Oversight Hearing on Sexual Assault in the Military

before the

Subcommittee on National Security and Foreign Affairs

Part IV

Are We Making Progress?

House Committee on Oversight and Government Reform

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Written Statement

by

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Chairman Tierney, Congressman Flake, members of the Committee, thank you for the opportunity to appear today to offer testimony on "Sexual Assault in the Military."[1]

My name is Merle Wilberding. I am a lawyer with the law firm of Coolidge Wall,Co., L.P.A. in Dayton, Ohio. Since early January of 2008, I have represented Mary Lauterbach,[2] the mother of Marine LCpl Maria Lauterbach.[3]

As an accomplished athletic high school senior, Maria Lauterbach had a dream of serving her country with a career in the Marine Corps and then serving her community with a career in law enforcement. Maria loved being in the Marine Corps - - until she filed a claim that she had been raped by a fellow Marine. For the next six months, her life in the Marine Corps became a nightmare. She was met with skepticism, if not outright disbelief, by her superiors and met with harassment and ostracism by her fellow male Marines. She felt isolated; her work suffered; her life seemed out of control. That six-month nightmare ended when she was murdered and buried in a shallow fire pit in the backyard of fellow Marine Cpl. Cesar Laurean.

As the facts and circumstances emerged about the last six months of Maria's life, her case struck a chord throughout the world, as past and current victims of sexual assault identified with the experiences, harassment and lack of support that Maria Lauterbach suffered, as she had reported to her mother.

Beginning on the day Maria's body was discovered on January 11, 2008, there was a continuing stream of victims and families reaching out to Mary Lauterbach and her family for the loss of Maria and the loss of her unborn son, Gabriel Joseph.

Many of these same victims and victims' families sought out Mary Lauterbach and me because they were seeking guidance and counsel for sexual assaults that they or their children had experienced in the military. Some of these contacts related to sexual assaults that had taken place years before, because the effects of the sexual assault continue to haunt them today - - - as we saw in the testimony of Ms. Ingrid Torres on July 31, 2008, before this very committee.

Other victims and their families contacted us about sexual assault claims that were pending even as we were having those conversations. While their claims were pending, these victims were undergoing the same threats of discipline because they were not

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[1]Neither I nor any entity represented by me in this hearing have received any federal grants (or sub-grants thereof) during the current fiscal year or during either of the two previous fiscal years.

[2] Mary Lauterbach contacted me because I knew her family and because I had served as a lawyer in the Army's Judge Advocate Corps during the Vietnam War. I have counseled Mary Lauterbach as she worked through the complexities of the military legal system and as she developed her own ideas on helping victims of sexual assault in the military

[3] I want to acknowledge the significant contributions of my partner, Christopher R. Conard, throughout our representation of Mary Lauterbach and for his review and comments on this written statement.

believed. They were undergoing the same harassment from their fellow members of the military.

The stories were familiar, in an eerie way. At the "boots on the ground level," no one believed the victim. Instead of being counseled and protected, they were subjected to threats of disciplinary action by their superiors, they were harassed and intimidated by their fellow soldiers or Marines. The victim became the accused, and the accused became the victim.

Each of their stories could have been told by Maria Lauterbach - - Maria Lauterbach could have told each of their stories. Time and time again, the prevailing concern was that each and every victim had a very real fear of the consequences of daring to report a sexual assault. The sad truth is that it was easier for these women not to report the crime.

For me, it started in the cemetery following Maria's funeral. I was approached by three or four women, all of whom told me that they had been victims of sexual assault in the military and all of whom told me that their lives had never recovered. One of these women had with her a Shar-Pei guard dog who always at her side. At night, the Shar-Pei was stationed between her bed and the door because that was the only way this victim could sleep.

As time continued, the stories from victims continued.

In late February we had a call from a mother whose daughter - - a soldier at Ft. Hood, Texas - - had filed a sexual assault claim that she had been raped by a fellow soldier. The most poignant part of our conversations with the mother was when she told me "The only difference between my daughter and Maria Lauterbach is that Maria is dead." Her daughter, too, had been threatened with disciplinary action by her superiors. Her daughter, too, had been harassed and intimidated by her fellow soldiers, and the accused was not removed from the unit.

