


**Headquarters U.S. Air Force**  
*Integrity - Service - Excellence*  
**Prosecuting Sexual Assaults  
&  
Special Victims' Counsel Program**



Capt Dena M.P. Burke  
Offutt Air Force Base

**U.S. AIR FORCE**

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**Overview**

- Military Justice System
- History of the SVC Program
- Role of the SVC
- Making a Difference
- Current Statistics
- Future of the SVCs

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**The Military Justice System**



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## The Military Justice System

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- **Decisions on whether to prosecute are made by a Military Commander**
  - Usually a senior officer (commander) in the accused's chain of command
- **The Military has no standing courts (district courts)**
  - before each court-martial, a convening authority must “convene” a court

Criminal Investigation

Charges Drafted by JAG

ACC Commander "Presents Charges"

Article 32 Preliminary Hearing

Court-Martial

CM Convening Authority Convenes a Court

Referral Decision

Recommendation by PHO sent to JAG and CC

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## The Military Justice System

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- **Air Force Office of Special Investigations (AFOSI or OSI) investigates**
- **Agents interview the victim, witnesses, and subject**
  - Subject has right to remain silent and right to attorney
- **Offutt AFB has MOA with Methodist Hospital**

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## The Military Justice System

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- **JAG at legal office advises the Commander**
  - JAG does not have prosecutorial discretion
- **Article 120, UCMJ, covers - Sexual Assault, Rape, Abusive Sexual Contact, & Stalking**

Criminal Investigation

Charges Drafted by JAG

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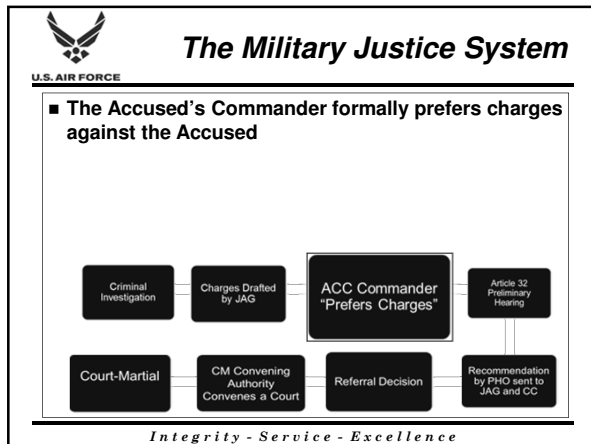
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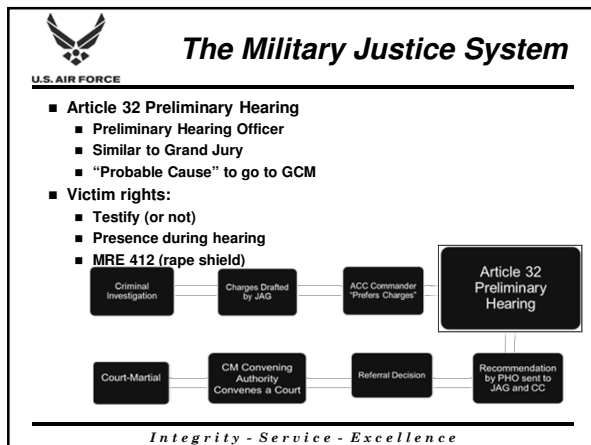
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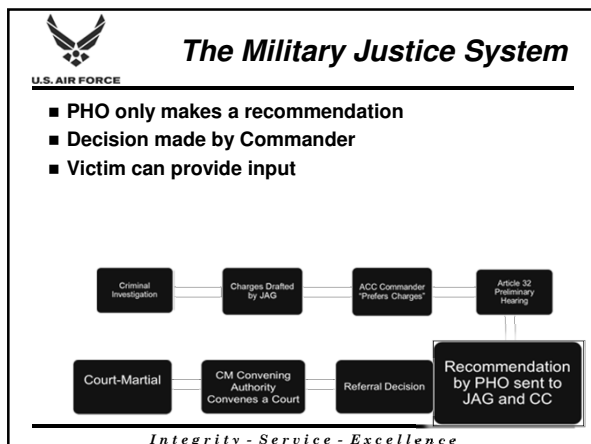
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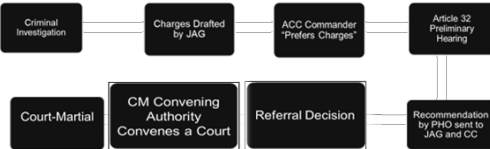
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## The Military Justice System

