

The following is from an audio recording. Although the transcription is largely accurate; in some cases, it may be incomplete, or inaccurate due to inaudible passages or transcription errors. Nothing from this show or any others would be construed as legal advice. Please consult an attorney for any legal issue. Nothing from this show is endorsed by the Federal Government, Air Force, or any of its components. All content and opinions are those of our guests and host. Views and hyperlinks expressed herein do not necessarily represent the views of The Judge Advocate General, the Department of the Air Force, or any other department or agency of the United States Government. The inclusion of external links and references does not imply any endorsement. They are meant to provide an additional perspective or as a supplementary resource.



Lieutenant General Harding

AFJAGS Podcast: Episode 29

Birth of the SVC Program with (Ret.) Lt Gen Richard Harding – Part 2

HOST: MAJOR RICK HANRAHAN, USAF

GUEST: LIEUTENANT GENERAL RICHARD HARDING, USAF RET.

In this 2-part interview we discuss the birth of the Special Victims' Counsel (SVC) program. In this part, we take a behind-the-scenes look at how the SVC program was created. Lieutenant General Harding discusses the initial opposition to the program, its biggest challenges, and how he worked to effectuate positive change.

MAJOR RICK HANRAHAN:

Welcome to part two of the birth of the Special Victims' Counsel program with retired Lieutenant General Richard Harding. The Judge Advocate General of the United States Air Force from 2010-2014, who was instrumental in creating the SVC program.

This part two continues where we left off from part one. As General Harding discusses the seminal case of *LRM v. Kastenberg* that afforded victims' counsel certain legal rights on behalf of their clients. How universities across the country are now modeling aspects of military procedure and their administrative Title IX, sexual assault cases on campus. And his views on how to effectuate positive change. Here are a few clips from part two.

[Upbeat Intro Music].

SHOW EXCERPT, LIEUTENANT GENERAL RICHARD HARDING:

I think we ought to hold our head high when he comes to the SVC program and know that we are on the cutting edge of, you know, where criminal justice needs to go.

Give people time to inculcate change. Let's stand up for what's right, and if you see something, say something.

ANNOUNCER:

Welcome to The Air Force Judge Advocate General's Reporter Podcast, where we interview leaders, innovators, and influencers on the law, leadership, and best practices of the day. And now to your host from [The Air Force Judge Advocate General's School](#).

LRM V. KASTENBERG

MAJ HANRAHAN:

Yes sir. And I actually had some involvement with this myself. I was part of that initial cadre back in December 2012, and recall you coming in to speak to all of us, I think it was the very first briefing we had that morning and I recall you discussing this and talking about how we were building the airplane in flight. And, also discussed how this was more or less equivalent to the Area Defense program that was initiated back during the civil rights era.

It was quite a moving speech as I recall, but for kind of our listeners that maybe to understand this a little bit better too, to understand kind of where we were, to where we're at today. There was a number of challenges, right? That first year, especially as it was still a pilot program for about the first six months until that summer of 2013, and I think is when it went full-time. Could you speak to our listeners a little bit about that, in a little further detail? Also, in respect to the sum of the cases, may be touching upon [LRM v. Kastenberg](#).

LT GEN HARDING:

Yeah that was pretty important day for us. When LRM, of course that's the initials of the sexual assault survivor. Opposed the military judge's order, Josh Kastenberg. Denying her what she believed was her right to be heard through counsel. And it wasn't an easy thing to do all. We've got appellate government, we've got appellate defense and it doesn't fit in either one of their pockets. We don't have an appellate shop for victims. And, who's going to represent the judge? Because the judge is now a party to this. And, what's the cause of action? Is it *mandamus*? I thought *mandamus* would work but then of course, you know, the All Writs Act really might not apply to military practice. So we had that problem.

I went to the JAG school and I assigned a few of the attorneys down there to be the appellate representation for LRM. And then the judge was assigned counsel through JAT, through the trial side. So at this hearing, there were two hearings. The first one of course in front

of the Air Force Court of Appeals. And, then the next one through CAAF. You know, there were four tables, because they were four parties. Prosecution, defense, judge and the survivor, the victim. And, the team from Maxwell did a great job, they really did. And, a lot of the judges were hammered with questions of both sides; but particularly, you know, the side of, you know, the SVC program. And so the question before them was: First, does *mandamus* really apply? And they did not reach that conclusion; instead they said, "We believe the judge made a mistake, so we're sending it back to the judge to fix it." Which is kind of what *mandamus* does. So they never really didn't need to call it that, but still to this day it's a disputed point whether *mandamus* is actually remedy that we can take advantage of.

