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[H.A.S.C. No. 116–24]

EXAMINING THE ROLE OF THE COMMANDER IN SEXUAL ASSAULT PROSECUTIONS

HEARING

BEFORE THE

SUBCOMMITTEE ON MILITARY PERSONNEL

OF THE

COMMITTEE ON ARMED SERVICES
HOUSE OF REPRESENTATIVES

ONE HUNDRED SIXTEENTH CONGRESS

FIRST SESSION

HEARING HELD
APRIL 2, 2019

U.S. GOVERNMENT PUBLISHING OFFICE
36–885 WASHINGTON : 2020

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EXAMINING THE ROLE OF THE COMMANDER IN SEXUAL ASSAULT PROSECUTIONS

HOUSE OF REPRESENTATIVES,
COMMITTEE ON ARMED SERVICES,
SUBCOMMITTEE ON MILITARY PERSONNEL,
Washington, DC, Tuesday, April 2, 2019.

The subcommittee met, pursuant to call, at 2:00 p.m., in room 2118, Rayburn House Office Building, Hon. Jackie Speier (chairwoman of the subcommittee) presiding.

OPENING STATEMENT OF HON. JACKIE SPEIER, A REPRESENTATIVE FROM CALIFORNIA, CHAIRWOMAN, SUBCOMMITTEE ON MILITARY PERSONNEL

Ms. SPEIER. Welcome to the Military Personnel Subcommittee of the Armed Services Committee. This is a very important issue that we are going to discuss today. I have been fighting this epidemic of sexual assault in the military since 2011. We have made meaningful, if fitful, progress addressing the scourge. Survivors have more resources, and there is more accountability for some commanders who would prefer to sweep assaults under the rug.

We have also made important changes to the legal process so that it more closely resembles the civilian justice system. Commanders can no longer unilaterally throw out convictions. The "good soldier" defense is gone, though one of our witnesses suggests not all commanders are following the law. And survivors don't have to suffer through excruciating Article 32 processes that require them to endure up to 48 to 72 hours of cruel cross-examination, absent normal legal checks.

These reforms have undoubtedly made the system better for survivors and more credible overall. Yet, assault rates remain far too high, nearly 15,000 in fiscal year 2016; and reporting rates perilously low, only 32 percent that year. The experience of some survivors is better, but it is not good. More service members trust female and male survivors when they report assaults or harassment. But a culture of endemic retaliation and doubt persists. Forty-five percent of all students who reported assault at the military service academies suffered from ostracism. Too many of our service members live and work in toxic cultures, characterized by pervasive, unrelenting harassment and assault.

Victims of sexual assault spend the rest of their lives coping with the mental and physical after-effects of their attack. Perpetrators often get off scot-free, get promoted, and collect accolades. Many survivors resign from service, humiliated and dejected.

I believe the Department and services care about fixing this problem. I just think they have tied their own hands by refusing

to admit current efforts aren't working. Incremental solutions are not good enough. Something here is fundamentally broken, and we need to act, and act urgently. Reforming the system requires balancing justice for survivors, the rights of the accused, and commanders' abilities to build effective units with diverse and inclusive cultures and minimal sexual assault.

I am convinced finding this balance must involve keeping decision-making in the military but transferring the decision to try special victims cases from commanders to an independent prosecution authority. Our allies in the United Kingdom, Canada, Australia, and Israel already exclude commanders from sexual assault prosecutions, and it works. Giving a special prosecutor this responsibility would make it easier for survivors to receive just outcomes, reduce aimless prosecutions, and allow commanders to better focus on addressing and improving their units' cultures.

A special prosecutor would be better for survivors. Survivors would know that an authority not influenced by conflicts of interest, readiness concerns, or outside perceptions, would decide whether to prosecute their cases.

Too often those factors, not legal concerns, drive the military criminal justice process. There are countless cases of commanders abusing their power to issue favorite subordinates wrist slaps, ignore victims' preferences for trial jurisdiction, or who are culpable themselves.

Senator McSally's commander raped her. No one in her chain of command should have decided whether her case was prosecuted. Limiting the commanders' legal role would encourage more survivors to report, to trust the system, and to believe that, no matter the outcome of their case, they had been given a fair shake.

