

Stenographic Transcript
Before the

COMMITTEE ON
ARMED SERVICES

UNITED STATES SENATE

TO RECEIVE TESTIMONY ON SEXUAL ASSAULT
IN THE MILITARY

Wednesday, March 24, 2021

Washington, D.C.

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U.S. Senate

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Committee on Armed Services

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Subcommittee on Personnel

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Washington, D.C.

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10 The committee met, pursuant to notice, at 2:32 p.m. in
11 Room SD-106, Dirksen Senate Office Building, Hon. Kirsten
12 Gillibrand, presiding.

13 Committee Members Present: Gillibrand [presiding],
14 Hirono, Warren, Tillis, Hawley, and Tuberville.

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1 OPENING STATEMENT OF HON. KIRSTEN GILLIBRAND, U.S.
2 SENATOR FROM NEW YORK

3 Senator Gillibrand: Good afternoon. The subcommittee
4 meets today to receive testimony on the epidemic of sexual
5 assault in the military and the failure of military
6 leadership to address it, despite 30 years of promises to
7 change, and over \$1 billion spent on prevention and response
8 measures.

9 Since this is the first subcommittee hearing of the
10 year I want to start by welcoming Ranking Member Tillis. I
11 look forward to continuing the great relationship we have
12 had over the past 6 years and our work to provide our
13 servicemembers, their families, and the Department's
14 civilian workforce the tools, support, and the resources
15 that they need to do their jobs.

16 Today we will hear from survivors and from survivor
17 advocates on their experiences with the military justice
18 system; from the Government Accountability Office on the
19 many changes in laws regarding sexual assault in the
20 military; and from outside experts on the effects, or lack
21 thereof, those changes have had on reducing sexual assault
22 within its ranks.

23 The first panel of witnesses include Ms. Natalie
24 Khawam, the Founder and President of Whistleblower Law Firm;
25 Ms. Amy Braley Franck, the Founder of Never Alone; Ms. Amy

1 Marsh, a survivor of sexual assault and advocate; and Mr.
2 Quinton McNair, a survivor advocate who retired from the
3 Army after 24 years of service as a senior drill sergeant
4 and sexual assault response coordinator.

5 The second panel will have Ms. Brenda Farrell,
6 Director, DoD Strategic Human Capital Management, Government
7 Accountability Office.

8 And the third panel will have Mr. Eugene Fidell, Senior
9 Research Scholar at Yale Law School and Adjunct Professor of
10 Law at New York University Law School; Retired Colonel Don
11 Christensen, United States Air Force, and President of
12 Protect Our Defenders; and Retired Colonel Lawrence J.
13 Morris, United States Army, Chief of Staff and Counselor to
14 the President, Catholic University of America.

15 The subcommittee will also receive statements from
16 other survivors and survivor advocates who, unfortunately,
17 given the time and space constraints of this hearing were
18 not able to be accommodated. Without objection, we will
19 include all of their statements in the record.

20 [The statements referred to follows:]

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1 Senator Gillibrand: There is an epidemic of sexual
2 assault in the military. The DoD's most recent survey
3 estimated that almost 21,000 servicemembers were sexually
4 assaulted in 2018. That makes them more likely to be raped
5 by their fellow servicemembers than shot by the enemy in
6 war.

7 Since 2013, unrestricted reports of sexual assault in
8 the military have doubled, yet the rate of prosecution and
9 conviction has halved. The assailant was often someone in
10 the survivor's chain of command, the same chain of command
11 responsible for deciding the case. These commanders are not
12 lawyers, they are not delivering justice, and they are not
13 doing enough to help survivors.

14 Two in three survivors who report the crime experience
15 retaliation or ostracism, like Amy Marsh, who you will hear
16 from today. Last month, following the tragic death of
17 Specialist Vanessa Guillen, the Fort Hood independent review
18 reported that the command climates surrounding sexual
19 assault response and prevention programs were so ineffective
20 that the world's largest Army base was, quote, "a permissive
21 environment for sexual assault and sexual harassment."

22 We must do better for the people who sacrifice so much
23 for our country. I first introduced the Military Justice
24 Improvement Act in 2013, with the goal of professionalizing
25 the way the military prosecutes rape, sexual misconduct, and

1 other complex crimes. Every year since, military leadership
2 has come before us and said that the chain of command would
3 solve this problem. They are not solving the problem. They
4 have failed.

5 The statistics on sexual assault that the DoD has been
6 reporting since 2006, make it plain. There has been no
7 progress made over the past 15 years. We have given the
8 military enough time and enough resources to fix this
9 problem. Congress has given the military more than \$1
10 billion, \$500 million in fiscal year 2019 alone, enacted 249
11 legislative provisions, and chartered special panels,
12 commissions, and advisory committees to address this
13 problem. Not one of these steps has reduced sexual assault
14 within the ranks. We are right where we were when we
15 started. Nothing has changed.

16 Nearly every Secretary of Defense since Dick Cheney has
17 promised this country and the servicemembers who serve us
18 zero tolerance for sexual assault. Every general or
19 commander that has come in front of this body for the past
20 10 years has told us, "We have got this, ma'am. We have got
21 this." Well, the truth is they do not have it.

22 The military justice system simply is in the wrong
23 hands. The Military Justice Improvement Act would put these
24 serious criminal cases in the hands of senior, experienced
25 military prosecutors. It would eliminate command bias and

1 create a fair, impartial system. It is our duty to our
2 servicemembers to solve this problem. I invite my
3 colleagues to recognize the lack of progress made over the
4 past 10 years and to support our effort to rethink this
5 system and professionalize the way the military handles
6 these cases.

7 I look forward to working with you, Senator Tillis, to
8 finally take the necessary steps to address this scourge on
9 our military.

10 Senator Tillis.

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1 STATEMENT OF HON. THOM TILLIS, U.S. SENATOR FROM NORTH
2 CAROLINA

3 Senator Tillis: Thank you, Chairwoman Gillibrand and
4 to -- I was going to call you Coach but I guess I should
5 call you Senator Tuberville. Welcome to the subcommittee.

6 Senator Gillibrand, I want to thank you for holding the
7 hearing. I truly admire your unwavering dedication to
8 addressing sexual assault. I agree with you that sexual
9 assault has no place in the military, but I believe we
10 cannot just stop there. It has no place in our society.

11 While today's hearing is about focusing on our
12 military, it is important to remember that this is not just
13 a Department of Defense problem. If it is an epidemic in
14 the Department of Defense, then it is even more so in our
15 society. If we are to have any hope of fixing the issue for
16 our military, we need to tackle this issue more broadly.
17 Each year, about 180,000 young Americans enlist for active
18 duty service in the armed forces. Statistics show that
19 sexual assaults are most prevalent among our youngest
20 servicemembers, those who are newest to the military,
21 generally ages 18 to 24. In comparison to similarly aged
22 college and non-college students, the rate of sexual assault
23 is lower in the military, the rate of reporting a sexual
24 assault is higher in the military, and the rate of sexual
25 assault prosecutions is higher. In fact, colleges and

1 universities -- I was at a gathering in Annapolis a year or
2 so ago -- are coming to the Department of Defense and
3 asking, "Help us. Show us how we can start fixing this
4 problem."

5 Now preliminary data from the GAO study, due later this
6 year, shows that between 2004 and 2019, Congress has enacted
7 249 legislative proposals concerning sexual assault in the
8 military. But the reality is only about 9 percent of them
9 have anything to do with prevention. So I hope as we move
10 forward this process that we spend more time on the subject
11 of prevention.

12 Senator Gillibrand, I would ask unanimous consent that
13 my full statement be put into the record.

14 But you and I had a great conversation about two weeks
15 ago, and I have also had conversations with current service
16 line secretaries, and I have been here for going on 6 1/2
17 years. I have spoken to those service secretaries and
18 commanders under the Obama administration, as you were
19 making proposals. That is what I am saying -- you are after
20 it. You are staying after it, and I admire you for it.
21 They expressed concerns. Under the Trump administration,
22 they expressed concerns with removing it from the command.
23 And more recently, under the Biden administration, they have
24 expressed concerns.

25 I told the service secretaries, in the most recent

1 conversations about a month ago, that you need to come with
2 a credible proposal, because in the wake of the Fort Hood
3 incidents there are members that are beginning to wonder
4 whether or not we should keep the current structure.
5 Senator Gillibrand, you and I did not get to have an
6 opportunity to talk about the data. I am a data person, and
7 I am trying to figure out, it seems like sometimes in our
8 hearings we hear different views on different sets of data.
9 But I think one of the things we have to do, when I hear
10 that the conviction rate is lower, I hear that. On the
11 other hand, I hear DAC and IPAD say that the number of
12 prosecutions are higher, the conviction rates lower. So it
13 seems like, under the current structure, one argument
14 against moving it from the command is that more go to court
15 martial than the DAC-IPAD would expect. And if you have got
16 more going through prosecution, then you would naturally
17 expect that maybe the conviction rate, or the acquittal rate
18 would be higher.

19 So I hope that as we hear the witnesses today,
20 understand that it disgusts me, so much so that 2 years ago
21 I started -- we do our nominations process for service
22 academy nominees. About 2 years ago, I said, inspired, in
23 part, by the concerns that you have raised, that I want a --
24 this is a joyous occasion. These are young men and women
25 who want to go to the service academies. You would

1 generally want it to be a joyous occasion, hand them off a
2 certificate, and say, "We are going to work hard to get you
3 appointed."

4 I have to dedicate about 10 minutes of that segment now
5 -- I, at my request -- to talk about sexual assault, and to
6 make all those young people who are about to go into the
7 academy understand that I am watching them, and I have high
8 expectations. It is a shame that an otherwise joyous
9 ceremony with these young men and women and their parents
10 has to resort to that, but that is another step towards
11 prevention.

12 I want to make progress, but I want it to be something
13 that is not the 227th bill that has gone through Congress on
14 prosecution that does not ultimately address prevention. I
15 want it to be something that we feel like can be implemented
16 and bring as many people to justice as possible who are
17 guilty, or at least accused of being responsible for sexual
18 assault.

19 So I look forward to working with you. I want to take
20 all of this data, because as I do my homework, I hear people
21 -- it is like you have got the debaters in separate room,
22 and not coming together to make sure that whatever policy we
23 move forward with is actually driven towards holding more
24 people accountable, but I also hope that we have a treatment
25 for more meaningful prevention efforts, and also after an

1 assault, care.

2 So thank you for holding this hearing, and without
3 objection I would like to submit my formal statement for the
4 record.

5 [The prepared statement of Senator Tillis follows:]

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1 Senator Gillibrand: Well, thank you very much, Mr.
2 Ranking Member, and I would just respond with two points.
3 The reason why I think this legislative idea is so important
4 is because a lot of rapists and sexual assaulters are
5 recidivists. So if you want to prevent more sexual assault,
6 put more recidivists in jail, so it is a measure of
7 prevention. And two, because I have found that a lot of --
8 unfortunately, people mislead on this topic. The rate of
9 convictions since 2010 -- I am going to read it off, going
10 year by year, from 2010 to 2019 -- rate of conviction in
11 2010 was 24 percent; 2011, 13 percent; 2012, 14 percent; 17
12 percent; 16 percent; 15 percent; 9 percent; 8 percent; 7
13 percent. We are at 7 percent. Raw numbers, in 2019 we
14 convicted 264 cases. In 2014, we convicted 433 cases.

15 So these numbers really are not going in the right
16 direction, and so I would not want you to be misled by any
17 data that is incorrect.

18 Senator Tillis: Well, and I am stipulating, what I am
19 trying to do is figure out maybe people are talking past the
20 numbers to numbers that are more favorable or less
21 favorable. What I am hoping to get to is something that as
22 we pass these bills we can actually start measuring, on a
23 consistent basis, the progress that we are making. We are
24 not making progress.

25 But I just also want to say, I heard you say that it is

1 an epidemic in the military. But it is fair to say with the
2 same cohorts in society it is even worse than that. I do
3 not what you call beyond an epidemic, but I do not want the
4 young men and women who are considering going into the
5 military to think it is a more dangerous environment, say
6 the service academies, than what they are going to find in
7 any private institution across this country. I think it is
8 very important to point that out. It is not unique to our
9 men and women in military, and it is even worse for their
10 cohorts in private institutions.

11 Senator Gillibrand: Thank you. I would now like to
12 turn to the first panel. You can each introduce yourselves.

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1 STATEMENT OF NATALIE KHAWAM, PRESIDENT AND FOUNDER,
2 WHISTLEBLOWER LAW FIRM

3 Ms. Khawam: Good afternoon, members of the Senate
4 Armed Services Committee, Subcommittee on Personnel. Thank
5 you, Senator, Chairwoman Gillibrand and Senator, Ranking
6 Member Tillis for having me here today to testify. Can I --

7 Senator Gillibrand: You may proceed with your
8 testimony. Thank you.

9 Ms. Khawam: Thank you, Chairwoman. My name is Natalie
10 Khawam and I am an attorney, and I represent Vanessa
11 Guillen's family. My background is I am a graduate of
12 Georgetown University Law Center, proudly. I have an MBA in
13 health care and a second master's in health care finance. I
14 am the founding partner of Whistleblower Law Firm and Khawam
15 Ripka Law Firm.

16 I am here today to speak on behalf of not only Vanessa
17 Guillen and her family but all soldiers that are victims of
18 military sexual assault and harassment. I agree with you,
19 Chairman, it is an epidemic. I am not here to put egg on
20 our military. Actually, I love our military and I love our
21 country. I am an immigrant from war-torn Lebanon. My
22 family are Lebanese Catholic. And the United States of
23 America made this our home. They brought us in. They took
24 us in. And I have a calling to help serve those who serve.

25 I represent many members of the military. Senator

1 Tillis, you probably remember in your office a year ago with
2 Sergeant First Class Richard Stayskal, the Green Beret,
3 highly decorated Green Beret, who is dying of lung cancer.

4 I represent many members in the military, on all
5 issues, including military base housing issues. I know what
6 is going on, I understand what is going on, and I speak here
7 from truth. I am not a politician; I am an attorney. There
8 is such an injustice that has happened to our soldiers. Our
9 soldiers deserve respect. Our soldiers deserve justice.

10 We have to do this as a country, not just members of
11 the military but all people, civilians and all. As you
12 know, there is no accountability right now in the military.
13 I understand a lot of people have a loyalty to the chain of
14 command, but it has proven a failure. It has proved to have
15 failed, and we need improvement.