And once it was announced, the opinion was announced, you know, I kinda—I did thought to the point that, you know, now we know that to the extent that a victim has a right to be heard, and they don't have a right to be heard all the time. As I mentioned there are three of our MREs that allow that. They can be heard through counsel. Now, the court said that could be in writing or verbally live, and didn't make a decision on that; left it up to the trial judges on how that would happen. But that you just can't shut down the victim's rights to be heard in some sense through their SVC. So that was very empowering for the SVC program. And, I thought was the right decision.

Had the ruling gone the other way, then we would have SVC's that, you know, could counsel, but could never really say anything to the court. And the victim would be in the same place that he or she was before when they didn't know quite how to respond to some of these questions. Again, back to rape shield, you know, I can't argue that this constitutional compel because I've never taken a case on constitutional—or a course on constitutional law. So I—we were very much worried about it, but we had a great team. And it was led by Ken Theurer, Colonel Ken Theurer. He and I had litigated some time and he had a lot of scar tissue on him; knew to how to handle this. And he did a great job. He and his teammates really got the ball downfield.

So we weren't sure what the court was going to decide after the hearing, you never know because of all their questions. I was delighted at the decision, and you know what? Today *LRM v. Kastenberg* is used in the civil community, and in the civilian community stands for the same proposition. So you've got Meg Garvin out there saying, "Look at this case," to state courts. And saying, you know, "they kind of got it right, maybe it's important to make sure that the victims have adequate representation. Representation with a voice." So I think that's great that the military practice is now leading, you know, the evolution of civilian law in this matter.

I'll tell you that the other place where we're leading on this matter is in campus sexual assault. It was interesting that when President Obama came out with his commission, and the commission included that 87 percent are unreported, and 13 percent are reported. Well I don't know if he just borrowed from the military, or if they actually did a study to find that out. But having helped the University of Missouri on their Title IX processes, I can tell you that there's a lot going on up there and they have the same dynamic we have. As I pointed out to them and others, that have asked me about this, the only difference between a military survivor and a civilian survivor is one is in uniform; one's not. That's the only difference. They both come from the same household. They are both recently emancipated from their parents; both the victim and the subject.

And what we recruit in the military are people that largely are going to take the post 9/11 GI Bill and go to college. They are going to wind up in one of these college dorms. So they're facing the same problem, an under reported event. It's getting a lot of attention, because all of these university systems have a state element to them. It doesn't quite get the vitriol from congressmen and senators that military sexual assault did. Because at the end of the day they're criticizing their own universities.

UNIVERSITY & COLLEGE CAMPUSES

MAJ HANRAHAN:

Yes sir. And I think when we were also talking about this, with respect to Title X, and for our—sorry, Title IX for our listeners which is dealing with what goes on in the universities on campus. I think you had mentioned too for these investigations that occur on campus, now that they're looking into whether both the accused and the victim would be entitled to counsel?

LT GEN HARDING:

Right. That's true. Secretary DeVos, Secretary of Education, put out, oh gosh, maybe three months ago, her guidance. And her guidance is: when you have one of these complaints, you are to conduct a hearing. It's going to be open to the public. That the FRE, the Federal Rules of Evidence are going to apply. That both parties must take the stand. And frankly, I think what it does, it just chases victims away. But, that's the current rule.

Now, depending upon what the election results are, it might go back to the *status qua ante*. Go back to where we were before and the interest groups in this, you know, the survivor's interest groups, what they want is some kind of an informal process, an investigation, if you will. Maybe almost like an Article 32, you know; but even not that sophisticated. And, so they were worried that, if there was a confrontational process under Title IX. Title IX deals with, you know, gender equality. Really was intended for sports, but now it deals with largely sexual assaults as well. If you provided one party counsel, like the victim. Then you're going to have to provide counsel for the other party, and you wind up with a trial. Which is what has happened, and then you are going scare victims away.

MAJ HANRAHAN:

And, just for our listeners. It's not a criminal trial, it's an administrative?

LT GEN HARDING:

Yes. It's administrative. But it's treated, you know, they borrowed the Federal Rules of Evidence, so now you're going to have rape shield as an issue, and both parties are entitled to, "advisors," which is highly suggested that those advisors be practicing attorneys. So what you wind up with is an administrative process that looks a whole lot like a criminal proceeding. Now, the burden of proof is different. Not proof beyond a reasonable doubt, but you know, a preponderance of the evidence. But, you know, it's largely like most of these it's going to be one side against the other. One v. one, he said she said kind of thing. And, it's important to remember all so, particularly in the Air Force, it's not just female victims that we're dealing with. The majority of victims in the Department of Defense are male. And that's because 80 percent in the Air Force are male. A little over 20 percent are female.

