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September 12, 2015

The President
The White House
1600 Pennsylvania Avenue, N.W.
Washington, DC 20500

Re: Transformational Anti-Sexual Assault Initiatives for the Armed Services

Dear Mr. President:

Thank you for your superb leadership. Godspeed in the War on Terror and all other missions, foreign and domestic.

Eighty percent (80%) of Americans believe sexual assault in the military is an “extremely important” or “very important” issue (*Washington Post-Pew Research Center Poll*, January 2015 and *Pew Research Center Poll*, June 12, 2013) – indicating the public believes the Pentagon is failing to adequately protect the daughters of America from sexual assault. The concerns of Americans might be higher if they were generally aware that U.S. servicemembers raped an estimated 17,000 women in Europe and Africa during the World War II era. Those crimes occurred in the larger context of other Allied powers engaging in “retaliation” rapes of over 2-million women and girls who lived in countries of Axis powers. See British historian and writer Keith Lowe, *Savage Continent* (2012) at 51-59.

Our law firm includes members with prior military service who are fathers of daughters. Our practice includes military administrative law; however, we are unaffiliated with any sexual assault victim in the military. On behalf of our women servicemembers who bravely and unselfishly serve this great county, veterans, advocacy groups and the public, our law firm applauds you for the Administration’s enactment of the largest sexual assault provisions ever signed into law. We stand with you in your efforts to usher in “exponential” transformational change in the operational principles of social justice and the character of our Armed Forces. Accordingly, we offer foundations vital to effectuating the monumental change sought by the Administration and Congress.

Executive Summary. Our proposal consists of external controls on the military that – in conjunction with efforts by the Administration and Congress – form a constellation of sexual assault escape valves for servicewomen at every military level, through seven (7)

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points: (1) an executive order by The President; (2) a new anti-sexual assault command, the National Defense Command, under the leadership of a dual-hatted 4-star chief of the command and commanding general or admiral; (3) appointing the 4-star chief of the National Defense Command as a member of the Joint Chiefs of Staff; (4) creation of the *Department of Defense Special and Confidential Board for Correction of Military Records (for Sexual Assault and Related Matters)*; (5) enactment of the *Military Sexual Assault Victims' Access to Federal Courts Act*; (6) Enhanced Special Security on a 24/7 Basis for Each Installation; and, (7) Heightened Personnel Evaluations.

This document is essentially the executive summary of our proposal, and is intended for senior leadership. *We have accompanied this document, however, with a memorandum containing supporting discussion that is designed for any interested staff.*

Major Recommendations:

■ 1. ***Executive Order.*** An executive order, *Ending Sexual Assault Against Women in the Armed Forces*, within 365 days, including (a) national anti-sexual assault policy within the Armed Forces; (b) an order to the Secretary of Defense to implement the Commander-in-Chief's directive for the withholding of the authority of all Army, Air Force and Naval officers below the rank of general or admiral to take initial disposition action regarding sexual assault and related cases, and the reservation of that initial disposition authority to the first general or flag officer in the chain of command, pursuant to ***Manual for Courts-Martial, United States, 2012***, at *Rule for Courts-Martial 306* (a superior commander may "withhold the authority" of a subordinate "to dispose of offenses in individual cases, types of cases or generally"); and, (c) establishment of *The Commander-in-Chief's Standing Commission For the Elimination of Sexual Assault in the Armed Forces*, consisting of a bipartisan and diverse 15-member panel. The Commission's duties include conducting investigations and making recommendations to the Commander-in-Chief and Congressional Armed Services Committees for improvement.

■ 2. ***New Anti-Sexual Assault Command.*** The establishment of a global DoD-level anti-sexual assault command – the National Defense Command – delegated concurrent jurisdiction over all sexual assault and related matters worldwide, with the authority to exercise primary command jurisdiction over any sexual assault matter at the request of any headquarters or field command, or involuntarily in the event a field command engages in anti-sexual assault malfeasance or actions contrary to the best interests of readiness. This approach maintains the chain of command intact while providing a redundancy or "backup" command to offset mission failures by field commands. The National Defense Command would also absorb the Defense Sexual Assault Prevention and Response Office.

