STATEMENT ON THE REPORT OF THE
INDEPENDENT REVIEW COMMISSION
ON SEXUAL ASSAULT IN THE MILITARY

Shadow Advisory Report Group of Experts

July 7, 2021

On July 2, 2021, the Defense Department released *Hard Truths and the Duty to Change*, the Report of the Independent Review Commission on Sexual Assault in the Armed Forces (IRC). The Shadow Advisory Report Group of Experts (SARGE), whose members are identified below, has examined the IRC report with particular attention to Appendix B, *Rebuilding Broken Trust: Recommendations for Accountability in the Military Justice System*. It is obvious that the IRC dedicated a great deal of time, effort, and thought to its task. The report recites that the accountability team "met with legal scholars who represent the full spectrum of diverse and opposing opinions related to military justice." It cites SARGE's April 20, 2020 "shadow report" in response to § 540F of the National Defense Authorization Act for Fiscal Year 2020, but none of us were among the experts the IRC consulted. Nor were the National Institute of Military Justice (NIMJ) or active bar committees like that of the New York City Bar Association among the organizations to which the IRC reached out as part of its determination "to gather relevant information from as many practitioners and experts in the fields of military and civilian criminal justice as possible."

BLUF: *Hard Truths* does not purport to address the broader changes Congress is currently considering. As a result, it should not be read as having rejected those changes. Congress should proceed with consideration of legislation transferring disposition authority over all offenses for which the maximum punishment exceeds a year's confinement to judge advocates who are independent of the chain of command, as recommended by NIMJ's May 12, 2021 Statement on Prosecutorial Discretion Under the Uniform Code of Military Justice (UCMJ). It should, at the same time, also address longstanding issues regarding the selection of court-martial panel members and equal access to the Supreme Court of the United States for military personnel.

The gravest shortcoming of *Hard Truths* is its limited scope. This is not the IRC's fault: the charter from the Secretary of Defense confined the IRC to sexual assault and harassment and related offenses. Because the core weakness of the military justice system—the vesting of prosecutorial discretion in non-lawyer commanders rather than lawyers independent of the chain of command—is structural and applies to *all* offenses, the limited scope of the charter was mistaken. The report observes (App. B at 58) that "[m]atching expertise with function provides the best opportunity for the Department to stop sexual harassment and sexual assault." By the same token, "matching expertise with function" calls, in 2021, for prosecution decisions in serious cases of any kind to be made by those with the pertinent expertise: a law degree. Rather than "a new weapon system for commanders that strategically targets the problem," App. B at 58, *Hard Choices* addresses a symptom rather than the underlying disease.

Additionally, if, as the report observes (App. B at 6), "junior enlisted Service members hav[e a] *general* distrust of their enlisted leaders and commanders" and there is "an *overall* distrust in a commander-centric military justice process" (emphases added), the clear implication is that those phenomena are not confined to sex offenses. The accountability line of effort was charged with, among other things, "assess[ing] the feasibility, opportunities, and risks from changes to the

commander's role in military justice," but Appendix B to *Hard Choices* does not examine a variety of alternatives for reforming the prosecution function, App. B at 20, and to its credit, the accountability team disavowed any opinion regarding matters unrelated to sexual assault, sexual harassment, and related crimes. *Id*. at 8. The result is that, like the September 2, 2020 Joint Service Subcommittee Prosecutorial Authority Study, this part of the IRC report will be of little assistance to Congress.

If the report is too narrow in its basic premise, it is also too broad in its sweep. The three "special victim categories" that would be the responsibility of a lawyer decision maker reach a host of UCMJ violations, depending on the offense, the victim's traits, and the offender's intent. *See* App. B at 10. Taken together, these categories are so expansive that what was plainly intended as an *exception* to the default principle of commander-centric disposition authority will wind up accounting for a very sizable portion of the military justice system's entire throughput of serious cases. That exception may even swallow the rule. The residue that the IRC would leave to disposition by commanders may be so small as not to justify a separate system. Moreover, that residue—whatever its size—will include cases (like murder, espionage, and computer or credit card fraud) for which legal training is essential to proper disposition decision making.

