ONE YEAR LATER…MILITARY JUSTICE SYSTEM HAS BEEN DEMONSTRABLY PROVEN TO REMAIN BROKEN, CONTINUES TO FAIL OUR HEROES IN UNIFORM AND WEAKEN OUR MILITARY

Top Reasons Why the Broadly Bipartisan Military Justice Improvement Act Is Still Needed to Finally Give Our Brave Men and Women Serving Our Country a Fair Shot at Justice

[Excerpt of portion related to SVC Program. For full article please see: http://www.gillibrand.senate.gov/mjia/myth-vs-fact]

4) SPECIAL VICTIMS' COUNSEL HAVE NO LEGAL STANDING IN COURTS-MARTIAL, ARE RETALIATED AGAINST AND POWERLESS TO HELP THEIR CLIENTS NAVIGATE A BROKEN SYSTEM

As part of last year's efforts to address the crisis of sexual assault in the military, Congress created the Special Victims' Counsel (SVC) Program -- a flagship reform that has rightly been characterized as an important step in changing the culture to protect victims. Yet this flagship program is deeply flawed and SVCs are facing the same broken system that victims face.

- **Some Military Criminal Investigating Offices continue to contact and interrogate victims directly instead of through their Special Victims' Counsel**. SVCs are intended to help survivors navigate the military justice system, and yet there are reports of MCIO investigators interrogating survivors without their SVCs. They are asking the survivors about their sexual background – which is barred under the rape-shield rule – and causing many survivors to decide that they do not want to participate in the investigation and court-martial. Some investigators have also convinced survivors that they should waive their rights to privileged communications with the therapist that is treating them for the sexual assault, and this privileged information then is being shared irresponsibly.

- **The SVCs are limited in their ability to protect survivors during Article 32 hearings and courts-martial.** Special Victims' Counsel have insufficient recourse to enforce their clients' privacy rights and ensure that they not be excluded from judicial proceedings. As it currently stands, if an Article 32 Investigation Officer or military judge rules to admit evidence regarding a victim's sexual background, privileged communications with a therapist, or to exclude a victim witness or their SVC – decisions which occur with depressing frequency – the victim has no recourse to appeal and overturn the decision-maker's negative decision in a timely fashion.

- **Some SVCs have been retaliated against because of their zealous advocacy on behalf of their clients; others are convinced they cannot prevent their victims from being retaliated against.**

- **SVCs feel that they may not help survivors with claims or complaints against the military**, such as: Congressional inquiries, Employment Opportunity (EO) complaints, Inspector General (IG) complaints, and Freedom of Information Act (FOIA) requests.

- **SVCs cannot help with criminal/adverse administrative actions**, such as courts-

martial, non-judicial punishment, and adverse administrative actions, such an administrative chapters or letters of reprimand. Survivors have expressed a desire to be represented in criminal and adverse administrative actions by the attorney with whom they have already shared their personal situation and built a relationship, *i.e.*, their SVC.

5) HISTORICAL NOTE: SUPREME COURT PRECEDENT EXISTS FOR REMOVING CONVENING AUTHORITY FROM CHAIN OF COMMAND

Contrary to the claim that removing convening authority for serious non-military crimes is a radical approach, America has already had an 18-year period where that was exactly the case.

Under Chief Justice Warren Burger, the U.S. Supreme Court ruled in the 1969 case *O'Callahan v. Parker*, that unless the military could establish a "service connection" showing that an offense had direct bearing on military order and discipline, a court-martial lacked jurisdiction to try the case.[18]

This decision was rooted in recognition of the potential for command influence to cloud independent judgment and a corresponding desire to limit command-driven justice to as narrow a domain as possible. In support of this position, the Court cited the Fifth Amendment, which predicates court-martial jurisdiction on the military nature of the offense rather than the military status of the offender, as well as the documented suspicion of broad court-martial powers prevailing at the time of the Framers.[19]

Two years later, in *Relford v. Commandant*, the Court addressed more specifically the factors to be taken into account when determining whether cases are service-connected, focusing upon the place of the crime's commission, the character of the crime, and the military duties involved.[20] With this guidance in place, the dual-track system for military and non-military offenses outlined in *O'Callahan* remained in effect throughout the 1970s and 1980s, ending only when a differently constituted Supreme Court overturned its earlier ruling in *Solorio v. United States* (1987).[21]

[18] *O'Callahan v. Parker*, 395 U.S. 258, 273-74 (1969).

[19] *O'Callahan v. Parker*, 395 U.S. 258, 261-274 (1969).

[20] *Relford v. Commandant, U. S. Disciplinary Barracks, Ft. Leavenworth*, 401 U.S. 355, 365 (1971).

[21] *Solorio v. United States*, 483 U.S. 435, 450-51 (1987); *See O'Callahan*, 395 U.S. at 274.