The probability of being assaulted sexually is greater for women than it is for men, but because there are so many more men, you wind up with a higher number of men. They are less likely for whatever, lots of different reasons to report. And so, it's difficult and the same thing applies on campus, I suspect. We don't know because they don't have the processes that we have. They don't have this, you know, every other year review. You know, anonymous survey. They don't do that. And when I was working with Senator McCaskill on Title IX, I said, "That's what you really need to do first to find the problem." But it was hard to convince people with large constituencies for all these universities to do that.

So it's a harder nut to crack on the civil side. But they're using our model in the Air Force and now the Department of Defense to kind of try and craft something that can get them beyond this.

CIVILIAN WORLD, CRIMINAL JUSTICE SYSTEM

MAJ HANRAHAN:

Yes sir. I mean it's so fascinating how we see that the military started this, right? The Air Force through your

leadership and spread to the entire DoD, and now we're seeing this apply on college campuses through their administrative process. Do you see this ever maybe even matriculating over to the civilian world, in the criminal justice system?

LT GEN HARDING:

Yeah. You know, it's not uncommon to find victims' counsel in the civil process. What's uncommon and doesn't exist to a large degree, they may have got victim advocates, non-attorneys. And, you know, we had Victim Advocate Program non-attorneys and it wasn't getting us quite where we needed to be. But you don't see attorneys hired by the state. My proposal to Senator McCaskill was, why not have the department, why not have some counsels work for DOE, the Department of Education, and they could do it regionally. So maybe Missouri only needs one, and we'll see. And they can travel from, you know, he or she can travel from college to college, it's not hard to get around this state. Maybe other states need two; but let them work for DOE. And the problem today is, all the Title IX people work for the university. And a lot of them have been fired, because they did things that the university didn't appreciate. I think there's an inherent conflict of interest when you work for the institution that's kind of being looked at. No school wants to be known as the rape school.

CONFLICT OF INTEREST

MAJ HANRAHAN:

And sir, if I could interject for second maybe you could also explain to our listeners how you created the structure of the SVC program, within the Air Force JAG Corps to eliminate, or try to reduce or eliminate that conflict of interest?

LT GEN HARDING:

Yeah. Well that's a good point. First we structured it regionally. Similar to what the ADC program started to be. I knew we couldn't afford one at every base and frankly some bases would have a lot of people just without anything to do. Because, either things weren't being reported or God were to allow, they weren't any sexual

assaults there. But it was important that they work for, you know, somebody that was independent. Originally it was recommended that they work for the military justice division. And, I said, "well you know they do more than military justice, they do no contact orders, they do assignment, reassignment requests, there's a lot of stuff that they do there, that really has nothing to do with military justice." And, I really think they need to be independent. They need to be nested in what we called community legal services, which was basically legal assistance.

You know, the guys down in San Antonio, that you know, help folks out with their veterans or with their claims, and then this one. Why? Because all three of them, you know, have a client with a face, and that's where their obligation is owed, and it is bigger than military justice. And, I know we talked about that for quite some time, but a good friend of mine, Jim Russell, who worked in JAJM passed away a few years ago. Retired Air Force JAG Colonel, and then a GS-15, was the first kind of apostle for all of this. He did great work on going out there and evangelizing and saying, "Hey, you know, this is going to work." Because he had worked with the victim community for some time. He was the first true believer and then he created others. But it was really important that they be independent of all of that, and not only in the fact, but in perception as well.

MAJ HANRAHAN:

Yes sir. For our listeners, an independent chain of command, right? They weren't underneath the commanders?

LT GEN HARDING:

Oh no. No way. They worked for a boss back in headquarters JAG in D.C. Actually at Bolling. And, the first boss they have is a lieutenant colonel, and if they had a problem they would've called her. They can call me certainly, and I heard from a couple of them. But she was there to be their backup. Completely independent, just like the ADC program. No way were they going to work for a commander.

And, you know what, the commanders understood that. You know, General Schwartz who preceded, well I guess it was General Welsh. General Welsh had me go to a meeting of the Three Stars. A Corona style meeting, and he said, "I want you to brief this program." And, you know what the commanders, I thought there would be resistance. But no [laughter]. They thought it was great. And, you know, they didn't want to be involved in supervising anybody that dealt with this. And they said, "Hey we got ADCs, you know, welcome the SVC." So, it worked.