The report proceeds on the basis that domestic violence necessarily raises the same kinds of concerns as sexual assault and sexual harassment. We are not persuaded that that is so as a general rule. The heart of the problem for sexual assault and sexual harassment is its impact on military personnel who are victims of such offenses. Member-on-member misconduct obviously can have an adverse effect on unit cohesion. And where the complainant is a servicemember, concerns about retaliation for making a complaint are an important consideration. But most married members of the armed forces are not married to other members of the armed forces. Where a civilian spouse or other civilian dependent is the complainant, or where the spouse is a military member but serving in a different branch, unit, or chain of command, it is difficult to see how unit cohesion is affected. Domestic violence may or may not be "fratricidal." The report refers to "readiness-detracting behaviors," but seems to cover misconduct that is outside that category.

The report observes that "spousal and intimate partner relationships can . . . include sexual violence." This proves too much, as the same is true of non-sexual violence between persons in such relationships. We wonder why a special prosecution system is warranted for sex offenses between individuals who have or have had partner relationships but not where one partner in such a relationship murders another, or attempts to do so.

Despite the IRC's limited charter, *Hard Truths* includes a variety of recommendations that go far afield of sexual assault, sexual harassment, and domestic violence. To call these "uniquely important in sexual assault cases," App. B at 52, is unwarranted. Examples include the recommendations for study of Article 32 and 34, UCMJ. In other respects, the recommendations seem to address unfinished business from the Military Justice Act of 2016, such as the extremely untidy arrangement for sentencing or the current lack of a uniform evidentiary standard for non-judicial punishment. Whatever standard of proof is ultimately settled on, the justification provided for adoption of the preponderance standard (rather than the Army's current standard of proof beyond a reasonable doubt) is conclusory: "Far more sexual misconduct cases are handled by nonjudicial punishment than by trial, and this standard is consistent with the need for accountability in these cases." App. B at 54. Given the draconian current direct and collateral consequences of nonjudicial punishment for sex offenses, which *Hard Choices* could make even more draconian, the more

onerous standard of proof is preferable.

Some of the recommendations make sense, but it is difficult to take seriously the claim that the goal is "to increase uniformity," App. B at 52, when the overall project is to establish a highly *un*uniform prosecutorial system. A reader nonetheless comes away with the unmistakable impression that *Hard Truths* was seized on as a convenient opportunity to attend to issues that have no particular nexus to the concerns that impelled the Secretary to charter the IRC. An example is the recommendation concerning defense counsel control of defense resources. Some of the report's assertions along the way seem either questionable or unproven. For example, the accountability appendix has kind words to say about the Navy JAG Corps' litigation track, App. B at 42, but offers no information on whether the Navy's conviction rate for sexual assault is any better than those achieved by the other services' military justice systems.

The IRC's suggestion for an SVC SES czar at the DoD level raises a host of issues. As we read the report, that official will have policy-making power but will not have hands-on power to direct action in any particular case. This seems highly artificial and counter to the interest in clear lines of accountability.

Among the generic issues *Hard Truths* addresses is the selection of court-martial panel members, constructively suggesting random selection. Unfortunately, the report still leaves commanders in a position to stack the jury through the power to relieve members before trial in the guise of resolving conflicting duty obligations. Congress should bite the bullet and transfer the member-selection function lock, stock, and barrel to court-martial administrators independent of the chain of command. If a person whose name comes up in the random-selection process cannot be spared, let the commander put it in writing. But the actual power to select the members should be vested elsewhere.

Because *Hard Truths* in important respects goes beyond the immediate need suggested by its narrow charter, it is regrettable and surprising that the IRC did not address the long-overdue need to afford military personnel equal access with other criminal defendants to the Supreme Court. The report states (App. B at 48), that "[a]ccess to justice can no longer be delayed." Those words will ring hollow to the 90% of court-martial accuseds whose cases under current law will never be eligible for direct review by the Supreme Court.

We share the IRC's concern about the slow pace of military justice, although we are skeptical that developing metrics beyond those set by the Sixth Amendment, the UCMJ, and decisions of the U.S. Court of Appeals for the Armed Forces is likely to be a productive use of resources. We are not convinced, in any event, that additional bodies are needed to speed up the process. *See* App. B at 57. In our judgment, the military justice system is, at least in places, overstaffed given what is, after all, a fairly modest (and declining) caseload.

