

SAVE OUR HEROES[®]

ADVOCATING FOR MILITARY JUSTICE REFORM AND EQUAL JUSTICE FOR ALL

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7 March 2023

**General Counsel, Department of Defense
Defense Advisory Committee on the Investigation, Prosecution, and
Defense of Sexual Assault in the Armed Forces, (DAC-IPAD)
One Liberty Center
875 N. Randolph Street, Suite 150
Arlington, Virginia 22203**

Re: Public Commentary Letter Submission

Pursuant to 41 CFR 102-3.140 and section 10(a)(3) of the Federal Advisory Committee Act of 1972, Save Our Heroes' Project (SOH) respectfully requests this public commentary letter for consideration for the meeting scheduled for 14 March 2023.

Save Our Heroes' Project (SOH) is a 501(c)(3) non-profit organization based in the State of Texas, advocating for U.S. service members who have faced wrongful military justice prosecutions, or who have been wrongfully convicted or incarcerated. SOH Officers, Board Members, and Advisors are all unpaid volunteers who are men and women, retired and former service members, business, government, and legal professionals, and retired law enforcement personnel. You can learn more about our activities and objectives by visiting our website at www.saveourheroesproject.com.

While this organization deplores any type of sexual misconduct in the military, we are also aware that the current political and social climate have fostered and enabled a plethora of injustices.

I am the Director of Investigations for SOH. I am also a licensed California Private Investigator, an honorably retired nearly three-decade Southern California Robbery-Homicide Detective, a former police academy instructor, and an Honorably Discharged Army Infantry veteran of the historic 82nd Airborne Division. I have over four-decades of investigative experience and have conducted thousands of criminal investigations, including many high-profile and complicated homicide investigations, and investigations of major international narcotic and money laundering operations involving Mexican and Columbian drug trafficking cartels while assigned to a Los Angeles County regional federal and state major narcotic task force.

I have a Bachelor of Science Degree in Business & Management, a California college teaching credential, and am a graduate of the FBI VICAP Criminal Profiler's course as well as a graduate of the Naval Criminal Investigation Service (NCIS) Cold Homicide Investigators' course.

Since 2015, I have reviewed or investigated over five hundred case examples of false allegations and/or wrongful convictions of allegations of domestic violence (DV) and sexual misconduct in the military. A majority of these cases involve some level of military law enforcement, prosecutorial, judicial and chain of command incompetence, indifference, unlawful command influence, or official misconduct.

There are numerous examples of unethical influence or interference in these cases by elected legislative representatives and/or persons in positions of influence and decision making within the Department of Defense. In some cases, the unethical influence or interference reaches a level that is a violation of law to include examples of Title 10 U.S. Code, Section 931b, (Article 131b), Obstruction of Justice, Title 10 U.S. Code Section 931g, (Article 131g), Wrongful Interference with an Adverse Administrative Proceeding, and Title 10 U.S. Code Section 837, (Article 37), Unlawful Command Influence.

Further complicating the problem is the issue of the failure to seek out evidence of innocence by military law enforcement, or ignoring such evidence in domestic violence and sexual misconduct cases when it is readily available. Instances of the failure to comply with discovery obligations in these types of cases by military prosecutors is quite common.

The charging of insignificant and innocuous charges, in addition to any allegation of DV or sexual misconduct, is almost universal. In 2016, then Defense Secretary Ash Carter, boasted in a letter to Senator Kirsten Gillibrand¹ how the military justice system is superior to the civilian justice system through the application of collateral charges to insure a conviction for some violation in the event of an acquittal for sexual assault.

“...in both civilian and military judicial systems, defendants are often tried for ‘collateral misconduct’ charges, such as lying to an investigator, in addition to an underlying crime. In both the military and civilian systems, it is sometimes difficult to obtain a conviction for sexual assault. It is a common practice for prosecutors to attempt to obtain convictions for collateral charges as well, which provide additional methods of holding an individual responsible for his or her acts in the event of an acquittal for the charge of sexual assault.”

¹ <https://dailycaller.com/2016/06/28/a-travesty-of-justice-collateral-charges-in-military-sexual-assault-cases/>

A 1979 memo² by the U.S. Department of Justice addressed their disapproval of issue of the overcharging a criminal defendant, stating in part.