■ 3. ***Commander, National Defense Command, Serves on Joint Chiefs of Staff.*** The National Defense Command would be directed by a 4-star commander who also serves as an additional member of the Joint Chiefs of Staff, and functions as the principal military advisor to the Commander-in-Chief and the Senate and House Armed Services Committees regarding the role of women in the Armed Forces, and sexual assault and related matters in the Armed Forces. This move leaves little doubt as to the consecration of The

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Commander-in-Chief, Congress and the Secretary of Defense regarding (i) the full utilization of the potential of servicewomen in the Armed Forces; (ii) the elimination of sexual assault; (iii) representation of the interests of women and other disempowered groups at the table of the pinnacle of power in the Armed Forces; and, (iv) direct access between the representative of the disenfranchised groups in the military and The Commander-in-Chief and the Armed Services Committees of Congress regarding the removal of remaining barriers.

■ **4. *Reversing Career Damage Through A Fair DoD Special and Confidential Board for Correction of Military Records (for Sexual Assault and Related Matters)***. Signal the significance of The Commander-in-Chief's and Congress' anti-sexual assault measures through the vesting of the Secretary Defense or delegee as the final appellate authority for all sexual assault and related matters arising within Army, Air Force and Naval Boards for correction of military records (BCMRs). The appellate entity would be styled the *Department of Defense Special and Confidential Board for Correction of Military Records (for Sexual Assault and Related Matters)*.

Additionally, vest the proposed DoD Board with the authority to address any petition from any servicemember at any level – basic training, the field, offices, deployments, installations, unified and major commands, and Offices of Service Secretaries – for extraordinary or expedited relief regarding sexual assault and related issues, including transgender and other sexual orientation matters. Expedited relief would be particularly relevant for servicemembers feeling desperately isolated or suicidal as a result of actual or attempted unwanted sexual activity by supervisors, as well as facing irreversible or devastating health, financial or career concerns. Additionally, expedited relief by the DoD Board would be significant since the Service Boards do not provide for expedited relief.

This proposal is a derivative of Congress' 1946 authorization of a Secretary of War Board for Correction of Military Records (*The Legislative Reorganization Act of 1946*, P.L. 601-79th Cong., § 207 at 30), and War Department Chief of Staff General Eisenhower's implementation of that law by issuance of *War Department Memorandum 400-20-1, Secretary of War's Board for Correction of Military Records*, January 1, 1946.

One reason for the installation of the DoD Board is because the Army and Naval boards for correction of military records are in substantial noncompliance with Congressional intent regarding BCMR adjudication of servicemember challenges to the credibility and fidelity of the judgment, motives, discretion, decisions, and actions of their alleged sexual assault perpetrators – including or related to superiors, the chain of command, and installation entities entrusted with the duty to protect them and resolve sexual assault claims and their ramifications. Given the avalanche of problems confronting victims of sexual assault, it has been and would continue to be an injustice to subject sexual assault and related victims – and persons sustaining reprisals for assisting them – to the profound unfairness of the Army and Navy systems. While we have no objection to the Air Force Board, for purposes of uniformity and fairness to servicemembers, it would also fall under the umbrella of the proposed DoD Board for appellate review.

