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TESTIMONY ON SEXUAL ASSAULTS IN THE MILITARY

HEARING

BEFORE THE

SUBCOMMITTEE ON PERSONNEL

OF THE

COMMITTEE ON ARMED SERVICES
UNITED STATES SENATE

ONE HUNDRED THIRTEENTH CONGRESS

FIRST SESSION

MARCH 13, 2013

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TESTIMONY ON SEXUAL ASSAULTS IN THE MILITARY

WEDNESDAY, MARCH 13, 2013

U.S. SENATE,
SUBCOMMITTEE ON PERSONNEL,
COMMITTEE ON ARMED SERVICES,
Washington, DC.

The subcommittee met, pursuant to notice, at 10:09 a.m. in room SH–216, Hart Senate Office Building, Senator Kirsten Gillibrand (chairman of the subcommittee) presiding.

Committee members present: Senators Gillibrand, Blumenthal, Hirono, Kaine, King, Graham, Ayotte, and Blunt.

Other committee members present: Senators Levin, McCaskill, Shaheen, Donnelly, and Inhofe.

Committee staff members present: Leah C. Brewer, nominations and hearings clerk; and Barry C. Walker, security officer.

Majority staff members present: Jonathan D. Clark, counsel; Gabriella E. Fahrer, counsel; Gerald J. Leeling, general counsel; and Peter K. Levine, staff director.

Minority staff members present: Steven M. Barney, minority counsel; and John A. Bonsell, minority staff director.

Staff assistants present: Jennifer R. Knowles, Kathleen A. Kulenkampff, John L. Principato, and Bradley S. Watson.

Committee members' assistants present: Jason Rauch, assistant to Senator McCaskill; Christopher Cannon, assistant to Senator Hagan; Chad Kreikemeier, assistant to Senator Shaheen; Elana Broitman and Brooke Jamison, assistants to Senator Gillibrand; Ethan Saxon, assistant to Senator Blumenthal; Marta McClellan Ross, assistant to Senator Donnelly; Nick Ikeda, assistant to Senator Hirono; Karen Courington, assistant to Senator Kaine; Steve Smith, assistant to Senator King; Todd Harmer, assistant to Senator Chambliss; Brad Bowman, assistant to Senator Ayotte; Craig Abele and Alice James, assistants to Senator Graham; and Charles Prosch, assistant to Senator Blunt.

OPENING STATEMENT OF SENATOR KIRSTEN E. GILLIBRAND, CHAIRMAN

Senator GILLIBRAND. Thank you all for joining us.

It is an honor and a privilege to chair this hearing of the Personnel Subcommittee this morning. I want to thank the ranking member of the subcommittee, Senator Lindsey Grahahm, for his support and for working with me to move this hearing forward as quickly as possible.

I know that all of our colleagues on the Armed Services Committee share our deep commitment to improving the quality of life of the men and women who serve in our All-Volunteer Force on Active Duty, the National Guard, and Reserves, their families, military retirees, and Department of Defense (DOD) personnel.

That is why this hearing today is so important to me personally and to thousands of servicemembers and their families across this country.

The issue of sexual violence in the military is not new. It has been allowed to go in the shadows for far too long. The scourge of sexual violence in the military should be intolerable and infuriating to all of us. Our best, brightest, and bravest join our Armed Forces for all the right reasons: to serve our country, to protect our freedom, and to keep America safe.

The U.S. military is the best in the world and the overwhelmingly, vast majority of our brave men and women serving in uniform do so honorably and bravely, but there is also no doubt that we have men and women in uniform who are committing acts of sexual violence and should no longer be allowed to serve.

Too often, women and men have found themselves in the fight of their lives not in the theater of war but in their own ranks, among their own brothers and sisters and ranking officers in an environment that enables sexual assault.

After an assault occurs—an estimated 19,000 sexual assaults happened in 2011 alone according to DOD's own estimates—some of these victims have to fight all over again with every ounce of their being just to have their voice heard, their assailant brought to any measure of justice, and then to fight for the disability claims they deserve to be fulfilled.

Congress would be derelict in its duty of oversight if we just shrugged our shoulders at these 19,000 sons and daughters, husbands and wives, mothers and fathers and did nothing. We simply must do better by them.

When brave men and women volunteer to serve in our military, they know the risks involved, but sexual assault at the hands of a fellow servicemember should never be one of them because not only does sexual assault cause unconscionable harm to the victim, but sexual assault is also reported to be the leading cause of post-traumatic stress disorder (PTSD) among women veterans. Sexual assault in the military also destabilizes our military, threatens our unit cohesion and national security. Beyond the enormous human costs, both psychologically and physically, this crisis is costing us significant assets, making us weaker both morally and militarily.

Already this committee and the Pentagon took some first steps on this issue as part of last year's National Defense Authorization Act (NDAA) that President Obama signed. While obviously our work is not done, I am hopeful that we can build on some of these initial changes which include: one, ensuring that all convicted sex offenders in the military are processed for discharge or dismissal from the Armed Forces regardless of which branch they serve in.

Second, we removed case-disposition authority from the immediate commanding officer in sexual assault cases, which is one of the issues we will look into today as to whether we need to remove

such disposition authority entirely from the chain of command and place it with a trained prosecutor instead.

We pushed the Pentagon to lift the combat ban that prevents women from officially serving in many of the combat positions that can lead to significant promotion opportunities. By opening the door for more qualified women to excel in our military, we have increased diversity in top leadership positions, improving response from leadership when it comes to preventing and responding to sexual assault.

We passed an amendment that was introduced by Senator Jeanne Shaheen and that was based on our legislation, the Military Access to Reproductive Care and Health for Military Women (MARCH) Act, which means that troops who do become pregnant as a result of a rape no longer have to pay out of pocket for those pregnancies to be terminated.

After we hear from Senator Barbara Boxer who has extraordinary passion and leadership on this issue, our second panel will be of men and women who are going to tell their personal stories. I want to salute each and every one of you for having the courage to tell such painful and personal stories. It is my hope and belief that by committing this selfless act, you are encouraging others to step forward and are also helping to prevent crimes from going unpunished. We have a duty to you and thousands of victims that you represent to examine whether military justice is possible and what is the most effective and fair system.

Despite some very dedicated Judge Advocate General (JAG) officers, I do not believe that the current system adequately meets our standard. The statistics on prosecution rates for sexual assault in the military are devastating. Of 2,439 unrestricted reports filed in 2011 for sexual violence cases, only 240 proceeded to trial. Nearly 70 percent of these reports were for rape, aggravated sexual assault, or nonconsensual sodomy.

A system where less than 1 out of 10 reported perpetrators are taken to trial for their alleged crimes is not a system that is working. That is just the reported crimes. DOD itself puts the real number closer to 19,000. A system where in reality closer to 1 out of 100 alleged perpetrators are faced with any accountability at all is entirely inadequate and unacceptable.

My view is that emphasizing institutional accountability and the prosecution of cases is needed to create a real deterrent to criminal behavior. The system needs to encourage victims that coming forward and participating in their perpetrator's prosecution is not detrimental to their safety or their future and that it will result in justice being done because currently, according to DOD, 47 percent of servicemembers are too afraid to report their assaults because of fear, retaliation, harm, or unjust punishment. Too many victims do not feel that justice is likely or even possible.

We need to take a close look at the military justice system and we need to be asking the hard questions with all options on the table, including moving this issue outside of the chain of command so that we can get closer to a zero tolerance reality in the armed services. The case we have all read about, the Aviano Air Base case, is shocking and the outcome should compel all of us to take

the necessary action to ensure that justice is swift and certain, not rare and fleeting.

I had the opportunity to press Secretary Hagel on the issue of sexual violence in the military during his confirmation hearing. Secretary Hagel responded by saying, "I agree it is not good enough to say zero tolerance. The whole chain of command needs to be accountable for this." I could not agree more.

I was pleased with the Secretary's public statement earlier this week that he is open to considering changes to the military justice system, as well as legislation to ensure effectiveness of our responses to the crime of sexual assault.

In addition, the Secretary has written two letters to the Services requesting a review of Article 60 of the Uniform Code of Military Justice (UCMJ) in light of the Aviano decision to be made by March 20 and March 27. This is a useful first step.

After Ranking Member Graham makes his opening remarks, we will hear the testimony from Senator Barbara Boxer who has been a leading voice on this issue. In last year's NDAA, she successfully including an amendment that prohibits any individual who is convicted of felony sexual assault from being issued a waiver to join the military.

We will then have witnesses who have either been victims of sexual assault while serving in the military or are very knowledgeable advocates for addressing the issue of sexual assaults in the military.

I will now defer to Senator Graham to give his opening remarks.

STATEMENT OF SENATOR LINDSEY GRAHAM

Senator GRAHAM. One, I want to thank Senator Gillibrand for having this hearing. When 47 or 49 percent—I cannot remember the number—feel intimidated to come forward because they think they may face reprisal, something is obviously wrong.

Having said that, the purpose of military justice is to instill good order and discipline in the units so that when they are called upon to engage the enemy and to train and deploy together, they can do so in the most effective fashion possible.

The military is a unique place. It is not a democracy. It is a place where you are asked to do extraordinarily difficult things and you have to count on the people to your right and to your left to be there when you need them and vice versa.

In the military we have it as a crime for a commander to have a personal relationship, sexual in nature or otherwise, overly familiar relationship that would be consensual. It is called fraternization. We probably should look at that policy as well to make sure that we are dealing with fraternization cases in an appropriate fashion.

Why would you be concerned about a consensual relationship that you would not be concerned about maybe in the private world? If your unit is called into combat, the last thing you want to think about is that the person who has a close relationship with the commander may get a pass at your expense. So we want to keep professional relationships between those who order the unit to engage the enemy so that those who follow the orders will never believe that there is some special relationship between the commander and

a particular individual in the unit because that will break good order and discipline apart. That is one area where human sexuality can really deal a blow to a unit that is consensual.

But I cannot think of a more devastating blow to a unit than to have one member assault another. If you want to break a unit apart and create a horrible environment to effectively engage the enemy, allow this to happen because it shows not only physical violence is the ultimate sign of disrespect. I cannot think of a more disrespectful measure than taking advantage of someone or physically violating them. That is just absolutely not only a crime, it is an ultimate detrimental demise of a unit to have such conduct break out. The reason, Senator Gillibrand, we want to prosecute people who do that is they are destroying the unit's effectiveness. They are the bad guy.

Having said that, I have been a military lawyer for 30 years. Another problem that could hurt a unit is for somebody to be wrongfully accused and feel like they have no voice, that the system is going to go from one extreme to the other. So at the end of the day, military justice is about rendering justice in an individual case, but always the theme of military justice is to make that unit as effective as possible to maintain good morale and discipline. If you are a female in a unit and you feel like nobody cares about what happens, you have destroyed morale. Also, if you are in a unit where people may misunderstand what you are saying and you feel like you cannot defend yourself, we have to find some balance here.

To the victims, thanks for coming forward. I know it is not an easy thing to do.

The numbers are astounding. If we are going to continue to be the most effective fighting force for freedom and good in the world, we are going to have to solve this problem. As long as you have human beings, you are going to have problems.

But clearly, the message we are sending to our female members of the military is that we are way too indifferent and that your complaints are falling on deaf ears. To all of our commanders, how in the world can you lead your unit in a responsible manner if people in that unit feel like the system does not care about them? I will do everything I can within reason to make sure that that stops and that if you are accused of an offense in the military, you still get a fair trial.

Senator GILLIBRAND. Senator Boxer.

STATEMENT OF SENATOR BARBARA BOXER, A U.S. SENATOR FROM THE STATE OF CALIFORNIA

Senator BOXER. Thank you so much, Madam Chairman and Ranking Member Graham. Thank you both for holding this critical hearing. It is very timely. Thank you so much for this opportunity to testify. I am very honored—very honored.

Today I am here to talk about the violent crime of sexual assault in the military, not about fraternization. I am not here to talk about disrespect but about vicious crimes. I am not here to talk about false charges but about real charges and the way they are handled.

As you well know, Congress to our great credit passed the bipartisan Violence Against Women Act, and I thank everyone on both

sides of the aisle who worked so hard for that to pass. I was so proud that President Obama signed it into law just last week.

That law recognizes that every human being—every human being, male, female—deserves protection from violence. It sends a clear and unequivocal message that wherever a sexual assault occurs, whether on a college campus or on an Indian reservation or in a religious setting or in our military, yes, the offender must be punished. Sexual assault is a heinous and violent crime and it must be treated as such. It is not an internal matter. It is a violent crime and it must be treated as such.

I want to thank each and every one of you for supporting the Boxer-Cornyn Amendment that said, no, the military cannot take offenders, people who have been convicted of sexual assault, into the military. That will help us going forward. But we need to do much more.

We know this crisis is staggering and despite some important reforms by DOD—and I thank them for those, they are trying to improve prevention, investigation, prosecution—still too many military sex offenders go unpunished and too many victims do not get the justice that they deserve.

As the chairman said, this is unacceptable and it must stop. We are the ones who can stop it, and you particularly are the ones who can stop it.

Well, in response to a letter that Senator Shaheen and I sent him last week, Defense Secretary Hagel committed to taking a hard look at the military justice system. He agrees that much more must be done to combat military sexual assault.

Now, let me tell you I do not have all the answers. If I had all the answers, I would tell you that today. But one thing I do know is that immediate steps must be taken to prevent senior commanders from having the ability to unilaterally overturn a decision or a sentence by a military court. I want to thank Senator McCaskill, who has introduced legislation to do just that. That is the first step and only the first step.

Two recent events I want to share with you to highlight the urgent need for dramatic change. The first case involves a decision by an Air Force lieutenant general to dismiss all charges against a lieutenant colonel who had been convicted of aggravated sexual assault. Again, all you had to do was listen to Senator McCaskill's comments on that to understand how deep this hits us. Many in Congress, our military, and our Nation were stunned to read that the general used his discretion as the convening authority to throw out a military jury's guilty verdict, the jury of high-ranking military officers. I want to say who was on this jury. Four colonels and a lieutenant colonel had sentenced the lieutenant colonel to a year in prison and dismissal from the Air Force. That is a jury of his peers for sure. Under the UCMJ, the general's decision to overturn that verdict is final and it cannot be reviewed or changed.

The second event I want you to hear because you may not know of it. It took place in my home State of California. Last month an Army veteran shot and killed two Santa Cruz police detectives who were attempting to question him over a sexual assault allegation. In the aftermath of this shooting, we learned that even though the former soldier had faced two separate rape charges while serving

in the Army, charges against him were dropped and he was discharged without a conviction as part of a plea bargain.

What is it going to take to convince the military that sexual assault is a violent and vicious crime and that those who perpetuate it are capable of other violent crimes, including murder? What is it going to take? It is a vicious, violent crime, and those capable of that vicious crime are capable of other crimes. Yes, murder.

These examples speak for themselves, and there are so many more. You will hear them today, and your heart will break.

It is time for us to take swift decisive steps to ensure that decisions in the military justice system do not rest solely in the hands of one individual. It is not enough that our military says zero tolerance for sexual assault. You can say anything. I can say anything. But the facts speak for themselves. DOD estimates that 19,000 sexual assaults occur in the military. I want to point out to my colleagues here, my friends, that many of these cases involve men. Only 17 percent of these cases are ever reported.

I am so grateful to both of you for this hearing. Senator Gillibrand, I am so happy that you chose to hold this subcommittee hearing, your first, on military sexual assault. I look forward to working with you on comprehensive solutions to this problem.

Today's hearing is the first on this critical issue in nearly a decade. A decade. It is high time not only for this hearing but for changes in the way the military handles these cases. I know we, all of us, who are touched by this issue, are going to work with our colleagues, Republicans, Democrats, Independents, and with the military. The military, most of all, wants this to go away, and we have to end this terrible tragedy of sexual assault. Just think of what an amazing legacy it will be for this Senate if we succeed. Even more important, think about how many men and women we will rightly protect.

Thank you so much and I am very excited about this hearing. I know with your leadership, the two of you, we can get this done. Thank you very much.

Senator GILLIBRAND. Thank you, Senator Boxer, for your very, very strong and valuable testimony. We are so grateful for your leadership.

We are now going to welcome the next panel. You can come up and I will read a biography that is very brief of each of you while you get settled.

We have Anu Bhagwati, who is the Executive Director and Co-Founder of the Service Women's Action Network (SWAN). Anu is a former captain and company commander. She served as a Marine officer from 1999 to 2004. While serving, Anu faced discrimination and harassment as a woman in the military and has borne direct witness to the military's handling of sexual violence.

We have BriGette McCoy, former specialist in the U.S. Army. BriGette served in the U.S. Army from 1987 to 1991. She was just 18 years old when she signed up to serve her country in the first Gulf War. While stationed in Germany from 1988 to 1991, she was sexually assaulted by a non-commissioned officer.

We have Rebekah Havrilla, former sergeant in the U.S. Army. Rebekah served in the U.S. Army from 2004 to 2008. She was the only female member of a bomb squad in eastern Afghanistan and

was attacked by a colleague at Salerno Forward Operating Base near the Pakistani border during her last week in country in 2007.

We have Brian Lewis, former petty officer third class, U.S. Navy. Brian enlisted in the U.S. Navy in June 1997. During his tour aboard USS *Frank Cable*, AS–40, he was raped by a superior non-commissioned officer (NCO) and forced to go back out to sea after the assault.

I encourage each of you to express your views candidly and tell us what is working and what is not working. Help us to understand what we can do to address this unacceptable problem of sexual assaults in the military.

We will hear your opening statements. Your complete prepared statements will also be included in the record. Following the opening statements, we will limit our questions to 7 minutes for the first round for the Senators.

Ms. Bhagwati?

STATEMENT OF MS. ANU BHAGWATI, EXECUTIVE DIRECTOR AND CO-FOUNDER, SERVICE WOMEN's ACTION NETWORK

Ms. BHAGWATI. Thank you. Good morning, Chairman Gillibrand, Ranking Member Graham, and members of the subcommittee.

My name is Anu Bhagwati. I am the Executive Director of SWAN, and a former Marine Corps captain.

SWAN's mission is to transform military culture by securing equal opportunity and freedom to serve without discrimination, harassment, or assault and to reform veterans services to ensure high-quality health care and benefits for women veterans and their families.

Military sexual violence is a very personal issue for me. During my 5 years as a Marine officer, I experienced daily discrimination and sexual harassment. I was exposed to a culture rife with sexism, rape jokes, pornography, and widespread commercial sexual exploitation of women and girls both in the United States and overseas.

My experiences came to a head while I was stationed at the School of Infantry at Camp Lejeune, NC, from 2002 to 2004, where I witnessed reports of rape, sexual assault, and sexual harassment swept under the rug by a handful of field grade officers. Perpetrators were promoted or transferred to other units without punishment, while victims were accused of lying or exaggerating their claims in order to ruin men's reputations.

As a company commander at the School of Infantry, I ultimately chose to sacrifice my own career to file an equal opportunity investigation against an offending officer. I was given a gag order by my commanding officer, got a military protective order against the officer in question, lived in fear of retaliation and violence from both the offender and my own chain of command, and then watched in horror as the offender was not only promoted but also given command of my company.

Many of the women who were impacted by these incidents, including me, are no longer in the military. However, all of the officers who were complicit in covering up these incidence have since retired or are still serving on Active Duty.

I was devastated because I loved and still love the Marine Corps.

I wish my experience was unique, but in the last few years of working on these issues, and in the hundreds of cases we handle each year on SWAN's helpline, I have discovered that rape, sexual assault, and sexual harassment are pervasive throughout the military. Sexual violence occurs today in every branch of service in both operational and non-operational environments, in both combat arms, as well as support units, and affects both men and women.

DOD itself estimates that 19,300 assaults occurred in 2010, and that while 8,600 victims were female, 10,700 were male.

This is a critical point. Military sexual violence is not a women's issue. Sexual assault is widely understood by military personnel who have been overexposed to a culture of victim-blaming and rape mythology.

So let us be clear. Rape and assault are violent, traumatic crimes, not mistakes, not lapses of professional judgment, not leadership failures, and not oversights in character. Rape is about power, control, and intimidation.

Thanks to a surge of pressure over the last few years by advocates, the media, and Congress, military leadership has finally been forced to reckon with the issue of military sexual violence. Some victims protections reforms have been sensible like the creation of special victims units, mandatory transfers for victims, or in the Air Force's case, a pilot program which assigns each victim a designated special victims counsel. Yet, while these measures help a victim after an assault, they will neither prevent sexual violence nor change a culture that still condones sexual violence.

Military leadership cannot solve this problem on its own. I urge Congress to enact the following reforms going forward.

First, Congress should grant convening authority over criminal cases to trained, professional, disinterested prosecutors. Commanding officers cannot make truly impartial decisions because of their professional affiliation with the accused and oftentimes with the victim as well.

In recognition of this fact, a number of common law countries have already transferred case disposition away from commanders to prosecutors, deeming the policy a violation of the right to a fair and impartial trial.

Second, open the civil courts to military victims. Civilian victims of workplace crimes, including civilian DOD employees, have one critical avenue for redress currently unavailable to uniformed personnel: access to civil courts.

To this day, the U.S. Supreme Court and the Federal courts below it continue to maintain that servicemembers are barred from bringing claims of negligence or intentional discrimination against the military, depriving military personnel of remedies for violations of their rights. In the face of this judicial doctrine, Congress must ensure that men and women in uniform can access the remedies available to all other aggrieved individuals under the Federal Tort Claims Act and the Civil Rights Act.

Given the prevalence of retaliation against servicemembers who report incidents of sexual assault and harassment, the absence of these remedies for military personnel is especially shameful.

I will close by saying that today we are looking at an institution that desperately needs to be shown the next steps forward. Sen-

ators, do not let today's servicemembers become another generation of invisible survivors.

Thank you.

[The prepared statement of Ms. Bhagwati follows:]

PREPARED STATEMENT BY MS. ANU BHAGWATI

Good morning, Chairman Gillibrand, Ranking Member Graham, and members of the subcommittee. My name is Anu Bhagwati. I am the Executive Director of Service Women's Action Network (SWAN), and a former Marine captain.

SWAN's mission is to transform military culture by securing equal opportunity and freedom to serve without discrimination, harassment or assault; and to reform veterans' services to ensure high quality health care and benefits for women veterans and their families.

Military sexual violence is a personal issue for me. During my 5 years as a Marine officer, I experienced daily discrimination and sexual harassment. I was exposed to a culture rife with sexism, rape jokes, pornography, and widespread commercial sexual exploitation of women and girls in the United States and overseas.

My experiences came to a head while I was stationed at the School of Infantry at Camp LeJeune, NC, from 2002–2004, where I witnessed reports of rape, sexual assault, and sexual harassment swept under the rug by a handful of field grade officers. Perpetrators were promoted or transferred to other units without punishment, while victims were accused of lying or exaggerating their claims in order to "ruin men's reputations."

As a Company Commander at the School of Infantry, I ultimately chose to sacrifice my military career to file an equal opportunity investigation against an offending officer. I was given a gag order by my commanding officer, got a military protection order against the officer in question, lived in fear of retaliation and violence from both the offender and my chain of command, and watched in horror as the offender was not only promoted but also given command of my company.

Many of the women who were impacted by these incidents chose not to re-enlist. I left by the skin of my teeth. However, all of the officers who were complicit in covering up these incidents have since retired or are still serving on active duty.

I was devastated, because I loved the Marines.

I wish my experience was unique, but in the last few years of working on these issues, and in the hundreds of cases we handle each year on SWAN's Helpline, I have discovered that rape, sexual assault and sexual harassment are pervasive throughout the military. Sexual violence occurs today in every branch of Service, in both operational and nonoperational environments, in combat arms as well as support units, and affects both men and women.

The Department of Defense (DOD) estimates that 19,300 sexual assaults occurred in 2010, and that while 8,600 victims were female, 10,700 were male.

This is a critical point. Military sexual violence is not a "women's issue". Sexual assault is widely misunderstood by military personnel, who have been over-exposed to a culture of victim-blaming and rape mythology, where victims are considered responsible for their own assaults, and perpetrators are simply naíve young servicemembers who might have had a lapse of professional judgment, at worst.

So let's be clear.

Rape and assault are violent, traumatic crimes, not mistakes, leadership failures or oversights in character.

Rape is about power. Control. Intimidation.

Thanks to a surge of pressure over the last few years by advocates, the media and Congress, military leadership has finally been forced to reckon with the issue of military sexual violence. Some victims protections reforms have been sensible, like the creation of Special Victims Units, mandatory transfers for victims, or in the Air Force's case, a pilot program which assigns each victim a designated Special Victims Counsel. Yet, while these measures help a victim after an assault, they will neither prevent sexual violence, nor change a culture that condones sexual violence.

Military leadership cannot solve this problem on its own. I urge Congress to enact the following reforms going forward:

1. Professionalize the Military Criminal Justice System

   Congress should grant convening authority over criminal cases to trained, professional, disinterested prosecutors. Commanding officers cannot make truly impartial decisions because of their professional affiliation with the accused, and often times with the victim as well.

   Last year's reform to make colonels the convening authorities over sexual assault cases was a step in the right direction, but it does not resolve the issue

of institutional bias. Colonels and Generals may have more rank than junior officers, but their rank does not endow them with expertise in the law.

In recognition of this fact, a number of common law countries have already transferred case disposition authority from commanders to prosecutors, deeming the policy a violation of the right to a fair and impartial trial.

Recent news about an Air Force Lieutenant General reversing the conviction of a Lt Colonel—a fellow pilot—in a sexual assault case at Aviano Air Force Base emphatically underscores several points. First, senior officers are not infallible, and in fact can be complicit in criminal injustice, and second, today's military criminal justice system is undermined by built-in bias.

There is no logical reason to let this system remain as it is. I urge you to enact legislation to authorize trained, professional prosecutors to handle criminal cases, as they do in the civilian criminal justice system.

2. Open Civil Courts to Military Victims

Civilian victims of workplace crimes, including civilian DOD employees, have one critical avenue for redress currently unavailable to uniformed personnel: access to civil courts.

To this day, the U.S. Supreme Court and the Federal courts below it continue to maintain that servicemembers are barred from bringing claims of negligence or intentional discrimination against the military, depriving military personnel of remedies for violations of their rights. In the face of this judicial doctrine, Congress must ensure that men and women in uniform can access the remedies available to all other aggrieved individuals under the Federal Tort Claims Act and the Civil Rights Act.

The civil system is where victims are much more likely to get justice. Civilian employers have historically improved hostile workplace climates because when victims win civil cases—which they win much more often than they win criminal cases—the courts can grant them relief that deters employers from violating the law.

Under laws like the Federal Tort Claims Act and the Civil Rights Act, employers may be held liable for failing to exercise reasonable care to prevent and correct harassment or assault, as well as for retaliating against employees who report violations. Given the prevalence of retaliation against servicemembers who report incidents of sexual assault and harassment, the absence of these remedies for military personnel is especially shameful.

Allowing military victims to pursue civil claims will act as a real deterrent to workplace assault and harassment—a deterrent that does not exist in today's military. The threat of civil claims and the right to pursue these claims will directly transform military culture.

3. Ensure Survivors' Department of Veterans Affairs (VA) Claims Get Accepted

The quickest and easiest thing the Senate can do to help survivors today is to pass The Ruth Moore Act, a bill introduced by Senator Jon Tester and Congresswoman Chellie Pingree, that fixes the broken VA claims process for survivors. Veterans often face a triple betrayal, first by their sexual predator, then by members of their own unit who fail to support them, and then finally by the VA that unfairly rejects their disability claims for post-traumatic stress or other life-threatening conditions related to in-service abuse. The Ruth Moore Act already has bi-partisan support. It can and must be passed in 2013.

I'll close by saying that today we are looking at an institution that desperately needs to be shown the next steps forward. Senators, do not let today's servicemembers become another generation of invisible survivors.

Thank you.

Senator GILLIBRAND. Ms. McCoy.

STATEMENT OF MS. BRIGETTE MCCOY, FORMER SPECIALIST, U.S. ARMY

Ms. MCCOY. Thank you very much for having me here today. I have deep gratitude towards those who have worked tirelessly for our voices to be heard and to those here listening with compassionate and open hearts poised to make positive changes toward these matters at hand, changes that need to come from the root.

I am a Gulf War-era, service-connected, disabled veteran.

I was raped during military service and during my first assignment. That was 1988. I was 18 years old. It was 2 weeks before my 19th birthday. This happened in a foreign country, away from American soil, while I was stationed in Germany.

I did not report it for reasons which will become clear as I tell my story. That would not be the last time I would be assaulted or harassed. This is my story, but it is not mine alone. More than 19,000 men and women every year share similar stories.

That year, the year that I was raped, that same year I was raped again by another soldier in my unit.

Another year, I was sexually harassed by a commissioned officer in my unit.

Between 1990 and 1991, another NCO in my unit began to harass me through inappropriate touching, words, and behavior. This NCO then requested from my command that I be moved to work directly for him in a work environment where there was no access, closed and window-less, key entry coded vault. Upon receiving my new shift schedule, I can only compare the anguish of this entrapment to discovering your child has been constantly molested by a person of authority. I was at mental and emotional collapse.

A senior woman NCO in my unit helped me to write a written statement to present to my command and to file a formal complaint, a complaint that my command answered with no official hearing, no written response, and it was only answered later with a verbal response from my first sergeant who asked me what did I want and that I had misunderstood this NCOs' intentions toward me.

The only thing that I wanted at that time was two basic things. One was an apology and for the harassment to stop. That was all.

I did not know what was happening, and at no time did anyone ever move forward with my formal complaint. Nor was anyone willing to discuss the process with me. They did, however, remove me from his team and his formal apology consisted of him driving by me on base, rolling down his window, and saying to me sorry.

So after that in the days that followed, I was verbally and socially harassed, put on extra duties that conflicted with my medical profile, and socially isolated. Eventually I was given a choice to either get out or to face possible UCMJ action myself.

Most women who are victims of sexual harassment or abuse are threatened and charged with UCMJ action. So I felt I had no choice. I was literally terrified, and so in that terrified position, I was paralyzed and I just chose to get out because that was the option that was given to me.

Within a week, I had orders out of Germany and I was escorted by two NCO's to my plane and that was it. My career was over.

Please note that in unit I was not the only one that was sexually assaulted or sexually harassed. Many women came to me and said they had had the same situation happen, but they never told me who in fact did this.

Returning to the United States and civilian life was difficult, and I had a lot of false starts. I had a lot of negative behaviors that carried from the military. I was anxious and overly protective. I became suicidal and attempted suicide. I went through severe depression and had multiple severe medical illnesses and was unable to

carry on the rigors of work for which I was highly trained. I repeatedly moved from place to place and was homeless and medically disabled, but not even the Department of Veterans Affairs (VA) would recognize this and help me until some 2 decades later.

I lost many material things and emotional relationships in my lifetime and struggled with my faith. I grieved because I felt I was the lucky one. I left my unit alive with an honorable discharge. Although discombobulated and scared for my life and my future, many leave with less than honorable discharges and personality disorders on their records, further hindering them from applying for medical treatment and medical claims. Some, like Private First Class (PFC) Lavina Johnson, do not come home to their parents alive.

22 years later almost to the day of my early expriation of term of service, I was awarded veteran service compensation and service connection for military sexual trauma (MST). Can you tell me why did it take so long? Why did I have to go through so much before anyone would listen to me? Why did I have to be violated again through the process of asking for help and seeking claim status?

Today I volunteer and this helps to ground me. I volunteer through different veterans organizations and outreach foundations. I participate in listening sessions to help organizations like the Sierra Club and Warrior Songs better understand the many facets of women veterans' needs for their programmatic purposes.

My history is chronicled with other women and men veterans in the documentary service, "When Women Come Marching Home." I am a social media peer supporter and technology advocate through my organization, Women Veterans Social Justice, and I collaborate with both community and veteran organizations and dozens of other organizations.

I speak and spoke at the Surgeon General's Task Force for Suicide Prevention because suicide and homelessness are two huge issues in the MST community and with the claims denial and lack of purposeful medical treatment exacerbating those issues. Of course, PTSD from MST is the main contributing factor.

I have to say I no longer have any faith or hope that the military chain of command will consistently prosecute, convict, sentence, and carry out the sentencing of sexual predators in uniform without absconding justice somehow. Only 8 percent of them are prosecuted. How many are relieved of their duties, their pensions, their careers? How many of them are placed on the national registry as sex offenders before they are returned to civilian life? Even asking that, what happens to the 92 percent that were not sentenced or prosecuted?

Let's not allow sexual predators who happen to wear a uniform the opportunity to become highly trained, highly degreed, military decorated sexual predators. Let's make sure they are convicted and dishonorably discharged and listed on the national registry. Let's do this before they go on notice in our communities to further harm our servicemembers, our community, and our family members.

Sexual assault and trauma has deep and broad roots in the military. Let's not just pluck a few leaves and trim the branch. Let's deal with this from the roots. Please make it stop.

[The prepared statement of Ms. McCoy follows:]

PREPARED STATEMENT BY MS. BRIGETTE MCCOY

Thank you. I have deep gratitude towards those who have worked tirelessly for our voices to be heard and to those here listening with compassionate and open hearts poised to make positive changes toward these matters at hand.

I am a Gulf War era service connected disabled veteran.

I was raped during military service and during my assignment at my first and only duty station. This was 1988 and I was 18 and in country less than 90 days. I did not report it. That would not be the last time I would be assaulted or harassed. This is my story but its not mine alone more than 19,000 annually share similarities in their story too.

In 1991, I reported sexual harassment. I was to the point of mental and emotional fatigue. When I reported to my command in a formal written complaint with help from one of the women noncommissioned officers (NCO) in my unit, I was told I misunderstood the offending NCO's intentions and was asked "what do you want"—I only wanted a an apology and to be removed from working directly with him. No one ever officially explained any further process like pressing charges or moving forward with my formal written complaint. It was never spoken about again. They did remove me from his team and his formal apology consisted of him driving by me on base and saying "sorry" out of his open car door window.

Afterwards, I was verbally and socially harassed, put on extra duties that conflicted with my medical profiles, and socially isolated. After major verbal and physical conflicts with my first sergeant, I was given a "choice" to either get out, by breaking my extension, to maintain my honorable discharge or continue to stay in and face Uniform Code of Military Justice (UCMJ) action. By this point the atmosphere in my unit and on post was so hostile I was in fear for my life so I signed the papers. Within the week I had orders out of Germany and I was escorted by two NCOs to my plane in Frankfurt, Germany. That was it! Within a few days, my military career was over.

Please note that in that unit I had not been the only servicemember sexually harassed I had been told directly by other women soldiers who were afraid to come forward.

Returning to the United States and civilian life was difficult, I had a lot of false starts, I had a lot of negative behaviors that carried over from the military. I was anxious and overly protective. I became suicidal and had suicidal attempts. I went through severe depression and had multiple severe medical illnesses and was unable to carry on the rigors of work for which I was highly trained for. I repeatedly moved from place to place, was homeless and medically disabled but not even the Department of Veterans Affairs (VA) would recognize this and help me until some 2 decades later.

I lost many material things and emotional relationships in my lifetime and struggle with my faith. I grieve because I feel I was the lucky one. I left my unit alive, with an honorable discharge, although discombobulated and scared for my life and my future. Many leave with less than honorable discharges and personality disorders on their records further hindering them from applying for medical treatment and medical claims. Some like PFC LaVena Johnson don't make it home to their parents alive.

22 years later, almost to the day of my early expiration of term of service, I was awarded veterans service compensation and service connection for military sexual trauma (MST). Why did it take so long? Why did I have to go through so much before anyone would listen? Why did I have to be violated again through the process?

Today I am a volunteer for a veteran therapeutic arts programs. I participate in listening sessions to help organizations better understand the many facets of women veterans needs for their programmatic purposes. My story is chronicled with other women veterans in the documentary "Service When Women Come Marching Home." I am a social media peer supporter and advocate. I collaborate with dozens of organizations working to resolve issues for veterans. Suicide and homelessness are two huge issues in the MST community with claims denial and lack of purposeful medical treatment exacerbating those issues. Post-traumatic stress disorder from MST is the main contributing factor with regard to women veteran community issues.

I have to say I no longer have any hope that the military chain of command will consistently prosecute, convict, sentence, and carry out the sentencing of sexual predators in uniform without absconding justice somehow. Only 8 percent are prosecuted . . . of that 8 percent how many are relieved of their duties, their pensions, their careers? How many of them are placed on national registry as sex offenders before they are returned to civilian life. What happens to the 92 percent?

Lets not allow sexual predators in uniform the opportunity to become highly-trained, highly-degreed, military-decorated sexual predators. Lets make sure they

are convicted and dishonorably discharged and listed on the national registry. Lets do this before they go unnoticed into our communities to further harm our servicemembers, our community, and family members.

Sexual assault and trauma has deep and broad roots in the military, lets not just pluck a few leaves and trim a branch, lets deal with this from the roots.

#makeitstop

Thank you.

Senator GILLIBRAND. Thank you.

Ms. Havrilla.

STATEMENT OF MS. REBEKAH HAVRILLA, FORMER SERGEANT, U.S. ARMY

Ms. HAVRILLA. Good morning. My name is Rebekah Havrilla. I am currently the Outreach and Education Coordinator for SWAN. I previously managed SWAN's National Helpline for Legal and Social Services from May 2011 to December 2012. During that time, I assisted and provided referrals for over 600 servicemembers, veterans, and their families on issues related to military rape, sexual assault, and sexual harassment. These included overcoming barriers to getting VA MST claims accepted, overcoming homelessness and accessing housing, and finding quality mental health care.

I hail from the great State of South Carolina where I grew up and lived until I joined the Army in 2004. I was an explosive ordnance disposal (EOD) technician and I achieved the rank of sergeant in 3 years and 3 months. I deployed to Afghanistan from September 2006 to September 2007 and spent the majority of my time in the eastern provinces where I was assigned to Taskforce Paladin, a combined explosives exploitation cell tasked with improvised explosive devices (IED) response and intelligence operations. I also spent time running route clearance missions with multiple combat engineer companies. I was awarded the Joint Service Commendation Medal for my achievements while deployed and was given an Army Achievement Medal and Good Conduct Medal before I left Active Duty.

My deployment brought more than just the stress of occupational hazards. During my tour, one of my team leaders continuously sexually harassed me and was sexually abusive towards me. This behavior caused me so much anxiety that I ended up self-referring to mental health and on medication to manage not just the stress of my deployment, but also the stress of having to live with an abusive leader and coworker.

One week before my unit was scheduled to return back to the United States, I was raped by another servicemember that had worked with our team. Initially I chose not to do a report of any kind because I had no faith in my chain of command as my first sergeant previously had sexual harassment accusations against him and the unit climate was extremely sexist and hostile in nature towards women.

After disclosing my rape to a few close friends, I ended up filing a restricted report 60 days before I left Active Duty against both my rapist and my team leader, but had no intentions of ever doing a formal investigation.

I began a job as a contractor and entered the Reserves at Fort Leonard Wood, MO, and tried to start a different life for myself.

Reintegration was challenging and I had few support systems to rely on. I struggled with depression and the effects of PTSD.

Approximately a year after separating from Active Duty, I was on orders for job training, and during that time I ran into my rapist in a post store. He recognized me and told me that he was stationed on the same installation. I was so retraumatized from the unexpectedness of seeing him that I removed myself from training and immediately sought out the assistance from an Army chaplain who told me, among other things, that the rape was God's will and that God was trying to get my attention so that I would go back to church. Again, I did not file an unrestricted report against my rapist.

Six months later, a friend called me and told me they had found pictures of me online that my perpetrator had taken during my rape. At that point, I felt that my rape was always going to haunt me unless I did something about it. So I went to Army Criminal Investigation Division (CID) and a full investigation was completed.

The initial CID interview was the most humiliating thing that I have ever experienced. I had to relive the entire event for over 4 hours with a male CID agent, whom I had never met, and explain to him repeatedly exactly what was going on in each of the pictures. After the interview was completed, I heard nothing from the investigator until 4 months later when CID requested that I come back in to repeat my statement to a new investigator who was taking over my case. I almost refused.

During the 4 months of waiting without any word on the case except phone calls from my friends who had been interviewed, I lived in constant fear that I might run into my rapist again or that he might retaliate against me in some way. I decided to continue with the case even though I felt that nothing was ever going to be resolved, and 6 months later I was told that even though my rapist had admitted to having consensual sex with me while married, his chain of command refused to pursue any charges of adultery and the case was closed.

The military criminal justice system is broken. Unfortunately, my case is not much different from the many other cases that have been reported. I feared retaliation before and after I reported, the investigative process severely retraumatized me, many of the institutional systems set up to help failed me miserably, my perpetrator went unpunished despite admitting to a crime against the UCMJ, and commanders were never held accountable for making the choice to do nothing.

What we need is a military with a fair and impartial criminal justice system, one that is run by professional and legal experts, not unit commanders. We also need an additional system that allows military victims to access civil courts if the military system fails them. Without both military criminal justice reform and access to civil courts, military sexual violence will continue to be widespread and a stain on the character of our Armed Forces.

Thank you for your time.

[The prepared statement of Ms. Havrilla follows:]

PREPARED STATEMENT BY MS. REBEKAH HAVRILLA

Good morning. My name is Rebekah Havrilla. I am currently the Outreach and Education Coordinator for Service Women's Action Network (SWAN). I previously managed SWAN's National Helpline for Legal and Social Services from May 2011 to December 2012. During that time, I assisted and provided referrals for over 600 servicemembers, veterans, and their families on issues related to military rape, sexual assault and sexual harassment. These included overcoming barriers to getting VA Military Sexual Trauma claims accepted, overcoming homelessness and accessing housing, and finding quality mental health care.

I hail from the great state of South Carolina where I grew up and lived until I joined the Army in 2004. I was an Explosive Ordnance Disposal Technician and achieved the rank of Sergeant in 3 years and 3 months. I deployed to Afghanistan from September 2006 to September 2007 and spent the majority of my time in the eastern provinces where I was assigned to Taskforce Paladin, a Combined Explosives Exploitation Cell tasked with Improvised Explosive Device (IED) response and intelligence operations. I also spent time running route clearance missions with multiple combat engineer companies. I was awarded the Joint Service Commendation Medal for my achievements while deployed and was given an Army Achievement Medal and Good Conduct Medal before I left active duty.

My deployment brought more than just the stress of occupational hazards. During my tour, one of my team leaders continuously sexually harassed me and was sexually abusive towards me. This behavior caused me so much anxiety that I ended up self-referring to mental health and on medication to manage not just the stress of my deployment, but also the stress of having to live with an abusive leader and coworker. One week before my unit was scheduled to return back to the United States, I was raped by another servicemember that had worked with our team. Initially, I chose not to do a report of any kind because I had no faith in my chain of command as my first sergeant previously had sexual harassment accusations against him and the unit climate was extremely sexist and hostile in nature towards women. After disclosing my rape to a few close friends, I ended up filing a restricted report 60 days before I left active duty against both my rapist and my team leader, but had no intentions of ever doing a formal investigation.

I began a job as a contractor and entered the Reserves at Fort Leonard Wood, MO, and tried to start a different life for myself. Reintegration was challenging and I had few support systems to rely on. I struggled with depression and the effects of Post-Traumatic Stress. Approximately a year after separating from active duty, I was on orders for job training and during that time I ran into my rapist in a post store. He recognized me and told me that he was stationed on the same installation. I was so re-traumatized from the unexpectedness of seeing him that I removed myself from training and immediately sought out assistance from an Army chaplain who told me among other things, that the rape was God's will and that God was trying to get my attention so that I would go back to church. Again, I did not file an unrestricted report against my rapist.

Six months later, a friend called me and told me they had found pictures of me online that my perpetrator had taken during my rape. At that point, I felt that my rape was always going to haunt me unless I did something about it so I went to Army Criminal Investigation Division (CID) and a full investigation was completed. The initial CID interview was the most humiliating thing that I have ever experienced. I had to relive the entire event for over 4 hours with a male CID agent whom I had never met and explain to him repeatedly exactly what was happening in each one of the pictures that were found. After the interview was completed, I heard nothing from the investigator until 4 months later when CID requested that I come back in to repeat my statement to a new investigator who was taking over my case. I almost refused. During the 4 months of waiting without any word on the case except phone calls from my friends who had been interviewed, I lived in constant fear that I might run into my rapist again or that he might retaliate against me in some way. I decided to continue with the case even though I felt that nothing was ever going to be resolved and 6 months later, I was told that even though my rapist had admitted to having "consensual" sex with me while married, his chain of command refused to pursue any charges of adultery and the case was closed.

The military criminal justice system is broken. Unfortunately, my case is not much different from the many other cases that have been reported. I feared retaliation before and after I reported, the investigative process severely retraumatized me, many of the institutional systems set up to help failed me miserably, my perpetrator went unpunished despite admitting to a crime against the UCMJ, and commanders were never held accountable for making the choice to do nothing. What we need is a military with a fair and impartial criminal justice system, one that is run

by professional and legal experts, not unit commanders. We also need an additional system that allows military victims to access civil courts if the military system fails them. Without both military criminal justice reform and access to civil courts, military sexual violence will continue to be widespread and a stain on the character of our Armed Forces. Thank you for your time.

Senator GILLIBRAND. Thank you.

Mr. Lewis.

STATEMENT OF MR. BRIAN K. LEWIS, FORMER PETTY OFFICER THIRD CLASS, U.S. NAVY, ADVOCACY BOARD MEMBER, PROTECT OUR DEFENDERS

Mr. LEWIS. Chairman Gillibrand and Ranking Member Graham, members of the subcommittee, thank you for holding this hearing today on sexual assault in our military. I am humbled to be sitting here today before you as the first male survivor to testify in front of Congress on this very important issue, and thank you for allowing that privilege to me.

I also want to take a minute to thank my partner Andy and all the spouses and partners of MST survivors. I would also like to thank the parents and caregivers that work so hard to keep us on a level playing field. Some days they shoulder a very large load and deserve our recognition.

I enlisted in the Navy in 1997 and advanced to the rank of petty officer third class. During my tour on the USS *Frank Cable*, I was raped by a superior NCO. I was ordered by my command not to report this crime.

After this crime had taken place, I was misdiagnosed with a personality disorder by the current director of the Defense Centers of Excellence for Psychological Health and Traumatic Brain Injury. I filed retaliation claims to no avail. I was given a general discharge for a personality disorder in August 2001.

My petition to change my discharge from a general discharge for a personality disorder to a medical retirement for PTSD was denied by the Board for Correction of Naval Records. I carry that discharge as an official and permanent symbol of shame on top of the physical attack, the retaliation, and the aftermath. I fear it will be discussed when I apply for law school, when I apply to be admitted to the bar, even when I apply for a job. I wonder what opportunities it may destroy for me.

However, I choose not to dwell on what the past has brought my way. I will graduate in May with a bachelor of science degree from Stevenson University in Maryland, and I will graduate in December with a masters of science degree from the same university. I plan to go to Hamline University School of Law, and I choose to work towards stopping this crime in our military. Needless to say, because of my discharge, I have had to pay for all of these degrees on my own.

I am here today because I am not alone. My story is all too common. Protect our Defenders regularly hears from Active Duty personnel seeking help as they are being denied opportunities to report, generally retaliated against, diagnosed with errant medical diagnoses, or being charged with collateral misconduct after reporting the attack. The culture of victim-blaming and retaliation while failing to punish the perpetrator must end.

DOD regularly acknowledges this crisis. They estimate 19,000 sexual assaults occur each year and 86 percent of victims do not report mostly out of fear of retaliation. Of those 19,000 victims, about 10,700 are men and 8,300 are women. To translate this into percentages, about 56 percent of estimated victims in our military are men. This is the part of the crisis that DOD does not acknowledge.

Now, just what can we do to stop sexual assault in our military? First, we must recognize that rape is not just about sex. It is about violence, power, and sometimes about abuse of authority. General Franklin's recent action to set aside the guilty verdict against Lieutenant Colonel Wilkerson of aggravated sexual assault is yet another example of an abuse of authority taken by a commander that will have a chilling effect on military judges, prosecutors, and juries and inhibit victims from coming forward. A system that elevates a single individual's authority and discretion over the rule of law often precludes justice and hinders it long into the future.

Colonel Wilkerson's victim has been in contact with Protect our Defenders, and she wants you to know, quote, I endured 8 months of public humiliation and investigations. Why bother to put the investigators, prosecutors, judge, jury, and me through this if one person can set aside justice with the swipe of a pen?

I have here a copy of her statement which has already been submitted for the record, Madam Chairman.

[The information referred to follows:]

[Please see Annex B at the end of this hearing]

Mr. LEWIS. Reforms to date, have clearly not successfully addressed this epidemic because they have targeted the symptoms without addressing the root cause, which is that the military justice system is fraught with inherent personal bias, conflicts of interest, abuse of authority, and too often a low regard for the victim. Whereas civilians have the constitutional protections of an independent judicial system, servicemembers do not. Servicemembers must report an assault to their commanders. However, if those commanders take action and prove that an assault occurred, they also prove a failure of their own leadership. Congress has put commanders in charge of violent sexual crime from victim care, through the legal and investigative processes, through adjudication, and post-trial. Commanders have too often failed to care for the victim or prosecute the perpetrator. They have failed to end this longstanding epidemic.

We also need to ensure that prevention efforts are inclusive of male servicemembers. The majority of prevention efforts are targeted toward females. As I demonstrated, men are a majority of the victims in our military. We cannot marginalize male survivors and send a message that men cannot be raped and therefore are not real survivors.

Survivors of MST also need a fair review of their discharges. The military has shoved many survivors out the back door with inaccurate, misleading, and very harmful, almost weaponized medical diagnoses like personality disorders that affect their benefits and future employment opportunities. We need to establish a system separate and apart from the boards for correction of military

records to examine these discharges and grant survivors the medical retirements they are due from DOD. Currently the correction boards only change about 10 percent of their discharges. These discharges make it much harder for veterans to find meaningful employment, often re-victimize the veteran, make it impossible often for these veterans to use their earned education benefits.

In conclusion, this epidemic has not successfully been addressed in decades of review and reform by DOD or by Congress. Some of the reasons for this include men being invisible and ignored as survivors of MST, inherent bias and conflict of interest present in a broken military justice system. The reporting, investigation, prosecution, and adjudication of sexual assault must be taken out of the chain of command and into an independent office with professional military and civilian oversight.

The established discharge review process is a rubber stamp that causes lifelong harm and needs overhaul badly. It is another way that DOD fails us.

Congressional legislation created these systems that are inherently biased, unfair, and do not work. It is now Congress' duty to pass legislation so servicemembers can receive justice that is fair, impartial, and finally addresses the military's epidemic of sexual assault. It should also be noted that a lot of survivors, as the other panelists have said, do not come home. There are people like Harry Goodwin and so many others that do not survive from their sexual assaults, and we need to do this in memory of them.

Madam Chairman, this concludes my remarks. I am prepared for your questions and those of the subcommittee.

[The prepared statement of Mr. Lewis follows:]

PREPARED STATEMENT BY MR. BRIAN K. LEWIS

Chairman Gillibrand and members of the subcommittee, thank you for holding this hearing today on sexual assault in our military. I am very humbled to be here today. I am the first male survivor to testify in front of Congress on this very important topic. Thank you for making this historic event possible. I also want to thank my partner Andy and all the spouses of military sexual trauma survivors. They shoulder a heavy load and deserve our recognition.

I enlisted in the Navy in 1997 and attended numerous schools and advanced to the rank of Fire Control Technician Third Class. During my tour on the USS *Frank Cable* (AS–40), in August 2000, I was raped by a superior noncommissioned officer. I was ordered by my command not to report this crime to the Naval Criminal Investigative Service. After my command learned of this crime, I was misdiagnosed as having a personality disorder by the current director of the Defense Center of Excellence for Psychological Health and Traumatic Brain Injury, and I was discharged in August 2001. I received a 100 percent disability rating from the Department of Veterans Affairs in June 2002 for post-traumatic stress disorder as a result of the rape. In August 2004, my petition to change my discharge from general discharge for a personality disorder to a medical retirement for post-traumatic stress disorder was denied by the Board for Correction of Naval. Therefore, I carry my discharge as an official and permanent symbol of shame, on top of the trauma of the physical attack, the retaliation and its aftermath. I fear it will be discussed, when I apply for law school, when I apply to take the bar exam, even when I apply for a job, and I wonder what opportunities it may destroy for me. No one should be forced to undergo such painful and inappropriate treatment. However, I choose not to dwell on what the past has brought my way. I will graduate in May with a Bachelor of Science degree in Paralegal Studies and graduate in December with Master of Science degree in Forensic Studies. I plan to go to law school, and I choose to work toward stopping this crime in our military.

I am here today because I am not alone. My story is all too common. Protect Our Defenders' regularly hears from active duty personnel seeking help as they are being denied opportunities to report, generally retaliated against, diagnosed with er-

rant medical diagnoses or being charged with collateral misconduct after reporting the attack.

One survivor recently discharged put it this way:

> "I still cannot grasp what happened to me. When mentioned to commanders, nothing is done—your report gets lost, people turn their backs on you. For 10 years, I was honored to wear the uniform, but I was treated like a second class citizen."

The culture of victim blaming and retaliation while failing to punish the perpetrator must end.

The DOD regularly acknowledges the crisis. They estimate that 86.5 percent of violent sexual crimes go unreported, of the approximately 19,000 that occur every year.

The military is 85 percent men and 15 percent women. According to the Naval Personnel Command, (2012 Sexual Assault Awareness Month Training Guide) of those 19,000 victims about 10,700 are men and 8,300 are women. To translate this into percentages about 56 percent of estimated sexual assaults in our military are men and 44 percent are women.

Now, what can we do to stop sexual assault in our military? First we must recognize that rape is not just about sex, it's about violence and power, and sometimes about abuse of authority,

For over 20 years, repeated scandals of sexual violence, cover up, and abuse of authority in the military have come to light: including Tailhook, Aberdeen, The Air Force Academy, Marine Barracks Washington and the still unfolding scandal at Lackland AFB.

Reforms passed by Congress or announced by the DOD to date have clearly not successfully addressed this epidemic. Despite all the rhetoric, things are not getting better. Between 2010 and 2011, the number of assaults did not decrease, yet actions taken by commanders regarding sexual assault cases decreased 23 percent. The number of perpetrators convicted of any charges, even adultery, in a sexual assault court martial decreased 22 percent. The number of initiated courts-martial fell 8 percent.

The reforms haven't worked because they have targeted the symptoms of this epidemic. They have not addressed the root cause, which is that the military justice system is fraught with inherent personal bias, conflict of interest, abuse of authority and too often a low regard for the victim. While civilians have the constitutional protections of an independent judicial system, servicemembers do not. Servicemembers must report rape to their commanders. However, if their commanders take action and prove that rape occurred, they also prove a failure of their own leadership.

It is only natural for commanders to want to believe that a crime did not happen. Making it disappear entails less risk for their careers. Not pursuing prosecution is much less disruptive for their units. Commanders know and work with the people involved, therefore they have biases. All those within the military hierarchy have strong incentives to follow their commanders' biases. Commanders have tremendous power over the lives and future careers of those in their command. It is only natural that survivors experience repeated patterns of cover-up and retaliation. No wonder Congress' reforms have not successfully delivered justice within a military justice system governed by commanders who have strong incentives not to bring rape to justice.

According to DOD, 51 percent of male victims report that the perpetrator is of higher rank and 26 percent report that the perpetrator is actually in their chain of command and 62 percent of female victims report that the perpetrator is of higher rank and 23 percent report that the perpetrator is actually in their chain of command.

Congress, through the UCMJ, put commanders in charge of violent sexual crime—from victim care, through the legal and investigative processes these cases involve. Commanders have too often failed to care for the victim or prosecute the perpetrator. They have failed to end this longstanding epidemic.

The quest for a quick resolution or an affinity for the defendant sometimes leads the command to reduce sentences, grant clemency, or overturn convictions. These decisions are some of the reasons why 86 percent of victims do not report.

Aviano Air Base commander, General Franklin's recent action to set aside the guilty verdict by a court-martial, against Lieutenant Colonel Wilkerson for aggravated sexual assault is yet another example of an action taken by a commander that will have a chilling effect on military judges and prosecutors, potentially effect future cases and inhibit victims from coming forward. A system that elevates a single

individual's autho1ity and discretion over the rule of law often precludes justice and hinders it long into the future.

It's time to address the fundamental problem to end this epidemic and eliminate the bias and conflict of interest inherent in the military justice system.

We need to take the reporting, investigation, prosecution, and adjudication outside the chain of command and into an independent office with professional military and civilian oversight. This step is vital to ensuring that victims feel safe to come forward and report. This will also ensure that victims and the accused receive a fair and unbiased look at their cases from a disinterested party.

We also need to ensure that prevention efforts are inclusive of male servicemembers. The majority of prevention efforts are targeted toward females.

As I demonstrated, men are a majority of the victims in the military. DOD's infamous "Ask her when she's sober" marginalizes to male survivors and sends a message that men cannot be raped and therefore are not real survivors.

Men need medical and psychological services crafted specifically for them and made available in gender specific settings. In 2009, the Defense Task Force on Sexual Assault in the Military Services recommended this specific step and it is not known whether this recommendation was implemented. Currently there are no residential treatment facilities specializing in treating only male survivors of military sexual trauma. Women can be sent by DOD to any one of a dozen currently run by the Department of Veterans Affairs. Often men cannot even receive effective outpatient therapy. This contributes to a suicide problem. Thirty-five veterans commit suicide every day and only 15 percent are combat related.

Another form of victim blaming comes from military doctors. Under pressure from commands, doctors often diagnose survivors with personality or similar disorders, as a way to discharge survivors from the Service. Survivors of MST need to be treated equally with combat troops suffering from PTSD. This means that the ban on personality disorder discharges currently in effect should be extended throughout DOD to include survivors of military sexual trauma Personality Disorders, by definition, cannot come about as the result of a rape. Military doctors need to be held accountable for these false diagnoses. Such weaponizing diagnoses are unfair and unjust to our service men and women who have been victims of sexual assault in our military.

Survivors also need a fair review of their discharges. The military has shoved many survivors out the back door with inaccurate, misleading, and very harmful discharges that effect their benefits and future employment opportunities. We need to establish a system separate and apart from the Boards for Correction of Military Records to examine these discharges and grant survivors the medical retirements they are due. Currently the Board for Correction of Military Records only changes about 10 percent of discharges. These discharges make it much harder for veterans to find meaningful employment and often impossible to use their earned education benefits. In reviewing the discharges, the Boards, by Federal regulation (32 C.F.R. §723.3(e)(2) and other analogous provisions concerning the Army, Air Force, and Coast Guard), must "presume regularity in the conduct of governmental affairs." In other words, they assume the military does not make mistakes. The military's own sexual assault statistics, though, show it would be far more appropriate to presume that, at least where rape is involved, the military's conduct is predominantly characterized by mistakes. Therefore, today, the system of reviewing discharges is a rubber stamp for a process known to be a deeply flawed. It is broken and unfair to service men and women who have been victims of military sexual trauma. Survivors need to be able to have their discharges reviewed by an independent authority and not the same organization that unjustly damaged them. There should be no presumption that the organization that hurt them did so correctly. This is why we support H.R. 975, which would allow these erroneous discharges to be reviewed by the same Physical Discharge Review Board that is evaluating combat veterans for medical retirement

In conclusion, even after decades of review and reform by the Department of Defense and by Congress, this epidemic has not been successfully addressed. Men are still invisible and ignored as survivors of military sexual trauma. Reform won't be effective until conflict of interest is removed in military justice, and the reporting, investigation, prosecution, and adjudication of sexual assault is taken outside the chain of command and into an independent office with professional military and civilian oversight. Discharge review is a rubber stamp that causes life-long harm, and needs overhaul. Congress' legislation created these systems that are inherently biased, unfair, and don't work. It is now Congress' duty to pass legislation, so servicemembers can receive justice that is fair, impartial, and finally addresses the military's epidemic of sexual assault.

Madam Chairman, this concludes my remarks. I am prepared for your questions and those of the subcommittee.

Senator GILLIBRAND. Thanks to each of you for such direct and thoughtful testimony.

Each of you has recommended in your own way that you would like the disposition authority removed from the chain of command and in fact that there should be an independent legal review and a prosecution.

Ms. Bhagwati, if we are able to institute a prosecution system that does not involve having to report to your chain of command, do you think that will increase the number of cases that are reported? Do you think it will increase the number of cases that are prosecuted? Do you think it will increase the number of cases where a conviction is found?

Ms. BHAGWATI. Thank you, Senator Gillibrand.

Yes, I do. It is really a two-pronged system, though, that needs to be changed. We have the pipeline of accused being prosecuted and hopefully convicted, but also the retaliation that so many servicemembers face in the process which cannot just be dealt with through the criminal justice system within the military. Yes, absolutely, an independent prosecutor being given case disposition authority, given convening authority will dramatically shift the way victims approach whether or not to report. Victims' care is a huge piece of that as well.

I look at it as kind of a cynical way of thinking about sexual assault being inevitable in the military if all we focus on is prosecution and victims' care. We need to do something on the front end to prevent sexual assault from happening at all. Right now, there is really no deterrent with the military to prevent these crimes. There is no deterrent to cause sweeping culture change.

Senator GILLIBRAND. Do you think that if we have more convictions and justice is served, that that will signal change within the military, that if you do commit these crimes, you will be caught, you will be prosecuted, you will be punished?

Ms. BHAGWATI. Absolutely. It is a huge step we need to take. But I would like to encourage the Senate to consider the fact that criminal justice is not a perfect system either in the military or the civilian world, and that victims need more than just a criminal justice system to achieve closure to get any sort of full access to justice. Civilian victims right now within our United States have much more access to redress, and that is why the civil court system needs to be open to military victims as well. Right now military victims have less access to justice than the civilian victims whom they have sworn to honor and protect and defend.

Senator GILLIBRAND. How do you think if you could open the civilian court system to victims, that will change the culture in the military?

Ms. BHAGWATI. Civil courts traditionally have been designed to serve victims. There is a lower burden of proof and victims are likely to get more justice in that system. It also acts as a deterrent to workplace discrimination, harassment, and assault. That is why it functions within the civilian context. You cannot go a week without reading a case in the news, in the mainstream news, about a civilian victim of discrimination, harassment, or assault actually get-

ting her day in court because even the civilian criminal justice system has not been able to give her justice.

Senator GILLIBRAND. What are some other ways, do you think, that we can change the culture within the military to create less of a climate of discrimination and a possibility of assault and abuse?

Ms. BHAGWATI. One very integral piece to this kind of unfortunate puzzle is really the legalized sex discrimination, which still exists in the military, and despite Secretary Panetta's fantastic news last month, only one military occupational specialty has actually been open to women as far as we know. We are very much looking forward to what the Service Chiefs announce in the way of how the lift of combat exclusion will actually be implemented. But sex discrimination within the military goes hand in hand with sexual harassment and sexual assaults.

Senator GILLIBRAND. Thank you.

For the other three witnesses, if you were able to have reported your case of sexual assault and rape to a prosecutor directly, how do you think it would have changed how your case was handled, and what differences do you think it would have shown? Ms. McCoy, you can go first, if you like.

Ms. MCCOY. I really have to reach back over 20 years to think about it, but I believe I would have moved forward with pursuing it. I would not have backed away. In my case, I did present the documentation that was necessary to move forward, and they did not do anything. So I would have had something in place or someone in place to go to to have that conversation so that we could have moved forward with some type of legal process. Ultimately I would have still had my career. I would have still been serving. I would not have been forced out. I would not have been scared for my life because I would have had someone, an intermediary, to go to.

Senator GILLIBRAND. Ms. Havrilla?

Ms. HAVRILLA. I am not sure if I would do much differently. I was in a unit of 22 people. Even if I had an independent prosecutor, up until last year's NDAA, there was no potential for base transfers. Had I actually gone through with a full investigation while serving, I still would have had to live with many of the men who were abusive towards me, and that is not anything that I would have ever wanted to go through, independent prosecutor aside.

The challenge is partially changing the culture within the military of how women are viewed. Until the leadership is held accountable for the actions of some of their subordinates, when leadership is allowed to push those things under the rug, when leadership is never made to stand for the actions others that they, hands down, could have easily said this is unacceptable behavior, it will not stop. Until that happens within certain units—not all units were like mine. I just happened to get a bad one. But had I been in that situation with that unit, I will probably would have not reported at that time.

Senator GILLIBRAND. Mr. Lewis?

Mr. LEWIS. Thank you for your question, Madam Chairman.

I want to be absolutely clear that my perpetrator was not just a perpetrator against me. He has perpetrated this crime against

other victims at that same command while under the command of the same commanding officer. So, yes, an independent prosecutor would have made a world of difference. It would have gotten the reporting outside of the chain of command and not enabled my commanding officer to sweep this under the rug. Even if I had had to stay on board the ship with my command and perpetrator, I would have still been able to access some form of justice, and that at the end of the day, would have saved me, I feel, a lot of heartache and a lot of disappointment. Hearing one of my senior members of my chain of command come to me and say you are not going to report this, that is devastating to any survivor, male, female, or whatever. It feels like your heart breaks when your commanders break faith with you in that fashion. An independent prosecutor would have made all the difference.

Thank you, Madam Chairman.

Senator GILLIBRAND. Thank you.

Senator Graham.

Senator GRAHAM. Do all of you believe if you had had somebody in your corner, someone assigned to kind of help you through the system, an advocate, that that would have helped?

Ms. HAVRILLA. I initially went to the Sexual Assault Response Coordinator (SARC), and I found them to be very helpful and very supportive. But they have absolutely no authority with these issues. While it was comforting in some respect to know that they were supportive and they were there, there is nothing that they can really do for you when you are going through the military judicial system. I think having someone who—because I eventually did a full investigation, and even then I had no one to guide me through that to explain to me what was going on. Again, I did not hear from CID for 4 months after my initial report. I think that having someone like a special victims individual who is trained in the legal aspects of what is happening and what is going on would have been extremely beneficial for me when I was going through the actual investigation process.

Senator GRAHAM. Could you give the committee not in public here but privately the name of the chaplain who told you that?

Ms. HAVRILLA. I honestly do not remember his name, but I can easily find it out for you.

Senator GRAHAM. Would you please find that out?

Ms. HAVRILLA. I can do that for you.

Senator GRAHAM. About opening to civilian litigation—is it Bhagwati?

Ms. BHAGWATI. It is Bhagwati.

Senator GRAHAM. Would you suggest that the claim be against the Government or the individual member?