“...The overcharging, (of criminal charges) is most often practiced by prosecutors to coerce a guilty plea. It has been disapproved by the American Bar Association, because intimidating a defendant who may be innocent to accept a guilty plea infringes upon the defendant’s right to a fair trial...”

In plain terms, the culture in the military in cases of domestic violence and sexual misconduct, is once an allegation is made, all investigative and prosecutorial efforts are laser focused on insuring a conviction by any means necessary. In cases in which there is insufficient evidence or probable cause to prefer an allegation to a court martial, the falsely accused will be forced to an administrative board for some type of negative discharge or receive some form of non-judicial punishment. The goal is to secure some type of sanction, or conviction for ‘something.’

In reality, what this essentially means is that if a servicemember is falsely accused, your career in the military is over, regardless of the legitimacy of the allegations, facts, evidence, or probable cause. A climate of guilt by virtue of an allegation alone sets into motion questionable and unethical methods to insure some type of conviction, non-judicial punishment, and/or removal from the service, with a loss of accrued and deserved benefits.

What is also problematic and what has received scant attention is the secret that is not a secret. The Department of Defense has created a climate of a fear of derailing a promotion or career on the part of many convening authorities, or those in positions of command or decision making when considering preferring an allegation of domestic violence or sexual assault to a court martial.

A few years back, several SOH volunteers and falsely accused servicemembers lobbied members of the Senate, specifically, members of the Senate Armed Services Committee (SASC), and were stalled on obtaining specific information.

While information has not been forthcoming, there appears to be a process in place when commissioned officers’ names have been submitted to the SASC for promotion. Based on interviews from many falsely accused military officers, they claim that those convening authorities who prefer unjustified DV and sexual misconduct cases to court martial, do so out of fear of losing their next promotion.

² <https://www.ojp.gov/ncjrs/virtual-library/abstracts/prosecutorial-overcharging#:~:text=THE%20OVERCHARGING%20IS%20MOST%20OFTEN,RIGHT%20TO%20A%20FAIR%20TRIAL.>

While it is extremely difficult to verify and the Senate Armed Services Committee has not been forthcoming with information, there appears to be a process in place wherein the names of persons who are in the decision-making process for the referral of court martial cases in DV and sexual misconduct allegations; if those persons do not make such a referral, their names are flagged by the SASC, and they will lose their next promotion.

While the efforts of SOH and other organizations have been largely unsuccessful in obtaining specific information, there appears to be either a written or unwritten rule with the SASC that any member of the SASC can down vote any officer for promotion and the SASC member does not have to provide their name or provide a reason. Recommendations to the SASC for a rule that any member of the SASC who downvotes a promotion for any servicemember must identify themselves and provide a reason in writing or in transcribed committee hearings has been ignored.

This apparently is widely known within those ranks whose responsibility it is to make decisions whether to send an allegation of DV or sexual misconduct to a court martial or other administrative action; that if they do not refer a case to court martial or other action, they will lose their next promotion or may jeopardize their own career.

The DAC-IPAD Committee has previously addressed the problem of too many cases being referred to a court martial that are lacking in facts, evidence and probable cause.

For lack of a better term, this is essentially a form of 'bullying.' A form of bullying, creating an atmosphere that if a convening authority does not send any and all cases of allegations of DV or sexual misconduct to a court martial or administrative action, even when the facts and evidence do not support such a charge, their promotions or careers are jeopardized. Of course there are cases in which facts, evidence and probable cause are insufficient, and no referrals are made.

One simple solution can be had in the form of transparency. The DAC-IPAD Committee can make a recommendation for a rule change, or to author a rule that any member of the Senate Armed Services Committee who down votes an officer promotion, must identify themselves and provide a written reason or a transcribed oral reason given in committee hearings.

There would be virtually no cost to this process, and would give a form of due process to those who have been denied a promotion by the SASC. This would also give the servicemember who had been denied a promotion, a process with which to administratively address their loss of promotion.

Another recommendation that the DAC-IPAD Committee can make, is for the formation of a Conviction Integrity & Accountability Unity, similar to what many prosecutors' offices are forming all across the country. I emphasize the recommendation that such a unit must be both a conviction integrity and an accountability unit, and it should not be limited to convictions, but also to cases in which a known and provable false allegation resulted in an unjustified investigation, unsubstantiated charges were filed, or unsupported charges resulted in an acquittal.