A special prosecutor would also be better for the accused. Over the last few years, I have heard the commanders never countermand their lawyers when the recommendation is to try a case, that the commander brings charges in every case in which a survivor wants to proceed. I have heard the commanders are trying cases that district attorneys would never touch. Those are not signs of a healthy system. They are signs of a system that has overcorrected, in which the pendulum has swung wildly to an opposite extreme.

Most years, less than 5 percent of sexual assault cases are referred to court-martial, and of those cases, only 20 percent result in successful convictions. Clearly, many commanders are far better at trying cases to dodge political pressure than they are to doing the hard work of referring charges when it is most appropriate. That approach wastes time and money, and makes the system less credible.

I don't want the military to try a case every time a survivor names a perpetrator. I want the military to believe the survivor, provide them the resources they need, and investigate the offense. If there is sufficient evidence to prefer charges, then charges should be preferred. I trust military lawyers to make that determination far more than I trust commanders.

Commanders would also be freer to fight sexual assault if they didn't also serve as convening authorities. In a string of recent decisions, the Court of Appeals for the Armed Forces has raised the specter of unlawful command influence in a shocking number of

sexual assault cases. They have thrown out convictions because the court believed the commander compromised proceedings by preferring charges or choosing jury members in response to political pressure.

Having commanders make prosecution decisions jeopardizes convictions. And commanders' awareness of this legal risk limits their ability to vocally and actively stamp out sexual assault in their units. Loudly opposing assault today can get a conviction thrown out tomorrow. If a special prosecutor instead determines whether to try cases, it would remove those risks.

Commanders could trade something they are not experts in, making legal decisions, for what they do very well, setting tone and expectations. Commanders could more freely build and enforce their unit cultures, while still being held accountable for fixing the problem. Senior commanders could mentor their subordinates on the front line to help them fight the problem without worrying about legal ramifications.

This isn't a slippery slope. It is the way to strengthen the foundation of military criminal justice.

Today, we will be joined by two panels, including three brave women who will tell us about their experiences reporting their sexual assaults, and the way their chain of command responded when they did. I encourage my colleagues to learn about their experiences and how the commander's role in the justice system complicated the legal response.

These survivors will be joined by outside military legal experts. I am interested to hear what they view as the military justice system's strengths and weaknesses, responding to sexual assault, and changes they would propose.

After a quick break, we will be joined by the top judge advocates from each service. I will be eager to hear how they think commanders can participate more effectively in the military justice process, especially given recent rulings about unlawful command influence.

Before I introduce our first panel, let me offer Ranking Member Kelly an opportunity to make his opening remarks.

[The prepared statement of Ms. Speier can be found in the Appendix on page 47.]

STATEMENT OF HON. TRENT KELLY, A REPRESENTATIVE FROM MISSISSIPPI, RANKING MEMBER, SUBCOMMITTEE ON MILITARY PERSONNEL

Mr. KELLY. Thank you, Chairwoman Speier.

And I have been blessed beyond belief. I have commanded at the brigade and higher levels. I have also been a district attorney elected duly by the people. So I have prosecuted. I have sent sexual predators to jail for consecutive life sentences without parole.

One sexual assault is too many. One that goes unaccounted for is too many. That being said, we don't need to throw out the baby with the bath water. People, commanders, can make an impact at the level. We need to ensure that we give that. There are bad commanders and there are good commanders; there are more good than bad, but when there is a bad commander, there are actions

that can be taken against that commander for the things that happen.

Each of our witnesses today, thank you so much for being here. I want you to know, you are brave, brave women. Thank you so much for your service to this great Nation, and for you coming here today to testify before this panel. I especially want to thank all the survivors of sexual assault for their bravery.

The UCMJ [Uniform Code of Military Justice] has evolved significantly over a 75-year history, but the past 10 years have seen particularly significant changes. From dramatically improving victim rights to establishing new sexual assault offenses, the UCMJ has experienced substantial improvement. Notably, the 2007 NDAA [National Defense Authorization Act] contained the most comprehensive overhaul of the UCMJ in over 50 years, the result of a multiyear study by the military justice working group.

