

COLONEL DANIEL J. HIGGINS
CHIEF, TRIAL DEFENSE SERVICES
UNITED STATE AIR FORCE

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Opening Comments

Members of the Committee, thank you for the opportunity to speak to you today about sexual assault prevention and response within the Air Force. As a defense counsel, I am especially grateful for the opportunity to discuss this tremendously important topic.

Let me begin by stating that I am privileged to lead 187 defenders worldwide. They are professional officers and non-commissioned officers who are dedicated to providing defense services in a zealous, ethical, and professional manner. We are fully committed to the idea that sexual assault has no place in the military. We have no desire to see these crimes ignored or swept under the rug. We are however, gravely concerned about a rush to modify the Uniform Code of Military Justice, Manual for Courts-Martial, and our military justice system, especially when those changes are not part of a larger systematic review of the process as a whole. We are very much concerned that many of the changes being proposed now would serve to remove or erode the accused's Constitutionally guaranteed due process protections and place a metaphorical thumb on the scales of justice which tips the balance in favor of the government and ultimately increases the risk of convicting innocent Airmen. Changes that compromise established due process protections also compromise the faith and confidence in the military justice system held by rank and file military members themselves and undermine a primary function for the Uniform Code of Military Justice, that is, good order and discipline. We should all be wary of any change or series of changes that devalue that prime function, especially at the expense of Airmen's due process of law.

Organization of Defense Counsel Services in the United States Air Force

The Air Force defense network consists of 187 active duty officers and non-commissioned officers broadly divided into three regions, West-Pac, which covers the western United States and our overseas Pacific bases; Central, which extends from Colorado in the west to St. Louis in the east, and East-Eur which covers the eastern United States, Europe and the United States Central Command Area of Responsibility. Each of these three regions is headed by a lieutenant colonel Chief Senior Defense Counsel. They are responsible for the provision of defense services within their area of responsibility. To assist them with this task, each Chief

Senior Defense Counsel supervises six or seven Senior Defense Counsel, or SDCs for a total of 19 who in turn each supervise four to five geographically dispersed Area Defense Counsel-Defense Paralegal teams. These teams form the core of the defense community. Our defenders represent eligible military members in administrative and judicial matters that range from challenges to professional credentialing and minor disciplinary infractions to major criminal allegations that could result in trial by court-martial. Normally assigned one team to each installation, they are primarily responsible for representing military members on their installation who are facing an adverse action but may be detailed to cases at other installations when necessary to balance the workload or avoid a conflict of interest. Together, we are responsible for providing defense services to the 330,000 active duty Air Force members worldwide. Our chain of command extends through the Chief, Air Force Judiciary, to the Commander, Air Force Legal Operations Agency, who, in turn, reports directly to the Judge Advocate General.

Our Senior Defense Counsel typically enter their duties having completed two base level assignments and 6 to 7 years of service in the Judge Advocate General's Corps. All of the SDCs have successfully completed a tour of duty as an ADC. The 19 SDCs are tasked with providing not only day to day supervision and administrative maintenance of defense teams at the installation level, but are also responsible for defending Airmen in the most serious cases at trial.

ADCs are competitively selected following one to two base level assignments. In general terms, they have spent between two and four years in the Judge Advocate General's Corps at the base level and have prosecuted approximately 10 courts-martial prior to assuming duties as a defense counsel. The average annual workload for any one defense team includes 8-10 courts-martial, 75 non-judicial punishments, and 300-400 other adverse actions.

One of the biggest challenges we face as a team spread geographically across the world is training. Generally, we rely upon our Judge Advocate General's School for formalized training. Military defense counsel attend foundational courses including the Judge Advocate Staff Officer Course, Trial Defense Advocacy Course, and Defense Orientation Course. It is a constant struggle to maintain a specialized training regimen because of the limited time the individual attorney remains in the position--generally only about 18 to 24 months as an ADC and 24 to 36 months as a SDC. The recent government shut down and budget issues have also negatively impacted our ability to train our defenders by forcing us to cancel training courses.

Due Process Concerns

In December 2002, U.S. News and World Report published a cover story entitled "Unequal Justice, Why America's Military Courts are Stacked to Convict." That article questioned the very fairness of the military justice system and stated unequivocally that "the odds, overwhelmingly, are that the accused will be convicted."¹ While I would take issue with some of the specific complaints mentioned in that article, the focus here is that our system was under attack 11 years ago as failing to provide essential fairness. Specific problems noted in that

¹ *Unequal Justice*, Edward T. Pound, U.S. News and World Report, 16 December 2002, 19 at 21.

article included unlawful command influence, convening authority selection of jury members and perceived flaws with Article 32 hearings being thorough and impartial. Notwithstanding any disagreement that I may have had with the specific issues identified by the author of that article, the anecdotal case examples cited in the article inescapably show the nexus between the integrity of the military justice system and military good order and discipline, i.e. the deck is stacked against the accused. Simply put, erosions and perceived erosions of due process protections undermine faith in the system and dilute the utility of the system itself. In the intervening years since the article the military justice system has not undergone any significant change designed to ensure greater protections, greater fairness, or greater due process rights for the accused.

Today, our system is again under attack and this time the proposed changes would appear designed to weaken individual due process protections many of which were identified by the 2002 article as already being insufficient or failing. For example, one of these changes is the proposed modification of the Article 60 to remove or significantly revise the power of a convening authority to grant clemency. In my view, the wholesale repeal of UCMJ Article 60 is not a sound approach, particularly when it is undertaken in response to a single case. Likewise, wholesale change to Article 32 and the pretrial investigation process—again in response to a single case—is not a sound approach. The legal adage that bad cases make bad law comes to mind.

