

ORANGE COUNTY THINK TANK TACKLES SYSTEMIC PROBLEMS HARMING SERVICE MEMBERS

by JOHANNES M. MARLER and SHIV PANDYA

With sexual assault in the military at record levels, the Center for Law and Military Policy (CLMP), a new Huntington Beach-based nonprofit think tank, is working on solutions. Researchers have found that well over half of all women serving in the U.S. military are sexually assaulted.¹ For years, the top brass has tried to stem the tide, enacting a variety of administrative changes.² Yet the number of instances has increased despite the surface-level changes.³ This suggests the underlying causes of the problem are structural in nature, systemic factors built into the legal framework and culture.

According to Dwight Stirling, the CLMP's founder and Chief Executive Officer, the new think tank is squarely focused on this type of deep-seated problem. "It is not enough to simply assist service members with their individual legal issues," Stirling said, a long-time JAG officer and USC law professor. "What we need now are policy-level solutions, fixes to the root causes of homelessness and suicide." He continued: "Without fixing the system—the upstream drivers of the distress—legal advocates are largely limited to applying band-aids, addressing exigent issues. It is high time to address the drivers themselves."

Stirling speaks from experience. He started the CLMP in 2018 after managing Veterans Legal Insti-

tute, a local legal aid he co-founded,⁴ for four years. His current focus is the Feres Doctrine, the little-known judicial policy that shields military officials from civil liability, including those who commit rape and other sexual offenses.⁵ Remarkably, courts consider sexual assault to be "incident" to service members' jobs, a risk factor courts say is part and parcel of the employment environment.⁶

As a result, judges prohibit rape survivors from suing their assailants for damages.⁷ "Not only is this policy patently immoral, it lies at the heart of the military sexual assault epidemic," Stirling said.⁸ "Since perpetrators can't be sued, and because very few are charged criminally, what incentive do perpetrators have to change their behavior? Since suits against military managers are also barred, there is little motivation for anyone to go after the wrongdoers. The conditions are ripe for retaliation and cover-ups."⁹

According to Dallis Warshaw, the CLMP's Vice President of Policy, better alignment between civilian and military norms is needed. "The reason the Feres Doctrine and other shocking policies like it exist is because civilians are largely not paying attention," Warshaw said, also a criminal defense attorney and the vice chair of the OCBA's Veterans Committee. "Military leaders are supposed to answer to civilian policy makers. Currently, however, policy makers largely defer to what senior military managers want rather than looking critically at the situation." That deference leads to policies that harm the rank and file, the 18-25-year-olds at the bottom of the organizational hierarchy. Warshaw observed: "Seriously, what senior manager wouldn't want to be immune from suits by his or her employees if they could be?"

Connecting sexual assault in the military to the larger national conversation on the topic is a leading goal. "There are thousands, maybe hundreds of thousands, of service members and veterans suffering in silence," Stirling said, who is writing his doctoral dissertation on the Feres Doctrine.¹⁰ "The abuser is usually in the survivor's chain of command. If she speaks up, the perpetrator—or his friends in management—will retaliate against her. The discrepancy in power and the pressure not to report are as high, if not higher, than in the



Dwight Stirling (the CLMP's founder and Chief Executive Officer), Jen Birch (CLMP Board Member), Dallis Warshaw (CLMP VP), Dr. Kristen Zaleski (USC Professor), and Dr. Francine Banner (Univ. of Michigan Professor) at the CLMP symposium at the Fowler School of Law, October 2018.

entertainment industry.”

The CLMP believes every survivor of sexual assault deserves access to the judicial system. Male service members are, of course, affected as well. For them, the shame can be even more intense. “To deny a survivor their day in court because he or she was serving military at the time of the assault is unconscionable,” Warshaw said. “Imagine how it feels to be told by your government that, although you’ve defended it with your life, you don’t have standing to file a lawsuit against your rapist.”

The CLMP’s capstone event of 2018 was a dinner program featuring Alyssa Milano, an actress and activist behind the #MeToo movement.¹¹ Conducted at the Joint Forces Training Base in Los Alamitos, the program was sponsored by Rutan & Tucker, LLP.¹² According to Marcia Marinovich, the CLMP’s Director of Development, the December event “was an opportunity to introduce ourselves to the community. We were delighted that Alyssa was able to join us, sharing her uplifting message of hope and empowerment.” The program ended with a performance from the Los Alamitos High School Choir, a quartet of patriotic songs that honored guests Justice Eileen Moore and Justice Richard Fields particularly enjoyed.

