

Comments from Victim Advocate Organizations on Removing Disposition Authority from Commanders

I. Objectivity and Expertise

A. Actual

1. **Ms. Miranda Petersen, Policy Advisor & Program Director, Protect Our Defenders (POD):** This debate, we believe, is fundamentally about American values of fairness and justice. We must ensure that the men and women who have signed up to serve this country and risk their lives for our rights are given the same access to impartial justice that every other citizen of this country is entitled to. In order to make that a reality, the military justice system must be reformed to ensure that there is fairness, objectivity, and impartiality. This cannot be achieved without removing the prosecution and adjudication from commanders.

Commanders can often be conflicted or biased towards frequently higher ranking perpetrators. Their careers can sometimes be adversely affected if a rape is reported on their watch. And at the heart of this issue, we believe that having commanders in the chain as the convening authority is antithetical to the American values of justice.

Additional changes will also be required, such as reforming the jury selection process and modernizing the Article 32 process. But we believe that removing the convening authority from the chain of command is the first and fundamental step towards professionalizing the military justice system.

Transcript of Testimony, Response Systems Panel (RSP) Public Meeting at 346-47 (Sept. 25, 2013).

2. **POD:** In the military, the accused's commander serves as the Convening Authority (CA) – the person who (1) decides whether the case should go to court-martial and (2) appoints the jury and convenes the trial. This is an inherently biased and inefficient system. The CA is not a lawyer, not a criminal law expert, and may have close ties to the accused. The commander's career may even suffer if assaults happen in his unit or on his watch, and he may have an interest in covering up the crime. . . . This system is inherently unfair – and it discourages many victims from reporting.

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Convening authority must be removed from commanders and placed in the hands of an objective, independent body. Furthermore, military prosecutors must have a more significant role in this process. Prosecutors – not commanders – who are trained to properly evaluate the evidence and make a decision on whether the case should go to trial, should be the ones reviewing all sexual assault cases. Giving prosecutors a more active influential role, and taking the decision making from commanders, will help legitimize the military justice system and protect victims.

Nine Roadblocks to Justice: The Need for an Independent, Impartial Military Justice System at 1.

3. **Ms. Nancy Parrish, President, POD:** Until you remove the bias and conflict of interest out of the chain of command, you will not solve this problem. The retaliation is not about peer pressure. The retaliation is about the lower-ranking victim being disbelieved by the higher-ranking perpetrators and their friends. *Transcript of Testimony, Senate Armed Services Committee, Hearing to Receive Testimony on Sexual Assaults in the Military at 122 (June 4, 2013).*
4. **Ms. Parrish, POD:** The problem is getting worse. It is not improving. Until more victims report, there will not be more prosecutions. You will not have more victims report until you remove the bias out of the process.

Professional prosecutors must be able to look at this professionally. Convening authorities have this job as a part time. They are not trained, and they are biased and conflicted. They believe the higher-ranking perpetrator.

Transcript of Testimony, Senate Armed Services Committee, Hearing to Receive Testimony on Sexual Assaults in the Military at 123 (June 4, 2013).

B. Perceived

1. **Ms. Anu Bhagwati, Executive Director and Co-founder, Service Women's Action Network (SWAN):** In my own experience in the Marine Corps, there were signs of hope along the way. When I was at the School of Infantry, it was actually the infantrymen on the enlisted side that were just as outraged as victims of sexual harassment and assault were. However, on the officer side, there was definitely a sense of an old boys' club, colonels protecting lieutenants, colonels protecting staff sergeants. Whether or not that has to do with an inclination to protect one's own career looking out for a future star or whether or not there is some sort of misguided attempt to protect a good man because you know his family and he has served for 20 years – I mean, you hear this language all the time. And officers – there are fewer of us and we spend time with one another, hanging out at the Oak Club. It is a completely different culture. *Transcript of Testimony, Personnel Subcommittee, Senate Armed Services Committee, Hearing to Receive Testimony on Sexual Assaults in the Military at 20 (Mar. 13, 2013).*
2. **Ms. Petersen, POD:** As an advocacy organization, we hear from victims who have been re-traumatized both by the perception and the experience of bias and unfairness in the system. . . . While we know that many commander[s] may want to do the right thing, others fail to put the victim's interest before their own or that of the perpetrator. *Transcript of Testimony, Response Systems Panel (RSP) Public Meeting at 348-49 (Sept. 25, 2013).*
3. **POD:** Another detrimental effect of the current role of commanders as convening authority is Unlawful Command Influence. 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 lead to [sic] many defense motions of UCI – some of which have lead [sic] to court rulings that undermine justice. The direct and simple solution is to remove the CA responsibility from the chain of Command, freeing commanders to focus on preventing sexual assault. *Written Statement to Response Systems Panel (RSP) Public Meeting at 3 (Sept. 17, 2013).*