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- Commander makes decision on whether goes to GCM
- Case “referred” to court martial and is “convened”



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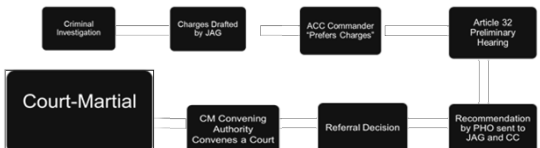


## The Military Justice System

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- Court-Martial is full federal court
- Military judge
- Panel (jury)
- Prosecutor
- Area Defense Counsel
  - Civilian Defense Counsel
- Special Victims' Counsel

- Military Rules of Evidence
  - Mirrored off of Federal Rules of Evidence
- Findings
- Sentencing



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## Why we were created...

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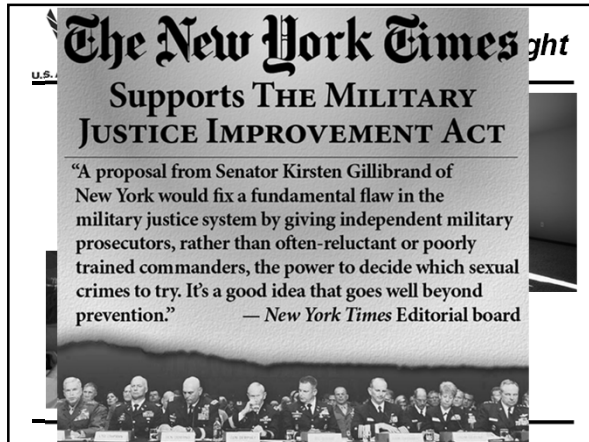
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**The New York Times** *ght*

**Supports THE MILITARY JUSTICE IMPROVEMENT ACT**

"A proposal from Senator Kirsten Gillibrand of New York would fix a fundamental flaw in the military justice system by giving independent military prosecutors, rather than often-reluctant or poorly trained commanders, the power to decide which sexual crimes to try. It's a good idea that goes well beyond prevention." — *New York Times* Editorial board




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**Why?**

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*

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**Concerns of Victims**

- Privacy (cell phones, mental health records)
- Unit Impact
  - Feeling ostracized by co-workers and social peers
  - Having to work with the assailant
  - Getting help w/o interfering w/ the mission
- Military Orders
  - To participate
  - To testify
- Career Impacts
- Collateral misconduct

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## What can AF do to help?

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- **Traditional Legal Assistance for Military**
  - Civil NOT Criminal
  - Wills, POAs, Landlord/Tenant Disputes
- **2012 NDAA, 10 USC § 1565b**
  - Congress directed legal assistance for sex assault victims
  - Traditional legal assistance
  - Representational legal assistance not provided (i.e., the level of assistance ADCs provide to accused)
- **9 Nov 12, OSD/GC Memo**
  - Authorized representational legal assistance in the criminal justice process

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## SVC Program Background

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- **1 Jun 13 – Independent program under AFLOA/CLSV – Special Victims' Counsel Division**
- **Congress continues to modify SVC programs through legislation including:**
  - Eligibility – expanded in each of the last 3 NDAA's
  - Victims' Enforcement Mechanisms
  - SVC assistance in IG, Congressional and EO filings
  - Specific appellate avenues of redress

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## Who can get an SVC?

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- **AD AF** – Any accused
- **ARC** – Nexus to military service, but really this means any accused in practice
- **ANG** – Title 10 will typically be represented by Title 10 ANG SVCs, but AD SVCs will support
- **Dep** – Accused is subject to UCMJ
- **Retiree** – Accused is subject to UCMJ
- **USAFA cadets** – Any accused
- **ROTC Cadets** – ECR – likely granted if accused is subject to UCMJ or is another cadet
- **DoD Civilians** – \*new in FY16 NDAA – in the works

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## SVC Detailing

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- SARC/OSI/JA will notify eligible victims
  
- Upon request for SVC, request referred to SVC Regional Office
  
- SVC Program Office will detail SVC w/in 48 hours

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## Purpose of SVC Program

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- **EMPOWER:** Give victims a voice
  
- **ADVISE:** Develop victims' understanding of the investigatory and military justice processes
  
- **ADVOCATE:** Protect the rights afforded to victims in the military justice system

*We are not the government!*

*We do not report to anyone on base!*

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## What is the role of an SVC?