Ms. BHAGWATI. As I understand it, claims against the Government are really the key piece here. It is claims against your employer that Federal tort claims and Civil Rights Act cases have been traditionally brought up for the victims. I mean, all of this, I think, needs to be closely looked at, but in our system, in our culture, civil courts are aware victims get justice much more frequently than in the criminal courts. We have to look at how we can make the military more on par with the civilian system. It makes

no sense that a young American should put on the uniform and then sacrifice their constitutional rights. It makes no sense.

Senator GRAHAM. Mr. Lewis, you received a general discharge. Is that correct?

Mr. LEWIS. Yes, Senator.

Senator GRAHAM. Again, maybe we can do this in the committee privately. Do you mind if we look at your file?

Mr. LEWIS. No problem, Senator.

Senator GRAHAM. From your point of view, do you think having a victim advocate would have been helpful if there is somebody that you could have went to that would have sort of been in your corner to kind of educate you of the things you could do when you hit a roadblock?

Mr. LEWIS. Some survivors have had success with a victim advocate, but I think that in order to be feasible, any person that would be in my corner would have to be of rank and able to issue orders and able to do things to help me directly. I was fortunate enough to see mental health, and I thought that doctor was in my corner and he was not.

Senator GRAHAM. He was not?

Mr. LEWIS. No, sir. I just cannot imagine a case where someone of lesser rank could effectively be in my corner while being subject to the chain of command.

Senator GRAHAM. Ms. McCoy, you were victimized multiple times. Is that correct?

Ms. MCCOY. That is correct.

Senator GRAHAM. Did you ever go through a CID process?

Ms. MCCOY. I did not. I did go through the process of filing the paperwork with another NCO. They helped me file a sexual assault complaint only. At that time, I do not know that there was necessarily a victim's advocate. I know that we had sexual harassment training and we were already given some steps to how to handle sexual harassment, but there was no one that could come alongside——

Senator GRAHAM. One thing I want to make sure people understand. Rape is not sexual harassment. It is a violent crime subject to severe punishment under the UCMJ.

Do you think a victim advocate may have been helpful to you?

Ms. MCCOY. I have to say that the victim's advocate, if they have the proper rank and if they are set aside and they supersede maybe the unit and they have more authority and more power, because if they just come along and they are just kind of supportive, I do not know how that is going to help that individual who is going through that day-to-day maybe some backlash for even reporting it and the isolation. I do not know how that is going to help that individual while they are still stationed in that unit where they are receiving that type of treatment.

Senator GRAHAM. Maybe all of you could comment on this individually from your own personal experience. Why do you think the command, the commanders, the senior NCO leadership—why were they so hostile to these claims?

Ms. BHAGWATI. In my own experience in the Marine Corps, there were signs of hope along the way. When I was at the School of Infantry, it was actually the infantrymen on the enlisted side that

were just as outraged as victims of sexual harassment and assault were. However, on the officer side, there was definitely a sense of an old boys' club, colonels protecting lieutenants, colonels protecting staff sergeants. Whether or not that has to do with an inclination to protect one's own career, looking out for a future star, or whether or not there is some sort of misguided attempt to protect a good man because you know his family and he has served for 20 years—I mean, you hear this language all the time. Officers—there are fewer of us and we spend time with one another, hanging out at the O-Club. It is a completely different culture.

That is why the Wilkerson case was even more egregious. I mean, you have two pilots. There is this appearance of impropriety even without looking at the facts of the case. That is typical in every unit throughout the armed services.

Ms. HAVRILLA. One of the things that I really do stress is it is about leadership. The hostility is not necessarily even towards women. The hostility is towards the feminine, the perception of being less than and the perception of being weak. Even though I was the only female in my unit, I was not the only one that was targeted for abuse. We had two other males in my unit that were targeted regularly for sexual harassment and sexual abuse that went through a lot of the same stuff that I did. It was not a gender issue. It was, we are targeting what we see as less than, and just by being a woman, I was automatically less than even though I was just as good as they were.

The mind-set when you have that mentality and then again you have the leadership that allows it to continue every day—I cannot tell you a single day that did not go by without some type of rape joke, sex joke, sex play, simulated sex play between men.

We had a sexual assault and harassment training that we went through, and one of our sergeants got up on the table and stripped completely naked and danced and laughed at it. I mean, that is the kind of culture that I lived in on a daily basis. Then when you deploy, you are stuck with these people in very small units in very small places. Why would I go to a chain of command that I knew was going to allow those things?

It is not even a hostility towards women in general. It is that is the kind of culture that some of these units' commanders allow to thrive, and when you have that type of culture, these issues are going to continue to be perpetuated.

Senator GILLIBRAND. Thank you.

Senator Blumenthal.

Senator BLUMENTHAL. Thank you, Senator Gillibrand. I want to thank you and other members of this panel who have been working for some time on this issue. I think Senator McCaskill, Senator Shaheen, Senator Gillibrand obviously. I have been privileged to be involved in some of the work that has preceded this hearing.

But I think the hearing is critically important because it really highlights why we are here today, which is that in the aftermath and the wake of 10 years of war, we want to assure that we continue to have in our military the best, the brightest, and the bravest. Obviously, sexual assault is one of the primary and predominant obstacles to attracting and retaining good people to our military. It is not just about the victims, although we deeply respect

and care for the horrific experience that you have encountered. It is the national interest that brings us here today.

It is the interest of our extraordinary military that also brings us here today. They have demonstrated that they are aghast and disgusted by this problem and that they are acting to do something about it, not just Defense Secretary Hagel but I believe many of our leaders in the military and that they will do something about it.

I view today's hearing as a cooperative effort, cooperative between this panel and our DOD, in seeking to address a problem that ought to have zero tolerance, literally zero tolerance.

As a parent of two sons who are currently serving in the military and one who serves on this panel and has spent some of the best moments of my 2 years as a Member of the Senate with our military, three times visiting Afghanistan, and having the privilege of working with our military, I believe that we have in our military, right now the next greatest generation, and that if we can deal with this problem, we will assure that we continue to have that quality of people in the military. I believe the leaders of our military are determined to make it so.

But this issue is more complicated than just making a speech or saying that we have zero tolerance. Literally deterrence is in the details. I say that as a former prosecutor, as U.S. Attorney in Connecticut for 4½ years, as State Attorney General for 20 years. The details of evidence, of sentencing, of review, and appeal are what will enable us to solve this problem. I really welcome the suggestion, for example, that we have independent prosecutorial authority outside the chain of command, which might be welcome by many of the officers who have to make these decisions. I think these issues ought to be explored.

The Wilkerson case is extraordinary not just for the reversal of the decision and the conviction, but the sentence was only a year, as I understand it, and even more troublingly—and I am going to quote from the full statement, Mr. Lewis, that was provided by the victim. "I endured 8 months of public humiliation and investigations, interviews by the Office of Special Investigations and the prosecution, apparently without an attorney." To continue the quote, "I was interrogated for several hours by Wilkerson's legal counsel without the benefit of legal counsel myself." She was interrogated for hours by the defense counsel without any aid of an attorney herself.

Let me ask you, Ms. Bhagwati, would you suggest that we ought to have not just a victims advocate, but a victims advocate who would serve, in effect, as legal representation for the victim so that that victim's rights and perhaps expanded rights would be better protected?

Ms. BHAGWATI. Senator, that is a very sensible recommendation or suggestion, and I would refer you to the Air Force's pilot program. I imagine General Harding will be touching on that in a few hours. We have actually referred a couple of clients just for this purpose, airmen who have needed that extra buffer, because it is an incredibly intimidating process even under the best circumstances because there is so much hierarchy and power and intimidation in the process of coming forward. Yes, that measure, as

it has been briefed to us, even goes beyond what civilian victims have, which is fantastic because military victims do need that extra buffer because of the hierarchical nature or environment in which they operate every single day, especially junior enlisted troops.

Senator BLUMENTHAL. We should be very clear. Civilian victims who come forward do so in a highly intimidating process, and they have needed—I can tell you, as one who has seen this process improve over the years, they have needed the kind of advocacy that the military is beginning to provide. I commend the pilot program that has been started, and we will be hearing later from folks who can tell us more about it. But I ask you as victims or their advocates now whether that kind of separate unit, which I have advocated, ought to be made institutional.

Ms. BHAGWATI. I believe it should be.

I would just add I do think there is extra pressure on military victims. It is a very different environment. It is a confined environment in which you cannot quit your job or you will be charged. In the civilian environment—rape, assault, and harassment are horrendous under any condition in any environment, but within the military you just have less freedom of movement, less access, and you have this incredibly hierarchical system in which 9 times out of 10, you are told to stay silent. That is how we are trained in basic training and officer candidate school, not to talk back.

Senator BLUMENTHAL. Ms. Havrilla, I think you have highlighted that point by calling attention to the culture within your unit, the practices within your unit which, in essence, were unreviewable because of both the physical and the command structure that you encountered.

Ms. HAVRILLA. Yes. It is something that I saw outside as well. I spent the majority of my time with infantry special forces and combat engineers. I spent 99 percent of my time deployed as the only female. I have had exposure to other units in other capacities, and there were some that were just as bad and there were some that were not. There were some that treated me with absolute professional respect and dignity and I never had any problems with some. So in my mind, it really does come to what is allowed, what does that leadership say goes and does not go and where they draw their lines, and that filters down to the lower levels and continues to do so.

Senator BLUMENTHAL. My time, unfortunately, has expired but I just want to close by saying that your testimony in particular—really all of your testimony—calls attention to the need for prevention. Part of it is deterrence. I say that as a prosecutor. I am a big believer in deterrence, firm punishment, excellent prosecution, but also education. I know the military has begun using an extraordinary documentary called "The Invisible War," which I hope will be shown to everybody, all of our brave men and women in the Armed Forces, so that we can prevent the kind of unit culture that you have described so movingly.

I really want to thank all of you for being here today, for having the courage to step forward, but also for your service in our military and thank all of the military and veterans who are present here today for your service as well. Thank you.

Senator GILLIBRAND. Thank you, Senator Blumenthal.

Senator Ayotte.

Senator AYOTTE. Thank you, Madam Chairman. I want to thank you for having this important hearing today.

I want to thank the witnesses for their service to our country and, in particular, for their courage for being here today. We really appreciate what you have to say, and this is an incredibly important issue.

I wanted to ask about this idea of prevention. What do you think we can do more effectively? I do not pretend to have a very good understanding. Now, I know that the military has made some steps in terms of what kind of education they are doing, whether it is showing individuals "The Invisible War" film, but also it seems to me that we will not have prevention unless we have at the military academies, at basic training this be a core component of readiness, a core component of training up the chain of command as a priority.

What was your experience with that, and any sense of what we could do more on that end to make this, as you say, changing the culture means this being a core component of every aspect of when you receive training and your readiness—awareness and reporting and accountability?

Ms. MCCOY. I have to say that it even starts at recruitment because we have quite a few of our men and women that are being raped and sexually harassed during the recruitment process. I would say even before you get to the Military Entrance Processing Station center where you are having this process of you being examined and all of your background history interrogated, it needs to start at the very beginning before you even get into the military so that when people come in, they know that there is a no tolerance, that this is not going to occur in this area, this breeding ground for you to wreak havoc against other people. It has to start at the very beginning. That is just what I believe.

Mr. LEWIS. Thank you, Senator.

One of the key components, as I said in my opening statement, was that we not marginalize the idea of a male survivor. DOD's campaign last year or so was "ask her when she is sober." The whole idea of that campaign marginalizes the idea of a male survivor being able to come forward, and given the strong societal, almost blind eye that is turned toward the idea of a male survivor, we need to empower them to come forward.

The other things, in terms of prevention, is yes, it must be a core part of readiness. It must extend, as Ms. McCoy said, all the way back to recruitment. Commanders must actually put the things they learn in training into practice. If they receive an expedited request for a transfer, the benefit of the doubt should automatically be with the victim, and the transfer should be granted unless there is some extenuating circumstances against it. I would be hard-pressed to think of any.

But prevention also has to be a way of thinking and it has to be accepted all the way down almost to the very bones of people that we do not act this way against each other. We do not hide the crime when it comes up, and even if this crime does come up, it is not a failure in my leadership to say this has happened and I need to report it up the chain of command properly.

Ms. HAVRILLA. Thank you. This is a question I have thought a little bit about. The DOD has direction about how sexual harassment trainings are to be conducted. A few years ago, the Government Accountability Office (GAO) did a report on those trainings, and it just does not happen the way it is supposed to happen for numerous reasons. We have been at war for over a decade now. Time is crunched. It becomes a PowerPoint, check the block here, read this, go on, move on. We have to get this done. Let's get through this. One of the things that we always saw is we had an E–6 in the unit click through our slides. Everybody sign here and move on.

So I think that by actually implementing the DOD's recommendations of having outside educators come in and do these trainings—that is very important that you have someone, again, who is not in the military system who understands the military system that can come in and say this is what consent is. They can lay out exactly and define it and then say this is what is going to happen if you do this and have actual consequences, as we have discussed all morning, for those actions if they occur.

But I think it is very important—the training is there. It is just not being implemented properly. There is not enough educators out there that are doing this—SARC—sometimes there is only one or two to an entire installation. They cannot handle reports and do training at the same time. So it is a budget issue, a funding issue of how are we going to provide appropriate educators for this topic exactly from recruitment on.

Senator AYOTTE. Thank you.

Ms. Bhagwati.

Ms. BHAGWATI. I think Brian's point is really important. Messaging is critical. Culture change cannot happen without an entire rethinking of how this issue is messaged within the military. I mean, generally I think the way servicemembers and veterans talk about this issue, there is this assumption that you are harassed or assaulted because you are weak. Weakness somehow plays into the entire makeup of why this does not—this is such a hard problem within the military. We are not trained to think of ourselves as weak. Victimhood is not something that any veteran wants to kind of own. It is completely out of sync with being in the military. But when there is messaging that is sort of "small women who are not strong enough are victims"—and you see variations on that theme constantly, which is a complete myth. It has nothing to do with the sex of a victim. When there is mixed messaging about alcohol and rape, where there is an assumption that there is just a lapse of professional judgment on the part of a young man in most cases, you see messaging about them. "Ask her when she is sober" posters is a perfect example of that. There is an inappropriate mixing of messages, which is also just based on mythology. It is not based on fact.

Rapists tend to be serial. They use tools like alcohol to undermine their victim's credibility. It is not a matter of young people partying and the wrong thing happening. Rapists lay out tactics to do what they want to do. There is really just a lack of understanding about what rape is, what sexual harassment is.

The final thing I would say is the culture is so entrenched right now when it comes to sexual violence, and because chain of command is really how we learn to operate from day one of basic training or Officer Candidate School, you really need outside systems that are available to victims within the military because it is hard for your mind to really think outside of that box once it becomes your 24-hour norm. It changes you for all the right reasons because it is very effective operationally to be trained that way, but when it comes to being violated, to being attacked, to losing your dignity at the hands of a fellow servicemember, we need outside systems because they are obviously perceived as safer and they are definitely more functional. They work better.

Senator AYOTTE. I want to thank all of you. My time is up.

Just briefly, first of all, sexual assault and rape is not about the weakness of the victim. It is about power and control and the assertion of that. That, obviously, in a military context becomes an even greater problem. My background is as a prosecutor too. I want you to know, Mr. Lewis, that I very much appreciate that men are victims of sexual assault both in the civilian sector but in the military. I can imagine this is an even greater issue that we need to address for both men and women and all people's dignity.

Two things I wanted to say briefly, which is that in my State on the civilian side, we had what is called a victim's bill of rights. It seems to me like there needs to be some kind of bill of rights also when you are in the military in terms of you know how you will be treated, and that has to also be something that the chain of command is held accountable for.

I appreciate all of you being here today and look forward to hearing what you have to say and listening to what you have to say beyond this hearing, as we try to make sure that we address this issue and stop what is happening. Thank you.

Senator GILLIBRAND. Thank you.

Senator Hirono.

Senator HIRONO. Thank you, Madam Chairman and Ranking Member Graham, and thank all of you for your testimony and the information that you provided.

I realize that this situation is very complicated, and one of the hardest things to change, of course, is the culture of an institution such as the military. We are very proud of the service of our men and women in uniform, but these kinds of assaults—we must move in the right direction. Some of the suggestions that you made were, I think, steps that we should consider seriously.

Ms. Havrilla, one of the questions that you were asked was if we were to remove the decision to prosecute or even to investigate from the chain of command and giving it to an independent authority, would that help. Something you said really struck me. You said that while this is all going on, though, are still in the environment. You are still feeling very vulnerable.

What are some things we could do during the process? Basically I want to know what kind of privacy is afforded to someone who comes forward to report these crimes. What can we do even if we were to remove the decision from the chain of command?

Ms. HAVRILLA. I think when you are in the military, you feel like you have absolutely no privacy at all anyway. When it comes to medical issues, there really is no privacy.

As mentioned, I think that implementing the concept of base transfers or unit transfers are getting you away from those people that were perpetrators against you. I cannot imagine being in my unit going through an investigation at any point in time. But had I that option, I am saying, hey, for example, say I go to the SARC and say this happened to me. I am thinking about reporting it, but I am really not sure because I do not want to stay in this unit and have to deal with all of the potential backlash that is going to come for me. What are my options? Had they given me the option of saying we can transfer you to another unit, another duty station—again, EOD is very small. It is not like I can go from one unit to another, one platoon to another. I would have to literally permanent change of station or go temporary duty in some capacity to get away from—change duty stations. I would have to move to the States basically. Then you have the challenges that might come with that. I am in another location. I have decided to press charges, and I am having to do all of this from a remote location.

I mean, there are complications as everybody has discussed, but I really think that had I the option to say you can go forward with a prosecution and not be in the unit that you are in, I might have considered that very seriously. But I cannot imagine doing it while embedded and entrenched with the same unit that was causing all of my difficulties.

Senator HIRONO. Would the rest of you agree that that should have been an option presented to you, to be removed from the environment in which these incidents occurred? Mr. Lewis?

Mr. LEWIS. Absolutely. Thank you, Senator Hirono, and absolutely.

One of the current problems with the unit transfer idea is that a unit may be in the same geographic location. For instance, if this had happened to me aboard a ship stationed out of Pearl Harbor—I was stationed on a submarine before I went to the Frank Cable out of Pearl Harbor. But if I could have been moved from that submarine to Naval Submarine Support Command right there in the same base, almost the same building, that should not be. Speaking personally, I would rather deal with the pressures of having to deal with the prosecution from half a State away or wherever than to be in a situation where I have to look my perpetrator in the face, where I have to eat, sleep, breathe, go to the bathroom, or anything else with that perpetrator.

Senator HIRONO. Thank you.

Would all of you agree that removing the decision to go forward with either investigation or prosecution should be removed and should go to an independent authority and out of the chain of command? Would all of you agree that that would be a desirable step?

[No verbal response.]

Senator HIRONO. Ms. Bhagwati, there are other countries that have removed the chain of command from making these decisions. I think Great Britain has done so. Are you familiar with the experiences in these countries, whether the incidence of sexual assault went down, whether prosecutions went up, whether reports went

up? Are you familiar enough to talk to us a little bit about what your impressions are of these other countries that have made this kind of change?

Ms. BHAGWATI. We have done some research. It is my understanding that the UK and Canadian systems are ones we should look at in closer detail. The Australian system is also one you can look at, although we have seen less success in that system. I think beyond that though, I would refer you to some additional subject-matter experts. It requires a great deal of further study. But the UK has done it successfully, and it is my understanding that the prosecutors themselves are military but that the supervisor of those prosecutors is civilian. It is a bit of a mix in the UK system.

Senator HIRONO. There are some things, evidently, that we can learn from these other countries.

I happened to read an article in the Maklachi newspapers, March 10, 2013, and it is talking about the Aviano case. It notes that because of all of the attention being paid to this terrible situation—these assaults—that somehow there is a political climate where commanding officers feel pressure to prosecute sexual assault allegations. The article goes on to say that commanding officers sometimes use their prosecutorial discretion to proceed with weak cases. They cite some examples of when this happened. So it seems to me would this not point to the desirability of removing these kinds of decisions from the chain of command so that they would not feel political pressure to prosecute weak cases? Would you like to comment?

Ms. BHAGWATI. Absolutely. It is a really critical point that professionalizing the system, actually putting legal experts in charge of the process serves everyone better. It creates a fairer and more impartial trial for the accused as well.

The classic kind of example of why the current problem is so serious is the Commandant of the Marine Corps doing the right thing as the head of the Marine Corps by speaking out strongly against sexual assault in the Marine Corps. We were very excited to hear that kind of language, but because he is in everyone's chain of command, it is seen as problematic. But if he were removed from that process like all other unit commanders, he could speak strongly about this issue, as he should, as everyone within the Armed Forces should. But we have this perception that there is undue influence by the Commandant or other military commanders because commanders have this discretion over these cases. It does not need to be that way. If we professionalize the system and go in the direction of, for example, the UK, we will not see this undue influence.

Senator HIRONO. Thank you.

Madam Chairman, my time is up and I thank you.

Senator GILLIBRAND. Thank you.

Senator McCaskill.

Senator MCCASKILL. Thank you, Senator Gillibrand, and thank you for being here today.

Rape is the crime of a coward. Rapists in the ranks are masquerading as real members of our military because our military is not about cowards.

Our military does an amazing job of training. I am so proud of our military. But, unfortunately, I believe that this is not a crime

that we are going to train our way out of because the crime of rape has nothing to do with sexual gratification. It has nothing to do with dirty jokes, and frankly, there are a lot of studies that say it is not even connected necessarily with people who like to look at dirty pictures. It is a crime of assault, power, domination. I believe, based on my years of experience, that the only way that victims of sexual assault are going to feel empowered in the military is when they finally believe that the focus on the military is to get these guys and put them in prison.

I believe that the focus of our efforts should be on effective prosecution and what do we need to do to make sure that these investigations are done promptly and professionally, that the victims are wrapped in good information, solid support, and legal advice, that the prosecutors have the wherewithal and the resources to go forward in a timely and aggressive way, and you do not have the ability of some general somewhere who has never heard the testimony of factual witnesses in a consent case who can wipe it out with the stroke of a pen.

What I would love from you all—your cases are all compelling, they are all moving. I, like Senator Graham, am infuriated at that chaplain. I am infuriated that the notion that some of the men who put up with what happened to you or even perpetrated what happened to you are still serving in our military.

I would like to hear from you, especially those whose cases were more recent, what happened when you reported in terms of getting good legal information about what your rights were and what to expect.

Ms. HAVRILLA. Thank you, Senator MCCASKILL.

As mentioned, I had none. When my friend notified me that he had found the pictures of my rape online, again it was actually kind of a spur of the moment decision. I was like, okay, enough is enough. This has gone on long enough. I am going to do an investigation. This is ridiculous.

Senator MCCASKILL. If I could go back to your initial decision because we know that there is a huge number of these cases, that there is never a restricted or an unrestricted report. Just so we make the record clear, a restricted report is kept for 5 years; an unrestricted report is kept for 20 years.

Ms. HAVRILLA. I believe those just changed. I believe that restricted reports now are to be kept for 50, but previously there was a much lower cap on that.

Senator MCCASKILL. Okay. Well, whatever the amount is, the difference between a restricted report and an unrestricted report is how timely we can get after it because if it is a restricted report, it is not going to be investigated.

Ms. HAVRILLA. Correct. You basically just become a statistic.

Senator MCCASKILL. So if, in fact, one of the reasons you made your report restricted was the unique nature of the victim being embedded with her perpetrator in a work environment that is intense and depends on working together, what would have happened when you went in if you were told that if there is probable cause found in the next 30 days that this crime was committed, your perpetrator would be removed from the unit? What would your response have been?

Ms. HAVRILLA. It probably would have been worth considering. At that point, you have a timeline, a light at the end of the tunnel, so to speak, with set standards and guidelines of, okay, this will happen in the event that this, this, this are found.

Again, when you are in the middle of it—you look back on it with kind of 20/20 or Monday morning quarterback style, and you are like, oh, I can look back on this and be like, oh, I might have done it differently. But when you are in the middle of it, it is extremely difficult to be able to think clearly. It is a huge trauma. It affects your mental health. It affects how you see the world, how you see yourself. But had I had more information, had there been some type of recourse of saying this is not about me, this is about him, and had there been probable cause for some type of prosecution—and I was actually asked later when I did my full investigation. They said if they find enough, are you willing to take this to court-martial, and I said, yes, absolutely. But in the beginning that was not even an option for me. That was not something that was given to me. Again, we can do the "what if's" all we want.

Looking forward, I am a different person now than I was. If I were to be in the same situation now and have that happen to me, I would say, yes, absolutely I am willing to take that as this perpetrator is going to be done in 30 days or at least the potential for that. Let's move forward with this.

Senator MCCASKILL. Do you feel like your SARC, your special advocate that you talked to—do you feel like they were neutral, supportive, tried to talk you out of it, tried to talk you into it?

Ms. HAVRILLA. Most of them were very supportive and they wanted to be helpful, but they all understood that their hands were tied to what they could actually do for you as a victim. When I went in to do my restricted report against my rapist, I mentioned in passing the constant sexual harassment and sexual assault of my team leader. They said, oh, do you want to do a report against him too. I was like, I had not even thought of that. But sure, why not? So they were not pressuring me into anything. It was just kind of you have the option of also making a restricted report against this individual as well. Is that something that you are willing to do?

At that time, my end of the tunnel, my light at the end was I had 60 days and I was out of the Army, and that is all I wanted. I just wanted out. I wanted to be done. I wanted to be away from the unit that I was in.

Senator MCCASKILL. Mr. Lewis, what about you? Did you feel like, at the point in time you reported, that there was any legal help or any kind of help at all that would have allowed you to move forward with some kind of effort to—and is your perpetrator still in the Navy?

Mr. LEWIS. I honestly do not know, and at this point I hope that I have moved far enough away from it that I honestly do not care. It has to be about me at this point, not what my perpetrator—

Senator MCCASKILL. I appreciate that, but I care, just so you know.

Mr. LEWIS. I appreciate that, Senator.

Senator MCCASKILL. I care.

Mr. LEWIS. Honestly, when the situation came to light, there was an eerie silence that emanated from the JAG office.

Senator MCCASKILL. What year was this?

Mr. LEWIS. 2000.

It was like a black hole had all of a sudden surrounded the JAG office because the JAG at that command is subordinate to the commanding officer. At some point, it becomes about preservation of their own career rather than helping me. No, there was no effective legal situation that I could access, Senator.

Senator MCCASKILL. My time is out. I do want to say I have spent a number of hours with amazing professional prosecutors in the area of sexual assault at the Pentagon on Monday—decades of experience. I do feel that there is some progress being made in some branches, some more than others, recognizing that they have failed at getting after this and doing what our military usually does best and that is focus on a mission and make it happen. What you all are doing today allows us to focus on the mission to get the coward rapists out of the ranks, and we are going to do everything we can to make that happen.

So thank you all very, very much for being here.

Senator GILLIBRAND. Thank you, Senator.

Senator Shaheen.

Senator SHAHEEN. Thank you, Madam Chairman, and thank you for holding this hearing today.

Thank you all very much for your testimony. We especially appreciate your willingness to come forward and tell your stories in a way that allows us to hopefully follow up and take some action to try and address with the military what is obviously a continuing challenge.

Mr. Lewis, I especially appreciate your willingness to point out that this is a crime that victimizes not just women but men.

Senator McCaskill said and, Ms. Bhagwati you have said in your testimony—and I think it is very important to start with—the fact that rape and sexual assault are not about sexual activity. They are about power, control, and intimidation. I think that is an issue that has taken a long time for the civilian world to appreciate. I was on the Commission on the Status of Women in New Hampshire back in 1980 when we were working with law enforcement and other advocates to try and get across that point. Clearly, it is still an issue and it is still something that not everyone understands, particularly people who have not been in your situation.

I was amazed to see that in your statistics that SWAN brought forward that one in three convicted sex offenders remain in the military and that the only branch of the service that says they discharge all sex offenders is the Navy. It seems to me that that is a pretty basic bar that we should think about as we are looking at people who have been convicted of rape and sexual assault.

Ms. Bhagwati, we hear that there is a connection between resistance to pursue sexual crimes and careerism among military officers. There is concern for the reputation of the accused and the commanding officer. Those concerns have been presented as reasons to frustrate the efforts to bring criminals to justice.

I wonder if you could talk more. You have made several recommendations in your testimony. But how can we more effectively

show that covering up sexual crimes is not a way to advance careers?

Ms. BHAGWATI. I will go back to what I think some of my colleagues here were talking about. When these crimes happen—in my case I was a junior officer reporting these crimes to senior officers. Thinking back 20/20, as Rebekah said, on those experiences, I had so much more rank and authority than the average servicemember navigating these issues, by far. Much more freedom of movement, but there is something that I think happens beyond the company grade level with officers who definitely are staying in for the full 20 years or more.

It was suggested to me by an equal opportunity officer that I should charge my battalion commander for failure to do the right thing in these cases, which was an absolutely overwhelming prospect. It just shut me down completely, and here I was a captain. I could not even fathom what it was like for somebody who was maybe E–2/E–3 going through the exact same thing. I could not do it because the thought of doing it made me dysfunctional. I had command. I had to command my company, and to do that, in addition to filing an Equal Opportunity investigation against a lieutenant—I mean, it was just overwhelming.

The old boys' club, which I was referring to earlier, is very much alive and well within each Service branch. I think the fact that for women in the military, there are still significant barriers to career progression and that there are not enough women throughout the Services at top levels, that there are not enough flag officers who are women, all of this is related ultimately. We need a sea change in which so many more women are entering the military. Six to 7 percent of the marines are female, but we are moving toward a quarter or a third and maybe even more eventually. We see at that rate, beyond 20 percent, where climates start to shift when it comes to discrimination, harassment, and assault. That is what we need to aim for. You cannot isolate women from all of these positions and expect your institution to treat its servicemembers fairly. Everyone suffers as a result.

Senator SHAHEEN. Does SWAN have metrics that show overall career impact to servicemembers who have been subjected to sexual assault? How many of those who report assault choose to remain in the military, and how many get out because of the trauma they have experienced? Are those numbers that have been collected?

Ms. BHAGWATI. Not to my knowledge. We have been in discussion with several congressional offices about discussing the retention issue alone. To my knowledge, the military is not yet, at least, suffering a recruitment crisis when it comes to more Americans learning about sexual violence in the ranks. But we are all examples of the retention crisis. There are thousands of our colleagues every year who are adding to those numbers because they know it is not a safe or welcoming environment for them to stay in.

Senator SHAHEEN. Absolutely. As the percentage of women in the military now is close to 15 percent, as you say, it has not reached the critical mass where it will begin, hopefully, to have more of an impact on how sexual assault is treated. But this could become an issue of recruitment, and as we look at how we attract the best and

the brightest people to our military, obviously this is an issue when it comes to both women and men that is going to greatly affect our ability to do that.

So thank you all very much for your testimony.

Senator GILLIBRAND. Senator King?

Senator KING. Thank you, Madam Chairman.

Thanks to all of our witnesses for joining us.

On the issue of culture, which keeps coming back, I lived through a period of change in this country of culture that was very significant and it was the culture of drunk driving. When I was a kid, it was sort of a badge of honor. How did you get home from the party? I do not remember. Ha, ha, ha, and that really changed.

I have tried to think through why it changed. One reason was the laws changed, and punishment became immediate and certain. In Maine, anyway, if you are caught drunk driving, you are going to spend the weekend in jail. Period, and you are going to lose your license for a period of time. It is very certain and no doubt about it.

I think part of what the message you are sending us is it is the length of time and the uncertainty of punishment that has allowed this culture to continue to exist in the military. Would you agree with that?

Mr. LEWIS. Yes, Senator, I would absolutely. It is unconscionable that punishment is solely up to the discretion of one individual who, as has been noted, was not even in the courtroom. It is also unconscionable that a sexual assault on a person brings a year in prison. It is sending the wrong message that the military does not value what happened to the victim.

Senator KING. What is the typical lapse of time between the time a charge is filed and the time the charge is disposed of one way or the other within the military system? Is there an average? Is it weeks, months, years?

Mr. LEWIS. That I am not certain of. I imagine that the military panel would be able to address that far better than I would.

Senator KING. Other thoughts? Ms. McCoy?

Ms. MCCOY. I would like to say that I received more reprimand for not passing a physical training test during my time than the perpetrator of sexual harassment and sexual assault toward me received with me filing official papers to my command.

Senator KING. What does that tell you?

Ms. MCCOY. That is what I am saying. There is no standardized if you assault someone, if you sexually harass, these are the things that are going to happen to you in an absolute and finite way. It absolutely depends on the command. It absolutely depends on the individual within the command and what their relationship is with the commander and the people who are going to possibly move that case forward.

Senator KING. We have been talking about various solutions today involving independent prosecution and those kinds of things, but it seems to me one of the other things we ought to talk about is the period of time. The charges shall be considered within 30 days or some period and a schedule of what the penalties are so that there is certainty. To me, that is what led to the change in the culture of drunk driving, that people understood that there

were consequences, and then it became socially unacceptable. Now drunk driving is way down. A lot of lives are being saved.

Ms. MCCOY. Again, in my particular case, I was systematically exited from the military following my bringing forward this case of sexual harassment and just purely asking for something to be done. Within 90 days, I was out of the military completely.

Senator KING. I want to follow up with you on a different question that is not strictly within the purview of this committee, but it is being considered here at the Capitol, and that is how long it took you to get VA benefits after this because there is a bill, the Ruth Moore bill, that is named after a very stalwart, wonderful Maine woman. Talk to me about your experience on that, on the VA side.

Ms. MCCOY. When I got out, on my documentation, my medical exam, I specifically stated that I was scared, that I was fearful and that I had physical injuries, multiple physical injuries. It took probably 2 years for them to finally get me processed and send me a document stating that my injuries were service-connected, but there was 0 percent compensation. That was in 1992.

So from 1992, because I did not understand the process—there was really no one there to guide me even though there were Veterans Service Organization (VSO)——

Senator KING. That is a separate issue. We will talk about that.

Ms. MCCOY. Yes. Even though there were VSOs there, going to the VA—at that time I was in North Carolina. I mean, it was a daunting experience to walk in as a young woman amidst nothing but older male veterans and try to go through that process.

Fast forward to 2006–2007, somewhere in there when I went again and put in paperwork, again for multiple medical issues—I had not even touched on anything MST because I did not even know that there was anything like that at that time. They sent me paperwork back, process, process, 10 percent again. So it was just constant.

Senator KING. We are talking almost 20 years.

Ms. MCCOY. It was 22 years before I actually received some response to the MST portion of the case—my benefits—and again, another 18 years before the physical injuries that I sustained partially because of the sexual trauma and partially because of patrol, being out on patrol.

But it is amazing to me that 1-in-3 MST cases are awarded. I mean, 1 in 3. So you have to go through this long process of filing paperwork, explaining to people exactly what happened to you step by step, and then get a doctor's note from the VA. Most veteran women are not even in the VA system. They just do not want to even touch it, and so you have to go through that process to even get them to look at your case to be approved for your benefits for compensation.

Senator KING. So our country is letting you down in three places: first by the perpetrator, second by the military while you are there, and third by the VA.

Ms. MCCOY. It is absolutely awful.

Senator KING. Ms. Bhagwati, comments on the Ruth Moore Act?

Ms. BHAGWATI. Yes, thank you, Senator King, for mentioning the Ruth Moore Act. It is in my testimony as well. I just did not have

time to add that. It is the easiest thing that the Senate can do at this point to alleviate the third betrayal of the three betrayals that you just outlined, which is the military may have betrayed servicemembers, but the VA can very easily award compensation which is well deserved. The standard which the Ruth Moore lays out would be comparable to the standard for PTSD that is currently laid out by VA policy for combat-related trauma. This legislation would easily resolve that problem.

Senator KING. Thank you.

Thank you, Madam Chairman.

Senator GILLIBRAND. Thank you, Senator.

Senator Kaine.

Senator KAINE. Thank you, Madam Chairman.

To the witnesses, I very much appreciate your testimony. I apologize for stepping out for another committee meeting in the middle, and I hope I do not repeat questions.

This is a very important hearing, and I thank the chairman for putting this first up to draw attention to this very serious issue. I was a civil rights lawyer for 17 years before I got into statewide politics, and this is a fundamental issue of civil and human rights and we need to get it right.

The experience that you share, painful experience, is going to help others, and so let me begin by thanking you and then thanking you additionally for being advocates for others, as I know you all are. You present sort of an interesting timeline for us because we have the four of you from different Service branches and you have served at different points in time from the 1980s through very recently. In your capacity as advocates, you are working for people who are serving today. So I feel like we can kind of get a little bit of the timeline of the military culture.

I guess where I would like to start is, are things changing? In your own experiences or in the work you are doing with victims, are things changing? Are things changing for the good? Are things changing for the bad? Are people more willing to open up and share their experience? I am hearing each of you address that because, to the extent that things are changing for the positive, if there are things that are changing for the positive, then we will want to do more of them, and to the extent that things are changing for the negative, then we will want to address solutions directly at things that are changing for the negative. In your experiences during the time you served but especially as advocates, do you see changes in the culture, steps being taken that are either moving us in the right direction or moving us in the wrong direction?

Ms. MCCOY. From my perspective, I come to this—I started a social media project that basically I just wanted to connect with other people who had been through the same things that I had been through. So I perceive that social media and grassroots community activism has been the single most important thing that brought people together to help solidify the groups of different, varying issues and brought all these people together to say, hey, we have an issue, let's work together to get something done in a positive direction.

Senator KAINE. When did you start the social media activity, Ms. McCoy?

Ms. McCoy. I had a Ning site called Veteran Social Justice. Initially it was very secret. You could not get on it unless you were invited. That was to protect women who had been sexually assaulted. At that time, people did not want to come forward and say anything. But then I felt that Facebook would be a better venue to move forward to gather more people together, to bring the community together, the community supporters together, the people who were starting organizations who were advocating on behalf of veterans. It just made sense to me. If everyone was on Facebook, then everyone was on Facebook.

Senator Kaine. Your sense is that that has been a positive change because it gives people first a safe way to share their stories and then find out there are others that have their stories. They need not suffer in silence. It is a way to better the community.

Ms. McCoy. For peer support in suicide prevention, absolutely. Absolutely.

Senator Kaine. How about other thoughts about things that are changing either for the positive or the negative in your experience? Ms. Havrilla?

Ms. Havrilla. Yes, thank you, sir.

I managed SWAN's helpline for 18 months, and I noticed a lot of interesting trends and dynamics as I started tracking a lot of the demographic data. One of the things that really has made a huge impact over the last 2 years is the constant media attention around these issues. The more education and awareness that the general population gets or even other veterans and survivors get, again it kind of goes to the social media aspect, but the concept that we as survivors are not alone with our shame, our stigma, whatever label we choose to put on our experiences. SWAN did a summit last year in Washington, DC, and we had one woman who came and she told us—she is like I have never met another survivor before, ever. I did not know that other women and other men had even gone through this. I was completely by myself and alone with my own experiences.

Unfortunately, our helpline is set up to help people who have been through these things. Obviously, we get a lot of the negatives. We get a lot of the people who have experienced these traumas who need assistance with mental health, homelessness, VA claims benefits.

One of the other interesting things that I have noticed too is I do get a lot of older clients, a lot of older women who served in Vietnam in careers starting to speak out about their experiences.

There has been a shift in momentum over the last 2 years. There has been a shift forward. There have been baby steps made through legislation in the NDAA. There has been some positive progress. That is what I try to hold onto.

But at the same time, we are still dealing with a lot of individuals. I get calls from Active Duty women and emails from Active Duty men who are still going through these things every day. I get calls from Korea, from Germany, from Japan, and from everywhere in the United States. The climate is still very much the same in a negative capacity. Obviously, we would not be having this hearing if this still was not a problem.

I think that we need to recognize the problems and we are, and then we need to continue to make forward progress, continue to educate the public, continue to educate our own military, continue to educate ourselves around these issues, and continue to take the steps that we have made already and continue on the path that we have already started on. We will continue to see more positives. We will continue to, hopefully, see less of these instances occur. We will continue to see that culture shift that we have been discussing so far.

Senator KAINE. Thank you.

Please, others? Mr. Lewis?

Mr. LEWIS. Thank you, Senator.

The unfortunate reality is that DOD is not leading the charge on change that you are mentioning. The change has been coming externally. One Senator mentioned "The Invisible War" by Kirby Dick as an agent for change. This summer, another documentary focusing on male survivors will be coming out, "Justice Denied." They have been agents for change.

There have been veterans as a result of advocacy organizations going as far back as World War II to come out and talk about what happened to them in terms of MST. So you are right, Senator. We do have a timeline here. Just from my own personal knowledge, it goes at least all the way back to World War II.

In change, I think that a greater emphasis should come from the DOD Sexual Assault Prevention Response Office. The branches themselves need to be reaching out to the MST advocacy organizations and saying you have this expertise, you have the survivors, what can you do to help us because, time and again, the military has proven themselves incapable of addressing this problem.

Another avenue of change also has to come, as I said, that men need to be validated and lifted up. Survivors in general need to be validated and lifted up and say that we believe you. There needs to be a system whereby survivors that have been kicked out in the last 20, 40, 50 years need to be able to go back to the military and get the medical retirements for PTSD that they are due and not have to suffer through life with a bad piece of paper saying, in essence, they pushed me out. It is unconscionable, but that change is not happening and it really needs to.

Thank you, Senator.

Senator KAINE. Finally, Ms. Bhagwati, do you have thoughts on that question?

Ms. BHAGWATI. I would echo what all of my colleagues said.

I would love to see the DOD come out with a poster that says "don't rape." Don't rape. Period. End of story.

Senator GILLIBRAND. Well, thank you to each of you for not only your courage but your determination and your unbelievable passion and advocacy on behalf of others. It makes a difference. I am sure for any survivor, they cannot imagine how such a horrible crime committed against them could ever make a difference. But because of your experience, you are making a difference. I can tell you we as Senators cannot do this job alone without your stories, without your courage, without your dedication. We cannot find the right solution.

I am grateful that many members of the armed services who are currently in command sat here for your testimony. They heard everything you said. This is the beginning of a much longer conversation, a conversation that we need to have not just as a committee in the Senate, but as a Nation. I want to thank you for your unbelievable strength and courage in leading that conversation. Thank you very much.

[Whereupon, at 12:17 p.m., the subcommittee recessed to reconvene at 1 p.m.]

Afternoon Session—2:20 p.m.

Senator GILLIBRAND. Our hearing of the subcommittee will resume.

Thank you, each of you, for your service, for your dedication, for the sacrifices you have made for our country. I am so grateful that you are here today for this important hearing. I am also incredibly grateful that many of you came this morning and participated and listened to the first two panels. That means a great deal, not just to our witnesses, but also to their families and to all of our military families. We appreciate it very, very much.

I know that this has become a very debated issue, both within the military and in everyday conversation. I also know that many of you have seen the film, "The Invisible War," as sort of a jumping-off point on how important this issue is for our military and their families.

I am very, very eager to hear your testimony, and each of you will have 5 minutes to give an oral statement, and you can submit for the record any additional material that you want to submit today and after your testimony.

We are going to hear from Robert Taylor, the acting General Counsel of DOD; Lieutenant General Dana Chipman, the Judge Advocate General of the U.S. Army; Vice Admiral Nanette DeRenzi, Judge Advocate General of the U.S. Navy; Lieutenant General Richard Harding, Judge Advocate General of the U.S. Air Force; Major General Vaughn A. Ary, Staff Judge Advocate to the Commandant of the Marine Corps; Major General Gary Patton, Sexual Assault Prevention and Response Office; Rear Admiral Frederick Kenney, Judge Advocate General of the U.S. Coast Guard.

Thank you all, and I think we can start with Mr. Kenney.

STATEMENT OF RADM FREDERICK J. KENNEY, JR., USCG, JUDGE ADVOCATE GENERAL OF THE U.S. COAST GUARD

Admiral KENNEY. Good afternoon, Chairman Gillibrand, and distinguished members of the subcommittee.

Thank you for the opportunity to appear before you to discuss the Coast Guard's efforts to prevent and respond to sexual assault in our Service.

Good afternoon to you, Ranking Member Graham.

I share the Commandant's commitment to the safety and well-being of each of our servicemembers, ensuring that Coast Guard personnel have a collaborative, cohesive work environment that allows them to accomplish their mission, protecting those on the sea, protecting America from threats delivered by sea, and protecting the sea itself.

Eliminating incidents of sexual assault within the Coast Guard was a significant, central theme of the Commandant's State of the Coast Guard address delivered 3 weeks ago. Sexual assault is intolerable in the Coast Guard. It is devastating to its victims. It has broad repercussions throughout the Service. We are committed to doing everything we can to prevent sexual assault, to investigating every allegation, to holding people accountable through military justice and other actions, and to ensuring victims of sexual assault are protected, treated with dignity, and provided appropriate ongoing support.

I would like to now address some of the highlights of our policies and programs. More detailed information is contained in my written testimony submitted for the record.

All allegations of serious sexual misconduct must be reported to the Coast Guard Investigative Service for investigation (CGIS), and CGIS has formally established a sex crimes investigation program. CGIS has also established a cadre of 22 specially trained and credentialed agents known as family and sexual violence investigators.

Coast Guard regulations on sexual assault prevention and response (SAPR) have been updated in the last year to more clearly define roles and responsibilities, mandate significant education and training, and ensure greater victim support and safety.

In April 2011, the Vice Commandant chartered a task force to holistically examine the Coast Guard's posture toward SAPR. The Vice Commandant approved 39 recommendations from the task force in January, including the establishment of the Sexual Assault Prevention Council (SAP–C). The SAP–C is a standing body of the most senior Coast Guard admirals and subject-matter experts designed to, among other things, oversee the implementation of the task force recommendations and order immediate and actionable course corrections to the Coast Guard SAPR policy as needed. The Vice Commandant held the inaugural meeting on February 27 of this year.

We place great importance on the need to train and empower all Coast Guard personnel to recognize and respond appropriately when they observe situations that involve disrespectful behavior. Last year, the Coast Guard created and rolled out a new Sexual Assault Prevention Workshop presented live by CGIS agents, judge advocates, and work-life specialists. It includes gender-specific breakout sessions to have a frank dialogue about sexual assault, how to prevent it, and how to respond. Since its inception, the workshop has provided training to 48 units and approximately 7,500 Coast Guard personnel. This initiative received the Department of Homeland Security's Office of General Counsel Award for Excellence in Training in 2012. Many Coast Guardsmen have reported that this training was the most meaningful and effective training they have ever received.

SAPR training sessions are and have been incorporated into all command and leadership courses in the Coast Guard, as well as at our recruit training center in Cape May, New Jersey, and the Coast Guard Academy in New London, Connecticut. We have also significantly expanded the number of trained victim advocates

across the Coast Guard with nearly 400 new victim advocates added in the last few years.

I am committed to enhancing the expertise of Coast Guard lawyers serving as counsel in sex assault cases. Coast Guard judge advocates serve in Navy and Marine Corps trial shops to gain experience the relatively small Coast Guard trial docket would otherwise not allow. Coast Guard judge advocates also attend advanced training to hone their litigation skills in sex assault cases.

In closing, our goal is to eliminate sexual assault within the Coast Guard by building a strong culture of prevention, education and training, response capability, victim support, appropriate reporting procedures, and accountability.

Thank you again for the opportunity to testify today and I am pleased to answer any questions that you may have.

[The prepared statement of Rear Admiral Kenney follows:]

PREPARED STATEMENT BY RADM FREDERICK J. KENNEY, JR., USCG

INTRODUCTION

Good afternoon Madame Chair Gillibrand, Ranking Member Graham, and distinguished members of the subcommittee. Thank you for the opportunity to appear before you to discuss the Coast Guard's efforts to prevent and respond to sexual assault in our Service.

As Judge Advocate General of the Coast Guard, I share the commandant's commitment to the safety and well-being of each of our servicemembers and ensuring that all members of the Coast Guard have a collaborative, cohesive work environment that allows them to accomplish their mission keeping the Nation safe and secure. This includes eliminating incidents of sexual assault within the Coast Guard.

Sexual assault is a criminal act that is simply not tolerated in the Coast Guard. It is devastating to its victims, and it has broad repercussions throughout the Service. Not only is the Coast Guard committed to doing everything we can to prevent sexual assault, we are also committed to investigating every allegation and ensuring victims of sexual assault are protected, treated with dignity and respect, and provided appropriate ongoing support.

The Coast Guard is dedicated to ensuring that in addition to persons accused of sexual misconduct, there is accountability across the entire organization, to include bystanders, the chain of command, commanders, and senior leadership. Every Coast Guardsman is trained in the Coast Guard's Sexual Assault Prevention and Response (SAPR) policy, and every Coast Guard Command is expected to know how to rapidly access the full range of support resources for the victims of sexual assault. Every Coast Guardsman is also expected to work tirelessly, individually and personally, to contribute to a work climate where sexual misconduct is never tolerated, and where every allegation is swiftly and appropriately addressed. Commanders are obligated to address and respond properly to every allegation of sexual misconduct in their unit. Simply put, commanders must be part of the solution.

POLICY & PROGRAMS

The Coast Guard has had policy in place for several years to address sexual assault.

As early as 2004, Coast Guard policy required commands to report all allegations of serious sexual misconduct to the Coast Guard Investigative Service (CGIS) for investigation, and in 2006, the Coast Guard Investigative Service formally established a distinct CGIS Sex Crimes Program and hired a Senior Special Agent to oversee the stand-up of the program. Indicative of the maturation of that program, the CGIS Sex Assault Investigations Tactics, Techniques, and Procedures manual is currently in final clearance with a formal release anticipated within fiscal year 2013.

In 2007, the Coast Guard SAPR instruction was significantly amended to include the addition of the restricted reporting option for victims, which aligned the Coast Guard's reporting options with the two options offered by the Department of Defense (DOD) (restricted and unrestricted). Restricted reporting is the process used to disclose to specific individuals on a confidential basis that he or she is the victim of a sexual assault. Unrestricted reporting is the process used to disclose a sexual

assault to the chain of command and law enforcement authorities. The official policy and guidance was issued in December of that same year.

In 2008, a dedicated Sexual Assault Prevention Program Manager was hired to implement and oversee the day-to-day administration of the USCG SAPR program.

In March 2011, CGIS established a cadre of specially trained and credentialed CGIS special agents—known as Family and Sexual Violence Investigators (FSVIs). In addition to their standard investigatory training, these agents attend advanced courses and seminars on sexual assault, domestic violence and child abuse. CGIS has credentialed 22 FSVI special agents to date.

In April 2011, the Vice Commandant of the Coast Guard chartered a Sexual Assault Prevention and Response Task Force to examine holistically the Coast Guard's posture toward sexual assault in five discipline areas:

- Education /Training;
- Policy/Doctrine;
- Investigation/Prosecution;
- Communications; and
- Climate/Culture

Subject matter experts from each of these five disciplines met for over a year to provide input to the Vice Commandant on ways to improve our sexual assault prevention and response program. The Vice Commandant approved the 39 recommendations from the Working Groups. One of the most significant recommendations, the establishment of a flag level Sexual Assault Prevention Council (SAP–C), has already been fully implemented. Other recommendations from the Task Force include providing enough Victim Advocates to cover our widely dispersed population, improving annual SAPR mandated training and leadership course training segments, implementing various bystander strategies, and continuing SAPR messaging year-round.

Some of these recommendations are already in the implementation stage (such as the bystander intervention initiative titled the "Sexual Assault Prevention Workshop"). The other recommendations are in the process of being prioritized and assigned for action to the three standing committees (currently being chartered) of the SAPC.

The SAP–C is a standing body of the most senior Coast Guard admirals and subject matter specialists designed to:

- Oversee the implementation of the Task Force recommendations;
- Consider and discuss SAPR policy generally;
- Direct empirical studies and trends (root cause analyses) based on accurate and reliable data; and
- Order immediate and actionable course corrections to Coast Guard SAPR policy as needed.

The Vice Commandant held the inaugural meeting on February 27, 2013.

In April 2012, the Coast Guard issued a new and comprehensive SAPR policy that clearly defines roles and responsibility, mandates significant education and training, defines reporting processes and response procedures, and ensures greater victim safety. The policy also clarifies that commands must immediately notify not only the CGIS, but also work-life and victim advocacy specialists, as well as the servicing legal office, upon receipt of an unrestricted report of sexual assault. This helps ensure a comprehensive interdisciplinary approach toward managing the victim's safety and support is in place, and that the investigation begins immediately.

In June 2012, the Commandant of the Coast Guard, along with the Secretary of Defense, issued a Coast Guard wide order to withhold the initial disposition authority for serious sexual misconduct to a Special Court-Martial Convening Authority having achieved the grade of O–6 (Captain) with a dedicated Staff Judge Advocate assigned. The Commandant included in his withholding order not only the most serious felony-level sexual offenses under the UCMJ (rape, sexual assault, and forcible sodomy) but also each of the lesser sexual offenses under Article 120a of the UCMJ such as abusive sexual contact. With the exception of several senior Coast Guard Base and Training Center Commanders, all serious sexual offenses will be reviewed by a flag officer (Admiral) level with a senior and experienced Staff Judge Advocate personally advising them.

LEADERSHIP AND TRAINING

We place great importance on the need to appropriately train and empower all Coast Guard personnel to recognize and respond appropriately when they observe situations that involve disrespectful behavior. All personnel must develop a strong

understanding of the definition of sexual assault and act to alert potential offenders and victims to what sexual assault is and how to prevent and/or stop it.

Every commanding officer, officer-in-charge, manager, supervisor, servicemember, and civilian employee is responsible for creating and maintaining a culture in which we hold those who commit sexual assault accountable; provide confidential avenues for reporting; treat all victims of sexual assault with dignity, fairness, and respect; and afford all victims timely access to appropriate services whether they choose to make a restricted or unrestricted report.

Within the last year, members of the Coast Guard Judge Advocate General were instrumental in the creation and roll-out of the Coast Guard's successful bystander intervention training program known as the "Sexual Assault Prevention Workshop" (which is one of the Task Force recommendations). The workshop is presented live by CGIS special agents, Judge Advocates and Coast Guard Work-Life specialists, who, in addition to providing the necessary information about the SAPR program in plenary session, then engage in gender specific break-out sessions to have a frank dialogue about sexual assault and SAPR. Since its inception in 2012, the workshop has provided training to 48 units and approximately 7,500 personnel. This training initiative received the Department of Homeland Security Office of General Counsel Award for Excellence in Training on January 11, 2013, and many Coast Guardsman have reported that this training is the most meaningful and effective training they have ever received. In addition to Sexual Assault Prevention Workshops, SAPR training sessions are being incorporated into all command and leadership courses in the Coast Guard, and we have significantly expanded the number of trained Victim Advocates across the Coast Guard, resulting in approximately 400 new Victim Advocates added in the last few years.

The Coast Guard Academy (CGA) will continue to offer training to the "Cadets Against Sexual Assault" organization to allow trained cadets to maintain confidentiality and accompany a victim to a Victim Advocate in the event another cadet discloses a sexual assault to them. The CGA also has the billet for the one dedicated SARC in the Coast Guard, and there is quite a robust training plan in place for cadets. Starting in "swab summer" all cadets receive training at various points during their 4 years at the CGA. Recruits at Cape May are provided computer-based training as soon as they arrive to ensure they know the reporting options and who they can go to for help in the event of sexual assault. SAPR information was also added to the pocket handbook the recruits carry on their person at all times, and the recruits receive a more extensive SAPR training module prior to their graduation from basic training.

The Coast Guard has a close working relationship with the Army and Navy Trial Counsel Assistance Programs. Through our longstanding Memorandum of Understanding with the Navy, Judge Advocates can gain significantly more trial experience than the small size of the Coast Guard's trial docket would generate through assignment to Navy offices around the country. Over the last 8 years, the Coast Guard has also been able to send our Judge Advocates to gain experience as prosecutors with the Marine Corps at Marine Corps Base Quantico, Camp Lejeune, and Camp Pendleton. Beginning in fiscal year 2013 Coast Guard Judge Advocates began attending, along with their CGIS Special Agent counterparts, the nationally-recognized U.S. Army Special Victim Investigator Unit course. To date, four Coast Guard Judge Advocates have completed the course, each stating at the conclusion of the course that it was the best training they had ever received as a prosecutor. Thirteen additional trial counsel are scheduled to receive training by the conclusion of fiscal year 2013.

CLOSING

The Coast Guard places the highest priority on preventing sexual assault. Sexual assault is not tolerated in the Coast Guard—it is incompatible with honorable service in the Coast Guard, and incompatible with our Core Values of Honor, Respect and Devotion to Duty.

Our goal is to eliminate sexual assault within the Coast Guard by providing a strong culture of prevention, education and training, response capability, victim support, appropriate reporting procedures, and accountability.

Thank you again for the opportunity to testify today. I will be pleased to answer any questions you may have.

Senator GILLIBRAND. Thank you.

Lieutenant General Harding?

STATEMENT OF LT. GEN. RICHARD C. HARDING, JAGC, USAF, JUDGE ADVOCATE GENERAL OF THE U.S. AIR FORCE

General HARDING. Madam Chairman and members of the committee, I also thank you for the opportunity to speak today about SAPR efforts in the Air Force.

We are committed to supporting victims of sexual assault while we do everything humanly possible to eradicate this awful crime from our Service.

Our Secretary, the Honorable Michael Donley and our Chief of Staff, General Mark Welsh, are fully committed to eliminating sexual assault within our ranks. They have made their position abundantly clear. The Air Force has zero tolerance for this offense. One sexual assault is one too many.

We believe that our sexual assault challenge, like other challenges we have faced in the past and will face in the future, will be overcome by staying rooted to our core values, integrity, service, and excellence, and acting on those values.

We have actively engaged in improving our efforts to prevent and respond to sexual assault across many different lines of effort. While we have many ongoing efforts to combat sexual assault, time constraints will limit my comments to just one at this time. Specifically, I would like to talk to you about our Special Victims Counsel (SVC) Program that we initiated in January. I believe it represents a positive and profound change in the way we approach sexual assault cases.

The pilot program provides airmen who report that they are victims of sexual assault with an attorney to represent them. Our SVC Program is unique among Federal agencies in providing that level of support to victims of sexual assault. This pilot program's primary purpose is to give the very best care to our people. Our SVC operate independently of the prosecution's chain of command. They establish an attorney-client relationship with victims, and they zealously represent on their client's behalf, thereby protecting victims' privacy and immeasurably helping victims not feel re-victimized by having to endure alone what can be a complex, exhausting and often confusing criminal justice process.

We are in the early stages of this program, but we are extremely excited about what the future holds. In December, we trained our first cadre of 60 experienced military attorneys as SVC. To date, we are representing about 200 clients in various stages of the investigation and adjudication phases of their cases, and feedback from victims to date has been very positive. The SVC program is the right thing to do in caring for airmen, and SVCs are already making a difference for their clients.

In closing, the men and the women who raised their right hand with great pride and volunteered to serve this great Nation became more than just airmen. They became part of our Air Force family. Therefore, we strongly believe that we have a sacred obligation to provide a work environment that welcomes them, that keeps them free from sexual abuse by their fellow airmen, and provides the very best care and advocacy on their behalf.

I look forward to answering your questions. Thank you.

[The prepared statement of Lieutenant General Harding follows:]

PREPARED STATEMENT BY LT. GEN. RICHARD C. HARDING, USAF

OPENING

Madam Chairman and members of the subcommittee, thank you for the opportunity to speak to you today about sexual assault prevention and response within the Air Force. This topic is extremely important to us. We are fully committed to supporting victims of sexual assault, while we do everything humanly possible to eradicate this crime from our service.

Our Secretary, the Honorable Michael Donley, and our Chief of Staff, General Mark Welsh, are fully committed to eliminating sexual assault within our ranks. They have made their position clear. They and other senior leaders in the Air Force have zero tolerance for this offense. Our goal is to drive the rate of sexual assault in the Air Force to zero. One sexual assault is one too many.

We believe that preventing sexual assault begins at the time of accession for each airman, when they join our ranks and become part of our Air Force family. At that time, they must enter a mission-focused work environment, one that emphasizes respect, trust, and professionalism and reflects our core values of integrity first, service before self, and excellence in all we do. We believe that our sexual assault challenge, like all challenges we have faced in the past and will face in the future, will be overcome by staying rooted to our core values—integrity, service, and excellence—and by acting on those values.

Employing our core values in combination with the Department of Defense's guidance, we developed a comprehensive approach to combating sexual assault with five lines of effort: Personal Leadership, Climate and Environment, Community Leadership, Victim Response, Holding Offenders Accountable.

While we are actively engaged in improving our efforts in all five lines of effort, I would like to discuss our efforts with regard to work environments, accountability and victim services . . . fields of practice where I have been personally involved in my role as the Air Force Judge Advocate General. These examples demonstrate our senior leaders' tireless resolve to do everything possible to combat sexual assault in the Air Force.

WORLDWIDE WING COMMANDER MEETING AND INSPECTION

Our core values demand that we maintain and sustain an environment of mutual respect. The Air Force succeeds because of the professionalism and discipline of our airmen. Every airman is critically important, and everyone deserves to be treated with respect. Anything less marginalizes great airmen, degrades mission effectiveness, and hurts unit morale and readiness.

In November, our Chief of Staff brought together Air Force wing commanders—more than 160 senior colonels or one-star generals—for an unprecedented day-long face-to-face conversation about leadership. One of the primary topics he discussed at length was sexual assault prevention and response. As far as I am aware, this is the first time all wing commanders have met in a single place at a single time with the Chief of Staff of the Air Force on any topic. It was an extremely candid discussion. The Chief stressed to them that as wing commanders—as leaders—they must directly and aggressively combat sexual assault in the Air Force. His message was clear—we must redouble our efforts, and we need to start by ensuring our work environments reflect respect for all airmen.

As part of this meeting, the Chief announced a Health and Welfare Inspection across the Air Force to reinforce expectations for the workplace environment, to correct deficiencies, to remove inappropriate materials, and to deter conditions that may be detrimental to good order and discipline. Commanders looked for and removed items that hinder a professional working environment. Stated another way, it was a "reset" of sorts to ensure that Air Force workplaces were free of offensive materials that might breed a lack of respect among airmen. Commanders inspected thousands of units at more than 100 Air Force installations, where almost 600,000 Air Force military and civilian personnel work and discovered over 32,000 items deemed inappropriate or offensive and removed them.

SENIOR TRIAL AND DEFENSE COUNSEL

Ensuring and maintaining appropriate work environments is only one initiative. We also have improved the staffing and training of our prosecutors and defense counsel, who litigate sexual assault cases.

For more than 40 years, the Air Force has staffed and fielded specially trained, senior trial counsel, who prosecute our most demanding cases. Sexual assault cases fall into this category and traditionally have been tried by Air Force senior trial counsel. To improve an already strong and mature program, we recently designated

eight of these senior trial counsel as special victims' unit senior trial counsel and are focusing their practice on sexual assault prosecutions. These JAGs also received specialized training on complex legal issues that arise in prosecuting sexual assault cases.

We have a similar training program for our senior defense counsel. It is important that our defense counsel be as experienced and well trained as our prosecutors. We must equally arm both the prosecution and defense with talent and training, in order to ensure that in our system of criminal justice, truth is never a casualty.

We are also working closely with the Air Force Office of Special Investigations on developing team teaching—developing courses where both special victims' trial counsel and other senior trial counsel are trained shoulder-to-shoulder with criminal investigators. This will strengthen our sexual assault investigative efforts. As an example, in January three of our senior trial counsel attended the Air Force Office of Special Investigation's Sexual Crimes Investigations Training Program to help strengthen our investigations into sexual assault, as well as instruct our special prosecutors in how sexual assault investigations often unfold.

Additionally, we are finalizing a course where we will bring investigators, prosecutors and defense counsel together to focus on the legal issues surrounding investigations and trials. We are also enhancing the training we provide our victim and witness liaisons and paralegals to better support special victims' teams.

SPECIAL VICTIMS' COUNSEL

Lastly, we have initiated a program that I believe represents a very positive and profound change in the way we approach sexual assault cases. On January 28, we began a pilot program to provide airmen, who report they are victims of sexual assault, with a personal attorney at Air Force expense. This new initiative, called the Special Victims' Counsel Program, is unique among Federal agencies in providing an unprecedented level of support to victims of sexual assault. It will greatly improve the quality of support we provide victims of sexual assault and help end victims feeling as if they were revictimized by criminal investigative and judicial processes designed to hold offenders, and not the victims, accountable.

From the fiscal year 2011 sexual assault statistics, we noted that 96 victims, who originally agreed to participate in the prosecution of their alleged offender, changed their minds before trial and declined to cooperate with law enforcement personnel and the prosecution. These 96 victims represented 29 percent of our victims of sexual assault who had filed an unrestricted report of sexual assault. I believe that, had these victims been represented by their own attorney, many of them would not have declined to cooperate in holding their alleged offender accountable.

While our pilot program will likely increase prosecutions for sexual assault, make no mistake, its primary purpose is to give the best care to our people. Victim care is extremely important to the Air Force. Our Special Victims' Counsel operates independently of the prosecution's chain of command, establishes attorney-client relationships, and zealously advocates on their clients' behalf . . . thereby protecting victims' privacy and immeasurably helping victims not feel revictimized by having to endure alone a complex, exhausting and often confusing criminal justice process.

We are in the early stages of this program, and are excited about what the future holds. In December, we trained the first cadre of 60 experienced military attorneys as special victims' counsel. Over the course of 3 days, these attorneys received in-depth training from experts in military justice, professional responsibility, legal ethics, and victims' rights. The training featured a recognized civilian expert on counsel for victims, Professor Meg Garvin, the Executive Director, National Crime Victims' Law Institute and Clinical Professor of Law in the Crime Victim Litigation Clinic at Lewis and Clark School of Law. Professor Garvin taught our JAGs lessons that she has learned in over a decade of experience in representing victims, providing valuable insights, recommendations, and practical tips to our new victims' counsel.

We also trained other Air Force professionals, who interact with the Special Victims' Counsel, including our investigators and our Sexual Assault Response Coordinators prior to starting the program.

To date, we are representing over 170 clients in various stages of the investigatory and adjudicatory phases of their case. These attorneys are zealously representing their clients and providing a very much needed service. The SVC Program is already making a difference for the Air Force and for its airmen. The feedback from victims that we have received to date is very positive and extremely encouraging. In short, providing attorneys to victims of sexual assault is the right thing to do.

CLOSING

The men and women of the U.S. Air Force raised their right hand with pride and volunteered to serve this great Nation. When they did so, they became more than just airmen ... they became part of our Air Force family. We strongly believe that we have a sacred obligation to provide a work environment that welcomes and celebrates their diverse backgrounds and contributions, and emphasizes the Air Force core values of integrity, service, and excellence, without which respect, trust, and professionalism cannot thrive. We also owe them the very best care possible when they tell us they have been victims of sexual assault, while at the same time providing the best criminal justice services possible to fairly judge, and appropriately hold accountable, the airmen who sexually abuse them.

