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Madam Chair,

Thank you for allowing me the opportunity to provide this statement as part of my testimony before the panel. For the record, I am currently the President of Protect Our Defenders (POD), a human rights organization dedicated to fighting for survivors of military sexual assault and harassment. Prior to assuming my current position, I served 23 ½ years as an Air Force judge advocate. During that time, I was fortunate to serve almost exclusively in litigation positions, which is almost unheard of for a JAG. I have served as an area defense counsel, a circuit defense counsel, multiple base level prosecution positions, as the chief prosecutor for Europe and Southwest Asia and as a military judge. The last four years of my career I served as the chief prosecutor of the Air Force and as head of the government appellate division.

I appreciate the opportunity to address the panel about three areas that are negatively impacting the fair administration of justice in the military. In particular, I want to discuss the need for sentencing reform, solutions to the military's dismal conviction rate and the need to strengthen victim discovery rights. I have previously talked at some length about these areas in a January letter to the panel and am thankful you have given me the time to expound them.

### **Sentencing Reform**

The need for sentencing reform is obvious, and it is shameful that military leadership repeatedly thwarts efforts to modernize the practice. The current process is archaic, ineffective and remains virtually unchanged from when Washington was leading the Continental Army. Most notably, sentencing options are nearly identical to those created when Congress enacted the Article of War in 1806. Punishment options are limited to confinement, restrictions, hard labor without confinement, forfeitures of pay, reduction of rank (but only for enlisted members), fines to a limited degree, a reprimand and a punitive discharge. Modern sentencing tools such as those that exist in the federal system simply do not exist in the military. To compound these limitations, sentencing in the military may be done by court members who are simply not qualified to make these weighty decisions.

Sentencing is conducted immediately after a verdict on guilt is reached. There is no ability to assess the future dangerousness of the accused. The government is severely limited on the types of evidence that may be introduced and operates under the restrictions of the rules of evidence, including hearsay. The sentencing authority has no ability to order conditions on supervised release such as mental health or sex offender treatment. Except for a select few offenses, the sentencing authority is at liberty to sentence the offender to a wide range of sanctions from no punishment to the current maximum. There

are no sentencing guidelines. As a result and particularly with members, the sentencing authority is left to guess what an appropriate sentence is.

Regardless of the adjudged sentence, when the offender is released from a sentence of confinement or if no confinement, from active duty, the offender is under no supervision. His movements are not restricted and he is under no obligation to seek any type of treatment. In other words, violent offenders and sex offenders are simply released into the civilian community with nothing more than hope they will not reoffend.

The foolishness of this process culminated in an attack on a church in Texas two years ago this month. Prior to Devin Kelley slaughtering 26 people in Sutherland Springs, Texas, he had been sentenced by court members in a court-martial for vicious assaults on his young stepson and his wife. As part of plea deal, he was sentenced by court members rather than a judge. These court members had no true understanding of how violent Kelley was or the true nature of his misconduct. Because of the limits of the military sentencing process, the court members had no way to assess his likelihood to reoffend or any understanding of his serious mental health issues. With his pretrial confinement credit, the members' sentence of only a year ensured Kelley would be released from confinement in just a few months. Of course after he was released, he was under no supervision and had received no treatment. In other words, a violent offender was freed into the civilian community with no effort to ensure he was being treated or society was being protected from his violent tendencies.

There has been significant media coverage surrounding the Air Force's failure to properly enter his conviction into a civilian database which enabled him to buy the assault weapon used in the massacre. However, little has been said about how the military's sentencing process allowed him to return to civilian society far too soon and with no measures in place to rehabilitate or monitor him.

Beyond the Kelley incident, media coverage of a few civilian sex offender sentences has so shocked the nation's conscience that in some instances calls for a judge's removal are immediately made. The Stanford case obviously comes to mind. In the military, such sentences sadly are the norm, not the exception. For instance, I reviewed the most recent available summaries of courts-martial released by the Air Force. Looking at the six months of results from December 2018 until May 2019, the sentences would be quite shocking for the casual observer. Below are some of the sentences that stand out as particularly light:

An airman was convicted of sexual assault and his sentence did not include a single day of confinement.

A senior airman was convicted of abusive sexual contact and his sentence did not include a single day of confinement.

A staff sergeant was convicted of sexual abuse of a child and his sentence did not include a single day of confinement.