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Accordingly, at this point, the most prudent and expedient course of action is to take the surgical approach of creating a sexual assault appellate board, the *Department of Defense Special and Confidential Board for Correction of Military Records (for Sexual Assault and Related Matters)* and ensure it operates in a progressive manner that protects the rights, interests and fairness of servicemembers. Thus, the DoD Board would, among other matters, (i) include a cadre of professional, full-time or permanent administrative law judges or lawyers, as opposed to all collateral duty employees currently in effect under the 1946 system; (ii) conduct hearings in certain credibility cases, as opposed to the Navy's refusal to conduct any hearing for 20 years and the Army's virtual repression of hearings; (iii) take the time actually required to fairly deliberate a case, as opposed the average 4-minutes of adjudication time under the Army system; and, (iv) end the presumptively reliable" status ascribed to statements by supervisors, command officials, and equal opportunity investigating offices, etc. – entities, as inferred by RAND studies, and as probably known to many senior officers and noncommissioned officers, that too often are involved in sexual assault and/or shielding the command from the allegations.

Further, all sexual assault and related BCMR decisions at the Service levels should be automatically reviewed by the DoD Board unless the applicant declines the automatic appeal. The automatic appeals process should be revisited after a 5-year period – which ensures the Secretary of Defense or delegee shall have a direct hand in the architecture of the process as DoD attempts to quash sexual assault.

■ **5. *Military Sexual Assault Victims' Access to Federal Courts Act.*** At the end of the day, many sexually exploited women servicemembers are cutoff from a Pentagon apparatus that is effectively unresponsive. Further, for military servicewomen, the road to federal court intervention and more active supervision of the military's mismanagement of sexual assault is fraught with an avalanche of obstacles. Accordingly, proposed is a recommendation that the Commander-in-Chief submit to Congress a narrow proposal to exempt sexual assault appeals arising from the *Department of Defense Special and Confidential Board for Correction of Military Records (for Sexual Assault and Related Matters)* from the requirements of Title 5 USC § 706 (*Scope of Review*), mandating federal courts to uphold of a final decisions by Service Secretaries through boards for correction of military records, unless the servicemember can: prove the decision was arbitrary and capricious; overcome the rebuttable presumption that military administrators discharge their duties lawfully and in good faith; establish the decision was unsupported by substantial evidence; or prove the decision was contrary to law or procedure.

■ **6. *Enhanced Special Security on a 24/7 Basis for Each Installation.*** To obtain the hardening of security for women servicemembers, and as a show of force, each installation is required to appoint, train and deploy special security patrols – extra duty for personnel on the installation directed to augment the installation military police.

■ **7. *Heightened Personnel Evaluations.*** Link policy to implementation through heightened military and civilian personnel evaluation standards regarding the prevention and disposition of sexual assault and related matters. Accountable specialty areas include officers; commanders; lawyers; law enforcement; senior noncommissioned officers;

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military personnel; and personnel involved in the prevention, assessment, investigation, review, recommendations, decisions, or other involvement at all levels, regarding sexual assault and related matters.

Discussion:

The proposals above, in effect, emphasize a reinvestment in the architecture of human capital within the Pentagon in a manner that resolves the contextual dilemma regarding sexual assault posed by the essential need for an effective command structure – yet, that is undermined by its historical failure. In that process, this discussion focuses on the beginning of the anti-sexual assault campaign in the form of the executive order and the National Defense Command, which are essentially the main attack against sexual assault. Subsequently, this section addresses the military’s last chance to correct a legal error or inequity raised by a servicemember before a Service Secretary’s BCMR finalizes the case. The latter is a critical stage because if the petition is rejected, many servicemembers – if they have the knowledge, will, time and financial resources – are forced to bear the costs of legal fees and court costs in federal litigation against a battery of lawyers from the BCMRs, civil litigation lawyers on the staff of The Judge Advocate General, and attorneys designated by the Department of Justice. Those resources would be more wisely spent investing in a transformation of the system to make it fair in a manner that is commensurate with the service and sacrifice of the servicemembers, rather than defending the status quo on the flawed premise that it (status quo) is always right.