While we have a long way to go in eradicating sexual assault from our ranks, we remain committed to a zero-tolerance approach and have taken key steps in strengthening accountability and victim care.

I look forward to answering your questions. Thank you.

Senator GILLIBRAND. The next speaker is Lieutenant General Chipman.

STATEMENT OF LTG DANA K. CHIPMAN, JAGC, USA, JUDGE ADVOCATE GENERAL OF THE U.S. ARMY

General CHIPMAN. Madam Chairman and members of the subcommittee, on behalf of the Honorable John McHugh and General Ray Odierno, thank you for the opportunity to testify before you here today.

Listening to survivors who bravely testified this morning about breaks firsthand in those bonds of trust that should lie at the core of Army values—how do we restore those bonds? How do we retain the trust of the very best of America's daughters and sons, those who continue to answer the call to serve our Army because it defends all of us?

For me the answer lies with a system of justice that gives voice and support to victims, maintains good order and discipline for our force, and protects due process for any soldier who stands accused of a crime.

Sexual assault crimes destroy the trust that enables mission accomplishment. Because of the harsh reality of these cases, we have developed a tailored approach to handle them. In the Army, professional and independent investigators and prosecutors form the vanguard for a special victims' capability directed by Congress last year. We actually began the transformation to a special victims' focus in 2008.

The capability starts with a report of a sexual assault. Victims have various options to report an allegation. Our goal is simple: to encourage victims to come forward. We understand that victims are often reluctant to report.

Every unrestricted sexual assault allegation reaches the Army's CID. There, specially trained criminal investigators, independent of the command, pursue their investigations without interference or agenda. These agents receive extensive training in sexual assault investigations. Working hand in hand with these investigators are the Army's special victim prosecutors (SVP). These experienced judge advocates are seasoned trial lawyers and are trained specifically to focus on victim care. They complete career prosecutor courses offered by the National District Attorneys Association and on-the-job training with a civilian special victim unit in a large metropolitan city.

In addition, both CID and the JAG Corps have hired civilian investigators and prosecutors to mentor, train, and assist these special victim teams. These experts bring decades of experience and expertise from civilian police agencies, other Federal law enforcement agencies, and State district attorneys offices.

SVPs serve the interests and rights of the victim, the community's safety interests, and the good order and discipline of the unit by holding offenders accountable. Testimonials from victims and their families attest to the dedicated support these attorneys provide, such as that from a victim's mother who described the SVP as a member of her family who made her daughter feel stronger and more capable than she knew she could feel.

Eleven years of war have reaffirmed that commanders have a central role in administering military justice in the same way that they are accountable for health, training, welfare, safety, morale, discipline, and mission readiness.

A recent court-martial conviction set aside by a commander has focused concern over the post-trial role of the commander. Should we evaluate needed changes to that post-trial role? Absolutely. We collectively evaluate military justice processes and procedures in an ongoing forum, the Joint Service Committee (JSC) established by DOD. Moreover, we have congressionally mandated panels that could responsibly consider changes to the code. These vehicles, like this hearing, are signs of a healthy system of justice subject to scrutiny, transparency, and accountability.

Although the focus of your hearing today is the prosecution of these offenses, we cannot assume we can prosecute our way out of this problem. Accountability remains critical. But real change will occur only when both prevention and response measures yield culture change. So we begin with every new recruit focusing on Army values and bystander intervention techniques.

Our system of justice is not perfect. No system is. We have worked dramatic changes to our system over six consecutive legislative cycles. Policy, programmatic, and statutory changes over that period are comprehensive. We make mistakes. Every day in every jurisdiction around this country, prosecutors make difficult decisions on cases. We are no different. But my commitment to you is that we will do everything in our power to retain the trust of the men and women who serve our Army and to preserve a system of justice of which we can be proud.

Thank you, and I look forward to your questions.

[The prepared statement of Lieutenant General Chipman follows:]

PREPARED STATEMENT BY LTG DANA K. CHIPMAN, JAG, USA

Sexual assault is an issue with which the Army continues to grapple. Its impact on readiness and individual survivors can be devastating. The Army takes accountability for sexual crimes very seriously and is committed to reducing and ultimately preventing sexual assault in the military. To that end, we believe the modern military justice system, in existence and evolving since the 1950's and based on the Uniform Code of Military Justice (UCMJ), is well equipped to meet the challenges of crime and indiscipline in the Army, and in particular, the terrible crime of sexual assault. Indeed, our system is focused, well resourced, intent on doing what is right and, cognizant of the necessary scrutiny we receive every day. A modern, comprehensive criminal statute, combined with trained commanders and qualified investigators and prosecutors, with a fully resourced justice system provide all the

tools necessary to hold offenders accountable, to protect due process rights of accused soldiers and to provide support and justice for victims. In the Army, our professional and independent investigators and prosecutors form the vanguard for our modern Special Victims Capability, simultaneously mandated by Congress and initiated by the Department of Defense in 2012.

The military justice system was established as a separate system because of the worldwide deployment of military personnel, the need for a system that can be responsive to the unique nature of military life and the combat environment, and the need to maintain discipline in the force. Though instituted with a draft Army in 1950, the UCMJ remains a key element of our all-volunteer force.

Ultimate authority in our system is vested in the commander for very important reasons. The commander is responsible for all that goes on in a unit—health, welfare, safety, morale, discipline, training, and readiness to execute the mission. The commander's ability to punish quickly, visibly, and locally is essential to maintaining discipline in units. The Uniform Code of Military Justice ensures that commanders can maintain good order and discipline in the force.

This unique role of the commander has raised questions in two areas: why do we allow a non-lawyer to make disposition decisions in a criminal justice system? Can a commander improperly influence the military justice process? Our system addresses these concerns through career-long training, the role of the Judge Advocate, and other procedural safeguards. First, the commanders who make these disposition decisions do not go into this process blindly, nor execute their authority in a vacuum. They are trained in their responsibilities under the Uniform Code of Military Justice from the day that they are commissioned and throughout their careers. Second, commanders have at their disposal Judge Advocates to provide advice and counsel. Judge Advocates are an integral part of the military justice system, and they serve as command legal advisors, prosecutors, defense counsel, and military judges. Judge advocates are trained to analyze evidence to determine if there are sufficient facts to support allegations, and to make recommendations to commanders on disposition. Third, there are a variety of procedural safeguards that ensure commanders make evidence-based disposition decisions, particularly in regard to sexual assault allegations. These include the ability of senior commanders to withhold disposition of an allegation from a subordinate.

The most fundamental procedural safeguard is written into the UCMJ. Commanders are, before all else, officers whose commission and oath of loyalty is to no person—but to the Constitution. Second, judge advocates are officers of the court – sworn to the profession of law and to uphold the due process accorded by the Constitution and our laws. These profound tenets of our American Army, conscientious commanders and judge advocates, adhering to and enforcing the rule of law and doing what is right regardless of costs, are, in my view, the best safeguards for our system of justice. Although the individuals operating within the institution are not perfect we have a system in place that holds these soldiers accountable. Our Uniform Code speaks loudly to the proper role of the Commander in military justice. Article 37 prohibits unlawful command influence—that is, a commander may not influence a subordinate commander's independent decision making. However, the ultimate procedural safeguards include the oversight authority vested in the civilian judges of the Court of Appeals of the Armed Forces, and in Article III courts, as well as the authority vested in the Army and DOD Inspectors General. To that end, it must be stated expressly—we attempt to track and report every allegation of sexual assault and make every disposition decision available for review.

What this means is that the military shares the truth in every case reported. In those cases where hindsight reveals a failure, we make adjustments. We have been in a self-evaluation and reaction mode for six consecutive legislative cycles now, and the policy, programmatic, and statutory changes made are comprehensive, progressive, and meaningful.

DISPOSITION: OPTIONS AND AUTHORITY

Commanders have a wide range of disposition options available to them, from four levels of court-martial, nonjudicial punishment, punitive administrative discharge, adverse administrative action, imposing nonpunitive measures to taking no action. The particular level of disposition is based on the nature and circumstances of each offense. This toolbox of disposition options allows Commanders to address the entire spectrum of sexual misconduct, from precursor behaviors of verbal harassment up to and including a rape. Civilian systems do not provide a corresponding range of disposition options.

Given the unique nature of sexual assault allegations, disposition authority for the penetrative offenses (rape, sexual assault, forcible sodomy and attempts to com-

mit these crimes) has been withheld to Brigade Commanders, Colonels with 20–25 years of experience in the Army, and significant training and experience in executing their authority and duties under the Uniform Code of Military Justice. These senior officers also have dedicated legal advisors. The dynamics of each case are evaluated and treated individually, just like any civilian criminal case, and there is no doubt that commanders listen carefully to their legal advisors. After 10 years of complicated contingency operations, the commander-legal advisor relationship is stronger than it ever has been in our military history, in my opinion. The dynamics of each case are evaluated and treated individually, just like any civilian criminal case, and there is no doubt that commanders listen carefully to their legal advisors. Commanders are not afraid to require the prosecutors to try the most difficult cases.

SEXUAL ASSAULT STATUTES UNDER THE UCMJ

The punitive articles of the Uniform Code of Military Justice, including Articles 120 and 125, criminalize a broad range of sexual misconduct from an unwanted touch over the clothing to forcible rape. Article 120 is a modern, offender-focused statute that recognizes constructive force as it exists in the unique hierarchy of the military. It is one of the most progressive sexual assault statues in the country. The statute also provides the ability to prosecute drug and alcohol facilitated sexual assaults like many other States with progressive statutes. Other Articles of the UCMJ criminalize behaviors that have been identified as precursors to sexual assault such as sexual harassment and indecent language. This enables commanders to hold potential offenders accountable for what is considered non-criminal behavior in the civilian justice system

As in every civilian criminal jurisdiction, there are procedural and evidentiary rules that protect victims, particularly victims of sexual assault. Military Rule of Evidence 412, the "rape shield" rule, nearly identical to Federal Rule of Evidence 412's criminal provisions, excludes evidence of a victim's past sexual history subject to limited Constitutionally-required exceptions. Motions and hearings regarding Rule 412 evidence are closed to the public and sealed in the record of trial. Confidentiality provisions, found in Military Rule of Evidence 513 and 514, protect disclosure of confidential statements made by victims to their mental health providers and their victim advocates.

The Army has made tremendous progress in providing special training to prosecutors and investigators since 2009. I will talk about our Special Victim Prosecutors in a minute, but want to emphasize the importance of victim privacy to our prosecutors and commanders. We know that victims are subject to pressures, direct and indirect, after a sexual assault allegation is made. Commanders, prosecutors, investigators, and especially victim advocates, are extremely sensitive to this reality.

ACCOUNTABILITY PROCESS FOR SEXUAL ASSAULT ALLEGATIONS

I believe that the investigative and prosecutorial arms of our system provide an independent, professional process for accountability. Victims have a variety of options to report an allegation of sexual assault including unit Victim Advocates, unit Sexual Assault Response Coordinators, the chain of command, military or civilian police, military or civilian hospitals and hotlines. Because victim reporting is a universal problem, the goal of these initiatives is to encourage victims to come forward by providing adequate support and services. All unrestricted sexual assault allegations in the Army, from an unwanted touch over the clothing to forcible rape, are referred to the Army Criminal Investigation Division (CID). There, specially trained criminal investigators, independent of the command, are free to pursue their investigations without interference or agenda. CID agents receive some of the best and most extensive training in sexual assault investigations of any investigative agency, including their initial training, annual refresher training, and an in-depth 80-hour Special Victim Unit (SVU) Investigation Course. Further, CID has hired civilian sexual assault investigators (SAIs) to supervise their SVUs and sexual assault investigative teams. The sexual assault investigators bring, on average, 16 years of experience and expertise from civilian police agencies and other Federal law enforcement agencies.

The legal offices that provide advice and counsel to the criminal investigators, as well as to commanders, are made up of licensed attorneys who are trained and skilled in the practice of criminal law. In the Army, we employ Special Victim Prosecutors (SVP) to advise on and develop these cases. The objective of these collaborative criminal investigations, led by the SAI and the SVP is the same as in any criminal investigation—to develop sufficient facts and evidence to allow a decision-maker to make an appropriate decision. SVPs are notified of and track every allegation of sexual assault. SVPs confer early and often with the investigators to ensure

a thorough and professional investigation. SVPs are trained to meet with the victim as soon as practicable after the report, to establish rapport and begin the relationship that will serve as the foundation of every case. Educating and supporting the victim is the primary charter of the prosecutor, who must serve both the interests and rights of the victim and the community's interest in holding offenders accountable and preserving good order and discipline. The SVP utilizes a member of the prosecution team known as the Victim Witness Liaison (VWL) to inform and educate a victim of his or her rights and the benefits to which one is entitled. The VWL is normally a civilian paralegal within the Staff Judge Advocate's Office who receives special training to provide victim care and support victim rights.

If the investigation reveals that there is sufficient evidence to support the allegation, that report is referred to the command for disposition. When a commander of any active duty servicemember determines that allegations are supported by the evidence, criminal charges are preferred. For a general court-martial to occur, the charges must first be referred to an investigation under Article 32 of the Uniform Code of Military Justice. The purpose of the Article 32 investigation is to have an independent officer review the case and determine if the charges are in the proper form, if there is sufficient evidence to support the charges, and whether a general court-martial is appropriate. Rules of evidence, including rape shield protections under Military Rule of Evidence 412, apply in the Article 32 proceedings. SVPs and paralegal Victim Witness Liaisons work with victims from the day of the initial report to prepare victims to testify. The Article 32 investigating officer makes a recommendation that informs the review and action of an intermediate-level Commander, a Colonel with between 20–25 years experience. From there, the case is forwarded to the Staff Judge Advocate who advises the General Court-Martial Convening Authority. Ultimately, the General Court-Martial Convening Authority decides whether the case will be referred to court for trial based on the legal advice of the SJA.

When a case is referred to court-martial, the parties to the trial and the process are similar to what one would see in a civilian criminal court. We have an independent military judiciary, made up of military lawyers who have extensive criminal law experience. It is their duty to be fair and impartial in overseeing trials, applying the law, and if applicable, determining guilt or innocence and imposing an appropriate sentence upon an accused soldier. An accused soldier is represented by a military defense counsel who zealously represents their client's legal interests. It is important to note that military defense counsel and military judges are assigned to separate organizations within the military, with command and performance rating chains that are separate from those of the prosecutors and convening authorities. Finally, the government is represented by a trial counsel, or prosecutor, whose mission is to present the evidence and argue the case against the accused on behalf of the United States.

After a soldier is convicted, the military justice system has a unique process for post-trial clemency and review by the Convening Authority known as the Initial Action under Article 60, UCMJ. The Staff Judge Advocate conducts an initial legal review of the proceedings and advises the Convening Authority on appropriate action. Convicted soldiers are permitted to submit materials for review by the Convening Authority. A recent court-martial conviction and sentence received significant media coverage because the Convening Authority disapproved the panel's findings of guilt and sentence and the convicted Lieutenant Colonel was released from jail. I cannot speculate about that matter, but I can say that I have not seen such a result in a court-martial in 32 years of service. Should we evaluate the need for the commander authority exercised here and for changes to our post trial system? Absolutely. Our Services already collectively evaluate military justice processes and procedures in an ongoing forum through the DOD constituted Joint Service Committee. Any changes to our system must be done with a full appreciation for the second- and third-order effects on our post-trial and appellate processes.

Moreover, the Uniform Code of Military Justice has been in place since 1950—more than 60 years. Before its enactment, Congress took 2 years, conducted numerous hearings, took testimony from lawyers and non-lawyers, and carefully drafted the law creating our current military criminal legal system. Since that time, Congress made major changes to the Code on only one occasion, when it enacted the Military Justice Act of 1968. That Act, passed during the Vietnam War era, similarly involved months and months of hearings and testimony. This deliberate and thoughtful approach has ensured that the UCMJ not only is a first class piece of legislation, but also has ensured that unforeseen or unanticipated consequences did not adversely affect our military legal system. Consequently, it is my view that any changes to our UCMJ—even if we agree that change is required—not be made in piecemeal fashion. We must ensure that we adopt the best possible legislative up-

date and that we avoid the law of unintended consequences. I believe with the congressionally-mandated panels directed in NDAA for Fiscal Year 2013, we have the right vehicles in motion to responsibly consider possible changes to our Code.

SPECIAL VICTIM PROSECUTOR PROGRAM

For sexual assault cases in the Army, we have established a Special Victim Prosecutor program to develop and prosecute sexual assault and special victim cases. In 2009, the Secretary of the Army authorized 15 Special Victim Prosecutors to assume responsibility for sexual assault and domestic abuse cases. As a result of the success of this program, in 2012, I increased the number of SVPs to 23. The SVPs have regional responsibilities. These judge advocates are individually selected and assigned based on demonstrated court-martial trial experience, ability to work with victims and ability to train junior counsel. They complete a specially designed foundation and annual training program to elevate their level of expertise in the investigation and disposition of allegations of sexual assault and family violence. This training includes the career prosecutor courses offered by the National District Attorneys Association and on-the-job training with a civilian special victim unit in a large metropolitan city. The SVP's primary mission is to investigate and prosecute special victim cases within one's geographic area of responsibility. Their secondary mission is to develop a sexual assault and family violence training program for investigators and trial counsel in their area of responsibility. SVPs are involved in every sexual assault and special victim case in their assigned region. The SVPs work hand-in-glove with the SAI investigators throughout the process. They train together and, in some locations, SVPs and SAIs are in the same office. As our program develops, we intend to strengthen and formalize the relationship to enhance the Army's accountability efforts. For example, one of our most senior SVPs will move to a new jurisdiction where he will not only prosecute special victim offenses, but also teach at the military police school. Finally, in addition to working directly with victims in these cases, SVPs provide training, support and guidance to those professionals responsible for the physical, emotional and other needs of victims, including Victim Advocates (VAs), Sexual Assault Response Coordinators (SARCs) and Victim Witness Liaisons (VWLs). The SVPs also work closely with local police, prosecutors and service providers. To provide continuity and develop expertise, we have assigned SVPs to 3-year tours and developed a strategy to assign former SVPs to positions that will utilize their skills. We are growing and developing a corps of Judge Advocates educated and experienced in the adjudication of these difficult cases. Looking to the future, we will expand and formalize the concept adding additional resources and personnel to establish a premier Special Victim Capability, consistent with NDAA for Fiscal Year 2013 direction.

What I am most proud of is the rapport these SVPs develop with victims. What you don't read about in the media is the case where the SVP went with the victim to the victim's custody hearing, or where the SVP helped the victim get out of a lease so she could move, or where the SVP helped a civilian victim obtain a restraining order in civilian court. Even better is a recent note from a victim's mother, in which she wrote that the SVP is considered a member of her family and that the SVP made her daughter feel stronger and more capable than she knew she could feel. Along with the reality that we try the harder cases that many civilian prosecutors will not touch, our SVPs work hard to connect with and assist our victims. From counterintuitive behavior, to traumatic memory recollection, to an understanding of alcohol-facilitated sexual assaults in general, our primary focus is knowing and supporting our victims.

HIGHLY QUALIFIED EXPERT ASSISTANCE

At the same time, the Army initiated the SVP program, we hired seven civilian Highly Qualified Experts (HQEs) to further enhance our ability to effectively investigate, prosecute and defend sexual assault and special victim cases. The HQEs bring a wealth of civilian experience and trial litigation expertise to our program. One HQE is assigned to the Criminal Law Department at the JAG school. His primary mission is to develop and train the curriculum on litigating sexual assault and special victim cases that we use to train our judge advocates. Two HQEs are assigned to our Trial Counsel Assistance Program to provide direct assistance to our Special Victim Prosecutors and other trial counsel in developing and litigating sexual assault and special victim cases. These dedicated professionals meet with victims, advise trial counsel, SVPs and Staff Judge Advocates on individual cases, assist in every phase of the prosecution of complex cases and train at conferences and outreaches. Their training includes the entire spectrum of first responders; including Judge Advocates, law enforcement, victim advocates, medical providers, and vic-

tim services providers for the Army and all other services. Two HQEs are assigned to our Defense Counsel Assistance Program to provide direct assistance to military defense counsel representing soldiers in sexual assault and special victim cases.

VICTIM WITNESS LIASION

The final component of the Army's Special Victim capability, working alongside the SAI criminal investigator and the Special Victim Prosecutor, is the Victim Witness Liaison (VWL). The VWL is a paralegal immersed in the military justice system and trained to work with all victims of crime, including sexual assault victims. The role of the VWL is to assist the victim in navigating the court-martial process. The VWL will educate the victim on her rights and the military justice system. The VWL may accompany victims to interviews with defense counsel, sit with the victim through Article 32 hearings or motions, coordinate travel or childcare for victims and provide referrals for all available resources. We are continuing to improve training for the VWLs to ensure they are equipped to educate victims about the process and their rights. We hope the relationship between victims and VWLs reflects the same level of care and assistance common between SVPs and victims and believe that adding additional highly skilled, highly trained VWLs to our team will facilitate that goal.

TRIAL COUNSEL/DEFENSE COUNSEL TRAINING—COMPREHENSIVE, INTEGRATED, AND SYNCHRONIZED

The Army has an extensive training system in military justice for judge advocates from 3 months to 25 years in service. All of our judge advocates are trained on their role in the military justice system in general, and specifically on the unique aspects of prosecuting and defending sexual assault and special victim cases. Prosecutors are trained that the Army is their client, rather than any individual commander. If there is a conflict between the interests of the individual commander and the interest of the Army, the Army's interests should prevail. Our prosecutors are trained that the Army's interest in "doing the right thing" is paramount to any interest that is contrary to that principle. All of our military justice practitioners are put through a synchronized, graduated training program administered by The Judge Advocate General's Legal Center and School, and our Trial Counsel Assistance and Defense Counsel Assistance Programs. Sexual assault and special victim cases are complex, and difficult to prosecute and defend. However, we strive to provide the training and resources to ensure that these cases are appropriately investigated, analyzed, developed, and resolved. In addition, we carefully analyze our training synchronization and planning to provide defense-specific training commensurate with the expertise required. This requires a delicate balance, and we are careful to allocate our resources appropriately.

VICTIM SERVICES/POLICY

An essential element to the success of the Army's accountability efforts is providing victims with ongoing support. Although the prevention and response arms of the Army Sexual Harassment/Assault Response Program (SHARP) fall within the responsibilities of The Deputy Chief of Staff for Personnel (G–1), it is important to provide you with a comprehensive picture of the Army's efforts. The Army has invested unprecedented resources, over $50 million in each of the past 2 fiscal years, into a prevention and response program designed to achieve culture change. The I.A.M. STRONG training, emphasizing Army values and teaching bystander intervention techniques, saturates soldier training at every level beginning with our newest recruits. A senior leader priority, this is an ongoing and monumental institutional effort. Advocacy and assistance for the victim are provided from the initial report through post-trial proceedings. Alongside the other Services, the Army has implemented policy to address the unique needs of soldier-victims, who have concerns about privacy and collateral misconduct. Details of the Army SHARP prevention and response program are attached.

VICTIM RIGHTS AND REMEDIES

As to victims' rights in the military justice system, rights afforded to victims in the Army are set forth in regulations and generally track the provisions of the Federal Crime Victims Rights Act, 18 U.S.C. 3771. These rights include the right to be treated with dignity and fairness, with a respect for privacy; the right to be reasonably protected from the accused offender; the right to be notified of court proceedings; the right to be present at court proceedings related to the offense; the right to confer with the attorney for the Government; the right to restitution; and,

the right to information regarding conviction, sentencing, imprisonment and release of the offender from custody. These rights are provided both in written, standard forms and in letters to victims after the court-martial process concludes. I note the CVRA was amended by Congress in 2004 which added 2 rights: the right to proceedings free from unreasonable delay, and the right to reasonably be heard at any public proceeding in the district court involving release, plea, sentencing or any parole proceeding. Current DOD regulations were drafted prior to the 2004 amendment to the Federal law and must be updated to reflect these two additional rights.

The responsibility to inform victims about these rights and the duty to enforce the rights are shared by all of the personnel who assist a victim. An overlapping and encompassing team of professionals, this includes the Commander, the Victim Advocate, the Sexual Assault Response Coordinator, the CID investigator, the Victim Witness Liaison, a Legal Assistance Attorney, the trial counsel prosecutor, the appellate court Victim Witness Liaison and Army Corrections Command officials. Army regulations require these personnel to provide information to the victim throughout the investigative and accountability process. In calendar year 2011, Army Victim Witness Liaisons and investigators provided 31,898 victim's rights forms to victims and witnesses of all crimes. During the court-martial process, the VWL, the trial counsel prosecutor and the SVP work together to keep the victim informed and actively participating. An educated victim is the most important asset the prosecutor and the Command have in the effort to hold offenders accountable.

Army legal assistance attorneys represent victims on any legal issues arising from the offense, including child custody, child support, landlord-tenant and other personal matters. A 2011 survey of legal assistance attorneys in the field indicates that many victims avail themselves of these services and that Army legal assistance attorneys were able to provide meaningful assistance. Legal assistance attorneys can also assist victims with requests for expedited transfers or other matters that arise in the command.

Each of the military Services has sought innovative solutions to providing advocacy for victims within the military justice system without sacrificing the ability to hold offenders accountable. Recently, the Air Force began a pilot program to provide a Special Victim Counsel, generally defined as an attorney detailed to represent victims who can intervene in the court-martial proceedings against the accused. The Army will watch this program carefully to learn best practices and potential pitfalls in such a change, one not contemplated by current rules and procedures. Our concern is that introducing an adversarial relationship between the government representative, the prosecutor, and the victim, especially during the presentation of evidence at trial, will have an adverse impact on the ability to prosecute and achieve accountability for offenders. The relationship between the prosecutor and the victim remains the bedrock of every case. If that trust or confidence is eroded, or a wedge is forced between them, the offender will reap the benefits. Even lawyers will admit that entry of another 'lawyer-litigant' to litigation almost by definition does not improve the process. The Army's specially trained SVPs are taught to work with victims to understand their concerns and address their needs, and we believe this is a more effective method of securing sexual assault accountability while also caring for the victim's interests, pursuing the interests of discipline, and enforcing the statutes created by this Congress. The prosecutor's responsibility to protect victim privacy and rights to the greatest extent possible should not be delegated to another party.

If a victim feels that one of his or her rights has been violated, the victim has several avenues of redress. The first avenue is the most direct—through the chain of command, the Victim Advocate, the Legal Assistance Attorney, the VWL or the SVP. All of these personnel are available to address the victim's concern and seek a remedy. In the event that a victim does not get relief from these personnel or does not wish to utilize these personnel, the victim has a set of secondary options. The victim can contact the Army or DOD Inspector General's office, independent investigative agencies. If the victim believes the chain of command is not enforcing the victim's rights, the victim can file a complaint under Art. 138 "Complaint of Wrongs" of the Uniform Code of Military Justice, with the assistance of a Legal Assistance Attorney. Finally, a victim can seek assistance and information from hotlines run by the Army SHARP program and the Department of Defense Sexual Assault Prevention and Response Office (SAPRO). But in the end, the first and best resource for a victim is the prosecutor and those on the government team (the VA for example) who are trained and focused specifically on ensuring the victim succeeds.

METRICS TO MEASURE PROGRESS

In my view, prosecution and conviction rates do not alone measure a criminal justice system's ability to address the crime of sexual assault. If we pursue challenging cases because we believe that serves victims and our community interests, some defendants will be acquitted. An acquittal in American justice is not failure. Whether there is an acquittal or a conviction is a manifestation of our reliance on the presumption of innocence. We cannot lose sight of this enduring bulwark in our foundation. The real measure or metric is the quality of our training, the ardency of our counsel in the pursuit of justice, the care we provide victims, and the commitment to equally resourcing our defense bar. These are the metrics, the benchmarks of a healthy justice system. In each of these categories we strive for excellence. Furthermore, in my experience, the Army JAGC takes on types of sexual assault cases that the civilian authorities decline to prosecute. For example, the Army often prosecutes sexual assault allegations involving an incapacitated or intoxicated victim. In my experience, civilian authorities often decline to prosecute these types of cases, especially when the accused has no prior criminal record.

Having said that, the Army's focus on accountability has produced measurable benefits and results. The close coordination between the Judge Advocate General Corps SVPs and the Criminal Investigation Command SAIs has improved the investigation, prosecution and victim-care aspects of sexual assault allegations. Commanders are trained to make evidentiary based disposition decisions with the advice of experienced, senior judge advocates and SVPs who understand the nuances of sexual assault allegations, particularly the unique aspects of behaviors exhibited by some victims in the wake of the trauma of sexual assault. The statistics on the number of sexual assault prosecutions in the Army reflect a healthy military justice system focused on these difficult cases. Since the inception of the SVP program in 2009, the number of courts-martial for sexual assault and domestic violence has steadily increased.

We know this because of the transparency of the process and our reporting. For example, the Annual Report to Congress on Sexual Assault in the Military shows a comprehensive breakdown of the numbers of sexual assault reports and their dispositions. However, the report was never intended to serve as a vehicle for calculating prosecution and conviction rates for four primary reasons. First, the report is a snapshot in time, taken on the last day of the fiscal year and thus includes in the total number of reports cases that are still pending investigation or disposition. Second, the total number of reports includes restricted reports, in which no law enforcement investigation is triggered, preventing commanders from taking any disciplinary actions. Third, the total number of reports includes cases involving either a soldier victim or a soldier offender and thus includes cases in which a soldier has been assaulted by a civilian, foreign national or unknown offender. The military does not have jurisdiction over these individuals and cannot take any disciplinary actions against them. Fourth, the report covers the entire spectrum of sexual assault as defined by the UCMJ in seven separate offenses that range from an unwanted touch over the clothing to rape. Any collective discussion of disposition data ignores the fact that at one end of the spectrum of misconduct, administrative or nonjudicial punishments are likely appropriate, while at the other end of the spectrum, courts-martial should be considered. Statistics garnered from the Annual Report that place the number of convictions over the total number of reports are misleading and of no value in measuring our success. However, when one looks at the most serious penetrative offenses, rape and aggravated sexual assault, in which there is a completed disposition and jurisdiction over the offender, the Army's rate of prosecution is strong and compares favorably with any other jurisdiction – civilian or military. The Army pays equal attention to the non-penetrative, contact offenses that can be just as disturbing and traumatic to victims.

The military justice system, through the Annual Report to Congress, is simply the most transparent and scrutinized system in the country. We welcome the scrutiny because we understand our obligation to the American public. Civilian jurisdictions are not required to report on the circumstances, demographic data and disposition of every report of the full range of sexual assault offenses.

Some members of the public and media have confused reported "clearance rates" for civilian jurisdictions with prosecution rates. Civilian jurisdictions report data to the Federal Bureau of Investigation for the Uniform Crime Report (UCR) on clearance rates only for the offense of rape. Only now does the FBI define rape as expansively as the military. Prior to 2012, the UCR definition of rape, unchanged since 1927, did not include rapes where the victim was incapacitated by drugs or alcohol, sleeping victims, male victims or penetration with an object or finger. For purposes of the UCR, an allegation is considered cleared when there is an arrest and a pres-

entation for charging or when there is probable cause to identify an offender, but no arrest. Many civilian jurisdictions have policies requiring corroboration of a victim's complaint, either through DNA evidence, injury or a confession, in order to prosecute a case. The Army has no such requirement. In 2009, the Congressional Defense Task Force on Sexual Assault in the Military examined the investigation and prosecution of sexual assault allegations and reported "the military services prosecute many types of sexual assault cases that civilian prosecutors choose not to pursue."

VICTIM TESTIMONIALS

Much of the criticism of our system comes from experiences of past victims who have felt revictimized by the system. The nature of the crime of sexual assault can make the process of the system exponentially more difficult to navigate than any other crime. In recognizing this additional burden on victims of sexual assault we have developed and mandated specialized training for all SVPs and trial counsel that addresses the unique needs of these victims from rapport building through proper interview and direct examination techniques that employ compassion and empathy. As a result of these efforts, we have received feedback from victims and their families attesting to the dedicated, compassionate assistance provided by the specially-selected and trained Special Victim personnel. In a letter sent to supervisors, the mother of a rape victim described the SVP as "a member of the family" who "fought for her daughter . . . but most of all, showed her that the Army does the right thing." A victim in an acquittal wrote "I want to thank you for what you did. Even though we didn't win I was very comfortable having you on my side and help tell my story." Another victim wrote, "To many people it may not seem like much, but you made it easier for me to sleep at night. You helped me to take my life back and get the justice I needed."

Since 1950, we have evolved our military justice system in response to forces both internal and external. That evolution continues today, reflected in an extraordinary number of changes over the last several years. I am convinced that our focus on the Special Victim Capability, and the constant training and education of commanders, investigators, and judge advocates, will help create a command climate that will allow military victims to feel safe and confident in reporting misconduct. Leadership is the solution to the change in culture we seek. Along with senior leaders across the Army, we in the JAG Corps will lead the march to accountability that reinforces committed leadership efforts to solve this critical problem.

Senator GILLIBRAND. Mr. Taylor?

STATEMENT OF HON. ROBERT S. TAYLOR, ACTING GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE

Mr. TAYLOR. Chairman Gillibrand, Ranking Member Graham, and members of the subcommittee, thank you for the opportunity to testify here today.

DOD is determined to combat and prevent sexual assault in the military. The men and women who put their lives on the line to protect this country must be assured that they have the opportunity to serve without fear of sexual assault. Sexual assault in the military is not only an abhorrent crime that does enormous harm to the victim, but it is also a virulent attack on the discipline and good order on which military cohesion depends. We must combat this scourge with all the resources at our disposal. Secretary Hagel has made it crystal clear to the senior military and civilian leadership of DOD that combating this blight is a major priority for him and that he demands results.

I watched the hearing this morning and I want to take this opportunity to thank the witnesses for coming forward, and I believe that their testimony will contribute to making our military better.

DOD is in the process of implementing a multifaceted effort to address sexual assault in the military. In the legal arena, my office, along with the JAG, and the JSC on Military Justice are working to improve DOD's legal policies pertaining to sexual assault.

These efforts are designed to make our judicial, investigative, and support structures more efficient, effective, and responsive to the rights and needs of victims while preserving the rights of the accused.

DOD has recently authorized the U.S. Air Force to implement a pilot program that assigns SVC to victims who report a sexual assault. SVC are experienced attorneys who may advocate on behalf of the victim to commanders, convening authorities, staff judge advocates, trial counsel, and to the extent authorized by the Manual for Courts-Martial, military judges. Although the pilot has been operational for just 6 weeks, I understand that numerous victims have already requested assistance.

We need to evaluate the program's effectiveness and to resolve questions concerning the proper role of SVC in the military justice system, which is critical to ensuring that this expansion of victims' rights does not have unintended consequences that could hinder the pursuit of justice. To that end, I have tasked the JSC, military justice experts from across DOD and the Coast Guard, with evaluating the program.

A longstanding issue of concern is the significant role that commanders have in the administration of military justice generally and specifically in cases involving allegations of sexual assault. The recent action of a convening authority to disapprove the findings and sentence and to dismiss the charges of sexual assault after a conviction by a court-martial has underscored continuing concerns with the role of commanders. Article 60 of the UCMJ authorizes a convening authority in his or her sole discretion to modify the findings and sentence of a court-martial.

Over the years, Congress has preserved the central role of commanders. However, the role of commanders has been narrowed numerous times to provide protections for the accused. So it would be a misreading of the long legislative history of the UCMJ to put the role of the commander beyond a careful reexamination.

We must strive for a military justice system that impartially considers evidence, respects the rights of the accused and victim alike, punishes the guilty, and reinforces military discipline. To be effective, members of the military must have confidence that the military justice system will treat both accused and victim fairly.

With that in mind, DOD has initiated a number of reviews to inform Congress and the Secretary of Defense regarding the advisability of additional changes to the administration of military justice.

Specifically, Secretary Hagel directed me to ensure that the panel of independent experts to examine the systems used to investigate, prosecute, and adjudicate crimes involving military assault, required by section 576 of last year's NDAA, considers the role of convening authorities in the military justice process, including the authority to set aside a court-martial's findings of guilt. The panel presents an excellent opportunity to solicit independent advice on the appropriate role of the convening authority in today's military justice system, which includes robust rights of appeal.

Proceeding with care and listening to all those affected by the military justice system and to experts on the administrative justice under other systems will ensure that changes to the administration

of military justice are constructive and avoid any unintended negative repercussions.

But care and caution must not be allowed to become an excuse for inaction where further action is needed. Our men and women in uniform serve to protect us every day. They put their lives on the line for us, and for this great country of ours. We owe them a military in which sexual predators have no part and sexual assault has no place. Until all sexual assault in the military is eradicated, it is our duty to ensure that the victims find support, and we lawyers at this table have a special obligation to ensure that the military justice system works effectively to provide justice in every case and to all involved.

I look forward to your questions. Thank you.

[The prepared statement of Mr. Taylor follows:]

PREPARED STATEMENT BY HON. ROBERT S. TAYLOR

Chairman Gillibrand, Ranking Member Graham, and members of the subcommittee, thank you for the opportunity to testify here today.

The Department is determined to combat and prevent sexual assault in the military. The men and women who put their lives on the line to protect this country must be assured that they have the opportunity to serve without fear of sexual assault. Sexual assault in the military is not only an abhorrent crime that does enormous harm to the victim, but it is also a virulent attack on the discipline and good order on which military cohesion depends. We must combat this scourge with all the resources at our disposal. Secretary Hagel has made it crystal clear to the senior military and civilian leadership of the Department that combatting this blight is a major priority for him, and that he demands results.

The Department is in the process of implementing a multi-faceted effort to address sexual assault in the military. In the legal arena, my office, along with the Judge Advocates General (JAGs), the Joint Service Committee on Military Justice (JSC) are working to improve the Department's legal policies pertaining to sexual assault. These efforts are designed to make our judicial, investigative, and support structures more efficient, effective, and responsive to the rights and needs of victims, while preserving the rights of the accused.

As an initial matter, the Department has taken decisive steps to ensure that no victim must deal with the aftermath of a sexual assault alone. Under the leadership of the Sexual Assault Prevention and Response Office (SAPRO), we have established a comprehensive system of victim care and support, including sexual assault response coordinators (SARCs), victim advocates, and a victim witness assistance program. This means that every victim has access to a network of professionals who can ensure that they receive the treatment they need and assistance in the military justice process. Recent policy changes have created a victim-advocate legal privilege so that victims can communicate candidly with victim-advocates assisting them through the process, without fear that their words could be taken out of context and be used against them.

The military also allows victims of sexual assault to file a "restricted report," which cannot be used to institute a criminal investigation, but which does trigger the provision of all the support services intended to help that victim become a survivor. Ensuring the availability of support services to all victims is certainly the right thing to do, and, in addition, by providing those services, we hope to empower the victim to change the restricted report into an unrestricted report, and thereby help bring the perpetrator to justice. In December 2011, we instituted a policy that permits victims who file unrestricted reports of sexual assault to request an expedited transfer, removing the victim from proximity to the alleged perpetrator and protecting them from potential harassment.

In the fall of 2011, the Under Secretary of Defense for Personnel and Readiness also directed each Service to expand the scope of legal assistance available to the victims of crime, including sexual assault. Pursuant to that directive, the Services now provide victims of sexual assault with legal advice on military justice issues, specifically including: (1) the military justice process, (2) restraining orders, and (3) the different reporting options available to victims of sexual assault.

The Department also recently authorized the United States Air Force to implement a pilot program that assigns Special Victims Counsel (or SVC) to victims who report a sexual assault. Special victims' counsel are experienced attorneys who may

advocate on behalf of the victim to commanders, convening authorities, staff judge advocates, trial counsel, and to the extent authorized by the Manual for Courts-Martial, military judges. Although the pilot has been operational for just 2 months, I understand that a number of victims have already sought assistance from such counsel.

We need to evaluate the program's effectiveness and to resolve questions concerning the proper role of special victims' counsel in the military justice system. Determining the proper role for special victims' counsel in the adjudication of sexual assault offenses is critical to ensuring that this expansion of victims' rights does not have unintended consequences that could hinder the pursuit of justice. To that end, I have tasked the Joint Service Committee—military justice experts from the Judge Advocates General of the Navy, Air Force, Army and Coast Guard, and the SJA to the Commandant of the Marine Corps—with evaluating the Air Force Pilot Program, including the authorities, procedures, and guidance regarding the detail of such counsel.

Evaluating the various initiatives directed at increasing the level of support to victims in the legal process will help us determine which program, or combination of programs, works most effectively. Lessons learned can inform additional changes to Department and military legal policies, as appropriate.

In addition to expanding direct assistance to victims, the Department has also implemented changes to how sexual assault and related offenses are prosecuted. For example, the Department now limits the initial disposition authority for the most serious sexual assault offenses to Special Court-Martial Convening Authorities who are officers of the grade O–6 and above (colonels and Navy captains). This ensures that only senior experienced commanders, with ready access to the advice of judge advocates, have authority over these important cases. It also reduces the likelihood that the convening authority will have any pre-existing direct involvement with any of the parties.

Other important initiatives are also in the process of being implemented. The Military Departments are aggressively developing special victim capabilities to assist in the investigation and prosecution of sexual assault cases. These capabilities include assigning experienced and specially trained prosecutors and investigators to sexual assault cases. These cases can be complicated, and can raise difficult issues. Handling those cases effectively requires well-trained and well-resourced investigators and counsel.

The Department also recently assessed the practicability and advisability of extending the protections afforded by the Crime Victims' Rights Act to victims involved in cases tried by court-martial. Based on that review, DOD Directive 1030.01, "Victim and Victim Witness Assistance," which was modeled after the Victim Rights and Restitution Act of 1990, will be updated to ensure that victims have the ability to be heard during public proceedings and that proceedings are not unreasonably delayed. Additionally, the Department continues to study what procedures are used to enforce a victim's rights in different jurisdictions to determine best practices for possible implementation within the military justice system.

I believe that all of these changes will be instrumental in increasing the effectiveness of the military justice system as a venue for the prosecution of sexual assault.

A longstanding issue of concern is the significant role that commanders have in the administration of military justice generally, and specifically in cases involving allegations of sexual assault. The elevation of the initial disposition authority was one response to this concern, but the recent action of a convening authority to disapprove the findings and sentence, and to dismiss the charges of sexual assault and conduct unbecoming of an officer after a conviction by a court martial has underscored continued concern with the role of commanders. Article 60 of the Uniform Code of Military Justice (UCMJ) authorizes a convening authority, in his or her "sole discretion," to modify the findings and sentence of a court martial. The origin and history of the military justice system helps provide context necessary to understand this authority, and is a starting point for a searching and careful consideration of whether there should be adjustments to the existing system, and if so, how extensive those adjustments should be.

As described in the Preamble to the Manual for Courts-Martial, "the purpose of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States." Unique to this system is the authority of the military commander over those under his command and the need for portability in the administration of military justice throughout the world. The commander's role in the process of military justice has been directly tied to the need for maintaining discipline within the ranks, as commanders

are accountable for the good order and discipline of the forces under their command and are ultimately responsible for what their units do or fail to do.

Commanders in the U.S. military have been responsible for the good order and discipline of their forces since the establishment of the United States. Congress enacted the UCMJ on May 5, 1950, in the aftermath of World War II, with the goal of balancing the need for good order and discipline against expanded due process rights designed to protect against the potential capricious exercise of authority by a commander. Although the UCMJ periodically has been updated to incorporate additional protections of individual rights, Congress has preserved the central role of commanders. However, over the long history of the military justice system, the role of the commander has been narrowed to provide protections for the accused, making clear that the role of the commander is not immune from careful re-examination.

Ultimately, we must strive for a military justice system that impartially considers evidence, respects the rights of accused and victim alike, punishes the guilty, and reinforces military discipline. To be effective, members of the military must have confidence that the military justice system will treat both accused and victim fairly.

With that in mind, the Department has initiated a number of reviews to inform Congress and the Secretary of Defense regarding the advisability of additional changes to the administration of military justice.

Pursuant to the requirements of section 576 of the National Defense Authorization Act for Fiscal Year 2013, the Department is currently in the process of establishing the Response Systems Panel. The Panel will be tasked with conducting an independent review and assessment of the systems used to investigate, prosecute, and adjudicate crimes involving sexual assault and related offenses, and to make recommendations on how to improve such systems.

In response to concerns about the broad discretion afforded a convening authority under Article 60 of the UCMJ, Secretary Hagel directed me to ensure that the Panel's charge includes consideration of the role of convening authorities in the military justice process, including the authority to set aside a court-martial's findings of guilt. Reexamination of the way in which this authority is exercised is appropriate, and the Panel presents an excellent opportunity to solicit independent advice on the appropriate role of a convening authority in today's military justice system, which includes robust rights of appeal.

Pursuant to the direction of Congress, after the Response Systems Panel completes its review, the Department will also establish a Judicial Proceedings Panel to conduct an independent review and assessment of judicial proceedings conducted under the UCMJ involving sexual assault and related offenses. This Panel will consider, among other things, the introduction by the defense of evidence of the victim's prior sexual conduct, the impact such evidence has on the outcome of cases, and a survey of court-martial convictions for sexual assault, including the number and description of instances when punishments were reduced or set aside upon appeal.

In addition to these efforts, I have directed the Joint Service Committee (JSC), as part of its 2013 Annual Review of Military Justice, to conduct a fact-gathering review of civilian jurisdictions' handling of sexual assault cases from the initial complaint to law enforcement through the prosecution process. This factfinding report should complement and assist the efforts of both the Response Systems Panel and the Judicial Proceedings Panel.

As you can see, we have implemented a number of major initiatives in this area in the last several years, and we are studying a number of other initiatives that have been suggested by Members of Congress, the public, and the military. As we move forward, it is worth recalling the caution of this committee in 1983:

"[P]eriodic adjustments to the UCMJ which are justified, desirable and necessary [should be made]. ... But, ... it can be a 'continuing and difficult task to balance the often competing interest of the maintenance of military discipline ... and the protection of an individual's rights.' Therefore, the committee, Congress, and the Defense Department have always proceeded carefully and cautiously before recommending any changes to the rights and procedures embodied in the UCMJ."

Proceeding with care and listening to all those affected by the military justice system, and to experts on the administration of justice under other systems, will ensure that changes to the administration of military justice are constructive and avoid any unintended negative repercussions.

But care and caution must not be an excuse for inaction, where further action is needed. Our men and women in uniform serve to protect us every day; they put their lives on the line for us, for this great country of ours. We owe them a military in which sexual predators have no part and sexual assault has no place. It is our duty to ensure that the victims of sexual assault find support, and we lawyers at this table have a special obligation to ensure that the military justice system works effectively to provide justice, in every case and to all involved.

Senator GILLIBRAND. Thank you.
Vice Admiral DeRenzi.

STATEMENT OF VADM NANETTE M. DERENZI, JAGC, USN, JUDGE ADVOCATE GENERAL OF THE U.S. NAVY

Admiral DERENZI. Thank you. Good afternoon, Madam Chairman, Ranking Member Graham, members of the subcommittee. Thank you for this opportunity to appear before you this afternoon to address the Navy's commitment to fighting sexual assault and specifically about the Navy's accountability initiatives.

Please let me state upfront this is not just a legal issue. It is a leadership issue for every one of us, and in recognition of this, the Secretary of the Navy, the Honorable Ray Mabus, and the Chief of Naval Operations, Admiral Jonathan Greenert, implemented a multifaceted approach to combat sexual assault, including comprehensive training and awareness that emphasizes active, involved leadership and bystander intervention.

When an incident does occur, the Navy is dedicated to ensuring that victims receive full-spectrum and timely support to include medical treatment, counseling, and legal assistance. Certainly meeting and listening to the members of the earlier panel who put a face and a voice to the impact of sexual violence underscores the importance of victim care.

To that end and consistent with the 2012 NDAA, the Navy is hiring 66 civilian credentialed, full-time SARCs and 66 full-time civilian credentialed victim advocates. They will augment the more than 3,000 Active Duty command victim advocates, and they will work with specially trained Naval Criminal Investigative Service (NCIS) investigators and specially trained JAG Corps officers to form the core of our special victim capability.

The JAG Corps is intensely focused on upholding the special trust that is placed in us to provide a fair, effective, and efficient military justice system. We have implemented several key initiatives to ensure that our clients, both the Government and the accused, receive the highest level of advocacy.

In 2007, to improve the overall quality of court-martial litigation, we established the military justice litigation career track. JAG Corps officers apply for the designation as military justice specialists or experts based on their litigation experience and aptitude. Those selected for the designation lead trial and defense departments and provide proven experience in the courtroom, personally conducting, overseeing, or adjudicating complex cases to include sexual assault. This program leverages trial counsel, defense counsel, and judicial experience to enhance the effectiveness of our court-martial practice for complex cases.

In 2010, we established the trial counsel assistance programs (TCAP) and defense counsel assistance programs (DCAP), respectively, led by experts in military justice.

TCAP has delivered trial advocacy training and prosecution process assessments worldwide. They have conducted outreach training to improve efforts between prosecutors, investigators, and other military justice stakeholders. They served as trial counsel or assistant trial counsel in several complex cases, to include sexual assault cases. The TCAP deputy director is a GS–15. She is a former State

prosecutor with extensive sexual assault prosecution experience. She previously served as the director of the National Center for the Prosecution of Violence Against Women, and she is a noted author in the field.

DCAP was established to support and enhance the defense bar, provide technical expertise for case collaboration, and standardize resources for defense counsel. The office leads training efforts and consults with detailed counsel through every phase of the court-martial process worldwide.

In 2012, we hired two highly-qualified experts, one to work at our headquarters level and another to work in DCAP. They are channeling significant sexual assault litigation experience into enhanced litigation skills and practices for prosecution and defense teams in the field. We are now in the process of hiring another highly-qualified expert to work in our TCAP.

We provide our litigators with extensive trial advocacy training throughout the course of their careers. The Naval Justice School, in conjunction with our Criminal Justice Division, our TCAP and our DCAP, coordinate specialized training on litigating complex sexual assault crimes, and they leverage knowledge from the civilian sector and from our sister services through cross training. We send career litigators to civilian post-graduate schools to receive master of law degrees in trial advocacy.

To further refine our complex litigation capabilities, just last year, the Navy established an externship program and assigned two mid-level career officers to work in the sex crime units in two civilian prosecution offices—one in California and one in Florida.

What I hope is clear from these and other initiatives that are described more fully in my statement is that Secretary Mabus, Admiral Greenert, and the entire Navy leadership team remain steadfastly committed to getting in front of the problem and to eliminating sexual assault from our ranks.

For our part, the JAG Corps remains actively engaged in sexual assault awareness and prevention training, victim response, and accountability initiatives.

Thank you again for this opportunity, and I look forward to taking your questions.

[The prepared statement of Vice Admiral DeRenzi follows:]

PREPARED STATEMENT BY VADM NANETTE DERENZI, USN

Thank you for this opportunity to testify before the committee about the Navy's commitment to eliminate sexual assault and, specifically, about the Navy's accountability initiatives.

On behalf of the Honorable Ray Mabus, Secretary of the Navy, and Admiral Jonathan Greenert, the Chief of Naval Operations, I want to assure you that the Navy is committed to eliminating the crime of sexual assault in our ranks. In addition to the toll on individual victims, sexual assault directly impacts operational readiness and unit cohesion. This is rightfully recognized as a leadership issue, not just a legal issue. Exemplifying this commitment, the Navy implemented a multi-faceted approach to address awareness and training, prevention, victim response, and investigation and accountability.

Beginning with awareness and training, in 2009, Secretary Mabus established the Department of the Navy Sexual Assault Prevention and Response Office (DON SAPRO). Since its inception, DON SAPRO has conducted leadership discussions, stakeholder interviews, and focus groups with sailors and marines worldwide. In 2010, DON SAPRO conducted the first Department-wide educational program for Sexual Assault Response Coordinators. This educational program was expanded the following year to include shore installation commanding officers and senior regional

leaders. Collaboration between DON SAPRO and a Navy training command at Great Lakes in 2011 and 2012 resulted in several local initiatives that yielded groundbreaking objective evidence of successful sexual assault prevention in a high-risk population of sailor students.

Recognizing that a majority of the sexual assault cases in the Navy involve a perpetrator who is a co-worker or acquaintance of the victim, and that many involve alcohol use, in October 2011, the Navy began teaching Bystander Intervention to our enlisted sailors going through initial skills training. Bystander Intervention is a strategy to motivate and mobilize people to act when they see, hear, or otherwise recognize signs of an inappropriate or unsafe situation in order to prevent harm to another person.

Second, the Navy developed and implemented a dynamic and interactive training program for leaders entitled Sexual Assault Prevention and Response Training for Leaders (SAPR–L). This training, for naval personnel in pay grades E–7 and above, was specifically developed to focus leaders on sexual assault, and to help them better understand the complex dynamics of this crime and the negative behaviors that can foster inappropriate conduct. SAPR–L training has been completed across the Fleet.

The third part of this training and awareness campaign involves training the remaining members of the Fleet. Sexual Assault Prevention and Response Training for the Fleet (SAPR–F) was developed for all sailors in the grade of E–6 and below and focuses on bystander intervention, responsible decisionmaking, core values, and de-glamorizing the irresponsible use of alcohol. The unmistakable intent of this training is to empower sailors to recognize and assume personal responsibility to stop inappropriate behavior. Over 243,000 sailors (88 percent) in pay grades E–6 and below, active duty and Reserve, have completed SAPR–F training to date. The remaining sailors are scheduled to complete the training by March 31, 2013.

The Department of the Navy Sexual Assault Prevention and Response Office is developing a Sexual Assault Prevention and Response Training for Civilians, or SAPR–C, that will be implemented this summer. This course is intended to complement SAPR–L and SAPR–F by training Department of the Navy civilian personnel and to fulfill the training requirement set out in the National Defense Authorization Act for Fiscal Year 2012.

The Navy Judge Advocate General's Corps (JAG Corps) has been involved at all levels of the Navy's efforts to eliminate sexual assault. Judge advocates are actively engaged in the development and delivery of the Navy's innovative and dynamic training programs, focused on educating the Fleet at all levels. Judge advocates also ensured all commanders were fully trained on how to properly address and respond to allegations of sexual assault. As participants on SAPR–L training teams, judge advocates trained commanding officers, executive officers and command master chiefs (our senior enlisted leaders) on their roles in sexual assault investigations, their responsibilities to support victims and protect the rights of alleged offenders, the Uniform Code of Military Justice (UCMJ) Article covering sexual assault (Article 120), as well as the Secretary of Defense policy that elevates the initial disposition authority for cases involving the offenses of rape, sexual assault, forcible sodomy and attempts to commit those offenses. These training efforts are in addition to the advice judge advocates provide to their commanders on a routine basis.

Victim response is critical to enable a victim to begin the healing process. The Navy is dedicated to ensuring victims of sexual assault receive proper and timely support, to include medical treatment, counseling, and legal assistance. The Navy is hiring 66 credentialed sexual assault prevention and response coordinators and 66 full-time professional, credentialed victim advocates. They will augment the more than 3,000 active-duty command victim advocates, and will work with specially-trained Naval Criminal Investigative Service (NCIS) investigators and JAG Corps prosecutors to form the core of our special victim capability. Our trained legal professionals also deliver direct legal assistance to victims. The JAG Corps instituted a Legal Assistance for Crime Victims conference and has trained more than 150 Navy and Marine Corps attorneys, paralegals, and enlisted personnel to ensure victims' rights are understood and protected. Victims can contact counsel, and victims eligible for military legal assistance services also have access to legal assistance attorneys to help with a wide variety of legal issues related to being the victim of a crime. Additionally, Navy prosecutors provide victims with explanations of victims' rights; the court-martial process; and available Federal, state, or local victim services and compensation.

The Navy JAG Corps' primary mission within sexual assault prevention and response resides with accountability. Offender accountability has both investigative and military justice components. All allegations of sexual assault are referred to NCIS for investigation; NCIS agents are specially trained to conduct adult sexual

trauma investigations. Seamless coordination with NCIS is essential. Judge advocates and NCIS special agents who investigate sexual assault allegations coordinate directly in a number of ways. Prosecutors frequently serve as visiting instructors for NCIS courses at the Federal Law Enforcement Training Center in Georgia, and judge advocates participate in Mobile Training Teams to instruct special agents, trial counsel, and paralegals on best practices in sexual assault investigation and prosecution. This cross-training model will also be employed with the 66 full-time civilian victim advocates.

The JAG Corps is also conducting a pilot program with the NCIS Sexual Assault Task Force. The Task Force consists of a small group of special agents assigned to sexual assault allegation investigations. The Task Force meets weekly to review specific case progress and monthly with the senior regional prosecutor and installation Sexual Assault Response Coordinators. This multi-disciplinary approach allows investigators, prosecutors, and sexual assault prevention and response personnel to troubleshoot sexual assault investigations, prosecution, and victim care issues as they arise. It also promotes early cooperation between stakeholders to improve quality of practice and provides the model for our special victim capability. On the east coast, the Task Force began meeting in November 2012. On the west coast, the Task Force began meeting in January 2013. The teams have already identified several means of improving coordination between investigators, prosecutors, and victim advocates. As the pilot program develops, leadership will continue to assess best practices for use in other regions.

Once an NCIS investigation is complete, the case is forwarded to the appropriate commander to make an initial disposition decision. Reports of sexual assault must be reviewed by Navy captains (pay grade O–6) or above who are designated as Special Court-Martial Convening Authorities. Additionally, Initial Disposition Authorities must consult with a judge advocate prior to making disposition determinations.

Once an Initial Disposition Authority decides a case should be prosecuted, the Navy JAG Corps provides prosecutors, defense attorneys, and military judges to conduct the court-martial, as well as active duty and Reserve judge advocates with fleet and litigation experience to serve as Investigating Officers at Article 32 pretrial investigation hearings. The JAG Corps' mission includes providing a fair, effective, and efficient military justice system, and we are intensely focused on upholding the special trust placed upon us in the prosecution, defense, and adjudication of sexual assault cases. Accordingly, the JAG Corps has implemented a number of initiatives to ensure the highest level of advocacy in sexual assault litigation.

In 2007, to improve the overall quality of Navy court-martial litigation, the JAG Corps established the Military Justice Litigation Career Track. JAG Corps officers apply for designation as military justice specialists or experts based on their litigation experience. Military Justice Litigation Qualified officers are detailed to lead trial and defense departments at Region Legal Service Offices and Defense Service Offices, which provide Navy prosecutors and defense counsel, respectively. These officers provide proven experience in the courtroom, personally conducting, adjudicating, or overseeing litigation in sexual assault and other complex cases. The Military Justice Litigation Career Track program increases the experience levels of trial and defense counsel and leverages that experience to enhance the effectiveness of criminal litigation practice.

In 2010, the Navy created Trial Counsel and Defense Counsel Assistance Programs. These separate programs are led by experts in military justice who provide direct support to prosecution and defense counsel. The Navy's Trial Counsel Assistance Program (TCAP) provides high-quality advice, assistance, support and resources for trial counsel (the Navy's court-martial prosecutors) worldwide through every phase of the court-martial process. TCAP counsel may be detailed to serve as trial counsel or assistant trial counsel and have been so detailed in several high visibility cases, to include five sexual assault cases. The TCAP Director is an O–5 Military Justice Litigation Qualified expert and is a former Naval Legal Service Office commanding officer and military judge. The TCAP Deputy Director is a GS–15 expert who specializes in sexual assault prosecution and victims' rights. A former state prosecutor with extensive experience, she previously served as the Director of the National Center for the Prosecution of Violence Against Women and is a noted author in the field. TCAP is also staffed with an O–4 Military Justice Litigation Qualified specialist with several years of litigation experience.

During the past 2 years, TCAP provided onsite assistance visits, delivering trial advocacy training and prosecution process assessments to all nine Region Legal Service Offices worldwide. Further, TCAP personnel conducted outreach training using a multi-disciplinary approach to improve efforts between prosecutors, NCIS agents, military investigators and other military justice stake-holders, including Sexual Assault Response Program contributors. TCAP staff conducted advanced

family and sexual violence training at the Federal Law Enforcement Training Center and training on alcohol-facilitated sexual assault at the Army JAG Legal Center and School and Air Force Keystone conference. TCAP personnel are frequent instructors at the Naval Justice School, including the Trial Counsel Orientation, Basic Trial Advocacy, Intermediate Trial Advocacy, Senior Trial Counsel, Litigating Complex Cases, Sexual Assault Investigation and Prosecution, and Prosecuting Alcohol Facilitated Sexual Assault courses. TCAP coordinates training and advice closely with Marine Corps TCAP and leverages expertise from other Services, including Army TCAP, highly-qualified experts, sexual assault investigators, and special victim prosecutors.

The UCMJ requires that qualified military defense counsel be detailed to military members facing trial by special or general court-martial. The Defense Counsel Assistance Program (DCAP) was created to support and enhance the proficiency of the Navy defense bar; provide experienced reach-back and technical expertise for case collaboration; and develop, consolidate and standardize resources for defense counsel. The office primarily supports the Navy trial defense bar with active cases. DCAP personnel are authorized to consult with detailed defense counsel through every phase of the court-martial process. Although not typically assigned as detailed defense counsel, DCAP personnel may be detailed to cases. Like TCAP, the DCAP Director is an O–5 Military Justice Litigation Qualified expert and former military judge. The Director is supported by an O–4 Military Justice Litigation Qualified specialist and a recently hired highly-qualified expert, discussed further below.

During the past 2 years, DCAP provided military justice policy advice and routinely coordinated with the defense services of the Army, Air Force, Marine Corps, and civilian defense organizations to maximize efficiency and capitalize on expertise. DCAP overhauled the Senior Defense Counsel course to focus on supervisory counsel responsibilities and continued to develop the Navy and Marine Corps Defending Sexual Assault Cases course hosted by the Center for American and International Law. DCAP personnel routinely present training during field assist visits, web seminars, and participate as instructors at a number of courses and seminars. DCAP works closely with civilian defense organizations to make use of the resources at Federal and state public defenders' offices.

In 2012, the Navy hired two Highly Qualified Experts (HQEs). One HQE works at the headquarters level to enhance sexual assault litigation training, trial practice, and policy. She has nearly 20 years of experience prosecuting sex crimes, domestic violence, and human trafficking crimes. As part of the JAG Corps' Criminal Law Division, she coordinates with the Naval Justice School and TCAP to ensure prosecutors and defense counsel receive specialized training on prosecuting complex sexual crimes, including the 2012 changes to UCMJ Article 120 and the intricacies of the rape shield provision under Military Rule of Evidence 412. The other HQE works with DCAP. He is a retired Marine Corps Lieutenant Colonel who completed two tours as a military judge while on active duty and has over 15 years of civilian experience as an assistant Federal public defender and preeminent civilian military criminal defense attorney. We are in the process of hiring a third HQE with significant civilian criminal litigation and training experience to provide litigation assistance within TCAP.

The Naval Justice School; TCAP or DCAP, as appropriate; and the JAG Corps' Criminal Law Division coordinate specialized training for Navy prosecutors and defense counsel on litigating complex sexual assault crimes. Prosecution of Alcohol-Facilitated Sexual Assaults is a week-long course taught in conjunction with AEquitas, the Prosecutor's Resource on Violence Against Women. It focuses on substantive aspects of prosecuting alcohol-facilitated sexual assaults and includes small-group practical exercises to hone skills such as conducting direct and cross examinations of sexual assault nurse examiners, toxicologists, victims, and the accused. The Naval Justice School also facilitates Sexual Assault Prosecution and Investigation Mobile Training Teams for prosecutors and NCIS agents. Defending Sexual Assault Cases provides defense counsel training on sexual assault litigation and is taught in conjunction with the Center for American and International Law. The Navy also sends career litigators to civilian post-graduate schools to receive Master of Laws degrees in litigation or trial advocacy.

To further refine the JAG Corps' litigation capabilities, in 2012 the Navy established an externship program and assigned two mid-level career officers to work in the sex crimes units in the Office of the State Attorney in Jacksonville, FL, and the San Diego District Attorney's Office in San Diego, CA. These 6-week clinical training externships enabled the officers to gain valuable practical experience and insight into how civilian prosecutor's offices manage a high volume of sexual assault cases.

In summary, the Navy is actively engaged in sexual assault awareness and training, prevention, victim response, and accountability initiatives. The Navy's leaders

remain steadfastly committed to getting in front of this problem, eradicating sexual assault within our ranks, and ensuring that sexual assault cases are processed through a fair, effective, and efficient military justice system. I look forward to taking your questions.

Senator GILLIBRAND. Thank you.

General Ary?

STATEMENT OF MAJ. GEN. VAUGHN A. ARY, USMC, STAFF JUDGE ADVOCATE TO THE COMMANDANT OF THE MARINE CORPS

General ARY. Thank you. Chairman Gillibrand, Ranking Member Graham, and members of the subcommittee, thank you for the opportunity to testify here today.

I must begin by assuring you that Secretary Mabus and General Amos continue to make the elimination of sexual assault a top priority in our Department.

Within the Marine Corps, our Commandant is personally leading this fight not just in words but through actions. In June 2012, the Commandant issued his Sexual Assault Prevention and Response Campaign Plan. This plan is a blueprint for institutional and cultural change within our Corps and sets us on a course to improve our ability to prevent and respond to sexual assaults.

In July 2012, our Commandant directed every Marine general officer to attend a SAPR symposium. This training event included subject-matter experts who spoke about prevention, the use of alcohol as a weapon, inadvertent victim-blaming, and dispelling myths.

Our Commandant also spent much of 2012 traveling around the world speaking to his leaders in a series of heritage briefs, making it clear that sexual assault would never be tolerated. As he recently stated—and I quote—we are determined to eradicate sexual assault in the Marine Corps. It is a personal thing to me.

I want to address two main areas today. First, I want to highlight the progress of the military's initiatives to combat sexual assault.

During the past few years, there have been significant statutory and regulatory changes made to the military justice system that affect SAPR. As we implement these changes, we must carefully balance three main interests: the commander's inherent responsibility to maintain good order and discipline, the constitutional rights of an accused, and our fundamental obligation to protect and care for victims. Military commanders are uniquely positioned to balance these three interests and ensure the military justice system serves and protects each of them.

Second, I want to address the improvements to our legal response capability. In 2012, the Commandant directed a complete reorganization of our legal community, a reorganization that affected over 49 different commands and over 800 legal billets. This new organization established four regional legal service support sections designed to ensure that we place the right counsel, both trial and defense, with the appropriate expertise, supervision, and support staff, on the right case, regardless of location.