16 I am here to support the Military Justice Improvement
17 Act. I am here to support any kind of improvement reform to
18 the military, so our soldiers have a voice, they have the
19 rights that we all have, and they have the protections that
20 they deserve.

21 There needs to be accountability. You know, when I see
22 these headlines and these soldiers are committing suicide
23 after being raped or assaulted or hazed, and I get these
24 phone calls in my office from families asking how I can help
25 their loved one, their daughter or their son, that is at

1 Fort Hood, at Fort Bragg. I sit there and I just think
2 about how much is going on in our society and how many
3 people do not get these calls that I get every day, all day.

4 You know, the reason I have taken this case is an
5 immigrant, the Guillen family are immigrants. I knew that
6 DoD is a very complicated area, and that they were just
7 going to be railroaded. They were not going to get answers.
8 They were not going to get results. And I knew we needed
9 one thing, and that was legislation on this matter.

10 When I originally drafted the Sergeant First Class
11 Richard Stayskal Military Accountability Act, sexual assault
12 was part of that bill, and it was removed. That language
13 was removed. So here we are, a year later, asking for
14 accountability for our soldiers. They deserve to be
15 protected. They deserve to be free to serve, free from
16 sexual harassment and sexual assault. And I am here to
17 speak on their behalf, for all those members of the military
18 that proudly service.

19 What happened to Vanessa at Fort Hood, a 20-year-old,
20 beautiful young lady, that just wanted to serve our country
21 proudly, she was bludgeoned to death. She was murdered, a
22 horrific murder that should never have happened on the base.
23 Daytime -- daytime -- in the armory room. And there was
24 cover-up after cover-up, lies after lies. This family went
25 through so much, and they are still going through. Look at

1 these reports that are coming out. They still do not have
2 answers.

3 We need change. We need legislation. I want to talk
4 about not just legislation. We need legislation that is
5 actually going to create results. I speak from experience.
6 When we had Sergeant First Class Richard Stayskal Military
7 Medical Accountability Act passed last year, we still do not
8 have our members of the military with rights to process
9 their claims. It is stuck in the DoD's bureaucracy, and
10 that cannot happen. We cannot wait for the DoD to do their
11 job. You, Members of Congress, you need to pass this
12 legislation. You need to do this for us. We look up to
13 you. We need you. And I ask that you protect these men and
14 women that serve, like they protect us.

15 I only speak because I know what I am talking about, as
16 do you. I know what they are going through, and I know what
17 they say to me. And without any kind of improvement and
18 revisions and reform, our members of the military are going
19 to continue to be afraid to join.

20 Senator Tillis, you were absolutely correct. We do not
21 want to scare anyone from joining. I absolutely agree. But
22 you also want to give them the morale to join. You want
23 them to say, "Hey, look, it is a better tomorrow for
24 everyone." We are here to help you guys like you are
25 helping us. We are here to protect you like you are

1 protecting us. And I speak from the heart, as an attorney,
2 not as a politician.

3 I thank you members, Congress. I thank you for having
4 me here today, and I am very happy to answer any questions
5 you have.

6 [The prepared statement of Ms. Khawam follows:]

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Senator Gillibrand: Thank you. Ms. Franck?

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1 STATEMENT OF AMY BRALEY FRANCK, FOUNDER, NEVER ALONE

2 Ms. Franck: Chairwoman Gillibrand, Ranking Member
3 Tillis, and members of the committee, I thank you for this
4 opportunity. My name is Amy Braley Franck. I have been
5 working with victims of sexual violence since 2006,
6 currently employed as a Victim Advocate at the 416th Theater
7 Engineer Command. I am currently being retaliated against
8 for reporting command for illegally concealing and failing
9 to report three violent sexual assaults to law enforcement.

10 I have been on a paid suspension since 20 November
11 2019, the day after I emailed Lieutenant General Charles
12 Luckey the evidence. I emailed the evidence to the Chief of
13 Staff of the Army, General James McConville on 22 November
14 2019. I also sent the evidence to the Chairman of the Joint
15 Chiefs of Staff, General Mark Milley, and DoD SAPRO, Admiral
16 Burkhardt and Nate Galbraith.

17 This evidence mirrors what was documented in the Fort
18 Hood report: sexual assaults and violent rapes not reported
19 to CID or law enforcement, there was a retaliation against
20 victims and reporters of crimes, no case management group or
21 attendance for over a year. I have been left in this
22 suspension after protecting my victims and reporting the
23 command for over 16 months, completely ostracized and
24 retaliated against.

25 This evidence was reported to the Office of Special

1 Counsel and the DoD IG. The Army's internal 15-6 process
2 has impeded justice for my victims and myself. This
3 internal investigative process does not allow for
4 transparency and should be abolished.

5 My whistleblower complaint was due to a 17-year-old
6 private in the Granite City, Illinois, Reserve Center, that
7 was raped, resulting in a broken collarbone and a broken
8 arm. She had to stand next to her assailant in formation.
9 The command's illegal 15-6 investigation was documented in a
10 Memorandum for Record. They said it was consensual sex.

11 For over year, no one assisted her until I was notified
12 in June of 2019, but after my suspension her advocacy ended.
13 Advocates are continually blocked by layers of command from
14 protecting their victims. When commanders ignored advice of
15 advocates, we have no recourse. There are no consequences
16 for commanders when they violate the law, documented by the
17 number of murders and murders by suicide.

18 Nicole Burnham's brigade commander, Colonel John
19 Monkford, left Nicole in the same barracks at Camp Casey
20 with her offenders, raped and later gang-raped, tortured for
21 over 82 days before her transfer was executed. Nicole
22 Burnham is dead.

23 Staff Sergeant Morgan Robinson's first offender is
24 still serving in the Oklahoma Army National Guard. Staff
25 Sergeant Robinson's report of nine Special Forces soldiers

1 playing a cover over her head, dragging her out of a tent,
2 and gang-raping her in Afghanistan has never been
3 investigated. An outstanding soldier committed suicide.
4 She was not protected.

5 LaVena Johnson's brutal murder has never been
6 investigated. The Army still states it was a suicide.

7 Sixteen years later, the toxic culture again exposed in
8 the murder of Vanessa Guillen.

9 This is not isolated to Fort Hood. Documented across
10 all components of the military.

11 Fort Campbell, April 2020, Never Alone received a phone
12 call from a soldier that was gang-raped. She was illegally
13 arrested by CID and denied counsel. Her Special Victims
14 Counsel, they told him that he was not the right kind of
15 attorney. Major General Shadley, Ret., alerted Major
16 General Donna Martin. Nothing was done. Never Alone helped
17 a soldier with suicidal ideations, but she is still fighting
18 to clear her record.

19 Fort Bliss, 31 December 2020. Private First Class Asia
20 Brown was found dead. Her offender is identified as an
21 accused serial rapist, walking free, no pretrial
22 confinement. He continued to live in the same barracks, on
23 the same floor with Asia, and was moved from Echo Company
24 into Headquarters Company with his victim, until her
25 untimely death. Asia's leadership failed to protect her

1 after she reported her rape in February of 2020, not June.

2 Private Richard Holliday is still missing from Fort
3 Bliss. When victims and Victim Advocates speak out about
4 the broken process and illegal actions of commanders we face
5 severe retaliation. All felony crimes -- murder, rape,
6 sexual assault, domestic violence -- do not belong with the
7 chain of command's control to investigate or prosecute.
8 Kamisha Block's death was deemed friendly fire. She was
9 murdered in a domestic abuse situation.

10 The abuse of power is real. In Italy, the Provost
11 Marshal, Lt. Col. Michael Parsons of Army Garrison, Vicenza,
12 Italy, filed an espionage charge in an Italian court against
13 an Army spouses, Michela Morellato, retaliation for exposing
14 General Harrington resulting in his firing and demotion.
15 This retaliation was reported to then Chief of Staff of the
16 Army, General Milley, and the IG. Nothing was done.

17 Illegal, internal 15-6 process, ability to redact
18 investigations. None of us will ever know the truth or get
19 justice. Just this week, my own sexual assault by a two-
20 star general, still under investigation, was improperly
21 released to be weaponized against another sexual assault
22 that was assaulted by a full-bird colonel. In an unrelated
23 court martial, the military has no checks and balances.

24 I was raised in the military, and I am a proud mother
25 of veteran of the Army. I will not stop until our military

1 is safe. Sexual misconduct is an abuse of power and a force
2 protection issue. The inability of commanders to execute
3 essential command functions of protection is a significant
4 threat to the United States military's ability to protect
5 this great nation. Soldiers should never be alone.

6 Thank you. I yield to any questions.

7 [The prepared statement of Ms. Franck follows:]

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1 Senator Gillibrand: Thank you. Our next panelist, Ms.
2 Marsh.

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1 STATEMENT OF AMY MARSH

2 Ms. Marsh: Good afternoon, Chairman Gillibrand,
3 Ranking Member Tillis, and members of the subcommittee.
4 Thanks for inviting me here today. I appreciate the
5 opportunity to speak about my experiences and my
6 convictions. I would also like to thank my husband, Brian,
7 for supporting me over these past 2 years of fighting for
8 justice. I would not be here if it were not for him.

9 I have been a military spouse for almost 4 years now,
10 and in December of 2018, while we were at our first base,
11 Travis Air Force Base, I was sexually assaulted by an E-9.
12 This was a person who should have been the highest example
13 of the Air Force core values, and who my husband and I
14 trusted and respected, even viewed as a mentor to my
15 husband, a young CGO at the time. Instead, this person
16 betrayed that trust when he sexually assaulted me after a
17 unit function. This experience nearly destroyed me, our
18 marriage, and it has ruined my husband's Air Force career.

19 I kept my trauma secret for months because I had not
20 yet understood what had happened to me. Once I understood
21 this was a sexual assault I was afraid of what would arise
22 if I said anything at all. After careful reflection of what
23 reporting this meant for me and my family, I decided to file
24 an unrestricted report. We initially had hope, because I
25 immediately was assigned an SVC and we had an expedited

1 transfer to Davis Monthan Air Force Base, where I could be
2 near family.

3 Although my SVC persistently requested feedback from
4 Travis Legal Office as to when they wanted a deadline on my
5 decision on whether or not to pursue charges, they did not
6 give an answer until the day of the deadline. I felt
7 pressured to give a quick response and requested
8 administrative action instead of a court martial. However,
9 after giving it more thought I decided, yes, I did want to
10 pursue charges. The base commander, an O-6, denied my
11 request. I asked for a video conference with him and was
12 denied. Instead, I was allotted a 10-minute phone call,
13 where I literally cried to him and explained why I needed to
14 pursue charges. He did not say anything in response and
15 still denied it.

16 Immediately after my decision of wanting to pursue a
17 court martial, my husband was punished by his command
18 because of allegations made against him by people who worked
19 directly for the accused. He appealed this decision, as
20 high up the chain as you could go, but it remained on his
21 record, and his promotion was delayed.

22 To us, all of this felt like retaliation for having
23 reported the assault and for not backing down when the
24 command did not prefer charges against the offender. The
25 only reason my husband's chain of command knew about the

1 allegations that led to him being punished is because we
2 made the decision to file the unrestricted report.

3 My assailant only received nonjudicial punishment and
4 was forced to retire early. The order was issued by the
5 18th Air Force commander, disregarded at a lower level, and
6 then had to be reissued. Now is that my assailant's only
7 consequence was a decreased pension in retirement, but my
8 husband's military career is essentially destroyed? The
9 frustrating part is that everyone in the chain of command
10 refused to provide me a response as to why this was, and
11 they have all been up for promotion since then.

12 After exhausting the chain of command, I filed a
13 congressional complaint with two separate offices in my
14 state. The Air Force gave a consistent, yet victim-blaming
15 response. The Air Force claimed that the chaplain had
16 encouraged me to believe the sexual activity was non-
17 consensual due to intoxication. This is a gross
18 mischaracterization of the drastically needed help my
19 support system was giving me at the time, and an insult to
20 anyone who has ever been assaulted while too incapacitated
21 to defend themselves. But the most egregious of the Air
22 Force's responses, to my case, was when an Air Force general
23 had written that marital difficulties between Brian and me
24 would, quote, "likely undermine my case," end quote. I find
25 it unfair how the Air Force considers a marital disagreement

1 a potential disqualifier when reporting sexual assault.

2 The Air Force promises survivors "Maximum Support"
3 after reporting sexual assault, but that is not what I felt
4 following my decision coming forward. At the end of the
5 day, even though I begged this colonel, he decided two times
6 not to prosecute the E-9 who assaulted me, and it has been
7 detrimental to my life and my husband's career. After it
8 was all over, we felt the repercussions for reporting had
9 been worse for us than my assailant, and the Air Force's
10 rationale had finally come out, that it was indeed victim
11 blaming.

12 If what had happened to me continues to go unchanged,
13 survivors will feel reluctant to come forward for fear that
14 they too will face retaliation. It pains me to say this,
15 but at many points throughout this process I felt it would
16 have been much better if I just had not reported anything at
17 all. If the status quo remains unchanged, bad actors will
18 be able to continue their military careers while victims
19 suffer in silence, and I do not feel any justice or fairness
20 in the system that has failed me, and I did everything
21 right.

22 Because of what we experienced, we have decided not to
23 continue with the military couple life that we really did
24 once cherish. But I do hope that my testifying here today
25 shows that we remain committed to helping improve justice

1 for survivors, and that it can finally become safe for
2 survivors to report sexual assault in the military. Thank
3 you.

4 [The prepared statement of Ms. Marsh follows:]

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1 Senator Gillibrand: Thank you. Our last speaker, Mr.
2 Quinton McNair.

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1 STATEMENT OF QUINTON McNAIR

2 Mr. McNair: Good afternoon Chairwoman Gillibrand and
3 Ranking Member Tillis, survivors, advocates, ladies and
4 gentlemen of the subcommittee, good afternoon. I am a
5 retired Army veteran with over 7 years in the field of
6 victim advocacy. I currently call Chicago my home, where I
7 own and run a small bakery business and volunteer at a
8 nonprofit organization that serves the community.

9 As a former Sexual Assault Response Coordinator for the
10 82ND Combat Aviation Brigade, I managed the unit's Sexual
11 Harassment, Assault Response and Prevention Program
12 alongside my fellow Victim Advocates. My primary duties
13 included training, case management, and providing resources
14 for over 3,000 soldiers, as well as revolving duties as the
15 installation on-call SARC, participation in Sexual Assault
16 Review Boards, and planning for installation events and
17 awareness.

