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September 19, 2022

The Honorable Caroline D. Krass
General Counsel
Department of Defense
1600 Pentagon
Washington, D.C. 20301-1600

Dear Ms. Krass,

We write to endorse the September 13, 2022 letter sent to you by the Reporters Committee for Freedom of the Press and to share our own concerns about how Article 140a, UCMJ is being misconstrued as a mandate for secrecy rather than for public access to courts-martial.

We write as an organization with a long record fighting for increased transparency in military justice proceedings – work engaged in as the nation’s only non-profit organization dedicated to the fair administration of military justice and enhanced public understanding of the same. Our executive board consists of criminal and constitutional law scholars, private attorneys, and former judge advocates of the Army, Navy, Air Force, and Coast Guard. Our board firmly believes that the fair administration of military justice admits of no partisan cause, and in that light we have taken positions both for and against government policies. Since 1991 we have weighed in on many of the most vital military justice issues of the day through litigation, academic conferences, prepared reports, and expert consultations. In particular, members of our leadership have been involved with highly-publicized courts-martial and have significant experience with issues of secrecy and public access.

Military justice must not only be fair but also maintain the public’s confidence that it is fair. To that end, undue secrecy and exclusion of the public from court-martial proceedings are especially harmful. All the more so because, as the Reporters Committee letter lays out, the law already provides for the public’s right to attend court-martial proceedings and access court filings and transcripts. The public is accustomed to a certain level of ready access to trial documents associated with federal criminal proceedings through the PACER system; the public deserves the same ready access to similar military justice documents.

While we endorse the points made in the Reporters Committee letter, we add the following observations. UCMJ Articles 36, 140a, and by implication, 146, each call for the development of military practices and procedures that are consistent with American civilian courts. Instead of such symmetry, it appears that military rulemaking has become increasingly divorced from civilian practice. The influence of outside criminal justice civilian expertise on bodies such as the previous UCMJ Code Committee and the current Joint Service Committee on Military Justice has been functionally reduced or entirely eliminated. As a result, recent statutory transparency initiatives such as Article 140a, UCMJ are implemented by the military in ways that are contrary to the intent behind them. Not only is such implementation increasingly out of step with civilian practice and hence the UCMJ, it is contributing to a burgeoning military justice legitimacy crisis.

We appreciate your interest and attention to these concerns.

Sincerely,



Rachel E. VanLandingham, President
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