Each region has a regional trial counsel office that gives us a special victims capability. The centerpiece of each office is a complex trial team composed of experienced senior prosecutors. These

regional offices also contain criminal investigators, a legal administrative officer, paralegal support, and highly-qualified experts. Our highly-qualified experts are experienced civilian prosecutors who provide training, mentoring, and advice on trial strategy and tactics to all military prosecutors in the region.

All of these improvements protect victim's interests while ensuring the accused receives the due process rights guaranteed by the Constitution.

In addition to increasing the available expertise to litigate sexual assault offenses, the Commandant expanded the scope of the Secretary of Defense policy on the disposition authority for sexual offenses to cover not only penetration offenses, but also all contact sex offenses, all child sex offenses, and attempts to commit such offenses. In essence, we now have a smaller group of more senior and experienced officers making disposition decisions for all sexual offense allegations and any related misconduct.

In addition, to gain more visibility and command attention on this critical issue, the Commandant directed a new 8 day brief to the first general officer in the chain of command from the date of the victim's unrestricted report of sexual assault. This 8 day brief serves as a checklist guaranteeing each victim's care is supervised by a senior commander.

Elimination of sexual assault is a top priority for our Corps, and the Commandant's personal leadership and commitment are making a difference. By using a top-down, comprehensive approach and by attacking on all fronts from prevention to prosecution, I truly believe we are making a positive change in the culture of our Corps.

As we consider additional action in the area of sexual assault, I believe the Response Systems Panel and the Judicial Proceedings Panel, established in the NDAA for Fiscal Year 2013 provide an opportunity to analyze any future reforms, and we look forward to participating.

Again, I thank you for the opportunity to testify here today, and I welcome your questions.

[The prepared statement of Major General Ary follows:]

PREPARED STATEMENT BY MAJ.GEN. VAUGHN ARY, USMC

Chairman Gillibrand, Ranking Member Graham, and members of the subcommittee, thank you for the opportunity to testify here today.

The Department of Defense (DOD), and specifically the Marine Corps, has made significant changes to the process of litigating sexual assault cases, and continues to make tremendous progress in providing services and care vital for victims of sexual assault. We have taken a holistic approach to combating sexual assault in the Marine Corps, by implementing a number of initiatives to improve our ability to respond to allegations across the entire spectrum of a case, from initial reporting through trial and post-trial matters. We continue to support Congress's effort to study the progress that has been made through the independent reviews and assessments directed by the National Defense Authorization Act (NDAA) for Fiscal Year 2013.

My testimony will address two major topics. The first major topic is the progress of the military's initiatives to combat sexual assault. Our military leaders are constructively focused on the important issue of sexual assault. As a result, our provision of victim services has improved and our provision of legal services has undergone significant change. In the Marine Corps, the Commandant's Sexual Assault Campaign Plan, including a complete reorganization of the Marine Corps legal community, highlights the proactive stance we have taken in addressing this matter. The independent reviews and assessments directed by the NDAA for Fiscal Year

2013 provide an opportunity for us to evaluate these changes and determine where additional reform is needed. The second topic of this testimony is an overview of the military justice process as it exists today following the many changes that have been made over the past few years. This overview will highlight the success we are having in four areas essential to reducing the incidence of sexual assault: prevention, investigation, victim services, and prosecution. It will also detail the ongoing efforts to make constant improvements in each of these areas.

THE PROGRESS OF CURRENT SEXUAL ASSAULT INITIATIVES IN THE MILITARY

In the area of sexual assault, the Marine Corps today is significantly different than it was just 1 year ago, and 1 year from now it will look significantly different simply based on our implementation of current initiatives and legislative requirements. We anticipate that these changes will have positive effects on the prevention of and response to sexual assault, to include more professional investigation, prosecution, and defense of sexual assault cases. Initial feedback, whether empirical or anecdotal, indicates that we have improved the legal processes related to the prosecution and defense of sexual assault cases, and we are expecting continued improvement. Prior to discussing the specific improvements to the litigation of Marine Corps sexual assault cases, it is important to first analyze the recent legislative and policy changes affecting this area.

Legislative changes

The NDAA for Fiscal Year 2012 made several changes to the area of sexual assault. Most notable are the reform of offenses relating to rape, sexual assault, and other sexual misconduct under the Uniform Code of Military Justice; the addition of 10 U.S.C. § 1565b providing victims of sexual assault access to legal assistance and the services of Sexual Assault Response Coordinators (SARC) and Sexual Assault Victim Advocates (VA); the addition of 10 U.S.C. § 673 providing for the consideration of applications for permanent change of station or unit transfer for members on active duty who are the victim of a sexual assault or related offense; and four other sections on sexual assault prevention and response.

On June 28, 2012, a new version of the Uniform Code of Military Justice (UCMJ) sexual assault statute, Article 120, took effect. The statute it replaced was the 2007 version of Article 120, which completely rewrote the original Article 120 statute to model it on the Federal scheme for sexual assault. Among other things, the 2007 statute made it very difficult to prosecute alcohol-facilitated sexual assaults, one of the most common types of sexual assaults found in the military. The 2012 statute adopted an "offender-centric" scheme that focuses on offenders' actions, and not the behavior of the victim, to determine culpability. Military trial and appellate courts are just beginning to use the new statute, and it will take time to acquire measures of effectiveness for the new statute.

The NDAA for Fiscal Year 2013 contains 12 specific sections related to sexual assault,. The provisions cover all aspects of sexual assault, to include training, prevention, investigation, and prosecution. Most notably, the NDAA for Fiscal Year 2013 directs the Secretary of Defense to establish two independent panels to review and assess the UCMJ and judicial proceedings related to sexual assault cases.

One of the most important parts of the NDAA for Fiscal Year 2013 is the act's acknowledgement, in creating these two independent panels, that changes to military justice involving just one subset of crimes, or changes that significantly alter the role of the commander in military justice, should be carefully studied. I cannot overstate my agreement with this principle. I believe a thoughtful and well-researched comparison of military and civilian jurisdictions will provide valuable information for you to make decisions about the efficacy and viability of the military justice system and the role of the commander. I believe the role of the commander in all aspects of military justice is best addressed through deliberate study by the NDAA for Fiscal Year 2013-mandated panels.

Section 576 of the NDAA for Fiscal Year 2013 creates two panels that will "conduct an independent review and assessment of the systems used to investigate, prosecute, and adjudicate crimes involving adult sexual assault and related offenses." Both panels will specifically address the role of the commander in military justice. The first panel, the Response Systems Panel (RSP), may last for up to 18 months and will contain five members selected by the Secretary of Defense, and two members selected by both the Senate and House Armed Services Committees. Specific tasks for the RSP include: an assessment of the strengths and weaknesses of the UCMJ in prosecuting sexual assaults; a comparison of military and civilian systems, to include best practices for victim support; the assessment of advisory sentencing guidelines for sexual assaults; a comparison of the training level of military prosecutors and defense counsel compared to Federal and State court systems; an

assessment of military court-martial conviction rates with Federal and State courts; an assessment of the roles and effectiveness of commanders at all levels in preventing and responding to sexual assaults; an assessment of the strengths and weaknesses of proposed legislative initiatives to modify the current role of commanders in the administration of military justice; and an assessment of the adequacy of systems to support and protect victims. The second panel, the Judicial Proceedings Panel (JPP) will convene upon completion of the RSP and last for up to 6 months. It will contain five members, two of whom must have served on the RSP. The JPP will use the information collected and analyzed by the RSP to complete the following tasks: make recommendations regarding proposed reforms to the UCMJ; review and evaluate the adjudication of sexual assault offenses by the military in criminal and administrative fora, including the punishments determined; identify trends in punishment by courts-martial compared to Federal and State courts; review and evaluate sexual assault court-martial convictions that were reduced or set aside on appeal; review instances when prior sexual conduct of an alleged victim was considered at an Article 32 hearing; review instances when the prior sexual conduct of an alleged victim was introduced by the defense at a court-martial; assess trends in training of military prosecutors and defense counsel; monitor the implementation of the NDAA for Fiscal Year 2013 requirement for a special victim prosecution capability; and monitor the recent Secretary of Defense decision to withhold initial disposition authority to a higher level of command for certain sexual assault offenses.

Department of Defense changes

Independent of congressional action in the area of sexual assault, the Secretary of Defense has made numerous changes in the areas of sexual assault reporting, investigation, and disposition. On April 20, 2012, the Secretary of Defense issued a memorandum withholding initial disposition authority for certain sexual assault offenses to the O–6 Special Court-Martial Convening Authority (SPCMCA) level (a disposition authority that previously could have been exercised by O–5 SPCMCAs). On October 1, 2012, the Defense Sexual Assault Incident Database (DSAID) became fully operational. DSAID originated from an NDAA for Fiscal Year 2009 requirement for a centralized, case-level database that collected and maintained information regarding sexual assaults involving members of the Armed Forces. On January 22, 2013, the DOD Inspector General (IG) informed the services' senior judge advocates that he intended to issue a survey of sexual assault victims to better understand the effectiveness of current support programs and to help guide improvements to them. On January 25, 2013, Department of Defense Instruction (DODI) 5505.18 "Investigation of Adult Sexual Assault in the Department of the Defense" was published. DODI 5500.18 specifically requires Military Criminal Investigative Organizations (MCIO) to investigate all adult sexual assaults. On February 28, 2013, the DOD IG released its Investigative Oversight Report "Evaluation of the Military Criminal Investigative Organizations' Sexual Assault Investigation Training." This report recommended an MCIO working group to review the continuum of sexual assault investigation training at the entry, refresher, and advanced levels.

Service-level changes

Internal to the Marine Corps, there have been four major developments in the last year that will improve the administration of military justice. The first development began in June 2012, when the Commandant issued his Sexual Assault Prevention and Response Campaign Plan, a three-phase strategy developed by an Operational Planning Team (OPT) whose members the Commandant personally selected. Chaired by a general officer and comprised of highly respected senior officers and enlisted marines, the OPT used the same planning techniques and processes we use to engage the enemy on the battlefield. The OPT aggressively analyzed the problem of sexual assault in our ranks, looking for solutions across the wide spectrum of prevention and response. The resulting Campaign Plan is a commander-led, holistic approach that improves our ability to prevent and respond to sexual assaults. Our goal is to change behaviors—the behavior of marines who might commit sexual assault, bystanders who can intervene and prevent sexual assault, and commanders, leaders, and professionals who respond to sexual assault. In a November 2012 interview, the Commandant said, "Classes are being held, not by a 21-year-old corporal, but the General Officer, the Colonel, and the Sergeant Major. So this is a fight. It won't be won this year or next. Will we get there? We're part of society. But, we are determined to eradicate sexual assault in the Marine Corps. It's a personal thing with me."

To personally deliver the message of the Campaign Plan and ensure that marines truly understand the need to change our culture regarding the prevention of and

response to sexual assault, the Commandant traveled around the world speaking to his leaders in a series of Heritage Speeches. In these speeches, the Commandant discussed the special trust and respect that marines have earned from the Nation, and the vast responsibility marines of today have in maintaining that trust and respect. The Commandant emphasized no matter how successful we are on the battlefield against our Nation's enemies, the Marine Corps could lose all of that respect if we as marines did not take care of our fellow marines—America's brothers and sisters, sons and daughters, fathers and mothers. The Commandant made it clear that sexual assault is not acceptable and that he would not tolerate it. He directed his marines to learn more about the situations that may lead to sexual assault, prevent those situations from occurring, and if a sexual assault did occur, to embrace the victim and provide that marine the support they needed. Attachment A contains a summary of the Commandant's Campaign Plan initiatives and requirements.

The second development was the Commandant's complete reorganization of the Marine Corps legal community. Previously, legal centers were decentralized and operated independently of each other. They were also limited to their own organic capability to address cases in their geographic location, regardless of complexity. Based on an analysis of the growing complexity of case types on the court-martial docket, to include sexual assaults, the Commandant directed a regionalized model that could better leverage training and experience to provide the proper level of expertise on the most complex courts-martial, regardless of location. This reorganization had an immediate and tremendously positive impact on the ability of judge advocates to prosecute complex cases and is discussed in more depth below in the section on courts-martial.

The third development in the last year involved two statutory modifications of the authority of Staff Judge Advocate to the Commandant of the Marine Corps (SJA to CMC). The first statutory change involved the supervisory authority of the Staff Judge Advocate to the Commandant of the Marine Corps (SJA to CMC). The NDAA for Fiscal Year 2013 modified 10 U.S.C. § 5046 to codify the SJA to CMC's authority to provide legal advice to the Commandant and supervise the Marine legal community. Prior to this statutory change, the SJA to CMC exercised this authority as delegated to him by regulation. In the second statutory change, 10 U.S.C. § 806 was modified to grant the SJA to CMC inspection and supervisory authority over the administration of military justice within the Marine Corps. These statutory changes recognize the unique nature of the Marine Corps as a second service within the Department of the Navy and make the SJA to CMC accountable for ensuring military justice services are meted out efficiently, professionally, and effectively.

The fourth development of the last year involved improvements in the ability to provide transparency and visibility of courts-martial cases to all levels of command. During fiscal year 2012, the Marine Corps began a Case Management System (CMS) pilot program with the U.S. Navy. The Judge Advocate General of the Navy (JAG) determined that CMS presented the best way forward in order to meet a congressionally-mandated requirement for the entire department to use a single case tracking system. Based on the JAG's input, the Secretary of the Navy selected CMS as the departmental case tracking system. At the close of fiscal year 2012, the Marine Corps and the Navy were working hand-in-hand to ensure that the CMS expansion will be completed by July 2013, the deadline set by Congress.

OVERVIEW OF THE MARINE CORPS' MILITARY JUSTICE PROCESS FOR SEXUAL ASSAULTS

An allegation of sexual assault

When a marine alleges that he or she is a victim of sexual assault, that allegation triggers a comprehensive system of required victim and legal responses. Commanders, law enforcement, victim advocates, and judge advocates are all required to comply with their statutory and regulatory responsibilities in order to respond to victims' needs and determine appropriate offender accountability.

Victim Response. In accordance with Marine Corps Order (MCO) 1752.5A, "Sexual Assault Prevention and Response (SAPR) Program," a sexual assault victim has the option of filing a restricted or unrestricted report. A restricted report affords military victims of sexual assault the option to make a confidential report to specified individuals (SARC, VA, Uniformed Victim Advocate (UVA), counselors, and healthcare providers) without requiring those officials to report the matter to law enforcement or initiate an official investigation. Individuals making restricted reports can also utilize the full-range of victim services received by victims who make unrestricted reports. Filing an unrestricted report requires that all suspected, alleged, or actual sexual assaults made known to command or law enforcement be submitted for formal investigation. An unrestricted report is the first "trigger" for a variety of victim and legal responses.

Following an unrestricted report, a Commander is required by MCO 1752.5A to take a number of initial steps. These steps include ensuring the physical safety and emotional security of the victim; determining if the victim desires/needs any emergency medical care; notifying the appropriate MCIO, as soon as the victim's immediate safety is ensured and medical treatment is provided; to the extent practicable, strictly limiting knowledge of the facts or details regarding the incident; taking action to safeguard the victim from any formal or informal investigative interviews or inquiries, except those conducted by the appropriate MCIO; ensuring the SARC is notified immediately; collecting only the necessary information (e.g. victim's identity, location and time of the incident, name and/or description of offender(s); advising the victim of the need to preserve evidence (by not bathing, showering, washing garments, etc.) while waiting for the arrival of representatives of the MCIO; ensuring the victim understands the availability of victim advocacy and the benefits of accepting advocacy and support; asking if the victim needs a support person, which can be a personal friend or family member, to immediately join him or her; immediately notifying a VA for the victim; asking if the victim would like a Chaplain to be notified and notify accordingly; determining if the victim desires/needs a "no contact" order or a Military Protective Order, DD Form 2873, to be issued, particularly if the victim and the accused are assigned to the same command, unit, duty location, or living quarters; ensuring the victim understands the availability of other referral organizations staffed with personnel who can explain the medical, investigative, and legal processes and advise the victim of his or her victim support rights; and listening/engaging in quiet support of the victim to assure the victim that she/he can rely on the commander's support.

After making an unrestricted report, a marine can request an expedited transfer. In accordance with the Commandant's Letter of Instruction on submitting and processing these expedited transfer requests, commanding officers "shall ... expeditiously process a request for transfer of a marine who files an unrestricted report of sexual assault. Every reasonable effort shall be made to minimize disruption to the normal career progression of marines who seek transfer ... " The letter further mandates expedited processing timelines, establishes a presumption in favor of transferring the marine requesting transfer, and establishes a process to appeal a denial of that request to a general officer. This process allows a victim to request assignment to a different unit for his or her physical and/or mental well-being. Since February 28, 2012, 57 marines have requested expedited transfer and all but one of the requests have been approved. The one marine who was denied an expedited transfer was temporarily assigned to a service school when she requested the expedited transfer. The commander was able to return the marine to her parent unit, which effectively accomplished the goal of separating her from the alleged offender.

At this early stage of the process, the Marine Corps also requires commanders of victims to submit an "8-day brief" to the first general officer in their chain of command, which provides general officers with valuable data about any trends in sexual assaults in their command and ensures all relevant victim services are being provided.

This past year, the Marine Corps also implemented 10 U.S.C.§ 1565b, which makes legal assistance, assistance by a SARC, and assistance by a sexual assault victim advocate available to victims of sexual assault. Additionally, 10 U.S.C.§ 1565b requires that victims of sexual assault be informed of the availability of such services as soon as practicable after the victim reports the sexual assault. The Marine Corps uses legal assistance attorneys to provide victims information about the following areas: (1) the Victim and Witness Assistance Program (VWAP), including the rights and benefits afforded the victim, such as the victim advocate privilege; (2) the differences between the two types of reporting in sexual assault cases (restricted and unrestricted); (3) the military justice system, including the roles and responsibilities of the prosecutor, defense counsel, and investigators; (4) services available from appropriate agencies or offices for emotional and mental health counseling and other medical services; (5) the availability of and protections offered by civilian and military protective orders; and (6) eligibility for and benefits potentially available as part of the transitional compensation program. Additionally, prosecutors will explain to victims how their privacy is protected under the military rape shield rule, Military Rule of Evidence (M.R.E.) 412.

In addition to the new counseling provided by legal assistance attorneys, the Marine Corps is also increasing the quality and professionalism of victim advocate services available to victims of sexual assault. Per the NDAA for Fiscal Year 2012, all SARCs, VAs, and UVAs are mandated to complete 40 hours of specialized victim advocacy training, as part of the new credentialing requirements for Sexual Assault Prevention and Response (SAPR) personnel. This initiative reinforces the Marine Corps ability to ensure that SAPR personnel remain well equipped to establish a

close and supportive relationship with victims, and to help victims understand their legal and privacy rights.

In response to another NDAA for Fiscal Year 2012 requirement, in fiscal year 2013, the Marine Corps will hire 47 full-time civilian SARC and VA billets (25 SARCs and 22 VAs). The 25 new SARCs will greatly augment our current staff of 17, giving us a total of 42 full-time SARCs by the end of fiscal year 2013. The 22 new VAs will be exclusive to the SAPR branch, and will augment the existing 42 VAs who are supported by the Family Advocacy Program. In addition, there are currently 67 Command SARCs and 813 UVAs across the Marine Corps. These new SARC and VA positions represent a move from part-time collateral duty billet holders to a professionalized cadre of victim service providers. The Marine Corps will also establish Sexual Assault Response Teams (SART), which is a collaboration with the Naval Criminal Investigative Service (NCIS), legal, medical, and other entities, designed to facilitate a multi-disciplinary approach to victim care, reduce re-victimization, and to provide a holistic response that extends beyond the boundaries of any one response service. The SARTs will also conduct quarterly reviews of regional trends in victim services.

Determining Offender Accountability. DOD Instruction 5505.18, dated 25 January 2013, directs MCIOs, including NCIS, to initiate investigations of all offenses of adult sexual assault of which they become aware that occur within their jurisdiction, regardless of the severity of the allegation. When NCIS initiates a sexual assault investigation, it will also investigate threats against the sexual assault victim, to include minor physical assaults and damage to property. If an adult sexual assault allegation is referred to another agency (e.g., local law enforcement or the Marine Corps Criminal Investigative Division), the reason for the referral must be fully documented in an investigative report that identifies the agency and states whether the MCIO will be involved in either a joint investigative or monitoring capacity. This Instruction also provides minimum training standards for the primary MCIO investigator assigned to conduct an investigation of sexual assault and provides standards for records maintenance.

The Marine Corps is working with the Navy to increase Sexual Assault Forensic Examination (SAFE) accessibility and the Sexual Assault Nurse Examiner capability. In addition, NCIS is utilizing the Adult Sexual Assault Program (ASAP), a surge team response to adult sexual assault cases to increase efficiency and expedite the handling of cases. Members of ASAP will receive comprehensive sexual assault training.

Investigation referred to a colonel commander for a disposition decision

On April 20, 2012 the Secretary of Defense (SecDef) issued a memorandum withholding initial disposition authority (IDA) in certain sexual assault offenses to the colonel, O–6, SPCMCA level. The SecDef withheld the authority to make a disposition decision for penetration offenses, forcible sodomy, and attempts to commit those crimes. This withholding of IDA to a Sexual Assault Initial Disposition Authority (SA–IDA) also applies to all other alleged offenses arising from or relating to the same incident, whether committed by the alleged offender or the alleged victim (i.e., collateral misconduct). On June 20, 2012, the Commandant expanded this withholding to include not just penetration and forcible sodomy offenses, but all contact sex offenses, child sex offenses, and any attempts to commit those offenses. The Marine Corps also made it clear that in no circumstance could the SA–IDA forward a case down to a subordinate authority for disposition. For example, if a marine was initially accused of a non-consensual sex offense, along with orders violations and adultery, but the NCIS investigation did not substantiate the non-consensual sex offense, the SA–IDA would still be required to make the disposition decision on the remaining non-sexual assault offenses, even if those types of offenses were of the type normally handled at lower levels of command. The result is that the USMC now has a smaller group of more senior and experienced officers making disposition decisions for all sexual offense allegations and any related misconduct.

In accordance with Rule for Court-Martial (RCM) 306(c), prior to trial, a convening authority (the SA–IDA for sexual assaults) may dispose of charged or suspected offenses through various means: "Within the limits of the commander's authority, a commander may take the actions set forth in this subsection to initially dispose of a charge or suspected offense," by taking: (1) no action, (2) administrative action, (3) imposing nonjudicial punishment, (4) disposing of charges through dismissal, (5) forwarding charges to a superior authority for disposition, or (6) referring charges to a court-martial.

Before making a decision regarding the initial disposition of charges, the convening authority must confer with his or her staff judge advocate (SJA), whose primary duties are to provide legal advice to commanders. In the Marine Corps model

for providing legal services, the provision of legal services support (i.e. trial and defense services, review, civil law, legal assistance) is completely divorced from the provision of command legal advice. Practically, this means the commander's SJA is not affiliated with the prosecutors who evaluate the evidence in the case and recommend whether to take a case to trial. Effectively, this ensures the commander and his SJA receive impartial advice (in addition to information from NCIS) in order to make an appropriate and well-informed disposition decision in accordance with RCM 306.

If a commander decides to proceed with charges against an alleged offender, the commander will file a request for legal services with the Legal Services Support Section (LSSS) or Legal Services Support Team (LSST) that services his or her command. Before a case can go to a felony-level trial, a general court-martial, the commander must first send the case to an Article 32 investigation.

According to Article 32, UCMJ, "[n]o charge or specification may be referred to a general court-martial for trial until a thorough and impartial investigation of all the matters set forth therein have been made." A general court-martial may not proceed unless an Article 32 investigation has occurred (or the accused has waived it). Unlike a grand jury under Federal Rule of Criminal Procedure 6, the proceeding is not secret and the military accused has the right to cross-examine witnesses against him or her.

RCM 405 governs the conduct of the Article 32 investigation and states in its discussion that "the investigating officer should be an officer in the grade of major . . . or higher or one with legal training . . . and may seek legal advice concerning the investigating officer's responsibilities from an impartial source." As a matter of regulation in the Marine Corps, for a case alleging a sexual assault, the Article 32 investigating officer (IO) must be a judge advocate who meets specific rank and experience requirements, in accordance with Marine Corps Bulletin (MCBul) 5813, "Detailing of Trial Counsel, Defense Counsel, and Article 32, UCMJ, Investigating Officers." MCBul 5813 was published on 2 July 2012 and ensures that judge advocates who are detailed as trial counsel (TC), defense counsel (DC), and Article 32 IOs possess the appropriate expertise to perform their duties.

Once the Article 32 investigation is complete, the IO makes a report to the convening authority that addresses matters such as the sufficiency and availability of evidence; and that more importantly, contains the IO's conclusions whether reasonable grounds exist to believe that the accused committed the offenses alleged and recommendations, including disposition. Although the rules of evidence generally do not apply at an Article 32 investigation, it is important to note that the evidentiary rape shield and all rules on privileges do apply, providing a level of protection for the victim.

The convening authority again receives advice from his or her staff judge advocate, and then decides how to dispose of the charges and allegations. Prior to making a disposition decision, convening authorities take the victim's preference into consideration. If the commander decides to move forward, he or she may refer the charges to a general court-martial or a lesser forum.

Court-martial

Alcohol facilitated acquaintance sexual assaults are one of the most difficult criminal offenses to prosecute, regardless of jurisdiction. Within the military, they are also the most common type of sexual assaults that our investigators and prosecutors confront. Our analysis of ways to improve sexual assault prosecutions uncovered a broader overall trend in military justice. We noticed an increase in complex and contested cases as a percentage of our total trial docket. We realized that our historical model of providing trial services needed to be revised to better handle these complex cases, many of which involve sexual assault. The Commandant, as an example of the importance of the commander in the administration of military justice, therefore directed us to reorganize our legal community into a regional model that gives us the flexibility to better utilize the skills of our more experienced prosecutors. Practically speaking, our new regional model, which became fully operational on October 1, 2012, allows us to place the right prosecutor, with the appropriate training, expertise, supervision, and support staff, on the right case, regardless of location.

The legal reorganization greatly increases the legal expertise (based on experience, education, and innate ability) available for prosecuting complex cases. The reorganization divided the legal community into four geographic regions—National Capital Region, East, West, and Pacific. These regions are designated Legal Service Support Areas (LSSA) and are aligned with the structure of our regional installation commands. Each LSSA contains a LSSS that is supervised by a colonel judge advocate officer-in-charge. Each LSSS contains a Regional Trial Counsel (RTC) office that is led by an experienced lieutenant colonel litigator whose extensive experience

provides effective regional supervision over the prosecution of courts-martial cases. This new construct provides for improved allocation of resources throughout the legal community and ensures that complex cases, such as sexual assaults, are assigned to experienced counsel who are better suited to handle them.

While the Marine Corps does not specifically identify "special victim prosecutors," this capability resides in the RTC offices through the use of Complex Trial Teams (CTT). The CTT is assembled for specific cases and may contain any or all of the following: a civilian Highly Qualified Expert (HQE), experienced military prosecutors, military criminal investigators, a legal administrative officer, and a paralegal. The civilian HQE has an additional role training and mentoring all prosecutors in the region. The HQEs are assigned to the RTCs and work directly with prosecutors, where they will have the most impact. HQEs report directly to the RTC and provide expertise on criminal justice litigation with a focus on the prosecution of complex cases. In addition to their principal functions of training and mentoring prosecutors, the HQEs also consult on the prosecution of complex cases, develop and implement training, and create standard operating procedures for the investigation and prosecution of sexual assault and similarly complex cases. The criminal investigators and the legal administrative officer in the RTC office provide a key support role in complex prosecutions. Historically, a prosecutor was individually burdened with the coordination of witnesses and experts, the gathering of evidence, background investigations, and finding additional evidence for rebuttal, sentencing, or other aspects of the trial. These logistical elements of a trial are even more demanding in a complex trial; the presence of criminal investigators and the legal administrative officer allow Marine Corps prosecutors to focus on preparing their case.

To support our prosecutors further, we created a Trial Counsel Assistance Program (TCAP) at our Judge Advocate Division Headquarters. Our TCAP consolidates lessons learned from throughout the Marine Corps and provides training and advice to our prosecutors in each region. The TCAP provides specialized training through regional conferences focused on the prosecution of sexual assaults. These training events include speakers on law enforcement techniques, victim and offender typology, expert witnesses, forensics, and the art of persuasion. Our Reserve judge advocates, who are experienced criminal prosecutors, are made available to mentor our active duty judge advocates either during trainings or on specific cases.. Our TCAP also coordinates on a regular basis with the DOD Sexual Assault and Prevention Office to ensure Marine Corps initiatives meet DOD requirements. To ensure an adequate level of experience and supervision not only at the headquarters level, but also in each LSSS and LSST, we more than doubled the number of field grade prosecutors we are authorized to have on our rolls from 11 to 25. We also specifically classified certain key military justice billets to require a Master of Laws degree in Criminal Law.

As I mentioned earlier, any change I recommend to the Marine Corps' system of dealing with sexual assault must carefully balance our ability to prosecute sexual assaults with our ability to defend marines accused of sexual assault. As concerned as I am that I have well-trained and competent prosecutors, I am equally concerned that each marine accused receives a constitutionally fair trial that will withstand the scrutiny of appeal. To that end, last year we established the Marine Corps Defense Services Organization (DSO), which placed all trial defense counsel under the centralized supervision and operational control of the Chief Defense Counsel (CDC) of the Marine Corps. This change was designed to enhance the independence of the Marine Corps DSO and the counsel assigned to it, while enhancing the efficiency and effectiveness of available services. The DSO also established a Defense Counsel Assistance Program (DCAP) to provide assistance and training to the DSO on sexual assault and other cases.

During the court-martial process, special care is taken to ensure that the rights and interests of victims continue to be protected. The M.R.E. provides the same protections as our Federal and State courts against the humiliation, degradation and intimidation of victims. Under MRE 611, a military judge can control the questioning of a witness to protect a witness from harassment or undue embarrassment. More specifically for sexual assault cases, the military's "rape shield" in MRE 412 ensures that the sexual predisposition and/or behavior of a victim is not admissible absent a small set of well-defined exceptions that have survived extensive appellate scrutiny in Federal and military courts (the exceptions listed in MRE 412 are identical to the exceptions listed in Federal Rule of Evidence 412). In addition, victims also have the protection of two special rules on privileges. Under MRE 513, a patient (victim) has the privilege to refuse to disclose, and prevent another person from disclosing, a confidential communication between the patient and a psychotherapist. Under MRE 514, the military has created a "Victim advocate-victim privilege" that allows a victim to refuse to disclose, and prevent another person

from disclosing, a confidential communication between the victim and a victim advocate in a case arising under the UCMJ. These two evidentiary privilege rules ensure that victims have a support network they are comfortable using and that they do not have to fear that their efforts to improve their mental well-being will be used against them at a court-martial.

Convening Authority's Clemency Power

I am aware that the discretion of a convening authority under Article 60 is an issue of extreme importance to you based on the recent Air Force case. In that case, the convening authority dismissed a sexual assault offense after setting aside a guilty finding that was voted on by a panel of officer members. A commander setting aside a finding is atypical, and even rarer in cases involving sexual assault offenses. In order to assess the manner in which today's convening authorities exercise their clemency power, a 2007 Naval Law Review article examined 807 Navy and Marine Corps special and general courts-martial convened between 1999 and 2004. The author found that Convening Authorities exercised clemency in only about 4 percent of the cases, and in only about 2 percent of the cases that were convened in 2003 and 2004. A review of the Marine Corps cases over the past 2 fiscal years revealed similar results. Of the 967 general and special courts-martial cases in fiscal year 2011 and fiscal year 2012 that resulted in convictions, findings of guilty were disapproved in only 5 cases—less than 1 percent of the total amount of cases. None of the findings of guilty were disapproved for sexual assault offenses. More specifically, in fiscal year 2012, for 115 general courts-martial (GCM) and 285 SPCMs, no guilty findings were set aside for GCMs and 1 guilty finding was set aside for a SPCM. In fiscal year 2011, for 154 GCMs and 413 SPCMs, findings were set aside in 3 GCMs and 1 SPCM.

A key reason for the Article 60 clemency authority involves situations where an accused faces multiple offenses at a general court-martial, and the most serious offense results in an acquittal. For example, an accused might face a general court-martial for the offenses of sexual assault, adultery, and violating an order on underage drinking. If the accused is acquitted of the sexual assault, he is left with a felony conviction for adultery and underage drinking. Standing alone, those two offenses are often handled at a lower misdemeanor forum, a special court-martial, or with administrative measures. In this type of situation, the convening authority may use his authority under Article 60 to dispose of the lower-level offenses in a more appropriate forum.

The Article 60 clemency authority is also closely linked to the sentencing aspect of a court-martial. Article 60 provides the authority to modify the sentence of a court-martial, which is a key component of the guilty plea process. In our military justice system, an accused can submit a pre-trial agreement asking for sentencing protection in exchange for his or her plea of guilty. However, even if the plea agreement is approved, the military judge or members are unaware of the protection contained in the agreement and will sentence the accused in a manner they feel appropriate based on the relevant evidence and facts and circumstances of the case. After the sentence is announced in court, the sentencing limitations agreed to by the convening authority will be honored in the post-trial process, pursuant to the convening authority's clemency power under Article 60. If the convening authority lacked this power, there would be no incentive for an accused to plead guilty, which would greatly hinder judicial economy and slow down the adjudication of the entire court-martial docket.

Article 60 interfaces with key aspects of the UCMJ and serves an important role in maintaining a commander's ability to ensure a fair court-martial process. It is not a stand-alone section of the UCMJ that can be easily severed without significant effects on other key portions of the military justice system. Therefore, modifications to Article 60 should involve a thorough analysis by the RSP and JPP.

CONCLUSION

The Marine Corps' ability to successfully prosecute and defend sexual assaults has never been stronger. We are succeeding in carefully balancing the commander's responsibility to maintain good order and discipline, the constitutional rights of the accused, and our obligation to protect and care for victims. Congress plays an important role in overseeing the proficiency and fairness of our military justice process. To this end, we are implementing many of the institutional changes Congress directed in the past 2 years. As you consider potential additional action in the area of sexual assault, I believe your establishment of the RSP and the JPP in the NDAA for Fiscal Year 2013 provides us the best chance to work together to make well-reasoned assessments and recommendations for any future reforms.

Attachment A

Sexual Assault Campaign Plan Summary

When we talk about preventing sexual assault, the Commandant uses the phrase "get to the left of the problem." That means using training, policies, and initiatives to help us stop sexual assault before it takes place. In step with the Campaign Plan, our Sexual Assault Prevention & Response (SAPR) Office implemented large-scale Corps-wide training initiatives, utilizing a top-down leadership model. The dominant message in SAPR's training model is for leaders to foster a climate where misconduct or crime—especially sexual assault—is not tolerated. SAPR training remains unequivocal in its assertion, however, that the inherent duty of preventing sexual assault belongs ultimately to Marines of every rank. The Campaign Plan was executed in three Phases, each with different goals.

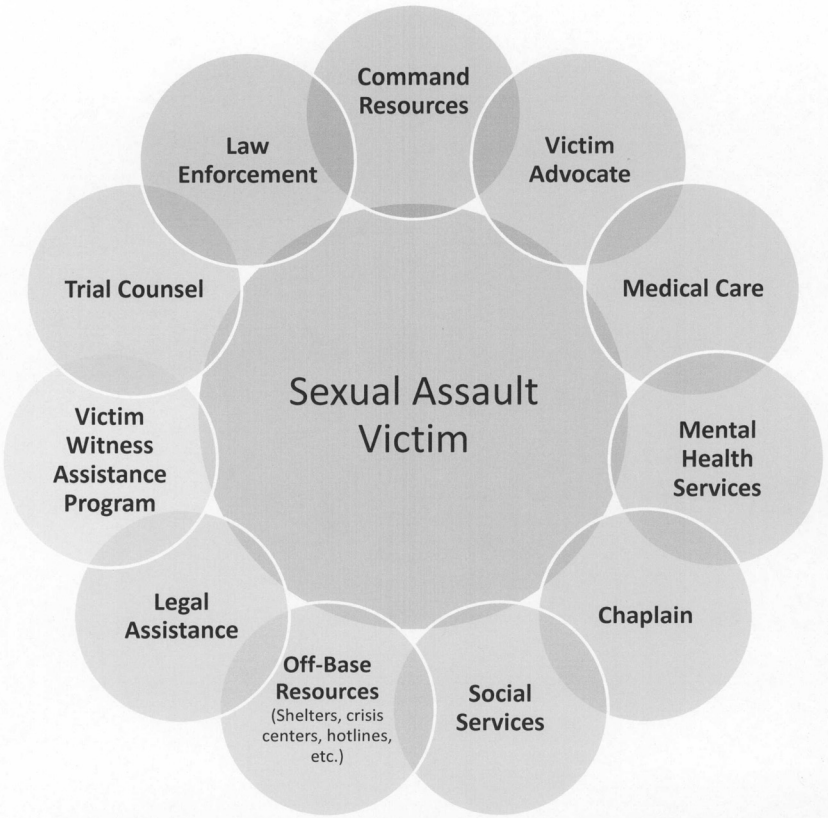
Phase I of the Campaign Plan, the "Strike" phase, focused on significantly increasing the quality and quantity of prevention-based training. It began with the publication of a CMC White Letter (a personal communication from the Commandant reserved for important issues) in May 2012. This White Letter was addressed to all Marines and charged them with creating an environment and command climate in which every Marine is treated with dignity and respect, and all Marines—whether victims or witnesses—are encouraged to report allegations of sexual assault. In July 2012, the Commandant directed every Marine general officer to attend a two-day SAPR General Officer Symposium (GOS), at Marine Corps Base Quantico. This two-day training event included subject matter experts who spoke on topics relevant to prevention, the use of alcohol as a weapon, inadvertent victim blaming, and dispelling myths. A similar symposium was held in August 2012 for all Marine Sergeants Major. Building on the momentum of these personal interactions with his leaders, the Commandant also directed three focused training initiatives on sexual assault. The first initiative was Command Team Training for commanders and their senior staff. This consisted of one and one-half days of training presented in the form of guided discussion, case studies, Ethical Decision Games (EDGs), and SAPR Engaged Leadership Training. The second initiative was "Take a Stand" training for all non-commissioned officers. Comprised of videos, mini-lectures, guided group discussions, and activities, this training was geared toward establishing a positive command climate that encourages Marines to intervene, to "step up and step in," to prevent sexual assault among fellow Marines. The third training initiative was "All Hands Training," required for all Marines and attached Navy personnel in the form of informal lectures, guided discussions, and EDGs. Presented by Commanding Officers, Sergeants Major and leaders across the Corps, "All Hands Training" relayed the Commandant's message that he "expects Commanding Officers, Officers-in-Charge, and senior enlisted to spare no effort in changing the prevailing conditions and attitudes that are allowing this crime to happen among our ranks." The Commandant also traveled around the world between the spring and fall of 2012 speaking to Marine leaders about "who we are" as Marines and what it means to uphold the integrity of the title "Marine." Although these "Heritage" speeches discussed a variety of issues, a main focus was the Commandant's personal interest in changing behavior so that we prevent sexual assaults from occurring, and if they do occur, that Marines are comfortable and confident enough in their leadership and the military justice system to report an allegation of sexual assault.

Phase II of the Campaign Plan, the "implementation" phase, focuses on customizing the Phase I SAPR training, along with improving the Marine Corps' response capability. Phase II began on November 10, 2012 and will last for six to twelve months. Training is being developed that is specific to different phases of military education, such as delayed entry accession programs, Recruit Depots, entry-level schools, Primary Military Education (PME) schools, Commanders and Senior Enlisted Courses, officer PME schools, and the pre-deployment environment. Annual training requirements are also being customized in a manner specific to grade. This building block approach will ensure training remains fresh and in accord with a Marine's knowledge and experience. Phase II also implemented changes in how to respond to sexual assaults, which I will discuss in the next section.

Phase III of the Campaign Plan is conditions-based. Most notable among these conditions is the assessed success of Phases I and II, and the integration of other programs into a holistic, truly sustainable effort.

Attachment B

AGENCIES, ENTITIES, AND INDIVIDUALS WHO INTERACT WITH A SEXUAL ASSAULT VICTIM OVER THE DURATION OF A SEXUAL ASSAULT CASE



The entities in blue (Law Enforcement, TC, and VWAP) do not provide victim services; however, they are tasked by statute and regulation with providing information to victims over various stages of a case.

Attachment B

- Commanders (MCO 1752.5B(draft); MCO 1754.11; MCO 5800.14(draft); Sexual Assault Campaign Plan 2012; MCO 3504.2; MARADMIN 317/09; MARADMIN 372/12; MARADMIN 624/12; HQMC Letter of Instruction, dtd 28 Feb 2012)
  - Appoints at least two SAPR UVAs at each battalion, squadron, or equivalent level command; appoints a VWAC.
  - Ensures unrestricted reports of sexual assault are responded to promptly and professionally, with due care for each victim's welfare.
  - Establishes clear standards for personal behavior, and holds offenders appropriately accountable.
  - Just after an allegation: Ensures the physical safety and emotional security of the victim; determines if the victim desires/needs any emergency medical care; notifies the appropriate military criminal investigative organization (MCIO), as soon as the victim's immediate safety is assured and medical treatment is provided; to the extent practicable, strictly limits knowledge of the facts or details regarding the incident to only those personnel who have a legitimate need to know; takes action to safeguard the victim from any formal or informal investigative interviews or inquiries, except those conducted by the authorities who have a legitimate need-to-know; ensures the SARC is notified immediately; collects only the necessary information (e.g. victim's identity, location and time of the incident, name and/or description of offender(s); advises the victim of the need to preserve evidence (by not bathing, showering, washing garments, etc.) while waiting for the arrival of representatives of the MCIO; ensures the victim understands the availability of victim advocacy and the benefits of accepting advocacy and support; asking if the victim needs a support person, which can be a personal friend or family member, to immediately join him or her; immediately notifying a Victim Advocate for the victim; asks if the victim would like a Chaplain to be notified and notify accordingly; determines if the victim desires/needs a "no contact" order or a Military Protective Order, DD Form 2873, to be issued, particularly if the victim and the accused are assigned to the same command, unit, duty location, or living quarters; ensures the victim understands the availability of other referral organizations staffed with personnel who can explain the medical, investigative, and legal processes and advise the victim of his or her victim support rights; and listens/engages in quiet support of the victim to assure the victim that she/he can rely on the commander's support
  - Quickly processes requests for expedited transfer.
  - Submit an Operations Event/Serious Incident Report (OPREP-3) to higher headquarters when appropriate.
  - Submit SAPR 8 Day Brief no later than the 8th day after the report of sexual assault to the first general officer in the victim's chain of command.
  - After consulting with staff judge advocate, O-6 level Sexual Assault Initial Disposition Authority documents initial disposition decision.
  - Attend monthly Case Management Group meetings.
  - Convening Authorities should consider victims' views, when offered, prior to acting on a pretrial agreement.
  - Process offenders for administrative discharge if no discharge awarded at court-martial after conviction for a sexual assault offense.

Attachment B

- Sexual Assault Response Coordinator (SARC), Victim Advocate (MCO 1752.5B(draft); MCO 1754.11)Victim Advocate
  - Sexual Assault Prevention and Response (SAPR) Victim Advocate provides integrated response capability & system accountability for awareness, prevention and response training, and care for adult sexual assault victims. Facilitates victim care by coordinating medical treatment, including emergency care, & tracking the services provided to victims of sexual assault from initial report through final disposition and resolution. Serves as central point of contact within a command.
  - Family Advocacy Program (FAP) Victim Advocates and Clinical Counselors provide short-term clinical treatment services to eligible beneficiaries who are involved in child abuse and domestic abuse. Provide comprehensive victim advocate assistance and support to victims of domestic abuse and sexual assault, to include the development of a safety plan, and other services similar to SAPR.
    SARC submits a report into the Defense Sexual Assault Incident Database (DSAID).

- Medical (BUMEDINST 6310.11; MCO 1752.5 B(draft))
  - Provides medical treatment, including emergency care, in a timely manner. Emergency care shall consist of emergency medical care and the offer of a sexual assault forensic examination (SAFE) consistent with the DoJ protocol and should refer to DD Form 2911, "DOD Sexual Assault Medical Forensic Examination Report" and accompanying instructions; and medical intervention to prevent loss of life or undue suffering resulting from physical injuries internal or external, sexually transmitted infections, pregnancy, or psychological distress.
  - Provides follow-on medical care, to include psychological counseling.

- Chaplain (SECNAVINST 1730.9; SECNAVINST 1730.10; MCO 1752.5B(draft))
  - Facilitates access to the SAPR program at the individual's location.
  - Provides faith-based counseling, mentoring and spiritual direction based on theologically derived truths. They also deliver relational counseling which is based on the trust gained through a shared experience of military service and characterized by confidentiality and mutual respect.
  - Commanders and chaplains are required to honor the confidential relationship between service personnel and chaplains.

- Law Enforcement (DoDI 5500.18; DoDD 6495.01; DoDD 6400.1; SECNAVINST 5430.107)
  - Military criminal investigative organizations (MCIOs) will initiate investigations of all offenses of sexual assault of which they become aware.
  - When an MCIO initiates a sexual assault investigation, it will also initiate and conduct subsequent investigations relating to suspected threats against the sexual assault victim, to include minor physical assaults and damage to property.
  - In cases of child sexual assault, coordinates with Child Protective Services.

Attachment B

- Trial Counsel/Support Staff (MCO 1752.5B(draft); MCO 1754.11; MCO 5800.14(draft); JAGINST 5800.7F)
  - Identifies victims in a case prior to preferring charges and ensures each individual receives a DD Forms 2701-2704.
  - Ensures that victims are notified of their rights and provided information concerning the criminal justice process. Contacts the applicable VWACs to ensure that proper support and resources are provided.
  - Ensures notification to the victim of various stages and milestones throughout the military justice process.
  - Ensures victim's views concerning prosecution and plea negotiations are obtained and forwarded to the convening authority prior to the signing of any pretrial agreement.
  - Informs victims of the opportunity to present evidence to the court at sentencing.
  - Informs victims and witnesses of basic information about the post-trial process.
  - Confers with victim to determine whether he/she wants to receive information about confinement status of accused.
  - Consults with convening authority and staff judge advocate and provides military justice advice, including the likelihood of prevailing in a prosecution at court-martial.
  - Ensures results of trial are forwarded to chain of command, SJA, VA, SARC, NCIS.

- VWAP (MCO 5800.14(draft))
  - Reduces the trauma, frustration and inconvenience experienced by victims and witnesses of crime; informs victims of their statutory rights; and, assists victim and witness understanding of the military justice process.

- Legal Assistance Attorney (10 USC 1565b; DoD (P&R) Memo on Legal Assistance for Victims of Crime)
  - Provides legal assistance support as authorized by law and regulation.
  - Provides victims information regarding their rights under the VWAP and applicable law and regulation, such as:
    - The rights and benefits afforded a victim; the military justice system; the ability of the government to compel cooperation and testimony; the contempt power of the court; protections offered by civilian and military restraining and protective orders.
  - When requested by a victim, contacts the creditor of a victim who is subjected to serious financial strain caused by the crime(s) or by cooperation in the investigation or prosecution of an offense.

- Off-Base Resources
  - Shelters, crisis centers, hotlines, etc.

- Social Services
  - Workplace safety, childcare, house, etc.

Senator GILLIBRAND. Major General Patton?

STATEMENT OF MG GARY S. PATTON, USA, DIRECTOR, SEXUAL ASSAULT PREVENTION AND RESPONSE OFFICE

General PATTON. Madam Chairman, Ranking Member Graham, and members of the subcommittee, thank you for inviting me to appear today.

First, I would like to thank the sexual assault survivors who testified earlier today. I appreciate their personal courage in standing up and speaking out. Their words inspire all of our efforts and renew my commitment every day to this cause.

It has been my honor to serve our Nation with servicemembers just like them over the past 33½ years, and during that time, I am no stranger to leading culture change, to include helping de-stigmatize mental health care for our combat veterans, more fully integrating women in the Armed Forces with last year's Department's Women in Service Report, and also managing the Department's successful repeal of "Don't Ask, Don't Tell". The common denominator in all of these complex institutional challenges has been an unequivocal commitment to mission success, readiness of the force, and the welfare of our men and women in uniform.

As the Director of DOD's SAPR Office for the past 9 months, I want to say that the Department recognizes that sexual assault is a terrible crime and more needs to be done in combating it. It is a national problem in our society, but we in the military must hold ourselves to a higher standard. Sexual assault has no place in my Army and no place in my military. It is an affront to the values that we defend, and it erodes the cohesion that our units demand.

It is unacceptable that 19,000 men and women servicemembers in 2010 are estimated to have experienced some form of unwanted sexual contact. This estimate is based on feedback from a DOD anonymous survey of the Active-Duty Force. That same year, just over 2,600 victims of sexual assault took the difficult step of coming forward and making an official report of these crimes, ranging from rape to abusive sexual contact. This number, when compared to the survey estimate, demonstrates the significant under-reporting of this crime. This under-reporting prevents victims from receiving the care they need and it limits our ability to investigate these crimes and hold offenders appropriately accountable.

As this reporting problem demonstrates, sexual assault is a complex issue. There is no single, "silver bullet" solution. Our DOD-wide mission is to prevent and respond to this crime in order to enable military readiness and to reduce, with a goal to eliminate, sexual assault from the military. Reducing and eliminating sexual assault requires a multi-pronged approach, one that leverages a wide range of initiatives and engages every servicemember to prevent the crime from occurring in the first place. But when one does occur, effective processes and expert people are in place to support victims and ensure the delivery of justice.

Underpinning all our efforts is the need for enduring culture change, requiring leaders at all levels to foster a command climate from top to bottom where sexist behavior, sexual harassment, and sexual assault are not tolerated, condoned or ignored; a climate where dignity and respect are core values that we must all live by and define how we treat one another; where a victim's report is taken seriously, their privacy is protected, and they are treated with sensitivity; where bystanders are trained and motivated to intervene and prevent unsafe behaviors; and finally, a command climate where offenders know they will be found and held appropriately accountable for their actions. These climate factors are being stressed and taught today at multiple levels of NCO and officer education and training across the force, and we are getting positive feedback from this training.

I often get asked how we will know when this culture change has taken hold. My answer relates back to some of my formative expe-

riences growing up in the Army spanning the past 5 decades. I believe we will know change has occurred when prevention of sexual assault is as closely scrutinized as the prevention of a fratricide or friendly fire. We will know change has occurred when sexist behavior and derogatory language produce the same viscerally offensive reaction as hearing a racist slur. We are not there yet, but we are heading in the right direction and we need to remain persistent in moving this forward.

The Department's multidisciplinary strategy is organized along five lines of effort: prevention, investigation, accountability, victim advocacy, and assessment. All five are described in detail in my written statement submitted for the record.

In the interest of time, I will conclude my oral statement at this time with a few personal observations.

I firmly believe we can turn this around, but it will take time. It will also take continued emphasis on all five lines of effort and at all levels. Culture change starts at the top, and I have seen in my 9 months in this job unprecedented senior and mid-level leader attention and energy right now focused on SAPR programs across all the Services. The key now is transferring this energy and focus from top to bottom across the force through quality training and strong leadership.

I began my remarks by stating that sexual assault is a national problem. I will conclude by stating that it is my view that DOD can and must be a leader in solving this problem for America.

Thank you for your attention. I look forward to your questions.

[The prepared statement of Major General Patton follows:]

PREPARED STATEMENT BY MG GARY S. PATTON, USA

Chairman Gillibrand, Ranking Member Graham, and members of the subcommittee, thank you for the opportunity to provide a statement on the Department of Defense's (DOD) approach to combating sexual assault and our progress in eliminating this crime in the Armed Forces. This statement will provide an update on our strategy, critical policy changes, Service-wide implementation of recent directives and military-wide efforts to improve the response and care for the victims and survivors of sexual assault.

BACKGROUND

Sexual assault is a crime and has no place in the U.S. military. It is a violation of everything that we stand for and it is an affront to the values we defend. Our DOD-wide mission is to prevent and respond to this crime in order to enable military readiness and to reduce—with a goal to eliminate—sexual assault from the military. Secretary of Defense Chuck Hagel is committed to this mission and to eradicating this crime from our Armed Forces.

Sexual assault is a complex problem—in our society, on our college campuses, as well as in the military environment. There is no single, "silver bullet" solution. Reducing and eliminating sexual assault requires a multi-pronged approach—one that leverages a wide range of initiatives and engages every servicemember to prevent the crime from occurring in the first place. But when one does occur, we must have effective processes and expert people in place to support victims and ensure the delivery of justice.

Sexual assault is a crime. Under military law, it encompasses a range of offenses from rape to abusive sexual contact. The Uniform Code of Military Justice (UCMJ) addresses these crimes by Article 120 (Rape, Sexual Assault, Aggravated Sexual Contact, and Abusive Sexual Contact), Article 125 (Forcible Sodomy), and Article 80 (attempts to commit these crimes).

As you heard in the prior panel, sexual assault can destroy and disrupt peoples' lives in very personal and very public ways when it is disclosed. Because of this, both military and civilian victims are not often willing to make a report of the crime to an authority. Since victims are reluctant to officially report, how do we determine

how often sexual assault occurs? To answer that question, we must use scientifically constructed, anonymous surveys. The Department has been surveying regularly on this topic since 2004. The most recent survey for which we have data was the Workplace and Gender Relations Survey of the Active Duty (WGRA) in 2010. In that survey, 4.4 percent of active duty women and nearly 1 percent of active duty men indicated they experienced some form of unwanted sexual contact in the year prior to being surveyed. "Unwanted sexual contact" is the survey term for the crimes that constitute sexual assault under the UCMJ that I just enumerated. But we wanted to know more than just a percentage rate. We wanted to know how many people 4.4 percent of active duty women and 1 percent of active duty men represent in the Department. Consequently, we used those percentage rates for women and men and our official population statistics, we call "end strength," to develop an estimated number of victims. Using the 2010 survey rates, we estimated that just over 19,000 men and women servicemembers may have experienced some form of unwanted sexual contact in 2010.

You may now want to know how many of those estimated 19,000 servicemembers reported the crime to a DOD authority in 2010. The answer is just over 2,600 servicemembers. Or, put another way, we were able to account for about 14 percent of our estimated number of servicemember victims in the sexual assault reports made to the Department in 2010. This phenomenon—where reports to law enforcement fall far short of the number of incidents estimated to actually occur—is known as "underreporting." Many experts in sexual assault believe that sexual assault is one of the most underreported crimes in U.S. society due to the stigma, fear, and shame many victims experience.

Combating a crime that stays mostly hidden from view despite the terrible toll it takes on the victims requires a coordinated, Department-wide approach. Our strategy is to apply simultaneous effort in five areas that we call lines of effort: Prevention, Investigation, Accountability, Advocacy, and Assessment. The underpinning in all these efforts is the focus on leaders at all levels and their responsibility to foster a command climate from top to bottom where sexist behaviors, sexual harassment, and sexual assault are not tolerated, condoned, or ignored: a climate where dignity and respect are core values we all live by and define how we treat one another; where a victim's report is taken seriously and privacy is protected; where bystanders are trained and motivated to intervene and prevent unsafe behaviors; and, finally, a climate where offenders know they will be found and held appropriately accountable for their actions.

My office, SAPRO, partners with a broad spectrum of Department entities, exercising authorities given to me by Congress and the Secretary of Defense. As Director of SAPRO, I oversee implementation of the comprehensive approach for the DOD Sexual Assault Prevention and Response program. My office serves as the single point of authority, accountability, and oversight for the sexual assault prevention and response (SAPR) program; and provides oversight to ensure that the military departments properly carry out SAPR program policy. To facilitate execution of these lines of efforts, we collaborate with a variety of stakeholders inside and outside the Department, to include: Department of Defense and senior Service leadership, the military legal community, the DOD Inspector General and investigative organizations, victim advocacy organizations, and other executive branch agencies such as the Department of Justice and the Department of Veterans Affairs. The latter is particularly important as we strive to ensure there is a continuous chain of support for servicemembers transitioning to civilian life. Given the complexity and nature of this problem, both in the military and civilian society, we know there is no single solution to eliminate this crime.

The significant underreporting of sexual assault limits the military's ability to hold offenders appropriately accountable and prevents victims from receiving the care they need. Therefore, the Department has put policies in place to bring more victims forward to report these crimes. However, victims won't come forward unless we can demonstrate we will treat them with the dignity and respect everyone deserves. Gaining victims' trust is paramount. We cannot eliminate this crime without their committed involvement. We gain their trust by creating a climate where a victim's report is taken seriously, their privacy is protected, and they are provided the resources and attention to manage their care and treatment.

In 2005, the Department established two reporting options—restricted and unrestricted—recognizing the best way to encourage victims to make a report and get the recovery services they need is by encouraging them to report in a way that is most comfortable for them. Restricted reports allow sexual assault victims to confidentially disclose the assault to specified individuals [i.e., sexual assault response coordinator (SARC), sexual assault prevention and response (SAPR) victim advocate (VA), or healthcare personnel], and receive medical treatment, counseling, and as-

signment of a SARC and SAPR VA, without triggering an official investigation. Maintaining privacy is a prime concern for many victims. The restricted reporting option allows victims this level of confidentiality. Since the option was first offered in 2005, over 5,000 men and women have made and maintained a Restricted Report. We strongly believe that these victims that would never have come forward but for the option of restricted reporting. Each year, about a quarter of sexual assault reports made to the Department are restricted.

An Unrestricted Report allows sexual assault victims to access the same care and support services, but the sexual assault is reported to command and law enforcement. By Department policy, only a military criminal investigative organization may investigate a sexual assault. Since we introduced the two reporting options in 2005, the number of reports made to the Department has increased by 88 percent. That is, we had 88 percent more sexual assault reports in fiscal year 2011 than we did in 2004. While some may be concerned about a rising number of reports, the under-reported nature of this crime makes bringing more victims forward a key objective if we are going to assist victims in restoring their lives and hold offenders appropriately accountable. Civilian research shows that more victims participate in care when they make a report of the crime. As a result, we see a rising number of reports as beneficial. With more reports, more victims are offered the care and counseling they need. Receiving more reports also means that the Department has a greater opportunity to hold offenders appropriately accountable.

Despite our progress in bringing more victims forward, we have much more work to do. We need the committed involvement of every servicemember. Our troops take care of each other on the battlefield better than any other military in the world—and this same ethos of care must extend to caring for victims and combating sexual assault within our ranks.

RECENT INITIATIVES

Over the past 15 months, the Department has initiated and implemented a variety of initiatives to fundamentally change the way the Department confronts sexual assault.

In December 2011, the Department issued guidance that mandated an increased document retention time for sexual assault reports, which includes investigative documentation, the sexual assault forensic exam report, and the victim's Reporting Preference Statement. Under this guidance, combined with the requirements of the recently enacted National Defense Authorization Act (NDAA) for Fiscal Year 2013 reports of sexual assault will be kept for 50 years. This is particularly useful for veterans as this documentation could be used to support a benefit claim from the Department of Veterans Affairs. The Department also issued new policy that provides victims of sexual assault the option to request a transfer from their current assignment or to a different location within their assigned installation. This expedited transfer policy requires that victims receive a response from their commander within 72 hours of the request. If denied, the victim may appeal to the first general or flag officer in their chain, who also has 72 hours to provide a response. From policy implementation in December 2011 through December 2012, the Services have approved 334 of 336 requests for expedited transfer.

Also in December 2011, the President signed an executive order adding Military Rule of Evidence 514 into military law. This new provision creates a privilege for communications between victims and their victim advocates in sexual assault cases. Providing this additional layer of confidentiality enhances victim trust by ensuring that communications between a victim and his or her victim advocate are protected.

In January 2012, the Secretary of Defense announced the implementation of the Department of Defense Sexual Assault Advocate Certification Program (D–SAACP). The Department contracted with a civilian victim advocacy organization to establish the DOD certification program in alignment with national standards. This program is now underway; to date, nearly 4,000 uniformed and civilian sexual assault response coordinators and victim advocates have met certification standards. The goal is for all DOD sexual assault response coordinators and victim advocates to be certified by October 2013. In January 2012, the Department also expanded sexual assault victim support to cover military spouses and adult military dependents, and ensured DOD civilians stationed abroad and DOD U.S. citizen contractors in combat areas receive emergency care after sexual assault.

In April 2012, the Secretary of Defense transmitted the Leadership, Education, Accountability and Discipline Act to Congress to further codify into law specific reforms to advance sexual assault prevention and response. These six provisions were included in the recently signed NDAA for Fiscal Year 2013. The new law includes the following provisions, all of which are now under policy development:

- Establish a Special Victims Capability within each of the Services, to ensure specially trained investigators, prosecutors, and victim-witness assistance personnel are available to assist with sexual assault cases and that each Service has specially trained experts in evidence collection, interviewing, and interacting with sexual assault victims.
- Require all servicemembers to receive an explanation of all SAPR policies within 14 days of entrance into active service as a way to educate our newest members on the resources available if victimized and to immediately underscore that the military culture does not tolerate sexual assault.
- Require records of outcome of disciplinary and administrative proceedings related to sexual assault be centrally located and retained for a period of not less than 20 years, in order to allow us to better track our progress in combating sexual assault and help us identify potential patterns of misconduct and systemic issues.
- Require commanders to conduct an Organizational Climate assessment within 120 days of assuming command and an annual assessment thereafter, enabling leaders to measure whether they are meeting the Department's goal regarding bystander intervention, command climate, and reducing barriers to reporting.
- Allow Reserve and National Guard personnel who have alleged to have been sexually assaulted while on active duty to request to remain on active duty or return to active duty until a determination is made as to whether the alleged assault occurred in the line of duty; and
- Mandate wider dissemination of SAPR resources, including victim resources such as the SafeHelpline.

In June 2012, the Secretary of Defense elevated the initial disposition decision for the most serious sexual assault offenses—rape, sexual assault, forcible sodomy, and attempts to commit these offenses—so that, at a minimum, these cases are addressed by a "Special Court-Martial Convening Authority" who is in the grade of O–6 grade (an officer at the Colonel or Navy Captain level) or above. This ensures that, in consultation with Judge Advocates General, disposition decisions for cases of sexual assault are made by experienced commanders. Elevating the initial disposition authority also ensures these cases remain within the chain of command, so our leaders retain responsibility and accountability for the problem of sexual assault.

Also in June 2012, our Safe Helpline was expanded to help transitioning servicemembers who have experienced sexual assault. The DOD Safe Helpline is an anonymous and confidential crisis support service for adult members of the DOD community. It is available 24/7, worldwide by "click, call, or text." The expanded service offered for transitioning servicemembers helps smooth the transition from DOD to the Department of Veterans Affairs. As of February 28, 2013, www.SafeHelpline.org has received 114,290 unique visits (each computer is counted once and the unique visits number does not represent sexual assault victims), and the 8,142 visitors have been helped (completed a live session).

In September 2012, the Secretary of Defense received the findings from the precommand training assessment he ordered in January 2012. My office, along with training, curriculum, advocacy, and military education subject matter experts, assessed precommand and senior enlisted leader training conducted by the Marine Corps, Navy, and Air Force and reviewed Army's newly developed Sexual Harassment/Assault Response and Prevention Program training support package for senior enlisted leaders. Upon reviewing our report, the Secretary directed the Military Services to take the following steps to improve training quality and consistency across the Services:

- Develop and implement standardized core competencies, learning objectives, and methods for objectively assessing the effectiveness of SAPR programs.
- Provide a dedicated block of SAPR instruction that incorporates best practices including interactive instruction with vignettes, exercises, and classroom discussion.
- Provide a quick-reference SAPR "Commander's Guide" that personnel can then use in subsequent leadership roles.
- Assess commanders' and senior enlisted leaders' understanding of the key SAPR concepts and skills and develop and implement refresher training to sustain skills and knowledge.

These core competencies and learning objectives for precommand curriculum were developed collaboratively with all the Services and were published to the field in February 2013.

In September 2012, in response to criminal acts and misconduct at Joint Base San Antonio-Lackland, the Secretary of Defense ordered a sweeping review and assessment of all initial military training of enlisted personnel and commissioned officers. As a result, the Services reviewed a variety of important elements of their training enterprises:

- Selection, training, and oversight of instructors and leaders who directly supervise initial military training. This review is specifically considering the potential benefits of increasing the number of female training instructors;
- Manning, including the ratio of instructors to students and the ratio of leaders in the chain of command to instructors;
- Internal controls in place to identify and prevent behavior inconsistent with established standards by instructors and leaders throughout all phases of initial military training;
- Student accessibility to SAPR services;
- Timing, content, and delivery of SAPR-related training; and
- Timing, content, and effectiveness of student feedback mechanisms.

The Services submitted their findings and recommendations in February 2013 and they are currently being reviewed in detail.

In October 2012, the Defense Sexual Assault Incident Database (DSAID) achieved its full deployment to the field, enhancing our ability to collect data on sexual assault reports uniformly across the Department. DSAID has three primary functions: standardization of reporting, managing victim care, and providing business management for sexual assault response coordinators. It is a common database that all Services are using, allowing the Department and each Service to track every report from beginning to end. Additionally, the system interfaces with the Services' investigative systems, integrating criminal and case management data. Reporting preference forms will be maintained in DSAID for 50 years, which will assist victims seeking disability compensation for military sexual trauma through the Department of Veterans Affairs.

SAPR STRATEGY: FIVE LINES OF EFFORT

In May 2012, as an integral part of the Department's efforts to combat sexual assault, the Joint Chiefs of Staff published the "Strategic Direction to the Joint Force on Sexual Assault Prevention and Response." This strategic direction emphasizes senior leaders' involvement and ownership in addressing sexual assault among the ranks. It is an unprecedented "32–Star" guidance written to synchronize Departmental efforts as we combat sexual assault along the previously described five lines of effort. With this joint guidance as our foundation, the Department is in the process of revising our DOD-wide SAPR strategy along these five lines of effort:

- Prevention. Our prevention goal is to standardize and deliver effective prevention methods and programs. It is critical that our entire military community work together to preclude criminal behavior from occurring. We have evaluated and are standardizing every sexual assault prevention and response training course our Services offer to our commanders, senior enlisted noncommissioned officers, our newest enlisted troops and to the Sexual Assault Response Coordinators and Victim Advocates. We are standardizing this training with best practices—the best practices within our current training and from the civilian sexual assault training—and making them common practices. We are establishing policy to reduce the impact of high-risk behaviors. We are reaching out to a variety of sexual assault prevention practitioners and researchers to ascertain which prevention policies and programs might work. Each Service has launched enhanced training programs; this new interactive training prominently features senior leaders, thus underscoring the importance of creating the right culture and bystander intervention. Our desired end state is an environment where the cultural imperatives of mutual respect and trust, professional values, and team commitment are reinforced to create an environment where sexual assault is not tolerated.
- Investigation. We continue to expand our efforts to achieve high competence in every investigation of sexual assault, which begins with an unrestricted report. Our investigative resources need to yield timely and accurate results. By DOD Policy, investigations are conducted entirely independent from the military chain of command. When an unrestricted report is filed, the case is referred for investigation to a professionally-trained Military Criminal Investigative Organization that is independent of the chain of command. Each military Department has its own MCIO—the

Army's Criminal Investigative Division, the Navy Criminal Investigative Service, and the Air Force Office of Special Investigations. The MCIOs are overseen by their Services' Secretaries and policy oversight is provided by the DOD Inspector General (IG). In fiscal year 2012, the DOD IG conducted oversight reviews of closed adult sexual assault cases and adequacy of training. The Department funded over 400 seats at the U.S. Army Special Victim Investigators Course through fiscal year 2017 and funded the U.S. Army Criminal Investigative Laboratory through fiscal year 2017 for 5 additional DNA examiners to keep sexual assault case evidence processing time under 60 days. We revised the Sexual Assault Forensic Exam Kit to align DOD evidence collection with national standards. Finally, we implemented a DOD-wide directive to keep investigative documentation for 50 years in unrestricted reports.