18 Although I am retired I will always consider those that
19 serve as my brothers and sisters in arms, and right now they
20 face an old enemy that is eating away at the integrity and
21 the proud history of our armed forces, an enemy who takes
22 its toll on and off the battlefield and whose wounds scar
23 deep. This enemy is sexual assault. To fight sexual
24 assault we must continue to make strides to change the
25 culture. As a SARC, I was at the front lines of that fight.

1 I used SHARP guidelines to create informative and open
2 discussions about sexual assault. Soldiers responded well
3 to that and it resulted in a decrease in incidents and an
4 increase in reporting in my unit. I see support and
5 awareness everywhere and we have come a long way from when I
6 took my first class as a young soldier. However, I find
7 this shift ineffective, especially if and when we fail at
8 accountability.

9 So what is change without accountability? I can recall
10 SHARP training early in my career where soldiers were taught
11 things like never go out alone or to cover your drink so no
12 one can slip something in it. We were even passed out rape
13 whistles. We essentially taught soldiers how to avoid being
14 assaulted. The onus or accountability was not on the person
15 committing the act; it was on the victim.

16 I can see the culture has shifted. We now teach
17 consent and intervention. But to end sexual assault we have
18 to do more than shift; we have to change the culture that
19 feeds it. To change the culture that feeds it we have to
20 hold those that commit these acts accountable. Changing the
21 hearts and minds of every single person who may commit
22 sexual assault is a difficult task, I would dare say an
23 impossible task. But we do have the power to hold them
24 accountable. People who commit sexual assault are like
25 sharks hunting -- you often are not aware of them until they

1 attack. Through accountability, we can make the waters so
2 hostile to the sharks that they are afraid to hunt. On the
3 other hand, lack of accountability emboldens them. All of
4 the efforts put into intervention by SARCs and Victim
5 Advocates around the world are lost when we fail to hold
6 people accountable.

7 I do not doubt that the prevention of sexual assault
8 and harassment is a priority for every leader in our armed
9 forces. It is non-negotiable. Every leader is required to
10 buy into the program, yet we continue to see examples where
11 that priority is not evident. What is evident is that there
12 is a large gap between the leaders who care because they are
13 required to and leaders who actually care. That gap is
14 painfully obvious every time a case is purposefully
15 mishandled. That gap is painfully obvious when things
16 spiral out of control as they did at Fort Hood. And right
17 there in the middle of that gap are the lives and careers of
18 the soldiers who suffer from it.

19 When a sexual assault is reported the first call is
20 made to CID who, independent of the unit, starts a criminal
21 investigation. The findings of that investigation are
22 turned over to the unit for adjudication. While most
23 commanders and their legal team handle cases with integrity,
24 the response is not uniform across the board. I believe
25 this has been a point of failure far too many times. The

1 effects of a mishandled case are far reaching, and the
2 damage is irreparable. Maybe it is time to try something
3 new. Perhaps the answer to restoring the faith of our
4 servicemen and women in the SHARP and SAPR programs is to
5 handle the adjudication the same way as the investigation,
6 by an entity outside of the unit where the incident
7 occurred.

8 Sexual assault and harassment are issues that span
9 mission and personnel readiness, unit cohesion, battlefield
10 effectiveness, and many other areas. In combat, I have to
11 be able to trust my leaders and fellow soldiers with my
12 life. That trust withers or dissipates altogether when I
13 can no longer trust those same people to protect me at home.

14 I dedicated 24 years of my life in service to this
15 country and its values. I am very embarrassed that the U.S.
16 military, where the best of the nation call home, has a
17 problem with protecting its women and men. How do I
18 encourage others to make the same sacrifice I made when I
19 cannot guarantee their safety, not from foreign enemies, but
20 their leaders and fellow servicemembers. I have two
21 daughters, ages 20 and 23. Their names are Destiny and
22 Tiana. They are extremely proud of my service, and at one
23 time both considered following in my footsteps. Sadly, I
24 discouraged them, because despite the honor of wearing the
25 uniform and all of the benefits that come along with

1 serving, there is no honor in going to combat and coming
2 home to be assaulted by the same people you fought beside.
3 I have seen first-hand, no benefit is enough to heal the
4 emotional scarring that comes with that.

5 Thank you for your time and the opportunity to share my
6 thoughts and experiences. I sincerely hope that this
7 committee can work together to find the change that is
8 needed to resolve this issue.

9 [The prepared statement of Mr. McNair follows:]

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1 Senator Gillibrand: Thank you very much. Thank you to
2 all the witnesses for your profound testimony.

3 I would like to ask a couple of questions. Ms. Khawam,
4 you have represented victims of crime in the military across
5 a long period of time and also in different circumstances.
6 As their representative, what can you tell us about their
7 faith in reporting crimes to their commander and having the
8 chain of command make the decision about whether a case
9 should be brought to trial?

10 Ms. Khawam: Thank you for your question, Senator,
11 Chairwoman. The victims that I speak to on a daily basis
12 tell me how fearful, like Vanessa was, to report the crime
13 that they have experienced. They are challenged by the
14 seniority. You know, statistics show -- and Senator Tillis
15 likes to hear -- the more younger that they are, the more
16 likely they are to be a victim of sexual harassment and
17 assault. And because it is still within the chain of
18 command you have a bias with somebody that you are put in a
19 more senior position with. So the perpetrator is usually
20 going to be somebody that has better, more approachable
21 relationship with the command than the young specialist like
22 Vanessa Guillen.

23 So reporting has three issues: (a) Will I be believed?
24 (b) Am I betraying my brother, or sister, whomever is the
25 assailant? (c) Why are you reporting this? Are you sure

1 this happened? Were there any witnesses? Suck it up,
2 buttercup, those kinds of responses. And worst of all, they
3 know the retaliation that goes with it for reporting alone.
4 The reporting itself becomes its own animal. You become a
5 victim -- you become re-victimized as a victim, because now
6 you are put through this channel of questions, doubt,
7 character assassination. You know, you heard it from the
8 other witnesses here.

9 So the way that right now the system is set up,
10 obviously we all know it has proven to be a failure. The
11 need to take sexual assault out of the chain of command is a
12 necessary and important step to give some kind of assurance
13 to our victims and our soldiers. The morale is really low
14 right now, and we need to change that morale for our
15 victims, and for our soldiers, in general, giving them a
16 voice and believing them, and letting the system, an
17 independent system, take place, not through the chain of
18 command.

19 Senator Gillibrand: I appreciate that Vanessa's family
20 is here. Could you talk a little bit about what the climate
21 was like at Fort Hood, what Vanessa told you, what you know
22 of that climate? Were her statements to you, or to her
23 family different than what the Fort Hood report just came
24 out with?

25 Ms. Khawam: Yes. When I was retained by the Guillen

1 family Vanessa was missing at the time. We did not know
2 where she was, and I came in to help find Vanessa.
3 Unfortunately, as we all know, she was murdered. But here
4 statements to her family and her friends, and, actually, her
5 fellow soldiers, were that she was being sexually harassed,
6 she did not like the way they were talking to her, they were
7 saying very inappropriate, vulgar statements, and this was
8 several of her fellow soldiers, sergeants, that did this to
9 her.

10 And, unfortunately, her concerns were, as she told her
11 family, my clients, that she was afraid to say anything
12 because she was afraid they would not believe her and that
13 she would just try to fix it or handle it herself. You
14 know, we saw what happened when she tried to handle it
15 herself. She was bludgeoned to death.

16 So I do not know if this system really works when
17 somebody is either going to be assaulted and keep it to
18 themselves or they report it, or as she said, she was going
19 to report it and the assailant did not want her reporting.
20 He killed her. Or the other victims' families that I speak
21 to, they kill themselves because they do not know what to
22 do, and they do not want to be, as you heard, re-victimized
23 by the system.

24 Senator Gillibrand: Thank you. Mr. McNair, thank you
25 for your testimony today. In your written testimony and

1 your oral testimony you discussed the difference between
2 actual buy-in from military leaders versus forced buy-in.
3 Can you explain for the members here what you mean by that
4 and why it is important in combatting sexual assault?

5 Mr. McNair: So when I speak of forced buy-in or
6 required buy-in it is written in every doctrine that we have
7 that there is a zero tolerance for sexual assault in the
8 military. We hear it all the time. We hear at these
9 hearing that there is a zero tolerance for sexual assault.
10 There is not a single commander or leader in any branch that
11 will not say, "Hey, this is not a top priority for me." But
12 if that is true, then why do we continue to have situations
13 like what happened at Fort Hood? Why do we keep continuing
14 to have mishandling of cases?

15 So it is extremely important that we find leaders who
16 have that actual buy-in, who buy into the program because
17 they actually care about their soldiers, they care about the
18 well-being of the women and men in the armed forces, versus
19 the leaders who say, "Hey, I care about this because I am
20 required to."

21 Senator Gillibrand: Senator Tillis.

22 Senator Tillis: Thank you, Chairwoman Gillibrand. Ms.
23 Marsh, when you reported sexual assault can you give me any
24 idea of the support that you got, just recovering from the
25 trauma?

1 Ms. Marsh: Yes. Thank you for the question. I did
2 receive help from a Victim Advocate, when we were still at
3 Travis, as well as an SVC, and then we moved to Davis
4 Monthan and I received support from a victim advocate
5 temporary there as well, as well as an SVC, Special Victims'
6 Counsel. She was my lawyer, essentially. But I did receive
7 support from them. The commander did check in on me once,
8 but not since then.

9 Senator Tillis: You mentioned that your husband's
10 promotion was delayed. Over what period of time did that
11 occur? Has been subject to any other promotions since then?
12 He is still active?

13 Ms. Marsh: Yeah, he is still active duty, yes, sir.
14 Yes, his promotion, he was supposed to be promoted in June
15 of 2020, and it was delayed, and it still is delayed.

16 Senator Tillis: Ms. Khawam, thank you for advocating
17 for veterans and the time you took in my office. As I am
18 trying to sort this out to make sure that we are making
19 positive progress on priorities that each of those witnesses
20 have expressed an interest in, are you aware of other
21 jurisdictions that have made this change, and I am talking
22 about side of the United States. Again, I am trying to get
23 my head around the data, to make sure we have a positive
24 outcome, but I have heard reports from Canada saying that
25 they are having problems now with their transition. I think

1 it was Australia as well.

2 Are you familiar with studies that just support doing
3 this has a best practice or an example where the policy has
4 been changed, it has been executed, and produced the results
5 that we all want?

6 Ms. Khawam: Senator, I studied the different military
7 systems of our allies, such as Canada and the UK, and I have
8 seen that the way that they have handled their military,
9 their military do have, for example, in the United States we
10 have the Feres Doctrine. They do not have the Feres
11 Doctrine or anything like that overseas. Quite the
12 opposite. In Canada, for example, you know, it is a
13 socialized health care system, and in their system it is
14 harder, as a civilian, or I should say the bar is higher to
15 pursue a medical malpractice claim, yet it is a lower bar if
16 you are in the military to pursue a medical malpractice
17 claim. Quite the opposite in the United States.

18 So you see that overseas, and our allies especially,
19 the way that they provide justice and rights to their
20 military a lot more than we do for our military in the
21 United States.

22 Senator Tillis: Mr. McNair, I mentioned in my opening
23 comments that members of the DoD, either service secretaries
24 or various people in different levels of the chain of
25 command will uses data that says we prosecute more,

1 therefore, our conviction rate is lower. What kind of
2 insight can you give me to say that is a red herring?

3 Mr. McNair: Well, when you look at situations where
4 you have less people reporting but you have less
5 prosecutions out of those reports, and it skews the numbers,
6 you cannot really say that, you know, we are doing more
7 there.

8 There is always the question of, in my unit, are we
9 reducing numbers of actual sexual assaults or are we
10 reducing numbers of reports? So one thing you do have to
11 consider is, has the chain of command or has the environment
12 become so toxic that less people are willing to report, or
13 are we doing enough now that it becomes so great that less
14 sexual assaults are happening? And there is no way to
15 really determine that unless you talk to the people that are
16 on the ground. You have to talk to the local SARCs and the
17 Victim Advocates who are actually out there in the unit with
18 the soldiers to figure that out.

19 Senator Tillis: Thank you. Thank you, Madam Chair.

20 Senator Gillibrand: Thank you, Senator Tillis.

21 Senator Hirono from Webex.

22 Senator Hirono: Thank you, Madam Chair. So, Madam
23 Chair, I want to thank you for the persistence of your
24 advocacy in dealing with the issue of sexual assault,
25 harassment, and retaliation in the military, and in that I

1 have been proud to join you. The scourge of sexual
2 harassment and assault has been since, as you said, time
3 immemorial. The military keeps trying to make improvements,
4 but we do not see improvements. So here we are with yet
5 another 90-day commission to come up with some suggestions.
6 And I do think that some of the previous 90-day
7 commissioners made suggestions, and, in fact, I think one of
8 your panelists will talk about her GAO report, which
9 contains yet more suggestions.

10 So this continues to be a huge problem. I think what
11 some of you may have mentioned is the context in which we
12 are operating is that sexual harassment and assault is
13 really an issue that is a scourge in the wider community,
14 not just in the military community. So do any of you have
15 any thoughts about what we can do, from a cultural
16 standpoint? Let's just talk about the culture in the
17 military. How do we change in the culture in the military
18 so that the scourge is not only to be prevented but to be
19 prosecuted, and basically to have people in the military
20 recognize that they have to change their attitudes about
21 sexual assault? Do you have any suggestions on how we can
22 do that in the military? Any of the panelists.

23 Mr. Fidell: Yes. Yes, Senator Hirono. I believe that
24 we have got to continue to have these open conversations in
25 the training environment. The training needs to be changed.

1 We have to have senior leaders be accountable to be engaged
2 with that training, that the Special Victims' Counsels and
3 the Victim Advocates need to be in their own command so that
4 they could not be harmed when they are fiercely advocating
5 for their clients. That is a simple move, to mirror us like
6 CID. That way we cannot be encapsulated.

7 And I think it is also important to point out, and all
8 the Gold Star mothers that I talk to, is that when their
9 children, their soldiers were deployed or out of the country
10 and being sexually assaulted, they have no bug-out plan.
11 They cannot just go to a Rape Crisis Center when they are in
12 Afghanistan. They are not like a college student. They
13 cannot say, "Mom and Dad, come get me," you know. Stacey
14 Burnham, her daughter, for 82 days she said, "Mom, just stop
15 asking me. Nobody can help me get out of here. Just stop
16 asking, Mom."