LASTING LEGACY

MAJ HANRAHAN:

So sir, the SVC program has come a very long way since its birth right, back in 2012, when you first worked to stand this up with you and the entire team at the time. And here we are in 2020, going forward. Would you consider this maybe one of your lasting legacies? Or one of the things may be you are the most happy about, that you achieved while being The Judge Advocate General?

LT GEN HARDING:

I'm very—the risk of sounding immodest, I'm very proud of the SVC program. You know, I wasn't the only one, you always need to give credit to those, and I have talked about Jim Russell. You know, the people that believed in it as well and kind of made it happened. The foot soldiers out there. But I'm very proud of this. I think it was the right approach. I think it's going to lead turn what the nation eventually does, and I look forward to its continued existence.

You know, part of the reason that some of other services didn't want to initially do this, is because they knew that once they were beyond refusal speed, they had to have one forever, and they just weren't sure if they could afford it. And then [laughter] Congress turns around and gives us millions of dollars to sustain it. So, you know, I think we ought to hold our head high when it comes to the SVC program, and know that we're on the cutting edge of, you know, where criminal justice needs to go.

And, you know, and the result was that fewer survivors of sexual assault are flooding to the ranks of protect our defenders and other groups, that you know, actually swept up unhappy survivors, and I think that's a great testament as well. And, as long as we can continue doing what we do, and you know, and sometimes, you know, 50 percent of these cases that go to court usually wind up in an acquittal. And, that's probably the right idea. Because at the end of the day the burden of proof, is proof beyond a reasonable doubt; and if, you're not there, you're not there. And you're likely to have an unhappy victim that wonders about that; but now, they got somebody that they can kind of lean on.

And, you know, this SVC can explain to them how this works, and you know, if you have ever dealt with RAIN, the [Rape Abuse Incest National Network](#), they track these things. Kind of like, what the FBI does. They use some FBI numbers, but they're down to 20 percent of civilian rapes are reported. Only one in five of those are prosecuted, and 50 percent of those one in five ended in an acquittal. And that kind of looked a lot like where we were, and that's okay. You know, what's not okay, is kind of cutting the victim loose and asking her, usually it's a female. We don't get many males that report. To try and make it through on their own. You know, without a flashlight in the middle of the dark and a forest, you know. It's just not well. Anyway, that's why I think the programs, you know, a good program and well worth the money.

INFORMATION & RESOURCES

MAJ HANRAHAN:

And sir, any resources, books, videos, podcasts, otherwise, you would recommend to our listeners? Maybe, if they had an interest in learning more about the program, or maybe getting involved if they are within the military?

LT GEN HARDING:

Yeah. Well certainly raise your hand and say I'd like to do that. We had lots of them thinking, this is a cool idea. I would like to be involved. Before you really can be an effective SVC, I believe, you need have a little bit of trial

experience. Certainly understand, you know, what the rules, what the MRE are all about. And speak with that voice of confidence that comes from experience. So that's why the that initial cadre I was looking for a lot of people that had trial counsel experience, some that had certainly ADC experience to do this. So you can certainly do that.

Meg Garvin runs an annual conference, and I know a lot of Air Force officers go up there, a lot of SVCs go to Portland to take her conference. And I've got a lot of respect for Meg. So, if you want to know more about this, then she's got all kind of experts up there talking about all kinds of victim, legal changes, and they break up into small groups and kind of take collectives and it's well worth anybody's time if you can find the TDY money to go up there. Usually occurs in May, but you know, keep an eye on that, and that would be, I think the best resource that one can take. And, you'll get all kinds of education, from neural biological responses, to you know, changes in last year in the law, and you know, state courts. And, I think that would be well worth anybody's time.

CLOSING THOUGHTS

MAJ HANRAHAN:

Yes, sir. And we'll make sure to put all that in the show notes. Contact information and links for Meg Garvin, and what she does there out in Oregon. And sir, I just want to give you the last final words here. And anything else you would like to leave with our listeners on the birth of the SVC program, or just the SVC program at large?

LT GEN HARDING:

Yeah. Take this as an example of trying to lean into the wind. Speak truth to power, respectfully. Give people time to inculcate change; but stand up for what's right. And, if you see something; say something, John Lewis would say. And, this is the kind of work that all of us could do. It's not just The Judge Advocate General. Yeah I know I had more access to people than other people in the JAG Corps, I get that; but you can do it on a smaller level, and make positive change. So if you see something

that just isn't working right, say something, and tell your supervisors and have trust and confidence that they just might take your advice and you can effect change. You know, we serve a reason, we serve because, you know were trying to serve others and you can't do that sitting on your hands and being silent in the face of something that's just wrong. So that's my advice.

