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Commanders' Central Role in Enforcing Discipline—the Key to Readiness and Lethality

Chairman Tillis, Ranking Member Gillibrand, and members of the Senate Armed Services Committee, thank you for the opportunity to appear before you and speak with you on this important issue.

The American Army is the best Army in the world. But, as the National Security Strategy wisely recognizes, "America's military has no preordained right to victory." Countless attributes make us the best, but first among these, are our leaders—courageous, responsible, and committed to the care of Soldiers who are willing to give their lives for this Nation and for their fellow Soldiers.

For over 243 years, commanders in our Army have led this exceptional force through the careful exercise of discipline. Discipline is, as George Washington stated, "the soul of an Army." Discipline is foundational; it is in our DNA. In my professional view, taking away a commander's decision over all discipline—including when appropriate, the decision to prosecute crimes at court-martial—will fundamentally compromise the readiness of our Army today, and on the next battlefield.

This is especially true for serious offenses, like sexual assault. Ten years ago, sexual assault offenses comprised 18% of Army trials. In 2018, 50% of trials in Army courtrooms were sexual-assault trials. This is not a coincidence. A new statute in 2007 strengthened the voice of victims. Additional reforms within the Army, such as the Special Victim Prosecutor, Special Victim Teams, and the Special Victim Counsel program have changed the landscape of accountability and improved the administration of justice. Within this framework, leaders developed a comprehensive prevention program and a fully resourced accountability process that put emphasis and resourcing in the hands of commanders to address the problem. This is what commanders do: commanders see a problem, and in response, they set priorities and standards, enforce them, and devote resources to solving the problem. Indeed, Congress and the Services have worked closely together over the intervening years to reform and improve our

prevention and response measures. With Congressional assistance, the military justice system has undergone truly unprecedented reforms—many of which took effect only nine weeks ago.

Commander Authority and Accountability

An expeditionary Army requires a justice system that is portable, swift, just, and transparent. Soldier behavior is governed, built, shaped, and reinforced over a Soldier's career by commanders and leaders who set and model standards, and who punish bad behavior.

The commander is vested with that authority because he or she is accountable for all that goes on in the unit—in conflict or in peace, at home or abroad. The commander—trained, experienced, and in partnership with his or her judge advocate legal advisor—must be able to dispose of indiscipline quickly, visibly, and locally. A commander who is denied the tools necessary to combat a crime will not be as accountable for preventing that crime as one who is appropriately equipped with that necessary authority – accountability for something must depend on the authority to do something about it. This is as true for sexual assault and other serious offenses as it is for any other crime.

Although American Soldiers are the world's best, it is, ultimately, a commander's authority to enforce discipline – including, when appropriate, by the highest sanction our society recognizes, a criminal conviction imposed after a fair trial – that ensures American Soldiers uphold the high standards of behavior expected of them, in war and in peace. The chain of command is, and must remain, the center of gravity for solutions. This includes sexual assault.

Commanders have the moral and legal authority to drive the United States Army toward preventing significant crimes in a way that lawyers do not. Courts-martial of Soldiers accused of murder in violation of the Law of Armed Conflict, for example, have

drawn criticism from some commentators as examples of lawyers applying unreasonable laws to prosecute American heroes. Over the past 18 years, the Army has tried over 790 courts-martial in a deployed environment. That is almost 800 instances where a commander decided to emphasize good order and discipline in order to achieve greater ends on the battlefield. Importantly, only 10% of those 790-plus cases were purely military offenses.

The commander ensures Soldiers retain their dignity in combat. One necessary method to enforce battlefield standards is through the court-martial. Indeed, at its foundation, the preservation of good order and discipline is why the commander has this authority. James McDonough expressed this notion most eloquently in his famous book Platoon Leader, an autobiographical account of his experience leading Soldiers in Vietnam. "I had to do more than keep them alive. I had to preserve their human dignity. I was making them kill, forcing them to commit the most uncivilized of acts, but at the same time I had to keep them civilized. That was my duty as their leader. They were good men, but they were facing death, and men facing death can forgive themselves many things. War gives the appearance of condoning almost everything, but men must live with their actions for a long time afterward. A leader has to help them understand that there are lines they must not cross. He is their link to normalcy, to order, to humanity. If the leader loses his own sense of propriety or shrinks from his duty, anything will be allowed. And anything can happen."

As good as Army lawyers are, they cannot substitute their legal experience for a commander's expertise and moral authority in the unit. It is this moral authority (highlighted by McDonough) that Soldiers follow, even at the risk of their own lives. If that authority is outsourced—even to lawyers in uniform—Soldiers will lose respect for their commander and the natural constraints command authority places upon them. Further, commanders are uniquely suited to address insidious behavior within the unit stemming from reports of crimes. For example, commanders understand that retaliation against victims who report sexual assault is a very real threat to victim safety,

readiness, and unit cohesion. Commanders are in the best position to take meaningful action to address retaliation.