17 So if they leave without permission they are AWOL, so
18 they are not like college students. They can be prosecuted
19 if they just leave, to make themselves safe. Asia Graham
20 received her Article 15 for getting an apartment off-post.
21 So we have got to change and get some transparency, because
22 without transparency we cannot have culture change. Thank
23 you.

24 Senator Hirono: I did ask all the panelists, but I am
25 running out of time, and I assume that your comments would

1 be similar in terms of the steadfastness with which we have
2 to pursue the kinds of changes that we need to pursue.

3 I do have one question for Natalie Khawam. You are the
4 attorney for the Guillen family. So are you familiar with
5 the I Am Vanessa Act that I will be reintroducing this
6 Congress?

7 Ms. Khawam: Yes, I am, Senator. Thank you so much for
8 an extraordinary bill.

9 Senator Hirono: So one of the provisions here, and I
10 would like to ask Ms. Marsh because you are a survivor, and
11 your husband's career was also very much detrimentally
12 impacted by your coming forward. Do you have any capacity
13 to file a claim in civilian court to pursue your redress?

14 Ms. Marsh: That I am not quite sure of the answer to
15 that one.

16 Dr. Houtrow. Ms. Khawam, do you know? Right now,
17 because of the Feres Act, active-duty people, personnel are
18 prevented from pursuing their claims in civil court, outside
19 of the military. Isn't that right?

20 Ms. Khawam: Was that for me, Senator?

21 Senator Hirono: Yeah.

22 Ms. Khawam: Senator, I wanted to answer your question.
23 Ms. Franck gave a great answer, but I am going to tell you
24 what I see the differences between, as they say, the
25 civilian world versus the military. And this answer is to

1 Senator Tillis' -- or this is to Senator Tillis' statement
2 earlier, which is, you know, you have sexual harassment,
3 this is a culture not just in the military world but it also
4 exists in the civilian world. Absolutely correct.

5 But the difference is in the civilian world someone
6 like Harvey Weinstein, who sexually assaults or harasses one
7 of employees or such, underlings, will be sued, will have to
8 answer. They do not have to go through Harvey to get
9 justice. They go through an outside organization, such as
10 the EEOC or such.

11 In the military, they do not have that option. They
12 have to go through the command. So it is an internal
13 conflict on so many levels, and it is a biased system, and
14 that is why we have the problems we have.

15 Secondly, the Feres Doctrine bars our military members
16 from being able to pursue a claim or have retribution,
17 indemnification, that we all have as civilians. So we need
18 to, as we did with the Richard Stayskal Military Medical
19 Accountability act, where we made a narrow exception to the
20 Feres Doctrine, we need to do the same, provide the same
21 rights to our victims of sexual assault and sexual
22 harassment.

23 Senator Hirono: I agree with you, and that is one of
24 the provisions of the I am Vanessa Guillen Act, and I think
25 we need to enable victims of sexual assault and harassment

1 to be able to pursue claims outside of the military and
2 process. Thank you very much.

3 Ms. Khawam: Thank you, Senator.

4 Senator Gillibrand: Thank you, Senator. Senator
5 Hawley.

6 Senator Hawley: Thank you, Madam Chair, and thanks to
7 all of the witnesses for being here. And I want to say
8 especially thank you, Ms. Marsh, for being here and being
9 willing to tell your story. I know that that is not easy.

10 Mr. McNair, could I begin with you? You were a Sexual
11 Assault Response Coordinator. In that capacity, which
12 programs did the victims who you worked with find most
13 helpful?

14 Mr. McNair: So I have seen it time and again, at the
15 hearings, where we talked about the Special Victims'
16 Counsel. Once that was finally enacted and when it worked
17 as it should, it was one of the best things we had going.
18 We often had issues of getting a Special Victims' Counsel in
19 a timely manner, because they just were not available. We
20 had so many cases going on at Fort Bragg and such a small
21 pool to pull from, there were times we had to borrow from
22 other units.

23 Also the ability to forego the military all at once and
24 visit places like the Rape Crisis Center for help. I have
25 had soldiers who would come, and they did not want to have

1 anything to do with the chain of command, but they still
2 wanted that help so they could get back into the fight. So
3 our relationship with outside resources like the Rape Crisis
4 Center in Fayetteville was a great asset to our soldiers.

5 Senator Hawley: So just on the Special Victims'
6 Counsel, you found that, the victims you worked with found
7 that particularly, that program and those resources,
8 particularly helpful. Is that fair to say?

9 Mr. McNair: Yes, sir.

10 Senator Hawley: But you said just a second ago that
11 you had, in a number of circumstances, difficulty in getting
12 a timely assignment of the counsel, you said sometimes just
13 because there were not enough of them. Were there other
14 things, other logjams that created lack of access to these
15 counsels?

16 Mr. McNair: It has been about 2 years since I retired
17 so I would have to sit down and try to recall. But there
18 were numerous roadblocks that I, as a SARC, and my team, as
19 Victim Advocates, would try to work around. Sometimes it
20 took a while to get them the mental health that they need,
21 because, once again, overwhelmed with, you know, the number
22 of survivors who needed some kind of mental health
23 counseling. And sometimes their appointments would be weeks
24 or months out.

25 Senator Hawley: Wow. Yeah, that is incredible. From

1 your point of view, Mr. McNair, what are the most important
2 things that Congress or the Department of Defense could do
3 to strengthen the prevention of military sexual assault?

4 Mr. McNair: So the skills that Victim Advocates and
5 SARCs develop, they develop over time. The longer a person
6 does that job, the better they are at the job. My best
7 asset as a fresh sergeant first class stepping into the job
8 was my Victim Advocate, who had been doing the job for 3, 4
9 years already. So the problem is we train them, we give
10 them this experience to speak in, we give them these tools
11 and assets, and in 2 years most likely that servicemember
12 PCS's and goes somewhere else. So you have to start that
13 cycle, that relationship again.

14 So with our retention in the military, we made
15 retention its own MOS. Recruiters are their own MOS. They
16 get to build upon those skills, and they take those skills
17 with them to the next unit. I feel like we should probably
18 do the same thing when it comes to Victim Advocates and
19 SARCs. So once we give them that experience and that skill
20 set they need, even if they go to another unit, now that
21 unit can benefit from the same thing.

22 Senator Hawley: That is really helpful. Thank you.

23 Ms. Marsh, let me just, in the little bit of time I
24 have left here, let me just ask you, in your own case, in
25 your experience, would it have made, do you think, a big

1 difference to have had the decision whether or not to move
2 forward with a prosecution be vested somewhere other than
3 the unit commander? I mean, do you think that that -- and
4 say if you know or say if you do not know, but I would just
5 be curious what your own experience is there.

6 Ms. Marsh: I do believe that would be -- yes, I
7 believe that would have been beneficial.

8 Senator Hawley: And can you give me a sense of why
9 that is? I mean, based on what you have been through, why
10 does it seem like that would have helped?

11 Ms. Marsh: We could possibly still decide to make an
12 Air Force career. Yeah, we would have probably still stayed
13 in the Air Force if that would have happened.

14 Senator Hawley: Very good. Thank you for your
15 testimony. Thanks all of you for being here. Thank you,
16 Madam Chair.

17 Senator Gillibrand: Just checking that Senator Warren
18 is not on Webex. Okay.

19 Let's transition to the second panel. Thank you so
20 much for your testimony. If there are any further questions
21 from any Senators they can submit it to the witnesses, and
22 they can provide it in writing. Your testimony truly
23 matters, and I am very grateful for the time you took, and
24 the willingness to share such difficult issues with all of
25 us. Thank you.

1 [Pause.]

2 Senator Gillibrand: We will now transition to the
3 second panel. We will hear from our government witness, Ms.
4 Brenda Farrell, the Director, Defense Capabilities and
5 Management, Government Accountability Office. Ms. Farrell,
6 you can start your testimony.

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1 STATEMENT OF BRENDA S. FARRELL, DIRECTOR, DEFENSE
2 CAPABILITIES AND MANAGEMENT, GOVERNMENT ACCOUNTABILITY
3 OFFICE

4 Ms. Farrell: Thank you. Madam Chairwoman, Ranking
5 Member Tillis, members of the subcommittee, thank you for
6 the opportunity to discuss issues related to congressional
7 oversight for prevention of and response to sexual assault
8 incidents in DoD. As you know, sexual assault is a heinous
9 crime that contradicts the core values that DoD expects
10 their servicemembers to follow, such as treating their
11 fellow servicemembers with dignity and respect.

12 Since 2004, Congress has continually taken steps to
13 address sexual assault in the military. GAO has issued
14 numerous reports on DoD's prevention of and response to
15 sexual assault and have made over 100 recommendations.
16 Despite sustained congressional oversight and DoD actions,
17 reports of sexual assault in the military continues to rise,
18 totaling approximately 6,200 in fiscal year 2018.

19 My written statement is based on ongoing work
20 identifying, among other things, the statutory requirements
21 related to sexual assault prevention and response in the
22 military, contained in the National Defense Authorization
23 Acts from fiscal years 2004 through 2019, and our prior work
24 in the area. I will briefly summarize my written statement
25 that is presented in two parts.

1 The first part of my statement describes the statutory
2 requirements concerning sexual assault that were contained
3 in the NDAA's from 2004 through 2019. We found that Congress
4 enacted 249 statutory requirements related to sexual assault
5 prevention and response to assist DoD in its efforts in this
6 area. Most of these requirements are still in force.

7 These statutory requirements covered a number of
8 different activities. Some examples are that NDAA, for
9 2007, required annual reports on sexual assaults at the
10 military academies and within the armed forces to aid with
11 oversight. The NDAA for 2011, required the establishment of
12 training and certification program for Sexual Assault
13 Response Coordinators and Victim Advocates. The NDAA for
14 2012, required that the Director of the Sexual Assault,
15 Prevention, and Response Office be at the general or flag
16 officer level or senior executive service level. Other
17 requirements have concerned the development of comprehensive
18 policies and procedures.

19 Although the requirements cover a wide range of
20 activities, we found that they generally related to two
21 broad categories. First, victim assistance and advocacy,
22 and second, management and oversight. These two categories
23 cover 70 percent of the requirements. A smaller percentage
24 of requirements, 9 percent, were related to prevention
25 efforts.

1 The second part of my statement discusses whether there
2 are areas where DoD can provide further focus to address
3 sexual assault. While DoD has taken a number of
4 considerable steps to address sexual assault, GAO's prior
5 work has shown that there are areas in which DoD can focus
6 to further the issues. With the exception of some more
7 recent initiatives, DoD's efforts have been largely focused
8 on responding to, rather than preventing, incidents of
9 sexual assault.

10 For example, we found that the Department had not fully
11 developed performance measures to assess the effectiveness
12 of its sexual assault prevention efforts and make changes
13 when needed and recommended that it do so. Recent DoD
14 efforts in this area, in addition to congressional oversight
15 and implementation of prior recommendations, could help DoD
16 reduce the incidence of sexual assault. F

17 Further, additional actions are needed to strengthen
18 DoD's efforts to address the needs of male servicemember
19 victims who have been sexually assaulted, and the needs of
20 DoD's workforce of nearly 900,000 civilian employees. For
21 example, GAO found that DoD was not tracking all reported
22 work-related sexual assaults involving civilian employees,
23 and recommended that it issue guidance to help ensure more
24 comprehensive tracking.

25 In summary, greater focus on preventing sexual assault

1 incidents for all of DoD workforce, military and civilian,
2 regardless of gender, could help reduce the number of
3 incidents in the Department.

4 Madam Chairwoman, that concludes my summary, and I
5 would be pleased to take questions when you are ready.

6 [The prepared statement of Ms. Farrell follows:]

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1 Senator Gillibrand: Thank you so much for your
2 testimony and thank you for your work.

3 As you noted in your statement, despite sustained
4 attention on the issue of sexual assault in the military by
5 both Congress and the DoD, reports of sexual assault have
6 continued to rise over the past decade. The Fort Hood
7 Independent Review Committee report, issued in November
8 2020, found that implementation of sexual assault prevention
9 response efforts at the installation was ineffective, and
10 that the Army's Sexual Harassment Assault Response and
11 Prevention, SHARP, program is structurally flawed.

12 Why are current efforts to prevent and respond to
13 sexual assault in the military falling short, and how can
14 DoD take more effective approach?

15 Ms. Farrell: We are continuing to monitor the actions
16 that DoD is taking in response to the Fort Hood
17 recommendations. I note that in the Fort Hood
18 investigation, accountability and leadership were
19 highlighted as issues of concern. We know that commanders
20 play an important role with climate assessments, and we have
21 previously recommended that there be a mechanism to track
22 the commanders' compliance with conducting the climate
23 assessment surveys. This has been a longstanding issue.
24 There have been other actions taken to try to encourage
25 commanders to use this tool.

1 But this is very important, because commanders can
2 influence a unit or an installation, and they can encourage,
3 by supporting and promoting and enforcing the policies and
4 the programs of the Sexual Assault Prevention and Response.

5 So that is definitely one recommendation related to the
6 climate environment, as well as leadership that crosses with
7 what the Fort Hood investigation found.

8 Senator Gillibrand: So why, in your opinion, are
9 commanders not doing that, since they promised to do that
10 for the last 10 years we have been focused on this?

11 Ms. Farrell: We have found that, as I said, when we
12 did our site visits at military installations years ago,
13 some commanders did not conduct the surveys. It was not a
14 priority. We made that recommendation and we have been
15 tracking it. We note that it has been picked up as a
16 statutory requirement. This is something that could aid
17 commanders in assessing the climate that they inherit.

18 As to why they are not doing it, I would have to say at
19 this time we do not have any information that is more
20 available to answer that question.

21 Senator Gillibrand: You noted in your statement that
22 since 2004, Congress enacted 249 statutory requirements
23 related sexual assault, prevention, and response in the
24 military. Further, GAO has made over 100 related
25 recommendations to DoD, dozens of which remain open. What

1 else should DoD be doing to prevent and response to sexual
2 assault, and the full continuum of unwanted sexual
3 behaviors? Despite all of these changes, we have actually
4 seen no change in DoD's ability to actually prevent sexual
5 assault. What authorities does DoD need that we have not
6 already given them?

