



24 March 2021

Chairwoman Gillibrand and Ranking Member Tillis, thank you for the opportunity to appear before you today to discuss military sexual assault and the need to reform the military justice system. Eight years ago, General Raymond Odierno testified before the full Senate Armed Services Committee, stating, “combating sexual assault and sexual harassment within our ranks is now the Army’s #1 priority.” Sadly, the recent release of the independent Ft. Hood investigative report proved the futility of this promise. Particularly damning was the report’s 9<sup>th</sup> finding that the “Command Climate At Fort Hood Has Been Permissive Of Sexual Harassment/ Sexual Assault.” This report along with ever-worsening data across all the services demonstrates how short-lived the Army’s commitment was.

The estimated number of sexual assaults and rapes of active duty men and women has stubbornly hovered above 20,000 for almost every year prevalence surveys have been administered. While there has been a slight improvement in the prevalence rate for men, this has been more than offset by the increase in prevalence rate for women serving on active duty. In fact, for women the rate is at its highest level since 2006 and increased by 50% from 2016 to 2018.

While military leadership has failed to make any improvements in sexual assault rates over the last decade, its record on accountability is also abysmal. In FY14, 4,660 men and women made an unrestricted report of sexual assault or rape. 588 of these reports were eventually prosecuted resulting in 204 nonconsensual sex convictions. By FY19 the number of unrestricted reports leapt to 5,699, yet prosecutions and convictions plummeted to 363 and 138 respectively. This 50% reduction in prosecution and conviction rates occurred during a time when military leadership repeatedly argued against military justice reform designed to modernize and professionalize the system.

Even as prosecutions have been declining, survivors have been reporting at record rates. But rather than see their offenders held accountable, they are the ones who suffer the price for reporting. Retaliation rates for those who report are consistently above 60%, and despite efforts of leadership to play down the severity of the impacts of retaliation, a DoD IG report found 1/3 of women who reported were forced out the military within a year of reporting. A recent Rand report also found that sexual assault and harassment result in over 10,000 victims leaving the service every year.

Despite the objective data proving its failure, military leadership continues to vigorously argue that commanders alone are the solution to solving the cancer of sexual assault and harassment. In opposing reform, leadership argues that commanders need more authority not less, yet I have never heard them explain what additional authorities they need. What tool does a commander not already have that would result in the prevalence rate being significantly lowered or accountability increasing? As Congresswoman Speier has noted, Congress has provided over a billion dollars to the military to fight this scourge, yet we see minimal, if any, results.

Over the last thirty years, scandal after scandal has been met with promises of zero tolerance and assurances that commanders will eradicate sexual assault from the ranks. The one constant in its ineffective response is the commander-controlled justice system. For most of our history, military justice had a reputation as a brutal and unfair process, and the abuses of commanders were the primary reason for this. Congress – almost always over the objections of military leadership – has continually reigned in the power of commanders to provide a less draconian system of justice. Yet, as recently as last November a federal judge warned that military justice was still “a rough form of justice.”

Military justice still possesses many inherently unfair infringements of an accused’s rights. The same is fundamentally true for victims of crimes committed by military members. However, while Congress has *mostly* reigned in the evil of improper command influence relative to an accused, the same is not true for crime victims. There is nothing to stop the out-sized influence that senior officers and commanders can have on other commanders and convening authorities to stop a favored subordinate from going to trial by putting their thumb on the scales. I have personally witnessed this negative impact on the ability to carry out justice when the former chief of staff of the United States Air Force and the former Air Combat Command commander pressured the process to stop an airman from being prosecuted despite his admissions of raping his wife.

Sexual assault and rape have appropriately put the military justice system under a spotlight, but I would just as strongly advocate for professionalizing and modernizing the justice system even if there was not a single sex offense in the military. After 246 years, it is time for Congress to give the men and women serving our nation a justice system worthy of their sacrifices, whether victim or accused.

Military leadership opposes fundamental reform primarily because they argue that the ability of a commander to enforce discipline through court-martial is fundamental to command. This argument is problematic for a number of reasons. First, it conflates command authority with the ability to send a service member to court-martial or what is known as convening authority. Second, it ignores the reality that service members are rarely actually prosecuted at courts-martial. Third, if prosecution authority were vested in military lawyers rather than convening authorities it would not impact the discipline powers for the vast majority of commanders.

There are about 14,500 commanders in the Department of Defense, but the ability to send (or refer) a case to a court-martial is vested in only a tiny fraction of commanders known as convening authorities. There are 2,052 special court-martial convening authorities or about 14% of all commanders, but only about 360 or 2.4% actually refer cases to court. There are even fewer general court-martial convening authorities with only 393 or 2.7% of commanders having general court-martial convening authority. However, only about 140 or .95% actually use the authority to refer charges to a court-martial in a year. Thus, of the 14,500 commanders only a little over 3% actually send cases to either a special or general court each year. The vast majority of commanders do their jobs with absolutely no authority to court-martial their troops.

