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Protect Our Defenders is a human rights organization dedicated to ending the plague of rape and sexual assault within the United States military. Our policy work focuses on the failings of the military justice system; we seek to reform the military training, reporting, investigation, and adjudication systems as they relate to the issue of sexual violence and harassment. Our work is motivated by the strength and bravery of survivors of military rape and sexual assault, who have stepped forward to tell their stories and push for change to a system that often re-victimizes survivors while failing to hold perpetrators accountable and effectively deter these crimes.

According to recent Pentagon reports, there were an estimated 26,000 incidents of unwanted sexual contact in the military in 2012. Of those estimated incidents, only 3,374 were reported, and only 238 of those resulted in a conviction. Based on the DoD SAPRO 2012 Survey, 60 percent of victims who did report their assault said they experienced some form of retaliation. We receive emails almost daily about cases of sexual assault that were never taken to trial, or from victims who were retaliated against, as well as from officers who have become discouraged by the process and seek help on behalf of victims. We have included some of these emails and letters in Attachment 1. Over the years, the estimated number of assaults has continued to grow, while the reporting rate has barely reached ten percent. This is an epidemic, and both the stories and statistics make it clear that the military is incapable of handling this problem on its own.

This panel, established under the FY2013 National Defense Authorization Act, was created to address this crisis and provide recommendations for reforming the military justice system so that real progress can be made on this three-decades old problem.. We urge the panel to take this opportunity to endorse meaningful reforms that address the structural changes at the core of the problem and create a professional, impartial, independent military justice system. There are two steps critical to achieving this goal: first, the authority to decide whether to prosecute a case must be removed from the chain of command and placed in the hands of trained prosecutors; second, the authority to adjudicate these crimes must be taken from the accused's chain of command.

While other changes will still be necessary to achieve a fair and functional judicial system—including reforming the jury selection process, modernizing the Article 32 process, and eliminating the Good Military Character defense (*see* Attachment 2)—taking commanders out of the legal decision process is the only way to ensure a fair and impartial system. This is a common sense step toward ensuring that members of our armed forces are given the same dignity, respect, and due process as the civilians they have volunteered to protect.

At the heart of the debate about the role of commanders, are a few fundamental questions that go to the core of our American values: Should justice be blind? Should the men and women who defend the Constitution be denied impartiality and objectivity in justice?

Should legal authority be vested in those trained and experienced in the law? How is good order and discipline really served by the current structure, when so many service members who have been victimized fear the process, do not trust the system, and do not consider their commanders to be impartial?

When considering these essential questions, we must start with the foundation, and address the inherently unfair structure that houses the Convening Authority (CA) within the chain of command. In addition to lacking any substantive legal training, commanders can be subject to bias and conflict of interest, and are in a position to retaliate against the victim while protecting the often higher-ranking perpetrator. As one victim told us: "I got raped.... When I tried to talk to my squad leader I got shut down and reminded that he (the rapist) was a Senior NCO.... I waited and spoke with my platoon SFC (sgt. first class) and Lt, [And, they told my perpetrator.].... Then, I got told if I say another word to ANYONE, I was going to be charged with Adultery...." (*see* Attachment 1). Furthermore, commanders are over-burdened, and serving as the convening authority detracts from their ability to focus on their primary mission. Removing CA from the chain of command will legitimize the system, provide impartial justice for both victims and the accused, unburden commanders, and increase transparency and accountability. Third party accountability is critical to fostering trust among victims, effectively deterring perpetrators, and fixing the culture of impunity that has afflicted the military for decades.

The recent case at Aviano Air Base in Italy and the ongoing injustice in the case currently pending at the Naval Academy exemplify many of the most troubling conflicts and flaws within the current military justice system. As the details of these cases have been revealed, they have exposed attitudes of military leaders and offered a window into conflicts of interest that undermine justice and re-victimize survivors. These cases highlight the fact that too often commanders are not objective, and when push comes to shove, they rally together to protect their own interests and those of more valued, higher-ranking service members. These attitudes are not relics of the past—they represent the status quo.