The National Rallying Point: Executive Order. Serving a purpose similar to President Truman’s 1948 *Executive Order 9981*, the proposed executive order is at the heart of the anti-sexual assault campaign. Through it, The President, as Commander-in-Chief, issues a doctrine, rallying point, objective and end-point for those in the Pentagon, the field, public sector, private sector and public generally. This would constitute a clear and succinct beacon for men and women servicemembers victimized or threatened by sexual assault, and members of the LBGT community victimized by discrimination; as well as set forth The President’s expectations and directives for personnel of the Armed Forces.

Additionally, the reservation of the initial disposition of sexual assault and related matters to the first general officer or admiral in the chain of command, ensures a seasoned and responsible senior officer will make the initial call about matters that, unfortunately, too often involve officers, noncommissioned officers, unit leaders, and other leaders. It is important to involve an officer who rises above the personal connections – such as a battalion commander’s desire to “save” one of his company first sergeants with whom he served in war – and render disposition judgment in an objective manner that is accountable to the Pentagon, the National Command Authority and Congress.

Rebalancing the Force to Combat an Internal Threat: National Defense Command / Anti-Sexual Assault Command. Every four years the Pentagon’s Quadrennial Defense Review rebalances the military in terms of areas such as security challenges, power projection, investment in readiness, expanding critical capabilities, and force modernization. In contrast, the Pentagon is engaged in a strategic stalemate, if not defeat,

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with its own military personnel acting as sexual marauders who sexually assaulted 1 in 5 servicewomen in 2014, as was approximately the case in 2002, with nearly 50% of the attacked servicewomen penetrated and the annual medical care and societal costs for sexual assault reaching a staggering \$4.4 billion annually.

As Chairman Dempsey explained to Senator Machin and the Armed Services Committee in 2013, one of the reasons the Armed Forces failed to make anti-sexual assault progress was because he took his “eyes off the ball.” However, if 1 in 5 tanks, aircraft, missile systems, and ships sustained major performance problems, the Pentagon would expeditiously fix the problem and detect the systemic cause. Likewise, if twenty percent (20%) of the troops in an all-male Army or Marine division, surrounded in a foreign country, were sexually assaulted by an enemy, the Pentagon would respond decisively and immediately with lethality. But similar problems in the context of women do not seem to galvanize a more ardent response in the Pentagon, despite the great interest in a remedy by The President, Congress, women servicemembers and the public.

In any event, forging ahead with no meaningful analysis for structural injustice, the Pentagon asserts as its critical path to the problem that the nation should have faith in its revalidation of commanders as protectors of women servicemembers. However, realistically it is rational for planning purposes to assume some commands and commanders will fail in the execution of the anti-sexual assault mission – as the historical record reveals indisputably. What is the Pentagon’s contingency plan for such command failure? Rather than to manage sexual assault issues with existing administrative systems infected by structural injustice that retard the War Against Sexual Assault, there should be a recognition of structural injustice, and a synchronized effort to correct it at all levels with a paradigm change. That is why we are writing The President.

One response to the sexual assault issue involves modernization by strengthening America’s defense through greater investment in human capital: women servicemembers via the National Defense Command. Sitting at the right hand of the proposed executive order, is the backbone of our proposal in the form of a Department of Defense anti-sexual assault command, styled the National Defense Command. ***Its main missions are to achieve decisive victory over sexual assault and related issues, and ensure that commands and organizations do not fail in their mission to execute anti-sexual assault policy in the military.*** A 4-star general or admiral, who is dual-hatted as the chief and commander, would lead the National Defense Command and serve as a member of the Joint Chiefs of Staff.

The National Defense Command would serve as a cooperative worldwide advisor to organizations dealing with sexual assault issues at the Service level (including boards for correction of military records (BCMRs) and equal opportunity), unified commands, joint commands, specified commands and major commands and their subordinates, among others. Not without teeth, the National Defense Command would be vested by The Commander-in Chief with secondary concurrent jurisdiction over all sexual assault cases worldwide; and, with the approval of the Secretary of Defense or his delegee, may under certain circumstances involuntarily transfer sexual assault cases from commands

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mishandling them. Upon such a transfer, the National Defense Command may exercise its discretion to include no action to courts-martial.

