VICTIM WITNESS LIAISON (VWL)**

The final component of the Army's Special Victim capability, working alongside the SAI criminal investigator and the Special Victim Prosecutor, is the Victim Witness Liaison (VWL). The VWL is a paralegal familiar with the military justice system and trained to work with all victims of crime, including sexual assault victims. The role of the VWL is to assist the victim through the court-martial process. The VWL will educate the victim on their rights and the military justice system. The VWL may accompany victims to interviews with defense counsel, sit with the victim through Article 32 hearings or motions, coordinate travel or childcare for victims and provide referrals for all available resources. We are developing the expertise and training for the VWLs to ensure victims are educated about the process and their rights.

### **TRIAL COUNSEL /DEFENSE COUNSEL TRAINING**

All of our judge advocates are trained on their role in the military justice system in general, and specifically on the unique aspects of prosecuting and defending sexual assault and special victim cases. They are put through a synchronized, graduated training program administered by The Judge Advocate General's Legal Center and School, and our Trial Counsel Assistance and Defense Counsel Assistance Programs [Tab H – Trial Counsel Assistance Program Training Initiatives; Training Pyramid;]. Sexual assault and special victim cases are complex, and difficult to prosecute and defend. However, I believe that we have the right training and personnel resources to ensure that these cases are completely investigated, analyzed, developed, and that we reach just resolutions.

### **VICTIM SERVICES/POLICY**

An essential element to the success of the Army's accountability efforts is providing victims with ongoing compassionate support. Although the prevention and response arms of the Army Sexual Harassment/Assault Response Program (SHARP) fall within the responsibilities of The Deputy Chief of Staff for Personnel (G-1), I think it is important to provide you with a comprehensive picture of the Army's efforts. The Army has invested unprecedented resources, over \$50 million in each of the past two fiscal years, into a prevention and response program designed to achieve culture change. The I.A.M. STRONG training, emphasizing Army values and teaching bystander intervention techniques, saturates Soldier training at every level beginning with our newest recruits. A senior leader priority, this is an ongoing and monumental institutional effort. Advocacy and assistance for the victim are provided from the initial report through the post-trial proceedings. Alongside the other Services, the Army has implemented

policy to address the unique needs of Soldier- victims, who have concerns about privacy and collateral misconduct. Details of the Army SHARP prevention and response program are attached [Tab I – SHARP materials].

### **VICTIM RIGHTS AND REMEDIES**

I would also like to address victims' rights in the military justice system. The rights afforded to victims in the Army are set forth in regulations and generally track the provisions of the Federal Crime Victims Rights Act, 18 USC 3771. These rights include the right to be treated with dignity and fairness, with a respect for privacy; the right to be reasonably protected from the accused offender; the right to be notified of court proceedings; the right to be present at court proceedings related to the offense; the right to confer with the attorney for the Government; the right to restitution; and, the right to information regarding conviction, sentencing, imprisonment and release of the offender from custody. These rights are provided in written form on the DD Form 2701, 2702, 2703 and 2704 and in letters to victims after the court-martial process concludes [Tab J – Victim's Rights; DD Forms].

The responsibility to inform victims about these rights and the duty to enforce the rights are shared by all of the personnel who assist a victim. This includes the Commander, the Victim Advocate, the Sexual Assault Response Coordinator, the CID investigator, the Victim Witness Liaison, a Legal Assistance Attorney, the trial counsel prosecutor, the appellate court Victim Witness Liaison and Army Corrections Command officials. Army regulations require these personnel to provide information to the victim throughout the investigative and accountability process. In CY2011, Army Victim Witness Liaisons and investigators provided 31,898 victim's

rights forms to victims and witnesses. During the court-martial process, the VWL, the trial counsel prosecutor and the SVP work together to keep the victim informed and actively participating. An educated victim is the most important asset the prosecutor and the Command have in the effort to hold offenders accountable.

If a victim feels that one of his or her rights has been violated, the victim has several avenues of redress. The first avenue is the most direct – through the chain of command, the Victim Advocate, the Legal Assistance Attorney, the VWL or the trial counsel prosecutor. All of these personnel are available to address the victim’s concern and seek a remedy. In the event that a victim does not get relief from these personnel or does not wish to utilize these personnel, the victim has a set of secondary options. The victim can contact the Army Inspector General’s office, an independent investigative agency. If the victim’s chain of command was not enforcing the victim’s rights, the victim can file a complaint under Art. 138 “Complaint of Wrongs” of the Uniform Code of Military Justice, with the assistance of a Legal Assistance Attorney. Finally, a victim can seek assistance and information from hotlines run by the Army SHARP program and the Department of Defense Sexual Assault Prevention and Response Office (SAPRO).

