Air Force Special Victims’ Counsel Program

Breaking Ground in Military Justice

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Overview

- The Military Justice system
- Program background & structure
- Eligibility & client representation
- Role & duties of a Special Victims’ Counsel
- Program statistics
- Future of the SVC program
- Measuring effectiveness
Uniform Code of Military Justice (UCMJ)

- Federal law (statutes)
- Supplemented by Executive Order (POTUS)
- Reviewed annually by the Joint Service Committee on Military Justice

UCMJ Jurisdiction

- Defines the offenses for which a person subject to the Code may be court-martialed or otherwise disciplined
- Applies 24/7, world-wide for active duty personnel
  - Concurrent jurisdiction may still be shared between State, Federal, or Foreign governments
- Goals of the UCMJ:
  - Good order and discipline
  - Rehabilitation
  - Accountability
  - Deterrence
Military Justice System

- Commander driven:
  - Command at multiple levels make decisions on how to handle investigations and whether to proceed to court-martial
  - Commanders must administer military justice fairly and impartially, while maintaining good order and discipline
    - Requires positive involvement
    - Must ensure fair and open process
    - Must be even-handed
  - Unlawful Command Influence (UCI) prohibited

A Few Comparisons

Civilian System
- Victims report to law enforcement
- Elected or appointed prosecutors make charging decisions
- Criminal law varies from state to state

Military System
- Victims report to other military members, agencies, commanders, or law enforcement
- Commanders, with advice from attorneys, make the initial charging decision
- Uniform law throughout the military
Major differences of the Military system:

- Various disciplinary options
  - Three types of Courts-Martial (General, Special, Summary)
    - Civilian system: Prosecution in federal, state, or magistrate court
  - Article 15
  - Admin Options
    - Administrative Discharge
    - Letter of Reprimand/Counseling
    - Withhold promotion/demote
  - Military defense counsel provided for all clients
  - Commanders make decision on whether to prosecute, refer to alternate disposition, or take no action

Major differences of the Military system (continued):

- Sentencing proceedings are immediate
- Wider range of punishments
  - Confinement (jail)
  - Reduction in rank
  - Reprimand / restriction / extra duty
  - Punitive discharge
  - Forfeiture of pay
  - Death
- Post-Trial Appellate Review
  - Commander review; US AFCCA & CAAF review
  - Separate Clemency & Parole Board
Who will assist the victim in the enforcement of their rights and in obtaining military services?

SVC Program Background

- Legal Assistance in the military – 10 U.S.C. § 1044
- FY12 NDAA – 10 U.S.C. § 1565b
  - “A member of the armed forces, or a dependent member, who is the victim of a sexual assault may be provided...legal assistance provided by military or civilian legal counsel pursuant to section 1044 of this title”
  - Representational legal assistance not necessarily provided
SVC Program Background

- OSD/GC Memo, Legal Assistance to Victims of Sexual Assault, 9 November 2012
  - “…in a military justice sexual assault prosecution, to the extent the victim could retain the advice or representation of a private counsel, §§ 1044 and 1565b [2012 NDAA] authorizes, and certainly does not prohibit, JAGs from providing the same legal advice and representation, to the same extent.”
  - “§§ 1044 and 1565b authorize, and certainly do not preclude, legal assistance to a victim of a sexual assault in criminal contexts, including attending interviews of the victim and interfacing with military prosecutors, defense counsel, and investigators.”
- This memo is the direct authority that allowed the AF JAG Corps to establish the SVC Program

We MUST do more to protect one another from this crime, by…strengthening our support of victims and making a culture of trust and respect a reality for everyone in our Air Force.