This is not to say that changes cannot or should not be considered. But the military justice system must be understood as a complex system—a system designed as a whole to ensure that individuals are provided with basic due process protections. These protections are not provided out of generosity or some type of largess. Rather they are fundamentally necessary to comply with both Constitutional requirements and to ensure that the military justice system maintains legitimacy in the eyes of service members. We cannot have a disciplined effective fighting force if the system used to enforce good order and discipline lacks legitimacy.

Discipline is absolutely essential to our armed forces. All the training, all the equipment, all the planning and logistics are irrelevant if they are not accompanied by discipline. A disciplined force is essential to the success of any military operation. A key component to discipline is the trust of the individual member in our military justice system. A military justice system that lacks the trust of those it purports to serve will not be viewed as legitimate and it will call into question the very results it produces. There are many areas of the world, even today, where the mere allegation of a crime is sufficient to throw the accused individual into jail for years. Such a system has, in our eyes, no legitimacy. Under our system, when a court-martial is held and a member is convicted, the Service and the members of that unit accept that result as valid because our system, with its rigorous due process protections, is viewed as legitimate.

Changes to that system should not be considered lightly. Changes in response to a single case, regardless of how much attention that case receives should be considered carefully and dispassionately when the roar of the political moment has subsided. The military justice system was designed to provide a fair environment for those accused of an offense. Those areas where it lacks some of the due process protections provided by our civilian criminal justice system are offset by more robust protections in other areas. When changes are made to the system with little to no effort to understand the impact of any one change on the system as a whole, there is a

great risk that minimum due process rights of the accused will be trampled along the path to perceived improvement. Change to the military justice system should not be off the table, but rather it should be the product of careful study, consideration, and deliberation. Changes once made have immediate effect and are unlikely to be reversed. Moreover, changes to the military justice system that are hastily made and not fully considered pose a significant and imminent risk to the men and women who serve. Changes to the military justice system should be the product of a systemic review. Only then can we ensure adequate protections and safeguards for those that serve this nation.

Unlawful Command Influence

One specific area of concern for the defense community is unlawful command influence, something our appellate courts have called the "mortal enemy of military justice." The past year has produced a number of comments from the most senior officials and officers in the armed forces, including the Commander in Chief, the Secretary of Defense, convening authorities and general officers that appear to encourage prosecution of sexual assault allegations in all cases and without regard to the merits of any individual case. Statements of this sort, especially when issued from the highest levels of command, can have an insidious and pervasive effect on the military justice system. Specifically, they raise the very real possibility that the critical vetting of cases entrusted to subordinate commanders and jury panel members will be short-circuited and corrupted due to the perceived directive to return a guilty verdict. Some courts-martial have already found that recent high level comments amounted to unlawful command influence and no doubt other courts will be asked to review the issue. These cases should serve as a reminder that our system does not operate in a vacuum and we must be ever vigilant about changes and comments that impact its overall integrity and skew an appropriate result in any particular case or type of case.

Special Victim's Counsel

Another area of concern for the defense bar is the development of the Special Victim's Counsel. Following the ruling in *LMR v. Kastenberg*, 72 M.J. 364, Victim's Counsel now has a right to be heard at various points in the court-martial. While the full impact of this decision has yet to play out in our courtrooms, it appears the traditional criminal litigation model of having two opposing parties--prosecution and defense is about to give way to a new paradigm that involves a third party, the Victim's Counsel who now fills a representational role for the alleged victim with the right to be heard. While we see some merit in allowing alleged victims counsel to facilitate their participation in and understanding of the military justice process, there is an increased risk that failure to clearly delineate roles and responsibilities of this additional party to criminal litigation will result in collusion between the SVC and prosecution or otherwise obstruct the accused's well settled Constitutional rights to confront the evidence and witnesses against him or her. We have already seen cases where the Victim's Counsel and the prosecutor appear to have worked in concert to develop case strategies, respond to or refute defense theories, and counter testimony developed at trial that is apparently adverse to alleged victim's interest. It

must be noted that Victim's Counsel have no independent obligation to provide discovery to the defense, and in fact, might be specifically prohibited by their client and/or applicable rules of professional responsibility from doing so. These limits, when taken in conjunction with active participation in and assistance to the prosecution can work to deprive the accused of his right to confront the witnesses against him and chip away at his right to a fair trial. We believe this exceeds the intended role of the SVC and begins to transform the traditional criminal litigation model from the sovereign's pursuit of justice into something much different.

Closing Comments

In closing, let me say that I am very grateful to be here today. I appreciate the opportunity to discuss the issue of sexual assault in our armed forces. As you go forward with your efforts I encourage you to consider that:

- Our military members deserve the best possible representation, starting as early in the process as possible when they are suspected or accused of criminal wrong doing.
- Second, a disciplined force is essential to commanders and the nation as a whole. Furthermore, the military justice system ensures a disciplined force only so long as it zealously protects the rights of the accused and is consequently viewed by those it serves as having legitimacy.
- Third, there should be no dilution of the due process protections currently afforded to service members by law and regulation. Changes to the military justice system, made without the benefit of a systemic review of the entire military justice process, runs the very real risk of placing a metaphorical thumb on the scales of justice and eroding the legitimacy of the system necessary to ensure a disciplined force.