A staff sergeant was convicted sexual assault and his sentence did not include a single day of confinement.

A lieutenant colonel was convicted of abusive sexual contact and his sentence did not include a single day of confinement.

A staff sergeant was convicted of abusive sexual contact and his sentence did not include any confinement or a discharge.

A captain was convicted of attempted sexual abuse of a child and his sentence did not include a single day of confinement.

A first lieutenant was convicted of abusive sexual contact among other offenses and his sentence did not include a single day of confinement.

In all of these cases, sentences were determined by court members. However an additional two sex assault sentences handed down by military judges within this period also did not include any amount of confinement. By my count, over this six-month period of time there were 33 nonconsensual sex assault convictions in the Air Force and ten (30%) did not include any period of confinement. An equal number included a sentence of five years or more, but most lengthy confinement sentences were from a judge. Of the remaining 14, most sentences measured in days or months, not significant years.

For survivors of sexual assault, it can be devastating to see their convicted offender walk out of a court a free man. A sentence without confinement conveys to these survivors that the court placed no value on the sanctity of their own body and the extent of their suffering. The unwillingness of court members to sentence convicted offenders to confinement also sends a particularly bad message to the rest of the military; if they report an assault, that perpetrator might simply walk free even if convicted. To perpetrators, this conveys the message that they can commit violent offenses and even if found guilty, they may never be incarcerated.

I have heard military leaders opposed to sentencing reform claim maintaining member sentencing is important because it gives a "sense of the community." I truly hope these sentences are not reflective of how the Air Force community views the seriousness of sexual assault. I actually believe the lack of sentences involving confinement in nonconsensual sex offenses are the result of asking military members to do something they are not qualified to do. I can say as a former military judge that sentencing someone is usually not a pleasant experience and nor is it easy. Court members are asked to do this with almost zero exposure to the court-martial process. Under the law they are given very little concrete guidance on how to carry out their task. This lack of knowledge is compounded by a sentencing range that can be from no confinement to potentially confinement for life on top of a multitude of military unique punishments.

The result of the current sentencing structure is a system that produces wildly disparate sentences that fluctuate from shockingly light to absurdly harsh. Moreover, I firmly believe when it comes to offenses such as sex assault, rape and child pornography offenses, military sentences skew significantly lighter than their civilian counterparts.

The Sentencing Reform Act (SRA) of 1984 went into effect on 1 November 1987. Congress passed the act because it recognized "every day federal judges mete[d] out an unjustifiably wide range of sentences to offenders with similar histories, convicted of similar crimes, committed under similar circumstances." The SRA looked to solve this issue. Sentencing guidelines have certainly been a part of that process, and although the guidelines have not been without controversy they have been used for over 32 years. We can debate whether civilian sentencing guidelines need to be adjusted, and some have been. But what should not be lost in this is the fact that Congress believed that even federal judges with lifetime

appointments and years of experience needed help in determining an appropriate sentence. Yet, the military still insists that court-members can craft appropriate sentences with no such guidance. It is an absurdity.

Beyond guidelines, a federal judge operates in a system that gives the judge the tools to best serve societal interests in protection from wrongdoers and nurturing the rehabilitation of offenders. The presentencing report is a critical part of the sentencing procedure and sadly unavailable in courts-martial. I have no doubt that a presentencing report would have gone a long way to ensuring Devin Kelley's violent tendencies would have been known by the sentencing authority. Another equally valuable part of the judge's authority is the ability to order a period of post confinement supervision and to place special conditions of supervision during this period. Thus an offender can be required to undergo evaluations, attend treatment, to not own or use a computer, to not access the internet and to be restricted from certain places. (a complete list may be found here: <https://www.uscourts.gov/services-forms/overview-probation-supervised-release-conditions>).

This is contrasted by the military judicial process when a military sex offender leaves the military after serving a sentence of no or minimal confinement. Perpetrators leave with no restrictions on their liberty, no monitoring of their activities and no requirement that they obtain treatment. The minute a child pornography offender is released from confinement they have unfettered access to the internet. They likely have received no treatment to reduce the likelihood of re-offense, nor will they receive post-confinement sex offender treatment. Any type of post confinement supervision in the military is limited to those few whose sentence is long enough to qualify for parole and only if they accept parole.