4. **Ms. Bhagwati, SWAN:** [A]ctually putting legal experts in charge of the process serves everyone better. It creates a fairer and more impartial trial for the accused as well.

The classic kind of example of why the current problem is so serious is the Commandant of the Marine Corps doing the right thing as the head of the Marine Corps by speaking out strongly against sexual assault in the Marines. We were very excited to hear that kind of language, but because he is in everyone's chain of command, it is seen as problematic. But if he were removed from that process like all other unit commanders, he could speak strongly about this issue, as he should, as everyone within the Armed Forces should. But we have this perception that there is undue influence by the Commandant or other military commanders because commanders have this discretion over these cases. It does not need to be that way. If we professionalize the system and go in the direction of, for example, the UK, we will not see this undue influence.

Transcript of Testimony, Personnel Subcommittee, Senate Armed Services Committee, Hearing to Receive Testimony on Sexual Assaults in the Military at 28 (Mar. 13, 2013).

II. Impact of Proposed Change on Reporting and Prosecution Rates

- A. **POD:** Victims are often discouraged or sometimes outright told not to report a sexual assault. Of the 26,000 incidents of sexual assaults and other sexual crimes that occurred in 2012, only 3,374 were officially reported. Many times, victims are advised by people in their chain of command that if they report, the victim could face criminal charges or non-judicial punishment for collateral misconduct. This is often enough to silence a victim who is already intimidated or distrustful of the system. Of the victims who chose not to report, 47% indicated fear of retaliation or reprisal as a reason for not reporting. *Nine Roadblocks to Justice: The Need for an Independent, Impartial Military Justice System at 1.*
- B. **Ms. Bhagwati, SWAN:** Servicemembers tell us that they do not report for two reasons primarily. They fear retaliation, and they are convinced that nothing will happen to their perpetrator. *Transcript of Testimony, Senate Armed Services Committee, Hearing to Receive Testimony on Sexual Assaults in the Military at 110 (June 4, 2013).*
- C. **Ms. Parrish, POD:** [Victims] don't report because they are disbelieved. They don't report because the often higher-ranking perpetrator is buddies with those that they must report to. They don't report because they are told when they are given their options to report that, oh, by the way, you were drinking. You are under age. You will be charged with collateral misconduct.

You don't report because the thought that you have heard from your friend who tried to report that – and you see what happens to them, and they are being drummed out and diagnosed with a personality disorder. These things are not going to change at any tweaks to the system, even common sense tweaks that are good. It is still not going to fundamentally address this issue.

Transcript of Testimony, Senate Armed Services Committee, Hearing to Receive Testimony on Sexual Assaults in the Military at 130 (June 4, 2013); accord id. at 131.

- D. Ms. Bhagwati, SWAN:** [T]he first thing [removing disposition authority from commanders] will do is restore faith and trust in the system. Right now, victims don't have any of that. They have lost all hope in the military justice system, unfortunately.

Retaliation happens in many respects. We see on a day-to-day basis that our callers, both servicemembers and veterans who have recently been discharged, have been punished with anything from personal retaliation from roommates and family members to professional retaliation by their chain of command from the lowest levels to the highest levels, platoon sergeants all the way up the chain.

They are also retaliated in more kind of insidious ways. They are given false diagnoses, mental health diagnoses, like personality disorders, which bar them from service, which force them to be discharged, which ban them from getting VA services, VA benefits. So it is comprehensive retaliation.