• Accountability. Holding offenders appropriately accountable in the military justice system is the objective in the accountability line of effort. Commanders are a critical part of this justice system. They are responsible for the readiness of their unit, as well as the health and welfare of their assigned servicemembers. To this end, commanders establish standards of behavior, enforce these standards, and hold people accountable for meeting them. Inherent in this responsibility is the authority to address misconduct and offenses and impose discipline in accordance with the military justice system. Preventing and responding to sexual assault should be no different from another crime or offense; offenders must be held appropriately accountable. It is a common misstatement that commanders conduct investigations of sexual assault cases. By DOD policy, sexual assault complaints are investigated by military criminal investigative organizations that are independent of the chain of command. The results of these investigations are provided to commanders, who then are responsible for taking appropriate actions. Removing disciplinary authorities from a commander's purview would jeopardize the good order and discipline of the unit, and impact unit readiness.

The military justice system provides tools to commanders to appropriately punish offenders depending on the facts and circumstances of each case, to include the severity of the misconduct. In developing a Special Victims Capability, which will enable the Services' ability to deliver enhanced investigation and prosecution of sexual offenses, child abuse, and serious domestic violence, we are establishing training programs so that investigators, prosecutors, judge advocates, victim witness assistance personnel, and paralegals, are specially trained in the latest technologies, policies, and emerging trends. The Special Victims Capability program will enable sexual assault practitioners to better investigate and prosecute, as appropriate, these complex and challenging cases.

• Advocacy. Victim care has been central to our approach since our office was established. Our goal is to standardize and deliver effective victim support, response, and reporting options, so that we instill confidence, restore resilience, and inspire victims to report—from the initiation of a report through case disposition in the justice system to victim recovery. When our victims report a sexual assault, they are provided a safe environment and receive medical care, counseling, legal assistance, and victim witness assistance. Because sexual assault is such an underreported crime, it is imperative that our program inspire victim confidence and motivate victim reporting—a necessary bridge to greater victim care and increased offender accountability. To this end, we implemented policy that provides for an expedited transfer for victims and a Certification Program for SARCs and Victim Advocates. We expanded emergency care and support services to DOD civilians stationed abroad and DOD U.S. citizen contractors in combat areas. We expanded the DOD Safe Helpline to help transitioning servicemembers who have experienced sexual assault. To ensure policymaking is informed by the voices of victims, we conducted a recent Survivor Summit where victims shared their experiences and insights with policy leaders.

• Assessment. We aim to effectively standardize, measure, analyze, and assess sexual assault prevention and response program progress in our final line of effort. Assessment is an enduring process of data collection and analytics designed to improve program effectiveness and is embedded within each of the other four lines of effort. This effort includes valuable feedback from servicemembers in the form of surveys and also includes feedback from commanders, victims, and victim advocates. Our goal is to incorporate

responsive, meaningful, and accurate systems of measurement and evaluation into every aspect of our programs in order to determine the impact we are having on reducing and eliminating sexual assault. We have initiated more frequent Department-wide surveys—now every 2 years, instead of 4—and we have placed sexual assault prevention and response questions on the climate surveys that are available to commanders. Administered in the tens of thousands each month, these climate assessments provide invaluable feedback to commanders on the climate in the unit, servicemember propensity to report, and the barriers to reporting that exist within individual units.

In conclusion, I do not submit this statement or speak before the U.S. Senate Committee on Armed Services in an effort to minimize the problem of sexual assault in the military. In the Department of Defense, we fully recognize we have a problem and we will continue to confront the brutal realities until this problem is solved. I am here to report that the Department is firmly committed to this goal and that we remain persistent in confronting this crime through prevention, investigation, accountability, advocacy, and assessment so that we can reduce, with a goal of eliminating, sexual assault from the military.

Senator GILLIBRAND. Thank you all.

We have a number of statements for the record, including statements from Nancy Parrish, President of Protect our Defenders; Lisa Maatz of the American Association of University Women; Mr. Ben Klay; and from the victim of the Aviano Air Base sexual assault case. If there is no objection, these and other statements we receive will be included in the record of this hearing.

[The prepared statements follow:]

[Please see Annexes A through F at the end of the hearing]

Senator GILLIBRAND. I would now like to turn the proceedings over to our chairman, Chairman Levin.

Senator LEVIN. Madam Chairman, first thank you for your leadership in holding this hearing, and to all of those who have joined in this effort, it is a major effort. It is a huge initiative. It is vitally important.

I very much appreciate your recognizing me for a few moments, and I want to thank our colleagues as well who have been here waiting to ask questions, and this will just take a few moments.

First of all, Mr. Taylor, I want to thank you. I wrote you a letter asking you for the legislative history of Article 60, and as of, I believe, just today, you responded to my letter with your own letter, and included in that letter is a fairly lengthy legislative history, which I would ask you, Madam Chairman, to incorporate in the record.

Senator GILLIBRAND. Without objection.

[The information referred to follows:]

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GENERAL COUNSEL

MAR 13 2013

The Honorable Carl Levin
Chairman
Committee on Armed Services
United States Senate
Washington, DC 20510

Dear Mr. Chairman,

Thank you for your letter dated March 8, 2013. In that letter, you ask that I inform the Committee of the legislative history of Article 60 of the Uniform Code of Military Justice, 10 U.S.C. 860, and that I provide you with the Department's view whether the authority provided by that section continues to be appropriate.

Attached is a paper that discusses the legislative history of Article 60, prepared by the Air Force JAG Corps. The provision in its current form was enacted as part of the Military Justice Act of 1983, nearly 30 years ago, however its roots are much deeper in history. The enormous discretion provided to the convening authority to accept or reject the findings of a court martial, and to change the sentence imposed by a court martial, including to eliminate the sentence in its entirety, dates back to the Articles of War adopted by the Continental Congress in 1775.

The Secretary of Defense has directed that the Secretary of the Air Force conduct an urgent review of the action taken by the convening authority to overturn the findings and sentence in a sexual assault case to ensure that the UCMJ was followed. I have been directed by the Secretary to make an initial assessment in consultation with the Secretaries of the Military Departments of whether changes should be considered to Article 60, or in the Services' implementation of Article 60, and if so, what changes should be considered. In addition, the Secretary has directed me to ensure that the role of the convening authority in sexual assault cases is considered by the Independent Panel required by section 576(a)(1) of the National Defense Authorization Act for Fiscal Year 2013.

I look forward to productive engagement with the Committee and its Staff as the Congress and the Department continue to address the critical work of eliminating sexual assault in our armed forces.

Sincerely,

Robert S. Taylor
Acting General Counsel

Attachment:
As stated

BACKGROUND PAPER

ON

THE LEGISLATIVE HISTORY OF ARTICLE 60(c), UCMJ

1. **Introduction**. Congress, through Article 60(c) of the Uniform Code of Military Justice [hereinafter UCMJ], empowered a convening authority, as a matter of command prerogative, to take action on the findings and sentence in every court-martial. 10 U.S.C. § 860(c) (2006). The convening authority's prerogative existed prior to the 1950 enactment of the UCMJ and legislative history of this prerogative is set forth below. This paper begins with the 1983 amendment of Article 60(c), UCMJ, and ends 238 years ago, with the Articles of War adopted by the Continental Congress in 1775.

2. **Current Article 60(c) – *1983-Present***. The convening authority's power to take action on a sentence is established by Article 60(c)(2), which provides, "The convening authority or other person taking such action, in his sole discretion, may approve, disapprove, commute, or suspend the sentence in whole or in part." Article 60(c)(2), 10 U.S.C. § 860(c)(2). The convening authority's power to take action on a finding is established by Article 60(c)(3), which provides,

> Action on the findings of a court-martial by the convening authority … is not required. However, such person, in his sole discretion, may –
> (A) Dismiss any charge or specification by setting aside a finding of guilty thereto; or
> (B) Change a finding of guilty to a charge or specification to a finding of guilty to an offense that is a lesser included offense of the offense stated in the charge or specification.

Article 60(c)(1) includes an explanation of this authority: "The authority under this section to modify the findings and sentence of a court-martial is a matter of command prerogative involving the sole discretion of the convening authority." *Id.*, Art. 60(c)(1), 10 U.S.C. § 860(c)(1).

3. **Legislative History of 1983 Amendment**. Article 60(c)'s current language was adopted as

part of the Congress's streamlining of the military's post-trial processing system in the Military Justice Act of 1983, Pub. L. No. 98-209, 97 Stat. 1395. That reform reduced the administrative prerequisites to the convening authority's action, while "recognizing that the convening authority's primary post-trial role should involve the exercise of command prerogative with respect to the case." S. REP. No. 98-53 7 (1983), *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/SR-98-53.pdf . The legislation did away with the requirement for the convening authority to review a court-martial record for legal error. But it retained the convening authority's power to set aside a finding or sentence (or portion of a sentence). The Senate Armed Services Committee explained: "Such action is a matter of commander's prerogative that is taken in the interests of justice, discipline, mission requirements, clemency, or other appropriate reasons, and is not a review for legal sufficiency." *Id.* at 19. The House Armed Services Committee observed: "The committee amendment would retain the requirement that the convening authority act on the case, but emphasizes that this role primarily involves a determination as to whether the sentence should be reduced as a matter of command prerogative (e.g., as a matter of clemency) rather than a formal appellate review." H.R. REP. No. 98-549 at 15 (1983), *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/HR-98-549.pdf. The Department of Defense supported the legislation, noting that "[t]he bill emphasizes that the convening authority's post-trial role primarily involves clemency matters rather than a formal appellate review." Enclosure to Letter from Secretary of Defense Caspar Weinberger to House Armed Services Committee Melvin Price (Sept. 15, 1983), *reprinted at* H.R. REP. No. 98-549 at 17, 18.

4. **Article 64 – *1950-1983***. Before the 1983 amendments, Article 60 required forwarding the record to the convening authority for action while Article 64 provided:

In acting on the findings and sentence of a court-martial, the convening authority may

> approve only such findings of guilty, and the sentence or such part or amount of the sentence, as he finds correct in law and fact and as he in his discretion determines should be approved. Unless he indicates otherwise, approval of the sentence is approval of the findings and sentence.

Article 64, UCMJ, *reprinted in* MANUAL FOR COURTS-MARTIAL, UNITED STATES (1969 rev. ed.) at A2-22.[1]

5. **Legislative History of pre-1983 Article 64.** Both the House and Senate Armed Services Committees' reports on the UCMJ noted that the convening authority "may disapprove a finding or a sentence for any reason." H. REP. No. 81-491 at 31 (1949), *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/report_01.pdf; S. REP. No. 81-486 at 27 (1949), *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/report_02.pdf.

As originally drafted, Article 64 did not include the phrase "as he in his discretion" determines should be approved. *See Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the House Armed Services Comm.*, 81st Cong., 1st Sess. 581 (1949), *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/hearings_01.pdf. During the House Armed Services Committee's hearings on the UCMJ, Felix Larkin, an Assistant General Counsel in the Office of the Secretary of Defense and a key figure in the UCMJ's drafting, explained that Article 64's use of the phrase "and determines should be approved" was designed to "give" the convening authority "a free hand in doing anything he wants for any reason in cutting down the sentence or in disapproving." *Id.* at 1183-84. Mr. Larkin and Representative Overton Brooks, the House Armed Services Subcommittee's Chairman who presided over the hearings on the UCMJ, discussed the nature of the convening authority's power to set aside any portion of the

[1] This language reflects certain stylistic, non-substantive amendments to the original version of Article 64 as a result of the 1956 codification of Title 10 of the United States Code. *See* An act to revise, codify, and enact into law, title 10 of the United States Code, entitled "Armed Forces", and title 32 of the United States Code, entitled "National Guard," Pub. L. No. 84-1028, 70A Stat. 1 (1956).

findings or sentence for any reason or no reason:

> Mr. BROOKS. He doesn't have to read the record or anything [else]. He can just say disapproved and it is through.
>
> Mr. LARKIN. That is right. In the normal course of the review of the case he looks to its legality and the establishment of the facts and the appropriateness of the sentence and he shouldn't approve anything that is wrong or illegal, but he can disapprove it if it is illegal, if it is wrong, and for any other reason.
>
> Mr. BROOKS. Or for no reason at all?
>
> Mr. LARKIN. Or for no reason at all.
>
> Mr. RIVERS. That is right.
>
> Mr. LARKIN. The classic case that I think General Eisenhower stated in his testimony before your subcommittee last year was that even though you might have a case where a man is convicted and it is a legal conviction and it is sustainable, that man may have such a unique value and may be of such importance in a certain circumstance in a war area that the commanding officer may say, "Well he did it all right and they proved it all right, but I need him and I want him and I am just going to bust this case because I want to send him on this special mission."
>
> He has the right to do that. It is that free rein--all of which operates to the advantage of the accused--

Id. at 1184.

Mr. Robert W. Smart, a House Armed Services Committee counsel, subsequently reiterated that point:

> Now this particular article here brings up a phase of command control that operates to the benefit of the accused.
>
> I well remember General Collins' testimony before the committee 2 years ago when he talked about his authority, as of that time, to empty the whole guardhouse if he wanted to. He had a bunch of people out there who had been convicted. They were getting ready to go to combat and he wanted to give them a chance to work themselves out from under a serious conviction.
>
> He suspended their sentences and let them all go back to combat. If they made good he remitted the entire sentence. Now this permits the convening authority to do the very same thing. That is the intent. As to the appropriateness of the language used, I am not in position to say one way or the other. But that is the intent of it and it works for the benefit of the accused.

Id. at 1185

The subcommittee subsequently added the words "as he in his discretion" determines should be approved to make clear the convening authority's unfettered power to disapprove a finding, sentence, or portion of a finding or sentence. *Id.* at 1266.

6. **Legislative History of the Elston Act of 1948 – predecessor to the UCMJ.** In 1946, as the House Armed Services Committee was considering what would become the Elston Act, Act of June 24, 1948, ch. 625, tit. II, § 203, 62 Stat. 604, 628, General Eisenhower wrote to the committee opposing proposals to move the power to mitigate or remit certain types of sentences from commanders to the Judge Advocate General. Letter from General Dwight D. Eisenhower to Acting Chairman Dewey Short (June 30, 1947), *reprinted in Hearings Before Committee on Armed Services of the House of Representatives on Sundry Legislation Affecting the Naval and Military Establishments 1947*, 80th Cong., 1st Sess. at 4157-58 (1947), *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/hearings_No177_No185.pdf. General Eisenhower, who was then serving as Army Chief of Staff, wrote:

> A commander of troops carries grave responsibility which is enormously enlarged in time of war. This responsibility can be fully discharged only by the exercise of commensurate authority without which the commander will be seriously impaired. I am completely confident that every experienced combat commander will agree with me that any other system would produce ruinous results.
>
> I am convinced that this conclusion is valid under either peacetime or wartime conditions. It is manifest, however, that it is both undesirable and impracticable to provide one system of procedure for use in peacetime and a different one for use in war.

Id.

General Eisenhower subsequently appeared before the House Armed Services Committee. *Id.* at 4423. In what is almost certainly the basis for Mr. Larkin's reference to General Eisenhower's position during the House hearings on the UCMJ, General Eisenhower testified:

> [W]hen you people here send a field commander to the field and place upon him the responsibilities of taking care of more than 3,000,000 Americans and using them in winning a victory, you are putting upon his shoulders a terrific responsibility. He is not concerned with this particular small group so much as he is with the morale, the feeling, and the sense of justice that his 3,000,000 men get. That is what he is concerned with.
>
> Now, in the court-martial system, there is of course an exemplary punishment

> idea which has its effect upon these 3,000,000 men. I should like to relate one little story to indicate very briefly where this court-martial system affects the Army a whole. We had battled our way up to the frontiers of Germany. It was cold, disagreeable weather. Our great shortages were primarily in gasoline and secondly in cigarettes. A great black market and thievery ring started in Paris. That became known throughout that command. Every time I visited the front and walked along the front, all I heard was, "General, what are you doing about that business? The people stealing our gasoline so we can go no place, and stealing our cigarettes." I kept out of the thing because it was not my primary responsibility to try these men, but I saw that they were getting very severe sentences.
>
> We took great care to publish those so that the boys in the front line knew about it. But that [is] what was done because the commander had some authority. As quickly as those sentences were all given, after the files were concluded, I went into that group of men, with my judge advocate, and with General Lear, who had been brought over to be the deputy theater commander, and I offered every one of them this: Complete opportunity to exonerate himself if he would volunteer for the front line. I made that offer to every single one of them, including men who had been given 75 years on this thing. I want to point out that 14 of those men who had 15 years or less refused to volunteer for the front line. I am trying to show you that there is a very delicate thing, but a very, very powerful thing always involved in this business and that is the morale of the whole fighting force. The commander in the field is not primarily concerned with the exact handling of details. Admitting that that is important, I want to tell you that my most onerous problem in the war was the administrative burden of giving consideration to court-martial sentences. Every case that involved the death of an enlisted man or the dismissal of an officer had to come to me, and every single week I gave an entire day to the detailed consideration of such cases. If any commander in the future can be relieved of that, he would very much like to be relieved of it.
>
> It is a terrific burden. But all the way along the line, no matter how high you go, finally there must be someone that is in the chain of responsibility, or the men in the field are not going to take it and like it. If they are out there doing their best, from the commander on down to the last private, and it is to be said, "No matter what kind of sentence is given to this man, some staff officer with no responsibility for winning the war, who is not even subject to the supervision of the Secretary of War for the handling of this thing," will pass on it, there is going to be resentment--and very deep resentment. I assure you there will be.

Id. at 4423-24.

Lieutenant General J. Lawton Collins, who commanded the Twenty-fifth Infantry Division at Guadalcanal as well as the Seventh Army Corps on D-Day, had previously testified. *Id.* at 2153, *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/hearings_No125.pdf. In what is almost certainly the testimony to which Mr. Smart referred during the House hearings on the UCMJ,

General Collins told the committee:

> We remained on Guadalcanal, after the fighting was over, for several months unloading ships before we went into the New Georgia campaign. We were very fortunate. We had very few trials. But we did have some men who had been sentenced either by general courts or by special courts to serve a period under confinement. I was particularly anxious to see that there would be no shirking in the division in order to avoid combat, in other words, to see that nobody, just before we were ready to go into action or at any stage, would commit some offense merely to avoid action. I was also anxious to give the enlisted men who might be under duress a chance to make good again in action. So it was a standing rule in my division that whenever we went back into action all of the men in the guardhouse reverted to duty with their units and the company commanders and the regimental commanders were informed to watch those men in action and then, depending upon what they did—I suspended their sentences as soon as they were returned to duty—in action we would wipe out the remainder of their sentence completely or else very materially cut it if they did well in action. In almost every instance that was the way it worked out. Once again, I say, as commander on my own authority I was able to do that. I think that sort of thing is the thing that the commander must be permitted to do. He must have that power, just as he must have the power of the initial submission of charges, and the review of the proceedings.
>
> I thoroughly believe in the business of review and of close coordination between the commander and his judge advocate, and every good commander that I have ever known in the Army had that very close contact. That is the main point that I would like to stress. It has been my experience, and I am sure it has been the experience of other commanders, that the commander must have authority commensurate with his responsibility. When you consider the other things that a commander does, he has control over life and death, then it certainly seems to me that you should not divorce from him the authority of his chain of command, which extends to the ultimate business of courts martial. *Our responsibility for ordering men into action under terribly adverse conditions carries a far more powerful authority than the authority we now have under the court-martial system. If you can trust us with one, then I think in all logic you must trust us with the other.*

Id. at 2154-55.

7. **<u>1920 Articles of War – Predecessor to the Elston Act</u>.** Ultimately, the Elston Act moved a provision concerning action on the record of trial from Article 46 of the 1920 Articles of War into Article 47, which already including a provision regarding powers incident to the power to approve a court-martial's results. The language, as amended, provided:

> c. Action on Record of Trial.—Before acting upon a record of trial by general court-martial or military commission, or a record of trial by special court-martial in which a bad-conduct discharge has been adjudged and approved by the authority

appointing the court, the reviewing authority will refer it to his staff judge advocate or to The Judge Advocate General for review and advice; and no sentence shall be approved unless upon conviction established beyond reasonable doubt of an offense made punishable by these articles, and unless the record of trial has been found legally sufficient to support it.

. . . .

f. Powers Incident to Power to Approve.—The power to approve the sentence of a court-martial shall include—

(1) the power to approve or disapprove a finding of guilty and to approve only so much of a finding of guilty of a particular offense as involves a finding of guilty of a lesser included offense;

(2) the power to approve or disapprove the whole or any part of the sentence; and

(3) the power to remand a case for rehearing under the provisions of article 52.

8. **Colonel Winthrop's 1920 Commentary on the Articles of War**. Colonel Winthrop addressed the commander's discretion when approving or disapproving the results of a court-martial:

> **Extent of his discretion.** Whether and how far the proceedings and sentence, or any part of the same, shall be approved, &c., is a subject wholly within the discretion of [the commander]. As to this, he is invested by [Article 104 of the 1874 Articles of War] with the sole authority, and cannot therefore be directed either by the President or other superior. While deferring to any known views of a superior as to any question of law or discipline involved in the particular case, it is yet his duty as it is his right, in the exercise of the power of approval or disapproval, to act according to his own best judgment, and in the light of the facts and the law as understood and held by himself.

WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 451 (2d ed. 1920), *available at* http://www.loc.gov/rr/frd/Military_Law/ML_precedents.html. Colonel Winthrop also indicated that while Article 104 specifically addressed only approval or disapproval of the sentence, in practice "the Reviewing Officer approves also, or disapproves the 'finding' or 'proceedings,' both in connection with or distinct from the sentence, if any." *Id.* at 453. He also discussed the bases for disapproving a court-martial's result:

> **Grounds of disapproval.** The grounds upon which the authority to disapprove a sentence or punishment may properly be exercised are mainly of two classes; some going to the legal validity or to the regularity of the proceedings, and others to the

> justice or expediency of allowing the judgment to stand or the sentence or punishment to be enforced. Thus where the court was not legally constituted or composed, or was without jurisdiction of the offence or offender, or proceeded with the trial when below the minimum of members; or where the record discloses irregularities which, though not amounting to fatal defects, are of a gross character: or where the accused has been denied material testimony, or otherwise prejudiced in his defense; or the findings or a part of them are unwarranted by the testimony; or the sentence itself is inadequate to the offence, or too severe, or quite unmerited, or imposes a punishment not authorized by law,--in any such case the Reviewing Officer may, in his discretion, withhold his approval from, and formally *disapprove*, the sentence, in whole or in part, as the law or facts may require or render proper. His discretion indeed is here without restriction; its exercise does not depend upon the quality of his reasons: whether or not *any* reasons are stated by him, or whether his actual reasons are in point of fact good and sufficient, or the reverse, the disapproval is equally effective in law. At the same time he will, of course, not properly disapprove without good reason--without better reason than the court had for the action which he fails to approve. Where, for example, the evidence in the case was conflicting, and it is apparent that the court, having the witnesses before it, must have been the best judge of their relative credibility and of the weight of the testimony, it will in general be wiser for the Reviewing Officer to defer to, rather than disapprove, its conclusion. Nor will he properly disapprove a sentence on account of a mere error on the part of the court which does not affect the merits or impair the final judgment--as, for instance, an improper rejection of testimony offered by the defence, which however would have added to the case no material facts. Nor will he ordinarily disapprove where he can have the defect remedied by a revision by the court . . . .

Id. at 452 (footnotes omitted).

9. **<u>1775 Articles of War.</u>** The Continental Congress passed the first Articles of War in 1775. Articles 37-39 required a commanding officer "confirm" the sentences of a court-martial. For example, Article 37 states:

> The commissioned officers of every regiment may, by the appointment of their Colonel or commanding officer, hold regimental courts-martial for the enquiring into such disputes or criminal mutters as may come before them, and for the inflicting corporal punishment, for small offences, and shall give judgment by the majority of voices; but *no sentence shall be executed till the commanding officer (not being a member of the court-martial) shall have confirmed the same.*

Journals of the Continental Congress, Articles of War, June 30, 1775 *available at:* http://www.pubpedia.com/Public/Doc.aspx?docid=XHCQF12655 (emphasis added).

General Washington was familiar with these rules and used them with great effect. He would use his authority to confirm sentences to further good order and discipline by pardoning

soldiers condemned to death, "at the last possible moment, [Washington] said, 'to strike terror into their fellow soldiers.' It worked." Chadwick, Bruce. *The First American Army: The Untold Story of George Washington and the Men Behind America's First Fight for Freedom.* Sourcebooks, Inc., Naperville, IL (2007), pp 246-48.

10. Conclusion. The command prerogative of the convening authority to take action on the findings and sentence is rooted within the UCMJ and its immediate predecessor, the Elston Act, and dates back 238 years to the Articles of War. The legislative history demonstrates Congress has long believed that a commander must have authority commensurate with his responsibility to maintain good order and discipline, and that "we need a system of military justice which supports the commanders' efforts to instill respect, obedience and, indeed, superior performance in their subordinates." S. REP. No. 98-53 2 (1983). To achieve this end, Congress "intended to grant to the convening authority an exceedingly broad power to disapprove a finding or a sentence." *United States v. Prince*, 36 C.M.R. 470, 472 (C.M.A. 1966).

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United States Senate
COMMITTEE ON ARMED SERVICES
WASHINGTON, DC 20510–6050

March 8, 2013

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Mr. Robert S. Taylor
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Dear Mr. Taylor,

Recent cases in which Court-Martial convening authorities have overturned convictions involving sexual assaults have raised questions about Article 60 of the Uniform Code of Military Justice (UCMJ), which empowers convening authorities in their "sole discretion" to set aside finding of guilty by a court-martial. This provision in the UCMJ apparently allows a convening authority to overturn a "beyond a reasonable doubt" finding of guilty by the military equivalent of a jury or by a military judge in his sole discretion.

I request that you inform this Committee of the legislative history of this broad grant of authority and the Department's view on whether this authority continues to be appropriate.

Sincerely,

Carl Levin

Carl Levin
Chairman

Senator LEVIN. Then I just have a couple questions for Mr. Taylor.

The legislative history that you provided indicates that the authority of a convening authority under Article 60 of the UCMJ dates back to the Articles of War adopted by the Continental Congress in 1775.

Now, at the time that that authority was established, did a servicemember convicted by a military court-martial have the ability to appeal his conviction to a higher military court?

Mr. TAYLOR. No, sir.

Senator LEVIN. Now, given that a servicemember can now appeal their conviction to the Air Force Courts of Criminal Appeals, in the case we are talking about, and into the U.S. Court of Appeals for the Armed Forces, is there any reason now to allow convening authorities to overturn a court-martial conviction on the basis of legal errors at trial?

Mr. TAYLOR. There have been many developments since 1775 to get us where we are today.

The robust appellate procedures provided by today's UCMJ do raise a very serious question about whether the authority provided by Article 60, which was most recently dealt with by Congress in 1983—whether the unlimited authority of the commander to dispose of a finding of a court-martial is any longer required or continues to serve a vital purpose. We are going to look into that very thoroughly with very much of an open mind. But the change in the robustness of appellate procedures over time, designed to protect the accused makes this a very different question certainly than existed in 1775.

Senator LEVIN. Thank you very much, Mr. Taylor.

I want to thank all of our witnesses, and again, thank you, Madam Chairman, for your leadership here and for the others who have joined with you. Again, I thank my colleagues and you for allowing me just a few minutes upfront.

Senator GILLIBRAND. Thank you, Mr. Chairman.

I am now going to allow Senator Graham to ask his questions because he has a time constraint. Senator Graham?

Senator GRAHAM. Thank you, Madam Chairman. Just indulge me a bit here and I will try to be as quick as possible, but I do have a Budget Committee markup.

I want to thank you for holding the hearing. I think it has been very informative to all of us.

Convening authority statistics regarding setting aside findings. From the Marine perspective, you gave us data from 2010 to 2012. There were 1,768 special and general courts-martial resulting in findings of guilty. In 7 cases out of those 1,768, the convening authority took action to disprove findings of guilty. None involved sexual assault. That is .4 percent. Does that sound right, General?

General ARY. Yes, it does.

Senator GRAHAM. Okay. The Air Force. In the last 5 years, the convening authority disapproved findings of guilt in 1.1 percent of cases, 40 out of 3,713. Five of the 40 were sexual assault cases. Does that sound right, General?

General HARDING. Yes, sir. That is correct.

Senator GRAHAM. The Navy does not have a tracking system for Article 60 disposition, but you will get one, will you not? [Laughter.]

Okay, good.

But you have been able to go around to your regional commands and collect evidence from those who have been involved in reviewing cases, and what we have from the Navy is we found one known case where the convening authority took action to disapprove the findings. That one case was a sexual assault case.

In the Army, since 2008, there have been 4,603 cases that went to court-martial with some conviction. In 68 cases, the convening authority either dismissed all specifications or disapproved the findings of guilt, 1.4 percent. No Army convening authority has disapproved the findings and sentence of a soldier who committed a sexual assault. Does that sound right for the Army?

General CHIPMAN. It does, Senator.

Senator GRAHAM. The reason I bring that up is I want to make sure that people understand one case has to be put in terms of the

whole system. The convening authority, General Harding, for a general court-martial (GCM) is at what rank usually?

General HARDING. For the Air Force, that would be an O–9, lieutenant general is the usual rank of a GCM convening authority. A special court-martial (SCM) convening authority would be normally an O–6.

Senator GRAHAM. What about the Army?

General CHIPMAN. Sir, our GCM convening authority, typically an O–8 or an O–9; special court, O–6.

Senator GRAHAM. Navy?

Admiral DERENZI. Typically, sir, for a GCM it is a one- or a two-star, an O–7 or an O–8, and for a SCM, typically an O–6.

Senator GRAHAM. Marine Corps?

General ARY. One-, two-, and three-star generals, sir, typically.

Senator GRAHAM. Army?

General PATTON. Sir, I think General Chipman gave you the Army.

I am representing the SAPR Office.

Senator GRAHAM. Okay, I am sorry. I apologize. I should have paid better attention.

Coast Guard? You are always last. That is not fair.

Senator GILLIBRAND. I called on him first.

Senator GRAHAM. I know. Good for you, changing tradition here.

Admiral KENNEY. Well, thank you, Senator. To answer the question, in the Coast Guard, general court-martial convening authority are one-, two-, or three-star admirals. Special court-martial convening authorities can range from O–3 lieutenant to O–6 captain.

Senator GRAHAM. If there is a case generated at a local unit—let us say, a squadron or a flight—the person reviewing that case, General Harding, is quite a distance away from the instant in terms of command. Is that correct?

General HARDING. That is correct, Senator.

Senator GRAHAM. This concern that this is a buddy-buddy system, I just want the public to understand that the convening authority, particularly for general courts-martial that would involve a case of rape or some serious sexual assault, is a distance away from the unit in question, just from the way the system works.

Now, the history of Article 60—and people in the civilian community may wonder why does a convening authority have the ability to set aside a punishment. You do have a robust appeals system. So if there is a legal error in a case, the accused has the right to appeal all the way to the Supreme Court if necessary to correct legal errors. But we still have the convening authority in the decisionmaking role about setting aside findings.

When you go back to the history of this concept, you do start with the Continental Army.

But General Eisenhower testified to the House Armed Services Committee before the Olston Act, which is the predecessor to the UCMJ of 1950, that in his opinion, it is necessary that the person in the chain of command have the power to take final action on courts-martial. He opposed a proposal to move the power to mitigate or remit certain types of sentences from the commanders to the JAG.

You had another general, Collins, who offered similar testimony. He was the commander at Guadalcanal. He believed that the commander must have power to initiate and review charges in order to effectuate good order and discipline.

So there are legal error problems that can be corrected by the appellate system, but when it comes to good order and discipline of a command, we have generally held the view that the one person that has the power to determine good order and discipline and to make sure it is present is the military commander.

Could each of you give me an opinion as to whether or not that concept is still viable and relevant in 2013?

General HARDING. Senator, if I could, I will start.

I think it is incredibly viable. It is part of the reason why we succeed in the Nation's armed conflicts. Over the course of 238 years, we have largely been successful in armed conflict. It is because we bring more things to every fight. We bring the best people. We are an All-Volunteer Force. We give them the best training. That is the second element. Third is we bring the very best equipment. Congress helps us in that regard. Those are three legs of a four-legged table. The table wobbles and falls without the fourth, and that is discipline. Command and control is an important element in discipline. It ties all those things together. The convening authority's ability to exercise some accountability on every aspect of an airman's, soldier's, sailor's, marine's behavior is incredibly important, creating a responsive disciplined force.

It was incredibly important in 1775, and the reason why we stayed in the field for 8 years and bested the best army on the planet at the time. It is still important today.

Senator GRAHAM. Could you indulge me?

Senator GILLIBRAND. Sure.

Senator GRAHAM. From the Army's point of view, do you concur?

General CHIPMAN. Senator, I would add this. In the cases where we have set aside findings or the entire case by the convening authority, it has typically been where we have a greater result to achieve by doing so. So, for example, a very light sentence on what was charged initially as a very severe set of crimes—the light sentence was such that it was equivalent to non-judicial punishment. Therefore, we set aside those findings in return, for example, a post-trial resignation in lieu of court-martial to get the greater good of getting the offender out of our service.

Senator GRAHAM. I want people to understand the convening authority cannot increase the sentence.

General CHIPMAN. That is correct, sir, but he can, in fact, take an action in a post-trial——

Senator GRAHAM. In lieu of it.

General CHIPMAN. In lieu of. That is correct.

Senator GRAHAM. In the Navy's point of view, does this command authority resonate in 2013?

Admiral DERENZI. Yes, sir, I believe it does. Commanders are responsible for life and death decisions, the safety, welfare, well-being, and good order and discipline of those under their charge. My experience has been that these convening authorities and these commanders take these decisions to heart. They strive day-in and

day-out to do the right thing. They are people of integrity. They are advised by well-qualified and well-trained legal counsel.

Having said that, the military justice process has matured greatly since the last time Article 60 was reviewed, and there are lawyers at every stage of that process now, trial counsel, defense counsel, staff judge advocates, and it is a good time to look at Article 60 again in light of those changes but ever mindful of the second- and third-order effects of adjusting or restricting somehow the convening authority's authority.

Senator GRAHAM. Is it the Navy's position that the convening authority should not have this power and it should be placed into someone else's hands?

Admiral DERENZI. No, sir, that is not our position at all.

Senator GRAHAM. What about the Marine Corps?

General ARY. Sir, thank you for the opportunity to talk on this issue.

I think for so long as we hold our commanders accountable for everything that a command does or fails to do, then they must have these types of authorities. They are responsible for setting command climate. They are responsible for the culture, and it is their leadership that we have to hold accountable. They need to be able to hold everyone in their unit accountable to preserve that good order and discipline to accomplish their missions.

Senator GRAHAM. The Coast Guard?

Admiral KENNEY. Thank you, Senator.

As the Coast Guard is the smallest of the Armed Forces, our units tend to be smaller as well, and that commander is the embodiment of leadership and discipline within those small units, and to maintain that discipline, I concur with my colleagues.

I would add that we have also reviewed our past court-martial practice to determine if a commander has ever overturned, in the last 4 years, a charge or specification involving sexual assault, and of the over 200 courts-martial convened in the Coast Guard, there have been three instances where a specification, a part of a finding, was overturned, but that was always on the advice of a judge advocate who had found plain legal error.

Senator GRAHAM. Now, what I will do, I will just wrap up here very quickly. I think that the hearing today shows the need for Congress to be involved. I think these programs that you are coming up with have a great possibility to pay dividends. But it is a cultural problem and it has to be changed. All I would urge my colleagues to do is if there has been a longstanding tradition in the military of allowing the commander this authority for the reasons just cited better than I could ever articulate.

General Harding, I would like in private for you to offer to brief the members of the committee about the Aviano case. You briefed me. It is quite an interesting case, and I would just ask every member of the committee to spend some time, if you could, being briefed about the facts of that particular case.

But as to the climate in the military, the fact that victims feel they cannot come forward, clearly this has to be addressed. I want to thank you, Madam Chairman, for bringing this up to the Nation's attention, to the committee's attention, and I look forward to finding a way to continue the progress that seems to be made.

Senator GILLIBRAND. Thank you, Senator Graham.

I am extremely disturbed, based on the last round of question and answer, that each of you believes that the convening authority is what maintains discipline and order within your ranks. If that is your view, I do not know how you can say that having 19,000 sexual assaults and rapes a year is discipline and order. I do not understand how you can say that of those 19,000 cases, to only have approximately 2,400 even reported because the victims tell us that they are afraid to report because of retaliation and the blame they will get and the scorn they will get from their colleagues is order and discipline. I really cannot understand how 2,400 cases, only 240 of which go to trial, can result in you believing that that authority is giving you discipline and order. It is the exact opposite of discipline and order.

I am very grateful for all of the changes that have been made. Each of you gave opening testimony that was very strong and thoughtful about the kinds of changes you are making, and I appreciate it that I heard from each of you that there is zero tolerance. I appreciate that I hear from each of you about the training that you are giving your lawyers and the training that you are giving your prosecutors and training that you are giving your advocates. That is all well and good.

But if the convening authority is the only decisionmaker of whether a case goes to trial or proceeds and the only decisionmaker about whether to overturn a case, well, then all that training and all those excellent lawyers and prosecutors you have do not mean a difference. It does not make a difference because the person with the authority is not the one who has that years of training in terms of legal ability and prosecutorial discretion and the understanding of the nature of a rape, that it is a violent crime. It is not "ask her when she is sober." That is not what this issue is about.

I appreciate the work you are doing. I honestly do. But it is not enough, and if you think you are achieving discipline and order with your current convening authority framework, I am sorry to say you are wrong. Every victim that has come in front of this committee and every story we have heard over the weeks and months shows that we have not even begun to address this problem.

Lieutenant General Harding, let us talk about the Aviano case. Do you think justice was done in that case?

General HARDING. I think that the convening authority reviewed the facts and made an independent determination. That was his obligation as given to him by this body. Granted, it was 65 years ago, but he fulfilled a statutory obligation, and he did so with integrity.

Senator GILLIBRAND. Do you think the five senior officers that were the jury in that trial did not do justice?

General HARDING. I cannot say that they did not, ma'am. I think both the jury and the convening authority did their duty.

Senator GILLIBRAND. Well, as they reached the opposite decision, in one instance justice was not done. Which instance do you believe justice was not done?

General HARDING. I cannot say. I am not going to conclude that justice was or was not done. What I will conclude is that all parties

did their job. From my review, all parties did what they were asked to do by the law.

Senator GILLIBRAND. Well, one of the parties was wrong. If you are the victim in that case, to have gone through 8 months of testimony, of providing evidence, I can assure you she does not believe justice was done.

I would like to move towards some questions concerning how we can evaluate a stronger system. Mr. Taylor, what do you think of the Aviano case?

Mr. TAYLOR. I am very concerned about the message received as a result of that case.

To back up just a little bit, each of the people at this table gave a response to Senator Graham's question except for me. I believe that we have to look very carefully about whether there is a continuing value to the authority provided to the convening authority to throw out the findings, to reject findings of a military trial, of a court-martial. As Senator Levin indicated, there is a very robust system of appellate rights that are available to protect the accused, and I think we have to very carefully reconsider whether there needs to be changes to Article 60, whether there needs to be further guidance on how Article 60 is to be employed.

But the Secretary has charged me to take a thorough and open and searching look into the continued need for Article 60 as it exists today, and I intend to do so. It will be informed certainly by the experience of these very fine lawyers and leaders and by others to make sure that we do not do damage to good order and discipline. But there is something that seems odd about the power to reject findings that came out of a jury in the absence of some major obvious problem.

I am concerned by the message that is received. I think we have to redouble our efforts to make sure that victims are willing to come forward and are willing to trust the military justice system. I think we need to redouble our efforts to ensure that victims feel supported and respected and honored for the service that they are doing by coming forward and saying no.

Senator GILLIBRAND. Thank you.

I have many other questions that I will submit for the record for each of you.

Our next Senator is Senator Blumenthal.

Senator BLUMENTHAL. First of all, let me thank Senator Gillibrand not only for the focus on this issue in convening this hearing, but also for the passion and commitment that she brings to this issue, which I share.

Let me begin by saying that you have all given very thoughtful and informed answers and, if I may say, very lawyer-like answers, which is to say cautious and careful. This issue really demands immediate action and not just tinkering around the edges.

In my first visit to Afghanistan—I have been there three times—my mission was to find out what could be done to protect our military men and women against the IEDs that continue to cause more than half of all our casualties. We have since dealt with that problem more effectively through a combination of body armor, better equipment to detect them, a range of actions.

When I first visited Camp Leatherneck, I was shown what the Marine Corps was doing in the absence of the body armor and all the other measures that took time to do. They had rigged up a 10-foot long pole with what looked like the end of a coat hanger, which they used very effectively to detect roadside bombs because they could not wait.

This problem is the equivalent of an IED in every unit in the Armed Forces. It is the equivalent of an immensely destructive force which the Aviano case has brought to the public's attention in a very dramatic way, much like the photograph of a roadside bomb going off in Iraq or Afghanistan would be. But I think it is equally potentially destructive to the good order and discipline and most especially to recruitment, to retention of the best and the brightest and the bravest that you now have. I could not agree more, Lieutenant General Harding, that all of those elements are necessary, but people ultimately are our greatest asset in the military. As I said this morning—I do not know how many of you were here—I truly believe we have the best and the brightest and the bravest now and the next greatest generation in the military, and we need to continue to attract and retain them, which is why this issue is so important and why the lack of effective action will be the equivalent of an IED for our Armed Forces.

My view is we need to do more than tinkering around the edges of the system and we need to do reform right away.

Chairman Levin asked a very thoughtful question about the convening authority's power to overturn a conviction. Even if we were to remove that power, in my view it would not really deal with some of the systematic shortcomings of this system, which are not your doing. In part, they are our doing because one of those shortcomings is the lack of sufficient resources. I know as a prosecutor to gain a conviction, you need evidence. For sufficient evidence that is conviction beyond a reasonable doubt, which is by no means an easy standard, you need really expert investigative elements. We have an obligation to provide you with those resources, as well as to assist you in dealing with this issue by helping to reform that system.

I want to begin by asking you, Mr. Taylor. You have the panel. You have various ideas. You have said you are considering them. What is your timetable?

Mr. TAYLOR. The Secretary has directed me to provide a preliminary assessment of the need for change in Article 60 and the nature of any such changes by March 27.

The panel is necessarily on a much longer timeframe. It is a panel that is mandated by the 2013 NDAA. Four members of the panel are to be appointed by the chairman and ranking of the Senate Armed Services Committee and the House Armed Services Committee. It will be subject to Federal Advisory Committee Act I believe. It is on a much more extended timeframe.

We will do an internal effort, and then there will be this external, independent panel effort. Then, of course, the timeframe ultimately is up to you.

Senator BLUMENTHAL. Is your assessment something that you can share with us at the end of this month? I assume it is March 27 of this year.

Mr. TAYLOR. Yes, it is. That, of course, would be up to the Secretary.

Senator BLUMENTHAL. Well, I would like to make a request on my behalf—others may join—in asking that it be made available on March 28 or as soon thereafter as possible. I know I do not have authority to issue subpoenas the way I did when I was a prosecutor, but I hope that the Secretary of Defense will share the sense of urgency that we have in moving forward as quickly as possible.

You have been asked about the rates convictions are overturned. Do you have numbers on the rates of conviction where courts-martial are convened on sexual assault cases?

Mr. TAYLOR. I believe that each of the Service TJAGs provided that during the answer, and I did not write it down. But it is very low specifically in cases involving sexual assault.

Senator BLUMENTHAL. Can you give me an explanation—unfortunately, my time has expired, but I have one last question for you and I will have others that I want to submit for the record—as to why the rates of conviction are so low?

Mr. TAYLOR. The rates of conviction—sexual assault can be a difficult charge to prove beyond a reasonable doubt. I think that many of the efforts that you heard about in improving the professionalism and the resources available for sexual assault cases, the creation of special victims prosecutors and that capability, the increased support to victims may result in an improvement in the conviction rate, but it can be hard to prove.

Senator BLUMENTHAL. My time has expired, and I will submit these questions. But I would respectfully suggest that that issue be part of your preliminary assessment submitted to the Secretary of Defense and then to us.

I thank you all for your extraordinary service to our Nation. None of this is personal to you or to the military, as I hope you understand. I firmly believe that you will solve this problem because you have been so effective at solving similar issues, whether they are cultural or strictly logistical or otherwise military, in our history. Thank you for your service.

Senator GILLIBRAND. Senator Hirono.

Senator HIRONO. Thank you, Madam Chairman.

Thank you to all the witnesses.

We heard from witnesses this morning, and I am sure you may have been in the audience listening to the testimony from them where they described going through a very difficult process even reporting their sexual assaults. You have testified this afternoon about the various programs, training, education, your efforts to change the culture in the military.

My question is, do you know whether all of this focus to change the culture, to provide the kind of support, education, whether that is working? Do you ask the victims, the survivors whether these programs are working for them?

General PATTON. Ma'am, I will take that first, if that is okay with my colleagues.

I direct the SAPR Office, and I do talk to survivors on a regular basis. We also have other informal mechanisms of hearing from them and other people on the issue, such as an anonymous Safe

Helpline which we have had tens of thousands of calls into over the 2 years that it has been in effect.

One of the things that we have been hearing fairly recently in those sorts of informal feedback is that they are encouraged by the reforms, the initiatives, and the programs that are being put in place. But it is something that we need to remain persistent on.

We have also got very positive feedback on the training that has been essentially revamped in the past year. The PowerPoint slides and things we heard about this morning are done. They are over. There is no training that solely consists of PowerPoint slides. They are interactive. They involve, in some cases, victim testimony, scenario-driven discussions, videos that are presented, ethical decision scenarios that are presented. I mean, I have been a part of training at multiple different levels on different bases, and this is revamped training that we are getting good feedback on and it is having some effect in terms of pushing this interest, awareness, and education not only at the top level, but pushing it down through the ranks to the very bottom, to the influence leaders that we really truly need to affect if we are going to make this an enduring culture change.

Senator HIRONO. I would say that that is probably a very long process.

In the meantime, we also heard a suggestion today that we should take out the decision to prosecute, to investigate from the chain of command and go to an impartial kind of an adjudicatory system and decisionmaking. I would like to ask you if you can briefly comment on—do you foresee major problems with going that route? Because countries such as Great Britain and Canada have gone that route.

General PATTON. I will answer it first and if I can pass it down the row. I am the only non-lawyer sitting at the table, but I have commanded infantry units for 7½ years. So I am speaking from a command perspective on this answer.

My point of view would be that we want commanders involved in the process. We want commanders paying attention to victims. We want commanders caring for them, taking their report seriously. We want commanders paying attention to crimes and other acts of indiscipline and harassment and derogatory language and all these things along the continuum of harm. We want commanders paying attention to that. We want commanders setting standards for what is acceptable and unacceptable in a unit where dignity and respect are the only standard in how we treat one another. We want commanders doing that.

As a commander, I am responsible for the health and welfare of my men and women in my unit. I take that as my ultimate responsibility and take it very seriously. I have led men and women in combat with that same responsibility.

We expect and hold commanders accountable for establishing standards in their unit and then holding people accountable that do not meet those standards, whether they be standards of performance or standards of behavior. As a commander, I want to know who that offender and perpetrator is of this crime because that person is degrading the readiness of my unit, and it is also

committing a crime against another human being in my unit. So I feel we need commanders very involved in this.

Senator HIRONO. I think they should be involved, but on the other hand, should they be basically judge and jury? I think that is the question that we are confronted with.

General CHIPMAN. Senator, if I could add at this point. I visited my counterparts that run those systems in the UK, in Canada, and in Australia. I visited every one of the JAGs from those respective Armed Forces. That model that they have is not a model to which we should aspire. Moreover, they are not comparable in any way, shape, or form to the size, the length, the frequency of our deployments of U.S. military forces. When we have 300,000 soldiers in two theaters of operations in Afghanistan and Iraq, we need a system that punishes swiftly, visibly, and locally and not independent of the chain of command, not an independent adjudicative authority, but under the direction, control, and focus of that responsible commander in the theater.

Senator HIRONO. Well, that is just it because we have a huge number of people who are serving and thousands and thousands of them are being assaulted according to information from the Pentagon. So this continues. I would say that we do need to acknowledge and face some facts. I do commend all of you for the work that you are doing to address what is a large issue. In fact, one of the testifiers mentioned that getting the convictions or pursuing sexual assault cases are very difficult because often it becomes 'she said, you said, or he said he said,' that kind of situation.

I have some experience in having to actually change a law in Hawaii when I was in the State legislature where the law allowed for the victims and the survivors to be revictimized, which is what we are hearing time and time again from our testifiers this morning. I think that this is a situation, another situation, where the actual underlying law and the authority probably needs to be addressed.

Mr. Taylor, I think I heard you say that this authority of the convening officer to be able to just undo a decision, a court-martial decision, that you think that in the situation where we do have a robust appellate process available to defendants in the military, that perhaps this kind of an ultimate authority to overturn a decision should not rest in one person's hands who may not even have any kind of legal training because that is what we are talking about. These are legal results. These are legal processes. In my view, anybody who is going to overturn a legal process should have a legal background, and that is not the case. I am glad that this does not happen frequently, which just says to me that perhaps we can eliminate this particular authority on the part of the convening authority.

Do you want to comment?

Mr. TAYLOR. Yes, ma'am. We will take a very hard look at that. We are absolutely committed to doing so and directed by the Secretary to do so, and we will. As I indicated, I have a deadline imposed on me by the Secretary of March 27th to give a preliminary assessment.

Senator HIRONO. Thank you.

Madam Chairman, my time has expired. Thank you.

General HARDING. Sorry. If I could add, we also have a deadline set by the Secretary of Defense to the Secretary of the Air Force of the 20th. We have 1 week to let him know what our thoughts are on the very same subject.

Senator HIRONO. Thank you.

Senator GILLIBRAND. Senator Ayotte?

Senator AYOTTE. Thank you, Madam Chairman.

I want to thank the witnesses for being here today on this very important issue which we have to address. It is undermining, as you mentioned, our readiness, our military. It is totally unacceptable and it is not consistent with the greatest military on Earth.

I want to ask about a GAO report that was issued in January. Mr. Taylor, the GAO report found that military health care providers do not have a consistent understanding of their responsibilities in caring for sexual assault victims because the Department has not established guidance for the treatment of injuries stemming from sexual assault and that there are certainly specific steps of care if someone is a victim. Steps that have to be taken to protect their confidentiality, and also in some instances, steps that need to be taken to preserve evidence that may be needed if they choose to report. We, obviously, hope that they are able to do that, report their victimization and the crime that has been committed against them.

So where are we in light of this GAO report? Do you have any established guidance from DOD for the treatment of injuries that could be transmitted to medical providers so that they properly treat victims of sexual assault in the military?

Mr. TAYLOR. Senator, I believe that General Patton would be in a better position to answer this question.

Senator AYOTTE. General?

General PATTON. Yes, ma'am. We have a standing Department of Defense Instruction (DODI) and it is very close to being reissued with the revised instruction. I expect that to be out by the end of this month. The revised instruction addresses in detail some of the inconsistencies that were found in the GAO report. I personally have read the GAO report and then looked at both the two enclosures, number 7 and 8. I have brought them with me here, if you are interested in having those. But these are enclosures in the revised instruction, the policy, that will be promulgated and which will address some of the very specific points that you were mentioning, specifically how restricted reports, victims, and survivors who make restricted reports—how they are to be dealt with confidentiality and with regard to the other procedures that our medical practitioners must afford and the counseling that must be available and the examinations that must be given and those sorts of things.

Equally, I think one of the gaps determined by the GAO report was the gap between unrestricted care and the gap with the restricted reports. Those points are specifically addressed in the revision of policy which, again, has completed the OMB and interagency coordination. I expect they will be promulgated here within the next couple weeks.

But like any policy, a policy is only as good as the paper it is on. It has to be promulgated and it has to be enforced, and there has

to be training that is based on that policy. Then the medical community—I know our Assistant Secretary for Health Affairs has conferred with the Surgeon Generals in all the Services, and they are focused on addressing that point and ensuring that those changes to the policy are promulgated and put in action as soon as possible.

Senator AYOTTE. General, in formulating the policy, before being in the Senate, I was an Attorney General. For example, in my State there was specific guidance issued from the Attorney General's office after having brought together stakeholders, including physicians, victims, law enforcement, basically all stakeholders and formulating these guidelines to make sure that they were appropriate, that they were thorough, and that this was not just something from the top down, but it came from really getting the stakeholders who are involved in it to make sure that they are right.

How did the process that you undertook to put these together—what did that involve? Who did you consult? There are very good models for this even in the civilian sector, and I wondered if you consulted any of those.

General PATTON. Ma'am, it was a very collaborative process. All the Services were involved, their medical experts were involved in this particular portion of the policy. Our Health Affairs staff was involved. We do confer with the experts in the field. I know one of the women on my staff has been involved in victim advocacy and has been working side by side, really on the front lines of victim advocacy and care for victims for most of her adult life. Another woman involved in the formulation of policy was the SARC of the Year for the Air Force and has a lot of hands-on experience in dealing with victims and getting them through not only the difficult step of coming forward and going through the reporting step, but then also into the medical system as well. So I am pretty comfortable that it has been a broad and collaborative process.

Like I said, the inconsistencies that were identified in the GAO report—I have made a comparative look between the GAO report and then what we have in our revised DODI and I believe that it does cover all those areas.

Senator AYOTTE. So when will this be issued, and then also, what are the implementation plans? I mean, one of the biggest issues we heard this morning from the panel of victims was the culture issue. This is only one component of the culture issue, but how do you implement these guidelines to make sure that victims are also receiving the proper treatment and respect within the medical system?

General PATTON. The first step is the policy. Like I said, we expect to have this back from the Office of Management and Budget and promulgated by the end of this month. So that is the first step.

But then DOD policy has to be taken by the Services and then promulgated in some fashion. On this case, being a medical—just take the medical component out. I would expect that the Surgeon Generals would be issuing guidance and reinforcing guidance on those aspects of the policy then within their Service.

Education programs then have to be based on the changes in the policy so people can be educated and they know the new standards of performance in terms of medical practice and care for all type of survivors.

Then lastly, there is an assessment step, which is to say we should be out there and we need to be out there identifying how these policies are being applied by the medical practitioners. I know that Dr. Woodson, our Assistant Secretary of Defense for Health Affairs, has a plan that he has shared with me. I do not know the timeline, but he does have a plan that once this policy is promulgated and education in place and so forth, to go out and audit various medical communities to ensure that these standards are being applied and our victims are being cared for as they demand.

Of course, we also hear from the survivors, and they tell us things. I had a summit of survivors in my office several weeks ago, and one of the survivors shared with me a very difficult tale of how she was treated in an emergency room in a military hospital. Those types of inputs are very important to how we go about this.

Senator AYOTTE. Thank you, General. I would ask that you provide that policy to the committee, and I would also ask that you provide us with the action implementation plan so that we can follow up on this issue. Thank you for being here, I appreciate it.

[The information referred to follows:]

In response to your request for:

1. The policy:

Attached is the revised Department of Defense Instruction (DODI) 6495.02 "Sexual Assault Prevention and Response Program Procedures," dated 28 Mar 2013.

2. The action implementation plan:

Next is the Assistant Secretary of Defense (Health Affairs) memorandum tasking the Services to report annually to Health Affairs on the status of the availability of sexual assault medical forensic examiners and to review the new instruction (DODI 6495.02) and provide written implementation plans, including target dates for implementation of updated program elements.

THE ASSISTANT SECRETARY OF DEFENSE

1200 DEFENSE PENTAGON
WASHINGTON, DC 20301-1200

HEALTH AFFAIRS

APR 15 2013

MEMORANDUM FOR ASSISTANT SECRETARY OF THE ARMY (M&RA)
ASSISTANT SECRETARY OF THE NAVY (M&RA)
ASSISTANT SECRETARY OF THE AIR FORCE (M&RA)
COMMANDER, JOINT TASK FORCE NATIONAL CAPITAL REGION MEDICAL
DIRECTOR, TRICARE MANAGEMENT ACTIVITY

SUBJECT: Department of Defense (DoD) Guidance on the Medical Management of Sexual Assault Cases

References: (a) Department of Defense Instruction (DoDI) 6495.02, "Sexual Assault Prevention and Response (SAPR) Program Procedures," March 22, 2013
(b) DD Form 2911, "DoD Sexual Assault Forensic Examination Report," September 2011
(c) DD Form 2911, "Instructions (Victim)," September 2011
(d) DD Form 2911, "Instructions (Suspect)," September 2011

The DoD is committed to ensuring that our military health care providers and facilities provide the best possible medical care and counseling for victims of sexual assault. The revision to DoDI 6495.02, "Sexual Assault Prevention and Response (SAPR) Program Procedures," was signed on March 28, 2013, and it consolidates the guidance for health care providers into Enclosures 7, 8, and 10 of that Instruction.

Enclosure 7 (pp. 50-53) of the policy reinforces key elements of victim care including: (1) standardized medical care; (2) timely medical care; (3) comprehensive acute medical care; (4) comprehensive follow-up medical care; and (5) provisions for medical care in deployed environments. It reinforces the requirement to maintain confidentiality for a Restricted Report and the penalty of disciplinary action for unauthorized disclosures, as seen in Enclosure 7, a (11):

"a. Standardized Medical Care. To ensure standardized healthcare, the Surgeons General of the Military Departments shall:

...(11) Require that healthcare personnel maintain the confidentiality of a Restricted Report to include communications with the victim, the SAFE, and the contents of the SAFE Kit, unless an exception to Restricted reporting applies. Healthcare personnel who make an unauthorized disclosure of a confidential communication are subject to disciplinary action and that unauthorized disclosure has no impact on the status of the Restricted Report; all Restricted Reporting information remains confidential and protected. Improper disclosure of confidential communications under Restricted Reporting, improper release of medical information, and other

violations of this guidance are prohibited and may result in discipline pursuant to the UCMJ or State statute, loss of privileges, or other adverse personnel or administrative actions..." (p. 52).

Enclosure 8 (pp. 54-56) states the necessary elements of sexual assault forensic examination (SAFE) kit collection and preservation including: (1) the use of the DD Form 2911 "DoD Sexual Assault Forensic Examination Report", September 2011; (2) the standardized process of evidence collection, regardless of type of report (restricted or unrestricted); (3) necessary requirements for availability of SAFE capability; and, (4) the requirements for document retention.

Enclosure 10 states the requirements for training, including those for health care personnel (pp. 70-73). These requirements include: (1) training that conforms to "A National Protocol for Sexual Assault Medical Forensic Examinations, Adults/Adolescents", U.S. Department of Justice, current version; (2) the need for responder training; (3) handling of a restricted report; (4) immediate medical care of the sexual assault victim; (5) conduct of the safe exam; and, (6) follow-up health care of the sexual assault victim.

All of the Services recently updated Health Affairs on the availability of health care support for SAFEs provided either in the military treatment facilities (MTFs) or by agreements with purchased care facilities in the community. These reports, submitted by the Services, demonstrated that the necessary coverage to ensure that the appropriate health care for Military Health System (MHS) beneficiaries who are the victims of sexual assault is in place. Additionally, in each of your annual reports to the Sexual Assault and Response Office (SAPRO), , you have provided information on the number of health care providers trained in the treatment of victims of sexual assault and information on the number of SAFEs performed, including a breakdown by restricted and unrestricted reports. It is clear to me that you have been taking the necessary actions to ensure quality health care to victims of sexual assault.

I request that you report annually to me on the status of the availability of sexual assault medical forensic examiners and that you thoroughly review the new instruction and send me your written implementation plans, including target dates for implementation of updated program elements, within 30 days from the date of this memorandum. Please ensure your responses address all elements in Enclosures 7, 8, and 10, particularly those that I have described above regarding training and confidentiality.

My point of contact for this issue is Dr. Cara Krulewitch, who may be reached at (703) 681-8184, or Cara.Krulewitch@ha.osd.mil.

Jonathan Woodson, M.D.

cc:
Surgeon General of the Army
Surgeon General of the Navy
Surgeon General of the Air Force
Joint Staff Surgeon
Director, Health, Safety, and Work-Life, United States Coast Guard
Joint Surgeon, National Guard Bureau

General PATTON. Yes, ma'am.

Senator GILLIBRAND. Senator McCaskill?

Senator MCCASKILL. Thank you.

After meeting with many of you and many of your colleagues, I have gotten much more familiar with the UCMJ. In fact, on the advice of one of the Army JAGs, I actually downloaded it on my iPad and now have it as an app.

I keep coming back to the structure that is very strange the more I think about it. I have tried every kind of criminal case there is from a low-level shoplifting burglary to a capital murder death pen-

alty case. In the criminal justice system, we build a fence around the fact finders, and we make sure that the evidence they hear is relevant and judges are in charge of making sure that the evidence is relevant and that the rules are followed. Generally in our system, the only people that can overturn the fact finders are people who have also heard the witnesses unless there is a legal problem with how the trial was actually conducted.

Now, your system is much different. In your system, a defendant can refuse to take the stand, which is certainly their right, and therefore their character does not come into evidence because the only way someone's character comes into evidence is if they place it in evidence. So the fact finders do not get to hear what a great guy someone is. They are listening just to the facts of the case.

It is bizarre to me that when that is over, you begin a clemency process. I am going to read the quote from the victim in Aviano about the clemency process. "The clemency process was a travesty. The vast majority of the statements were personal attacks on the judge, the prosecutors, and me. A few were actual clemency letters stating their relationship with Wilkerson. Please think of his family, et cetera. Many of them, especially the ones from the pilot community and their wives, wrote caustic, vitriolic letters alleging that the judicial system is corrupt and that the trial was not legitimate. They claimed the prosecutors were bullies and unethical. The panel was biased because they weren't pilots. The judge made bad decisions. I am a slut, a liar, unprofessional."

This information goes to this general and he is to look at that contemporaneously with supplanting his judgment for the fact finders. There is no good reason for that. I cannot think of one, and I would love it if one of you would tell me why—in our system, after the appeal is finished, then there is an opportunity for clemency by an executive authority to commute a sentence, to pardon someone, but not prior to a decision on whether the case was, in fact, conducted legally. How can someone's judgment about the factual determination in a case be clear if they are being bombarded with evidence of character of the defendant who had not taken the stand for an opportunity of the fact finders for his character to be cross examined for bad acts? I would like some explanation from you as to how good order and discipline is enhanced by the ability of the mixing of those two very different deliberations.

General CHIPMAN. Senator, I would like to try first on that question.

I think we have two distinct aspects to this, the convening authority's authorities on findings and those authorities on the sentence, because I can see that clemency, of course, extends also to sentence revision. In some cases, for example, a convening authority might delay the imposition of forfeitures that were part of the sentence to provide continued support financially to the accused's family, dependent spouse and children. So that is one aspect where clemency would be appropriate from the outset.

In some cases, clemency might be appropriate to address a legal error that was identified either by the judge during the course of the trial, by the staff judge advocate on his or her review that we know will be taken care of by the appellate court, but why not go

ahead and clean that error up with the action by the convening authority?

Senator MCCASKILL. I understand the point you made, but I think that there will have to be a stronger argument than that for me not to come down on the side that clemency belongs at the end of a legal determination, not in the middle of it. I am not somebody who believes that somebody who has not heard the evidence presented should be making a determination on who was telling the truth. A transcript never tells the full story as to who was telling the truth. That is why we have trials. To supplant that judgment for the people who actually heard the testimony, particularly in these cases because these cases are "he said/she said." These cases are all about the believability of the witnesses. Juries are very good at sniffing out who is telling the truth.

I am not sure a general, far removed with no legal training looking at a stack of clemency matters contemporaneously with a dry transcript, is given the right information to make the kind of decision that is going to be for the good order and discipline of the whole.

So that is one issue.

Another issue I have is that if this power, this amazing power that is given this one individual, is about the good of the whole—and we talked about this, General, in my office with General Welsh—it appears to me that the Aviano general has really failed because if this decision is because you want them to have the ability of looking at the good of the whole, I do not think anybody is going to argue that this decision has been terrible for the whole. This decision has turned the military on its ear as it relates to the criminal justice system that is contained therein. He was not looking at the good of the whole. He was looking at this individual case.

The irony is the very power he has is because of the good of the whole, but yet he is narrowly looking at the facts in evidence in a stack of clemency matters, in this case, and making a decision that sets the Air Force back. We may be all the way back to Tailhook at this point in terms of all the work you have tried to do to move the Air Force forward.

Mr. Taylor, could you comment on that as to whether or not these cases are really being decided on an individual basis or whether or not this good of the whole is being considered because I think Senator Gillibrand's point is a really good one. If it is about the good of the whole, I do not know that we are doing a very good job since this problem is as pervasive as it is and is getting worse and not necessarily better.

Mr. TAYLOR. Senator, I think you have a very good point. It is entirely possible that there is a disconnect between the rationale for this authority, which is the good of the whole, and how it has come to be utilized. That is one of the things that I will need to consider in making my preliminary assessment, but it is a serious issue and it requires a very serious response and hard thinking. I commit to you that I will think hard about that. I think it is a very good point.

Senator MCCASKILL. My time is out. Let me first just make sure. Has everybody seen "The Invisible War" on the panel?

[No verbal response.]