This approach projects the anti-sexual assault message around the globe in an observable manner: on the ground at the locations of the troops, giving women and others tangible hope and avenues for relief. The command is to lead a synchronized global approach to the elimination of sexual assault by preventing sexual assault, ensuring expeditious responses to sexual assault allegations, and ensuring that review organizations apply the intent of The President, Congress, Secretary of Defense and Service Secretaries.

The National Defense Command is not a policy organization, but is the equivalent of a warfighter on the ground where servicemembers are located, similar to the Army's establishment of the Army Trial Defense Service – a Pentagon-based stovepipe organization established in the 1980s that placed independent criminal defense lawyers worldwide throughout theater, regional and installation offices. That outfit, unbossed by commands, vigorously challenged unjust command practices on behalf of servicemembers.

There are about 800 US military installations overseas worldwide at a cost of at least \$100 billion annually, as well as 4,000 military installations in the United States. Dr. David Vine (Associate Professor of Anthropology at American University), *Base Nation: How the U.S. Military Bases Abroad Harm America and the World* (2015). To the extent that women servicemembers are stationed in some of those locations, many are isolated in sexual cauldrons with the command's word as controlling. That, alone, is reason for a world-wide command for anti-sexual assault.

The War Against Sexual Assault requires a paradigm change, and we believe the National Defense Command is a meaningful start. Rather than to shuffle reports in the Pentagon and allow the anti-sexual assault measures on the ground to remain exclusively in the hands of commands and installations with a historically fledging, if not failing, record, the National Defense Command is a simultaneous and alternative route that works with commands to improve, but will work around problematic commands to execute the mission.

At the end of the day, there is a need for besieged servicewomen, servicemen and members of the LBGT community in distress, to be able to send a letter or email, or make a telephone call, to an independent agency that has the organic power to do something about it immediately, such as investigate, confer with the chain of command, and take curative action itself – as opposed to servicemembers languishing for months or a year or more. The National Defense Command serves that purpose. All commanders should have an incentive to put their best judgment forward as opposed to being perceived by a DoD-level agency under the command of a four-star general or admiral as unable to manage and administer their commands regarding the integration of women and the LBGT community.

Modernization of 1946 Architecture: Department of Defense Special and Confidential Board for Correction of Military Records (for Sexual Assault and Related Matters).

Historically, personnel management is fraught with structural injustice. The military's World War II oppression of personnel was subjected to the public spotlight when 16-million servicemembers were under arms in World War II. As a result, in 1945 and 1946, the public was bitterly distressed at the military's harsh treatment of its

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servicemembers and demanded that Congress remedy the problem. Congress responded quickly by establishing novel Service boards for correction of military record imbued with unparalleled Congressional powers to correct not only legal errors, but personnel results that were legal but unjust in terms of equity, fairness and policy. For example, if a servicemember died before signing papers denoting insurance benefits for his wife and family, BCMRs may *change his records to reflect the he did sign* the insurance papers, thereby, legally entitling the servicemember's family to his death insurance benefits.

Two generations later, however, in the 1990s, a distressed Congress determined that BCMRs “abdicated their independence to the uniformed services”; failed to perform “adjudication” duties fairly; and, were “unresponsive, bureaucratic extensions of the uniformed services.” *Senate Committee on the Armed Services, Senate Report 104-112* (104th Cong., 1st Sess. (1995) at Section 555; *House Report 104-50*, January 22, 1996, Section 554a (*Review of BCMRs*); *House Committee on National Security Report, 105 House Report 532* (May 2, 1998). Congress reaffirmed its 1946 intent that BCMRs were “*administrative arms of Congress entrusted with the responsibility to be ‘guarantors of fair and equitable treatment for thousands’ of active duty and former Members of the Armed Forces and ‘veterans and retirees.’*” Congress reminded America of the fragility of the rights of servicemembers, the enormous power wielded by BCMRs, and the great consequences at stake before BCMRs by those servicemembers who sacrifice so much.