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- **First & Foremost – take care of the client's needs**
  - Educate on legal process, Art 6b rights, etc.
- **Advocate to Military Justice actors**
  - May attend interviews (TDY ~ 12 days/month)
  - May advocate to convening authorities
  - Attend Art 32s, Courts-Martial
- **In court representation & Motions:**
  - Rape shield, mental health records/privileges
- **Advocate to AF/DoD agencies**
- **Advocate to civilian prosecutors/agencies**
  - We cannot represent clients in civilian courts
  - Can attend, observe, assist as permitted by ethics rules

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### What is the role of an SVC?

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- Legal assistance – myriad issues
- Advocate Art 6b rights (MCVRA)
- ET advocacy
- Collateral misconduct – partnership with ADC
- Case disposition advocacy
- Be creative within ethical bounds
- LISTEN

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### Victims' Rights (2014 NDAA)

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1. *Right to be reasonably protected from accused*
2. *Right to reasonable, accurate, and timely notice of hearings*
3. *Right not to be excluded from hearings*
4. *Right to be reasonably heard at hearing (sentencing, etc.)*
5. *Reasonable right to confer w/ counsel for government*
6. *Right to receive restitution*
7. *Right to proceedings free from unreasonable delay*
8. *Right to be treated with fairness and with respect for the victim's dignity and privacy*

**The MCVRA (Article 6b, UCMJ)**

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### Representation/Legal Assistance

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- Custody of children
- Protecting privacy in media
- Landlord-Tenant Issues
- Victim's Compensation & Restitution
- Property Reimbursement Claims
- Ensured client could bring support animal into hearing
- Minimizing career impacts
- Civilian restraining order
- PCS funding
- Helping maintain benefits

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### *Our (a)typical day?*

- Helped secure fetal remains and transport
- Convinced WG/CC to fund travel for child to live with biological father
- Travel to visit child clients (often)
- Staying up until midnight or later talking to clients
- Waking up at 0200 to take a phone call from suicidal client
- Getting up at 0430 to talk to client overseas
- Visiting w/ client who filed restricted report
- Traveling to 30-minute Art 32

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### *Child Representation*

- Advocate for the child
  - Not a GAL (Best Interest of the Child)
- Representation Issues
  - Competence of the child
  - Fluid
  - Scope of Representation
- Attorney Client Privilege

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### *Successes*

- Service "comfort" dog in court proceedings
- Obtained 2d opinion on mental health diagnosis – waiver obtained to keep Airman on active duty
- Direct access to convening authorities
- Resolving technical training conflicts to allow airmen to keep their preferred career field
- Educating commander about post-assault misconduct to focus efforts on treatment options vice punishment
- Getting online news org to remove comment about victim
- Convincing MJ to deny *in camera* review of MH records

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## Restricted Reporting

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- Limited right for victim to report a sexual assault without law enforcement or command notification
- Purpose – allows victims to receive treatment while maintaining privacy
- Who can take a restricted report?
  - Mental Health
  - Medical personal (for treatment)
  - SARC/VA (victim advocate)
  - SVCs can not take restricted report, but is not a mandatory reporter

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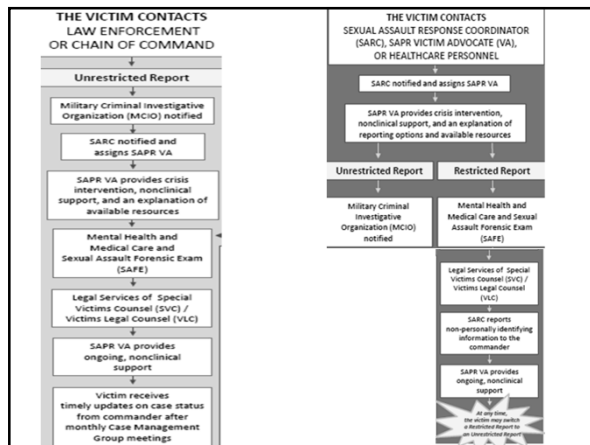
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## Resources for Victims