General Mark A. Welsh III, Air Force Chief of Staff
18 November 2012
The Beginning…

November 2012 – January 2013
- SVC Rules of Practice/Procedure and SVC Charter developed
- Coordination w/ other Services that the SVC Program would be a “pilot program” for DoD
- 10-12 December 2012 – 60 JAGs trained at AF JAG School
- 28 January 2013 – SVC Program implemented
  - SVCs initially served “part time” out of base legal offices
  - Interim program housed in JAJM (Military Justice Division)
- 1 Jun 2013 – Independent program under AFLOA/CLSV – Special Victims’ Counsel Division
  - SVC Course held week earlier at AF JAG School (Maxwell AFB)
  - 24 JAGs, 10 paralegals at 22 regional and satellite offices
  - Serving as full-time SVCs and SVPs

L.R.M. v. Kastenberg

- 28 January 2013: SVC denied standing in court-martial
- AFCCA found no jurisdiction to hear appeal
- CAAF ruled in favor of the victim (July 2013)
- “A reasonable opportunity to be heard at a hearing [under M.R.E. 412 and 513] includes the right to present facts and legal argument, and that a victim or patient who is represented by counsel be heard through counsel.”
- Does not necessarily extend beyond M.R.E. 412 and 513, but does not exclude/leaves the door open
Creation of an “SVC”

FY14 NDAA establishes SVC programs under 10 U.S.C. § 1044e
- Potential criminal liability
- VWAP – esp confidentiality differences
- SARC/VA/DAVA – esp confidentiality
- Potential for civil litigation
- Military Justice
  - Roles and responsibilities
  - Proceedings victim may attend
  - Government’s authority to compel
  - Victim’s duties to the court (testify?)

10 U.S.C. § 1044e

- Accompany victim to ANY proceeding in connection with reporting, military investigation, and military prosecution
- Explain and assist with services from other agencies
- Assistance (representation?)
  - Military proceedings where victim is a witness or party
  - Civilian or military protection orders
  - Eligibility for military and veteran benefits
Requirements to Serve as SVC

- Certified as trial counsel under Article 27(b), UCMJ
  - Graduate from Judge Advocate Staff Officer Course
  - Serve effectively as trial counsel on some number of courts-martial
- Request to be an SVC
- Nominated by SJA
- Vetted by CLS/CLSV leadership
- Hand selected by TJAG
- Successfully complete TJAG-approved SVC Course
- 18-24 month assignment

SVC and SVP Training

- SVC training course
  - Eight days at AF JAG school (adult and child training)
  - Instruction by civilian experts, military justice instructors, psychologists, and other AF/DoD subject matter experts
  - Classroom instruction and practical exercises require SVCs/SVPs to role play with “victims”. SVCs deliver an argument on behalf of a client in a rape shield hearing. SVCs/SVPs practice client interviews/intakes.
  - Webcasts for training and collaboration
  - SVCs/SVPs attend additional training/national conferences when possible
Outreach & Client Education

- SVCs educate and train the DoD community on services and availability of counsel
  - Victim Advocate training
  - Commander/First Sergeant Symposiums
  - Base-wide Sexual Assault training days
  - Briefings to legal, law enforcement, and community
- Outreach to national crime victims’ rights groups, organizations of interest when possible

Victim Demographics

- 75% of clients are AF active duty
- 83% of clients are female
SVC Clientele

- 72% of military clients are E-1 to E-4
- 83% of clients had made an unrestricted report by the time they requested an SVC
- 2% of client allegations include UPR
- 4% of clients indicated their assault occurred at a deployed location

Basic Eligibility for SVC

- Air Force – Active Duty (AD)/Air Reserve Command (ARC), if incident occurred in military status
  - The status of the perpetrator does not matter (Air Force, other service, civilian, or unknown)
- Adult/child dependents of Air Force members
  - Perpetrator must be a military member subject to the UCMJ
- Other services – AD/ARC (if incident occurred in mil status)
  - Perpetrator must be a military member subject to UCMJ
- Dependents of other services’ members
  - Perpetrator must be a military member subject to UCMJ
- Entry-level status Airmen in UPR involving physical contact of a sexual nature with BMT or TT faculty/staff
Reserve Eligibility