In the Aviano case, Lt Col James Wilkerson was convicted of aggravated sexual assault. Lt Gen Franklin, acting as the convening authority, overturned the conviction and freed his fellow pilot, going against the legal advice of his own Staff Judge Advocate (SJA).. Franklin's biased and poorly reasoned justification for his decision was based in part on his self described belief that Wilkerson was a good officer and a "doting father and husband." For a copy of Franklin's letter explaining his decision, as well as POD's point-by point comparison to the facts of the case, *see* Attachment 3.

Further details uncovered in the recent FOIA release of emails by Lt Gen Franklin and other Air Force leaders show that not only was Franklin biased, he was determined to help Wilkerson at any cost. In one particularly concerning email, Franklin ignored a plea from Brig Gen Scott Zobrist, the base commander, who pleaded with Franklin not to overturn the conviction. Zobrist warned that granting clemency, "would be absolutely devastating in so many ways...[and] 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."

Lt Gen Franklin ignored these warnings and instead, with support from his chain of command, moved ahead to dismiss the jury's findings and toss out the conviction. With the blessing of his command, including the Air Force Commander in Europe, General Mark Breedlove, who voiced his support for Franklin's decision in an email to General Mark Welsh, saying "[Franklin] and I have discussed in depth the meaning and the possible blow back. I stand behind his decision." With that, Franklin used his unfettered authority to set aside justice and began a full court press to get Wilkerson promoted and flying again (*see* Attachment 4 for POD's press release and the emails released under FOIA).

This case is an example of a commander who believed his own personal assessment of the perpetrator and biased reading of the evidence should override the verdict of a jury of senior officers, who—unlike him—had heard all of the testimony and reviewed the evidence in court. Lt Gen Franklin is a high-ranking commander who showed the nation what happens when individual loyalty is valued over impartiality and justice.

In the Naval Academy case, not only was there pressure on the victim by those in power as well as her fellow midshipman not to report, but also, once she did decide to come forward, the convening authority—a commander and Superintendent of the Academy—refused to take action. Only after pressure from the victims' civilian attorney was the case referred to an Article 32 hearing, where the investigating officer allowed the defense counsel to abuse and intimidate the witness. Without heavy pressure from outside sources, the case would have never seen a courtroom. The actions by the CA in this case are yet another example of the broken system and lack of regard for victims who report. They are seen as troublemakers and swept aside as collateral damage, "for the sake of the institution."

Another detrimental effect of the current role of commanders as convening authority is Unlawful Command Influence (UCI). By giving commanders the power to decide whether to prosecute a case, their subsequent actions can be construed to tip the scale for either side. No one wants an innocent defendant to be railroaded. On the other hand, one harsh statement from a commander about rooting out the problem of sexual assault can be used to derail sexual assault cases. In fact, a recent sequence of statements from top commanders regarding zero tolerance for sexual assault has led to many defense motions of UCI—some of which have led to court rulings that undermine justice (*see* Attachment 5 for details of recent cases impacted by UCI). The direct and simple solution is to remove the CA responsibility from the chain of Command, freeing commanders to focus on preventing sexual assault.

For decades, military leaders have decried any change to commander's authority in prosecuting and adjudicating rape and sexual assault. However, they have failed to provide any specific evidence to support the allegation that such change would undermine their ability to lead. In fact, the current biased and inefficient military justice system actually undermines good order and discipline and mission readiness.

How long must the victims – our service members – have to wait before we will recognize that it is time for a fundamental change? No more Tailhooks, no more Aberdeens, no more Lackland abuse scandals. Our troops deserve better.

Attachments:

1. Anecdotes from victims and letters from commanders re: convening authority
2. POD "Roadblocks to Justice" position paper
3. POD letter to Secretary Hagel, Lt. Gen. Franklin's letter, POD point-by-point rebuttal
4. Email excerpts from FOIA re Franklin
5. Examples of cases where UCI led to rulings for defendant