In March we had another call from a mother whose nineteen-year-old daughter - - also a soldier at Ft. Hood, Texas - - had filed a sexual assault claim that she had been raped by a fellow soldier. Instead of giving protection and programs to help her deal with it, she was treated as the "bad person."

In June, after *NBC Dateline*[4] aired a program on Maria Lauterbach's case, we received a telephone call from a mother who had watched the program. Her twenty-year-old daughter was a Marine who had just made a claim of sexual assault against a fellow Marine. Now she feared for her life. When she asked for a military protective order, her first sergeant told her that it would be of no value, because, in her view, if her assailant wanted to kill her, the Military Protective Order would not stop him. She was threatened with her own court-martial if her story did not hold up. She was obligated to stay in the same unit with the alleged attacker and was haunted by his presence. She did have a

[4] The hour-long program was aired on NBC Friday evening, June 6, 2008, at 9:00 pm (E.D.T.).

military victim advocate assigned to her, but, as she reported to me, the victim advocate told her that there was not really anything she could do.

When we talked to the victim, we were immediately struck by how frightened she was. She did not want to ask for any protection, for fear that the intimidation and harassment would be worse. Like Maria Lauterbach, this victim just wanted it to go away. It was clear that she too wished she had not reported the rape.

All of these stories were virtually identical – the complaining victim becomes isolated, taunted, and tormented. In every instance, the victim told me (either directly or through their mother) that the victim was not guided or directed to appropriate support programs, she did not feel protected from her assailant, and she found herself treated as the guilty party, not the victim.

All of these stories reveal young members of the military - - nineteen and twenty years of age - - whose lives have become isolated. Their families are far away, often with little or no money, so their family support system is weakened if not broken. Their ability to work has been compromised and, as a consequence, the military is being compromised in terms of the quality of its work force.

The security and safety of all of these victims, including Maria Lauterbach, was punctured by the hard realities of being a victim of sexual assault in the military. They all reported that the military did not believe them, that they lived in fear of harm from the perpetrator, and that they continue to be in fear of harassment and intimidation from the rest of the unit.

All of these families have spoken out of desperation and fear, desperation because no one could help them and fear that their daughters would be physically harmed or emotionally traumatized. They were also frustrated because they could not provide the help that they knew their children needed. Like Maria, these victims had been threatened with court-martial, administrative reprimands, or in some cases being drummed out of the service.

It is no wonder that victims of sexual assault conclude that the consequences of reporting a rape are far more serious than the consequences of not reporting a rape, as Maria Lauterbach's murder painfully showed the country.

Are we making progress?

I cannot thank this panel enough for its efforts to provide better protection and better programs for victims of sexual assault in the military. I have read the Report of The Defense Task Force on Sexual Assault in the Military Services (December 2009) (the "Task Force Report"). There are a lot of very good points in that report, and there are points that I believe should be implemented in legislation and regulation.

This afternoon I would like to focus on the analysis and discussion in the Task Force Report about Victim Advocates.[5] The reason I want to focus on Victim Advocates is because all of the victims we met had at the heart of their concern their relationship with their Victim Advocate. My concern is that the Task Force Report does not address the critical issues that I believe are inherent in the Victim Advocate system in the military.

But, first, I would like to acknowledge and endorse the primary recommendations in the Task Force Report for improvements in the Victim Advocate program:

> [1] The Task Force recommends that Congress enact a comprehensive military justice privilege for communications between a Victim Advocate and a victim of sexual assault.
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> [2] The Task Force therefore recommends that the Secretary of Defense ensure that members of the Armed Forces who report they were sexually assaulted be afforded the assistance of a nationally certified Victim Advocate.
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> [3] [T]he Task Force recommends that the Secretary of Defense ensure that members of the Armed Forces who report they were sexually assaulted be given the opportunity to consult with legal counsel[6] qualified in accordance with Article 27(b), Uniform Code of Military Justice.