Yet, a generation later – today – there is a partial reversal of the tide, as elements of the BCMR bureaucracy have transubstantiated that Congressional intent into a virtual suppression of all hearings in the Army and Navy – with the Navy having a record of twenty (20) consecutive years without a hearing. Similarly, in November 2014, the executive director of the Army BCMR stated on National Public Radio, in effect, that the Army board typically spends slightly less than four minutes adjudicating each case (including constitutional, statutory, regulatory, policy, administrative and equitable matters), and inferred that was fair. That prompted our law firm to send to Secretary Hagel an objection, in November 2014, on behalf of servicemembers, citing a litany of problems in the BCMR system and proposing recommendations for change, including for sexual assault cases. *See* Jordan Patrick Cooley, *Memorandum to Secretary of Defense Hagel, et. al., Protecting the Due Process and Fairness Interests of Active Duty Servicemembers, Coast Guardsmen, National Guardsmen, Reservists, Veterans, former Servicemembers & Retirees From Unfair Adjudications By the Armed Forces Boards for Correction of Military Records* (November 23, 2014) (Re-issued Corrected Copy) (53-pages) (arguing, among other matters, that the Army and Navy BCMRs are unresponsive to The President's call for “exponential progress” regarding the “profound injustice” of sexual assault).

While eliminating hearings accelerates case adjudication and compliance with the Congressional deadline for case resolution, the Army's and Navy's blanket suppression of hearings erodes the adjudication process, by jettisoning the development of material facts regarding the credibility of (i) military supervisors frequently involved in misconduct regarding their young female subordinates, (ii) members of the chain of command who may have participated in the sexual assault or played a role in obstructing the progress of the complaint, or (iii) other witnesses. Lacking an in-person assessment of the demeanor or

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conduct of the witnesses at a hearing, Army and Navy BCMRs are content to rely on “official paperwork” prepared or influenced by persons with a significant probability of having some relationship to the sexual assault (*see* the RAND Reports and summaries in the accompanying memorandum to this communication) in resolving victim servicemember challenges to discretion, motives, and credibility of military administrators.

Further, after refusing to conduct a hearing, the Army and Navy deny relief to applicants based on a boilerplate claim that the applicants failed to overcome the presumption of administrative regularity regarding the sanctity of those records. Moreover, perpetrators are not challenged, commanders do not feel uncomfortable and the only thing that a besieged servicewoman violated by a culture of sexual assault may have in her hand may be a denial letter and a right to engage in federal court litigation.

This flawed system fails to adequately evaluate all challenges to the chain of command. In the last several years, the Pentagon has opened about 100,000 positions to women and has welcomed the LBG^T community. That commendable social progress is undermined by the 1 in 5 sexual assault rate and continuing gender discrimination, which are omens of resistance by elements of the military to women competing in traditionally male positions, and fair dealing regarding the integration of the sexual orientation community. And, those problems are compounded by a partially unfair Army and Navy BCMR adjudication process. But, we are confident that the DoD BCMR and the *Commander-in-Chief’s Standing Commission* will correct those flaws.

Conclusion

With a broader vision, the Pentagon and America can reverse the sexual assault tide flooding the Armed Forces. United – the public, private and nonprofit sectors – we can contribute to this generation’s effort to deal with the question of expanding the military’s tent for at least some of those previously excluded or treated unfairly. In that regard, our law firm and colleagues in the legal and retired military communities are pleased to provide as much assistance as we can. Finally, please find supporting discussion for any interested staff in an accompanying memorandum; and, again, we salute your outstanding, progressive and historic leadership regarding this matter.

Most Respectfully,

original signed by Howard G. Cooley

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cf:

Senate Armed Services Committee
House Armed Services Committee

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