7 Ms. Farrell: We would like to see DoD implement the
8 recommendations from our 2015 report to further develop
9 their prevention strategy. In 2015, DoD decided to use a
10 model that was evidence-based, from the Centers for Disease
11 Control, to develop a prevention strategy, and we assess
12 that strategy with CDC's criteria.

13 We found that DoD had taken steps to do what the model
14 suggest, identify the domains that servicemembers are in,
15 and that, CDC had noted, is individual relationships as well
16 as the society. DoD added two domains that servicemembers
17 are in that are unique to the DoD environment, that being
18 the military community and leadership. DoD did follow
19 through with some of the risk protective factors. The CDC
20 recommends that risk factors be aligned with each domain.
21 DoD aligned risk factors for the three that CDC had
22 recommended, but for the two domains that they the most
23 control over, the military community and leadership, they
24 did not align what those risk factors are.

25 For the protective factors, they did not align those

1 protective factors with the domain. They did identify the
2 protective factors, but it was collective. If DoD would
3 follow through and align the risk and protective factors,
4 the research that the CDC has done shows that then the
5 agency could take steps to mitigate the risk factors or
6 enhance the protective factors, thus reducing the incidence
7 of sexual assault.

8 Senator Gillibrand: You said these recommendations
9 were made in 2016?

10 Ms. Farrell: In 2015.

11 Senator Gillibrand: In 2015. So we have had 6 years
12 to begin to think about actually doing the prevention that
13 you recommended after doing a thorough review. So again, it
14 is not that we have not given them ideas on prevention. It
15 is that they will not implement the ideas on prevention that
16 the GAO, in fact, gave them.

17 Senator Tillis.

18 Senator Tillis: I am going to defer to Senator
19 Tuberville and come after Senator Hirono, who I believe is
20 still online.

21 Senator Gillibrand: Thank you.

22 Senator Tuberville: Thank you very much, Senator
23 Gillibrand. Thank you for your hard work on this very
24 important matter. Thank you, Ms. Farrell. Thank you for
25 being here.

1 I think we can all agree on two things. Sexual assault
2 and harassment are unacceptable. I have been coaching all
3 my life and dealt with a lot of it, and it is an ugly part
4 of our society. We have got to do everything we can to get
5 rid of it in our military.

6 Ms. Farrell, there seems to be a view that the
7 Department of Defense does not care about sexual assault.
8 In your many engagements with the Department personnel and
9 servicemembers on sexual assault, do you get a sense that
10 the issue is not important to them?

11 Ms. Farrell: We think that there are a number of
12 actions that Congress has enacted through law, as well as
13 GAO has recommended, that DoD can move forward with, and it
14 is beyond a roadmap, because this is growing. There are so
15 many roads and so many avenues that they need to address.

16 We have seen leadership in DoD on this issue. I have
17 met with the Director of the Sexual Assault and Prevention
18 Office, which is, as I noted in my opening, is usually at a
19 general officer level. It used to be at a GS-15 level. I
20 think when that was raised to the general officer or flag
21 officer level that gave a voice to the senior leadership.

22 We want to see, though, more put in place in terms of
23 the framework with metrics, so that when the leadership
24 changes over there is a framework in place, regardless of
25 what happens with the leadership, they can make sure that

1 not only the victims are being tended to, but the incidents
2 of sexual assault are being prevented.

3 Senator Tuberville: Yeah, when leadership changes
4 sometimes you have problems. People have different views.
5 In your view, has the DoD been lying or attempted to mislead
6 Congress about taking this matter seriously? Do you believe
7 that?

8 Ms. Farrell: We have a good relationship with the
9 SAPRO office. They have been, overall, very cooperative in
10 responding to our requests for information. As noted, we
11 have an ongoing review that have had to collect a tremendous
12 amount of information from the Department, and they have
13 been very cooperative.

14 As far sexual assault the leadership goes, the
15 leadership is key for prevention. That is one of the areas,
16 when we were analyzing the requirements, that we looked for.
17 We looked for leadership for prevention, we looked for the
18 climate for prevention, and we looked for education and
19 training. So the leadership does start at the top, and we
20 have seen, with the current SecDef some increased focus on
21 prevention, and that leadership goes all the way down the
22 chain of command.

23 Senator Tuberville: Do you feel good about that, the
24 leadership and what they are doing? When we have changes do
25 they usually step to the front on this, or do they take a

1 long time to look into matters? You know, again, I have
2 been in situations before where sometimes people let other
3 people make decisions, and somebody has got to start making
4 a decision on this. And sometimes leaders do not step up
5 front and do that. And it looks like, to me, our military
6 should be full leaders to make decisions on this, to stop
7 this.

8 So I know everybody gets frustrated. I am a military
9 brat. My dad was in military all his life. He died on
10 active duty and saw some of this. And this was years and
11 years ago. And so sooner or later somebody has got to find
12 an answer to this, and it has got to start at the top. Our
13 leadership has to make decisions, and make decisions and
14 make sure that our men and women are safe.

15 Thank you very much. Thank you, Chairman.

16 Senator Gillibrand: Senator Tillis -- oh, Senator
17 Hirono via Webex.

18 Senator Hirono: Hello? Okay. Thank you, Madam Chair.
19 Thank you, Ms. Farrell.

20 I note that you referred to a 2015 GAO report, and it
21 appears that there were aspects of the recommendations that
22 were not followed. And I was very curious about the fact
23 that DoD was supposed to assign risk factor alignment with
24 each domain, and I think you said that the two domains,
25 military community and leadership, these two domains risk

1 factors were not identified? Why not? Those seem to be
2 really big areas where the risk factors should have been
3 identified, wouldn't you say?

4 Ms. Farrell: Yes, that is key in order for them to
5 complete their plan for prevention. DoD issued another
6 prevention strategy in April of 2019. We have reviewed that
7 strategy to see what it says about risk and protective
8 factors, and it is silent. It does not repeat the
9 information that was there before, and it does not expand
10 upon the information.

11 We have had conversations with DoD about the risk and
12 protective factors. We do note that they are including
13 questions in their climate surveys about the risk and
14 protective factors, but it is not clear to us how that is
15 going to be integrated with their preventive strategy. So
16 this is an area that we continue to monitor and have
17 conversations with DoD to see how they are going to follow
18 through on this particular aspect.

19 Senator Hirono: So are these climate assessments,
20 climate surveys routinely done, and what kinds of questions
21 are asked? Are there very specific questions as to whether
22 anyone has ever been a victim of a sexual harassment or
23 sexual assault or retaliation? Are there those kinds of
24 specific questions in the climate assessments?

25 Ms. Farrell: There are standard questions that are

1 asked in the climate surveys, regardless of where the
2 commander is. The commander, I think, does have the
3 opportunity to have additional questions if they wish. It
4 is my understanding that there are some questions on sexual
5 assault currently in the climate survey.

6 Senator Hirono: Are they standard? Are these climate
7 surveys standard throughout the military, and the kind of
8 questions that we are talking about that need to be asked?

9 Ms. Farrell: Yes. There are a standard set of
10 questions that are used to survey the personnel at a
11 particular location.

12 Senator Hirono: No, but there are actually standard
13 sexual assault kinds of questions?

14 Ms. Farrell: Yes.

15 Senator Hirono: And then they are supposed to get this
16 and then do something about it, based on the responses that
17 they get.

18 So going back to the risk factor alignment. I do not
19 understand. Can you describe to me how a risk factor
20 alignment would work for the leadership domain, if I am
21 phrasing that correctly?

22 Ms. Farrell: Sure. The two domains for which we have
23 not seen risk factors, the military community and the
24 leadership -- I will give you an example of the military
25 community first. This is something that would be unique to

1 DoD, the active component versus the reserve component. So
2 it is what are particular risk factors that are unique to
3 the active versus the reserve component. There could be
4 risk factors also for communities, such as the pilot
5 community versus the medical community.

6 For leadership, the risk factors could be, again, at
7 different levels of command leadership. There is more
8 decision-making or that the commander is responsible for.
9 But these are factors that GAO would not determine for DoD,
10 that DoD should determine.

11 It is interesting. DoD did identify the military
12 community as well as leadership as domains that they needed
13 risk factors for, but they have not followed through, from
14 the documentation that we have reviewed or the --

15 Senator Hirono: I am running out of time. I have to
16 conclude that if the military identifies risk factors, based
17 on evidence, et cetera, that they would therefore try to
18 minimize these risk factors. Correct?

19 Ms. Farrell: I am sorry. Say that again, please.

20 Senator Hirono: If the military identifies risk
21 factors that are attendant to these particular domains then
22 that would enable them to minimize those risk factors.

23 Ms. Farrell: That is correct. Yes, ma'am.

24 Senator Hirono: And if they do not even identify them,
25 then there you go.

1 Can you think of any other example where Congress
2 enacted 249 statutory changes over 17 years to address a
3 problem and here we are, 17 years later, and there seems to
4 be little progress being made. Can you think of any other
5 situation where this is the case?

6 Ms. Farrell: Well, we are looking at the extent to
7 which they have implemented those 249 requirements, and that
8 would be the next piece of this puzzle, what has actually
9 been implemented and the extent to which it has been
10 implemented. So just because there are 249 requirements
11 does not mean everything has been done. That is part of our
12 ongoing work that we are trying to determine.

13 Senator Hirono: Yes. Clearly not, because otherwise
14 we would not be having this hearing.

15 Another thing. I think it would be important to
16 disclose the names of the people who are on the 90-day
17 Sexual Assault Commission.

18 And with the indulgence of the chair I would just like
19 to say that the GAO report is shocking, and over the last
20 decade and a half we have worked faithfully with DoD to
21 address this issue. Unfortunately, the facts are the fact,
22 and it is clear that a bold, new approach is required to
23 instill trust in how the military responds to and
24 adjudicates sexual violence in the ranks. And it is time
25 give professionally trained lawyers, military service judge

1 advocates, outside the chain of command, the authority to
2 make court martial adjudication decisions. And in my view
3 it is the only way we can ensure our servicemembers,
4 especially those junior in the ranks who are most at risk,
5 have enough trust in the system to come forward and report.
6 And we owe it to them to act now.

7 Thank you once again, Madam Chair, for your leadership.

8 Senator Gillibrand: Thank you, Senator Hirono.
9 Senator Tillis.

10 Senator Tillis: Thank you, Madam Chair. Ms. Farrell,
11 the studies by the Department of Defense and the Rand
12 Corporation suggest that unwanted sexual assault and other
13 similar behaviors are part of a continuum of harm. Can you
14 explain to this committee the meaning of that term?

15 Ms. Farrell: The continuum of harm is a term that is
16 used by many research organizations, not just DoD. DoD
17 defines it as an integrated, inappropriate behavior that is
18 sexually misconduct, that can lead to incidents of sexual
19 assault and promote an environment where such behavior is
20 tolerated.

21 So what does that mean? That means that sexual
22 harassment is often used as an example that is on the
23 continuum of harm. We have seen studies where
24 servicemembers who have been sexually harassed or have
25 experienced gender discrimination have higher rates of

1 sexual assault than those who have not experienced sexual
2 harassment. We have also seen a study where one-third of
3 the servicemembers who were sexually assaulted were first
4 sexually harassed by their perpetrator.

5 So looking at the continuum of harm is a way to try to
6 understand all sexual violence and the interplay amongst
7 those different aspects and how to go about preventing it.

8 Senator Tillis: To what extent do you think the DoD
9 has made progress on addressing the behaviors on a continuum
10 of harm?

11 Ms. Farrell: We looked at their continuum of harm
12 draft strategy a few years ago. We had some conversations
13 with them. We issued a report on where they stood with
14 sexual harassment in the continuum of harm at that time. I
15 think that was around 2017. What DoD shared with us about
16 their continuum of harm overarching strategy was missing
17 many of the key factors that we would expect to see in such
18 an organizational transformation type strategy. It is
19 basics that I am sure you are familiar with -- clear goals,
20 clear deadlines, metrics. And DoD was very receptive to the
21 recommendations that we made but they have not issued such a
22 strategy at this time.

23 Senator Tillis: So they were receptive to the
24 recommendations. What time frame was that?

25 Ms. Farrell: That was about 3 years ago, sir.

1 Senator Tillis: And is there any evidence that
2 although they were well received that they have been acted
3 upon, on a systematic basis?

4 Ms. Farrell: We have not seen anything in the last
5 year. We know that they believe more research was needed,
6 and we are working toward that. But we are still waiting to
7 see if they actually have a strategic plan on the continuum
8 of harm to issue.

9 Senator Tillis: In the written opening statement, and
10 I alluded to it in my comments before the first panel, but
11 of the 249 requirements that have come out of past
12 congressional action, it seems to me that only a minor
13 portion of it, about 10 percent of all those requirements,
14 have anything to do with prevention. Do you believe that
15 there are other things that we should consider beyond what
16 has already been recommended, or in your opinion is it just
17 an unacceptable recommendation of the requirements set forth
18 by Congress?

19 Ms. Farrell: Well, sexual assault crosses many
20 functional lines. There are so many organizations involved
21 -- the health care, the legal -- besides the immediate care
22 through the Victim Advocates or the SARCs for the victims.
23 We would like to see, as I have noted, all of the statutory
24 requirements actually implemented, as well as our
25 recommendations. But we do think that the recommendations

1 in our prior report on preventing sexual assault could help
2 DoD reduce the number of incidents. So we are pointing at
3 those particular recommendations in terms of preventing
4 sexual assault.

5 Senator Tillis: Thank you. Thank you, Madam Chair.

6 Senator Gillibrand: Thank you, Senator Tillis. I just
7 had one follow-up question. Do you know, Ms. Farrell, how
8 much Department of Defense has spent on addressing sexual
9 assault in the military, including the military justice
10 reforms, victim supports, prevention, and response?

11 Ms. Farrell: No, ma'am, I do not have a figure on how
12 much they have spent.

13 Senator Gillibrand: Would you be able to provide an
14 estimate, with time, and submit it to the committee?

15 Ms. Farrell: We can definitely check into that and see
16 what is available, in terms of the amount spent.

17 Senator Gillibrand: Also, I noted in your earlier
18 testimony that you said that you recommended that we begin
19 to track the civilian cases, and that is one of my concerns
20 for a very long time, because in the estimated cases of
21 20,000 in whatever the last date, 2018, the DoD estimated
22 there was 20,500 cases. That estimate does not include
23 civilians. It only is an estimate based on servicemembers.
24 And when I have had the privilege of reviewing the records
25 of cases at each of the four largest bases, one for each

1 service, I noted during some years that about half of the
2 cases that were reported were civilians.