### **METRICS TO MEASURE PROGRESS**

In my view, prosecution and conviction rates do not effectively measure a criminal justice system’s ability to address the crime of sexual assault. If we pursue challenging cases because we believe that serves victims and our community interests, some defendants will be acquitted.

## **STATISTICAL ANALYSIS**

The Army's focus on accountability has produced measurable benefits and results. The close coordination between The Judge Advocate General Corps SVPs and the Criminal Investigation Command SAIs has improved the investigation, prosecution and victim-care aspects of sexual assault allegations. Commanders are trained to make evidentiary based disposition decisions with the advice of experienced, senior judge advocates and SVPs who understand the nuances of sexual assault allegations, particularly the unique aspects of behaviors exhibited by some victims in the wake of the trauma of sexual assault.

The statistics on prosecution rates reflect a healthy military justice system focused on these difficult cases. Since the inception of the SVP program in 2009, the number of courts-martial for sexual assault and domestic violence has steadily increased. The Annual Report provides data that confirms a strong rate of prosecution, especially when compared to civilian jurisdictions that pursue sexual assault allegations against Soldiers. There is no comparable civilian data on overall prosecution rates for sexual assaults. The military justice system, through the Annual Report to Congress, is simply the most transparent and scrutinized system in the country.

Civilian jurisdictions are not required to report on the circumstances, demographic data and disposition of every report of sexual assault. Some members of the public and media have confused reported "clearance rates" for civilian jurisdictions with prosecution rates. Civilian jurisdictions report data to the Federal Bureau of Investigation for the Uniform Crime Report (UCR) on clearance rates only for the offense of rape. Only now does the FBI define rape as expansively as the military. Prior to 2012, the UCR definition of rape, unchanged since 1927,

was narrowly defined as forcible penetration of the vagina by the penis. This definition did not include rapes where the victim was incapacitated by drugs or alcohol, sleeping victims, male victims or penetration with an object or finger. For purposes of the UCR, an allegation is considered cleared when there is an arrest and a presentation for charging or when there is probable cause to identify an offender, but no arrest. Many civilian jurisdictions have policies requiring corroboration of a victim's complaint, either through DNA evidence, injury or a confession, in order to prosecute a case. The Army has no such requirement. In 2009, the Congressional Defense Task Force on Sexual Assault in the Military examined the investigation and prosecution of sexual assault allegations and reported "the military services prosecute many types of sexual assault cases that civilian prosecutors choose not to pursue." This conclusion confirms extensive anecdotal evidence that the Army aggressively prosecutes cases that civilian jurisdictions choose not to pursue.

### **VICTIM TESTIMONIALS**

It is no secret that much of the criticism of our system comes from anecdotal experiences of past victims who have expressed dissatisfaction. The nature of the crime of sexual assault makes the process of the system exponentially more difficult to navigate than any other crime. In recognizing this additional burden on victims of sexual assault we have developed and mandated specialized training for all SVPs and trial counsel that addresses the unique needs of these victims from rapport building through proper interview and direct examination techniques that employ compassion and empathy. As a result of these efforts, we have received feedback from victims and their families attesting to the dedicated, compassionate

assistance provided by the specially-selected and trained Special Victim personnel. In a letter sent to supervisors, the mother of a rape victim described the SVP as “a member of the family” who “fought for her daughter... but most of all, showed her that the Army does the right thing.” A victim in an acquittal wrote “I want to thank you for what you did. Even though we didn’t win I was very comfortable having you on my side and help tell my story.” Another victim wrote, “To many people it may not seem like much, but you made it easier for me to sleep at night. You helped me to take my life back and get the justice I needed.”

Since 1950, we have evolved our military justice system in response to forces both internal and external. That evolution continues today, reflected in an extraordinary number of changes over the last several years. I am convinced that our focus on the Special Victim Capability, and the constant training and education of Commanders, investigators and judge advocates, will help create a command climate that will allow military victims to feel safe and confident in reporting misconduct. Leadership is the solution to the change in culture we seek. Along with senior leaders across the Army, we in the JAG Corps will lead the march to accountability that reinforces committed leadership efforts to solve this critical problem.