MAJ HANRAHAN:

Well sir, thank you so much for your time today. I know our listeners will get a lot of value out of today's discussion. It's been an honor and privilege sir, and we wish you the best in your retirement.

LT GEN HARDING:

All right. Thanks Rick.

TAKEAWAYS

MAJ HANRAHAN:

Thank you, sir. That concludes our interview with Lieutenant General Harding. I would like to focus my top three takeaways on leadership from the interview.

NUMBER ONE: Effectuating change takes persistence and time. The birth of the SVC program was a monumental initiative and one that initially faced extreme opposition both within the Air Force and DoD. Many senior leaders and elected officials at that time did not see the utility of affording victims their own counsel. Some argued that the government already represented victims' rights and or the Sexual Assault Response Program and Coordinator, i.e., SARC, along with victim advocates were fully adequate to assist victims with their rights. Others stated the resources and manpower simply weren't there. However, General Harding understood how these criticisms were not adequate. As the government does not have an attorney client relationship with victims. The SARC or victim advocate is not a lawyer, and precluded from providing legal advice. And, the military ultimately needed to ensure victims had greater trust in the military justice system which could at least begin with the resources and manpower allotted at that time.

General Harding faced an uphill battle to say the least; to get the SVC program off the ground. He was constantly challenged and second-guessed by senior military leaders and elected officials. However, he understood the power of persistence and time required to effectuate change. And, he never lost faith in his vision and belief that affording victims of sexual assault their own independent legal counsel would ultimately build their fate in the process and the military justice system at large.

NUMBER TWO: Take feedback in stride. It's important to listen to feedback, the art comes in what amount of deference or weight you give to any particular feedback. Not all feedback is equal. Some feedback may be good; while other feedback may be downright bad. The key lies in your discernment of the feedback based on all the facts and circumstances and your willingness to listen to all sides. Effective listening as discussed in episode nine, is the hallmark of a good leader. But at some point after considering all the feedback, action must be taken. Which leads me to my last point.

NUMBER THREE: Don't be a silent critic on issues that matter. Yes, you may face criticism and backlash from those don't support your position. But that's okay. General Harding understood that's part of the process to effectuate positive change. Especially views considered contrarian to a majority viewpoint. General Harding believed the SVC program was something worth fighting for, despite holding a minority viewpoint at the time, amid resistance to the idea. He could have remained a silent critic. That would have been easy and expected. However, he didn't choose that route. He had been studying the issues and listening for long time. He understood the "playing field" of sexual assault within the military and the power of voice and choice to victims of sexual assault. And when the Air Force Chief of Staff asked General Harding what could be done in light of all the training that didn't seem to be working that well at the time, General Harding was ready to offer a solution in the SVC program.

Things really can and do change on a count of one person standing up for a positive cause. Most today would say the SVC program has been a resounding success on behalf of victims' rights and the integrity of the military justice system.

In conclusion, do you face any issues right now that may require a voice to effectuate positive change? Are you that voice? Maybe it's for personal issue, a team challenge or something larger. Either way, the process is more or less the same. It includes issue spotting, fact gathering, analysis, considering different courses of action, and ultimate recommendation. It's what leaders and legal professionals do all the time. So be ready to speak for the causes you believe in when called upon.

[Upbeat Music].

Thank you for listening to another episode. If you like this episode please let us know by leaving a review on Apple podcasts, Spotify or your favorite podcast platform. And consider subscribing to this show. We will see you on the next episode.

ANNOUNCER:

Thank you for listening to another episode of The Air Force Judge Advocate General's Reporter Podcast. You can find this episode, transcription and show notes along with others at reporter.dodlive.mil [site is now jagreporter.af.mil]. We welcome your feedback. Please subscribe to our show on [iTunes](#) or [Stitcher](#) and leave a review. This helps us grow, innovate, and develop an even better JAG Corps. Until next time.

DISCLAIMER:

Nothing from this show or any others should be construed as legal advice. Please consult an attorney for any legal issue. Nothing from this show is endorsed by the Federal Government, Air Force, or any of its components. All content and opinions are those of our guests and host. Thank you.

GLOSSARY

- **ADC:** Area Defense Counsel
- **CAAF:** Court of Appeals for the Armed Forces
- **DoD:** Department of Defense
- **DOE:** Department of Education
- **FRE:** Federal Rules of Evidence
- **JAG:** judge advocate general
- **MRE:** Military Rules of Evidence
- **RAIN:** Rape Abuse Incest National Network
- **SARC:** Sexual Assault Response Program and Coordinator
- **SVC:** Special Victims' Counsel
- **TJAG:** The Judge Advocate General