- FY15 NDAA, Sec 533:
  - Amends 10 U.S.C. § 1044e
  - Requires SecDef to prescribe regulations that provide SVCs to victims of a sex-related offense who are a member of a reserve component while serving on active duty, full-time National Guard duty or inactive-duty training OR during any period, regardless of the service status if the circumstances of the offense have a military nexus to the military service of the victim.
  - National Guard has stood up their own SVC program (AF and Army)

Exceptions to Policy (ETP)

- Exceptions to general eligibility requirements may be granted by leadership.
- Examples:
  - Victim made restricted report while on active duty for a covered offense and has now separated
  - Former AD dependent made a report prior to divorcing AD member/perpetrator
  - Multiple-victim cases in which one victim is eligible for an SVC and others are not
  - Other special circumstances that support detailing an SVC
- Denials of ETP requests are routed through leadership to the AFLOA commander and Deputy Judge Advocate General (both 2-stars), who has final denial authority.
And Now...Children

- Who is the client?
  - Ethical obligation is to the child
  - Child is the client, makes the decisions with SVC consultation

- SVCs represent the legal, stated interests of their client
  - Presumption: Child is competent, has same role in the attorney-client relationship as an adult client
  - Lack of competency to sign the Scope of Representation DOES NOT mean a child cannot understand and make decisions

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Child Representation (continued)

- What if child’s decision is seriously injurious to them?
  - ABA Model Rule 1.14 Exception: Attorney may seek protective actions to prevent substantial harm

- Diminished capacity is contextual, based on particular issue, complexity, and circumstances surrounding the question at hand

- An SVC’s obligation to assess their client’s ability to comprehend and make informed decisions on a particular issue is ongoing
FY15 NDAA, Sec. 531:
- “Legal Guardian” becomes “Individual to Assume Rights” and “Representative”

Appointment of Guardians:
- 18 U.S.C. § 3771: court may appoint representative...
- 10 U.S.C. § 1044e: judge shall appoint a guardian...

2015 Executive Order revamps R.C.M. 801(a)(6)
- (A) For the purposes of this rule, the individual is designated for the sole purpose of assuming the legal rights of the victim as they pertain to the victim’s status as a victim of any offense(s) properly before the court. (Article 6b rights)

ABA, Standards for Lawyers Who Represent Children in Abuse and Neglect Cases, 2009

The ABA expresses “a clear preference” for a lawyer acting as a “child’s attorney . . . who provides legal services for a child and who owes the same duties of undivided loyalty, confidentiality, and competent representation to the child as is due an adult client.” The ABA’s position is that, “[i]n all but the exceptional case, such as with a preverbal child, the child’s attorney will maintain this traditional relationship with the child client.”
**Victim Participation**

- Law enforcement interview
- Pretrial
  - Interviews with government and defense counsel
- Article 32 hearing
- Trial
  - Direct
  - Cross-examination
- Sentencing
  - Victim impact testimony
    - Not the same as a victim impact statement

**Common Victim Issues**

- Consent:
  - May be refuted with physical evidence and/or traumatic responses
- Victim’s sexual history: M.R.E. 412 Rape Shield law
- Victim’s mental health history
- Respectful treatment
- Feeling alone, self blame
- Privacy
  - Impact of trauma evidence
  - Cell phones, mental health records, social media
  - A top issue SVCs are assisting clients with – 77%
Issues Unique to Military Victims

- Unit Impact
  - Feeling ostracized by co-workers and social peers
  - Having to work with the assailant
- Career impact
- Collateral misconduct
  - 8% of clients represented by an ADC
  - 10% of clients have an SVC assisting with courts-martial
- Military orders to participate and testify

Representational Challenges

- Access to information
- Status updates/case communication
- Scheduling
- Travel
- Getting involved at the early stages
- Working “with” law enforcement
How SVCs addresses those challenges