In fact, these extensive reforms were just implemented on January 1 of this year. Clearly, much work remains to ensure every sexual assault perpetrator is held accountable. However, I would caution against additional major changes to the commander-centric justice system, when we have not even seen the results of the reform instituted just 90 days ago.

There can be no doubt that the problem of sexual assault remains one of the most challenging and persistent issues in society. As a former district attorney who has prosecuted sexual offenses, I can attest that these horrific crimes have a long-lasting impact on both the victims and the community.

But I can also tell you from personal experience, that the answer to solving this problem in the military does not lie in attempting to replicate the civilian prosecution system, where less than 0.5 percent of sexual assaults will ever result in a conviction.

I have been inside a grand jury. I have seen grand juries not indict on one person's word against another, when they should have. I have seen lawyers, district attorneys, who would not take a case to trial for fear that they might lose because they are worried about being re-elected, and they are worried about losing.

Congress has established multiple independent commissions to study sexual assault in the military, and specifically, the role of the commander in prosecution. And I want to thank the chairwoman and others on this committee for their role in establishing them.

Not one of these independent panels, however, has recommended removing the commander. In fact, one of those panels, the response systems panel, included former Democratic Congresswoman Elizabeth Holtzman and Ms. Mai Fernandez, a civilian prosecutor and executive director of National Center for Victims of Crimes. Both Representative Holtzman and Ms. Fernandez came to the panel believing that removing the commander sounded right. But after hearing from hundreds of expert witnesses and reviewing the data, both changed their mind. Representative Holtzman said that "if removing the commander and putting the power in the hands of prosecutorial bureaucracy would make a difference, I would be saying junk it."

We can't have the present system, but we haven't seen any evidence of that. Three weeks ago, one of our former Military Personnel Subcommittee colleagues spoke on this subject. Senator

Martha McSally bravely came forward to tell about her experience of sexual assault in the military. In a subsequent letter to the Acting Secretary of Defense, she stated, "I strongly believe we cannot take responsibility away from the commanders due to the unique roles commanders play in culture, readiness, good order and discipline, and mission."

Senator McSally went on to call for the Defense Department to establish a task force to look for meaningful and immediate changes to improve sexual assault prevention and response.

Madam Chair, I fully support this task force and ask that Senator McSally's letter to the Acting Secretary of Defense be made part of today's record.

Ms. SPEIER. Without objection, so ordered.

[The information referred to can be found in the Appendix on page 161.]

Mr. KELLY. As a former commander and district attorney, I know that sexual assault is a scourge on both the military and society as a whole. But from both a military and legal perspective, I am convinced that removing the commander from the process will not help the root issue and will likely undermine the process. I am committed to working to find meaningful, effective solutions to this problem. I look forward to hearing from today's witnesses about how to do that.

Thank you, and, Madam Chair, I yield back.

Ms. SPEIER. Thank you, Mr. Kelly.

Each witness will have the opportunity to present his or her testimony, and each member will have an opportunity to question the witnesses for 5 minutes. We respectfully ask the witness to summarize their testimony in 5 minutes. Your written comments and statements will be made part of the hearing record. We will begin by welcoming our first panel: Colonel Don Christensen, United States Air Force, retired, president of Protect Our Defenders; Colonel Ellen Haring, U.S. Army, retired, chief executive officer of Service Women's Action Network; Lieutenant Commander Erin Elliott, U.S. Navy; Ms. Nelli Hanson; Ms. Angela Bapp; Lieutenant General Flora Darpino, U.S. Army, retired.

With that, Mr. Christensen, the floor is yours.

STATEMENT OF COL DON CHRISTENSEN, USAF (RET.), PRESIDENT, PROTECT OUR DEFENDERS

Colonel CHRISTENSEN. Chairwoman Speier, Ranking Member Kelly, distinguished members of the subcommittee, thank you for the opportunity to appear before you to examine the role of the commander in sexual assault prosecutions.

I am glad you are holding this hearing on this topic, as the role of the commander is greatly misunderstood. I believe the common misconception is that all commanders have prosecution authority, which is entirely not true. Prosecution authority vests in a tiny subset of commanders called convening authorities.