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- **Restricted Report**
  - Mental Health/Medical support
  - Privacy
- **Unrestricted Report**
  - Mental Health/Medical support
  - Prosecution
  - Command intervention
  - No contact order/ different work area
  - Expedited Transfer

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## Common Misconceptions

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- Can't help the Victim without prejudicing / pre-judging the Accused
  - The question of whether a crime occurred and whether someone is hurting are two different matters
  - Most rights don't conflict
- Rising numbers in reporting is bad
  - Indetermined – may be positive

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## Common Misconceptions

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- Victims want Punishment
  - Varies
- Victims want courts-martial
  - Varies
- Victims now dictate what should happen
  - No – but they are given a voice in the process
- All cases must now go to court-martial
  - No
- I have to punish collateral misconduct
  - Not always, discretion applies

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## Collateral Misconduct

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- Collateral Misconduct (defined):
 

“[M]isconduct that is committed by a victim of a sexual assault that has a direct nexus to the sexual assault.”
- Potential bar to reporting / participating
- Typical collateral misconduct?
  - Underage drinking, DUI
  - Fraternalization, Adultery
- SVC informs client that if action is initiated a MDC will be appointed
  - Client can choose to continue w/ SVC for misconduct

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## Collateral Misconduct

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6.4.3. When considering what corrective actions may be appropriate, commanders **balance** the objectives of **holding members accountable** . . . **with** the intent to **avoid unnecessary additional trauma** to sexual assault victims **and the goal of encouraging sexual assault reporting**.

AFI 90-6001, Sexual Assault Prevention & Response Program

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## What if Victim doesn't want to go to court?

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- SVCs can provide the Victim's perspective
- SVCs can provide documentation
- Guidance is NOT to order Victims forward
- Alternative disposition may be reasonable
- Commander's have a tough call (balancing interests)

AFI 90-6001, Sexual Assault Prevention & Response Program

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## Non-Participating Victims

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3.6. The victim's decision to decline to participate in an investigation or prosecution should be honored by . . . commanders . . . and personnel in the victim's chain of command.

3.6.2. Prior to ordering a victim to participate . . . commanders are **required** to consult with the GCMCA who receives written legal advice from the servicing SJA prior to ordering a victim to participate.

AFI 90-6001

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## Combating Retaliation

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**■ Ostracism**

- Defined as: “the exclusion, from social acceptance, privilege or friendship with the intent to discourage reporting of a criminal offense or otherwise discourage the due administration of justice”
- Hard to prove, but the most prevalent complaint by victims

**■ Maltreatment**

- AFI specifically references the FY14 NDAA and no superior-subordinate relationship is required
- Like ostracism, maltreatment is punishable under the UCMJ

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## Retaliation...it is a real problem

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- CLSV data call (Summer 2015)
  - 74 instances of retaliatory-type situations
  - Current SVCs – former SVCs not polled
  - Not all official complaints about CCs, rather about 1<sup>st</sup> line supervisors
- Ostracism most prevalent – either through social media or in social settings

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## By the numbers . . .

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- Represented 2,112 victims over the life of the program
- 1,007 current clients of which 54 are children
- In 2015, SVCs represented clients in
  - 168 Article 32 Hearings
  - 156 Courts-Martial
  - 65 Motions argued
  - 521 Interviews attended
- In CY15, 634 of 787 new cases were referred by SARCs

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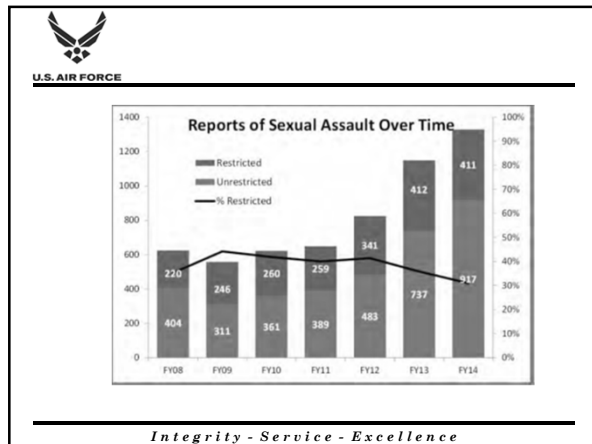
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*Current a/o 4 Jan 16*

