



THE ASSISTANT SECRETARY OF DEFENSE

WASHINGTON, DC 20301-1300

LEGISLATIVE
AFFAIRS

The Honorable Carl Levin
Chairman
Committee on Armed Services
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

Thank you for your letter requesting the Department of Defense's views on S.1917, the "Victims Protection Act of 2014". As you know, the Department is deeply committed to eliminating sexual assault from the Armed Forces and we are continuously working to improve and strengthen our sexual assault prevention and response programs. The success of these efforts depends on a dynamic and responsive approach that includes working with Congress to address this important issue. Although preventing the crime of sexual assault remains the Department's focus, when a crime does occur, we must make certain that the military justice process is fair, efficient, and holds perpetrators appropriately accountable.

Over the last few years, the Department and Congress have made many significant changes to the military justice system to improve the handling of sexual assault cases. Most recently, the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2014 included an unprecedented array of victim protections, including: (1) Adding a military crime victims' rights article to the Uniform Code of Military Justice; (2) Codifying the Special Victims' Counsel programs that Secretary Hagel had previously ordered the Services to establish; (3) Narrowing the scope of Article 32 hearings and giving military victims the option not to testify at such hearings; (4) Requiring higher-level review of a decision by a commander not to refer a sexual assault charge to court-martial; (5) Giving victims a right to participate in the post-trial clemency process; (6) Prohibiting a convening authority from considering information about a victim's character that was not admitted at trial during the post-trial review process; and (7) Requiring creation of a legally enforceable prohibition against retaliation against either victims or non-victims who report offenses. The Department is currently in the process of implementing these and many other reforms, which, as Senator McCaskill has observed, have produced "the most victim friendly criminal justice system in the world". Nevertheless, we agree that more can and must be done.

S. 1917 would make several additional improvements to the Department's sexual assault prevention and response efforts. For example, section 3(a) would require Special

Victims' Counsel to advise victims on the differences between civilian and military prosecutions, better ensuring that victims are equipped with the knowledge necessary to make fully informed decisions; section 3(c) would require written performance appraisals to include assessments of the extent to which the service member supports the Department's sexual assault prevention and response efforts, ensuring that every service member is doing their part to eliminate sexual assault from the military; section 3(e) would allow former service members to challenge the characterization of their discharges based on having been the victim of certain sexual offenses, through a confidential process, providing an important protection for past victims of military sexual assault who have already left military service; and section 4 would reaffirm the Department's commitment to ensuring that the victim protections contained in the NDAA for FY 2014 also apply to cadets and midshipmen at the Military Service Academies. Thus, these and other provisions in the bill would enhance victims' rights while also strengthening our response to allegations of sexual assault.

We do, however, have concerns with some of the provisions in the bill as drafted. The Department's most significant concern is with section 3(d), which requires command climate assessments following incidents of certain sexual offenses. Command climate assessments are an important tool for ensuring a military workplace free from sexual harassment, sexual assault, and retaliation against victims. In fact, command climate assessments are already required within 90 days of a commander's assumption of command and annually thereafter. Additionally, section 587 of the NDAA for FY 2014 requires that the results of these command climate assessments be provided the next-higher level of command and that failure of a commander to conduct a required command climate assessment be noted on commanders' performance evaluation. However, the Department is concerned that requiring a climate assessment after every report of a sexual assault could lead to survey fatigue and produce resentment against victims for reporting offenses. Additionally, such a requirement may undermine victim privacy and deter victims from reporting. Thus, although the Department strongly supports rigorous and regular command climate assessments, we are concerned this provision could actually undermine their effectiveness.

The Department also has concerns with section 2, which would require that the case file for a sex-related offense be forwarded to the Secretary of the relevant military department if the senior trial counsel recommends that the charges be referred to a court-martial and the convening authority decides not to refer the charges, even if the commander's staff judge advocate recommended not referring the charges. The Department supports requiring higher-level review of any decision by a commander not to refer sexual assault charges to a general court-martial. We believe, however, that elevating this review to the level of the Service Secretary is not warranted where a staff judge advocate has reviewed the case thoroughly, consulted closely with the assigned military trial counsel, and recommended non-referral. Instead, the Department would

welcome the opportunity to work with Congress to determine the best manner to involve military prosecutors in ensuring appropriate review of these cases.

With regards to section 3(b), the Department of Defense is committed to ensuring that victims are treated with fairness, dignity, and respect. This includes consulting with victims throughout the process and taking their preferences into account whenever appropriate. Requiring convening authorities to give “great weight” to a victim’s preference about whether an alleged sexual assault should be tried in military or civilian court, however, would prove difficult because the Department does not have authority over civilian criminal justice systems. For example, placing the military prosecution apparatus on hold while a civilian prosecutor decides whether to exercise jurisdiction in the case could result in significant delay, which is inconsistent with both the cause of justice and military readiness. Additionally, the military and civilian justice systems often share concurrent jurisdiction. In such cases, military prosecution would not preclude prosecution of the same offense in a civilian court if that is preferred by the victim. The Department would welcome the opportunity to work with the Senate to explore alternative language that would address such concerns.

Finally, the Response Systems to Adult Sexual Assault Crimes Panel (RSP)—established by the Secretary of Defense pursuant to section 576 of the NDAA for FY 2013—is currently in the process of conducting a detailed analysis of the systems used to investigate, prosecute, and adjudicate sexual assault offenses in the military. As part of this process, the RSP has issued requests for information relating to section 3(g), concerning the use of military character evidence. This suggests that the Panel may address such evidence in its June 2014 report and the Department looks forward to reviewing the Panel’s thoughts on this issue at that time.

The Office of Management and Budget advises that, from the standpoint of the Administration’s program, there is no objection to the presentation of this letter to the Committee for consideration.

Sincerely,



Elizabeth King

cc:
The Honorable James M. Inhofe
Ranking Member