*Hard Truths*' concern about achieving speedier military justice is also incomplete because it fails to address the appellate process. At the Courts of Criminal Appeals, wholesale enlargements of time for briefing have become routine. This ought to end. If staffing is an issue, then thought should be given to reducing the workload by confining appellate review at both appellate tiers to issues asserted on behalf of the accused. If the accused and appellate defense counsel cannot identify an issue, the appeal should be disposed of summarily. The current system is an artifact of an earlier era before we had military judges and before there were lawyer defense counsel in every case. Another

way of reducing the time before finality is to change Article 67, UCMJ, so that cases at the U.S. Court of Appeals for the Armed Forces are briefed only once, rather than the current two-step process of seeking review and then submitting very similar briefs on the merits.

The IRC was spot on in suggesting that the pace of *Manual for Courts-Martial* amendments has to be picked up. App. B at 50-52. To some extent the matters cited in *Hard Truths* may have been a result of dysfunction in the last administration, but the problem is of longer standing and needs to change. On the other hand, the report's suggestion for a policy statement along the lines of the one Secretary Chuck Hagel issued on August 6, 2013, App. B at 20-21, seems like window-dressing. After all, former President Trump's press office issued such a statement which he himself promptly ignored in a notorious incident of unlawful command influence.

If the House or Senate Armed Services Committees conduct a hearing on the IRC's report, SARGE hopes that one of more of our members will be afforded an opportunity to testify.

## Appendix

### Shadow Advisory Report Group of Experts (SARGE)

*His Honour Judge Jeff Blackett* was the Judge Advocate General of the UK Armed Forces, a judicial position, for 16 years, following his retirement from the Royal Navy in the rank of Commodore. His last naval assignment was Director of Naval Legal Services. He is also a part-time Judge of the High Court. He is the author of *The Court Martial and Service Law* (Oxford 3d ed. 2010).

*Walter T. Cox III* served on the U.S. Court of Military Appeals and the U.S. Court of Appeals for the Armed Forces from 1984 to 1999. He was Chief Judge in 1994-99 and Senior Judge in 1999- 2000. Judge Cox graduated from Clemson University and the University of South Carolina School of Law. A Distinguished Military Graduate of Army ROTC, he served on active duty in 1964-73. Before his appointment to the Court of Military Appeals, he was in private law practice and was South Carolina state trial judge and acting Associate Justice of the State Supreme Court. He has taught at Duke University School of Law and the Charleston School of Law and chaired the National Institute of Military Justice's Commission on the 50th Anniversary of the Uniform Code of Military Justice and the follow-on Commission on Military Justice in 2009.

*John C. Dehn* is Associate Professor of Law, Loyola University Chicago. A West Point graduate, he retired after 23 years on active duty, including airborne artillery and legal assignments. After law school, he served as a trial counsel, prosecuting detainee abuse and other cases, before returning to West Point as a faculty member. He holds two LL.M. degrees and was a James Kent Scholar at Columbia Law School. His research has been published in top national and international legal journals and examines how domestic and international law regulate U.S. war powers and the U.S. military.

*Colonel-Maître® Michel W. Drapeau* is an attorney in private practice in Ottawa. He retired from the Canadian Army after 34 years as a combat logistician. He is an Adjunct Professor at the University of Ottawa Faculty of Law and co-author of *Military Justice in Action* (Thompson Carswell 2d ed. 2015). He has testified before Canadian parliamentary committees on military justice reform.

*Eugene R. Fidell* is Adjunct Professor of Law at NYU Law School, Senior Research Scholar at Yale Law School, and of counsel at Feldesman Tucker Leifer Fidell LLP. A former U.S. Coast Guard

judge advocate, he has headed the National Institute of Military Justice and the Committee on Military Justice of the International Society for Military Law and the Law of War, and served on the Defense Legal Policy Board, the Advisory Board on the Investigative Capability of the Department of Defense, and the Executive Review Panel for the 2019 Comprehensive Review of the Department of the Navy's Uniformed Legal Communities. He wrote *Military Justice: A Very Short Introduction* (Oxford 2016).