The military needs to stop viewing the sentencing process as only a discipline process and recognize that reprimands, extra duties and restrictions simply are not appropriate sentences for serious crimes. Devin Kelley should have been a wakeup call for the military to not only support sentencing reform but to demand it. Instead the military has been silent. I will say what they have not: the federal system has a 32-year track record that should serve as the model for the military including judge alone sentencing, sentencing guidelines and appropriate rehabilitation and protective tools. I urge the panel to support a modern military sentencing system.

### **Conviction Rates**

The panel is well aware of the abysmal conviction rates for sex offenses in the military. The military loses about 75% of the very few cases it takes to court, and I know of no other mission the military has that it would accept that high of a failure rate. In fact, it does not seem the military is bothered at all by its lack of success. To the degree leadership even acknowledges its failure rate they attribute it to taking "tough cases to court." But when the vast majority of cases never actually go to court, this claim rings hollow. For example last year there were over 6000 unrestricted reports of sexual assault but barely 300 actually went to court-martial. The military appears to be highly selective of what cases make it to court. In other words, there is likely more to this dismal success rate than the cases being "tough."

Based on my experience I believe there are three areas where reforms could significantly alter the success rate for convictions. Two have to do with experience and the other is a structural reform to the system.

Many prosecutors tend to believe they are the key to success in the courtroom; however, I believe that 90 to 95% of a case is won or lost by the law enforcement investigation. A prosecutor can only do so much to overcome a poor investigation and a good investigation sets up the prosecutor for success. The problem I have seen from military investigations most often comes from the lack of experience of investigators, and this is particularly true with sex assault cases. However, I do not believe the military has ensured that investigators receive proper training and amass enough experience to conduct thorough investigations.

I want to make two things clear. Most investigators I have worked with are hard working, competent and dedicated. Second, each service's investigative agencies are run differently, and I am most familiar with the Air Force Office of Special Investigations (OSI). As such, I will focus on the OSI. When I entered active duty in 1991, most OSI agents I dealt with had many years of experience in criminal investigation, however, that changed dramatically after 9-11. Understandably, agents were needed in a counter intelligence (CI) role, and consequently CI drained experienced investigators out of criminal investigations. Criminal matters seemed limited to new agents fresh out of the academy. In fact most of the cases I prosecuted after 9-11 appeared to be lead by agents in their first assignment. Moreover, agents frequently deployed during or after the investigation and were often difficult to have available for trial. Defense counsel often appropriately exploited OSI availability to their client's benefit, or cases were delayed for lengthy periods awaiting a key agent's return. Simply put, there were not and appears still are not enough highly experienced OSI agents.

The result of the inexperience of investigators are many from mistakes in search authorizations, violations of an accused's Article 31 rights, failure to seize evidence, chain of custody issues, failure to follow up on leads and ineffective witness and subject interviews. All of these are areas that take time to master, and failures can be devastating. Losing evidence to a suppression motion can kill the even the strongest case. Evidence not seized can be the difference between winning and losing a case. If we truly care about winning cases that should be won or clearing someone wrongly suspected of an offense, we need experienced investigators.

When I speak of experience, I do not mean a few years before the agent is moved on to another position. I mean that agents with a decade or more of experience should be the norm, not the exception. Our agents are asked to handle incredibly complex investigations. Leadership needs to commit to ensuring they have the training and sustained experience to do so.

The second area of experience has to do with actual litigation experience of our prosecutors. I prosecuted my first case in 1991 and my last 23 years later in 2014. I learned something every time I prosecuted a case, but this is especially true regarding sex assault and rape cases. I am still learning five years later. The career model in the Air Force JAGC values generalists over specialists. Congress has twice passed legislation making it clear they expect the military to have a career track system that develops experienced career defense and trial counsel. I know Congress' intent is that there be a system where JAGs are able to spend their career trying cases, but that has not been done.

While I was serving, I was told multiple times at multiple stages of my career that I had spent too much time in military justice. I was a captain the first time I heard this from a senior leader. As a colonel I was an anomaly in that I was still prosecuting cases at that rank, and it was clear many JAG leaders were actually angry I was still prosecuting cases. For whatever reason, the JAGC was uneasy that a colonel was still practicing law in a courtroom. This is the antithesis of the rest of the professions in the Air Force. Pilots still fly even at the most senior ranks including four star generals, colonels who are doctors still see patients, and colonels who are clergy still give sermons and tend to their flock. But the JAGC discourages the practice of law beyond the first few years of a career that most defines the profession: litigation.