To get its message out, the CLMP manages two publications. Its flagship platform, the *Journal of Law, Policy & Military Affairs*, is a traditional law review overseen by Grant Frazier, a third-year law student at Arizona State. The center also publishes the *Sound Off* blog, a national platform for military-related op-eds. Both publications are unflinching in their honesty and independence. In a recent blog post, for instance, Ryan Bertram, a Chapman law student and CLMP policy analyst, addressed *Feres*’ constitutional implications:

Because of the broad application of the *Feres* Doctrine, there is undeniably a violation of constitutional rights taking place within the military. Those who protect our country are being deprived of equal protection of the very laws that they risk their lives to defend. Equal protection under the law must be afforded to everyone. Joining the military should not force an individual to give up their rights or open them up to being sexually assaulted with no meaningful recourse.¹³

To Stirling and Warshaw, a precondition to lasting reform is closing the civil-military gap, the divide that separates the civilian and military aspects of society. To do so, they have seeded their leadership team with lumi-

aries from both worlds. The CLMP’s board and advisory council include national authorities such as Col. (ret) Don Christensen, former Chief Prosecutor of the Air Force; Dr. Kristen Zaleski, author of *Understanding and Treating Military Sexual Trauma*; and Col. (ret) Robert McFetridge, former Staff Judge Advocate of the 82nd Airborne Division. The leadership team also includes influential Orange County attorneys, including Michael Baroni, a past president of the OCBA; Renato Izquieta, Directing Attorney at the Legal Aid Society of Orange County; and Mark Frazier, a senior partner at Rutan & Tucker, LLP.

Another way the CLMP bridges the civil-military gap is by conducting educational programs. In October of 2018, the center put on a ground-breaking symposium on sexual assault and the *Feres* Doctrine at the Dale E. Fowler School of Law at Chapman University. Opened by Dean Matthew Parlow, the multi-day event included a screening of *The Invisible War*, the Academy Award-nominated documentary about sexual assault in the military. The film’s director, Kirby Dick, and one of its stars, renowned lawyer Susan Burke, participated in a Q&A session afterward.

Student policy analysts are vital to the CLMP’s efforts to bridge the gap. Allyson Oishi and Matthew Wagner from Chapman Law School and Pomona College, respectively, recently interned as policy analysts. Both gained life-changing insight. “Just as service members fight to protect our country,” Oishi wrote in a November 2018 *Sound Off* blog post, “they need civilians to fight for them, to increase and strengthen the rights they are afforded within the legal system. It is an honor to be a part of an organization whose mission is to do exactly this.”¹⁴

The CLMP is a 501(c)(3) nonprofit organization. Listen to its podcast, *A World Apart*, on iTunes. Members of the OCBA are invited to assist the CLMP on a variety of levels. If interested, please contact Dwight Stirling at dwight@centerforlaw.org or visit www.centerforlaw.org.

ENDNOTES

(1) Jessica Turchick, *Sexual Assault in the U.S. Military: A Review of the Literature and Recommendations for the Future*, *Aggression and Violent Behavior* 15, 267-77 (2010).

(2) Stephanie Russell-Kraft, “Continuum of Harm”: *The Military Has Been Fighting Sexual Assault in Its Ranks for Decades, But Women Say It’s Still Happening*, *Task and Purpose* (Feb. 7, 2018), <https://taskandpurpose.com/military-sexual-assault-me-too>.

(3) Zachary Cohen, *U.S. Military Sees*

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(4) Margot Roosevelt, *Most Influential 2016: Antoinette Balta and Dwight Stirling Founded Veterans Legal Institute, Serving Low-Income Vets and Military*, *Orange County Register* (Dec. 26, 2016).

(5) Dallis Warshaw, *The Irrational Rationale: How the Military Hides Behind the Feres Doctrine to Deny Justice to Service Members*, *Orange County Lawyer* (July 2017), 28-32.

(6) *Smith v. United States*, 196 F.3d 774 (7th Cir. 1999).

(7) *Pérez v. P.R. Nat’l Guard*, 951 F. Supp. 2d 279 (D.P.R. 2013).

(8) See also Dwight Stirling and Dallis Warshaw, *Rethinking the Feres Doctrine*, *Orange County Register* (June 15, 2017).

(9) See also Dwight Stirling, *The Feres Doctrine and Accountability*, *J. of L., Pol’y, & Mil. Aff.*, 1, 7 (2018).

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(11) Susan Goulding, *TV Star, Activist Alyssa Milano to Headline Fundraiser for New Center for Law and Military Policy*, *Orange County Register* (Dec. 12, 2018).

(12) David Young, *Alyssa Milano Visits Los Al to Support New Military Nonprofit*, *News-Enterprise* (Dec. 19, 2018).

(13) Ryan Bertram, *The Feres Doctrine’s Constitutional Implications*, *Sound Off* blog, (Sept. 25, 2018), <https://centerforlaw.org/sound-off/f/the-feres-doctrine-and-its-constitutional-implications>.

(14) Allyson Oishi, *My Semester as a Policy Analyst at the CLMP*, *Sound Off* blog (Nov. 6, 2018), <https://centerforlaw.org/sound-off/f/my-semester-as-a-policy-analyst-at-the-clmp>.



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