Those recommendations are good but they do not get at what I believe are two critical deficiencies of the Victim Advocates: [1] their inability to be proactive and [2] their lack of independence.

I call them, not Victim Advocates, but Victim Listeners. In every sexual assault claim filed, the assigned Victim Advocate was described as a very nice person who expressed her concern and understanding for the plight of the victim. But they were not proactive and they were not independent.

In Maria Lauterbach's case, her Victim Advocate was her direct report within the chain of command. How could we expect that Victim Advocate to challenge the procedures, seek changes, obtain records, direct the victim into rehabilitative programs. Remember, in Maria Lauterbach's case, her Victim Advocate had to think about her own efficiency

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[5] Task Force Report at pages ES4-ES5, page 28, and pages 67-69.

[6] The Task Force Report does not give any details on this "legal counsel qualified in accordance with Article 27(b) of the UCMJ. Article 27(b) provides the basic rules for qualification as a lawyer in the Judge Advocate General's Corps, but the Task Force Report gives no recommendation as to how this legal counsel would be able to provide independent advice to the victim. Would legal counsel be under the command's line of authority? Or, would it be under the defense counsel's line of authority? If the latter, it must be remembered that it would be the same office of defense counsel that would be representing the accused in the sexual assault claim.

reports and performance reviews for her obligations to further the interests of the command.

While it is unfair to expect the Victim Advocate to risk her own advancement in the military, it is outrageous to proclaim that the victim is being appropriately protected and rehabilitated by a Victim Advocate who is her direct superior.

Specifically, I believe the military needs more effective victim advocates.

By more effective victim advocates, I believe we need a study of the effectiveness of victim advocates in the military compared to victim advocates in the civilian society.

Based on my conversations with numerous victims and mothers of victims, I believe that

- Too many Victim Advocates are Victim Listeners. I have had victims tell me time and again that their military victim advocates have been very understanding, very nice, but in the final analysis, were unable or unwilling to do anything.

- There should be a study comparing victim advocates in the military to victim advocates in the civilian justice system. We believe that victim advocates in the civilian world are far more pro-active in protecting the victim, sometimes suggesting and other times pushing protective measures or rehab programs.

- Victim advocates need to be more pro-active. It seems that the military victim advocates may list options, perhaps even list good options for the victim, but then put it back on the victim and make the victim decide. It is at these most critical times -- when the victim is most vulnerable – that the victim advocate must act. It is important to remember that these victims are often eighteen to twenty-one years old and at this point feel very vulnerable, very much alone, and incapable of making good decisions.

- Victim advocates need to be guiding and directing victims along the way

    - All too often victims are young, isolated and traumatized.

    - They need guidance both in handling the investigation and in regaining a sense of control over their work and personal lives.

- Victim Advocates need clear authority to act independent of the command. Congress should consider establishing a line of authority for Victim Advocates that is outside the base chain of command.

There are things that I believe can be done to change how the military treats its sexual assault victims. We need changes that will provide independent Victim Advocates who will pro-actively help future victims of sexual assault, and not put the burden on the

victim to connect the dots, not put the burden on the victim to generate the evidence for the military, and not put the burden on the victim to protect herself.

There are many other victims of crime who have left the military, but who might still be productive, contributing members of the military if they had received adequate support and protection during their times of need.

Thank you for your time and attention.

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Professional Background: My primary career has been as a practicing lawyer, although my interests and pursuits have included a broad range of topics. During the Vietnam War, I served as a Captain in the U. S. Army Judge Advocate General's Corp and represented the government in the briefing and arguing of appellate courts-martial hearings, including *United States v. Lt. William L. Calley* ("The My Lai Massacre") and *United States v. Rowland* ("The Presidio Mutiny"). In private practice I started as an associate with Arent, Fox in Washington, D.C., before moving to Dayton in 1973 when I joined Coolidge Wall, a legal professional association, in Dayton Ohio. I am admitted to practice in Ohio, Iowa, and the District of Columbia, as well as the United States Supreme Court.

- Juris Doctor — University of Notre Dame (1969)
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- LL.M. (Taxation) — George Washington University (1972)
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