Senator MCCASKILL. General Ary, I would certainly like from you later what, if any, action for the good order and discipline of the whole unit happened to any command at the military barracks here in Washington as a result of the incident. You do not have to tell me now. But I am dying to know what commander was relieved, what commander was dismissed. Clearly, the facts around that case have serious implications beyond the sexual assault that is alleged. I will never look at the Friday night evening parades the same way again after seeing that movie. On behalf of the Marines, I would think that there would be a deep desire to clean that up and show that it is a new day at the Washington barracks.

General ARY. Yes, ma'am. We will get you that response.

[The information referred to follows:]

"The Invisible War" is a feature length documentary about sexual assault in the U.S. Military. The documentary includes stories from military sexual trauma survivors, including two female Marine officers who were stationed at Marine Barracks Washington at two different times between 2006 and 2010. The documentary, however, fails to present the investigative and adjudicative actions that occurred in both of those cases, leaving the viewer with the impression that both reports of sexual assault went unanswered. That is not the case. Both reports were fully investigated by the Naval Criminal Investigative Service and appropriate action was taken on the alleged offenders based on the evidence adduced during those investigations, including a general court-martial for one of the alleged offenders.

The Marine Corps has made significant changes to the process of litigating sexual assault cases, and continues to make tremendous progress in providing services and care vital for victims of sexual assault. We have taken a holistic approach to combating sexual assault in the Marine Corps, by implementing a number of initiatives to improve our ability to respond to allegations across the entire spectrum of a case, from initial reporting through trial and post-trial matters.

In the area of sexual assault, the Marine Corps today is significantly different than it was just 1 year ago, and 1 year from now it will look significantly different simply based on our implementation of current initiatives and legislative requirements. We anticipate that these changes will have positive effects on the prevention of and response to sexual assault, to include more professional investigation, prosecution, and defense of sexual assault cases. Initial feedback, whether empirical or anecdotal, indicates that we have improved the legal processes related to the prosecution and defense of sexual assault cases, and we are expecting continued improvement.

Senator MCCASKILL. Finally, I have a long list of others about investigators and their specialized training.

Senator GILLIBRAND. We will have another round.

Senator MCCASKILL. Okay, great. I will wait then. Thank you very much.

Senator GILLIBRAND. Thank you, Senator MCCASKILL.

We are going to take a second round because there is interest by the Senators sitting here.

Mr. Taylor, we have talked a little bit about how other nations have addressed their previous practices of having a convening authority, Britain, Canada, Australia. Have you had an opportunity to study what they did in those jurisdictions and whether it had any beneficial effect on increasing the amount of reporting, increasing the amount of prosecutions? Did it have any effect on unit cohesion, unit morale, on discipline, on order? Did they see a loss in discipline and order by removing convening authority?

Mr. TAYLOR. I have done a little reading on the topic. But as I understand it, the rationale for the action taken in Canada and in Great Britain and some other countries has been focused really on

protecting the accused, and it is to provide a further layer of insulation for the benefit of the accused. Whether it has had any impact at all on sexual assault cases I do not know. I plan to be talking with counterparts and try to gather some of that information over time, not for the 27th.

Senator GILLIBRAND. I want to talk with each of you about this real challenge of under-reporting. Anecdotally listening to the testimony this morning, each of the victims said if I had an advocate early on to tell me what my rights were, to stand by them, to have some authority, if I knew that I could be transferred immediately or the perpetrator could be transferred immediately, that might give me the courage to withstand the 30, 60, 90 days it would take to have a case reviewed. They said if I knew my allegations would be taken seriously and I had a real chance that this perpetrator could be convicted and he would be held accountable, I might have been willing to report.

So I would like each of the Services to tell me their view of why do you think there is so little under-reporting. If it is literally 19,000 and more than half are sexual assaults against men and if only 2,400 are actually unrestricted reported, that is a terrible reporting rate. What do you think the reasons are? Are the things that are being implemented now—will they begin to address it? What do you think the most important reform in your mind is there to increase the number of reports that are made for the sexual assaults? Lieutenant General Harding, you can start there and we will go across.

General HARDING. Well, that is one of the reasons, ma'am, that we structured that SVC program.

The majority, at least the survey tells us, of our sexual assaults are not reported. We believe that if victims believe that there is somebody on their side, as they go through this complicated process that can be very exhausting, that we will see more of them come forward. That is our hope in part.

Also, when we looked at fiscal year 2011, the last batch of statistics we gave you, we noticed that in the unrestricted reporting side, that we had 29 percent of our victims who had said I want to cooperate with law enforcement, walk away, and refuse to cooperate before they got to the courthouse door. In the Air Force's case, 96 victims. So we believe that that helps us encourage and embolden them as well to get through that process and to feel less like they have been revictimized by that process when they have somebody there to explain why things are happening the way they are.

I believe there are multiple reasons. Our surveys have shown multiple reasons why people do not report. We know that one of them is the belief that this is a difficult process to get through. That is not the only reason.

I think I would turn it over to Major General Patton to let you know what the survey revealed and told us among the various reasons why people do not report.

Senator GILLIBRAND. Lieutenant General Chipman?

General CHIPMAN. Senator, I think to follow on what General Harding said, these are the most difficult kinds of allegations to share with anyone. These are the intimate details of our personal lives, our bodily integrity. I think there is a natural reluctance

there. I think there is a great desire for privacy on the part of these victims to avoid general knowledge among unit members, the community of the kinds of things that have been inflicted upon them.

Finally, I think what is different about military service is this idea that you take on this member of a team, cohesion, esprit, good order, discipline. I think that was shown very well in the documentary that you asked us if we had seen. One of the biggest crimes was, first, the assault, but second the attitude of the military when it was reported, the lack of support that those victims received, and that sort of violation of the fundamental belief that they were part of the team that would take care of them that would not allow this to happen. So I think that still plays out in the underreporting.

Senator GILLIBRAND. Vice Admiral?

Admiral DERENZI. Yes, ma'am. I agree with General Chipman and with General Harding as well.

I think it comes down to victims knowing that they will be responded to, supported, cared for through the process. We are in the process of hiring professional, full-time victim advocates, which is different than having a lawyer serve as a victim advocate. We are striving to form a core relationship between prosecutors, investigators, and the victim advocate to work with the victims who come forward in a constructive, cohesive way. We are watching with interest the Air Force pilot on what a SVC role could be within the system where we do not have one very well defined, but they would not supplant a victim advocate.

We have all instituted expedited transfer. Last year, the Navy approved 79 of them—none were disapproved—within 72 hours. If a command declines, the request goes to the next flag in the chain. There were no declinations.

I think the training that we have devised, informed in large part by the experiences shared so powerfully in "The Invisible War," are helping at the deck plate fleet level to understand the resources that are available, what actually happens when an allegation is made. Commanders do not investigate these allegations. That is given immediately to NCIS. Commanders support the victims. They need to be mindful of the due process rights of the accused. They need to initiate an investigation.

The training has gone to great lengths to dispel myths about this crime, to ensure that people understand that it is a crime that involves men, as well as women, to ensure that we protect the most vulnerable among us, that we have the proper training for investigators, for lawyers, for first responders. We have hotlines that can be reached through text, through phone, through email.

Restricted reporting is something that I know is difficult for people to completely understand. I think the truth is we are trying to give people options to come forward. Ideally we want people to come forward to us and make an unrestricted report so that we can pursue accountability aggressively. But not everyone will—as we heard this morning, it is so difficult to come forward, the courage to come forward, the trust to come forward. We are working to earn that. Until we do and until an individual finds that courage, supported by the people around them, they have the ability to make a restricted report which allows them to get medical care, coun-

seling, and victim support without going through the accountability process. It is our hope that with that support, they will find the courage to change into an unrestricted report.

Senator GILLIBRAND. My time has expired. So I am going to turn now to Senator Graham.

Senator GRAHAM. Thank you.

This is an emotional topic, so I will be pushing back a bit to some of the things said. But having said that, please do not mistake the push-back for an understanding that sexual assault in the military needs to be addressed and we need to improve upon the current system because what we have today is not working.

But in terms of whether or not we have a good ordered and well disciplined military, I would say the answer is yes. The answer is yes because you see it in the way they conduct themselves in battle. The enemies of this Nation have never faced a finer military force than exists today, and we have problems. There are human beings involved in our military, and there is no justification when people act badly and poorly. But I want America to know that the best test of discipline is when the flag or the balloon goes up. We are the best in the world.

Now, this idea that fighter pilots take care of fighter pilots. We are going to talk about that a little bit. General Harding, do you know the convening authority?

General HARDING. I do, yes, sir.

Senator GRAHAM. Is there any suggestion that he set aside the findings because of the career field he was in or a personal relationship with the accused?

General HARDING. Absolutely not. As a matter of fact, he does not know the accused.

Senator GRAHAM. I just want to set this straight. You may not agree with what the general did, but I actually know these people. They take this job very seriously of sending people into combat. They take their job very seriously as a convening authority to make sure that in their view for the units in question, justice was rendered. We are talking about a handful of convening authority actions, given thousands of cases. Please do not over-indict the system.

Mr. Taylor, I want you, if you could, to have people in your office to review every convening authority in the military in terms of special court-martial, general court-martial convening authority, and see if you can find somebody who is not up to the task because I believe, ladies and gentlemen, that our commanders who get to this rank have been chosen for a reason.

[The information referred to follows:]

In the Air Force, convening authorities are commanders who have been chosen for their position based upon their demonstrated leadership abilities, character, and judgment as well as professional expertise. These senior leaders are experienced officers with many years of military service.

Senator GRAHAM. Now, the problem of reporting sexual assault in the military. General Patton, is it any greater a problem in the military than it is in the civilian community?

General PATTON. Sir, I believe they are on par in both sectors.

Senator GRAHAM. I would say that what happens in the civilian community in this area is probably duplicated in the military. "On

par" may be the right word, but I promise you this. There is no city, there is no State, there is no county that is going to take it more serious than the men and women before you.

When it comes to defending somebody in the military, I have been a defense counsel and I have been a prosecutor in the civilian world and in the military world. The one thing I never had to worry about defending a military member is cost. I got every witness I ever wanted. I did not have any overhead to pay, and I did not have hundreds of cases. As a military prosecutor, I spent an inordinate amount of time preparing a case that our civilian colleagues would envy. Are there district attorneys out there not bringing cases they should? Absolutely. Sometimes the system fails. But I just want people to understand in the military justice arena, it is a focused effort to get this right, that the defense counsels are an independent chain.

I was on 60 Minutes once trying to take the drug labs down that the Air Force had created that I thought was producing false positives, and we voided 60,000 results because the system worked. My boss had my back, and the military judge was a real hero.

The only thing I can say is that the purpose of this hearing is a good purpose. People are not feeling comfortable with telling what is going on in that unit regarding sexual assault. But the idea, quite frankly, that convening authorities are the problem is not what I see here. I see the system broken.

I do believe that if you are going to give a man or woman the power to send someone in battle and to literally go and die, that we should trust their judgment when it comes to disciplining that unit. Now, that is just my personal bias.

Having said that, I think there is a tremendous amount to build on here. Mr. Taylor, I look forward to working with you and the administration to try to find ways to make this system work better.

Madam Chairman, this is a difficult issue, but let us please not—I want you to read, if you can, a summary of the Aviano case. You may not come out where the convening authority did, but I just do not believe that he did it in a cavalier fashion. I just do not believe that.

[The information referred to follows:]

Please see the attached letter to Secretary Donley from Lieutenant General Franklin, dated March 12, 2013.

DEPARTMENT OF THE AIR FORCE
HEADQUARTERS THIRD AIR FORCE (USAFE)

12 March 2013

Secretary Donley

I am keenly aware of the significant Congressional interest and media coverage of my 26 Feb 13 decision as a General Court-Martial Convening Authority (GCMCA) to disapprove the findings and dismiss the charges in the court-martial U.S. vs. Lt Col James H. Wilkerson III. I am troubled by the recent wave of continuing negative and biased dispersions being cast upon the Uniform Code of Military Justice (UCMJ), the constitutional court-martial process, and the weighty and impartial responsibility of a convening authority to fairly administer justice.

Accusations by some that my decision was the result of either an apparent lack of understanding of sexual assault on my part, or that because I do not take the crime of sexual assault seriously are complete and utter nonsense. I unequivocally view sexual assault as a highly egregious crime. I take every allegation of sexual assault very seriously. As a commander, I cannot think of a more destructive act to good order and discipline and to the maintenance of a cohesive and effective fighting force. Likewise allegations that I made this decision to protect a Lieutenant Colonel pilot or because I was a former Aviano/31 Fighter Wing Commander are equally preposterous. I have many responsibilities as the Commander of Third Air Force, one of those being a GCMCA. In this role, I review and decide all matters of military justice fairly and impartially. I review each court-martial thoroughly and independently.

The UCMJ directs that a convening authority may, in his or her sole discretion, set aside any finding of guilty in a court-martial. This broad and independent discretion is a direct function of military command. There are legitimate reasons, past and present, why the UCMJ does not require a convening authority to explain his/her actions, and in some ways, it even appears rightly to discourage convening authorities from explaining their decisions so as not to cause even a perception of Unlawful Command Influence.

I have no desire to set an unfortunate and potentially damaging precedent for present and future convening authorities. By law and in the interests of justice, they should not believe they are obliged to provide such explanations. No one has asked or directed me to provide this information to you or to anyone else. Yet due to the ongoing controversy that I have recently observed in the "court of public opinion," it is appropriate, in this case only, to provide you a sense of what I considered in arriving at my decision.

To begin, this was the most difficult court case that I have ever faced as a convening authority. The case was comprised of mostly consistent testimonies of a husband and wife in contrast to the testimony of an alleged victim. There was no confession or admission of guilt by the accused and no physical evidence. I even struggled with referring this case to a court-martial after reviewing the results of the Article 32 Investigation. As you know, the evidentiary standard of probable cause to refer charges to a court-martial is much less than the very high standard of proof beyond a reasonable doubt to convict in a court-martial. Consequently, after my review of the evidence within the Article 32 investigation report, and after my many discussions with my

Staff Judge Advocate (SJA), I concluded that sufficient probable cause existed to refer the case to trial.

After the court-martial, I was somewhat surprised by the findings of guilty based upon the evidence that I had previously reviewed and the high constitutional standard of proof beyond a reasonable doubt in a court-martial. However, I gave deference to the court-martial jury because they had personally observed the actual trial. I subsequently received the request for clemency by Lt Col Wilkerson and his defense counsel along with its many compelling clemency letters. To be honest, this was the most extensive clemency request package that either my SJA or I had ever seen. I read all of the clemency letters (91 of them) in detail and some I read several times. Most pleaded with me to review the entire court transcript and all the evidence in detail because of grave concerns that they had with the fairness of the trial.

Letters from Lt Col and Mrs Wilkersons' family, friends, and fellow military members painted a consistent picture of a person who adored his wife and 9-year old son, as well as a picture of a long-serving professional Air Force officer. Some of these letters provided additional clarity to me on matters used effectively by the prosecution in the trial to question the character and truthfulness of both Lt Col Wilkerson and Mrs Wilkerson. Some letters were from people who did not personally know the Wilkersons, but wanted to convey their concerns to me about the evidence and the outcome of the case.

Due to my previous concerns with Lt Col Wilkerson's case prior to referral and the concerns identified in defense clemency matters, my deliberation became extensive. Accordingly, I began to personally review and consider the entire record of the trial and its accompanying papers. I reviewed the Article 32 investigation report again. I reviewed the entire court transcript and all the other evidence the jury reviewed (captured on compact discs or in hard copy photos). I looked at some evidence a second and third time and I re-read particular portions of the court transcripts. I reviewed affidavits provided after trial by the prosecuting attorneys and I also read a personal letter to me from the alleged victim. I carefully looked at everything, evidence supporting the findings of the court-martial and evidence against. The more evidence that I considered, the more concerned I became about the court martial findings in this case.

After my extensive and full review of the entire body of evidence and my comprehensive deliberation spanning a three-week period, I only then finally concluded there was insufficient evidence to support a finding of guilt beyond a reasonable doubt. Based upon my detailed review, I could not conclude anything else. Accordingly, I could not in good conscience let stand the finding of guilty.

Please note, at the beginning of my thorough review, my SJA recommended approving the court-martial findings and approving the sentence of one year confinement. In consideration of Lt Col Wilkerson's family and his lengthy military service, my SJA also recommended commuting the sentence of dismissal to an additional two years of confinement. However, after we engaged in numerous subsequent conversations during my extensive deliberation of the evidence, he told me that he had come to fully respect my concerns with the evidence in the case and my conclusion that the evidence did not prove Lt Col Wilkerson guilty beyond a reasonable doubt. At the end, he advised me that I could only approve court-martial findings and a sentence that I found correct in law and in fact. Based upon his personal knowledge of how extensively and

thoroughly I had reviewed and deliberated on this case, my SJA said he fully respected my decision to disapprove findings in this court case.

Below is a portion of the considerable evidence which caused me, in part, to form my reasonable doubt as to Lt Col Wilkerson's guilt. I reviewed all the evidence below, and other evidence, holistically and comprehensively in reaching my conclusion:

a) The evidence indicated that the alleged victim turned down at least three distinct offers of a ride from the Wilkerson home back to her room on base. Whenever she was offered a ride, she seemingly had a different reason to stay at the Wilkerson home;

b) When shown clear photos of all bedrooms of the house, the alleged victim could not identify the bed in which she slept and/or where she claimed the alleged assault occurred;

c) At different times, the alleged victim's description of the hours leading up to the alleged assault varied, as did her description of the state of her clothing during and immediately after the assault;

d) In her initial statement, the alleged victim said that she "passed out" (went to sleep) between 0045 hours and 0100 hours in the morning, and in her court testimony she said that her next memory was that she was in a dream state and was subsequently awoken at about 0300 hours by Mrs Wilkerson turning on the light. Yet the alleged victim's phone records and her testimony in court showed that she was texting on her phone to a friend at 0143 hours;

e) The alleged victim did not remember whether or not the man who she says assaulted her had facial hair. In addition, she said his face was only 6 inches away from hers. Lt Col Wilkerson had a full mustache and the alleged victim had already seen him throughout the recent evening;

f) The alleged victim's version of events describes a path out of the house from the downstairs bedroom (the only room that she could have logically stayed in). This path was not feasible based upon the actual layout of the house;

g) The alleged victim claimed that she woke to a bright light being turned on in the room in which she was sleeping, and Mrs Wilkerson yelling at her to "get out of my house." The room that she stayed in had an energy-saving ceiling light that is dim for the first few minutes of operation. Although the military judge did not allow the members of the jury to visit the house, the defense counsel made a video to document what would have been the alleged victim's actions based upon her testimony. I watched the entire video twice. It shows the very dim light and the only path to get out of the house from the only room that she could have logically stayed in. It was not consistent with her description of the path that she said she took out of the house;

h) Mrs Wilkerson's version of the events at her house the night of the alleged incident was substantially consistent from her initial OSI interview statement, to her Article 32 investigation statement, and through her court testimony. And my detailed review of all phone records (of all the key witnesses) validated Lt Col and Mrs Wilkerson's combined

version of what occurred on the night in question and the next morning. Please note, I spent close to 4 hours looking at phone record evidence alone. In particular, I determined that the alleged victim's cell phone records (times and durations of incoming/outgoing calls and text messages) when aligned with the testimony and phone records of the friend of the alleged victim, all merged to a common picture that was more consistent with Lt Col and Mrs Wilkerson's combined version of events;

i) Regarding the next morning after the alleged incident, Mrs Wilkerson claimed she slept in until 0900 hours. In closing arguments, the prosecution argued she was "lying" because she had outgoing calls, incoming calls, and texts before 0900 hours. The defense counsel countered that it was possible that Lt Col Wilkerson was using her phone (I am aware that occasionally wives will use husbands' phones, husbands will use wives' phones, kids will use adults' phones, etc.). The prosecution argued that the defense explanation was impossible since phone records showed Lt Col Wilkerson was on his own phone/texting at apparently the same time. When I closely checked the phone records to verify this prosecution argument, I determined the times of Lt Col Wilkerson's phone-use were different from his wife's cell phone-use -- thereby making it entirely possible that Lt Col Wilkerson was using Mrs Wilkerson's phone before 0900 hours. Likewise, the letter of clemency from the mother of the two guest-children (who were staying overnight at the Wilkerson house), specifically indicated that she called Mrs Wilkerson's phone that morning at approximately 0700 hours and that Lt Col Wilkerson answered it, saying his wife was still asleep. She also said that she spoke with her children during this same phone call. In addition, when she subsequently stopped by the house prior to 0800 hours to check on her children, she said Lt Col Wilkerson was awake/up and that her children said that Mrs Wilkerson was still sleeping;

j) The Office of Special Investigations (OSI) interviewed these two guest-children, ages 13 and 9 who were guests in the Wilkerson house the night of the alleged incident. Neither awoke or heard any yelling during the time of the alleged incident. Yet, the alleged victim at one point said that Mrs Wilkerson yelled at her to "get out of my house";

k) In addition, the mother of these two children observed her kids and the Wilkersons the very next day following the alleged incident. She did not notice any change in the Wilkerson's behavior or her children's behavior, or that her children sensed any tension between the Wilkersons. Further, these two children apparently stayed at the Wilkerson house the following night. If an incident occurred as claimed by the alleged victim, it would be highly peculiar for the Wilkersons to volunteer to take care of these two children again the following evening;

l) Additionally, witness testimony about the Wilkerson marriage before the night in question and in the immediate days and weeks after that night, showed no perceptible tension or change in their relationship. Had the alleged sexual assault taken place as the alleged victim claimed, it would be reasonable to believe that their relationship would change and that close friends would perceive this change;

m) Witness testimony from a female friend of the alleged victim (who also works at the 31st Medical Group, and who took the alleged victim to the hospital the next day) and her

subsequent letter of clemency (in support of Lt Col Wilkerson), caused me notable additional doubt about the alleged victim's stated version of events. The friend's comments in this clemency letter also indicated a potential reasonable motivation for the alleged victim to have been less than candid in her stated version of the events;

n) One particular witness was not allowed to testify in court. The primary rationale was that the applicable events of which she had knowledge in regard to the character and truthfulness of the alleged victim occurred 10 years earlier (when the alleged victim was approximately 39 years of age). I reviewed this excluded testimony, as well as the clemency letter of this witness which detailed court proceedings that involved the alleged victim 10 years earlier. The excluded witness had a strong opinion that the alleged victim (now 49 years old) might lie in a court proceeding when it would be in her personal interest to do so;

o) Significantly, I closely watched the video of the entire OSI interview of Lt Col Wilkerson (3 hours and 25 minutes). I watched it not once, but twice (and several portions I watched additional times). The prosecution effectively used small segments of the video in closing arguments in attempts to portray Lt Col Wilkerson as a liar, or as someone who was trying to cover up misconduct. However, when I twice viewed the video in whole, and I considered his answers in the context of the questions and paths that the OSI attempted to take him down, I believed the entire OSI interview portrayed him as truthful;

p) In addition, Lt Col Wilkerson waived his rights to remain silent, did not request a lawyer, and appeared cooperative throughout. The Special Agents who conducted the interview utilized a full gamut of investigative interviewing techniques in attempts to garner incriminating statements from Lt Col Wilkerson. He maintained his innocence throughout the interview, provided a written statement, never stopped the interview, nor did he ever ask for a lawyer at anytime. As I viewed the entire interview in whole (twice), it was my consistent impression that Lt Col Wilkerson answered all the questions in a manner like an innocent person would respond if faced with untrue allegations against him;

q) Lt Col Wilkerson voluntarily agreed to take an OSI polygraph examination. I am fully aware of and considered the polygraph results. As you are aware in a criminal investigation, a polygraph is only an investigative tool to assist in the potential focus of the investigation and/or to attempt to elicit admissions of guilt. It is not a "lie-detector test," nor is it "pass" or "fail." Because of the inherent unreliability of polygraphs, they are entirely inadmissible in a court-martial. Ultimately, Lt Col Wilkerson has consistently maintained his complete innocence -- throughout two lengthy OSI interviews, through the entire court-martial, and throughout his nearly four months in prison (following the court-martial and during the post-trial process);

r) Finally, I do not assert in any way that the event as argued by the prosecution was out of the realm of the possible. However when I considered all the evidence together in total, the evidence was not sufficient to prove this alleged version by the prosecution beyond a reasonable doubt. In addition, and as simply one more point of reference, I was perplexed in relation to this conundrum – Lt Col Wilkerson was a selectee for promotion

to full colonel, a wing inspector general, a career officer, and described as a doting father and husband. However, according to the version of events presented by the prosecution, Lt Col Wilkerson, in the middle of the night, decided to leave his wife sleeping in bed, walk downstairs past the room of his only son, and also near another room with two other sleeping guest-children, and then he decided to commit the egregious crime of sexually assaulting a sleeping woman who he and his wife had only met earlier that night. Based on all the letters submitted in clemency, in strong support of him, by people who know him, such behavior appeared highly incongruent. Accordingly, this also contributed, in some small degree, to my reasonable doubt.

There were some matters of evidence that I could not reconcile. For example, I did have questions about differences in some witnesses' respective versions of events that conflicted with the combined testimony of Lt Col and Mrs Wilkerson. Accordingly, I scrutinized the allegations and arguments that the Wilkersons were untruthful in these instances. The majority of these inconsistencies had plausible alternate explanations. Those that did not were not independently conclusive, nor did all of them put together satisfy me beyond a reasonable doubt of Lt Col Wilkerson's guilt.

Moreover, minor inconsistencies between Lt Col Wilkerson and Mrs Wilkerson's versions of events indicated to me that they had not colluded to manufacture a "unified story." In fact, if their two separate versions were too consistent, I would have reasonably been skeptical of them. After I reviewed all the evidence, it appeared to me that, at the time of their OSI interviews, the two Wilkersons were simply trying, in good faith, to recall an evening that had occurred almost 3 and ½ weeks prior. After consideration of all the matters I have mentioned, as well as other matters within the record of trial, I impartially and in good faith concluded that there was insufficient evidence to prove beyond a reasonable doubt that Lt Col Wilkerson was guilty.

Obviously it would have been exceedingly less volatile for the Air Force and for me professionally, to have simply approved the finding of guilty. This would have been an act of cowardice on my part and a breach of my integrity. As I have previously stated, after considering all matters in the entire record of trial, I hold a genuine and reasonable doubt that Lt Col Wilkerson committed the crime of sexual assault. As a result, I would have been entirely remiss in my sworn military duty and responsibility as a GCMCA if I did not release someone from prison whose guilt I did not find proven beyond a reasonable doubt. Accordingly, I knew that my court-martial action to disapprove findings and to dismiss the charges was the right, the just, and the only thing to do.

In summary, I exercised the obligation of a GCMCA exactly as required by the UCMJ, when after my lengthy review and deliberation of the evidence, I had reasonable doubt as to Lt Col Wilkerson's guilt. Sir, I provide this letter for you to use or to share with others as you deem appropriate in relation to this case or in relation to the lawful and necessary discretion of a court-martial convening authority.

Very Respectfully,

CRAIG A. FRANKLIN, Lieutenant General, USAF
Commander, Third Air Force

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Senator GRAHAM. So, finally, Mr. Taylor, as we go forward, what can we do in terms of sequestration? I mean, we are talking as if nothing else is going on out there. Everybody is doing more with less. There are less lawyers. There is more responsibility. Please tell us what you need in terms of budgets to enhance these programs, and I think everybody on this committee—and, Senator McCaskill, you have been terrific about focusing on this. Let us find out what we need to resource that is not being resourced and make this a priority because I will end with this thought.

[The information referred to follows:]

Standing up the Special Victims' Counsel (SVC) Program drives a resource bill for the Air Force, estimated at this time to be about 65 positions and $2.2 million a year. To the extent we are required to repurpose existing positions at installations for the SVC Program, we will have to proportionally reduce legal services to commanders and to our airmen.

Senator GRAHAM. If women in the military—and men are victims too. But if you really believe that there is no place for you to go and you are being abused, that has to be the worst possible feeling in the world. I would not want one member of my family to ever have to live under those conditions. This command climate I think is beginning to change. But how did we get here? These cases were a nuisance. Nobody wanted to talk about it. Nobody wanted to embarrass the command. They wanted to shove this stuff under the rug. There is no other answer for it to get this out of hand.

I believe a new day is here, and all I ask is that when we find this new way forward, that we still preserve the ability of the system to judge every individual case based on the individual facts, that we do not paint with a broad brush everybody is guilty.

Thank you very much.

Senator GILLIBRAND. Senator McCaskill?

Senator MCCASKILL. Well, first, I certainly agree with Senator Graham, especially the first part of his statement. I am compelled to be passionate about this because I agree with him. We are the best in the world.

My comment about the overall health and good order and discipline of the unit is based on what I believe is a military that is grappling with a problem that the military knows you do not have under control. I do not think I am saying anything that most of you do not agree with. I think you know we need to do better. I think there are women out there that feel because of the particular facts and circumstances of their military service, their ability to get a piece of justice is limited. I know you all want them to. I do not think there is a significant disagreement between Senator Graham and me about that.

I just think that some of the convening authority's power does not appear to be rational to me, particularly the way it is currently set up in terms of the order of things and the ability, which I think most of you are uncomfortable with the notion that the rules say this can be done for no reason at all. As General Welsh, I think said to me, we are not in a time where you are dragging people out of prison to put them on the front lines because we need the warm body. Some of these rules date from that time when you did not have to give any reason at all. I think you explained to me why it said no reason at all. It came from the mouth of General Eisenhower in a hearing like this or something to that effect.

Let me talk about a couple of things that I wanted to get to. It is my understanding that if a member of the military needs to update their security clearance, they must self-report counseling around their sexual assault, and they do not have to report counseling for combat-related issues, grief, or family matters. Is that true, Mr. Taylor?

Mr. TAYLOR. It generally is true. It is question 21. There are different interpretations, but generally that is accurate. I think there are serious issues with question 21, and I would just like to say that the issues are not limited to those who are receiving the care

that we want them to receive. That is true whether the need for care is a result of sexual assault or something else. I personally am very concerned about question 21 and would like to see some action on it.

Senator MCCASKILL. Well, I think we need to really take a look at that because if you are looking at someone's mental health, what you are really saying is if your mental health issues come from combat or a problem in your family, that does not impact your security clearance, but if you have been a rape victim, it does. I cannot imagine any of you agree with that outcome. Does anybody think that is right or fair?

Okay. So be sure and let us know if you have a problem with us looking at that because I want to get that changed right away. If I was a woman in the military and I had been raped and I had a security clearance, that sure would impact my willingness to come forward. It sure would impact my willingness in terms of giving up my career.

What about the suggestion I made earlier? If we have probable cause based on a sound criminal investigation and the JAGs are recommending to the convening authority that we go to a general court-martial proceeding, why are we so focused about moving the victim? Why are we not moving the perpetrator at that point?

General CHIPMAN. Senator, we do have the authority to move a perpetrator to another command, installation, or unit. That is within the discretion of the chain of command, so that is an available option. It would make it a little more tedious in the sense of the proceedings that have to go forward with the article 32 investigation, any motions hearings. So you might have to move that accused back and forth to the installation that is holding the court-martial. But certainly it is an option within the chain of command's authority.

Senator MCCASKILL. As tedious as it would be for the victim in terms of potentially having—although, I guess you would say that the defense lawyers could go to her wherever she is for interviews?

General CHIPMAN. That is correct, Senator.

Senator MCCASKILL. Well, to me once you have crossed the line of probable cause, after a competent criminal investigation, the least disruption should occur to the victim, not to the alleged perpetrator. That certainly is the way it is in the civil system. We arrest him and they have to bail out and be reporting to an authority, a pretrial, or they are held in jail to stay away from the victim. The notion that a victim and an alleged perpetrator are working shoulder to shoulder during this particular period of time I think is going to impact the quality of your cases and your ability to get sound prosecutions.

How soon in the process for each branch of the military do your criminal investigators have contact with the prosecutors that would be responsible for trying the case? If you would go down the line and just tell me. If you do not know, say that. If you know it is within 30 days or within a week or if there is some requirement that they check in with them immediately or maybe never, I would like some sense from each branch how closely dovetailed are the investigative efforts with the advice and counsel of a prosecutor who is going to direct the evidence in trial.

Admiral KENNEY. Thanks, Senator.

In the case of the Coast Guard, that contact is almost immediate because of the way our reporting system works. It actually will come, in many cases, up the same chain that a significant search and rescue case, or a major oil spill will. Those communication networks are used, and CGIS, as well as our attorneys and our district legal offices or our area legal offices, are notified through that communication network immediately.

General HARDING. Ma'am, it is about the same for the Air Force. It is pretty quick. When I was in that role at base level, we knew a report within 24 hours. The lash-up with the investigators is immediate. We provide them a proof analysis, a list of elements that they need. We walk hand in hand. They report back to us as the investigation is ongoing. Then later, we fold in one of our senior trial counsels, our most experienced. We have eight of them that are dedicated to prosecuting sexual assault cases. So the lash-up is immediate and constant.

General CHIPMAN. Senator, recall that part of our special victim capability is the SVP and the sexual assault investigator. The best practice for us is to have our SVP actually located in the CID offices so that there is that immediate lash-up and case coordination that is so critical to perfecting these cases from the outset.

Admiral DERENZI. Yes, ma'am, we have the immediate lash-up as well with our agents and our prosecutors.

Senator MCCASKILL. Marines?

General ARY. It starts at day one, and then our complex trial teams also have investigators embedded with them that continue to work the liaison as they develop the theory of the case and the evidence, ma'am.

Senator MCCASKILL. Thank you for your patience, Madam Chairman.

I have one last question, and that is if any of you have a good reason why there should be a different period of time that you would keep a restricted report versus a non-restricted report.

I would like all of you, for the record, to let us know what attempts are made formally—when you get a new report on an alleged perpetrator, what attempts formally are made to go back and look at reports and re-contact victims on restricted reports with the news that there has been another victim and have they changed their mind. You do not need to do that now, but I want that for the record because I know that from experience that when a woman knows there has been someone else victimized after her, it changes her perspective about the importance of stepping forward. I want to make sure we have a system in place that is accessing those records quickly and getting back to those victims as quickly as possible and securing their cooperation and moving forward against the defendants.

[The information referred to follows:]

General CHIPMAN. When a victim makes a restricted report, the Victim Advocate or Sexual Assault Response Coordinator (SARC) does not question the victim about the nature or circumstances of the offense and does not enter any personally identifying information about the victim or the offender into the Defense Sexual Assault Incident Database (DSAID). The Army's system of record notice for the Sexual Assault Data Management System, published 18 Mar 10 in the Federal Register, prohibits the collecting of personally identifying information on either the victim or the

offender, in accordance with DOD policy. Thus, there is no system in place to inform investigators or victims in restricted reports if another victim subsequently makes an unrestricted report against the same offender.

The Army is committed to ensuring victims of sexual assault are protected, treated with dignity and respect, and provided support, advocacy and care. Army policy strongly supports effective command awareness and prevention programs, and law enforcement and criminal justice activities that will maximize accountability and prosecution of sexual assault perpetrators. To achieve these dual objectives, the Army prefers complete reporting of sexual assaults to activate both victims' services and accountability actions. However, recognizing that a mandate of complete reporting may represent a barrier for victims to access services when the victim desires no command or law enforcement involvement, there is a need to provide an option for confidential reporting.

Admiral DERENZI. The primary reason for Restricted Reporting is to protect the privacy of the victim while enabling the victim to receive medical and Victim Advocacy services. Under the recently implemented DOD Instruction governing Sexual Assault Prevention and Response (SAPR) procedures, Restricted Reports (DD Form 2910 and DD Form 2911) are kept for a period of 5 years; however, at the request of a servicemember who files a Restricted Report, the DD Forms 2910 and 2911 filed in connection with the Restricted Report will be retained for 50 years, the same as an Unrestricted Report.

Regarding attempts to re-contact victims who file Restricted Reports when another sexual assault takes place; Restricted Reports of sexual assault, by their very nature, are not shared with NCIS or the other military criminal investigative organizations (MCIOs). NCIS thus has no knowledge of the victim's identity, or of any alleged perpetrator. In general, SAPR support services are victim-centric, and SARCs and Victim Advocates (VAs) avoid interviewing victims about the details of assault circumstances or specific perpetrator identities. With regard to most Restricted Reports, there is simply no record of perpetrator information to compare with subsequent cases, and no knowledge beyond the individual SARC of the victim's identity. The basic concept of Restricted Reporting thus obviates victim "reach back" or perpetrator follow-up.

Victims who file a Restricted Report have the option of changing from a Restricted Report to an Unrestricted Report. The Restricted Reporting option gives victims additional time and increased control over the release and management of their personal information and empowers them to seek relevant information and support to make more informed decisions about participating in the criminal investigation. A victim who receives support, appropriate care and treatment, and is provided an opportunity to make an informed decision about a criminal investigation is more likely to develop increased trust that the victim's needs are of concern to the command. As a result, this trust may eventually lead the victim to decide to pursue an investigation and convert the Restricted Report to an Unrestricted Report. The decision to convert is left entirely up to the victim.

In Restricted Report cases where a Sexual Assault Forensic Examination (SAFE) Kit was conducted, the SARC will contact the victim 1 year after the report was made to inquire whether the victim wishes to change their reporting option to Unrestricted. This is the only instance where the option to change reporting status is initiated by the SARC.

If the victim does not change to Unrestricted Reporting, the SARC will explain to the victim that the SAFE Kit, DD Form 2910, and the DD Form 2911 will be retained for 5 years from the time the victim signed the DD Form 2910 (electing the Restricted Report) and will then be destroyed. The SARC will emphasize to the victim that his or her privacy will be respected and he or she will not be contacted again by the SARC. The SARC will stress it is the victim's responsibility from that point forward, if the victim wishes to change from a Restricted to an Unrestricted Report, to affirmatively contact a SARC before the 5-year retention period lapses. However, at the request of the victim, the DD Forms 2910 and 2911 filed in connection with the Restricted Report shall be retained for 50 years.

If, before the expiration of the 5-year retention period, a victim changes his or her reporting preference to the Unrestricted Reporting option, the SARC shall notify the respective MCIO, which shall then assume custody of the evidence pursuant to established chain of custody procedures.

General HARDING. There is neither a formal requirement nor a prohibition that a SARC notify a restricted victim that his or her alleged offender has been named in an unrestricted report. In practice, the SARC makes such a notification in certain circumstances. For example, if victim 1 makes a restricted report and victim 2 makes an unrestricted report, then the SARC will let victim 1 know that an independent report against the accused has been made by victim 2.

General ARY. Restricted Reporting allows servicemembers and military dependents who are adult sexual assault victims to confidentially disclose the assault to specified individuals (SARC, Sexual Assault Prevention and Response Victim Advocate (SAPR VA), or healthcare personnel) and receive healthcare treatment and the assignment of a SARC and SAPR VA. When a sexual assault is reported through Restricted Reporting, the victim still receives support. First, a SARC shall be notified. The SARC will then respond to the victim or assign a SAPR VA. Additionally, the victim will be offered healthcare treatment and a SAFE.

In cases where a victim elects Restricted Reporting, the SARC, SAPR VA, and healthcare personnel may not disclose confidential communications or the Sexual Assault Forensic Exam and the accompanying Kit to DOD law enforcement or command authorities, either within or outside the DOD, except as provided in the exceptions designated in DOD Instruction 6495.02 (SAPR Program Procedures).

One such exception is when "[n]ecessary to prevent or mitigate a serious and imminent threat to the health or safety of the victim or another person; for example, multiple reports involving the same alleged suspect (repeat offender) could meet this criteria."

Accordingly, the framework for such a disclosure exists under current regulation. However, most victims who elect the Restricted Reporting option have historically declined to provide the name of the alleged offender when submitting a Restricted Report. Therefore, in order to effect a process whereby victims who file Restricted Reports are later notified that the alleged offender in their case has been accused of committing a subsequent sexual assault, the reporting requirements to the SARC would need to be amended to require entry of the offender's name into the Defense Sexual Assault Incident Database. Additionally, victims should be given the opportunity to elect whether or not they would like to be notified in the future if their alleged offender re-offends.

Admiral KENNEY. If a SARC, Victim Advocate, or the Sexual Assault Prevention and Response Program Manager become aware that prior victims have the same offender and restricted reports were filed, the SARC will reach out to the victim(s) to let them know that there are other victim(s). This is accomplished in a sensitive and empathetic manner intended not to negatively impact the victim(s) or make them feel responsible for not filing an unrestricted report, but allows for the opportunity to reflect and decide on a course of action moving forward. Often victims will decide to go forward with an unrestricted report if they are aware of other victims who were allegedly offended by the same perpetrator.

Senator MCCASKILL. I know you all are trying hard, and I know even the general who made the decision in Aviano, I absolutely do not think he did that maliciously or cavalierly. But I think it is time to take a hard look at whether or not the rules of the road can be adjusted to still give the unique aspect to military justice that it deserves. I am not saying it should be like the civil criminal system, but there do seem to be some things that make absolutely no sense. I hope rather than getting a push-back from the military, we will get your cooperation and support in making some of those changes. Thank you all very much.

Thank you, Madam Chairman.

Senator GILLIBRAND. Thank you all for your testimony today. I am very grateful for your determination to solve this problem. I think there is no problem the military cannot solve if it puts its mind to it. So thank you for your commitments today, and thank you for working with this committee going forward.

The hearing is adjourned.

[The prepared statement of Ms. Parrish follows:]

ANNEX A: Prepared Statement by Ms. Nancy J. Parrish, President of Protect our Defenders

STATEMENT OF NANCY J. PARRISH, PRESIDENT PROTECT OUR DEFENDERS
US Senate Armed Services Subcommittee on Personnel
March 13, 2013

Secretary Panetta was correct in stating that unpunished sexual assault in our military is an epidemic. It has been for decades and continues to undermine mission readiness and unit cohesion. Although the military has taken action, it is important to recognize that these actions have not resulted in a reduction in the scope of the problem. Sexual assault in our military has a deeply rooted cultural component and until prosecutions increase dramatically and senior officers enforce a dramatic change in the culture within their commands, this problem will persist.

The recent wars may have exacerbated this crisis, but this epidemic predated both the wars in Iraq and Afghanistan and the increase in women in the military. Men are in the majority of the estimated half a million veteran victims. This is about the Department of Defense's abject failure to protect the rights of service members. Not only do attackers go unpunished, frequently victims are unjustly treated and even overtly attacked by those in command. The Department effectively countenances all of this. If it were really a priority, the department would support changes in the justice system and would drive a change in the culture, as they have regarding past dysfunctional issues such as racism and treatment of gays.

Protect Our Defenders was founded as a place for survivors to build community, amplify their voices, support one another, provide services and collectively take action on behalf of veterans and active service members who have been unjustly treated.

Sgt. Smith's Story – A Culture of Harassment, Misogyny and Assault

Five months ago, Air Force Sergeant Jennifer Smith, who loves the military and is honorably serving our country, went public with an official complaint of allegations of harassment and sexual assault.

Sergeant Smith has had several tours of duty including Iraq, earning achievement medals and stellar performance reviews. But, for seventeen years, under a number of commanders and on several bases, she endured what thousands of service members endure every day: an environment of hate speech; inappropriate or violent gender-based, degrading behavior; bullying; and sexual assault. And, like so

many others, she has done everything in her power to protect herself and her career. Eventually, she sought help from her chain of command - none was forthcoming.

This is not just about simple pinups. It is about formal traditions – hate filled documents, images, songs, and practices. Coins [See Exhibit G] printed, according to the Smith complaint, at government expense depicting women as objects of ridicule and exploitation, and voluminous misogynist materials on government servers. It is about impressionable seventeen and eighteen year old female trainees forced to walk into mess halls and face something called a "Catwalk," which consists of demeaning organized shout outs about their gender and their bodies. Female Marines are called upon to repeat cadences that humiliate and objectify them. Sergeant Smith was forcibly carried into a bar, in what is known as a "sweep," physically thrown on the counter, and forced to endure a "naming ceremony," which involves officers loudly singing songs with graphic descriptions of women being mutilated and sexually violated. A phrase from one such songbook [See Exhibit M] goes like this:

*"who can take two ice picks, stick'em in her ears ride her like a Harley while you f**k her in the rear. Who can take a chainsaw, cut the bitch in two, this half is for me, the other half is for you."*

Officers themselves describe, in a handbook of Air Force traditions, that, because they take risks and do things that are hard and dangerous, it is therefore ok for them to denigrate and even abuse others, who in their view are less worthy. And, as an officer with sixteen years of service recently described to me: upon arriving at a particular base overseas she was alerted by another female officer that, "almost every woman carries a knife and so should you, not for battle against the enemy, but to cut the person who tries to rape you."

In response to news coverage of Technical Sergeant Smith's formal complaint, Air Force Chief of Staff General Mark Welsh ordered a service wide sweep of workspaces and public areas for images, calendars and other materials that objectify women. The sweep, which, after a prior public announcement, began on Wednesday, December 5, 2012, provided a twelve-day window for it to be completed. This window and public notification intentionally or unintentionally provided service members and commanding officers the time to hide content. This sweep also did not include individual desks, cabinets, lockers, or military issued computer hard drives, where much of the content in the Smith complaint was stored. Despite the notice and limited scope, the search still produced large volumes of offensive material

Servicewomen are much more likely to be assaulted in the military than are women in civilian life. According to The *New York Times*, it is estimated that 17% of women in the general population become sexual assault victims during their lifetime. While a 2006 VA study estimates that 22% - 33% of female service members are assaulted while in the service.

Male rape and assault victims face severe isolation and disbelief. According to survivors, many are gang raped and then ridiculed for coming forward. Their assault is often chalked up to hazing. When survivor, Heath Phillips reported being repeatedly gang raped, he was called a liar and a mama's boy. To avoid the continual brutal attacks onboard his ship, Heath left and was charged with going AWOL. According to DoD [PDF] out of the estimated 19,000 assaults that take place annually, 10,000 are men.

Long Existing Problem

This is not a new problem or a recent revelation. More than 20 years ago, during the Tailhook scandal, the Navy said all the right things about confronting the problem, but fundamentally nothing changed. In Sept. 1992, according to a *LA Times* story, Acting Navy Secretary Sean O'Keefe said:

"We get it. We know that the larger issue is a cultural problem, which has allowed demeaning behavior and attitudes towards women to exist within the Navy Department. Our senior leadership is totally committed to confronting this problem... Those who don't get the message will be driven from our ranks."

Now 20 years later, faced with another scandal, Air Force Chief of Staff General Mark Welsh's recent words are eerily similar when he said:

"In my view, all this stuff is connected. If we're going to get serious about things like sexual assault, we have to get serious about an environment that could lead to sexual harassment some ways, this stuff can all be linked."

We even have the recent example, discussed below, of a General overturning the conviction of an officer, who had been found guilty by a Jury of his peers. This clearly sends a negative signal to future victims, prosecutors, juries, judges, and even serial rapists. If such actions do not affect the careers of senior officers, then nothing will change.

Words matter, but only if they are followed with fundamental legislative reform and culture changing action.

Scandals, Reports, Reforms – 25 Years and Counting

For over 25 years, scandals of sexual violence within the military, cover up and abuse of authority have come to light, often due to brave service members, who risk their careers and wellbeing by coming forward. This includes Tailhook in 1992, Aberdeen Proving Ground in 1996, the Air Force Academy in 2002, USMC Marine Barracks One, Washington in 2012 and the ongoing largest military sexual abuse scandal in history at Lackland Air Force Base. Military leadership has repeatedly investigated itself; punished well-publicized, usually low ranking offenders; and released reports touting supposedly new reforms that have not and will not fundamentally fix the broken system.

The Tailhook scandal investigation, in 1992, (where 83 women and 7 men were groped and assaulted) was going nowhere, until former Navy pilot, Lieutenant Paula Coughlin, stepped forward. The subsequent reports and reforms failed to produce a change in the culture, improve outcomes for victims, or increase conviction rates.

Ten years later, in 2002 during the Air Force Academy abuse scandal, an Air Force Academy Command Survey revealed that 63% of female respondents said they were the subject of derogatory comments based on their gender and 57% felt generally discriminated against.

The 2010 and 2011 DoD and SAPRO reports [PDF] and gender surveys clearly demonstrate that the crisis persists. Although the Pentagon chose to emphasize one minor ripple in the 2011 data that could be considered an improvement: the 10% increase in the percentage of sexual assault related charges that resulted in court-martial trials. In reality: charges have decreased, initiated courts-martial fell, and convictions plummeted. By the numbers: In 2010, 1,025 actions were taken by commanders on the grounds of sexual assault, in 2011 there were 791 – a decrease of 23%. The numbers of initiated courts-martial fell 8%, from 529 in 2010 to 489 in 2011. The number of perpetrators convicted of committing a sexual assault decreased 22%, from 245 in 2010 to 191 in 2011.

On June 22, 2012, twenty years after Tailhook there were momentary hopeful signs that the Air Force was taking a holistic approach in investigating the culture and ongoing scandal at Lackland. Major General Edward Rice, commander of the Air Education and Training Command, on ordering the investigation at Lackland and "all training units," rightfully said, "it's important to look even deeper and wider to identify any systemic issues that may place our youngest airmen at risk in any basic and technical training environment." Unfortunately, a few weeks later without benefit of an investigation, General Rice changed his position, when on July 17th he said, "it is not an issue of an endemic problem throughout basic military

training...it's more localized, and we are doing a very intensive investigation on that squadron."

On November 14, 2012 the Air Force released its' internal investigation on the abuse scandal at Lackland. The report found weaknesses in institutional safeguards and leadership. The investigation did not include, as it should have, interviewing the victims of the crimes they were aiming to address. The reforms proposed are similar to the obviously ineffective reforms that other branches have taken over the past 25 years following previous public sexual abuse scandals.

On December 21, 2012 the Pentagon, in releasing the required annual "Academic Program Year 2011-12 Report on Sexual Harassment and Violence at the Military Service Academies" Secretary Panetta stated, "despite our considerable efforts, I am concerned we have not achieved greater progress, therefore I am directing that you enhance your programs. The goal is to change the culture."

The Conflicted And Broken Justice System

The culture is a real problem, but as important -- is the broken military justice system. Every aspect, from prevention and victim care, to investigation, prosecution, and adjudication is fundamentally dysfunctional and there has been no coherent effort to fix the deficiencies.

As one survivor of rape at Lackland told us, "the way all sex assault reports are handled encourages the ouster and fall from grace for almost every victim. Therefore, while on the surface it may seem as if good order and discipline exists, in reality it does not. It is quick removal of the victims through errant mental health diagnosis, legal crisis, and so called ongoing disciplinary problems: an effort to prove the victim a liar or mentally unbalanced." The result is too often the destruction of the victim's reputation and wellbeing.

The inconsistencies and conflicts inherent in the system, coupled with absolute command discretion, often effectively preclude justice. It is a system that elevates an individual commander's authority and discretion over the rule of law. It is fraught with inherent personal bias, conflicts of interest, abuse of authority and too often a low regard for the victim. Throughout, the commander impacts the legal and investigative processes and paths these cases take. The JAGs and investigators work for and answer to the commander. This process is also encumbered with inexperienced and undertrained staff, constant turnover, arbitrary and inconsistent application of the law, no sentencing minimums or guidelines, and a biased system. Article 32 preliminary hearings, which can become a black hole, down which the government's case is lost. These hearings often are a defense free-for-all where the

rules of evidence do not apply and hours can be spent traumatizing and tying the victim in knots in an effort to create impeachable material for trial. It is arguably more traumatic than trial itself. The military appellate courts are highly defense protective. All of this often renders the few victims rights that exist ineffectual.

Often the command, the convening authority, is conflicted. This individual can select members of the courts-martial or unilaterally and even arbitrarily decide to not move forward with one. As the convening authority for courts-martial, the accused's commanding officer controls the decision on whether to send the case to trial, to settle at non-judicial punishment, or to ignore the allegations altogether. These convening authorities are normally military commanders and not attorneys or judges. Though they may receive advice from JAGC officers, it is ultimately the convening authority's sole decision as to whether and how to proceed.

The military insists absolute command discretion is required to maintain good order, discipline, mission readiness, and unit cohesion. Yet, when victims are punished and perpetrators go free and everyone knows it to be the case, trust, the essential ingredient to an effective, functioning military, is undermined. And for more than an estimated a half million service members, this system has failed to provide simple justice. All too often, the go-to-solution for the command is to eliminate the problem by sweeping the offense under the rug and kicking the victim out of the service. Whether it is inexperience, bias, concern for negative career repercussions, desire to quickly get back to the business at hand, or personal guilt the effect is the same.

The commander is also the disposing authority. The quest for a quick resolution or an affinity for the defendant sometimes leads the command to reduce sentences, grant clemency, or overturn convictions.

Recently, this issue was clearly demonstrated, when Lt General Craig Franklin dismissed the case against Lt. Col. Wilkerson, who was convicted of aggravated assault by a jury (chosen by Gen. Franklin). This is yet another and very current example of an action taken by a commander that will have a chilling effect on military judges and prosecutors, potentially effect future cases and inhibit victims from coming forward. A system that elevates a single individual's authority and discretion over the rule of law often precludes justice and hinders it long into the future.

Colonel Wilkerson's victim reached out to Protect Our Defenders and asked that we communicate on her behalf in order to protect her identity.

Quote: "I am an independent contractor working at Aviano Air Base since September 2011. I had been working at Aviano for six months when, in March 2012, Colonel Wilkerson sexually assaulted me. I endured eight months of public humiliation and investigations, interviews by OSI and the prosecution. I was interrogated for several hours by Wilkerson's legal counsel without benefit of legal counsel myself. The defense did everything they could to drag my name and character through the mud, and I still went to work and did my job. My superiors and the prosecution team were supportive, professional, worked very hard and believed in me. After the conviction, I was relieved that I could put it behind me and get my life back, hold my head up that I did the right thing, try to remain under the radar for the remainder of my time here. The actions taken by General Franklin are shocking and disappointing. . Why bother to put the investigators, prosecutors, judge, jury and me through this, if one person can set justice aside with the swipe of a pen. I was sexually assaulted. The memory will remain but it will not define who I am. I want the focus to be on the ethical issue of a single person wielding the power to derail a decision that was made in a methodical, objective manner with the swipe of a pen. I would like to use the result of my experience to change the process of law to separate sexual assault cases from the military justice system

Wilkerson's Victim's statement in its' entirety will be presented at the hearing.

This action by General Franklin, taken according to news reports against his legal adviser's advice, flies in the face of any reasonable definition of an unbiased, objective and fair process for finding justice.

Regarding military policy and culture, Air Force General Welsh recently said, "The number is zero. That's the only acceptable goal. Everybody in our Air Force needs to think that way and every commander, every supervisor who isn't actively engaged in being part of the solution of this is part of the problem."

http://www.stripes.com/news/incoming-air-force-chief-says-eliminating-sexual-assault-a-priority-1.184753

Furthermore, although a minority, commanders are just as capable of bad behavior. Take for example, Brigadier General Jeffrey Sinclair who was recently charged with forcible sodomy among other sex offenses. An attorney, Susan Burke who has represented numerous victims stated: "In the past 27 years, how many cases could Sinclair have been able to shut down? It's very troubling."

Sixty-two percent of women victims report that the perpetrator was a military person of higher rank and 23% are actually in their chain of command

Reforms To Date Have Not Been Enough

2012 brought persistent and unprecedented public attention to this issue. In response to each wave of publicity, the Pentagon churned out a list of supposedly new, but, in fact, mostly recycled and historically ineffective reforms or policies.

While well intentioned, some policies place the burden on potential victims The *Wingman* or *battle buddy* policy, which requires trainees of both genders to be accompanied at all times. The way this policy is structured, it becomes a vehicle for holding victims accountable for having been attacked. Sergeant Smith, who had gone to the gym alone to exercise, was assaulted. She did not report the assault at the time, because according to her complaint, "she knew that the Air Force would blame her, the victim, and reprimand her for not having a "battle buddy" with her at all times." We often hear similar reports from other survivors.

The most publicized reforms announced by the Secretary of Defense last year include: (1) creating a special victims unit, something the Army instituted over a year ago, without a resulting increase in cases brought forward, conviction rates, or improvement in victim treatment; (2) establishing sexual assault databases, which Congress mandated years ago and still have not been instituted; and (3) moving the authority to deal with these cases up the chain of command. Elevating the authority may be of some value, however the Army instituted this practice over a year ago with no discernable effect. And, other branches have also instituted this practice to some degree with minimal results. We know commanders at all levels too often sweep offenses under the rug.

We receive reports from well-intentioned commanders, who are trying to do the right thing, but are being thwarted by uncooperative higher-ranking commanders up their chain of command.

Pentagon's Words Do Not Comport with Actions

Despite Secretary Panetta's often-quoted declaration that there is a policy of "zero tolerance," recent DoD actions challenge that notion.

In December 2011, a federal judge dismissed a class action lawsuit (Cioca v. Rumsfeld) filed by 28 current and former service members for sexual assaults and the ensuing retaliation suffered at the hands of the military command. He agreed with the military defense attorneys' argument that, among other things "the alleged harms are incident to plaintiffs' military service." In other words, DoD argued that sexual assault and rape are occupational hazards.

DoD argued that according to the Feres Doctrine, which is based on a Supreme Court ruling, current US law immunizes military leaders from legal accountability for civil rights abuse. Congress should amend the law to make it clear that service members have the same recourse for abuse of their civil rights for some non-conflict related offenses, at least those regarding sexual harassment and assault, as do those in the civilian justice system.

Last year, Secretary Panetta opined that the core of the problem is a lack of convictions, which he says, "must be improved." Yet in September 2012, the Secretary sent to the President an amendment to 412 – Military Rules of Evidence. The proposed Executive Order, as submitted by the Secretary, would effectively eliminate the Military Rape Shield Rule. As it stands now, MRE 412 is already too broadly construed in favor of the accused. In response, POD sent a letter to the President asking him to reject the proposed amendment. And sent a letter to Secretary Panetta asking that he rescind the request. In January 2013 we learned that the DoD Office of the General Counsel decided to temporarily leave MRE 412 unchanged and notified the White House. However, the amendment is currently under review. This matter should be definitively resolved, through legislation establishing that the rape shield protection in the military will be as strong as it is now in civilian justice system

Many Congressional Reforms are Inconsistently Applied, Unnecessarily Encumbered, or Not Implemented

Even limited reforms passed by Congress to address this crisis, are sometimes not implemented by the DoD or if promulgated, they are inconsistently applied or encumbered with requirements that often render the policies ineffective.

Language contained in the STRONG Act was folded into the 2012 NDAA and passed by Congress requiring (if requested) a victim be given an expedited transfer away from the perpetrator unless a general or flag officer disapproves. Frequently victims are told that their papers are lost, they don't qualify, or are placed on "med-hold" under false pretenses, thereby requiring them to stay put. Protect Our Defenders recently paid for a civilian attorney to handle an appeal of one such victim and after eight months of numerous requests for an expedited transfer, it required action by three members of congress to get this young service member moved.

Restricted reports were legislatively mandated, with the hope that more victims would come forward confidentially to receive needed medical and psychological care. No criminal investigation is initiated and no perpetrator is named. Far too often, confidentiality is not maintained; the victim does not receive adequate support or care and is still subject to retaliation; and of course the unintended

consequence is that perpetrators remain free to repeat the crime. Sixty percent of women and thirty-six percent of men cited confidentiality as a reason not to report, as indicated in the 2010 SAPRO report (page 44) [PDF].

According to victims and their families, victims' confidential communications with psychotherapists and other medical personnel and their medical records are often inappropriately disclosed. The right to legal counsel provided by S1565b passed by Congress December 31, 2011 (NDAA 2012) was intended to provide legal assistance to sexual assault victims to help protect their privacy and privileges in courts-martial proceedings. But, currently S1565b is being misinterpreted and some JAGS are refusing to provide assistance to help victims protect their privacy rights, which civilians are given under HIPPA. The Air Force is attempting to correct this by providing legal assistance to victims to protect their privacy by creating the Special Victims Counsel (SVC) program. Even so, SVC's will only be allowed to speak on their client's behalf, as permitted by the presiding military judge. In addition, the SVC must request the military judge to direct that the SVC be provided informational copies of motions filed where the victim has an interest. In addition, there is push back from other services. It has even been alleged that the law was only intended to assist the victim in writing the rapist out of their will or to break a lease to allow a victim to move away from the rapist. This is clearly not what congress intended. Here again, congress must act unequivocally establishing the privacy rights of victims, which are accorded to civilians under HIPPA.

Reporting, whether restricted or unrestricted, to the unit chain of command is problematic. As one victim told us, "Another one of the biggest reasons for people not reporting, or I should say people wanting to report an assault but the chain of command blackmails them not to, is (the threat of) using something that the victim was doing against them.... I find it hard to understand how a 20 year old should get in trouble for underage drinking because she was raped...."

Impact on Victims

The hardest calls we receive are from recently involuntarily discharged service members, such as a former airman, who was assaulted by someone in their chain of command, who said, "I still cannot grasp what happened to me. When (assaults are) mentioned to commanders, leaders and peers nothing is done about it, your report gets lost and people turn their backs on you. (For ten years,) I was honored to wear the uniform and it's difficult for me to know that this part of me was taken away. I was treated like a second-class citizen."

The processes and procedures are inconsistent and confusing and are often calculated to terrorize and silence the victim, to push them to and even beyond the edge of sanity.

And the Sexual Assault Prevention and Response Office (SAPRO) programs have been defensive and ineffectual. The office has been much criticized for its' prevention campaigns rooted in a wrong headed 1950's paradigm of two people getting together and making bad decisions such as the "Ask Her When She's Sober" campaign or the "Buddy Program," which puts the responsibility squarely on the victim. And former SAPRO Director, General Hertzog's pledge to provide, "more outreach and support for victims," is still undefined and victims and family members tell us calls to SAPRO go unanswered or are referred to a suicide hotline.

Victims know they put their career at risk if they come forward so 86 percent of them do not.

Of the many service members kicked out simply because they were victims of sexual violence, there are too many examples of military separation with errant medical diagnoses, such as personality disorder, or false charges, such as misconduct or moral and professional dereliction. These instances are the result of abuse of authority, pure and simple. It is an easy way out for a command that is conflicted personally or professionally and just wants the problem to go away. Since victim support, investigative, prosecutorial, and judicial personnel are generally responsible to the command structure, there are many ways for them to get the message and make the problem go away.

DoD Inappropriately Diagnoses and Discharges Victims

According to the Veterans Services Clinic at Yale Law School, since 2001, more than 31,000 service members have been discharged, many inappropriately, with a Personality Disorder (PD) diagnosis. In 2006, the Air Force diagnosed Personality Disorders among its population at double the frequency of the civilian population. And an internal DoD review concluded in 2008-09 that 91% were not processed properly[PDF]. After much public attention to the number of inappropriate PD diagnoses, a new diagnosis, Adjustment Disorder, is often taking it's place as a tool to blame, punish and force the discharge of the victim

The impact of a Personality or Adjustment Disorder diagnosis is devastating for our veterans. It follows them for years, as they try to put their lives back together and find new careers. Lives are unnecessarily destroyed and, to compound the injustice, a diagnosis of PD, because by definition it is a pre-existing condition, from prior to joining the service, it often leaves many victims without veterans' benefits.

Furthermore, those service members and veterans who are diagnosed with PTSD due to MST often loose their eligibility for security clearances, effectively limiting their military and future civilian employment opportunities. Yet, those diagnosed with PTSD due to combat are not similarly affected.

Military Sexual Trauma (MST) has a debilitating effect on hundreds of thousands of our nation's veterans, who therefore face severe obstacles as they reenter civilian life. VA clinics have few resources specifically designed for these veterans, particularly for the men, who therefore often must go to women's health clinics for help. The VA reports 40% of those female homeless veterans and 3.2% of male homeless veterans, who are VHA users, suffer from MST.

We often hear from survivors that the retribution, rejection, and then eviction from what they had come to regard as their military family can be even more traumatic than the physical assault

What Happens To The Perpetrators?

Perpetrators know the likelihood is that they will continue their career with little risk of being caught, much less punished. They often become very skilled serial predators, with many victims, as they rise through the ranks. And they become skilled at currying favor with their superiors and colleagues, effectively hiding their dark side. In the 2011 DoD report out of 2,400 reported assaults – only eight percent resulted in courts-martial conviction. And, of the few convicted, many are for lesser charges, such as indecent language or adultery, and some are given light or non-judicial punishment, such as restriction to base or extra duty. The consequence is that serial predators are often permitted to continue their predatory behavior, rise in rank, complete their careers, and leave the service, without being placed on a sex offender database.

Former US Marine Lt. Ariana Klay puts face to this abysmal statistic. According to Klay, a fellow Marine and his friend raped her. One of her perpetrators was among the 191 (the eight percent in the 2011 report) that were "convicted." A three star general reduced his 45-day sentence, for adultery and indecent language, to seven days. The alleged rapist was paid $7,000 a month while incarcerated and no mark was left on his permanent record. The second perpetrator was granted complete immunity to testify against Lt. Klay.

The Military has Effectively Addressed Systemic Challenges in the Past

The military has effectively addressed previous seemingly intractable systemic challenges, which adversely affected its mission readiness and unit cohesion. Racism

within the military was effectively addressed after the passage of transformative legislation, the Civil Rights Act, and a subsequent decision within the military that racism was a fundamental problem affecting our national security and a recognition that it was vital that the culture change. According to news reports, after the passage of the legislation, leaders like Adm. Zumwalt, as Chief of Naval Operations, "created stiff new rules against racial bias and ordered senior officers to uphold them or be dismissed." Racism is still an issue, as is the acceptance of homosexuals in the military, but great strides have been made. Eliminating sexually oriented bullying; discrimination, abuse, and assault would enhance mission readiness and unit cohesion. Fundamental reform is necessary and can be accomplished with the right policies and the will of our military leadership.

Conclusion

The Department of Defense is responsible for failing to effectively govern its personnel. The problems are so long standing and pervasive that, at a minimum, they constitute gross negligence on the part of the leadership and actually reflect, albeit informal, countenancing of the violation of the rights of women in the service and of victims of assault, men and women. Congress, DoD, the Executive, and the Judiciary each have roles to play in righting this horrible situation.

DoD is unjustly punishing these veterans and active duty members, seeking retribution, ruining their careers, and stripping them of their rights to benefits.

In September 1992, according to the *LA Times*, "several lawmakers" in response to the Tailhook scandal "proposed stripping the armed services of their role in probing sexual molestation cases," the patience and deference that congress and the American public have shown the Defense Department, in giving it the opportunity to fix this problem has come at great cost to our service members, veterans and ultimately to our society.

This crisis cannot be effectively addressed incrementally. Regardless of the reason, the chain of command is not making the right calls with these cases. Continued lack of efficacy validates the standing up of an impartial, expert office to determine effective investigation and appropriate adjudication of sexual assault cases.