Military leadership often argues that commanders need to be able to enforce the standards they set, but this misses the mark. As noted, commanders, who have the most immediate impact on discipline, can't send cases to trial. This authority is possessed by convening authorities who are many levels removed and may be thousands of miles away. At best, the commander can make a recommendation to send a case to trial. It's illogical to think that somehow discipline will be destroyed if a commander advocates for a military prosecutor to send charges to court rather than a general or admiral. No commander, even a convening authority, can both charge someone and refer the case to a court-martial.

Over the last three fiscal years, the military has averaged 813 general courts and 644 special courts a year for a combined average of 1,457 courts a year. To put this in perspective, this works out to be .1 courts-martial a year per commander, .3 courts per year per special court-martial convening authority and 2.06 a year per general court-martial convening authority. In other words, it is an extreme rarity that an individual commander has a troop court-martialed.

In fact, court-martial use has dropped dramatically and steadily over the years. In FY60, the military tried 40,810 general and special courts, but by FY19 that number was only 1542 courts or about .12% of the 1,340,000 men and women on active duty. FY20 saw the lowest number of special and general courts tried since the UCMJ went into effect in 1951 with only 1323 cases prosecuted.

Of the cases tried, especially at the general court level, they are overwhelmingly for common crimes like rape, sex assault, murder, drug use, and child pornography. Military unique offenses are rarely ever sent as a stand-alone offense to a general court. Data provided to Protect Our Defenders through Freedom of Information Act requests showed over a five-year period of time that the Navy did not prosecute a single stand alone military unique charge at a general court-martial, the Marines prosecuted 2, and the Army prosecuted 9 per year, or about 2% of their general courts. The Air Force did not answer the FOIA request.

Even in desertion cases the Army rarely uses court-martial. At the height of the Iraqi surge, the Army only prosecuted 174 out of 3,301 soldiers that deserted in 2006, and the SPC Guillen murder exposed that the Army policy was to not even search for missing soldiers. What we see from these numbers is that the court-martial has evolved from being primarily used as a discipline tool to almost exclusively handling criminal justice matters. Thus in this type of system, attorneys, not commanders, are best qualified to determine who is charged in a criminal justice system.

A common argument from military leadership opposing legislation like MJIA is that it would remove a commander's ability to hold their troops accountable. This is a false argument. MJIA is tailored to only change who makes the final decision to send a case to court-martial and mostly at the felony or general court-martial level. For the 99% of commanders who don't currently have that authority, their ability to discipline troops will be unaffected. All commanders will retain exactly the same authority to use administrative actions including initiating involuntary discharges. They will have the same authority to use nonjudicial punishment, issue Military Protective Orders, authorize searches, place limits on a suspect's liberty including the use of

pretrial confinement and to authorize expedited transfers. These legitimate command authorities will be untouched by fundamental reform.

When all is said and done, military leadership's argument against fundamental reform boils down to "trust us, this will destroy good order and discipline." However, the military has long used this scare tactic to oppose reform of military justice and have long been wrong. For example, in Professor Kastenberg's book, "In a Time of Total War: The Federal Judiciary and the National Defense," he noted that many senior officers opposed passing the Uniform Code of Military Justice. This included the Air Force Judge Advocate General, Major General Harmon, who believed the UCMJ would destroy good order and discipline. Even ten years after the UCMJ went into effect, Harmon and his successor, Major General Kuhfeld, argued the UCMJ should be repealed because it would not work during combat operations. These are the same type of arguments we hear today, and yet the UCMJ is now the pillar upon which military leaders argue for retained prosecutorial decision-making authority for convening authorities.

Finally, fundamental reform will result in greater efficiency thereby saving precious resources and delivering timely justice. The current system is bloated and bureaucratic due the multiple layers of command involved in prosecuting offenders. Each layer requires legal advice provided to commanders because they lack legal expertise. As cases pass between layers of military bureaucracy, they often languish in indecision and paperwork. A seasoned prosecutor does not need to be advised by another lawyer before deciding if a case should be prosecuted. The current procedure utilizing thousands of commanders, convening authorities, and lawyers to prosecute a small number of cases can easily be replaced by a small corps of experienced attorneys delivering cost effective and timely justice.

I often hear senior leadership claim that a JAG somehow lacks the capacity to understand why a commander would want a case to go to trial and would therefore refuse to prosecute a case. This is a red herring. Under the current system no case can proceed to trial without the buy-in of JAGs. Moreover, by the time a JAG becomes an O-6, they will have spent 20 years wearing the uniform. They will have completed three levels of professional military education such as Squadron Officer School, Air Command and Staff College and Air War College and most will have deployed in support of combat operations. In other words, senior JAGs have the experience and training to understand discipline issues facing commanders.

It is for these reasons, that I strongly urge your support to move the military justice system into the 21<sup>st</sup> century with a prosecutor-based system empowered to handle felony level crimes.



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