Retaliation for any report of a crime is unacceptable. By policy, any allegation of retaliation must be thoroughly investigated. On January 1, Article 132—the first punitive Article that expressly prohibits retaliation—went into effect. Even before 1 January, though, commanders have prosecuted crimes that affected witnesses in the military-justice system, from violating a no-contact order to obstruction of justice. Social retaliation is complex: although clearly harmful, much of it is not criminal, but a commander's commitment to fostering an environment in which victims are supported is key to establishing a culture in which such acts rarely occur.

Calculus in Command Decisions—Good Order and Discipline

I fully acknowledge that the Army is not a perfect institution when it comes to addressing sexual assault and sexual harassment. We will, like any institution, or system, make mistakes. But we are an accountable organization, one that subjects itself to a level of scrutiny for which there is no parallel in civilian society. I believe this is what we owe the mothers and fathers who send us their sons and daughters.

Some may point to prosecution or conviction rates and argue that these are litmus tests of our ability to handle sexual assault cases. I do not agree. Just because something can be measured does not mean it is a valuable metric. Conviction rates are the quintessential poor metric: they are simple to record, yet they reveal little.

Further, no criminal system should be graded by a conviction rate alone. Show me a 98% conviction rate, and I'll show you a system that doesn't try the hardest cases. Nonetheless our overall conviction rate is 86%. It is true that a narrow subset of fully-contested sexual assault cases is lower – around 40% in any given year. Yet, some cases that should be tried are also harder to try than others. To take these deserving cases to trial means accepting a lower conviction rate. And anyone who has

experience in trying sexual assault cases will acknowledge this fact – these can be, quite simply, the toughest cases often for such reasons as the victim's word against the accused's, alcohol and bad memory, and little-to-no physical evidence or witnesses.

I embrace the criticism that comes with trying these hard but meritorious cases. We will take cases to trial that a civilian jurisdiction will not because our commanders have a different calculus – one based on the unique requirements of discipline in a warfighting Army where Soldiers must rely on each other, have confidence that they can count on the person to their left and right, and that when one Soldier gets out of line that their commander will fix the problem and enforce the standard. Whether it is weapons safety or victim safety, this is the essence of discipline. This is good order. This is what commanders enforce. And so, a commander's discipline, good order, and safety calculus is different from any United States district attorney's, commonwealth's attorney's, or state's attorney's calculus.

A commander may decide to prosecute a case of an aircraft mechanic who distributes small amounts of cocaine to his fellow Soldier mechanics even when the local DA's threshold may be higher. Why? The Commander may have 12 Soldiers on that Blackhawk tomorrow. Our calculus in the best Army in the world is simply different.

So it is with sexual assault crimes for which there may be little corroborative evidence. Law enforcement and judge advocates spend significant time developing cases and assessing the available evidence. Based on that work, our commanders take cases not because they know to a certainty that the Government will win, but rather when they believe the victim and that victim seeks justice in court and there is a reasonable chance of a conviction–and then only after receiving the benefit of their judge advocate's thorough review of the evidence. When that is true, the crucible of the courtroom – bound by the requirements of due process—I s the American way of deciding what the facts are. We must remember that the military justice system is an adversarial criminal process that must honor the non-negotiable constitutional

protections for an accused. Our scales of justice are balanced for sound reasons—our sacred charter is to ensure we show proper respect for both sides of the scale.

Commanders must also carefully consider the concerns of the victim and the safety of our community when addressing any allegations of crime—most especially sexual assault. As a society, we must be concerned for the victim, but we cannot lose sight of the potential for future victims, should an accused not be prosecuted and held accountable. In a recent case where a victim declined to participate in a rape prosecution, the United States, after careful, thoughtful consideration, decided to subpoena the victim, who ultimately testified, albeit reluctantly. The Soldier was convicted and given a lengthy sentence. This is a rare occurrence, admittedly, but noteworthy as it is a reminder that the safety of our community is one of the foundational principles of every criminal justice system, to include our own. It can be a very difficult balance with many considerations: we must also think of how forcing a victim to participate in a prosecution might negatively affect reporting in the future as word potentially spreads. Yet, public safety is paramount.

Congressionally Mandated Empirically Based Commissions Have Concluded Commanders Should Remain in the System.

The proposal to remove the commander from the military justice process is not a new one. Significantly, where the role of the commander has been thoroughly examined, the conclusion is clear: removing commanders from the military justice process will not improve either reporting or prosecutions of sexual assault.

Over the past several years, three significant external reviews have examined the military response to sexual assault and each of those reviews has focused on the role of the commander. Not one has recommended removing the commander.

The congressionally-mandated Response Systems Panel (RSP), which consisted of nine civilian members, led by retired federal Judge Barbara Jones,

exhaustively studied sexual assault in the military: more than 70 public meetings, testimony from over 600 witnesses, 10 site visits, and thousands of pages of information. Multiple advocacy organizations were invited to submit materials and appear before the RSP. This was, in short, a comprehensive, evidence-based review of our system by outside experts.