We agree with former U.S. Army Brigadier General Loree Sutton when she said that it's time to create, "an independent special victims unit completely outside the unit chain of command, under civilian oversight."

[The prepared statement of Ms. Maatz follows:]

ANNEX B: PREPARED STATEMENT BY MS. LISA MAATZ, DIRECTOR OF PUBLIC POLICY AND GOVERNMENT RELATIONS OF THE AMERICAN ASSOCIATION OF UNIVERSITY WOMEN

Written Testimony of

Lisa Maatz, Director of Public Policy and Government Relations
American Association of University Women (AAUW)

United States Senate Armed Services
Subcommittee on Personnel

Hearing on
Sexual Assault in the Military
March 13, 2013

Chairwoman Gillibrand, Ranking Member Graham, and members of the Subcommittee, thank you for the opportunity to submit testimony for this important and timely hearing on sexual assault in the military.

On behalf of the 150,000 members and supporters of the American Association of University Women (AAUW), I am pleased to share AAUW's perspective on the importance of equitable and safe climates for women serving their country in the military. AAUW strongly supports "freedom from violence and fear of violence in homes, schools, workplaces, and communities"[1] which extends to freedom from sexual harassment and violence for women serving in the military.

Since its founding in 1881, AAUW has been breaking through barriers for women and girls. We applauded the military's recent decision to officially open combat positions to women. Our executive director, Linda Hallman, a proud nine-year veteran of the United States Army, recently wrote, "Women want to serve and have been serving in combat. We owe them recognition, equal treatment, and our full support."[2] The decision to open these combat positions to women is a reflection of military leadership recognizing the value of the critical skills women bring to our modern military workforce.

As President Obama remarked, "This milestone reflects the courageous and patriotic service of women through more than two centuries of American history and the indispensable role of women in today's military." However, to maintain a strong military, we must address the problem of sexual harassment and violence all too common among women and men who seek to serve our country.

AAUW strongly supports efforts to protect the rights of military service members and to end the scourge of sexual assault and violence. We believe this issue, which statistics indicate is endemic in the military, must be addressed in a prompt, comprehensive, and sustained manner. Recent surveys of female veterans have found that close to a third were victims of rape or assault while they were serving, which is double the rate of the civilian population.[3]

According to the Pentagon, nearly 3,000 women were sexually assaulted in 2008, yet the Pentagon also estimates that "80% to 90% of sexual assaults go unreported."[4] New research by the Department of Veterans Affairs has found that sexual harassment is at epidemic levels in conflict zones, with half of the women sent to Iraq or Afghanistan reporting being sexually harassed, and nearly one in four reporting sexual assault.[5] This is unacceptable and must change.

AAUW backs many initiatives to address the problem of sexual assault in the military. Among our efforts is the work of our member-supported Legal Advocacy Fund (LAF). The LAF has provided support to service members who allege in lawsuits (*Cioca v. Panetta,*[6] *Klay v. Panetta,*[7] and *Shaw v. Panetta*[8]) that they were sexually assaulted or raped by other service members while serving their country. AAUW is committed to ensuring that these service members have their day in court, despite the Department of Defense's opposition.

AAUW has worked to raise awareness about military sexual assault.[9] We have teamed with the filmmakers of the Oscar-nominated documentary *The Invisible War* to arrange screenings for our 1,000 branches nationwide.[10] Thousands of AAUW members, as well as their communities, have seen this important movie and have engaged in discussions about sexual assault and violence in our nation's military.

In addition, AAUW supports legislation to prevent sexual assault and to punish those who commit sexual assault. We supported Senator Al Franken's (D-MN) legislation to protect defense contractors from sexual assault,[11] and we strongly support Representative Jackie Speier's (D-CA) Sexual Assault Training Oversight and Prevention Act (STOP Act). The STOP Act would fundamentally change how sexual assault is handled in the military by creating an independent body to investigate and prosecute sexual assault cases. This would remove the inherent conflict of interests that exists in a "command and control" environment, where those in command have incentives to not pursue allegations. As Rep. Speier put it:

> "The Defense Department estimates that there were 19,000 sexual assaults in 2010 and that the overwhelming majority of these assaults were never reported. The "why" of these unreported cases isn't answered by more training and statements of zero tolerance."[12]

The need for command structure reform has been publicly demonstrated recently through the decision of a senior Air Force commander to overturn the sexual assault conviction of an Air Force fighter pilot.[13] AAUW is pleased by the attention paid to this decision by Congress and the media, and we support efforts to prevent this type of injustice from occurring in the future.

Through accountability, education, and a robust prosecution system, we can end sexual assault in the military. Such protections are a long time coming, and they are the least we can do to support and respect the women and men around the world advancing this country's interests and safety. Their civil rights are worth no less than anyone else's and must be protected by every means at our disposal.

Thank you for the opportunity to submit testimony. We are pleased to be working with you on this critical issue.

[1] AAUW. (June 2011). *Biennial Action Priorities.* Retrieved March 6, 2013, from www.aauw.org/act/issue_advocacy/principles_priorities.cfm#biennial
[2] AAUW. (March 6, 2013). *End of Combat Ban Will Give Women Recognition They Deserve.* Retrieved March 12, 2013, from www.aauw.org/2013/03/06/end-of-combat-ban-will-give-women-recognition-they-deserve/
[3] *Time.* (March 8, 2010). *Sexual Assaults on Female Soldiers: Don't Ask, Don't Tell.* Accessed March 6, 2013, from www.time.com/time/magazine/article/0,9171,1968110,00.html#ixzz12va7eGYf.
[4] Ibid.
[5] *USA Today.* (December 26, 2012). *VA Finds Sexual Assaults More Common in War Zones.* Retrieved January 8, 2013, from www.usatoday.com/story/news/nation/2012/12/26/va-finds-sexual-assaults-more-common-in-war-zones/1793253/
[6] AAUW. (February 2012). *Cioca et al v. Rumsfeld et al.* Retrieved January 8, 2013, from www.aauw.org/act/laf/cases/Cioca.cfm
[7] AAUW. (March 2012). *Klay et al v. Panetta et al.* Retrieved January 8, 2013, from www.aauw.org/act/laf/cases/Klay.cfm
[8] AAUW. (September 2012). *Mission & Action.* Retrieved January 8, 2013, from www.aauw.org/learn/publications/mission/upload/September2012.html
[9] See AAUW. (February 19, 2013.) *Fighting Sexual Assault in the Military.* Retrieved March 6, 2013, from www.aauw.org/article/fighting-sexual-assault-in-the-military/; AAUW. (January 15, 2013). *Weak Progress on Ending Military Sexual Assault.* Retrieved March 6, 2013, from www.aauw.org/2013/01/15/weak-progress-on-ending-military-sexual-assault/; and AAUW. (January 24, 2012). Making Military Sexual Assault Visible. Retrieved March 6, 2013, from www.aauw.org/2012/01/24/military-sexual-assault/
[10] AAUW. (January 24, 2012). *Making Military Sexual Assault Visible.* Retrieved January 8, 2013, from http://blog-aauw.org/2012/01/24/military-sexual-assault/
[11] AAUW. (January 31, 2011). *AAUW Comments to the Department of Defense on Military Contractor Sexual Assault.* Retrieved January 8, 2013, from www.aauw.org/act/issue_advocacy/actionpages/upload/DoD_SexualAssaultRegs.pdf
[12] Office of U.S. Congresswoman Jackie Speier. (January 2012). *Statement: Congresswoman Speier Responds to DOD Efforts to Curtail Sexual Assault in the Military.* Retrieved January 8, 2013, from http://speier.house.gov/index.php?option=com_content&view=article&id=561:statement-congresswoman-speier-responds-to-dod-efforts-to-curtail-sexual-assault-in-the-military-&catid=1:press-releases&Itemid=14
[13] *The New York Times.* (March 11, 2013). *Hagel to Open Review of Assault Case.* Retrieved March 12, 2013, from www.nytimes.com/2013/03/12/us/politics/hagel-to-open-review-of-sexual-assault-case.html?partner=rss&emc=rss&smid=tw-nytimes&_r=1&

[The prepared statement of Mr. Klay follows:]

ANNEX C: PREPARED STATEMENT BY MR. BEN KLAY

March 13, 2013

Military Sexual Assault, Judicial Independence, and Tort Liability
Statement of Ben Klay for the Senate Armed Services Committee

I served on active duty in the United States Marines from 2003 through 2007, and I was a reservist in 2011. I deployed twice to Iraq, served in combat, and left the Marines as a captain. My wife, Ariana Klay, graduated from the Naval Academy in 2006 and was an officer in the Marines through 2011. She deployed to Iraq as well. Ariana reported a rape at Marine Barracks Washington in 2010, and is currently a plaintiff in the lawsuit *Klay v. Panetta,* which seeks redress from the leadership of the Department of Defense for their role in the Department's problems of sexual harassment, rape, cover-up, and retaliation against those who report.

My statement includes my assessment of the causes and patterns of the U.S. military's mishandling of sexual offenses and my recommendations for what can be done about it. These observations are based on my Marine Corps experience, my experience living through the crimes against my wife described in *Klay v. Panetta,* and the subsequent research I have done so I could understand the causes and corrections for the systemic abuses my wife and I have suffered. I am providing this statement on my own personal behalf, and not on behalf of my current employer or the Marine Corps.

Causes of the U.S. Military's Mishandling of Sexual Offenses

The U.S. military's mishandling of sexual offenses is a symptom of a military justice system without independence from the military's hierarchy, and a military hierarchy that is both immune from tort liability and exceptionally empowered over its people.

Lack of Judicial Independence

Military leaders have an interest in avoiding the exposure of their commands' serious failures, a natural disinclination against believing their commands could commit such failures, a strong interest in destroying the credibility of any who would allege such failures, and no legal training that would make them qualified to properly perform these tasks anyway. Yet it is these same people who are responsible for overseeing and approving the investigations of such failures and for convening courts-martial to adjudicate them. Likewise, all who staff this system are members of the same small hierarchy, and they know full well that they may someday work for or serve with those their pursuit of justice may harm. In military justice, it is in no member of the system's interest to prove serious failures where doing so reflects poorly on themselves, their peers, or their leaders.

The result of this conflict of interest experienced by those who oversee and staff the military justice system are tendencies to cover-up crimes that could reflect poorly on the leadership, and retaliate against those who would allege such crimes. Cover-up is often far less risky than exposing an ugly truth, and retaliation serves the purposes of scaring people away from making serious allegations, and destroying the credibility of those who do make them. Where cover-up is infeasible, the tendency is to assign and isolate blame at the lowest plausible level. Military commanders' lack of legal training and career dependence on preventing blemishes on their

military records add to these tendencies, while commanders' military inclinations to compartmentalize and destroy their enemies add to the ferocity of their retaliation.

Immunity from Tort Liability

At the same time that military commanders' authority over the military justice system gives them an exceptional ability and incentive to commit wrongs, the U.S. Supreme Court's Feres doctrine makes military commanders immune from lawsuits for those wrongs. This deprives service-members of their right for redress for civil wrongs, and deprives military leaders of needed incentives to refrain from dishonesty, cover-up, retaliation, and abuse. In addition, military commanders have other powers that make them especially able to harm those they lead. They can issue orders that carry the force of law, they have power over their troops' society and career, they have special powers for non-judicial punishment, and their troops are obstructed from leaving them to work or even live somewhere else.

This combination of power and immunity from legal accountability for its misuse results in petty tyranny. A commander who is mean or sadistic can abuse. No one can leave his command, so he doesn't have to worry about his abuse's impact on retention. He outranks and can give orders to any who would complain. He can discredit them, scare them, oversee investigation into their complaints, and make their lives miserable. Those who work for the commander will fear that if they come to the complainant's aid they will endanger themselves by crossing their commander. Even a good commander doesn't have much interest in redress for wrongs in cases where acknowledging those wrongs can reflect poorly on him, create divisions in his unit, and damage his command and/or career. Only victims have the needed incentives to seek redress for the wrongs that only affect them, only a lawsuit can allow for such redress, and only an impartial justice system can grant it. This right for redress and judicial independence, held by every U.S. civilian, is denied from those who serve in the U.S. military.

Military commanders do perform unique military responsibilities from which troops may get hurt but for which those troops should not be able to seek redress through a lawsuit. Ordering troops into battle is an example. A military could not effectively fight battles if its commanders faced lawsuits for any injuries in them. There are other command actions, though, which serve no military purpose and thus deserve no immunity. Sexual harassment and assault, which destroy rather than enhance military readiness and have no unique role in military affairs, are prime examples.

Institutionalization

The pathologies from lack of judicial independence and immunity from tort liability are also magnified in the U.S. military through passed on institutional corruption. Commanders learn, and pass on, the lesson that their careers are less likely to be harmed by a mishap if they can cover it up or, where cover-up is impossible, assign blame to the lowest level, than if they thoroughly and impartially expose the facts. Service-members accept the gross failings and inequities of the military justice system both as unspectacular, and as a natural and inevitable part of their governance. Victims learn that reporting a rape has little chance of resulting in justice, and every chance of ending their careers. Predators learn how to use the system to

protect themselves and exploit their victims. And the tactics of retaliation and cover-up, such as diagnosing the victim with a personality disorder and attacking the victim for "collateral misconduct," are also passed on, taught, and normalized. As normalization occurs, abuse at every level of severity becomes more intense and more likely.

Staffing reinforces this too. Professionals who do not accept the failings of the military justice system can be kept away from cases where their integrity would hurt their superiors, or they may become frustrated and leave the service. Lawyers, judges, and investigators who give their superiors the answers they want can be rewarded. Lawyers, judges, and investigators who do the opposite, but in the name of justice, can be punished with social isolation and lackluster reviews, assignments, and career progression. Commanders who retaliate and cover up can advance with spotless records, or even reputations as strict disciplinarians for all the harsh punishment they doled out for misdemeanors as they retaliated and covered up felonies. Those who don't cover up can be stymied by the admission of their commands' scandals. And outwardly, military lawyers are inclined to deliver the wrong message about their justice system. They have built their identities and careers around the military justice system, so they have a personal and professional stake in defending its legitimacy. It has no legitimacy.

Resulting Pattern for the Military's Handling of Sexual Assault

The result of this absence of judicial independence and absence of legal accountability for civil wrongs is the predictable pattern we see for military sexual assault. Sexual harassment feeds on itself and escalates, with no effective check to stop it. The harassment takes its own toll, and also fosters the anxiety, desperation, and situations that would make a potential sexual assault victim more vulnerable; the sense of immunity, power, and conviction that would embolden a rapist; and the attitudes and fears that would make a victim's peers abandon him. Rape occurs, followed by daily contact with the rapist, terror of reporting, severe trauma, isolation, and all the behaviors and vulnerabilities that go with sexual trauma combined with the official and incestuous qualities of U.S. military betrayal.

If a victim reports his command's ugliest failure to his command, he then becomes the command's natural enemy. Beneath official bureaucratic assurances of a thorough hearing he encounters the command's disbelief and a desire for other explanations—that the victim is lying or crazy or both. So retaliation and isolation begin. This is first a knee jerk attempt to show the command is innocent of disgrace by attacking the victim's credibility and scaring him away from his assertions. Once retaliation has begun, though, the interest of the command (which includes all who work for it) in attacking the victim's credibility is deepened. The command must now also attack the victim's credibility in order to justify its own direct criminal actions—the retaliation, scare tactics, complicity, and cover-up that were the command's knee jerk reaction to a rape report. The humiliation and attacks are unpredictable, last over months or years, and increase the chance that the victim will perform an act of desperation or withdrawal that can be used to justify more attacks. Finally, in the unlikely event there is a trial at all, a kangaroo court is held. The commander convenes a court staffed by members of an obedient hierarchy within a closed society, and fed information produced during the command's months or years of retaliation. The rape receives the public, final, and full blessing of the U.S. Government; an emboldened and legally trained rapist is set free after either full vindication or a slap on the

wrist; and the victim's dignity is officially destroyed after the rapist already physically destroyed it. For many victims this will be accompanied with a negative characterization of service on their discharge. Such victims have just lost one career, and that characterization can prevent the pursuit of many others, may preclude veterans' benefits, and will persist as a permanent and official mark of dishonor their entire lives, with the potential to resurface every time they apply for a job.

Needed Reforms

The reforms needed are simple, effective, and universally accepted in civilian justice. The military justice system should have judicial independence, and its commanders should not be immune from tort liability.

Judicial Independence

Judicial independence is needed in military justice to prevent those overseeing or staffing the system from having an interest in the outcome of their proceedings, and thus an incentive and ability to cover-up crimes they want to deny and retaliate against those people they want to silence.

The Congress should put the military's courts in the judicial branch and its investigators, prosecutors, and defense attorneys in the Department of Justice. Commanders could keep lawyers within their chain of command who overtly advise and represent them, but those are the only lawyers who should be internal to the military's hierarchy and rotational career progression. Unique laws, procedures, and considerations for uniquely military issues, such as disobedience to orders or crimes committed in the midst of battle, could also be retained. These unique laws, procedures, and considerations should be subject, however, to the independent judicial system. Commanders could retain special authority for non-judicial punishment for certain crimes and where military need justifies it, but the accused should have the option of adjudication of such punishments by an independent judiciary instead, if desired. There is no military need for commanders to have authority for the investigation and adjudication of felonies their own units are responsible for, least of all when those felonies, like rape, have nothing whatsoever to do with military service and are a stain on the commander's reputation. America's allies have recognized this, and the international trend in military justice has been away from commander-convened courts-martial for individual cases, towards systems more like general civilian courts in peace and war.[1]

Absent comprehensive reform such as above, any reform that creates judicial independence would be beneficial. In the current Congress, the most promising bill proposing reform that adds independence to military justice is H.R. 3435, the *Sexual Assault Training Oversight and Prevention Act,* which takes the handling of military sexual assault out of the chain of command.

Tort Liability

[1] Dahl, Arne Willy, "International Trends in Military Justice," Presentation at the Global Military Appellate Seminar at Yale Law School, April 1-2, 2011, p. 2.

Military commanders should not be immune from lawsuits for acts that serve no military purpose.

The Congress or the Supreme Court should amend the Feres doctrine, so that military commanders are liable for civil wrongs that have nothing to do with military affairs. There is a military value in protecting commanders from lawsuits for acts that cause risk of harm, yet serve a unique military purpose, such as ordering soldiers into battle. There is no military value, however, in protecting commanders from liability for participating in, covering up, or condoning abuse that serves no military purpose, such as sexual harassment and assault.

Conclusion

These reforms, together, provide the impartial checks needed to implement and enforce policies against military sexual assault. Past reforms pertaining to this crime have failed because the commanders implementing the reforms have had the power and incentives to believe and show that the problem does not even exist, at least in their own commands. An impartial justice system and legal accountability for civil wrongs removes the conflict of interest and lack of external accountability at the root of the military's mishandling of sexual assault, thereby enabling justice and humane treatment after the crime, and preventing it as well. Recourse to impartial justice would encourage more victims to report the crime, end the military's re-victimization of survivors, put predators in jail so they can do no more harm, deter would-be predators, and incentivize commands to set a climate where all members are treated with dignity and respect.

It is the Congress' responsibility to fix this. It is the Congress' responsibility "to make rules for the government and regulation of the land and naval forces," and it is the Congress' fault that that system of governance and regulation, in the United States Armed Forces, is inherently biased, unjust, and unaccountable. We may criticize military commanders for their mishandling of sexual assault, but we must also recognize that they are acting according to the incentives of the legal system that the Congress has established for them. To remedy that, the Congress must make military justice independent and impartial, and amend the Feres doctrine so commanders are not immune from accountability for civil wrongs that serve no military purpose.

[The prepared statement of a victim from the Aviano Air Base follows:]

ANNEX D: PREPARED STATEMENT BY AVIANO AIR BASE SEXUAL ASSAULT VICTIM

Embargoed until March 13, 2013

Statement from Aviano Air Base Sexual Assault Victim for United States Senate Committee on Armed Services Hearing on Sexual Assaults in the Military

Media Contact: Brian Purchia, 202-253-4330, brian@protectourdefenders.com

Last month, Lieutenant General Craig Franklin set aside the sexual assault conviction of Lt. Col James Wilkerson who had been sentenced to a year in prison and dismissed from the armed forces by a jury of his peers. Franklin provided no explanation of his actions.

The military estimates that there are 19,000 military rapes and sexual assaults a year, but only 3,200 victims reported the attacks and out of those fewer than 191 cases resulted in court martial conviction ("conviction" means any charge in a sexual assault case including for example adultery with 7 days in the brig). According to DoD's own data, 47% of service members are too afraid to report their assaults, because of what happens to those who do.

The victim reached out to the advocacy organization, Protect Our Defenders looking for support after the verdict in her case was set aside.

Background:

Recently, a sexual assault case against Lt. Col. James Wilkerson, USAF, went to trial at Aviano Air Base, Italy. In it, a jury found Lt. Col. Wilkerson guilty of aggravated sexual assault and sentenced him to one-year of confinement, total forfeitures of pay, and a dismissal from the Air Force. After trial, the jury's recommendation went to Lt. Gen. Craig Franklin, the GCMCA, for action. Lt. Gen. Franklin (against the recommendation of his legal advisor) granted total clemency and disapproved the criminal conviction and the sentence. Lt. Col. Wilkerson remains in the Air Force today. Currently, the victim in this case has requested to preserve her privacy, but desires to make her story known. She has drafted the following statement:

Victim's Statement:

I am an independent contractor working at Aviano Air Base (on an annually renewable 3-year contract) since September 2011. Currently, the office in which I work is rated number one in the Air Force in regard to completion of mandated assessments – a significant improvement from 62% to 98% completion rate. In addition, I was a volunteer for base projects such as Relay for Life, Ecological Day and the Fall Bazaar.

Prior to Aviano, I worked in the civilian sector in my chosen field. I am a college graduate with a degree in history. I also obtained a teaching credential and taught elementary school for 6 years. I have 13 years experience in my current field.

I have a small circle of friends here at Aviano. I had been working at Aviano for six months, when, in March 2012, Colonel Wilkerson sexually assaulted me.

It has been an incredibly hard journey back to being myself. I am still working on that. I don't know whether it is because of the assault or the legal process or both.

During this entire ordeal, I kept to myself. I was ashamed and embarrassed. I was already a little introverted. This process has made me even more so. I stay home most weekends. I don't want to run into Wilkerson's friends. I work with wives of pilots who are close to Wilkerson and dread coming into work.

I initially filed a restricted complaint because I wasn't sure what I wanted to do. Days later I was told I would either need to drop it or file an unrestricted report. It was explained to me that the usual process was the case is initially sent to the Vice Wing Commander, who was coincidentally a best friend of the accused and also at the party that night. I was shocked but I had to make a decision. I decided to do the right thing and report.

I endured eight months of public humiliation and investigations, interviews by OSI, the prosecution and the defense. And an Article 32 hearing where I was interrogated for several hours by Wilkerson's legal counsel without benefit of legal counsel myself. The defense did everything they could to drag my name and character through the mud, and I still went to work and did my job.

My superiors and the prosecution team were supportive, professional and worked very hard. This team stood by me and believed in me and pursued the case in the face of unrelenting personal and professional attacks. I can see why many in their position would not want to risk their careers by standing up for a victim. But these prosecutors put it all on the line.

What's been especially hard for me is allowing Wilkerson and his friends to see me vulnerable, because they make fun of it, and they haven't earned the privilege of knowing me for who I am. It was incredibly hard to say to a packed courtroom, filled with all of his friends and their wives how I had changed, how I wasn't myself and how numb I felt ever since the assault. I remember crying, and hearing one of the guys in a flight suit snort when I was testifying about how I will never be the same

Finally the trial was over. After the conviction, I was relieved that I could put it behind me and get my life back, hold my head up that I did the right thing, try to remain under the radar for the remainder of my time here.

Then the letters of clemency came in. The clemency process was a travesty. The vast majority of statements were personal attacks on the judge, the prosecutors and me. A few were actual clemency letters; stating their relationship with Wilkerson, please

think of his family, etc. Many of them, especially the ones from the pilot community and their wives, wrote caustic, vitriolic letters alleging that the judicial system is corrupt and that the trial was not legitimate. They claimed the prosecutors were bullies and unethical; the panel was biased because they weren't pilots; the judge made bad decisions; I am a slut, a liar, unprofessional. The ability for officers of the United States Air Force to lie with such abandon and such disregard for the truth has been one of the most shocking things about this entire experience.

The actions taken by General Franklin are appalling and disappointing. It was such a poor decision. It was the wrong decision. It's the old boy network thing to do. Why bother to put the investigators, prosecutors, judge, jury and me through this if one person can set justice aside with the swipe of a pen.

All this work – to have it thrown away – why don't we just write a letter and send it to the Commander who makes a unilateral decision? I am aware that General Franklin and Lt Col Wilkerson flew together previously. They are a part of a tiny community of pilots who are very loyal to one another, and they have numerous mutual friends and acquaintances. I can understand it was a difficult decision for General Franklin when he was being lobbied so hard by so many fellow generals and colonels who are also a part of that same community. But it was the wrong decision. I know what happened.

I am almost 50 years old. I'm pretty together but if I went through all this, what's in store for a young airman? I did the right thing. I was sexually assaulted, and I reported it. How could a young woman who just joined the Air Force go through all this and survive? Gen Franklin's decision sent a message to every single victim of sexual assault out there that it's probably not worth it to go through what I had to go through.

I was sexually assaulted. The memory will remain forever, but it will not define who I am.

I want the focus to be on the ethical issue of a single biased person wielding the power to derail a decision that was made in a methodical, objective manner with the swipe of a pen. I would like to use the result of my experience to change the process of law to separate sexual assault cases from the military justice system. This is the real focus now. Not my assault, because General Franklin has made sure that can't be changed. He has made sure that Col Wilkerson is free to do this again. What really scares me also is that Wilkerson could make Colonel now, and will be issued a position of leadership. Really? Leadership?

Sincerely,

[name]

P.S. I have asked Protect Our Defenders to communicate on my behalf in order to protect my identity. A number of family, friends and my adult child are unaware of what happened to me.

[The prepared statement of The American Civil Liberties Union follows:]

ANNEX E: Prepared Statement by The American Civil Liberties Union

WRITTEN STATEMENT OF
THE AMERICAN CIVIL LIBERTIES UNION

For a Hearing on

"Sexual Assault in the Military"

Submitted to the Subcommittee on Personnel of the U.S. Senate Committee on Armed Services

March 13, 2013

ACLU Washington Legislative Office
Laura W. Murphy, Director
Vania Leveille, Senior Legislative Counsel

On behalf of the American Civil Liberties Union ("ACLU") and its more than a half million members, countless additional supporters and activists, and 53 affiliates nationwide, we commend the Senate Armed Services Personnel Subcommittee for its leadership in convening this hearing to examine the continuing problem of sexual assault in our armed forces.

For decades, the ACLU has worked not only to end discriminatory treatment within our military,[1] but also to prevent and respond to gender-based violence and harassment in the workplace. The ACLU also works to hold governments, employers and other institutional actors accountable so as to ensure that women and men can lead lives free from violence.

Over the last several years, Congress and the Department of Defense have grappled with the scourge of sexual harassment, sexual assault and rape within the military. Although a variety of proposals have been implemented and some progress has been made to prevent and respond to sexual assault, sexual harassment and rape in the military, the problem is deeply-rooted and persists. More than 3,100 reports of sexual assault were made in FY 2011[2], but we know that the incidence of sexual assault is significantly underreported. The Department estimated that more than 19,000 incidents of sexual assault occurred in 2010 alone.[3] While such statistics alone are alarming, the problem of military sexual assault is compounded by the perception and the reality of a military justice system that fails to mete out actual justice when sexual assault, harassment or rape is alleged. Adding insult to injury, service members who leave the service find that the trauma they experienced as a result of sexual assault is not adequately recognized by the Department of Veterans Affairs. Congress must address these issues.

1. Re-examining the Military Justice System

A. Command Authority and Discretion

There has been renewed attention on the adequacy and effectiveness of the military justice system, as outlined in the Uniform Code of Military Justice, in achieving real justice for service members who allege sexual assault, sexual harassment and rape.[4] The statistics reported by the Pentagon's Sexual Assault Prevention and Response Office— on prosecutions, punishments, and service members' unwillingness to report criminal activity— suggest that heightened scrutiny is appropriate and necessary.[5] Indeed, Congress recently instructed the Department of Defense to conduct a review

[1] Most recently, In November 2012, the ACLU initiated a lawsuit, on behalf of the Service Women Action Network and other plaintiffs, against the Department of Defense challenging the ground combat exclusion. Over the years, we have also successfully challenged military recruitment standards and military academy admissions policies that discriminated against women; fought for servicewomen to receive the same military benefits as their male counterparts; and defended the rights of pregnant servicewomen; and advocated for servicewomen's access to reproductive health care.

[2] DEPARTMENT OF DEFENSE, ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY: FISCAL YEAR 2011, 33 (2012), *available at* http://www.sapr.mil/media/pdf/reports/Department_of_Defense_Fiscal_Year_2011_Annual_Report_on_Sexual_Assault_in_the_Military.pdf.

[3] DEPARTMENT OF DEFENSE, ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY: FISCAL YEAR 2010, 90 (2011), *available at* http://www.sapr.mil/media/pdf/reports/DoD_Fiscal_Year_2010_Annual_Report_on_Sexual_Assault_in_the_Military.pdf.

[4] *See, e.g.*, U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-579, MILITARY JUSTICE: OVERSIGHT AND BETTER COLLABORATION NEEDED FOR SEXUAL ASSAULT INVESTIGATIONS AND ADJUDICATIONS (2011), *available at* http://www.gao.gov/new.items/d11579.pdf; Editorial, *Sexual Assaults and Military Justice*, N.Y. TIMES, March 12, 2013, at A24; Nancy Montgomery, *Hagel orders review of UCMJ after Wilkerson sex assault case*, STARS & STRIPES, March 11, 2013.

[5] In 2011, 3,192 sexual assaults were reported in the military. Of these reports, 1,518 were reviewed for possible disciplinary action, with only 240 cases being preferred to courts-martial by commanders. From these cases, 191 subjects were convicted. In 47 cases,

and assessment of the systems used to investigate, prosecute and adjudicate crimes involving sexual assault and to develop recommendations for improving the systems.[6]

One element of the military justice system that Congress must probe is the scope of command authority and discretion. This central feature of military law derives from the oft-stated paramount need for discipline and order in the armed forces.[7] Under the military system, the commander controls many of the levers of justice and has broad power and discretion to prosecute and dispose of allegations and findings of criminal activity. Such power, it is asserted, is necessary to maintain unit cohesion and operational readiness, the core elements in combat capability.

While command authority may well be a bedrock principle of military justice, it is also clear that the breadth of the problem of military sexual assault, the unwillingness of service members to engage commanders when assaults have taken place (at times because the commander is the perpetrator), and the perceived and actual misadministration of justice erodes confidence in the chain of command, undermines unit cohesion and readiness, and damages the military justice system. Instead, Congress should consider establishing an independent prosecutorial authority outside the chain of command. Doing so could help both the victim and the accused achieve justice and restore the notion of fundamental fairness and legitimacy that is essential to sustaining any justice system.

B. Access to Civil Remedies

Congress should act so as to allow service members to seek redress in civil courts. In the civilian world, victims of sexual assault in the workplace have access to two different systems: the criminal justice system, which centers on punishing the perpetrator and the civil justice system, which focuses on protecting and compensating the victim and holding the employer accountable for its failures to address and prevent violence in the workplace. Beyond the problems with the military justice system, service members who experience sexual assault face unique barriers to civil justice.

Service members have virtually none of the civil remedies that are available to civilians whose employers are aware of sexual assault or harassment on the job. The U.S. Supreme Court decision, *Feres v. United States*,[8] shields the federal government from suits by service members when they are injured in the performance of their duties. The Court later ruled that constitutional claims are similarly foreclosed under *Feres*,[9] leading some lower courts to dismiss constitutional lawsuits brought against the government by service members who were sexually assaulted.[10]

The Supreme Court, however, has not ruled on whether service members may bring claims under Title VII of the Civil Rights Act of 1964,[11] one of the primary civil rights laws governing

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commanders declined to take any action. DEPARTMENT OF DEFENSE, ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY: FISCAL YEAR 2011, 42 (2012).

[6] *See* National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, § 576, 126 Stat. 1632, 1758-62 (2013).

[7] *See* DEPARTMENT OF DEFENSE, MANUAL FOR COURTS-MARTIAL UNITED STATES, I-1 (2012) ("The purpose of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States.").

[8] 340 U.S. 135 (1950) (no claim under Federal Tort Claims Act).

[9] Chappell v. Wallace, 462 U.S. 296 (1983) (barring servicemember's claim of race discrimination in evaluations and promotion).

[10] *See* Cioca v. Rumsfeld, No. 1:11-cv-00151 (E.D. Va. Dec. 9, 2011); Klay v. Panetta, No. 12-0350(ABJ) (D.D.C. Feb. 7, 2013).

[11] Title VI prohibits employment discrimination on the basis of race, color, religion, sex, or national origin. 42 U.S.C. 2000e et seq.

employment discrimination. Yet, the Equal Employment Opportunity Commission does not accept complaints from service members, and lower courts have held that *Feres* also forecloses Title VII claims.[12] This is especially unjust because civilian employees of the military, who often work alongside service members, have the same right as other federal employees to pursue Title VII remedies for sexual harassment and violence.[13]

Title VII is the key federal law addressing the rights of employees who experience sexual harassment and violence, and its protections have special salience in the military sexual assault context. First, Title VII holds employers appropriately responsible for hostile work environments. If an employee who has been sexually assaulted or harassed on the job by a supervisor is fired or some other adverse action is taken against her, the employer may be found liable.[14] If there is no adverse employment action against the employee victim, the employer can still be held liable for the hostile work environment, but can avoid liability by showing that it exercised reasonable care to prevent and correct the situation and that the employee failed to take advantage of protective measures available to her.[15] Employer accountability is particularly important in the military context, where commanders have broad authority to determine the fate of both the victim and perpetrator. Without a civil remedy, the victim has no legal means outside the chain of command to ensure she receives protection, or that policies and practices are changed within her unit.

Second, Title VII prohibits retaliation against employees who bring forward claims of discrimination. It is well-documented that military sexual assault victims often remain silent about violence due to fear that they will be further harassed or targeted if they report the crime. Anti-retaliation protection would enable more victims to step forward without fear of retribution.

The Court's precedents foreclosing tort and constitutional claims brought by service members has rested on deference to the military in its personnel decisions.[16] For a typical discrimination claim, such as a failure to promote, such deference may well be warranted, as the command is often best positioned to determine whether one service member is more qualified than others for a promotion, or whether one person experienced discrimination based on membership in a protected class. In most types of discrimination cases, Title VII involves an analysis of employer's justifications, by allowing an employer to provide a legitimate, non-discriminatory reason for its action once an employee makes out a prima facie case of discrimination. If the employer meets its burden, the employee must establish that the proffered reason is pretext for discrimination.[17] It is reasonable that courts are reluctant to assess the military's justifications, as well as whether such reasons are pre-textual, when the military has greater expertise in its staffing needs. In the sexual harassment context, however, courts have recognized that an employer's justifications for the hostile work environment are irrelevant. The analysis instead focuses on the inherent inappropriateness of sexual harassment.[18] Sexual violence and harassment have nothing to do with job responsibilities. Thus, courts have greater ability to fairly assess Title VII claims brought by service members when they

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[12] *See, e.g.*, Fisher v. Peters, 249 F.3d 433 (6th Cir. 2001); Urie v. Roche, 209 F. Supp. 2d 412 (D.N.J. 2002).
[13] *See, e.g.*, Yamaguchi v. U.S. Dept. of the Air Force, 109 F.3d 1475, 1484 (9th Cir. 1997) (finding that civilian Air Force employee's Title VII sexual harassment claim was justiciable).
[14] Faragher v. City of Boca Raton, 524 U.S. 775 (1998); Burlington Industries v. Ellerth, 524 U.S. 742 (1998).
[15] *Id.*
[16] *See Chappell*, 462 U.S. 296; *Feres*, 340 U.S. 135.
[17] McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).
[18] *Burlington Indus.*, 524 U.S. 742.

are based on sexual harassment and violence and can bring deep expertise on the issue when considering claims.

For these reasons, we urge Congress to clarify that Title VII protections are available to service members who are sexually assaulted. Providing access to civil remedies in these instances can play a critical role in holding institutions, like the military, accountable and to transform the policies and practices that have allowed sexual assault to be committed far too often within the ranks.

2. Disability Claims for Sexual Assaulted-related PTSD Claims

Veterans who were sexually assaulted during their service in our armed forces, and who now seek disability benefits for conditions such as post-traumatic stress disorder (PTSD) and depression, face enormous barriers. Data obtained through a FOIA lawsuit, filed in 2010 by the ACLU and the Service Women's Action Network against the Department of Veterans Affairs ("VA") and the Department of Defense, shows that only 32 percent of PTSD disability claims based on military sexual trauma were approved by the Veterans Benefits Administration, compared to an approval rate of 54 percent of all other PTSD claims from 2008-2010. Moreover, of those sexual assault survivors who were approved for benefits, women were more likely to receive a lower disability rating than men, therefore qualifying for less compensation.

The Department of Veterans Affairs' regulations explicitly treat veterans who suffer from PTSD based on sexual trauma differently from those whose PTSD arose from combat. Even when a veteran can establish a diagnosis of PTSD and his or her mental health provider connects the PTSD to sexual assault during service, the VA requires additional evidence, such as law enforcement reports, that generally does not exist. As the Department of Defense itself acknowledges, the vast majority of service members who are raped do not report the assault, because of the retaliation they are likely to face.

The harsh treatment of VA disability claims filed by sexual assault survivors is especially disturbing given that veterans cannot access other remedies available to civilian survivors. Civilians who are sexually assaulted on the job can file civil claims against their employer under state or federal laws like Title VII, receive compensation for their injuries, and seek to change the way their employer responds to sexual violence. As discussed above, service members, however, are barred from pursuing these remedies.

The ACLU supports the Ruth Moore Act of 2013 (S. 294/H.R. 671), which would remove the current barriers to disability compensation. Congress should act quickly to enact this legislation.

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Should you have any questions, please don't hesitate to contact Senior Legislative Counsel Vania Leveille at 202-715-0806 or vleveille@dcaclu.org.

[The prepared statement of The American Legion Veterans Affairs and Rehabilitation Commission follows:]

ANNEX F: PREPARED STATEMENT BY THE AMERICAN LEGION VETERANS AFFAIRS AND REHABILITATION COMMISSION

STATEMENT FOR THE RECORD OF
THE AMERICAN LEGION
VETERANS AFFAIRS AND REHABILITATION COMMISSION

BEFORE THE

UNITED STATES SENATE
COMMITTEE ON ARMED SERVICES
SUBCOMMITEE ON PERSONNEL

ON

"OVERSIGHT: SEXUAL ASSAULTS IN THE MILITARY"

MARCH 13, 2013

STATEMENT FOR THE RECORD OF
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Disabilities related to Military Sexual Trauma (MST) are the only disabilities in which American veterans are hampered in their ability gain treatment and compensation because their government destroys the very records needed to help them prove the disability occurred in service. The American Legion believes that MST undermines is a terrible crime committed against the victims, and furthermore undermines the good order and discipline essential to effectively fielding a cohesive fighting force in defense of this nation. If the military is to move forward in effectively combating MST, the victims must be taken care of, and that involves some change to how the records of these incidents are dealt with.

Chairman Gillibrand, Ranking Member Graham, on behalf of our National Commander James E. Koutz I would like to thank you for allowing us to voice the concerns of the 2.4 million members of the nation's largest wartime veterans' service organization. Military Sexual Trauma has devastating effects on as many as 19,000 service members a year. Often the wounds inflicted in these traumatic events can take a lifetime to heal. The wounds are compounded by the manner in which the veterans are required to relive the shame and degradation through successive investigations. We cannot leave these wounded service members behind.

Although there has been progress recently in pressuring the military branches to retain records related to MST for longer periods of time, this is still an obstacle no other veterans face when seeking treatment and compensation for their injuries. Records related to MST are still routinely destroyed after as little as three to five years in practice. While much of the attention on this issue focuses on what the impact of these records is during active service, many fail to see the long term impact on those who later in life seek help for medical conditions such as Posttraumatic Stress Disorder (PTSD) or other medical concerned related to their in service trauma.

American Legion service officers across the country regularly work with veterans who suffered from sexual trauma in service. Because of the way the Department of Veterans Affairs (VA) claims system is set up, a veteran needs to show evidence that a current condition is related to an event or condition that developed in service. Generally, for most disorders, a veteran's medical

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records from service suffice to prove that the claimed condition occurred in service. However, veterans suffering from conditions related to MST have a much more difficult road to follow.

Even when the veteran reported the incident, the fact that records related to MST are destroyed often means VA will be unable to corroborate a veteran's story, and therefore deny service connection for the conditions related to the assault. Without service connection, there can be no compensation and no medical treatment for the residuals of these terrible events. The American Legion urges Congress to direct the military to protect these records in perpetuity so veterans can move forward with healing even years later, as would be the case with any other disorder or illness.

Sadly, some estimates by the military claim as much as 80-90% of sexual assaults in the military are never even reported[1]. With these incidents, it can be almost impossible to prove service connection under the current system. The law has previously allowed, in the case of combat related PTSD, for VA to waive any requirement of direct evidence of the event when there is a diagnosis of PTSD related to their combat experience. This was made in recognition of the notoriously poor record keeping in the military in the midst of combat.

The American Legion argues this must be extended as well to victims of MST. Veterans whose diagnosed PTSD is related to sexual trauma in the military should be entitled to the same recognition of systemically poor record keeping. The Ruth Moore Act (S. 294, HR 671) would provide exactly this equity in evidentiary burden, and The American Legion supports passage of this key piece of legislation.

Furthermore, The American Legion urges this committee to pressure the Department of Defense (DoD) to improve its investigation and prosecution of reported cases of MST to be on par with the civilian system and for DoD to examine the underreporting of MST and to permanently maintain records of reported MST allegations, thereby expanding victim's access to documented evidence which is necessary for future Department of Veterans Affairs (VA) claims[2]. The DoD could also improve its MST training for active duty service members by including explicit information about what information is required to file a claim with VA for conditions related to trauma incurred in service. While the above provisions will be helpful to veterans who suffer from PTSD related to MST, other residual conditions such as sexually transmitted diseases and disorders of the reproductive organs have no such evidentiary protections in place and are often overlooked.

While efforts are being made by DoD to increase awareness, the military is still far from an ideal environment. The current hybrid system of Restricted and Unrestricted reports on MST incidents was meant to make it easier for service members to report crimes without fear for the impact within their chain of command. However, in practice the system is proving problematic according to American Legion experiences with service members. Victims of sexual assault who choose to report it are allowed to protect their report from following normal reporting channels to chain of command and police reports and investigations. Unrestricted reports of sexual assault which are investigated often result in no corrective action as victims choose not to participate in

[1] "Sexual Assaults on Female Soldiers: Don't Ask, Don't Tell" March 8, 2010 Time Magazine
[2] American Legion Resolution No. 295: "Military Sexual Trauma" August 2012

[Questions for the record with answers supplied follow:]

QUESTIONS SUBMITTED BY SENATOR JEANNE SHAHEEN

CAREER IMPACT OF SEXUAL ASSAULT

1. Senator SHAHEEN. General Patton, as testified by the Panel I witnesses from this hearing and as captured in the film, The Invisible War, military sexual assault influenced the victims' decision to leave the military. In order to assess the overall career impact, do you have metrics that capture the number of sexual assault victims who remain in the military versus those who choose to discontinue service because of military sexual assault?

General PATTON. No, we do not have any metrics that capture the number of sexual assault victims who remain in the military versus those who choose to discontinue service because of military sexual assault. The discharge process and associated documentation does not identify or code a person's sexual assault history. In addition, since most victims don't report the sexual assault, the Department would not have records on whether separating servicemembers had experienced a sexual assault while serving. Therefore, this is not a question that can be easily answered with a records review.

According to the Department's Workplace and Gender Relations Survey (2012) of the active Force, data suggests that the experience of sexual assault may impact a person's plans to stay in the military:

- In fiscal year 2012, of the female active duty population who did not experience unwanted sexual contact (USC)[1] in the past year, 61 percent indicated they were likely to stay in the military. This is a higher percentage than those women who had experienced USC (52 percent).
- In addition, 36 percent of female active duty members who had experienced USC reported they were unlikely to stay in the military. This is a higher percentage than those women who had not experienced USC in the last 12 months (26 percent).
- No such differences were noted between men who experienced USC in the past year and men who had not experienced USC.

This survey item is provided to all respondents to answer, without identifying "why" they are or are not likely to stay in the military. Please note that this survey item does not specifically ask respondents if their experience of USC impacts their plans to make a career. The survey also does not measure whether the person actually stays in the military or not.

2. Senator SHAHEEN. General Patton, victims of sexual assault can request an expedited transfer, which allows them to be moved from the command they were assigned at the time of the incident. It is my understanding that the victim's decision to move is at his/her own risk because the military makes no guarantee about the possible career impact that move might have. Therefore; if someone elects to move from an assignment, especially if it happened to be one critical for career progression, then this victim could lose out on future career opportunities. Is this your understanding? If so, are there plans in place to ensure that the careers of sexual assault victims are protected should the request for expedited transfer cause a disruption to their normal career pipeline?

General PATTON. The expedited transfer policy is in place for sexual assault victims/survivors who file an unrestricted report. These victims/survivors may request a transfer if they no longer feel comfortable in their unit or environment. The Department of Defense Instruction (DODI) 6495.02 (dated March 28, 2013) mandates that every military department shall make every reasonable effort to minimize disruption to the normal career progression of a victim of sexual assault. The DODI also requires commanders to directly counsel the servicemember to ensure he or she is fully informed regarding reasonable foreseeable career impact. We see this counseling as an important step in the process which is why it is spelled out in the DODI.

3. Senator SHAHEEN. General Patton, as noted in your testimony, the Sexual Assault Response Coordinator (SARC) and Sexual Assault Prevention Response Victim Advocate (SAPR VA) are readily available to assist victims of sexual assault to ensure the member's health, well-being, and privacy once the assault occurs; but it is

[1] Unwanted sexual contact is the survey term for the contact sexual crimes between adults prohibited by military law, ranging from Rape to Abusive Sexual Contact (e.g. crimes such as groping).

less clear as to what happens if the member requires long-term care or is unable to continue in the performance of his/her current duties due to military sexual trauma. Is the member given the opportunity to change career paths to one that he/she can perform given the new set of circumstances brought on by this traumatic experience?

General PATTON. Military sexual trauma is a term used by the Department of Veterans Affairs that covers both sexual harassment and sexual assault. Within the Department of Defense (DOD), we do not use the inclusive term and issues of sexual harassment are addressed through the Equal Opportunity Program with sexual assault program falling under my authority. Each is a separate and unique program; I can address the Department's sexual assault program.

Long-term care is addressed for any wound, injury or illness under the DOD's Recovery Coordination Program (RCP). This program is governed by DODI 1300.24, dated December 1, 2009. Victims/Survivors of sexual assault who experience Post-Traumatic Stress Disorder may self-refer to RCP or be referred by their command, medical care provider, Military Department Wounded Warrior program, or the Wounded Warrior Resource Center.

Whether a servicemember is provided the opportunity to change career paths depends on a number of factors to include the abilities, limitations and aptitudes of the servicemember, taken together with the needs of the Service and specific job and occupational specialty requirements. Accordingly, retraining and reclassification may be an option and remains an individual Service function done in concert with individual servicemembers.

SEXUAL ASSAULT TRAINING

4. Senator SHAHEEN. General Patton, your testimony highlights the numerous training initiatives undertaken in recent years. How do you evaluate the overall effectiveness of this training to determine if what is being done is truly the best course of action in changing military culture?

General PATTON. DOD uses two surveys to measure the effectiveness of Sexual Assault Prevention and Response training. The Defense Manpower Data Center surveys the active duty workforce utilizing the Workplace and Gender Relations Survey of Active Duty Members and the Defense Equal Opportunity Management Institute surveys the active duty work force utilizing the Defense Equal Opportunity Climate Survey (DEOCS). The Air Force utilizes its specific Unit Climate Assessment survey.

The results of the surveys are assessed to help determine the effectiveness of training and prevention programs. For example, the recent DEOCS and Air Force Unit Climate Assessment surveys indicate growing servicemember propensity to intervene in situations at risk for sexual assault, which we attribute, in part, to focused sexual assault prevention training programs.

Additionally, DOD has initiated a variety of measures to standardize and enhance the training provided to prevent and respond to sexual assault across the Services. The Department has assessed the existing training and collaborated with the Services to establish standardized learning objectives to ensure consistent training outcomes. The focus of training enhancement has been to improve its effectiveness through greater emphasis on small group discussion and interaction, analysis of scenarios, and role-playing exercises. Each Service has established methods to gather data on the effectiveness of this training, and ongoing collaboration with the Department's SAPR Office will ensure best practices become common practices across the Services.

On September 25, 2012, the Secretary of Defense mandated standardized Sexual Assault Prevention and Response training for all Pre-Command and Senior Enlisted Leaders, as well as a standardized assessment of the effectiveness of the training. Over the last 6 months DOD SAPRO, in conjunction with the Services, developed standardized core competencies, learning objectives and methods for assessing the training. As of April 1, 2013, all of the Services have implemented these improved and standardized learning objectives for all Pre-Command and Senior Enlisted Leader training courses.

Of note, the Department has focused significant effort in the assessment, standardization and enhancement of the training provided to sexual assault responders who provide care to victims. With the passage of Public Law 112–81, the National Defense Authorization Act (NDAA) for Fiscal Year 2012, SARCs are required to complete a certification program, including a pre-requisite 40-hour training course, 32 hours of continuing education, and establishment and adherence to an ethical charter, the DOD Standards for Victim Assistance Services. The Department has

partnered with National Organization for Victim Assistance to certify our advocates while also assisting in ensuring the training provided meets national standards.

DISCHARGING SEX OFFENDERS

5. Senator SHAHEEN. General Chipman, General Harding, General Ary, and Admiral Kenney, Service Women's Action Network, noted that 1 in 3 convicted sex offenders remain in the military and that of the Services only the Navy discharges all convicted sex offenders. What is your plan to prevent the continued service of those who commit these violent crimes?

General CHIPMAN. The statistic cited by SWAN is incorrect and is not supported by Army data. In calendar year 2012, there were 192 soldiers convicted of an offense that required registration as a sex offender. Those offenses include all penetrative and contact offenses under Article 120, possession of child pornography, and indecent assault. Of those 192 soldiers convicted, 174 (91 percent) received a punitive discharge as part of their approved sentence. The remaining 18 soldiers were subject to Army Regulation 635–200 that requires commanders to process soldiers for separation who were convicted of a sexually violent offense but did not receive a punitive discharge as part of their sentence. This regulation, in place since 2005, provides for a more comprehensive requirement than the NDAA for Fiscal Year 2013, which required initiation of separation after conviction on the penetrative offenses (rape, sexual assault, sodomy) only. An Army officer, working as an interagency fellow at the U.S. Marshal Service National Sex Offender Targeting Center, is responsible for ensuring that soldiers released from military confinement facilities or administratively separated from the Army comply with state registration requirements. The Army is committed to identifying, tracking, and separating sex offenders from active duty.

General HARDING. Section 572(a)(2) of the NDAA for Fiscal Year 2013, signed into law on 2 January 2013, required the Secretary of each military department to establish policies to require administrative separation processing for servicemembers who are convicted of a sexual assault offense but do not receive a punitive discharge. The Air Force is currently staffing a proposed interim change to its administrative separation instructions to implement this provision of the NDAA for Fiscal Year 2013.

General ARY. The Marine Corps and the Navy follow the same policy. A Secretary of the Navy memorandum published in 2008 states: "Navy or Marine Corps members who are convicted of a sex offense while on active duty or in a Reserve status and who are not punitively discharged shall be processed for administrative separation." "Processed for administrative separation" does not mean an automatic discharge; no service has such a policy.

Admiral KENNEY. Members convicted of a sexual assault at court-martial and sentenced to a punitive discharge will be separated from the service by operation of law upon completion of the member's term of confinement and the appellate review process.

By policy, the Coast Guard will initiate administrative discharge proceedings against members convicted of a serious offense at a civilian criminal trial or court-martial where no punitive discharge is imposed (Military Separations, COMDTINST M1000.4). Moreover, discharge from the Coast Guard for a serious offense does not require adjudication by judicial proceedings. An acquittal or finding of not guilty at a judicial proceeding does not prohibit discharge proceedings for serious misconduct. However, the offense must be established by a preponderance of the evidence. Police reports and reports of investigation may be used to make the determination that a member committed a serious offense.

In addition, Coast Guard policy mandates that any applicant convicted of a felony or a domestic violence offense is ineligible for enlistment or commission (Coast Guard Recruiting Manual, Commandant Instruction M1000.2E).

6. Senator SHAHEEN. Mr. Taylor and General Patton, what role will you play in aligning the Services discharge policy for sex offenders?

Mr. TAYLOR. In DOD, administrative discharge policy is established by the acting Under Secretary of Defense for Personnel and Readiness. I and my staff will support and provide legal advice to the acting Under Secretary and her staff on discharge policy for sex offenders.

General PATTON. Servicemembers who have been convicted of a sexual assault are not allowed to continue to serve. Existing Service policies require that an individual convicted at courts-martial for a qualifying sexual offense who did not receive a punitive discharge (Bad Conduct Discharge or Dishonorable Discharge) be processed for administrative separation. Now, in addition to our policy requirements man-

dating separation, the NDAA for Fiscal Year 2013 requires all servicemembers convicted of a sexual assault offense at courts-martial be processed for separation.

The oversight of discharge policy for sexual offenders is within the authority of the Under Secretary of Defense for Personnel and Readiness and my office continues to monitor progress in implementing policies to comply with this provision of the NDAA for Fiscal Year 2013.

QUESTIONS SUBMITTED BY SENATOR JAMES M. INHOFE

ADJUDICATION OF MILITARY SEXUAL ASSAULT

7. Senator INHOFE. Mr. Taylor, General Chipman, Admiral DeRenzi, General Ary, General Harding, General Patton, and Admiral Kenney, is the military justice system, as established by Title 10, U.S. Code, the Uniform Code of Military Justice (UCMJ), adequate for the mission of providing efficient, effective, and fair adjudication of sexual assaults?

Mr. TAYLOR. I believe that it is. That said, no system is perfect and the military justice system should remain subject to continuing review, and amended as necessary to make it better. The Joint Service Committee (JSC) on Military Justice in DOD conducts annual reviews of the military justice system, and when appropriate proposes changes to the UCMJ and the Manual for Courts-Martial. In addition, Congress directed the Secretary in section 576 of the NDAA for Fiscal Year 2013 to establish an independent panel to take a comprehensive look at the military justice system and the crime of sexual assault. That review will be thorough and searching, and it will be informed by experience within and outside the existing military justice system.

General CHIPMAN. The UCMJ, established under title 10, U.S.C., is more than adequate for the mission of providing efficient, effective and fair adjudication of sexual assaults. The system, in existence and evolving since the 1950s is focused and well resourced. All involved in the system are intent on doing what is right and cognizant of the necessary scrutiny we receive every day.

We have a modern, comprehensive offender-focused sexual assault statute that recognizes constructive force as it exists in the military hierarchy and provides for the prosecution of drug or alcohol-facilitated assaults. The UCMJ criminalizes a broad range of misconduct, including the precursor behaviors to sexual assault such as sexual harassment and indecent language, allowing commanders to hold offenders accountable for what is considered non-criminal behavior in the civilian community. The UCMJ also provides a wide range of disposition options, allowing commanders to address the entire spectrum of sexual misconduct and to hold offenders accountable in administrative proceedings when the evidence does not merit a court-martial.

Military commanders, responsible for good order and discipline, form the core of our system and have the authority necessary to punish misconduct locally, visibly and quickly. These commanders are trained in their responsibilities from commissioning through senior commands. Prior to assuming brigade command, officers attend Senior Officer Legal Orientation courses at The Judge Advocate General's Legal Center and School (TJAGLCS) with a focus on sexual assault cases. General officers receive individual instruction at the TJAGLCS on the same topics.

Army Judge Advocates are provided with an integrated, synchronized training model that takes them from initial entry through senior military justice assignments. Many of the courses focus on sexual assault as those often complex factual scenarios raise the entire spectrum of evidentiary issues while presenting advocacy challenges. The core of our prosecution program for sexual assault offenses are the Special Victim Prosecutors. Hand-selected at the Department of the Army level for their courtroom skill and experience and their proven ability to work with victims, these counsel are involved in every allegation of sexual assault. Special Victim Prosecutors complete an intense and comprehensive training program prior to assuming their duties including nationally-recognized career prosecutor courses and on-the-job training with a civilian special victim unit in a major metropolitan city. Special Victim Prosecutors confer early and often with specially trained investigators from the U.S. Army Criminal Investigation Command to ensure a thorough and professional investigation while providing compassionate support to victims. Full-resourcing requires that the Army provide commensurate funding and resources to the defense bar that represents accused soldiers.

The military justice system is well equipped to meet the challenges of crime and indiscipline in the Army, especially the crime of sexual assault, and will hold offend-

ers appropriately accountable, protect the due process rights of accused soldiers, and provide justice and support for victims.

Admiral DERENZI. Yes, the UCMJ and accompanying Manual for Courts-Martial provide a military justice system with guarantees for an efficient, effective, and fair adjudication of any criminal allegation, including those involving sexual assault.

Offender accountability has both investigative and military justice components. An unrestricted report of sexual assault triggers a full investigation. The Naval Criminal Investigative Service (NCIS) investigates all allegations of sexual assault and has agents who are specially trained to conduct adult sexual assault investigations.

Once an NCIS investigation is complete, the case is forwarded to the appropriate commander to make an initial disposition decision. Reports of the most serious sexual assaults must be reviewed by Navy captains (pay grade O–6) or above who are designated as Special Court-Martial Convening Authorities. Those Initial Disposition Authorities must consult with a judge advocate prior to making disposition determinations. Lesser forms of sexual assaults, including sexual contact offenses, are also independently investigated by NCIS and provided to command for appropriate disposition, to include advice from a judge advocate prior to final operational reporting on all sexual assault allegations.

Once the appropriate commander decides a case should be prosecuted, the Navy JAG Corps supports the commanders and provides prosecutors, defense attorneys, and military judges to conduct the court-martial, as well as Active Duty and Reserve judge advocates with fleet and litigation experience to serve as Investigating Officers at Article 32 pretrial investigation hearings. The JAG Corps' mission includes providing a fair, effective, and efficient military justice system, and we are intensely focused on upholding the special trust placed upon us in the prosecution, defense, and adjudication of sexual assault cases.

The commander's role in military justice is vital to maintaining good order and discipline, including holding offenders accountable. The support provided by judge advocates to commanders in exercising that vital role ensures the fair, efficient and effective administration of justice for the accused as well as the victim.

General ARY. The military justice system, as established by the UCMJ, is adequate for this mission. We are constantly looking at ways to improve the UCMJ and the practice of law. Consequently, the Marine Corps has members on the JSC for Military Justice, which is a standing committee that is charged (through DOD Directive) with conducting an annual review of the Manual for Courts-Martial (MCM) in light of judicial and legislative developments in civilian and military practice. The JSC reviews proposed amendments with a few basic goals in mind: (1) conformity with Federal practice to the extent possible, except where the UCMJ requires otherwise or where specific military requirements render such conformity impracticable; (2) usefulness to military law practitioners (military and civilian) and non-lawyers; and (3) workability across the spectrum of circumstances in which courts-martial are conducted, including combat conditions. By continuously reviewing the MCM, the JSC regularly looks for ways to improve its efficiency, effectiveness, and fairness.

General HARDING. Yes, with one caveat. The Air Force fully supports Secretary Hagel's direction to prepare a legislative proposal to amend Article 60.

General PATTON. Yes, it is. As it does for all offenses in the UCMJ, the military justice system ensures that sexual assault cases are appropriately and fairly adjudicated. Further, the military justice system recognizes the distinct role of commanders. Commanders are responsible for the readiness of their unit and the health and welfare of their assigned servicemembers. To this end, they establish standards of behavior enforce these standards and hold people accountable for meeting them. Inherent in this responsibility is the authority to address misconduct and offenses and impose discipline in accordance with the military justice system. Finally, in June 2012, the Secretary of Defense withheld the initial disposition authority from all commanders who are not at least special court-martial convening authorities and in the grade of O–6 (colonel or Navy captain) for the most serious sexual assault offenses (rape, sexual assault, forcible sodomy and attempts to commit theses offenses). This policy ensures cases of sexual assault receive a high level of command attention and scrutiny from more seasoned, experienced commanders.

Admiral KENNEY. The military justice system apparatus—with specific rules of procedure, evidentiary court rules, professionalized practitioners, and independent judicial bodies—has more in common with the Federal civilian courts than differences. The U.S. military justice system today is one of the best, most fair and just systems in the world. However, we should not take the status quo for granted. While the system works well, it is not perfect. There should be, and there is, a never-ending quest to improve it.

IMPROVEMENTS FOR PROCESSING SEXUAL ASSAULTS

8. Senator INHOFE. Mr. Taylor, General Chipman, Admiral DeRenzi, General Ary, General Harding, General Patton, and Admiral Kenney, what legislative changes, if any, do you recommend to improve the military justice system to improve processing of sexual assault cases?

Mr. TAYLOR. Although I have no specific recommendations to make at this time, I believe that a review of the military justice system is appropriate, because every system can be improved. That review should not be limited to cases regarding allegations of sexual assault, however, but should include all alleged criminal acts. In the Department, the JSC on Military Justice conducts annual reviews of the military justice system, and proposes changes to the UCMJ and the Manual for Courts-Martial. In addition, the Independent Panel directed in the NDAA for Fiscal Year 2013 will begin this summer, and will review the military justice system in detail. Together, these efforts should provide us with important recommendations to improve military justice.

General CHIPMAN. For the past 6 years, the NDAA has legislated important and comprehensive changes to the military justice system and improvements to the Services' efforts to prevent and combat sexual assault crimes. The Services have also implemented innovative and profound changes to regulations, policies and the way we investigate and prosecute these offenses to affect a change in culture. The Army needs time to fully explore and evaluate the effectiveness of all of these changes and the second- and third-order effects on our system.

The JSC with Judge Advocate representatives from each Service is tasked by the President to provide an annual assessment of the UCMJ. The JSC is responsible for studying, drafting, and submitting any amendments to the UCMJ, the Rules for Court-Martial, and the Military Rules of Evidence. Issues for study are tasked by the Office of the General Counsel, the public, or the individual Services. This enduring collective mechanism for evaluating and improving the military justice system provides an ongoing joint forum to review potential issues and challenges and make appropriate recommendations.

The Army is convinced that our focus on the Special Victim Capability and the constant training and education of soldiers, commanders, investigators, and judge advocates will help create a command climate that will allow military victims to feel safe and confident in reporting misconduct, the critical first step in effectively processing sexual assault cases.

Admiral DERENZI. The Services are currently reviewing possible modifications to a Convening Authority's (CA) authority to change the findings and sentence of a court-martial under Article 60 of the UCMJ.

The Navy is receptive to appropriate changes in this authority, and DOD is taking a deliberate approach to reviewing proposals to ensure there are no unintended negative consequences to the UCMJ or the military justice process.

Other changes to the military justice system, to include legislative changes, are regularly proposed, studied by the JSC on Military Justice, and submitted to Congress when appropriate. We have had a number of legislative changes over the past several years, and it is important to provide run time for these initiatives and then assess them before making continuous change in this area. The Navy believes study by the newly passed Systems Response Panel is a good avenue to assess recent changes and provide recommendations for improvement.

General ARY. The Marine Corps supports the legislative changes proposed by the Secretary of Defense. Specifically, the Secretary has directed the acting General Counsel of the DOD, in coordination with the Secretaries of the Military Departments, to prepare a legislative proposal that would amend Article 60 to eliminate the discretion of the convening authority to change the findings of a court-martial except for certain minor offenses. Additionally, the legislative proposal will require the convening authority to explain in writing any modifications made to court-martial sentences, as well as any changes to findings involving minor offenses.

General HARDING. The JSC on Military Justice has been tasked to study several initiatives that have been proposed to improve processing of sexual assault cases. The Air Force also fully supports Secretary Hagel's direction to prepare a legislative proposal to amend Article 60 of the UCMJ. I also support legislation stating that in court-martial proceedings, when a victim has a right to be heard, the victim also has a right to be heard through counsel; the victim may seek to enforce this right to be heard through seeking a writ of mandamus through military appellate courts and military courts have authority to issue a mandamus order to the trial court.

General PATTON. The NDAA for Fiscal Year 2013 established two independent panels to review and assess the systems to investigate, prosecute, and adjudicate cases involving adult sexual assault offenses. The first panel will review and assess

the UCMJ response systems used to investigate adult sexual crimes under Article 120 for the purpose of providing recommendations on how to improve the effectiveness of such systems. The second panel will review and assess judicial proceedings under the UCMJ involving adult sexual offenses since the amendments passed in the NDAA for Fiscal Year 2012.

I believe it prudent to allow the panels to perform their duties, as prescribed in law, to inform new legislation.

Admiral KENNEY. This nation can be proud of its military justice system. The modern system embraces the appropriate balance between maintaining good order and discipline within the ranks and protecting the civil liberties of those individuals accused of a crime. Since its inception, the UCMJ has been modified and amended, and it will continue to change in order to adapt to our evolving democratic and diverse nation. The modern military justice system has achieved legitimacy as a fair judicial process measured by its treatment in Supreme Court decisions and opinions of servicemembers. Nevertheless, current aspects of military justice are worthy of robust examination and debate. However, it is important that serious thought goes to how the UCMJ should be changed, as to what should be changed.

With this aim in mind, the NDAA of 2013 creates two independent panels—the Response System Panel and the Judicial Proceedings Panel—that will provide an empirical data-driven study to assess criminal justice systems used to investigate, prosecute, and adjudicate crimes involving adult sexual assault and related offenses. This deliberate and thoughtful study is an appropriate method to consider possible changes to the UCMJ.

The Coast Guard supports the Secretary of Defense's recent decision to seek legislative changes to Article 60 by eliminating a convening authority's ability to grant clemency on a courts-martial findings, except for certain minor offenses that would not ordinarily warrant trial by court-martial; and by requiring a convening authority to explain in writing any changes made to a court-martial sentence, as well as any changes to findings involving minor offenses.