Transcript of Testimony, Senate Armed Services Committee, Hearing to Receive Testimony on Sexual Assaults in the Military at 116 (June 4, 2013).

- E. Ms. Bhagwati, SWAN:** [Question from Sen. Gillibrand]: Ms. Bhagwati, if we are able to institute a prosecution system that does not involve having to report to your chain of command, do you think that will increase the number of cases that are reported? And do you think it will increase the number of cases that are prosecuted? And do you think it will increase the number of cases where a conviction is found?

[Response from Ms. Bhagwati]: Thank you, Senator Gillibrand. Yes, I do. It is really a two-pronged system, though, that needs to be change. We have the pipeline of accused being prosecuted and hopefully convicted, but also the retaliation that so many servicemembers face in the process which cannot just be dealt with through the criminal justice system within the military. Yes, absolutely, an independent prosecutor being given case disposition authority, given convening authority will dramatically shift the way victims, I think, approach whether or not to report. Victims' care is a huge piece of that as well.

Transcript of Testimony, Personnel Subcommittee, Senate Armed Services Committee, Hearing to Receive Testimony on Sexual Assaults in the Military at 16-17 (Mar. 13, 2013); accord Transcript of Testimony, Senate Armed Services Committee, Hearing to Receive Testimony on Sexual Assaults in the Military at 138 (June 4, 2013).

- F. Ms. Parrish, POD:** [Question from Sen. King]: [I]s there data that indicates that in a significant number of cases, a commander at whatever level, and it is at the O-6 level in these cases, has decided not to prosecute? Do we have any information on that, do you know, Ms. Parrish?

[Response from Ms. Parrish]: I don't. We only know the statistics that the DOD has put out, and few cases move to prosecution. . . . According to the numbers the Department of Defense has recently put out, few – there are few cases that move to prosecution and then conviction. And preferring charges, prosecutors tell us that, contrary to what we have heard in Senator Gillibrand's subcommittee, that often cases are not preferred.

There is just no – there is no way of right now being able to determine a convening authority's, how effective they are in their process, I think. So I don't know how you ever dig down deep enough to come up with that data. I think you just have to look at the results, and the result is victims don't report. There are few prosecutions. There are fewer convictions.

[Sen. King]: I understand that, but one of the issues is reporting, which you just mentioned. What evidence is there that the failure to report is a result of the victim's perception that the commander isn't going to prosecute the case? Do you see what I mean? Obviously, there are a lot of complicated reasons to not report. Is that one of them, and how do you know?

[Ms. Parrish]: It certainly is one of them. Well, because they see. Their own experience is what is before them, and they see that oftentimes the perpetrator is not brought up on charges, that victims report and are disbelieved. And so that higher-ranking perpetrators are more believed. That is part of the chain of command. That is part of the higher ranking you are, the more on your lapel, the more you are believed, the more credibility you have. So until you create some objectivity in the process where there is no bias and influence and prejudice against the victim, the lower-ranking individual in the situation, you are not going to solve this problem.

Transcript of Testimony, Senate Armed Services Committee, Hearing to Receive Testimony on Sexual Assaults in the Military at 136 (June 4, 2013).

- G. Ms. Parrish, POD:** Third-party accountability will help legitimize the system and fix the culture. Victims will report, retaliations shrink, and prosecutions increase. Today, there is absolutely no tracking of how a convening authority performs this part-time duty. *Transcript of Testimony, Senate Armed Services Committee, Hearing to Receive Testimony on Sexual Assaults in the Military at 109 (June 4, 2013); accord Nine Roadblocks to Justice: The Need for an Independent, Impartial Military Justice System at 1.*
- H. Ms. Parrish, POD:** [Removing disposition authority from commanders] is required to change the culture. You won't change the culture until you have accountability, and you won't have accountability until you have transparency. And so, good order and discipline will not – is lacking now within our unit, within these units. *Transcript of Testimony, Senate Armed Services Committee, Hearing to Receive Testimony on Sexual Assaults in the Military at 130 (June 4, 2013).*