After conducting their thorough review of the military's response to sexual assault, the RSP found the evidence did not support the conclusion that removing commanders would reduce sexual assault or increase reporting. It would not, the RSP concluded, improve investigations or prosecutions. Finally, and importantly, the panel concluded removing the commander would not increase victim's confidence in the military justice system or reduce concerns about potential reprisal.

More recent evidence suggests that commanders are making sound decisions in sexual assault cases. The Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (DAC-IPAD), another congressionally-chartered commission, recently released the preliminary results of a study in which members evaluated a commander's disposition decision in 164 randomly selected cases – 74% of which did not involve a court-martial. That ongoing review, conducted largely by lawyers, concluded in a preliminary report that commanders' decisions were reasonable in 94% of the cases, and even in that 6% remainder, more often than not, the attorneys could not come to a unanimous conclusion on whether the commanders' decisions were reasonable or not. This demonstrates that even trained, experienced lawyers can disagree, especially in these tough cases.

When evidence shows that change is needed, the services have welcomed it. Indeed, following the RSP, the services embraced reviews by the Judicial Proceedings Panel and the Military Justice Review Group (MJRG). In particular, from 2014 to 2015, a Secretary of Defense-established entity, the MJRG, which included judge advocates from each of the services, comprehensively reviewed the UCMJ and identified areas in which we could strengthen our system.

Congress accepted most of these recommendations, and with the Military Justice Act (MJA) of 2016, the most significant changes to the military justice system in more than 50 years went into effect. Over the 24 months that followed passage of MJA 16, our Military Justice Training Team trained over 6,000 people at 50 installations, in 23 states and 6 countries on the changes brought by MJA 16. Though it is too early to reach any conclusions about those changes, one thing is clear: we welcomed them, trained accordingly, and are focused (along with commanders) on moving forward and improving our system.

Of course, the sweeping changes to our criminal justice system by MJA 16 follow successive years of hundreds of statutory and policy changes to our criminal justice system. For any criminal justice system to be effective, it must be predictable and stable. Article 120, UCMJ, alone has undergone four substantive changes in 10 years, and the statute we have is indeed the most progressive and responsive sexual assault statute in existence. Yet, even justified change carries the risk of unintended consequences. Only because of the energy and skill of judge advocates across the services and the flexibility and adaptability of our commanders have we been able to absorb the sheer volume of changes and ensure justice is done. Yet, with every change, there exists an element of judicial uncertainty. Take, for example, the challenges made to the burden-shifting elements in the 2007 version of Article 120. In those cases, victims who came forward and bravely gave testimony saw those cases overturned at the appellate level. We must, as responsible policy makers, allow the system to breathe normally for a period of time to absorb the changes.

Allies' Experience and Historical Context

Many of our allies have seen commanders removed from disposition decisions for cases involving serious misconduct, and it can be tempting to want to follow suit. Of course upon closer inspection, none of our allies made this change because of concerns about sexual assault. Their experiment in removing commanders has also

shown that there is no evidence that removing commanders from disposition decisions has made their armies more ready or lethal by reducing incidence of serious crimes like sexual assault.

The past can also be instructive. In 1947, General Eisenhower (then the Chief of Staff) testified before the Senate Committee on the Armed Services and when asked about the commander's role in military justice, he said something prophetic: "Remember this: you keep an Army and Navy to win wars. That is what you keep them for. The line officer is concerned with the 4,000,000 men on the battle line far more than he is with the small number who get in trouble. The lawyer is there, of course, to protect their absolute rights under our system to the ultimate, but these men who are in charge of and are responsible for these things which come from the President through the Secretary of War to the commanders, have to win the war." General Eisenhower continued, "If you make a completely separate staff body to whom is charged no responsibility for winning the war and you say, 'you can do as you please about these people,' you are going to have trouble."

Ongoing Efforts

Commanders and their judge advocates have spent the last 12-plus years focused on preventing, and responding to, sexual assault, with positive results, including an increase in victims reporting, seeking services, investigations, and prosecutions. There have been improvements, but like any such effort, there will be some setbacks, such as the recently released prevalence reports from the academies.

We know that there remains much more to do, and the Army remains committed to doing it. Like the rest of society, we cannot prevent every crime, and we cannot, consequently, prosecute our way out of this problem. What we can do is continue to make preventing sexual assault the priority it must be—which is something that, in the military, only commanders can do. And we can hold commanders accountable, but only if we give them the authority that they need.

In the end, commanders drive priorities and emphasis on those priorities yields results. Commanders, not uniformed prosecutors, are in the best position to make decisions affecting good order and discipline because, in the end, it is ultimately a commander's responsibility to ensure good order and discipline – a well-trained, well-equipped, and well-disciplined force that is ready for any mission that they are assigned.

I thank the committee for your attention and the opportunity to speak with you today, and I look forward to answering your questions.