As countless news articles have revealed about the problem of false allegations and wrongful convictions in the military justice system; in all cases, not just DV and sexual misconduct cases; when a military law enforcement agent, prosecutor, judge, person in the chain of command, Department of Defense official or elected representative engages in misconduct or unethical conduct, there is virtually no accountability.

While the efforts to reduce the incidents of those who commit acts of DV or sexual misconduct are noble, there must also be noble and common sense reminders, direction and policy to those in positions who decide whether an investigation should be launched, a reminder that there still exists a presumption of innocence and constitutional and due process protections, and of their legal and moral obligation to insure a fair and unbiased process at all stages.

As the committee is keenly aware, there have been many examples of egregious misconduct in the military justice system, and virtually no one has been held accountable. When a military law enforcement agent, prosecutor, judge, or person in the chain of command is incompetent, indifferent, ignores evidence of innocence, fails to disclose evidence of innocence, or makes some type of egregious decision that could negatively affect a servicemember for life, there must be some level of accountability, whether that is re-training, administrative action, or a criminal referral.

Just within the past few years, I have investigated a number of cases that involve incompetence, misconduct, unethical conduct or potential criminal culpability and have listed a few examples below. Due to privacy concerns I will not disclose the identities of the negatively affected servicemembers, nor provide any additional facts in order to protect their identities.

- A case of an officer servicemember who was falsely accused of sexual misconduct by a teenage intermediate school aged stepdaughter during a contentious divorce proceeding. During the investigation, it was learned that a military law enforcement agent who had a teenage daughter of the same age as the accuser and who was friends with the accuser, and who was one of the agents investigating the allegation, supplied alcoholic beverages to the agent's own daughter and the accuser during a 'sleep over.' No referral for an investigation or inquiry of the offending military law enforcement agent was conducted.

- A case of an enlisted servicemember who ended a dating relationship of over a year with another servicemember. The servicemember who was rejected, attempted for several months to regain, or re-ignite the relationship by making social media posts, sending text messages, and making phone calls professing the rejected servicemember's love for their former love interest, in unsuccessful attempts to re-ignite the relationship. When the rejected servicemember came to the realization that the relationship was not going to happen, the rejected servicemember made a claim of sexual assault. During the course of the investigation, it was discovered that the rejected servicemember had engaged in a sexual relationship and was cohabitating with one of the military law enforcement agents who was investigating the case. No referral for an investigation or inquiry ever occurred.
- A case of a falsely accused officer servicemember of sexual misconduct by the spouse of another officer servicemember, where the statements of an uninvolved third party witness were ignored and where military law enforcement agents and prosecutors ignored months of social media postings by the accuser of the accuser's dissatisfaction with the location of the military installation where the accuser was residing. The accuser's social media posts revealed that the accuser was willing to do anything to be re-assigned to a preferable duty station location, including falsely accusing a servicemember of sexual misconduct.
- A case of an officer servicemember who was falsely accused of DV and sexual assault by a civilian spouse, wherein a military JAG prosecutor suborned the perjury of the false accuser and other prosecution witnesses to keep the charges from being dismissed, then the prosecutor committed perjury in a hearing in which it was alleged that this same prosecutor had committed unlawful command influence. There was no inquiry or sanction of the offending JAG prosecutor.
- A case of an enlisted career servicemember who was married to another career enlisted servicemember. While the career servicemember was deployed, the career servicemember was made aware that his/her spouse was flagrantly engaged in multiple sexual affairs with other servicemembers and posting of those affairs to social media. When the career servicemember returned from deployment, the career servicemember asked his/her spouse for a divorce. The offending spouse informed the career servicemember that if they attempted to seek a divorce, the offending servicemember will make an allegation of spousal sexual assault. The career enlisted servicemember attempted in vain to seek help from Family Advocacy and his/her command, showing numerous social media posts of the offending servicemember, warning of potential false allegations, and was ignored and was told that nothing could be done. The highly trained and extremely competent career enlisted servicemember then chose to voluntarily leave

the service, in order to avoid being subjected to, in his/her words, 'a kangaroo court witch hunt.'

While a majority of cases involve female accusers and males who are accused, there have been a growing number of female servicemembers who have been falsely accused, and I have provided a few examples.