3 And so if that is true then you might have double that
4 estimated cases. Is that your understanding?

5 Ms. Farrell: The number could greatly be understated,
6 because of not including the incidents with civilians. You
7 are right. And our report notes that there are gaps in the
8 guidance that lead to very little visibility about the
9 number of those incidents.

10 Senator Gillibrand: Thank you. Senator Tillis, do you
11 have any follow-up?

12 Senator Tillis: No. Thank you.

13 Senator Gillibrand: Thank you so much. I appreciate
14 your testimony.

15 We are now prepared for the third panel. Thank you
16 very much, Ms. Farrell.

17 Ms. Farrell: Thank you.

18 Senator Gillibrand: In our next panel, we will hear
19 from Colonel Don Christensen, United States Air Force,
20 Retired, and President of Protect Our Defenders; Mr. Eugene
21 Fidell, Senior Research Scholar, Yale Law School, and
22 Adjunct Professor of Law at New York University Law School;
23 and Colonel Lawrence Morris, United States Army, Retired,
24 Chief of Staff and Counselor to the President of Catholic
25 University of America.

1 [Pause.]

2 Senator Gillibrand: Thank you, gentlemen. Mr. Fidell,
3 would you like to start with your testimony?

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1 STATEMENT OF EUGENE R. FIDELL, SENIOR RESEARCH
2 SCHOLAR, YALE LAW SCHOOL ADJUNCT PROFESSOR OF LAW, NEW YORK
3 UNIVERSITY LAW SCHOOL

4 Mr. Fidell: Thank you very much, Madam Chairperson. I
5 am going to make a few very brief comments. I am more
6 anxious to hear the committee's questions and to try to
7 grapple with them than I am in giving a speech. I prepared
8 some detailed testimony, which I hope, along with the
9 exhibits, can be made part of the hearing record.

10 Senator Gillibrand: Without objection.

11 [The information follows:]

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1 Mr. Fidell: In my opinion, there are cogent reasons to
2 transfer the disposition power from commanders to lawyers.
3 I want to make four very brief observations in this regard.

4 Number one, from my perspective, the highest value is
5 public confidence in the administration of justice, and the
6 "public" in that sentence is not only people within the
7 military but the rest of the American public. If there is
8 not confidence in the administration of justice within the
9 armed forces, both the American public and people in the
10 military workforce will have every reason to be disappointed
11 in the performance of government.

12 Needless to say, the impact of full-off and public
13 confidence in the administration of military justice would
14 be felt in accessions, retentions, and performance of duty,
15 as well as in political support for military activities for
16 the national defense program of this country.

17 The second point I want to make is that transfer of the
18 disposition authority, that is to say, the power to decide
19 who gets prosecuted for what and at what level of gravity,
20 is sensible. Non-lawyer commanders -- and today, nearly all
21 commanders are not attorneys -- are ill-equipped to make the
22 kind of increasingly complex legal decisions that the
23 military justice system requires.

24 And I can highlight a few of those. How able, for
25 example, would a non-lawyer decision-maker be at the arcana

1 of social media, which play a remarkably salient role in the
2 military justice throughout these days. Metadata. Free
3 speech issues, including extremist speech -- timely subject
4 -- your analysis issues, or another scientific issue, hair
5 analysis, used in drug prosecution. The right to confront
6 witnesses -- a very arcane subject, but constitutional law.
7 Computer fraud. Child pornography, which seems to be --
8 talk about an epidemic, there does seem to be an epidemic of
9 child pornography in the armed forces. Mental health
10 issues. All of these are hardly what you would call the
11 bread and butter of military command. They are much closer
12 to involving the kinds of skill sets and analytical tools
13 that lawyers are called upon to bring to bear.

14 Commanders also have other things competing for their
15 limited time and attention, and I would argue that typically
16 those other things are going to be more urgent, pressing,
17 and geared to their skill set than the kinds of matters that
18 come across their desk in their current role as convening
19 authorities, those few who actually are convening
20 authorities.

21 Third, commanders' decision-making may, at times, be
22 skewed by self-interest. It is not good for a commander, in
23 career terms, if there is a crime epidemic in the unit, if
24 the command climate is poor. These are the things that the
25 services track very closely, and they do impact on

1 commanders' career opportunities, for example. Similarly, a
2 commander may have an interest, for example, in preserving
3 the viability of a fighter pilot, in whom the taxpayers may
4 have invested a fortune in training costs. Or a very senior
5 non-commissioned officer, a staff NCO or a master chief
6 petty officer. These are valuable people, and a commander
7 may be loath to give up the utility of such a member of the
8 command.

9 There has been a question as to whether transfer of the
10 authority to dispose of charges would deprive the decision-
11 maker of the benefit of command insight, and the answer is
12 absolutely not. Commanders can and should be heard, if
13 there are command-specific considerations that call for a
14 particular outcome. Is there is an epidemic, for example,
15 of sexual violence within a command, then the disposition
16 authority ought to be made aware of that. And I am here to
17 tell you that under a revised system, a revised
18 architecture, along the lines of what the Military Justice
19 Improvement Act would provide, that new system would take
20 full account. It should take full account of the views of
21 commanders. Those views, by the way, should be in writing,
22 and they should be provided to the victim or complainant --
23 complaining party, perhaps more accurately -- and to the
24 accused, so that everybody can be playing with a full deck.
25 Nothing will happen ex parte in this kind of decision-

1 making.

2 To me, there are two other points that need to be made.
3 First, although the conversation today has, not
4 surprisingly, and not mistakenly, focused on sexual assault,
5 I think it is critical, Senators, that you be aware that the
6 issues you are dealing with are structural issues that
7 transcend sexual assault and sexual criminality within the
8 armed forces. The very problems that I have pointed to in
9 terms of the need for an independent and dispassionate
10 decision-maker at the charging stage apply equally to non-
11 sexual assault offenses, of which the Uniform Code of
12 Military Justice's punitive articles have many, many, as you
13 know.

14 So I think it is critical that whatever the committee
15 recommends, or reports out, should not be limited to sexual
16 assaults. The issue is a structural one, and it should be
17 addressed on a structural basis.

18 Finally, to me, the most interesting challenge that I
19 think the committee faces is not whether to make the
20 transfer but where to draw the boundary line between those
21 parts of the disciplinary system that are retained by
22 commanders and those parts basically dealing with criminal
23 matters are transferred to lawyer decision-makers outside
24 the chain of command. In my view, I think it is quite
25 important that this be kept simple, and to me, the simplest

1 boundary line is the one that we are all familiar with in
2 the civilian community, and in the military community. If
3 it is over a year's confinement as the maximum permissible
4 punishment it should be on the criminal side of the line,
5 handled by lawyers outside the chain of command, and if it
6 is below that point -- somewhat arbitrarily but there it is
7 -- it should be dealt with as a disciplinary matter.

8 Thank you very much.

9 [The prepared statement of Mr. Fidell follows:]

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1 Senator Gillibrand: Thank you so much, Professor
2 Fidell. Next, Colonel Christiansen, please.

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1 STATEMENT OF COLONEL DON M. CHRISTENSEN, USAF (RET.),
2 PRESIDENT, PROTECT OUR DEFENCERS

3 Colonel Christensen: Chairwoman Gillibrand and Ranking
4 Member Tillis, thank you for the opportunity to appear
5 before you today to discuss military and the need to reform
6 the military justice system. And Ranking Member Tillis, I
7 would appreciate the opportunity, during the question-and-
8 answer period, to talk about the question you had earlier
9 about the allies and what their experiences are, and also
10 the data. I agree it gets misstated a lot. I live and
11 sleep and eat this data, and I would love to talk to you
12 about the actual data.

13 Eight years ago, General Raymond Odierno testified
14 before the full Senate Armed Services Committee, stating,
15 quote, "combating sexual assault and sexual harassment
16 within our ranks is now the Army's number one priority."
17 Sadly, the recent release of the independent Fort Hood
18 investigative report proved the futility of this promise.
19 Particularly damning was the report's ninth finding that,
20 quote, "Command climate at Fort Hood has been permissive of
21 sexual harassment and sexual assault." This report, along
22 with the ever-worsening data across all the services
23 demonstrates how short-lived the Army's commitment was.

24 The estimated number of sexual assaults and rapes of
25 active duty men and women has stubbornly hovered above

1 20,000 for almost every year that a prevalence survey has
2 been administered, and as Senator Gillibrand pointed out,
3 this does not include the thousands and thousands of
4 civilian victims of military sexual assault.

5 While there has been slight improvement in the
6 prevalence rate for men, this has been more than offset by
7 the increase in prevalence rate for women serving on active
8 duty. In fact, for women, the rate of sexual assault is at
9 its highest level since 2006, and increased by 50 percent
10 from 2016 to 2018.

11 And while military leadership has failed to make any
12 improvements in sexual assault rates over the last decade,
13 its record on accountability is abysmal. In fiscal year
14 2014, 4,660 men and women made unrestricted reports of
15 sexual assault or rape, and 588, or about 12.4 percent of
16 those reports, eventually were prosecuted and resulted in
17 204 consensual sex convictions. That is about 6 percent.

18 It is important to point out, these are actual sex
19 convictions. The military often inflates the rate of
20 conviction by including charges that are completely
21 unrelated to sex offenses. By fiscal year 2019, the number
22 of unrestricted reports had leapt to 5,699, yet prosecutions
23 and convictions plummeted to 363 -- and again, there were
24 only 138 actual sex offense convictions in fiscal year 2019.
25 This is a 50 percent reduction in both the rate of

1 prosecution and the rate of conviction. So they are taking
2 fewer, not more, cases to trial and they are losing them at
3 a much greater rate.

4 Even as prosecutions have been declining, survivors
5 have been reporting at record rates. But rather than see
6 their offenders held accountable, they are the ones who
7 suffer the price for reporting. And I think this is
8 important to remember the distinction between sexual assault
9 in the military and in the civilian world. Retaliation
10 rates for those who report are consistently above 60
11 percent, and despite efforts of leadership to play down the
12 severity of the impacts of retaliation, the DoD IG report
13 found one-third of women who reported a sexual assault were
14 forced out of the military within a year of reporting. A
15 recent and report also found that sexual assault and sexual
16 harassment are retiring out over 10,000 servicemembers a
17 year.

18 Despite the objective data proving its failure,
19 military leadership continues to vigorously argue that
20 commanders alone are the solution to solving the cancer of
21 sexual assault and harassment. In opposing reform,
22 leadership argues that commanders need more authority, not
23 less, yet I have never heard them explain what additional
24 authority the need that they do not now possess that would
25 drive down prevalence rates or increase accountability.

1 Over the last 30 years, scandal after scandal has been
2 met with promises of zero tolerance and assurances that
3 commanders will eradicate sexual assault from the ranks.
4 The one constant in the ineffective response -- we can talk
5 about the 250 pieces of legislation passed -- the one
6 constant is the commander-controlled justice system. For
7 most of our history, military justice had a reputation as a
8 brutal and unfair process, and the abuses of commanders were
9 the primary reason for this. Congress, almost always over
10 the objections of military leadership, has continually
11 reined in the power of commanders to provide a less
12 draconian system of justice. Yet as recently as last
13 November, a Federal judge warned that military justice was
14 still a rough form of justice.

15 Military justice still possesses many inherently unfair
16 infringements of an accused's right. The same is
17 fundamentally true for victims of crimes committed by
18 military members. However, while Congress has mostly reined
19 in the evil of improper command influence relative to an
20 accused, the same is not true for crime victims. There is
21 nothing to stop the outsized influence that senior officers
22 and commanders can have on other commanders and convening
23 authorities to stop a favored subordinate from going to
24 trial by putting their thumbs on the scales.

25 Sexual assault and rape have appropriately put the

1 military justice system under a spotlight, but I, like
2 Professor Fidell, would strongly advocate for
3 professionalizing and modernizing the justice system, even
4 if there was not a single sex offense in the military.
5 After 246 years, it is time for Congress to give the men and
6 women serving our nation a justice system worthy of their
7 sacrifices.

8 I look forward to your questions.

9 [The prepared statement of Colonel Christensen
10 follows:]

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1 Senator Gillibrand: Thank you. Our next speaker is
2 Colonel Lawrence Morris, United States Army, Retired, Chief
3 of Staff and Counselor the President of Catholic University.

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1 STATEMENT OF COLONEL LAWRENCE J. MORRIS, USA (RET.),
2 CHIEF OF STAFF/COUNSELOR TO THE PRESIDENT, THE CATHOLIC
3 UNIVERSITY OF AMERICA

4 Colonel Morris: Chairman Gillibrand and Ranking Member
5 Tillis, I appreciate the opportunity to join your discussion
6 about the most serious matter of sexual assault in the
7 military and the command's ability to continue efforts to
8 prevent and address it.

9 My background is in your material so, very briefly, I
10 served 30 years in uniform, 27 of them as a judge advocate,
11 a lot of that time trying cases around the world. Later in
12 my career I was the Chief of the Trial Defense Service and
13 the Chief Defense Counsel for the Army, Chief Prosecutor at
14 Guantanamo Bay, and Counsel to the Superintendent at West
15 Point. After retirement, I was the first head of the Army
16 office whose mission was to train prosecutors and defense
17 counsel in the just and competent trial of sexual assault
18 cases.

19 I understand that sexual offenses have a uniquely
20 harmful impact on our fighting forces and on the families
21 who entrust them to serve in our country. I do not believe
22 that the Military Justice Improvement Act or the main and
23 good-faith concerns of its proponents would improve military
24 justice or make for a more disciplined force.

25 Permit me to make four quick points, after which I am

1 happy to answer any questions.

2 First is carefully interpret the data, to be sure the
3 data mean what you think they mean. There are so many
4 variables in all of these comparative data sets it is
5 precarious to compare prosecution rates without sorting for
6 matters like the sanctions available, and most importantly,
7 what constitutes the numerator.

8 A distinctive feature of the military justice and
9 disciplinary system is the ability to reach relatively minor
10 offenses and to try to stamp out precursor conduct committed
11 by those who might commit sexual harassment or other
12 offenses that do not constitute full-scale sexual assault.
13 The civilian sector does not have such tools. In addition,
14 it is my experience that the military is much more likely to
15 try to close case. A commander can send a case to trial if
16 he or she thinks it is the right thing to do.