- Advocacy to military justice actors
  - Interview with trial counsel, defense counsel, OSI
  - May advocate to convening authorities
- In court-representation
  - Rape shield/mental health records/privileges
- Assert victims’ rights (MCVRA)
- Advocacy to AF/DoD agencies/offices
  - Expedited transfers
- Advocacy to civilian prosecutors/agencies
  - May NOT represent victims in civilian courts
- Collateral misconduct

Representation in the Courtroom

- Navigating L.R.M. (standing)
- Communicating with the court
- Impact of Military Rules of Evidence
  - M.R.E. 412 (Rape Shield)
  - M.R.E. 513: Psychotherapist-Patient Privilege
    - Government usually possesses the records
    - In camera review is frequent
  - M.R.E. 514: Victim Advocate-Victim Privilege
    - New and not well tested by the Appellate Courts
    - Modeled after M.R.E. 513
### Major Military Justice Changes

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- Elimination of Statute of Limitations for certain offenses
- Enhanced government subpoena authority
  - Government counsel may order docs produced for Article 32
- Greater protections for victim’s mental health records
  - Party seeking introduction must meet higher standard, based on specific facts that demonstrate likelihood the records will contain non-cumulative, admissible evidence
  - “Constitutionally Required” Exception stricken
  - Threshold for in-camera review heightened
- Limits on use of “Good military Character” as a consideration during charging or as a defense to show probability of innocence

### Military Victims’ Rights Act

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- 10 U.S.C. § 806b, Rights of the Victim (“Article 6b rights”) Effective 26 Dec 13
- Modeled after, but not verbatim, 18 U.S.C. § 3771
- Pertinent rights:
  - Right to reasonable protection from ACC
  - Right to notice
  - Right not to be excluded
  - Right to be heard
  - Reasonable right to confer with the government counsel
  - Right to receive restitution as provided in law.
  - Right to proceedings free from unreasonable delay.
  - Right to be treated with fairness and with respect
Article 6b

- What is “reasonable” protection?
- Is timely “notice” enough? What about presence and right to be heard?
- How do we confer with the government?
- What restitution is available, by law?
- How do we enforce these rights?

Legal Assistance to Victims

- Landlord-tenant
- Powers of Attorney
- Tax liabilities
- Consumer law
- Family law (divorce, custody, adoption, paternity)
- Servicemembers Civil Relief Act (SCRA)
- Identity theft
- USERRA (reserve re-employment)
- Small claims
- Restraining Orders
- Wills/estates
## Other Areas of Law

- FOIA
- IG/Congressional Investigations (advisory only)
- Claims against the government
- Medical law
- Security Clearance issues
- Equal Opportunity complaints
- Labor law
- Family Advocacy inquiries (domestic violence)
- Advising/interpreting regulations
  - Ex. humanitarian/expedited transfers

## Holistic Victim Representation

- Protecting privacy in media
- Victim’s compensation & restitution
- Minimizing career impacts
- PCS funding
- Helping maintain benefits
- Obtaining visas
- Custody issues
Success for the Victim

- Aided victim in removing personal information from comments in media story leaked by anonymous source
- Helped victim with expedited transfer break apt lease
- Assisted in filing claim for reimbursement for property handed over to OSI
- Ensured client could bring support animal into hearing
- Filtered discovery requests that seek to harass or intimidate clients
- Worked with command to return client to normal training to ensure minimal career impact
- Assisted victim with filing civilian restraining order

By the numbers...