*Brenner M. Fissell* is Associate Professor of Law, Hofstra Law School. He has been appellate defense counsel in the Guantánamo Bay military commissions system and clerked for Judge Jerome Farris of the U.S. Court of Appeals for the Ninth Circuit and Chief Judge Scott W. Stucky of the U.S. Court of Appeals for the Armed Forces. He is Vice-President of the National Institute of Military Justice.

*Christopher Griggs* is a barrister at the New Zealand bar and a serving legal officer in the Royal New Zealand Naval Reserve, holding the rank of Commander. He was the architect of substantial reforms to New Zealand's military justice system in 2009 which *inter alia* removed court-martial convening authorities and established the Director of Military Prosecutions. He is currently leading New Zealand's project to assist the armed forces of Fiji with their own military justice reform program.

*Amos N. Guiora* is Professor of Law, S.J. Quinney College of Law, University of Utah. He served in the Israel Defence Force Military Advocate General's Corps for 20 years, including as Judge Advocate for the Israel Navy and Home Front Command. His books include *The Crime of Complicity: The Bystander in the Holocaust* (Ankerwycke 2017) and *Armies of Enablers: Survivor Stories of Complicity and Betrayal in Sexual Assaults* (American Bar Association 2020).

*Dr. Elizabeth Lutes Hillman* is President of Mills College, having previously taught at UC Hastings College of the Law, Rutgers-Camden Law School, and the U.S. Air Force Academy. She served in the U.S. Air Force and was a member of the Response Systems to Adult Sexual Assault Crimes Panel. She has served as President of the National Institute of Military Justice and wrote Defending America: Military Culture and the Cold War Court-Martial (Princeton 2005).

*Joshua E. Kastenberg* is Professor of Law, University of New Mexico Law School. He retired from the U.S. Air Force as a Lieutenant Colonel in the Judge Advocate General's Corps and served as a military judge. He wrote *The Blackstone of Military Law: Colonel William Winthrop* (Scarecrow 2009).

*Franklin D. Rosenblatt* is an attorney in private practice at Butler Snow LLP in Ridgeland, Mississippi, where he is the team leader of the firm's national Military and National Security Law group. He retired from the U.S. Army as a Lieutenant Colonel in the Judge Advocate General's Corps, where his last assignment was as Deputy Chief, U.S. Army Trial Defense Service. After the Army, he clerked for the Honorable Barbara J. Rothstein, U.S. District Court for the District of Columbia. He is General Counsel of the National Institute of Military Justice and President of the Committee on Military Justice of the International Society for Military Law and the Law of War.

*Jan Peter Spijk* is a retired Brigadier General in the Netherlands Army. He commanded the Dutch contingent in Kabul in 2006. In 2010, he was appointed Head of Military Legal Services (TJAG) of the Netherlands Armed Forces and senior Military Judge in the Military Chamber of the Arnhem Court of Appeal. He was President of the International Society for Military Law and the Law of War from 2012 to 2018 and is a member of the Council of the International Institute for Humanitarian Law.

*Rachel E. VanLandingham* is Professor of Law at Southwestern Law School. She retired from the U.S. Air Force as a Lieutenant Colonel in the Judge Advocate General's Corps. She is President of the National Institute of Military Justice and co-author of *U.S. Military Operations: Law, Policy and Practice* (Oxford 2016).

*Stephen I. Vladeck* holds the Charles Alan Wright Chair in Federal Courts at the University of Texas School of Law, where he teaches Federal Courts, Military Justice, and other subjects. He is a co-author of *National Security Law* (Aspen 7th ed. 2020) and has been counsel in leading military justice cases such as *Ortiz v. United States*, 138 S. Ct. 2165 (2018), and *United States v. Briggs*, 141 S. Ct. 467 (2020), both of which he argued before the Supreme Court.

Professors VanLandingham, Kastenberg and Fidell, Dr. Hillman, and Lieut. Col. Rosenblatt are co-authors of *Military Justice: Cases and Materials* (Carolina Academic Press 3d ed. 2020).

Affiliations are shown for identification purposes only. The views expressed in this report are solely the authors' and should not be imputed to any other person, government agency, or institution.