17 I do not think my experience was unique in gaining a
18 commander's approval to trying the close cases where
19 conviction was not certain. The October 2020 report of the
20 Defense Advisory Committee on Investigation, Prosecution,
21 and Defense of Sexual Assault validates that experience. It
22 shows that commanders and convening authorities referred
23 close cases to trial, reflecting greater acceptance of risk
24 than it is likely to obtain in many civilian jurisdictions
25 where conviction rates can be a manipulatable metric. So

1 the military's lower conviction rate, if it is, in fact, a
2 lower conviction rate, can reflect fidelity to survivors and
3 command seriousness.

4 The second point is if it isn't broke. It once was
5 broke, our system, and that yielded the UCMJ 70 years ago,
6 and numerous wise revisions since then. At the core of this
7 system has been the combination of leaders and lawyers.
8 Leaders decide, informed by the counsel of experienced judge
9 advocates. The proposed innovations would not tinker with
10 that system. They would fracture it.

11 It is misleading to claim that commanders make
12 decisions that district attorneys make in the civilian
13 sector. In fact, judge advocates are engaged at every stage
14 of investigation and moving a case toward trial. It is
15 critical to remember that the current system requires the
16 senior lawyer to make three specific signed certifications
17 before a commander can refer any case to general court
18 martial -- a profound legal and ethical obligation.

19 Third point, respect due process. The military
20 appellate courts are scrupulous in guarding against unlawful
21 command influence, the creeping of the commander into the
22 courtroom or deliberation room. It has taken generations to
23 arrest this and to maintain the confidence of the rank and
24 file. The courts commonly say there is no such thing as
25 command influence the air. I am not so sure. A leader, or

1 lawyer, who is unduly attuned to pleasing the command might
2 find his judgment distorted in a way that would drive the
3 powerful prosecutorial machinery of the government. Such
4 decisions require the unencumbered judgment of those
5 entrusted to it, so the Senate should think carefully about
6 the impact of legislation like this and the potential for
7 those making disposition decision to absorb some of that
8 command influence in the air, to the detriment of a
9 servicemember's ability to receive a fair trial.

10 Last point, fully equip our leaders. If this act were
11 to pass, commanders would be just as responsible for their
12 servicemembers as they are today. They would just have an
13 emptier toolbox. It is paradoxical to leave this
14 responsibility commanders but to take away a key element of
15 authority and undermine good order and discipline and
16 military readiness. Even more true in a deployed
17 environment, which the legislation does not account for.
18 One of my jobs was serving as the staff judge advocate for
19 the 10th Mountain Division, the most deployed division in
20 the most deployed army in the world. Imagine the complexity
21 of Afghanistan, or wherever you might be, and meeting the
22 requirements of the bill.

23 Finally, I have a very close relationship with two
24 young officers, one of them about to take command of an Army
25 infantry company, another who was recently commissioned as

1 an officer in the Marine Corps, having previously given 5
2 years of honorable enlisted service. I would like them, as
3 they take charge of soldiers and are entrusted with the care
4 of soldiers, to have all the tools needed to lead their men
5 and women.

6 But my thoughts run more to those who they will lead
7 than to them as the leaders. Those being led need to know
8 that the justice system in the specialized society of the
9 military is an extension of the authority of command. They
10 need to know that the intensity with which a commander
11 invests in their welfare includes underwriting all aspects
12 of a disciplined force under ethical and vigorous
13 leadership. Fragmenting that authority by slicing a
14 considerable portion of discipline to non-commanders
15 undercuts the unity of command and undermines good order and
16 discipline. Thanks.

17 [The prepared statement of Mr. Morris follows:]

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1 Senator Gillibrand: Thank you all for your testimony.
2 Mr. Morris, you say that you would make a comparison that
3 you believe commanders are more likely to press the tight
4 cases than the DA's would. Do you know if the Military
5 Justice Improvement Act has anything to do with civilian
6 DA's.

7 Colonel Morris: No, I understand it does not have to
8 do with --

9 Senator Gillibrand: Okay. So that testimony,
10 therefore, would be irrelevant, because we are not comparing
11 this to civilian DA's. We are giving this right to military
12 prosecutors who understand the military, point one.

13 Point two. You say commanders will have less tools in
14 their toolbox. What percentage of commanders have convening
15 authority?

16 Colonel Morris: Commanders at all levels rely on the
17 military justice system, Senator Gillibrand. So I recognize
18 part of the intent here is to move the authority, previously
19 with commanders for all felony-level cases, to a sort of a
20 legal command. Recognize that judge advocates touch a case
21 from the point of offense, advising commanders --
22 correction, advising investigators and then advising
23 commanders at all levels before --

24 Senator Gillibrand: Let me give you the answer. Three
25 percent of commanders have convening authority for felonies

1 and above, 3 percent. So your testimony is saying that 3
2 percent of commanders will have less tools in their toolbox.
3 Does that, therefore, not say that 97 percent of commanders
4 will have the same tools they have today?

5 Colonel Morris: I do not think so. I think it is not
6 just a matter of referring a case to trial. It is a
7 collaborative and developing impact on the case from when it
8 starts into the system. So in the formal sense, of course
9 the number of general court martial convening authorities is
10 appropriately a smallish number. You have developed that
11 general court martial authority over the course of a career.
12 But the judge advocates remember, administer, and touch the
13 cases all the way through, and they are --

14 Senator Gillibrand: We are not talking about the staff
15 judge advocates. In fact, how much criminal experience does
16 an average staff judge advocate have, who gives advice to a
17 commander, an O-6 or above?

18 Colonel Morris: Oh, certainly, I think the great
19 majority will have some amount.

20 Senator Gillibrand: How much? How much? More than a
21 year? More than 2 years? How much criminal justice
22 experience does a typical staff judge advocate have?

23 Colonel Morris: Senator, it varies at least by
24 service, but all of them will have some amount.

25 Senator Gillibrand: Some. Exactly. And do you think

1 it is appropriate to have the legal advice of the equivalent
2 of a junior associate on a case that has a conviction
3 penalty of more than a year or above? Because if that is
4 true, then you do not believe in defendants' rights, because
5 for a junior lawyer, with very little experience in criminal
6 justice, to be making recommendations to a commander, if you
7 could be thrown in jail for more than a year is a serious
8 issue of civil liberties, is it not?

9 Colonel Morris: I am not sure I am understanding your
10 perception of the system. For a case to go to a --

11 Senator Gillibrand: Do you think a contracts lawyer
12 has the ability to assess a complex case of sexual assault?

13 Colonel Morris: I think our -- yes, I do.

14 Senator Gillibrand: I do not. I was a lawyer for 15
15 years. You develop special abilities as a prosecutor to
16 understand the complexities of these cases. I do not think
17 someone who has expertise in contracts or in HR or in real
18 estate would necessarily have the ability to do that work.

19 Colonel Morris: If I could reply, please. I mean, we
20 have quite smallish number of people who are involved in
21 real estate law. Most of the people who become staff judge
22 advocates will have been a generalist, to a degree. All of
23 them will have tried cases, to a degree, but they may then
24 have had expertise in law of war or other areas of military
25 practice that enable them to be the comprehensive legal

1 advisor to commanders, who commanders have come to trust.

2 Senator Gillibrand: Do you believe the commanders who
3 do not have a convening authority have the responsibility to
4 maintain good order and discipline?

5 Colonel Morris: Of course.

6 Senator Gillibrand: Do they have the responsibility to
7 make sure there is no sexual assault or sexual harassment
8 within their units?

9 Colonel Morris: They do, and because that is such an
10 incredibly important part of their leadership, they should
11 then have all of the tools available to them to --

12 Senator Gillibrand: They do not have that authority.
13 You have to be an O-6 or above to have convening authority.

14 Do you believe they have to make sure there is no
15 retaliation in their ranks, even if they do not have
16 convening authority?

17 Colonel Morris: Of course.

18 Senator Gillibrand: Thank you.

19 I would now like to ask a question of Mr. Fidell and
20 Colonel Christiansen.

21 Mr. Fidell: Before you do that, Senator, can I make an
22 observation that is quite important in terms of your last --
23 one of the points that you raised with Colonel Morris. The
24 military justice system includes a number of punitive
25 articles that call for capital punishment, and I think this

1 hearing would be incomplete if there were no reference made
2 to that possibility. The notion that a decision to move
3 forward with a potentially capital case, that decision being
4 made by a non-lawyer, is, to me, totally indefensible, and I
5 think that should be part of the committee's deliberations.

6 Senator Gillibrand: Thank you, Mr. Fidell. And, in
7 fact, most staff judge advocates have no more than 2 years
8 of criminal justice experience. So the commander has no
9 experience, and the lawyer that they have touted as being
10 part of this process all along has very little relevant
11 experience. Correct?

12 Mr. Fidell: That is true.

13 Senator Gillibrand: Thank you.

14 Colonel Christiansen and Mr. Fidell, you both made the
15 point that commanders' ability to utilize military justice
16 tools under their disposal now would not be significantly
17 impacted by removing charging decisions from the commander
18 to the legal professionals for complex cases. What can we
19 do to ensure that commanders continue to have these tools,
20 or indeed, even increase them so that in cases where
21 prosecutors declined prosecution the commander still has the
22 ability to take action to ensure the maintenance of good
23 order and discipline? Colonel Christiansen.

24 Colonel Christensen: Yeah, well, we often hear, as Mr.
25 Morris just said, that while commanders have all these other

1 tools that they do not have in the civilian world, and that
2 is because unlike any other institutions in this country,
3 the employer is also serving as the prosecutor. So of
4 course they do. They have employment decisions they can
5 make. The commander has the inheritability to
6 administratively discharge someone, to administer a non-
7 judicial punishment, to reprimand them, to counsel them, to
8 give them no contact orders, to put them into pretrial
9 confinement.

10 Nothing that the Military Justice Improvement Act does
11 would do anything to in any way diminish those, nor would,
12 as it has been claimed by opposition, nor would it preclude
13 if a prosecutor made the decision not to send someone to a
14 general court, it would not preclude a lower-level convening
15 authority to send that case to a special court, if the
16 evidence warranted it.

17 That happens right now. A general court martial
18 convening authority can determine they are not going to send
19 a case to a general court, it goes back to the special court
20 martial convening authority, and it can go to a special
21 court. That is a complete red herring from the Department
22 of Defense on that issue.

23 Senator Gillibrand: Thank you. Mr. Fidell, can I ask
24 you to hold your answer so I can give Senator Tillis his
25 turn, since I am over.

1 Senator Tillis: Thank you, Madam Chair. Mr. Morris
2 and Mr. Christensen, thank you for your service. Mr.
3 Morris, I want to give you an opportunity. You have heard
4 things discussed today, and instead of asking a direct
5 question, is there anything you have taken note on that you
6 would to offer up as a counter view?

7 Colonel Morris: Maybe just two matters so far. One is
8 the portrait of commanders as these kinds of, these issues
9 are too complex for them. My old friend and colleague, Mr.
10 Fidell, mentioned that, for example, matters of hair
11 analysis or urinalysis would kind of befuddle these lay
12 commanders. It is worth considering an example, and an
13 example that might be instructive, to a degree, on how the
14 campaign to wipe out sexual assault might work, urinalysis
15 in particular.

16 The military had just an intractable problem with drug
17 use, and in the very early '80s came up with a credible,
18 efficient, reliable, and defensible in court urinalysis
19 system. I spent a fair amount of time as a defense counsel
20 fighting those cases in that time. And between the public
21 campaign and having a sanction available, relatively quickly
22 administered, that problem was reduced, to a great degree.
23 So it was not beyond the head of commanders. You only have
24 to understand these are also smart and educated people who
25 are able to deal with a whole lot of complexity in the rest

1 of their jobs.

2 Then the last point, just on the characterization of
3 judge advocates as the equivalence of junior associates.
4 The people who give advice to the 3 percent of officers who
5 are convening authorities are, themselves, career lawyers
6 who have managed a lot of complex practice. So it is worth
7 also remembering that as I mentioned earlier, the lawyers
8 are at the side of the commanders all the way through, and
9 before a commander can send any case to a general court
10 martial, that staff judge advocate has to certify in writing
11 that there are three elements available, including that the
12 evidence was warranted. If he does not sign that, the
13 commander cannot take any case forward on his own.

14 Senator Tillis: You mentioned in your opening
15 testimony, I think you referred to the Defense Advisory
16 Committee on Investigation, Prosecution, and Defense of
17 Sexual Assault. I believe at least two other commissions,
18 the Response Systems to Adult Sexual Assault Crimes Panel
19 and the Judicial Proceedings Panel. It appears as though in
20 each of those convening commissions with civilian experts
21 that they found no data to support removal from the command.
22 What did they miss? What would you tell me about those
23 studies, but what did they potentially miss that would draw
24 them to that conclusion?

25 Colonel Morris: I sat on the Response Systems Panel

1 for the year and a half or so that it was in effect, and it
2 was -- I mean, I was like at the kids' table intellectually
3 with all the other people who served on it. But it was a
4 really impressive, open-minded analysis of the system, and
5 included a range of people, including some career-long,
6 strong, informed critics of the system. And at the end of
7 that examination all of them -- I think virtually all of
8 them -- came to the same conclusion of the appropriateness
9 of the convening authority structure.

10 Senator Tillis: Are you familiar with the other panels
11 and their conclusions?

12 Colonel Morris: Of the conclusions, I am. I mean, not
13 intimately but the same. I do not think there was any
14 significant difference.

15 Senator Tillis: Thank you. Mr. Christensen, I am a
16 data analytics person myself, and what I am really trying to
17 sort through here are foundational aspects of this
18 challenge, that, number one, if we pass any additional
19 congressional measure that we are able to make sure that we
20 have gotten it right, and we have to do that through
21 tracking. But we also have to get what I referred to in my
22 opening comments, what I see is competing data. I do not
23 have time, and we do not have time to go through that right
24 now because we could argue that maybe you could give me one
25 view of it that needs to be matched up against the other

1 view, and normalized.

2 But I would appreciate the opportunity for me or my
3 staff to speak with you and get information so that we can
4 really get that baseline so we have well-informed decisions
5 as we consider not only the need to move forward but how we
6 could actually measure it if we do move forward with
7 anything.

8 Colonel Christensen: Absolutely. I would love to do
9 that. Like I said, I sleep and breathe this data. It is
10 what I do almost every day, looking through the day, so I
11 would be happy to do that.