- A female enlisted servicemember in a same-sex marriage with another female enlisted servicemember who made a false allegation of domestic violence and sexual assault. After numerous changed stories of the facts, timeline and version of the events led to no formal charges, the falsely accusing female servicemember was never held accountable.
- A female officer servicemember was falsely accused by an enlisted career servicemember of sexual misconduct and although the circumstances of the allegation was physically impossible almost immediately, the female officer servicemember was kept in an a position where she had no official duties for over a year before finally being cleared, and it was later discovered that the male enlisted servicemember made the false allegation in order to be relieved of responsibility for his own official misconduct while he was under investigation.
- A female officer servicemember was falsely accused of domestic violence by a male officer servicemember, six months after the alleged incident. Coincidentally, the false allegation by the male officer servicemember occurred when his own misconduct was discovered. Despite overwhelming evidence of the falsely accused female officer's innocence, military law enforcement agents displayed indifference, ignored evidence of innocence of the falsely accused female officer servicemember, and never sought out any evidence of innocence.

I routinely engage, share, and discuss examples of false allegations of domestic violence and sexual misconduct in the military with the majority of national non-profit and advocacy organizations in the country. It is commonly agreed that the military justice process in most cases involving allegations of domestic violence and sexual misconduct, has metastasized into a 'kangaroo court.'

It is estimated by many advocates and persons who have knowledge of the injustices involving allegations of DV or sexual misconduct in the military, that in the past 12-15 years, somewhere between 400-600 falsely accused servicemembers have been wrongfully convicted and have either have been incarcerated and served their sentences, are still incarcerated in military detention facilities, or who have experienced some form of wrongful administrative action.

Save Our Heroes' wants what all members of the DAC-IPAD Committee wants, and that is to reduce the incidents of domestic violence and sexual misconduct in the military, and to hold those responsible for those crimes to be held fully responsible. What we cannot do however, is to eviscerate constitutional and due process protections simply for the purposes of continuing with a false political narrative that there exists a sexual assault 'epidemic' in the military.

According to a 2021 report³ by Michigan State University College of Law, the National Registry of Exonerations, there were 161 exonerations in 2021. Official misconduct was cited in 102 of those exonerations and 107 of those exonerations involved false allegations.

What we can do however, is to make changes and improvements to the system to hold offenders accountable, to hold accountable those who make false allegations, and to hold accountable those in positions of investigating, prosecuting, and those in the chain of command accountable for incompetence, indifference, and misconduct.

The military justice system must uphold the presumption of innocence and must restore a level of integrity, professionalism, and fairness into the process of investigating these types of crimes. Not all servicemembers who make allegations of DV or sexual misconduct, nor servicemembers who deny that they committed acts of DV, or sexual misconduct are telling the truth.

When the military justice system initiates a DV or sexual misconduct investigative and/or prosecutorial process with the pre-determined or pre-judged assumption that the allegations are true and conduct that process with the sole goal of ensuring some form of sanction, then the military justice system has succumbed to the methods of a banana republic.

This does not need to be a long drawn out or complicated process. Simple rule or policy changes that can be implemented quickly can require transparency in the 'blacklisting' in the promotional process with the Senate Armed Services Committee, and a directive from the top down of the Department of Defense to insure integrity of the military justice process until the formation of a functioning Conviction Integrity and Accountability Unit.

Those in the chain of command who make decisions whether to refer a case of DV or sexual misconduct that is lacking in facts, evidence, or probable cause, should not be fearful that their decision to not forward a case may result in a loss of promotion or a loss of their careers for doing the right thing.

³ <https://www.law.umich.edu/special/exoneration/Documents/NRE%20Annual%20Report%202021.pdf>

There is a need to begin a process and campaign to hold false accusers accountable, and to restore the good and professional reputations of those who are falsely accused whether they are male or female.

Those in positions that make decisions whether to prefer a case to court martial or other administrative action, need not be fearful of negative career implications, if their decision is not enjoyed by a particular group, organization, appointed officials, or elected representatives.

In an April 1, 1940, speech⁴ by then Attorney General Robert H. Jackson, while addressing a group of federal prosecutors he stated in part.

***“...While the prosecutor at his best is one of the most
beneficent forces in our society, when he acts from malice'
or other base motives, he is one of the worst...”***

Very respectfully,
/s/ Michael Conzachi
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cc

⁴ <https://www.justice.gov/sites/default/files/ag/legacy/2011/09/16/04-01-1940.pdf>