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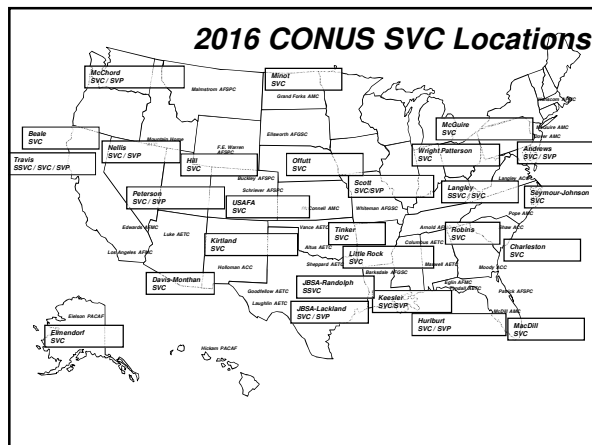
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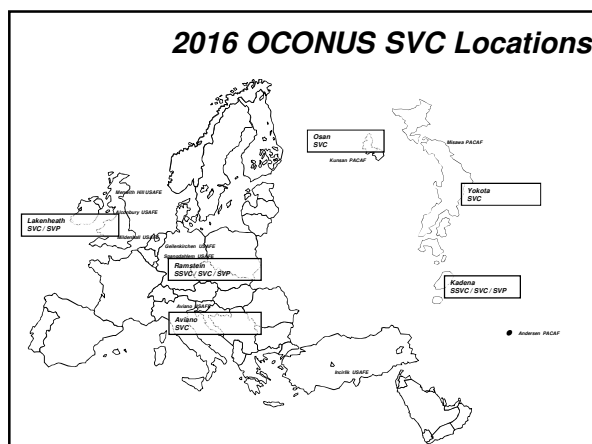
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## Growing SVC Organization

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- Added of 5 SSVCs in 2015
  - Aligned with the Judicial Circuits
  - All pinned-on O-4s
- From 28 SVCs in 2014, to 35 SVCs in 2015, to now 51 by Jul 16
- O-5 military deputy
- O-4 Reservist to CLSV
- 16 new SVP positions filled in Fall 15 thru Spring 16 (total of 26 by Summer 16)

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## Result: Improved Victim Care

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- Empathy and sensitivity
- Recognize the impact of trauma
- Help empower victims
- By providing information
- By providing choices
- By giving them a voice
- Help victims understand their rights and options
- Help victims make informed decisions
- Help protect victims' rights

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## Measuring Effectiveness

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- Victim Impact Survey
- 90% "extremely satisfied" with the advice and support the SVC provided during the Article 32 hearing and court-martial (9% "satisfied"; 1% "dissatisfied")
- 99% would recommend other victims request an SVC
- 95% indicated their SVC advocated effectively on their behalf
- 96% indicated their SVC helped them understand the investigation and court-martial processes

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## Views From The Civilian Community

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*"The DoD has done an incredible amount of work in a short amount of time combatting sexual assault and violence against women. We have never seen that kind of change in a civilian community and I just wish more people would recognize that fact."*

- Joanne Archambault  
Executive Director of End Violence Against Women

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## Views From The Civilian Community

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*"I have been doing [Crime Victims' advocacy] work since 2003 and three years ago when I started to work with the military on [the SVC program], I thought I had a lot to share with the military. Now, I will say the military has a lot to share with the civilian world."*

- Prof. Meg Garvin, NCVLI

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## More Recognition

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**April 2014- The Department of Justice awarded the Air Force Special Victims' Counsel Program the Federal Service Award.**

*"Through their courage and critical contributions to assist and empower victims, these individual SVCs and their organization have given hope to countless Americans victimized by crime—even under the most difficult circumstances."*

- Attorney General Eric Holder

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### Why we do it...

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*"I am internally grateful for Capt XX's representation. Capt XX literally (probably unknowingly) saved my life. He is my hero. During the most stressful, most discouraging, most painful time in my life, Capt XX was there to guide me. I spoke to Capt XX nearly every day, if not weekly, until my case was finally closed. I fully understood and supported all of the decisions made in my case. 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."*

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## Headquarters U.S. Air Force

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### Questions?

Capt Dena M.P. Burke

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