12 Senator Tillis: Thank you very much. Thank you all
13 for being here, and thank you, Madam Chair.

14 Senator Gillibrand: Thank you. Senator Warren on
15 Webex.

16 Senator Warren: Thank you very much, Madam Chair. So
17 2013, my first year in the Senate, this committee considered
18 competing ideas to tackle the problem of military sexual
19 assault. Senator Gillibrand's Military Justice Improvement
20 Act would have put the decision to prosecute sexual assault
21 cases, along with the authority to convene a court martial,
22 outside the accused's chain of command. Unfortunately,
23 Senator Gillibrand's proposal was not included in the
24 Defense Authorization bill that year.

25 An alternative series of proposals that proponents

1 argued would be more effective were adopted instead that
2 year. And that alternative approach included several
3 important items, including requiring commanders' performance
4 evaluations to include evidence of their compliance with
5 annual command climate assessments of their handling of
6 sexual assault cases. And I remember many folks saying that
7 is what is going to get the job done.

8 So let me ask, Colonel Christensen, since 2013, since
9 we put those rules in place, has the sexual assault problem
10 in the military gotten better, gotten worse, or stayed about
11 the same?

12 Colonel Christensen: It has gotten worse,
13 significantly.

14 Senator Warren: So 1 year after those reforms were
15 adopted, in 2014, this committee went a small step further
16 and required that commanders' performance appraisals include
17 whether they had established a climate of properly managing
18 and fairly evaluating sexual assault. People told us this
19 is going to get the job done. Colonel Christensen, are you
20 aware of any commander who has been relieved or not promoted
21 based on that criterion?

22 Colonel Christensen: No. I would say the only kind of
23 exception to that is the Fort Hood report resulted in people
24 being fired, but it was not because of the climate survey.
25 It was because they ignored their climate surveys and all

1 the other issues there.

2 Senator Warren: So, in fact, it is interesting that
3 you raise Fort Hood. Fort Hood is kind of what proves the
4 point here, isn't it? The Fort Hood Independent Review
5 Commission, which looked at this issue, found, and I quote,
6 "a permissive environment for sexual assault and sexual
7 harassment," suggesting that this was not getting in the way
8 of anyone's career advancement up to that point.

9 So is it fair to say that we have no idea if commanders
10 are really being held accountable, in any way whatsoever,
11 for their handling of sexual assault in units under their
12 command?

13 Colonel Christensen: I know of no publicly available
14 data that shows this. The Privacy Act often is used by the
15 Department of Defense to shield anyone who would have been
16 fired. But we do know that there are problems within units,
17 like Fort Hood, that were long and systemic, that commander
18 after commander knew about. Senior commanders knew about
19 it, yet nothing was done.

20 Senator Warren: So let me just ask you plain then,
21 Colonel Christensen. Have we gone far enough when it comes
22 to holding commanders accountable for sexual assault?

23 Colonel Christensen: Absolutely not. One of the
24 problems we have is because we have the commander-controlled
25 justice system it is very difficult to find where the line

1 is to hold them accountable because then it crosses into
2 unlawful command influence. That is one of the reasons it
3 would be much better if we took prosecution authority out of
4 their hands, because then you could more easily hold people
5 accountable.

6 Senator Warren: So very interesting point. You know,
7 military leaders, to a person, have come before this
8 committee since 2013, saying, "We cannot take commanders out
9 of the chain of command over sexual assault cases.
10 Commanders are the only way that we can solve this problem,
11 and we will fix it." They said that, and yet here we are, 8
12 years later, and thousands of sexual assaults later, and not
13 only have commanders not fixed anything, but the problem has
14 actually gotten worse. And we do not even know if the
15 people we are relying on to address sexual assault are being
16 held accountable or are incentivized to care about this
17 scourge in their ranks.

18 Military commanders have had their chance. They said
19 they would fix this, and they did not. It is long past time
20 for this committee and for the Congress to do the right
21 thing and pass Senator Gillibrand's proposal. I am going to
22 fight alongside her until we get this done.

23 Thank you, Madam Chair.

24 Senator Gillibrand: Thank you, Senator Warren.

25 We are going to take a quick second round, if that is

1 okay with you, Senator Tillis.

2 So we have had a lot of discussion about the sacred
3 convening authority, and I want to get back to the issue of
4 the fact that most commanders do not have convening
5 authority, and never will, since it is reserved to O-6 and
6 above.

7 Colonel Christensen, is it possible for the 97 percent
8 of commanders to maintain good order and discipline and to
9 keep control of their troops and have good command control
10 without convening authority?

11 Colonel Christensen: Absolutely. It happens every
12 day. For example, in the Air Force, the commander that has
13 the most immediate impact on the good order and discipline
14 of a unit is the squadron commander. The squadron commander
15 can use administrative punishments, can use counseling, but
16 they cannot prosecute someone. They can charge them, but
17 literally anybody can charge somebody under the Uniform Code
18 of Military Justice. But they do not have the ability to
19 send someone to court. All they have to do is the ability
20 to say, to a superior, "Please prosecute this person." That
21 would be no different under the Military Justice Improvement
22 Act. There is nothing in that act that would prohibit that
23 squadron commander from trying to convince a prosecutor,
24 just as they have to try to convince a convening authority,
25 that this case should be prosecuted.

1 Senator Gillibrand: Thank you. And Mr. Morris went on
2 and on about the multiple panels that have looked into this,
3 and that is true. There have been multiple panels. There
4 are binders and binders and binders of recommendations.
5 Every recommendation that has been made that is a
6 legitimate, legal change that Congress can take up, we have
7 actually made. I have made sure we made it.

8 And so I want to answer the question he asked, that
9 Senator Tillis asked. Why did they not make this
10 recommendation? Colonel Christensen, you might have some
11 experience in that. Why did they never make a
12 recommendation to look at the Military Justice Improvement
13 Act as a solution, to your knowledge?

14 Colonel Christensen: Okay. Well so first off, only
15 the Response Systems Panel looked at the role of command.
16 The Judicial Proceedings Panel was prohibited from looking
17 at the role of command, and the DAC-IPAD has not looked at
18 the rule of command, whether or not they should be in
19 charge. The Response Systems Panel voted 7-2 to retain
20 command in convening authorities.

21 What is really important about the Response Systems
22 Panel, there were a lot of qualified people on it, but the
23 Department of Defense overwhelmingly controlled who
24 testified before the Response Systems Panel, and no
25 surprise, those people who testified before the Response

1 Systems Panel, and I did myself, were there to support the
2 convening authority system. If you look at the number of
3 witnesses they talked to who were experts on prosecutions,
4 or had a contrary view, who wore the uniform, it is minimal,
5 because they were not allowed to speak.

6 Also, the Military Justice Improvement Act, as far as I
7 know, was not even proposed at the time the RSP met. But I
8 think it is really important to understand what the
9 limitations are, even with the DAC-IPAD, where they looked
10 at and said that, "Well, we believe commanders made a
11 reasonable decision in 97 percent of the cases," or 95
12 percent of the cases. You have to understand what they were
13 doing. They looked at the investigative files from the
14 investigative agencies, such as CID, OSI, or NCS. They
15 looked at 1,700 files where they spent about an hour, per
16 file, to make a decision. They never talked to any
17 witnesses. They did not know what the lawyers in that case
18 looked at. And those investigative files, as it is put in
19 the DAC-IPAD report, were incomplete and did not contain
20 everything they needed to make a fair assessment.

21 So I would not take away too much out of this idea the
22 DAC-IPAD looked at that. I will give you an example. I
23 would never recommend whether a case go forward or not
24 reading a report of an investigation for an hour without
25 ever talking to a single witness, and most importantly, the

1 victim. You should really take that with a grain of salt.

2 Senator Gillibrand: Thank you. Colonel Christensen,
3 also another statement by Mr. Morris was that God forbid
4 this happens in Afghanistan. You couldn't possibly deal
5 with this system. Can you please explain what would happen
6 if there is a rape in Afghanistan, Iraq, Virginia, anywhere
7 in the United States or in the world?

8 Colonel Christensen: Well, let me give you an example.
9 So for the Air Force assets, most of them that are deployed
10 in Iraq, Afghanistan, Qatar, Kuwait, the convening authority
11 for them is the CENTAF commander who is located in Shaw Air
12 Force Base, South Carolina. So it would be nothing
13 different if the prosecutor making the decision was not
14 there. But there is absolutely no reason why there cannot
15 be multiple career prosecutors making these decisions, and
16 there is absolutely no reason why you could not forward
17 deploy one of those prosecutors to deal with this.

18 You have to understand, you know, we talk about abuses
19 in Iraq or Afghanistan. Well, in order to court martial
20 somebody in Iraq or Afghanistan you have to have defense
21 counsel, prosecutors, court reporters, and judges. It would
22 be nothing different to bring in a career prosecutor and
23 make the decision. So that, again, is a red herring
24 situation.

25 And then the last thing I would say on that, Senator,

1 is that the vast majority of serious crimes that were
2 committed in Afghanistan or Iraq would be covered by MJIA
3 and were brought back to the United States and prosecuted.

4 Senator Gillibrand: And last, Mr. Fidell, you
5 recommended that this Military Justice Improvement Act be
6 applied to all serious crimes, the equivalent of felonies,
7 and you stated that you were in favor of a bright line.
8 Have you looked at our bill, and do we provide that bright
9 line?

10 Mr. Fidell: Yes, Senator. You have provided a bright
11 line, but I have got a brighter one. I think anything over
12 a year avoids the kind of anomalies that show up. I mean, I
13 have looked at this eight ways from Sunday to try to figure
14 out if there is a truly nourishing, satisfying way to draw
15 the line. The answer is, there is not. Every possible
16 array, you can always point to something and say, "I think
17 that should be on the other side of the line," or "That
18 thing over there, that should be on this side of the line."

19 I think the simplest way of doing it, really, is the
20 familiar felony/misdemeanor dichotomy. The military justice
21 system, by the way, does not use that language, but as a
22 practical matter every Americans knows what we are talking
23 about when you are distinguishing between felonies and
24 misdemeanors. So that is the best I can do on that subject.

25 I would say this, by the way. Colonel Christensen --

1 and I might add, Senator Tillis, you may not be aware, but I
2 also served in the military when I was a younger man. The
3 Response Systems Panel, as Colonel Christensen mentioned,
4 had a dissent, and sometimes a short document, there can be
5 a great deal of wisdom in even a short document. And I
6 strongly encourage that every member of the committee read
7 the dissent that was prepared by Professor Elizabeth
8 Hillman, who is now president of Mills College in the Bay
9 Area, and the state prosecutor in Virginia Beach, Virginia.
10 It is a brilliant account, and I think it is an unanswerable
11 case for why commanders should not have the kind of
12 authority that we have traditionally given them.

13 Senator Gillibrand: Thank you. Senator Tillis?

14 Senator Tillis: Mr. Fidell, thank you for your service
15 too. Actually, the one follow-up question I had for you was
16 related to that line. I think in your opening comment you
17 were saying anything that would result in a year or more of
18 --

19 Mr. Fidell: That could result. That could result.

20 Senator Tillis: -- that could result in a year or
21 more.

22 Mr. Fidell: No. More than a year.

23 Senator Tillis: More than a year. And, Mr. Morris,
24 just back on the follow-up question that Chair Gillibrand
25 had with respect to the complexities of forward-deployed

1 situation, why would you disagree with what Mr. Christensen
2 said? You alluded to it being difficult or complied to. Mr.
3 Christensen said it is not really that much different. Did
4 I just infer from your comment or the follow-up question a
5 difference of opinion there?

6 Colonel Morris: Yes, and his perspective is that a
7 fair number of cases were returned from theater to be tried
8 in the States, which had not been my experience. But it is
9 just I do not think that complexity is accounted for in the
10 legislation.

11 Senator Tillis: Thank you. Thank you, gentlemen, for
12 testifying today.

13 Senator Gillibrand: Just to clarify, Mr. Morris.
14 Where is the convening authority typically for a unit that
15 is deployed?

16 Colonel Morris: Typically forward with the unit.

17 Senator Gillibrand: Mr. Christensen? Colonel
18 Christensen?

19 Colonel Christensen: Well, it depends on the service.

20 Senator Gillibrand: Okay.

21 Colonel Christensen: For the Army their convening
22 authority, Marine Corps convening authority was there. For
23 the Navy, who knows, because the Navy ships are moving
24 around. For the Air Force, it is Shaw Air Force Base,
25 CENTAF. For general court martials there were special court

1 martial convening authorities there, but for felony-level
2 cases, for almost every deployed airman who was at CENTAF.

3 And I would just add we can look at Sergeant Bales, the
4 guy who went into the Afghani village and slaughtered, I
5 think it was 14 Afghani villagers. He was prosecuted in
6 Washington State. The people at Abu Ghraib who were abusing
7 the prisoners were not prosecuted in Iraq. They were
8 prosecuted in the United States.

9 There a lot of summary courts that occur in theater,
10 but summary courts would not be touched by Military Justice
11 Improvement Act, and the vast majority of cases -- I mean, I
12 have personally prosecuted cases in theater, but those were
13 simple cases. The one rape case I was doing in theater got
14 transferred to North Carolina.

15 Senator Gillibrand: Thank you. Go ahead, Mr. Fidell.

16 Mr. Fidell: There is another source. You have heard
17 about a variety of reports. Let me simply mention another
18 one, for your idle hours. The Defense Legal Policy Board,
19 which existed under a prior administration, did a report on,
20 effectively, war crimes. I am having trouble remembering
21 the exact title, but part of that subcommittee report
22 addressed the question of where offenses were being tried,
23 that is, offenses committed in deployed operation, but some
24 were tried in country and some were tried back here in the
25 United States.

1 Senator Gillibrand: Thank you very much. Senator
2 Tillis, any further questions?

3 Senator Tillis: No.

4 Senator Gillibrand: Gentlemen, thank you so much for
5 your testimony today. This has been extremely useful.
6 There may well be follow-up questions that I will submit to
7 each of you to respond in writing, to give to the full
8 committee. There are many other Senators on this committee
9 who I think would like to hear your testimonies, so we will
10 make that available to them. So I would be grateful if you
11 would submit responses to follow-up questions in writing.

12 Thank you very much. Take care.

13 Mr. Fidell: Thank you.

14 Senator Gillibrand: That is the end of our hearing.
15 Thank you to all the participants. Adjourned.

16 [Whereupon, at 4:58 p.m., the subcommittee was
17 adjourned.]

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