RESOURCING FOR MILITARY JUSTICE

9. Senator INHOFE. General Chipman, Admiral DeRenzi, General Ary, General Harding, and Admiral Kenney, do you have an adequate number of judge advocates, enlisted legal clerks and technicians, and civilian staff to meet requirements for military justice?

General CHIPMAN. The Army has an adequate number of Judge Advocates, enlisted legal clerks and technicians and civilian staff to meet the requirements for military justice. The Personnel, Plans, and Training Office is responsible for ensuring adequate numbers of Judge Advocates and appropriate assignments to meet all of the missions of the Judge Advocate General's Corps.

Continued, predictable resourcing of our robust training program will ensure that practitioners, both prosecution and defense, are prepared to execute their duties professionally and with well-honed advocacy skills.

Admiral DERENZI. The JAG Corps community is adequately manned to meet military justice requirements. We continue to carefully monitor manning and evaluate requirements to meet current and future missions. Additional JAG Corps mission requirements or changes in funding for billets would require reevaluation of manning requirements.

General ARY. Yes. Before reorganizing our legal community last year, we conducted an in-depth, wholesale, requirements-based analysis of each legal billet and each unit with legal personnel in the Marine Corps. This analysis included gathering statistics of legal support requirements and operational planning teams made up of senior judge advocates, enlisted personnel, and legal administrative officers. After months of planning, the Commandant of the Marine Corps directed this reorganization, which became operationally capable on 1 October 2012. Therefore, the Marine Corps has recently validated its legal personnel requirements within this new model for the provision of legal services.

General HARDING. Yes. However, standing up the Special Victims' Counsel (SVC) Program will drive a resource bill. Because military justice is required by statute and is integral to good order and discipline, we will continue to devote the resources needed to meet all military justice requirements. To the extent, though, that we are required to re-purpose existing resources for the SVC Program, we will have to reduce legal services in other practice areas. See the answer to question .

Admiral KENNEY. With the current criminal caseload levels, the Coast Guard maintains an adequate number of judge advocates and legal support staff to fulfill its military justice requirements.

To meet its legal service requirements, the Coast Guard has approximately 195 officers designated as judge advocates serving on active duty, of whom 150 are serving in legal billets and 45 are serving in "out-of-specialty" billets. Fourteen Staff Judge Advocates advise seventeen officers exercising general court-martial jurisdiction. Those fourteen SJAs as well as three additional independent duty SJAs at training centers advise approximately 350 officers exercising special court-martial jurisdiction. Responsibility for detailing trial and defense counsel to general and special courts-martial rests with the Chief, Office of Legal and Defense Services, a staff office reporting to the Deputy Judge Advocate General charged with providing defense and personal legal services to Coast Guard members. Pursuant to an interservice memorandum of understanding, the U.S. Navy provides trial defense counsel for all Coast Guard courts-martial. In return, at least four Coast Guard attorneys are assigned to full time duty, typically for 1-year or 2-year assignments, at one or more Navy Defense Service Offices or Regional Legal Service Offices.

The Coast Guard has one general courts-martial judge and eight collateral-duty special courts-martial judges. The Coast Guard plans to reduce the number of collateral-duty special courts-martial judges to six by July 2013.

The Office of Military Justice at Coast Guard Headquarters is responsible for representing the United States in all courts-martial appeals and providing support to staff judge advocates and trial counsel (prosecutors) throughout the Coast Guard. The office is also responsible for developing military justice policy for the Coast Guard, including participation on the JSC on Military Justice. The Office of Legal and Defense Services is responsible for defense appellate representation.

END STRENGTH

10. Senator INHOFE. General Chipman, Admiral DeRenzi, General Ary, General Harding, and Admiral Kenney, what is your projected fiscal year 2013 end strength of officers, enlisted, and civilians?

General CHIPMAN. The Army Judge Advocate General's Corps is projected to have 1,975 officers, 104 warrant officers, and 1,708 enlisted personnel on active duty at the end of fiscal year 2013. Under the qualifying authority of The Judge Advocate General of the Army, we anticipate a fiscal year 2013 end strength of approximately 575 civilian attorneys, which is a subset of the approximately 1,390 civilian attorneys employed throughout the Department of the Army. These attorneys provide support to all legal practice areas, but are generally concentrated within the civil law practice. In legal offices under TJAG's technical control, the non-attorney civilian employees belong to local commanders and are not centrally-managed. We estimate a fiscal year 2013 end strength of approximately 625 non-attorney civilian paraprofessionals in legal offices under TJAG's technical control. This is a total of 4,987 personnel.

Admiral DERENZI.

Active Duty

The fiscal year 2013 projected end strength is 825 officers, 416 legalmen, and 437 civilians.

The legalman end-strength is below the number of authorized billets, but the JAG Corps will close this gap by the end of fiscal year 2014.

Reserve

The fiscal year 2013 projected end strength is 451 officers and 174 legalmen.

General ARY. The estimated fiscal year 2013 end strength for legal personnel (including patients, prisoners, trainees, and transients or "P2T2") is 635 judge advocates, 18 legal administrative officers, 542 enlisted legal services support specialists, and 71 civilians (does not include Departmental attorneys who do not provide direct support to the Marine Corps).

General HARDING. Projected as of the end of this fiscal year, the authorized funded positions for active (versus Air Reserve component) forces in The Judge Advocate General's Corps are: 1,234 officers, 899 enlisted, and 885 civilians (GS, or equivalent, and SES). Projected as of the end of the fiscal year, authorized funded positions for the Air Reserve component are 930 officers and 414 enlisted.

Admiral KENNEY. Officers - 6,803; Chief Warrant Officers - 1,668; Enlisted Members - 32,635; and Civilians - 8,305.

ROLE OF RESERVE COMPONENT FOR MILITARY JUSTICE

11. Senator INHOFE. General Chipman, Admiral DeRenzi, General Ary, General Harding, and Admiral Kenney, what is the role of the Reserve component in the military justice system?

General CHIPMAN. The Army Judge Advocate General's Corps is projected to have 1,975 officers, 104 warrant officers, and 1,708 enlisted personnel on active duty at the end of fiscal year 2013. Under the qualifying authority of The Judge Advocate General of the Army, we anticipate a fiscal year 2013 end strength of approximately 575 civilian attorneys, which is a subset of the approximately 1,390 civilian attorneys employed throughout the Department of the Army. These attorneys provide support to all legal practice areas, but are generally concentrated within the civil law practice. In legal offices under TJAG's technical control, the non-attorney civilian employees belong to local commanders and are not centrally-managed. We estimate a fiscal year 2013 end-strength of approximately 625 non-attorney civilian paraprofessionals in legal offices under TJAG's technical control. This is a total of 4,987 personnel.

Admiral DERENZI. Navy Reserve component judge advocates are involved in all phases of the military justice process. Many Reserve judge advocates have extensive State and Federal criminal law expertise developed through civilian employment as prosecutors, defense attorneys, and judges, and that expertise is utilized when performing active duty service.

The Reserve Law Program includes nine Navy Reserve Region Legal Service Office units (NR RLSOs) and two Navy Reserve Defense Service Office units (NR DSOs). Judge advocates assigned to NR RLSOs typically provide prosecution assistance and command services to sea and shore commands. Reserve judge advocates also serve as UCMJ Article 32 pretrial investigation officers. Judge advocates assigned to NR DSOs provide defense services relating to courts-martial and administrative separations. In addition to NR RLSOs and DSOs, the Reserve community has five units which provide specialized military justice support:

- The NR Navy-Marine Corps Appellate Review Activity (NAMARA)/Military Justice unit supports the Office of the Judge Advocate General (OJAG) Criminal Law Division oversight of military justice in the Department of the Navy, including policy, administration, and support to practitioners in the field and also supports the Deputy Assistant Judge Advocate General for Military Law and Assistant Judge Advocate General for Military Justice in reviewing courts-martial and petitions for new trials.
- The NR NAMARA Defense Unit supports the OJAG Appellate Defense Division in the representation of servicemembers before the Navy and Marine Corps Court of Criminal Appeals, U.S. Court of Appeals for the Armed Forces, and the U.S. Supreme Court.
- The NR NAMARA Government Unit supports the OJAG Appellate Government Division in representing the Government in all criminal appeals.
- The NR Appellate Judiciary Activity supports the OJAG Appellate Judiciary. Reserve Appellate Military Judges receive the same training as their active duty counterparts, in addition to any training they receive as civilian attorneys.
- The NR Trial Judiciary Activity supports the OJAG Trial Judiciary. Reserve Trial Military Judges receive the same training as their active duty counterparts, in addition to the training they receive as civilian attorneys. Approximately one third of the mission of the trial judiciary is met by the Reserves.

General ARY. The role of the Reserve component is to provide Reserve legal services to the total force to support active and Reserve requirements. reservists provide continuous, effective Reserve legal support, across all core functional areas, including military justice, in support of Headquarters Marine Corps, the operating forces, and the supporting establishment, in garrison and deployed. The Reserve component does so in order to facilitate and ensure mission accomplishment, unit readiness, maintenance of good order and discipline, and protection of the rights of the accused and the interests of victims.

The Marine Corps Reserve legal community is currently undergoing a reorganization to closely mirror the active duty legal reorganization. The guiding principle for this reorganization is placing the right counsel, at the right place, at the right time, with the right support and supervision. This Reserve legal reorganization will ensure that the SJA to CMC has control of assignments of all legal support providers. Such support includes force augmentation that provides Reserve leadership to the legal services support sections and teams and ensures that the active component

has sufficient assets to provide general support to all Marine Corps units and organizations.

Many Marine Corps Reserve judge advocates are assistant U.S. attorneys, district attorneys, or criminal defense attorneys in their civilian careers. Consequently, the Marine Corps draws on their experience to supplement the active component when necessary. These Reserve judge advocates supervise and train less experienced judge advocates, and also try cases.

General HARDING. Our legal professionals in the Air Force Reserve and Air National Guard play a significant role in our military justice system. In addition to fulfilling their roles, where appropriate, as staff judge advocates under the UCMJ, our Air Reserve component members also participate in non-judicial punishment and court-martial actions in both the active duty and Reserve contexts as part of their regular training. Air Reserve component judge advocates frequently serve as Article 32 investigating officers, and reservists serve as military judges at both the trial and appellate levels. In addition to utilizing their excellent substantive legal work, our Corps takes advantage of the significant litigation experience found in our Air Reserve component members—reservists and Guardsmen alike—by facilitating their training of our more junior active duty judge advocates. This training is accomplished through instruction sponsored by The Judge Advocate General's School, through a traveling advocacy instruction program called the "TRIALS team" (Training by Reservists in Advocacy and Litigation Skills), and through on-the-job training and mentorship.

Admiral KENNEY. Coast Guard Reserve Legal Program is a key provider of legal services, particularly during contingency operations such as the Deepwater Horizon Incident or the aftermath of Hurricane Katrina. The role individual Reserve judge advocates play in the military justice system often depends on their prior training and experience, as well as their civilian legal specialty.

Last year, Coast Guard Director of Reserve and Military Personnel approved a reorganization plan of the Coast Guard Reserve Legal Program by creating deployable Reserve legal teams that would maximize the delivering of quantifiable and quality legal services during incidents of national significance, as well as allowing Reserve judge advocates and enlisted personnel to provide augmentation support to Coast Guard servicing legal offices. The reorganization plan offers structured training to Reserve judge advocates to provide command advice in the military justice context. While the training, itself, does not provide them with the requisite knowledge to act as government or defense counsel in a court-martial, it does provide the legal skills necessary to provide military justice advice to Incident Commanders during a contingency operation and also to assist in initiating low-level disciplinary action for uniquely military-type offenses or minor misdemeanor type-crimes that are typically resolved at summary court-martial and non-judicial punishment. However, some Reserve attorneys possess significant military justice experience gained from active duty service.

12. Senator INHOFE. General Chipman, Admiral DeRenzi, General Ary, General Harding, and Admiral Kenney, what is the role of the Reserve component in the prosecution and defense of sexual assault cases?

General CHIPMAN. Army Reserve Judge Advocates advise commanders and criminal investigators, and they consult with Special Victim Prosecutors regarding the prosecution and defense of sexual assault cases. Currently, all cases involving an allegation that a Reserve component soldier has attempted or committed an unlawful sexual act or sexual contact must be reported to the Commanding General of the U.S. Army Reserve Command (CG, USARC) prior to disposition.

If court-martial is appropriate, the case will normally be referred to an Active Component General Court-Martial Convening Authority. However, Army Reserve Judge Advocates will continue to assist their Active component counterparts, as necessary, by helping to finalize the investigation, drafting the charge sheet and prosecution brief, participating in the Article 32 investigation, and participating in the actual court-martial.

If court-martial is not appropriate, the CG, USARC, may take appropriate administrative or disciplinary action against the accused soldier himself, or he may release the authority to dispose of the allegation to an O–6 commander at the brigade level or higher, who is required to obtain advice from his servicing Judge Advocate before taking action.

Admiral DERENZI. Due to the time required for criminal litigation and the typically limited duration of Reserve orders, Reserve judge advocates do not often serve as lead prosecutors or defense counsel in sexual assault cases. Drawing upon their civilian expertise, Reserve judge advocates frequently assist their active duty counterparts by providing substantive advice when particular issues arise in the context

of these cases. This reachback capability is not limited to drill weekends but is available on demand through flexible and incremental drilling programs established by the Chief of Navy Reserve. It is quite common for Reserve judge advocates with criminal law experience, and especially those with experience in sexual assault cases, to assist on particular cases outside of the normal drill weekend.

General ARY. As stated in Question 11, the Reserve component plays an important role in the prosecution and defense of many complex cases, including sexual assault cases. Reserve prosecutors provide expert advice, assistance, and training on military justice matters, including trial and appellate advocacy, strategy, and ethics, and they also try cases when the complexity of the case so demands. On the defense side, senior Reserve defense counsel assist the active duty regional defense counsel, provide mentoring advice and assistance, and provide professional guidance and support to assigned Active Duty and Reserve defense counsel. Other Reserve defense counsel represent marines and sailors in the appellate courts. Therefore, the Marine Corps leverages the experience that the Reserve community provides and uses Reserve component trial and defense counsel to lead, mentor, and train Active component judge advocates, which increases the level of competence and professionalism of counsel who prosecute and defend clients in sexual assault cases.

General HARDING. Air Reserve component judge advocates play an active and visible role in our Corps' handling of sexual assault cases. At Joint Base San Antonio-Lackland, for example, our Military Training Instructor Prosecution Task Force has been led by two judge advocate colonels in the past year, both of whom are Reserve colonels. Other personnel on that task force included three Reserve judge advocates and two Reserve paralegals, all of whom have volunteered to serve on long-term orders in support of this effort. The duties of these individuals include, among other things, case evaluation, drafting of charges and specifications, and trial. More generally, Air Reserve component judge advocates participate actively as Article 32 investigating officers and as trial counsel. reservists are also assigned as appellate government and appellate defense counsel.

Admiral KENNEY. Coast Guard Reserve Legal Program is a key provider of legal services, particularly during contingency operations such as the Deepwater Horizon Incident or the aftermath of Hurricane Katrina. The role individual Reserve judge advocates play in the military justice system often depends on their prior training and experience, as well as their civilian legal specialty. For the most part, however, Reserve judge advocates do not play a role in the prosecution or defense of criminal cases.

Last year, Coast Guard Director of Reserve and Military Personnel approved a reorganization plan of the Coast Guard Reserve Legal Program by creating deployable Reserve legal teams that would maximize the delivering of quantifiable and quality legal services during incidents of national significance, as well as allowing Reserve judge advocates and enlisted personnel to provide augmentation support to Coast Guard servicing legal offices. The reorganization plan offers structured training to Reserve judge advocates to provide command advice in the military justice context. While the training, itself, does not provide them with the requisite knowledge to act as government or defense counsel in a court-martial, it does provide the legal skills necessary to provide military justice advice to Incident Commanders during a contingency operation and also to assist in initiating low-level disciplinary action for uniquely military-type offenses or minor misdemeanor type-crimes that are typically resolved at summary court-martial and non-judicial punishment. However, some Reserve attorneys possess significant military justice experience gained from active duty service.

IMPACT OF REDEPLOYMENT ON MILITARY JUSTICE CASELOAD

13. Senator INHOFE. Mr. Taylor, General Chipman, Admiral DeRenzi, General Ary, General Harding, General Patton, and Admiral Kenney, as troops are redeployed to garrison as a result of the administration's announced plan to reduce U.S. forces in Afghanistan, do you anticipate an increase in the overall rate of military justice cases and what plans are you taking in anticipation of any such increase?

Mr. TAYLOR. We redeployed a significant number of troops from Iraq, and are now redeploying troops from Afghanistan. I believe in the men and women in our armed forces and do not anticipate a significant increase in the military justice caseload based solely on redeployments. The Military Services plan, program, and budget to meet expected requirements including requirements for implementation of an effective military justice system.

General CHIPMAN. As troops are redeployed to garrison as a result of the administration's announced plan to reduce U.S. forces in Afghanistan and as the Army ex-

pects to draw down the number of troops, we do not expect an appreciable change in the overall rate of military justice cases. The Army Judge Advocate General's Corps (JAGC) is well-prepared for any potential increases or decreases in the numbers of courts-martial. The Personnel, Plans, and Training Office is responsible for ensuring adequate numbers of Judge Advocates and appropriate assignments to meet all mission requirements of the JAGC. At each installation, the local Staff Judge Advocate has the ability to assign individual Judge Advocates to each division within the office to ensure all the missions are adequately resourced.

Admiral DERENZI. No. Given the nature of Navy forces and assignments, we do not anticipate an increase in the overall rate of Navy military justice cases as a result of planned reductions in Afghanistan.

General ARY. Overall the number of courts-martial has decreased over the last decade, but there is little empirical data to suggest that caseloads might increase as deployed forces return to garrison. Regardless, the Marine Corps maintains a cadre of trained and experienced litigators, supervisory counsel, and judges to effectively and efficiently meet the demands of the military justice system, including the prosecution and defense of complex cases. The 2012 legal reorganization has positioned the Marine Corps legal community to successfully meet these demands.

General HARDING. While it is true that the rate of UCMJ offenses historically increases during peacetime, the Air Force does not anticipate an increase significant enough to warrant changing the current infrastructure to deal with criminal misconduct.

General PATTON. Each of the Services maintains a cadre of trained and experienced litigators, supervisory counsel, and judges to effectively and efficiently meet the demands of the military justice system, to include the prosecution and defense of complex cases.

Additionally, consistent with NDAA for Fiscal Year 2012 and Department policy, the staffing of full-time SARCs and Victim Advocates is being expanded across the Services at the brigade or equivalent level. This expansion will provide more awareness and ensure dedicated support and case management for victims of sexual assault. Additionally, the DOD Safe Helpline has been established as the sole DOD hotline for crisis support services. The Safe Helpline is available 24/7 worldwide for anonymous and confidential support and can be accessed by visiting www.safehelpline.org or by calling 1–877–995–5247.

Admiral KENNEY. While Coast Guard military men and women have deployed abroad to support Operating Enduring Freedom, because of the small number of expected redeploying members, the Coast Guard does not anticipate an increase in the overall rate of military justice cases.

STATUTORY AUTHORITY FOR VICTIM INPUT

14. Senator INHOFE. General Chipman, Admiral DeRenzi, General Ary, General Harding, and Admiral Kenney, does any Article of the UCMJ codify the ability of the victims of crime to provide information for consideration by the convening authority, prior to action on the results of courts-martial under Article 60?

General CHIPMAN. There is no statutory authority for victims of crime to provide information for consideration by the convening authority, prior to taking action on the results of courts-martial under Article 60, UCMJ.

Under Rule for Court-Martial (RCM) 1107(3)(B), the convening authority may review the record of trial. The record of trial would typically contain the victim's testimony on findings and sentencing. Under RCM 1107, the convening authority may also review any other matters as the convening authority deems appropriate. However, if the convening authority considers matters adverse to the accused from outside the record, without the accused's knowledge, the accused shall be notified and given an opportunity to rebut.

The JSC with Judge Advocate representatives from each Service is responsible for studying, drafting, and submitting any RCM amendments to the President. The JSC is currently considering amendments to the post-trial processing rules, including RCM 1007, to provide the victim the right to be heard without jeopardizing the due process rights of the accused.

Finally, the nine civilian members appointed to the Response Systems Panel, mandated by the NDAA for Fiscal Year 2013 are already tasked with comparing military and civilian justice systems for sexual assault offenses, including the adequacy of systems and procedures to support victims. The Response Systems Panel will provide another source of expertise to examine current rules and recommend appropriate amendments.

Admiral DERENZI. Article 36 of the UCMJ delegates to the President the power to prescribe pretrial, trial, and post-trial procedures. Article 60(d) of the UCMJ enables the President to prescribe those matters that shall be included in the Staff Judge Advocate's recommendation, which a convening authority (CA) must consider prior to taking post-trial action in a case.

Rules for Courts-Martial 1106, "Recommendation of the Staff Judge Advocate," and 1107, "Action by the Convening Authority," permit consideration of additional matters deemed appropriate and 1107 states, "[b]efore taking action the convening authority may consider . . . such other matters as the convening authority deems appropriate." Although the rule does not state with specificity that a victim can provide information for consideration by the CA, the rule does allow the CA to consider any such information. However, any adverse matter presented to the CA outside the record of trial would require additional opportunity for review and rebuttal by the accused prior to the CA taking action.

General ARY. There is currently no statutory authority for a victim of a crime to provide information for consideration by the convening authority prior to action on the results of courts-martial under Article 60. However, pursuant to DODD 1030.1 (Victim and Witness Assistance), "court-martial convening authorities and clemency and parole boards may consider victim statements on the impact of crime."

General HARDING. No. However, while the ability of victims of crime to provide victim impact statements to the convening authority is not currently codified in the UCMJ, nothing prevents a victim from providing such information for the convening authority's consideration and many victims choose to do so. It is not uncommon in the Air Force for the victim to be given the opportunity to submit a written statement to the CA as part of the SJA's recommendation to the CA on action. The Air Force is currently revising AFI 51–201, the military justice instruction, to formalize the opportunity for victims to provide victim impact statements as part of our post-trial process.

Admiral KENNEY. There are no provisions in the UCMJ that specify that a victim of a crime may provide information to a convening authority after trial and prior to action. There is also no provision in the UCMJ that precludes a victim from submitting documentation to the convening authority. However, if the convening authority considers potentially adverse matters regarding the accused from outside the record of trial, the accused must be notified and provided an opportunity to respond.

At a contested trial, a victim may testify during the presentation of the government's case on the merits, and again during the sentencing phase to present evidence of aggravation directly relating to or resulting from the offenses of which the accuses has been found guilty. Matters of aggravation include providing testimony on the impact of the crime, such as financial, social, psychological, and medical harm experienced by the victim. This testimony is captured in the verbatim transcript and may be provided to convening authority as a matter to consider in clemency decisions.

AUTHORITY FOR VICTIM INPUT; POST-TRIAL

15. Senator INHOFE. Mr. Taylor, General Chipman, Admiral DeRenzi, General Ary, General Harding, General Patton, and Admiral Kenney, should the UCMJ include authority for victims of crime to provide information for consideration by the convening authority, prior to action on the results of courts-martial under Article 60? Or would a change to the Manual for Courts-Martial, perhaps to modify Rule 1107 be the more appropriate method to provide victims this opportunity to be heard?

Mr. TAYLOR. I personally believe that a very strong argument can be made that victims of all crimes should be afforded the opportunity to present information to the convening authority after a court-martial. The convening authority could then consider that information in deciding what action to take on the court-martial. I do not believe that a change to either the UCMJ or the Manual for Courts-Martial would be required legally to effect such a policy; the Secretary of Defense could do so. Whether it would be best to do so in law, in Executive Order, or in Department policy is an issue worthy of additional review.

General CHIPMAN. The preferable method for providing authority for victims of crime to provide information for consideration by the convening authority prior to action is to amend the Rules for Court-Martial (RCM), rather than amendment of Article 60 UCMJ.

The JSC with Judge Advocate representatives from each Service is responsible for studying, drafting and submitting any RCM amendments to the President. The JSC is currently considering amendments to the post-trial processing rules, including

RCM 1007 to provide the victim the right to be heard without jeopardizing the due process rights of the accused. The JSC members are the subject matter experts on the military justice system and will appropriately consider the second- and third-order effects any change to the post-trial rules will have on the due process rights of the accused and the efficient administration of military justice.

Finally, the nine civilian members appointed to the Response Systems Panel, mandated by the NDAA for Fiscal Year 2013 are already tasked with comparing military and civilian justice systems for sexual assault offenses, including the adequacy of systems and procedures to support victims. The Response Systems Panel will provide another source of expertise to examine current rules and recommend appropriate amendments.

Admiral DERENZI. The Navy is receptive to appropriate changes to provide this right to victims, and DOD is taking a deliberate approach to reviewing proposals to ensure there are no unintended negative consequences to the military justice process. The JSC on Military Justice has recently undertaken review of recommended revisions to the DOD Directive on victims' rights as well as whether victims should be able to provide information to the Convening Authority. Therefore, the Navy does not believe there is a need to legislate this authority; it can be addressed through Departmental and Service policies and instructions or Rule 1107.

General ARY. The JSC for Military Justice is currently working on a proposal to incorporate language into Article 60 and Rule 1107 that would allow victims of crime to provide information for consideration by the convening authority, prior to action on the results of courts-martial. The Marine Corps supports such an amendment to Article 60. The statute would include general language and the rule would provide further guidance on the timeline and content for a victim's written submission.

General HARDING. The Air Force supports providing the victims the opportunity to be heard throughout the military justice process. We believe either method could be appropriate.

General PATTON. The NDAA for Fiscal Year 2013 established two independent panels to review and assess the systems to investigate, prosecute, and adjudicate cases involving adult sexual assault offenses. The first panel will review and assess the UCMJ response systems used to investigate adult sexual crimes under Article 120 for the purpose of providing recommendations on how to improve the effectiveness of such systems. The second panel will review and assess judicial proceedings under the UCMJ involving adult sexual offenses since the amendments passed in the NDAA for Fiscal Year 2012.

I believe it prudent to allow the panels to perform their duties, as prescribed in law, to inform any potential changes to the UCMJ.

Admiral KENNEY. The military justice process should provide an affirmative legal process affording victims an opportunity to submit written materials to the convening authority before they take final action on a court-martial case. Either an amendment to Article 60 or a change to the Manual for Courts-Martial would have the force of law. However, due process considerations should be studied to ensure than any changes in the rules do not adversely affect the due process rights of the accused.

The JSC on Military Justice is currently studying the authorities and rules regarding post-trial processes, including drafting procedural rules to provide an opportunity for victims to submit post-trial matters to convening authorities without exposing cases to appellate relief. In addition, the Response Systems Panel, which is statutorily mandated under the NDAA for Fiscal Year 2013 to conduct a comparison study of military and civilian justice systems, will review the issue regarding the capacity of the military justice system to provide an appropriate voice to victims of sexual assault.

MANUAL FOR COURTS-MARTIAL AUTHORITY FOR VICTIM INPUT; POST-TRIAL

16. Senator INHOFE. Mr. Taylor, General Chipman, Admiral DeRenzi, General Ary, General Harding, General Patton, and Admiral Kenney, should the Manual for Courts-Martial be modified to provide authority for victims of crime to provide information for consideration by the convening authority, prior to action on the results of courts-martial?

Mr. TAYLOR. I personally believe that a very strong argument can be made that victims of all crimes should be afforded the opportunity to present information to the convening authority after a court-martial. The convening authority could then consider that information in deciding what action to take on the court-martial. I do not believe that a change to either the UCMJ or the Manual for Courts-Martial

would be required legally to effect such a policy; the Secretary of Defense could do so. Whether it would be best to do so in law, in Executive order, or in Department policy is an issue worthy of additional review.

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Admiral DERENZI. The JSC on Military Justice has recently undertaken review of recommended revisions to the DOD Directive on victims' rights as well as whether victims should be able to provide information to the Convening Authority. Therefore, the Navy does not believe there is a need to legislate this authority; it can be addressed through Departmental and Service policies and instructions or Rule 1107.

General ARY. The JSC for Military Justice is currently working on a proposal to incorporate language into Article 60 and Rule 1107 that would allow victims of crime to provide information for consideration by the convening authority, prior to action on the results of courts-martial. The Marine Corps supports such an amendment to Article 60. The statute would include general language and the rule would provide further guidance on the timeline and content for a victim's written submission.

General HARDING. The Air Force supports providing the victims the opportunity to be heard throughout the military justice process.

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Admiral KENNEY. The military justice process should provide an affirmative legal process affording victims an opportunity to submit written materials to the convening authority before they take final action on a court-martial case. Either an amendment to Article 60 or a change to the Manual for Courts-Martial would have the force of law. However, due process considerations should be studied to ensure that any changes in the rules do not adversely affect the due process rights of the accused.

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AIR FORCE SPECIAL VICTIMS COUNSEL PILOT PROGRAM

17. Senator INHOFE. General Harding, the Air Force recently created a unique pilot program to establish Special Victims Counsel for victims of sexual assault. In your statement you cited fiscal year 2011 sexual assault statistics, and noted that 96 victims, who originally agreed to participate in the prosecution of their alleged

offender, changed their minds before trial and declined to cooperate with law enforcement personnel and the prosecution. These 96 victims represented 29 percent of the Air Force victims of sexual assault who had filed an unrestricted report of sexual assault. What measures of effectiveness will the Air Force use to evaluate this pilot program?

General HARDING. The SVC Program is conducting an impact evaluation (IE) of the program over the course of the 1-year pilot phase. The IE will study two prongs to assess the program: (1) victim impact to assess the experiences of victims in the military justice process, and (2) Air Force impact to assess the effectiveness of the program from the perspectives of Commanders, SARCs, and their Family Advocacy Program counterparts, and Air Force Office of Special Investigation agents. The results of the IE will be included in a broader report delivered at the 1-year mark of SVC Program implementation (28 Jan 2014). In addition to the results of the IE, the SVC Program Report will also include: (1) an overview of the SVC Program, including training, outreach, workload, program successes, and lessons learned; (2) a summary of case law developed based on SVC litigation and a survey of the military justice landscape; (3) recommended policy changes to the SVC Program; (4) any recommended changes to Air Force and DOD policies and the Manual for Courts-Martial; and (5) any recommended legislative changes.

RESOURCING IMPLICATIONS OF SPECIAL VICTIMS COUNSEL PROGRAM

18. Senator INHOFE. General Chipman, Admiral DeRenzi, General Ary, General Harding, and Admiral Kenney, if the Air Force Special Victims Counsel pilot demonstrates its effectiveness, what resourcing would be required to implement it, within current and projected end strength, in each branch of the armed services?

General CHIPMAN. Implementation of additional victim advocacy services akin to the Air Force Special Victims Counsel pilot program would significantly strain current Army legal assistance resources. Representation of sexual assault victims is going to be very labor intensive, especially if services are expanded to include participation during interviews and any Article 32 or court-martial hearing. Additional resources will be needed.

The Air Force pilot program is staffed with 60 Judge Advocates. The Army, as the largest Service, has a significantly higher case load. A comparison of court-martial data indicates that the number of Air Force Special Victim cases is approximately one third of the Army's total. Using the Air Force pilot as a model and the ratio of Air Force to Army special victim cases, the Army would require an additional 180 Judge Advocates (or a combination of Judge Advocates and civilian attorneys).

Army Legal Assistance Offices provide a wide range of services to our clients. These include estate planning, family law, consumer law, landlord-tenant issues, immigration/citizenship and taxes. Army Legal Assistance Attorneys also provides representation in a number of adverse military actions, to include rebuttals to determinations of financial liability and appeals of adverse fitness evaluations. The other Services provide these services through their Defense Counsel. Our largest Legal Assistance practice area has been the legal readiness of deploying soldiers, followed closely by family law matters. Unfortunately, we have also had to provide legal assistance to surviving families in casualty support cases. Many of our Legal Assistance Offices are already forced to turn clients away due to lack of resources. For example, in fiscal year 2012, 1 office reported seeing 5,466 clients, while turning away another 1,086 clients due to lack of available resources.

Army Legal Assistance Attorneys already provide the full scope of services set forth in the 17 October 2011 Under Secretary of Defense for Personnel and Readiness Memorandum "Legal Assistance for Victims of Crime." In addition to traditional legal assistance services, these include consultation regarding: the Victim Witness Assistance Program; the difference between restricted/unrestricted reporting in sexual assault cases; explanation of the Military Justice system; the availability of health and mental health services; the availability of and protections offered by restraining orders; and eligibility for transitional compensation and other benefits. They will also assist sexual assault victims in applying for protections/benefits, to include expedited transfer.

Admiral DERENZI. The Air Force pilot is just one of the approaches being taken by the Services to support sexual assault victims. Like any pilot, it will serve to identify issues and alternatives.

The Navy continues to develop and implement initiatives to focus on sexual assault prevention, response, and accountability with particular attention paid to the rights of victims. While the Navy does not intend to implement a similar pilot pro-

gram, we are closely monitoring the Air Force pilot and will study the results of the pilot with the other Services.

The Navy JAG Corps could not implement a program similar to the Air Force pilot without a significant increase in manpower and resources. As the Air Force pilot program is still in its early stages, any estimate of requirements would be speculative. The Air Force—a Service of similar size to the Navy—is currently using 60 attorneys, plus support staff, on a part-time basis. The Air Force plans to move to 25 full-time attorneys and 10 paralegals this summer, with the option of increasing full-time attorney manning to 45 if there is sufficient demand (e.g., 450 clients). The Navy JAG Corps would need to evaluate the Air Force pilot to determine the manning model most appropriate for the Navy.

General ARY. The use of victim's counsel warrants study by the JSC on Military Justice before service-wide or DOD-wide implementation. The Marine Corps does not plan on instituting a victim's counsel at this time. The comprehensive system of victim services currently provided by SARCs, Victim Advocates, legal assistance attorneys, and trial counsel in the Marine Corps meets the needs of all crime victims. The recent changes and improvements to our program of victim's services needs to be observed and evaluated before incorporating a dramatic change on the level of a victim's counsel program. If a SVC program was mandated in all the Services, we would also need to evaluate how to integrate the SVC program into the existing military justice system as well as look at resourcing issues.

General HARDING. As mentioned in the answer to question #9, standing up the Special Victims' Counsel Program will drive a resource bill for the Air Force, estimated at this time to be about 65 positions. To the extent we are required to repurpose existing resources at installations for the SVC Program, we may have to reduce legal services in other legal practice areas, such as administrative law, claims, contract law, environmental law, labor law, operations and international law, and legal assistance. For example, it is possible we will need to scale back our Legal Assistance Program, eliminating types of services we currently provide Airmen and their families (e.g., tax assistance), as well as categories of clients (retirees and/or family members).

Admiral KENNEY. Implementation of a special victim counsel modeled after the Air Forces pilot program would significantly stretch the Coast Guard's current legal resources. In fiscal year 2013, the Coast Guard had 141 unrestricted reports of sexual assault. In fiscal year 2011, there were 83 unrestricted reports. The Office of the Judge Advocate General is closely monitoring the Air Force program and considering its options to implement a Coast Guard Special Victim's Course/Program with available resources.

19. Senator INHOFE. General Chipman, Admiral DeRenzi, General Ary, General Harding, and Admiral Kenney, is there a requirement that the capability similar to the Air Force Special Victims Counsel must be a lawyer or could this capability, if it moves from pilot program, be effective with appropriately trained non-lawyers?

General CHIPMAN. There is no requirement that the capability similar to the Air Force Special Victims Counsel pilot program must be a lawyer and the capability could be effective with appropriately trained paralegals serving as Victim Witness Assistance Personnel/Victim Witness Liaison (VWL).

The impetus behind the Air Force's program is to ensure that victims are educated about their rights and the military justice process and are, therefore, less likely to drop out of the process and refuse to cooperate with an investigation and prosecution. These concerns do not require a separate victim's attorney to be addressed.

First and foremost, the responsibility to protect the rights of the victim and to keep the victim informed and actively participating in the accountability process is the charter of the prosecutor. The relationship between the prosecutor and the victim is the foundation of every sexual assault prosecution, and the success or failure of each case rests on the strength of this relationship. The Air Force Special Victim Counsel could in fact create an adversarial relationship between the prosecutor and the victim. This will probably have the unintended and unfortunate effect of decreasing the Army's ability to hold offenders accountable.

Army VWLs are currently educating and assisting the victim in navigating some of the more difficult aspects of the adjudication process. Army VWLs, typically civilian paralegals assigned to the Staff Judge Advocate office, receive annual specialized training in working with victims of crime. As civilian paralegals, they are less likely to move on to a new position or installation than active duty Judge Advocates, providing valuable stability and continuity. Army VWLs educate victims about their rights and the military justice process, provide referrals and support throughout the process, will accompany victims to interviews if requested, arrange child care or transportation for court appearances, and sit with the victim during trial to answer

questions about the proceedings. Army VWLs work with victims after the court-martial to ensure notification of changes in confinement status or parole of an incarcerated soldier and assist victims with preparing victim impact statements for future parole hearings. The Army VWL at the Army Court of Criminal Appeals notifies victims when the case is considered on appeal and provides victims with opportunities to attend hearings or arguments. Feedback from victims and their families regarding the services of the Army VWLs is overwhelmingly positive.

The Army is looking to further integrate the VWLs into the Special Victim Capability mandated by the NDAA for Fiscal Year 2013 and to improve and increase the amount of training VWLs attend. The Army believes that a cooperative, team approach to assisting the victim, with the prosecutor and the VWL working together, is the best approach to balancing the needs and interest of the victims with the Army's interest in holding offenders accountable.

Admiral DERENZI. The Navy believes it can be effective with non-lawyers. While the Navy is dedicated to ensuring victims of sexual assault are provided their full rights, an expansion of standing to a counsel representing a victim's interest in a criminal proceeding needs careful thought and review prior to implementation. It is the Navy's understanding that the Air Force pilot program is designed to help the Air Force determine the optimal way to assist sexual assault victims throughout the investigation and prosecution process. The Air Force pilot is just one of the approaches being taken by the Services.

The Navy is dedicated to ensuring victims of sexual assault receive proper and timely support, to include medical treatment, counseling, and legal assistance. The Navy is hiring 66 credentialed sexual assault prevention and response coordinators and 66 full-time professional, credentialed victim advocates. They will augment the more than 3,000 active-duty command victim advocates, and will work with specially-trained NCIS investigators and JAG Corps prosecutors to form the core of our special victim capability. Our trained legal professionals also deliver direct legal assistance to victims. The JAG Corps instituted a Legal Assistance for Crime Victims conference and has trained more than 150 Navy and Marine Corps attorneys, paralegals, and enlisted personnel to ensure victims' rights are understood and protected. Victims can contact counsel, and victims eligible for military legal assistance services also have access to legal assistance attorneys to help with a wide variety of legal issues related to being the victim of a crime. Additionally, Navy prosecutors provide victims with explanations of victims' rights; the court-martial process; and available Federal, State, or local victim services and compensation.

General ARY. The Marine Corps believes appropriate victim services and support, for all crime victims, can be provided by SARCs, Victim Advocates, legal assistance attorneys, and trial counsel. The Marine Corps is currently utilizing this comprehensive approach and will observe and evaluate the effectiveness of recent changes and improvements to our program of victim's services before considering a dramatic change on the level of a victim's counsel program. At a minimum, the use of victim's counsel warrants study by the JSC on Military Justice before DOD-wide implementation.

General HARDING. In the Air Force program, Special Victims' Counsel must be an attorney. SVCs enter into an attorney-client relationship with victims protected by a confidentiality privilege in the same way that Area Defense Counsels enter into an attorney-client relationship with the accused. SVCs provide legal advice to victims of sexual assault and advise them of their legal rights under Federal law, particularly the UCMJ and the Military Rules of Evidence. Due to their familiarity with, and expertise in, military justice, SVCs also help victims understand the court-martial process and facilitate resolution of problems with prosecutors, defense counsel, judges, and law enforcement. Non-lawyers would not be able to provide the same level of support, nor could they offer protected/privileged confidential communication with a victim.

Admiral KENNEY. As presently devised, the Air Force Special Victims Counsel enters into an attorney-client relationship, makes legal representation on the victim's behalf, and promotes the individual interests of the victim without regard to how their legal actions affect the institutional interest of the military. Under this model, the Air Force's program requires a lawyer. However, if the purpose behind the program is to educate the victim on the military justice process, facilitate access to victim services, and build resiliency of the victim to endure the criminal process, then a trained non-lawyer could be used.

20. Senator INHOFE. Mr. Taylor, General Chipman, Admiral DeRenzi, General Ary, General Harding, and Admiral Kenney, what concern, if any, do you have that establishing Special Victims Counsel could be perceived as improperly undermining the necessary balance between the government and defense in the military justice system?

Mr. TAYLOR. As a pilot program, the Air Force's Special Victims Counsel program needs time to operate before any fair and thorough evaluation can be accomplished. The evaluation criteria will include the effect of the program on the rights of the accused, the trial counsel, the criminal investigators, and the convening authority. Ensuring that the program does not undermine the necessary balance between the government and defense in the military justice system is critical, both to ensure that that balance is maintained and to ensure that the program does not have the unintended effect of undercutting the prosecution of those who should be held to account.

General CHIPMAN. The Services currently provided to sexual assault victims by Victim Advocates, SARCs, Victim-Witness Liaisons, Legal Assistance Attorneys, and Special Victim Prosecutors, among others, are comprehensive and readily accessible. These services are well-resourced and fully capable of meeting all of the legitimate needs of victims. The Army defense bar believes that any proposal to establish the Air Force Special Victims Counsel pilot program, although well-intentioned, is unnecessary and could have a detrimental impact on the administration of military justice. The participation in the court-martial process by Special Victim Counsel could be disruptive, complicate proceedings, and undermine a servicemember's right to a fair trial. It would produce uncertainty on matters of discovery, inevitably delay cases, and inject confusion into the court-martial process.

Admiral DERENZI. In the absence of clearly defined roles, responsibilities, and procedures, establishing special victims counsel could result in disparities in services provided to victims, procedural errors in courts-martial, encroachment on the rights of the accused, and possible adverse impact on prosecutions.

Such an initiative must address how a victim's statutory rights conflict with the constitutional rights of the accused. The relative priorities of the victim's and the accused's rights need to be delineated so that courts-martial are not forced to make ad hoc determinations.

A victim's counsel's zealous representation could interfere with the necessarily direct relationship between the government counsel and the victim and/or cause the victim to perceive government counsel as a party-opponent who is not protecting his or her interests. Victim's counsel may complicate prosecution efforts; at worst, victim's counsel may impede prosecution efforts and run counter to initiatives intended to be more sensitive to a victim's rights.

Professional responsibility rules could also be implicated by such an initiative. Prosecutors and victim's counsel need to have clear guidance to ensure compliance with applicable ethical rules.

General ARY. There are three main components to the military justice system that must be carefully balanced in order to achieve a fair and just system: the commanders' inherent responsibility to maintain good order and discipline, the constitutional rights of an accused, and the moral obligation to protect and care for victims. The Marine Corps is committed to caring for victims of sexual assault, yet is also responsible for ensuring that all marines accused of crimes receive a constitutionally fair trial that will withstand the scrutiny of appeal. The maintenance of this balance is another factor for the JSC to consider when studying the efficacy of the Special Victims Counsel program. If not carefully balanced, there is a potential concern that accused will be facing what could be perceived as two sets of Government counsel during a sexual assault prosecution.

General HARDING. The SVC Program is a critical element of the Air Force's "response" piece of the Sexual Assault Prevention and Response program. The SVC Program is a robust, and we believe necessary, expansion of legal assistance provided to victims of crime by statute in the NDAA for Fiscal Year 2012. The SVC Program does not expand the rights of victims in the military justice process, but rather gives a greater voice to and explanation of those rights. Victims have always been free to hire civilian counsel to represent them in the military justice process. An important note is that victims are not parties to a court-martial and do not have the same entitlements as parties under the UCMJ. If I believed there was no way that we could guarantee due process and other constitutional rights to accuseds in courts-martial and also provide attorneys to victims, I would not have recommended implementing an SVC program, and instead, I would have opposed standing up an SVC program. However, after great study and almost 3 months of experience in exe-

cuting our SVC program, I am even more convinced that we can guarantee an accused's constitutional rights and provide counsel to victims in our UCMJ practice.

Admiral KENNEY. The Air Force Pilot Program has been in effect for less than 3 months. During this short period, the nascent program continues to evolve and adjust. To ensure that the program has the intended effect of assisting victims through the military justice process and facilitating prosecution of cases, further evaluation is required. Once sufficient information is received with regard to the program's efficacy, the Coast Guard will determine the best course of action on how to proceed.

In addition, the statutorily mandated Response Systems Panel is charged with comparing civilian and military jurisdictions, including best practices for providing support services to victims of sexual assault. Evaluation of this in-depth and thoughtful study will be helpful in proposing further implementation and avoiding unintended appellate law consequences. In the meantime, the Coast Guard is committed to providing the victims with professional support and services where victims and witnesses feel safe to come forward and report sexual assault.

A significant potential issue is whether Special Victim Counsel can or ought to have any role in court. Adding a Special Victims Counsel to the personnel of a court-martial (see Rule for Court-Martial 501(d)), could pose a variety of potential challenges, including suitability of existing trial procedures, confusion of court-martial members, and perceived or actual unfairness to the accused. The Coast Guard has reviewed the case of LRM v. Kastenberg, Misc. Dkt. No. 2013–05 (A.F. Ct. Crim. App. Apr. 2, 2013), where the Air Force Court of Criminal Appeals ruled that victim's Special Victims Counsel had no standing to compel production of evidence. We are monitoring this case closely to determine its potential impact on a Coast Guard Special Victim Course program.

VICTIM SUPPORT AND ADVOCACY PROGRAMS

21. Senator INHOFE. General Patton, how does the Special Victims Counsel pilot work to complement other victim support and advocacy programs throughout DOD?

General PATTON. Implemented on January 28, 2013, the Air Force Special Victims Counsel program is well underway with 60 specially trained attorneys providing legal representation. As of April 9, 2013, approximately 235 clients have been served by this program.

Under this program, legal assistance attorneys represent victims in a confidential, attorney-client relationship, throughout the investigation and prosecution processes. In addition to the case management and victim support functions provided by SARCs and Victim Advocates, these attorneys provide legal assistance to their clients with respect to the military justice process. The Air Force is closely reviewing all aspects of the program implementation, studying what guidelines may be needed, assessing the feedback from victims and studying the program impact on the outcome of cases.

The Air Force Special Victims Counsel program is currently a pilot program that will help inform the way ahead for DOD in this critical area of sexual assault victim advocacy.

ABOLISHING ARTICLE 60

22. Senator INHOFE. Mr. Taylor, General Chipman, Admiral DeRenzi, General Ary, General Harding, and Admiral Kenney, some have suggested that the authority of convening authorities under Article 60, UCMJ should be abolished. Is there a continued basis in military due process for the unfettered authority of convening authorities in Article 60?

Mr. TAYLOR. The commander plays a vital role in ensuring his or her command is ready to accomplish all assigned missions. An essential part of a command's readiness is maintaining a high degree of good order and discipline. Good order and discipline are present when members of the command follow the law, comply immediately with lawful orders, and treat one another with dignity and respect. When a member of the command does something wrong, the commander is responsible for holding the member accountable. Thus, I believe that there is a continuing need for a commander-centric military justice system. However, I am open to evaluating whether the current role that the commander plays in each part of the military justice system should be modified. Regarding Article 60, I am open to evaluating whether the commander, as convening authority, should continue to have the broad discretion that he or she currently exercises. Much has changed in military justice since Article 60 was enacted, the convening authority's role under Article 60 has

been modified and limited in the past, and I am open to assessing whether it should be modified again.

General CHIPMAN. The authority of the convening authority under Article 60, UCMJ should not be abolished. Any changes to Article 60 must carefully balance the role of the commander with the need to protect the rights of victims and accused soldiers. There is a continuing basis in military due process for the central role of the commander. The commander is responsible for all that goes on in a unit—health, welfare, safety, morale, discipline, training, and readiness to execute the mission. The commander's ability to punish, including the post-trial authority to grant clemency, is essential to maintaining discipline in units. The commander's authority under Article 60 also has practical applications including the ability to reduce sentences in compliance with pre-trial agreements for guilty pleas, to correct legal error prior to appeal, to modify outlier sentences between co-accused and to set aside convictions of minor offenses when the charged major offenses have resulted in acquittals.

The "unfettered authority of convening authorities" to take post-trial action in favor of accused soldiers has been part of the military tribunal system since before the birth of the Nation. It is clearly an element of military due process enunciated in *U.S.* v. *Clay*, 1 C.M.R. 74 (1951) and the importance of post-trial clemency was confirmed by the Court of Military Appeals in *U.S.* v. *Wise*, 20 C.M.R. 188 (1955) and *U.S.* v. *Boatner*, 43 C.M.R. 216 (1971). The Rules for Courts-Martial (RCM), first adopted in 1985, detail the responsibilities of the convening authority to consider defense submissions before taking action in a case (RCM 1107). This is a crucial check on any potential unfairness in the findings or sentence, including unlawful command influence. The clemency authority of convening authorities in Article 60, UCMJ, is part of the careful balancing of interests enshrined in the UCMJ that ensures the overall integrity and fairness of our military justice system.

Admiral DERENZI. Unfettered, no. However, continued basis for the authority still exists. Commanders must have authority commensurate with their responsibility to maintain good order and discipline. To achieve this end, Congress "intended to grant to the convening authority an exceedingly broad power to disapprove a finding or a sentence." *United States* v. *Prince,* 36 C.M.R. 470, 472 (C.M.A. 1966).

The rationale underlying continued basis for a CA's authority to take action on findings and sentence is that commanders need the flexibility to deal with any exigencies that may arise in the unique military environment, including during combat operations.

General ARY. A key reason commanders need this authority is to be able to disapprove "minor offenses," which comes into play when an accused faces multiple offenses at a GCM and is found not guilty of the serious offenses. For example, an accused might face a GCM for the offenses of sexual assault and adultery. If the accused is found not guilty of sexual assault, he is left with a GCM conviction for adultery. In this situation, the convening authority should have the authority to dispose of the lower-level offenses (e.g., adultery) in a more appropriate forum. Additionally, Article 60 provides the authority for a convening authority to enforce the terms of a pre-trial agreement (PTA) that was approved by the convening authority prior to trial (e.g., if a convening authority agrees to disapprove all confinement in excess of 2 years, and the adjudged sentence was 2 years and 6 months, the convening authority needs Article 60 authority to disapprove the additional 6 months of confinement in accordance with the PTA).

General HARDING. The Air Force fully supports Secretary Hagel's direction to prepare a legislative proposal to amend Article 60 pursuant to his letter dated Apr 8, 2013.

Admiral KENNEY. Convening authorities have had the authority to approve or disapprove guilty findings, as well as to grant clemency on sentences, of military members convicted by courts-martial since the Revolutionary War. Ostensibly, the power was provided to commanders because there were no appellate courts to review court-martial cases, and thus the review and action by the convening authority provided some post-trial substantive protection to a convicted servicemember. Although the modern UCMJ introduced appellate review, it preserved the historical function of the convening authority to review a case as well as consider clemency.

On April 8, 2013, Secretary of Defense directed that new legislation be prepared for Congress to amend Article 60 in two ways; first, by eliminating the discretion for a convening authority to change the findings of court-martial, except for certain minor offenses that would not ordinarily warrant trial by court-martial; and second, by requiring the convening authority to explain in writing any changes made to court-martial sentences, as well as any changes to findings involving minor offense. As indicated by the Secretary, the Service Secretaries, the Joint Chiefs of Staff, and

the Service Judge Advocates General, including the Judge Advocate General of the Coast Guard, support these changes.

The JSC on Military Justice is further evaluating the underlying assumptions of the convening authority's post-trial powers and options for modifying Article 60 power, and the Coast Guard has been actively involved in these discussions. In addition, the congressionally-mandated panels directed under the NDAA of 2013 provides a process for a holistic review of the military justice system. These review processes will generate well-informed and evidenced-based policy reforms regarding the UCMJ.

23. Senator INHOFE. General Chipman, Admiral DeRenzi, General Ary, General Harding, and Admiral Kenney, if Article 60, UCMJ, were abolished, eliminating the convening authority's power to review and take action on the results of trial, what would be the impact to the right of an accused to seek clemency in a timely manner?

General CHIPMAN. Article 60, UCMJ, is not an isolated statutory provision. It is a component of an overall system to provide justice to servicemembers who have been charged with offenses triable by court-martial. In the opinion of the Army defense bar, abolition of Article 60, UCMJ, would seriously compromise the right of a servicemember to seek clemency in a timely manner. In addition, it would call into question the authority of the convening authority to enter into pretrial agreements. It would also impact the ability of convening authorities to disapprove, reduce, suspend, or defer automatic or adjudged forfeitures for the benefit of the servicemembers' dependents. The abolishment of Article 60 would also prevent the local and more immediate correction of legal errors in trials by summary courts-martial (that never receive review in Courts of Criminal Appeals), and those special courts-martial not reviewed by the Courts of Criminal Appeals under Article 66.

Admiral DERENZI. The authority to modify a sentence as a matter of clemency is a traditional and important exercise of command discretion by the convening authority. It serves as a means by which the convening authority maintains good order and discipline in the ranks and ensures that our fighting force maintains essential capabilities. This authority is also critical for purposes of giving effect to plea bargains, and the second- and third-order effects, were the authority abolished, would be very damaging.

Were the authority abolished, clemency would be delayed, and the ability to effect pretrial agreements would be affected and eliminated in its current form. In all courts-martial, the convening authority must take action under Article 60 within 120 days of the completion of trial or justify exceeding that timeline requirement. Should the opportunity for clemency under Article 60 be eliminated, an accused would have to wait for review under Article 66 or Article 69 or review by the Naval Clemency and Parole Board. For cases which require Article 66 review by the Navy and Marine Corps Court of Criminal Appeals, a decision is to be rendered within 18 months of docketing the case. The Naval Clemency and Parole Board conducts an initial clemency review of the cases of all eligible servicemembers within approximately 11 months from the first day of confinement.

General ARY. An accused currently has the ability to seek clemency through the post-trial process before the convening authority acts on the findings and sentence. However, if Article 60 were abolished, an accused would not have the ability to seek clemency before the convening authority's action. Therefore, the first level of post-trial review would be through the Courts of Criminal Appeals through Article 66, UCMJ. Only cases in which the accused has an approved sentence of a punitive discharge or confinement for 1 year or more are eligible for automatic appellate review. Also, marines are eligible for clemency consideration through the Navy Clemency and Parole Board (NC&PB); however, the initial clemency review by NC&PB could be up to 60 days after the offender's clemency review eligibility date (the "clemency review eligibility date" is 10 days after CA's action for those whose approved sentence includes less than 12 months confinement or 9 months from the day confinement began for those whose approved sentence includes 12 or more months of confinement).

General HARDING. If Article 60 were abolished, other aspects of the UCMJ and MCM would have to be amended to retain non-clemency components of the post-trial process, to include PTAs, and deferment of components of a sentence like forfeitures and confinement. However, there is no Constitutional right to CA clemency. If Article 60 were abolished, the accused would still be able to seek relief through the judicial process (CCAs, CAAF, S.Ct.), Article 69, and Article 74. The Air Force fully supports Secretary Hagel's direction to prepare a legislative proposal to amend Article 60 pursuant to his letter dated Apr 8, 2013, and we do not recommend abolishing Article 60.

Admiral KENNEY. The Court of Appeals for the Armed Forces has frequently noted that an accused's best chance of relief rests with the convening authority' power to grant clemency. See e.g. *United* v. *Davis*, 58 M.J. 100, 102 (C.A.A.F. 2003). Despite the recent attention to Article 60 power, convening authorities rarely exercise this authority as applied to findings. The Coast Guard Court of Criminal Appeals can, however, adjust sentences sua sponte on a finding of legal error.

Military appeal courts, whether it is the Coast Guard Court of Criminal Appeals or Court of Appeals for the Armed Forces, are not statutorily authorized to engage in exercises of clemency.

Once appellate review is complete, Article 74(a) grants the Secretary the authority to remit or suspend the unexecuted portions of any sentence. This authority has been delegated to the Coast Guard Commandant. Under Article 74(b), the Secretary may, for good cause, substitute an administrative form of discharge for a punitive discharge or dismissal executed in accordance with the sentence of a court-martial.

Without the authority vested in Article 60, the accused would have no viable opportunity to clemency with regard to findings, and the power to grant clemency to an adjudged sentence would be narrowed to those unexecuted portions by the Commandant, and as well as authorizing only discharge upgrades by the Secretary for good cause.

IMPACT OF PROSECUTION INITIATIVES ON MILITARY JUSTICE DEFENSE

24. Senator INHOFE. General Chipman, Admiral DeRenzi, General Ary, General Harding, and Admiral Kenney, each branch of the armed services has taken steps to improve the professional training and oversight of the prosecution function. Has the pendulum swung too far in favor of the prosecution and what concerns, if any, do you have about the impact of these initiatives on the rights of accused in the military justice system?

General CHIPMAN. Improvements to the Army's professional training and oversight of the prosecution function have been accompanied by improvements to the professional training and oversight of the defense function. Combined, these initiatives have improved the overall quality of military justice practice and been a very welcome development. Historically, the UCMJ has represented a careful balancing of the individual servicemember's rights and interests of the command in good order and discipline, augmented by its investigative and prosecutorial resources. Any amendments to the UCMJ must be carefully considered to preserve the protections provided to accused soldiers or we risk losing the confidence of our ranks in the integrity and fundamental fairness of our military justice system.

Admiral DERENZI. The Navy's leaders remain steadfastly committed to ensuring that cases are processed through a fair, effective, and efficient military justice system. This commitment is exemplified in Navy JAG Corps training and reach-back capabilities. The Navy is committed to ensuring victims' rights are protected, as well as an accused's right to a fair trial. To ensure that both the government and the defense are adequately resourced and have the best training, we have implemented changes to improve our litigation capability, but have always done so with equal emphasis on the prosecution and defense capabilities.

In 2007, to improve the overall quality of Navy court-martial litigation, the JAG Corps established the Military Justice Litigation Career Track. JAG Corps officers apply for designation as military justice specialists or experts based on their litigation experience. Military Justice Litigation Qualified officers are detailed to lead trial and defense departments at Region Legal Service Offices and Defense Service Offices, which provide Navy prosecutors and defense counsel, respectively. These officers provide proven experience in the courtroom, personally conducting, adjudicating, or overseeing litigation in sexual assault and other complex cases. The Military Justice Litigation Career Track program increases the experience levels of trial and defense counsel and leverages that experience to enhance the effectiveness of criminal litigation practice.

In 2010, the Navy created Trial Counsel and Defense Counsel Assistance Programs. These separate programs are led by experts in military justice who provide direct support to prosecution and defense counsel. The Navy's Trial Counsel Assistance Program (TCAP) provides high-quality advice, assistance, support and resources for trial counsel (the Navy's court-martial prosecutors) worldwide through every phase of the court-martial process. TCAP counsel may be detailed to serve as trial counsel or assistant trial counsel and have been so detailed in several high visibility cases, to include five sexual assault cases. The TCAP Director is an O–5 Military Justice Litigation Qualified expert and is a former Naval Legal Service Office commanding officer and military judge. The TCAP Deputy Director is a GS–15 ex-

pert who specializes in sexual assault prosecution and victims' rights. A former state prosecutor with extensive experience, she previously served as the Director of the National Center for the Prosecution of Violence Against Women and is a noted author in the field. TCAP is also staffed with an O–4 Military Justice Litigation Qualified specialist with several years of litigation experience. During the past 2 years, TCAP provided on-site assistance visits, delivering trial advocacy training and prosecution process assessments to all nine Region Legal Service Offices worldwide. Further, TCAP personnel conducted outreach training using a multi-disciplinary approach to improve efforts between prosecutors, NCIS agents, military investigators and other military justice stake-holders, including Sexual Assault Response Program contributors. TCAP staff conducted advanced family and sexual violence training at the Federal Law Enforcement Training Center and training on alcohol-facilitated sexual assault at the Army JAG Legal Center and School and Air Force Keystone conference. TCAP personnel are frequent instructors at the Naval Justice School, including the Trial Counsel Orientation, Basic Trial Advocacy, Intermediate Trial Advocacy, Senior Trial Counsel, Litigating Complex Cases, Sexual Assault Investigation and Prosecution, and Prosecuting Alcohol Facilitated Sexual Assault courses. TCAP coordinates training and advice closely with Marine Corps TCAP and leverages expertise from other Services, including Army TCAP, highly-qualified experts, sexual assault investigators, and special victim prosecutors.

The UCMJ requires that qualified military defense counsel be detailed to military members facing trial by special or general court-martial. The Defense Counsel Assistance Program (DCAP) was created to support and enhance the proficiency of the Navy defense bar; provide experienced reach-back and technical expertise for case collaboration; and develop, consolidate and standardize resources for defense counsel. The office primarily supports the Navy trial defense bar with active cases. DCAP personnel are authorized to consult with detailed defense counsel through every phase of the court-martial process. Although not typically assigned as detailed defense counsel, DCAP personnel may be detailed to cases. Like TCAP, the DCAP Director is an O–5 Military Justice Litigation Qualified expert and former military judge. The Director is supported by an O–4 Military Justice Litigation Qualified specialist and a recently hired Highly Qualified Expert, discussed further below.

During the past 2 years, DCAP provided military justice policy advice and routinely coordinated with the defense services of the Army, Air Force, Marine Corps, and civilian defense organizations to maximize efficiency and capitalize on expertise. DCAP overhauled the Senior Defense Counsel course to focus on supervisory counsel responsibilities and continued to develop the Navy and Marine Corps Defending Sexual Assault Cases course hosted by the Center for American and International Law. DCAP personnel routinely present training during field assist visits, web seminars, and participate as instructors at a number of courses and seminars. DCAP works closely with civilian defense organizations to make use of the resources at Federal and state public defenders' offices.

In 2012, the Navy hired two Highly Qualified Experts (HQEs). One HQE works at the headquarters level to enhance sexual assault litigation training, trial practice, and policy. She has nearly 20 years of experience prosecuting sex crimes, domestic violence, and human trafficking crimes. As part of the JAG Corps' Criminal Law Division, she coordinates with the Naval Justice School and TCAP to ensure prosecutors and defense counsel receive specialized training on prosecuting complex sexual crimes, including the 2012 changes to UCMJ Article 120 and the intricacies of the rape shield provision under Military Rule of Evidence 412. The other HQE works with DCAP. He is a retired Marine Corps Lieutenant Colonel who completed two tours as a military judge while on active duty and has over 15 years of civilian experience as an assistant Federal public defender and preeminent civilian military criminal defense attorney. We are in the process of hiring a third HQE with significant civilian criminal litigation and training experience to provide litigation assistance within TCAP.

The Naval Justice School; TCAP or DCAP, as appropriate; and the JAG Corps' Criminal Law Division coordinate specialized training for Navy prosecutors and defense counsel on litigating complex sexual assault crimes. Prosecution of Alcohol-Facilitated Sexual Assaults is a week-long course taught in conjunction with Aequitas, the Prosecutor's Resource on Violence Against Women. It focuses on substantive aspects of prosecuting alcohol-facilitated sexual assaults and includes small-group practical exercises to hone skills such as conducting direct and cross examinations of sexual assault nurse examiners, toxicologists, victims, and the accused. The Naval Justice School also facilitates Sexual Assault Prosecution and Investigation Mobile Training Teams for prosecutors and NCIS agents. Defending Sexual Assault Cases provides defense counsel training on sexual assault litigation and is taught in conjunction with the Center for American and International Law. The Navy also

sends career litigators to civilian post-graduate schools to receive Master of Laws degrees in litigation or trial advocacy.

General ARY. There are three main components to the military justice system that must be carefully balanced in order to achieve a fair and just system: the commanders' inherent responsibility to maintain good order and discipline, the constitutional rights of an accused, and the moral obligation to protect and care for victims. The Marine Corps is committed to caring for victims of sexual assault, yet is also responsible for ensuring that all marines accused of crimes receive a constitutionally fair trial that will withstand the scrutiny of appeal. New military justice initiatives should first be evaluated for their constitutionality and whether or not they promote a fair and just process. When the primary stated goal of a new initiative is to achieve more convictions, that initiative should be critically evaluated to ensure it does not upset the careful balance built into the military justice process.

General HARDING. We must always remain mindful of maintaining a military justice system in which the rights of the accused are zealously protected. While the Air Force has made great strides in improving the methods by which we ensure a victim's rights are protected, these efforts have not disadvantaged Air Force accused. While criminal litigation in the military is rightfully an intensely adversarial process, our prosecutors are encouraged to focus on justice as opposed to blind advocacy. Furthermore, aspects of our military justice system such as, more protective rights advisement, early access to government provided defense counsel, open discovery, opportunities to attend Article 32 pretrial investigations and cross-examine witnesses and offer evidence, an opportunity to request clemency from the convening authority, and automatic appeal to the Air Force Court of Criminal Appeals for certain sentences, ensure that the recent enhancements to our ability to prosecute cases and protect victims' rights do not come at the expense of compromising an accused's right to a fair trial.

Admiral KENNEY. The UCMJ establishes the foundation of expected standards of conduct for all servicemembers, and creates the legal options by which commanders enforce those standards. Thus, the steps taken to enhance training and oversight of the prosecutorial function were not only appropriate, they were absolutely necessary. Rape and sexual assault are not compatible with a disciplined military service, and cannot be tolerated in the Coast Guard. The sexual assault programs and military justice reforms reinforce the Coast Guard's core values that each person in the military must be treated with respect and dignity and each servicemember will be held responsible for their actions.

The recent initiatives were important for increasing awareness of rape and sexual assault, providing greater response services to victims, requiring trained law enforcement agents to investigate such crimes, and providing trial counsel greater advocacy knowledge to prosecute sex crimes. However, these initiatives do not suggest that discipline should be summarily dispensed because commanders refer cases to court-martial. Courts-martial are, and continue to be, instruments of justice. The military justice system empowers independent judicial entities to safeguard constitutionally protected individual rights. The military justice system presumes the accused innocent and guilt must be proved beyond a reasonable doubt. The military justice system provides the necessary procedural checks and balances to prevent abuse of punitive powers. Maintaining the balance between the protection of fundamental Constitutional rights and the maintenance of military discipline is a challenging one. Therefore, any critical review of the UCMJ must ensure that the military justice system continues to render justice fairly and impartially and guard against the erosion of individual rights and due process of all servicemembers who wear the uniform.

[Whereupon, at 4:30 p.m., the subcommittee adjourned.]

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