As with investigators, this approach is short sighted. Experience matters in the courtroom; it can be the difference between winning and losing. Experience matters when protecting the record from errors that can lead to reversal on appeal. Experience matters when working with survivors to a degree I cannot emphasize enough. I know without a doubt, I was a better litigator at year 23 then I was at year 15 or 10 or 5. I was better because of experience. I was better because I bucked the system and had stayed in the courtroom every year of my career.

Rather than focus on a cadre of JAGs who serve as prosecutors and defense counsel for their careers, the Air Force model is that every first assignment captain must do trials whether they have the talent or the desire to be in court. Some of those captains will serve a follow on additional assignment as a defense counsel or a senior trial or defense counsel. Most will never try a case again after making major. Begrudgingly, the Air Force will allow a couple of lieutenant colonels back to the courtroom typically after a long time away and only for a short duration. No colonels will prosecute or defend cases.

To compound the matter, there are an ever fewer number of cases being prosecuted. Thirty years ago the military prosecuted over 10,000 general and special courts a year. That has dropped to around 2000 a year if not below that number. There has been no such corresponding reduction in JAGs during this time meaning much fewer opportunities for JAGs to actually try cases. For example, in the Air Force there are approximately 600 JAG captains, yet the Air Force did less than 500 courts last year. There are simply too few courts to sustain more than a core group of experienced prosecutors and defense counsel. The old career model is not working in the new paradigm of fewer but more complex cases.

Added to this mixture is that an accused may hire a civilian defense counsel to represent him. Many of these civilian counsel are highly skilled and have decades of court-martial experience. It can be difficult for even the best captain to match up with a civilian counsel doing their 500<sup>th</sup> case. I believe that many of the acquittals are being obtained by these civilian counsel who are up against much less experienced military prosecutors. This issue again speaks to the need for more senior prosecutors to handle our most complex cases.

The structural reform I believe is necessary is to create randomly selected juries of 12 who reach a verdict whether guilty or not guilty by a unanimous consensus. The current system allows for a verdict without the court members reaching an agreement on the whether accused is guilty or not guilty. A single vote is taken and if at least  $\frac{3}{4}$  vote guilty, then the accused is guilty. If less than  $\frac{3}{4}$  vote guilty, then the accused is found not guilty. From the perspective of the accused, the process appears unfair because he knows some members may have voted not guilty and the verdict may not be unanimous. From the perspective of a victim who has just seen the offender acquitted, the process seems unfair because she

knows that a small minority might have set him free despite the majority being convinced beyond any doubt he was guilty. It's a process that garners faith on neither side.

From my prospective the single vote and minority acquittal is a major factor in the low conviction rates. I know I have lost cases where we had the majority and those members would never agreed to a not guilty. I know I won cases as a defense counsel where the same was true; an unanimous vote of not guilty would have never happened. It is also possible an unanimous vote of guilty might have never happened. At worst this scenario results in a hung jury, but for me, I would take that any day over an acquittal. I would still have another chance for conviction, and I believe the government is in a stronger position than the defense after a hung jury, especially if the accused testified in his own defense.

Regardless, I believe a 12 person jury reaching a unanimous verdict is the best way to achieve justice. The military court member process does not engender confidence in a verdict and is contrary to American values. I have full faith that experienced investigators and prosecutors operating under such a system will have a better chance of delivering justice to victims while diminishing the chance of wrongful convictions.

### **Victim Discovery Rights**

In my letter I laid out the issues facing victims and their counsel in getting access to certain documents. I propose at a minimum that victims should be provided unredacted copies of any statement they make whether in writing or recorded. Victims also must have access to any forensic analysis of their property or person. A victim must be provided notice and a copy of any motion by either party concerning any privilege the victim may have and specifically including MRE 412, 513, 514 and 615. A victim should be provided a copy of any witness statement or statement by the accused that implicates 412, 513 and 514. Civilian counsel serving as victim's counsel should have the same access to evidence as military victim's counsel.

In closing, I wish to thank you and the panel for the opportunity to address you.

Sincerely,

A handwritten signature in black ink that reads "Don m Christensen". The signature is written in a cursive, slightly slanted style.

Don Christensen, Colonel  
President, Protect Our Defenders