- 35 SVCs
- 5 SSVCs
- 10 SVPs
- 25 locations in Summer 2015
- 778 current caseload (Ave is 29 cases/ SVC)
- Attended 271 courts-martial & 349 Article 32 hearings
- Attended over 2,500 interviews with investigators, defense counsel and trial counsel
AFLOA/CLSV
Organization Chart

Chief, Special Victims Counsel Division
Colonel Andrea deCamara

Deputy Chief
Maj Michael Hopkins

Associate Chief
Ms. Lisa Kreeger-Norman

Paralegal Manager
MSgt Tiana Martel

5
Senior Special Victims’ Counsels

35
Special Victims’ Counsels

10
Special Victims’ Paralegals

In t e g r i t y  -  S e r v i c e  -  E x c e l l e n c e

Summer 2015 Org Structure
What we have Learned

- There is no “typical” victim
  - Victims respond in different ways
  - Victims may have goals which are counter-intuitive
  - Past experiences may shape current problems

- The Wingman Concept is a critical element in our response and prevention of sexual assault

- Change in this area of law is the only constant
Congressional Interest in the SVC Program

Areas under Congressional consideration includes:

- **Eligibility**
  - DOD civilians as well as any victim of a sex-related offense by a military member
  - Previously eligible but no longer connected to the service if the incident happened while eligible for legal assistance

- **Retaliation protection for victims and for SVCs**

- **Information sharing with victims/SVCs**

- **Enforcement of Victims Article 6b rights by Court of Criminal Appeals**

- **Timing of when an SVC is provided to a victim (think initial law enforcement interview)**

- **SVC representation to IG, Congress, EO, etc**
Congressional Interest in the SVC Program

- SVCs/sexual assault addressed in last three NDAAAs, as well as FY16 NDAA
- Improvements to the SVC Program
  - Standardization
  - Evaluation of program’s effectiveness
- SVCs’ role in discussion regarding election of forum
- Release of Article 32 Record/complete record where results could include punitive discharge

Future of the SVC Program

- Key to success is our people—their compassion for and dedication to the clients we represent
- Effective outreach, partnership, and policy development at HQ level
- Grow the Capabilities of SVCs/SVPs
  - Ensure that SVCs/SVPs have the training and resources they need to effectively
    - Identify best practices
    - Define the role of the SVP
    - Build continuity in SVC practice
- Ensure outreach and training is effective so that Airmen know how to access the SVC program
Measuring Effectiveness

Every client whose case is closed is asked to provide a victim satisfaction survey

- 87% “extremely satisfied” with the advice and support SVC provided during the Article 32 hearing and court-martial; 12% “satisfied”
- 99% would recommend other victims request an SVC
- 96% indicated their SVC advocated effectively on their behalf
- 96% indicated their SVC helped them understand the investigation and court-martial processes

Beyond the numbers

"After a lengthy investigation process and trial where my client had to take the stand and talk about this incredibly personal and invasive thing that happened to her, she did not get the result she had hoped for - she was devastated. Initially I felt like I had failed her. However, shortly after the trial her husband approached me. He told me how much having me there meant to his wife. That she felt she had a voice in the system and the court listened to her, that she had someone to call with questions, that someone was in her corner. He thanked me, then took a step back and saluted me, not because customs and courtesies required it, but as a sign of gratitude. It was an incredibly moving moment and it was then that I realized this program isn’t about outcomes, it is about people - victims’ rights are not about ensuring a conviction, they are about promoting respect, dignity, and meaningful participation in the justice system.”
Why we do it...

“I am internally grateful for Capt XX’s representation. Capt XX literally (probably unknowingly) saved my life. He is my hero. I spoke to Capt XX nearly every day, if not weekly, until my case was finally closed. Capt XX is the epitome of a Special Victim’s Counselor. He doesn’t just file the paperwork and make phone calls; he holds you up when everything around you is crumbling down. He always knows the best move to make, and always says things in exactly the right way. This case was an emotional rollercoaster, and it seemed like every day something new and terrible came up. For over a year, I felt like there were only two people I could trust; my husband and Capt XX. I owe him my life and my sanity. Thank you Capt XX.”

Conclusion

“The feedback from the victims who have used [Special Victims’ Counsel] is exceptional so far...I think that’s one program that is one of those potential game changers.”

General Mark A. Welsh III, Air Force Chief of Staff
Questions?