Convening authorities are the only commanders who have the traditional prosecutorial authority to send a case to a court-martial, to add or dismiss charges, or to approve a pretrial agreement or a plea bargain.

Based on recent changes to law, convening authorities are the only ones who can dispose of a sex assault or rape case. To put this in perspective, the DOD [Department of Defense] has around 14,500 commanders. But only 393 commanders have general court-martial convening authority, and only 139 actually use this authority to convene a court, according to most recent DOD data.

In other words, less than 1 percent of all commanders exercise prosecution authority for the most serious level of court. Approximately 600 special court-martial convening authorities referred a special court, or about 4 percent of all commanders. I bring these numbers to your attention because it is important to understand that despite what you may hear today, prosecution authority is not integral to being a commander.

Ninety-five percent of the commanders do their job every day without the ability to send anyone to a court-martial. These commanders have a wide range of tools to allow them to set and enforce discipline. They can do this through nonjudicial punishment, administrative counseling, discharges, ordering pretrial restraint and confinement, and issuing protective orders. The commanders without convening authority have the greatest impact on a disciplined force, because they are the commanders the rank and file work directly for and know.

Convening authorities are many layers removed from the rank and file and may be geographically separated by thousands of miles.

Moreover, the reality is, courts-martial are almost never used for purely discipline issues, such as disobedience and AWOL [absent without leave]. Instead, over the last 230 years, courts-martial have transitioned to an almost exclusive process for prosecuting common crimes. By this, I mean conduct that would be both a crime in the military and a crime in civilian society.

Additionally, the use of courts-martial has and is plummeting. According to the most recent data from the Department of Defense, in fiscal year 2015, the entire military convened less than 2,000 general and special courts. That is for all crimes, not just sex assault. This is a dramatic drop from fiscal year 2000, when the military prosecuted almost 5,000 special and general courts. Despite the military only being 4.65 percent smaller, general courts fell 31 percent, and special courts plummeted 73 percent.

If we look back to fiscal year 1990, the drops are even more dramatic. That year, the military prosecuted almost 10,000 special and general courts. In the late 1950s, the Army alone did almost 50,000 courts a year despite being the same relative size as it is today.

It is clear that the military has transitioned away from the court-martial as a discipline tool to a criminal justice process. Yet, the military has demanded that nonlawyer convening authorities retain control of a process they are simply not qualified to administer.

The ABA [American Bar Association] has set out a clear standard that the prosecution decision should be made by lawyers admitted to a bar and subject to ethics standards. The reason for this standard is obvious: Only lawyers are qualified to act as prosecutors and make prosecution decisions.

The military's insistence that convening authorities are more qualified is indefensible. There is nothing inherent to command that qualifies someone to make prosecution decisions. Someone does not become qualified to make prosecution decisions from PowerPoint briefing and talking to their staff judge advocate any more than they are qualified to perform surgery because they have taken a Red Cross course.

It is time to accept that the practice of law is a profession [in] which commanders should not be engaged.

And in my remaining time, I would just point out, Ranking Member Kelly, only one of the three panels has actually looked at the role of commander. The Judicial Proceedings Panel refused to look at that issue. And the current DAC–IPAD [Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces] has not yet addressed the issue.

And with that, I look forward to answering any questions you may have.

[The prepared statement of Colonel Christensen can be found in the Appendix on page 50.]

Ms. SPEIER. Thank you, Mr. Christensen.

Ms. Haring.

STATEMENT OF COL ELLEN HARING, USA (RET.), CHIEF EXECUTIVE OFFICER, SERVICE WOMEN'S ACTION NETWORK

Colonel HARING. Thank you for allowing me to make remarks today on this important topic. I am the CEO [chief executive officer] of the Service Women's Action Network. I retired from the Army in 2014 after 30 years of military service. I am a West Point graduate, and I have degrees—I have a master's degree in public policy and a Ph.D. in conflict analysis and resolution. I have taught at the Army's Command and General Staff College, the Army War College, and Georgetown University.

My research and work focuses on women and gender in the military. I commanded two Army units, the last at the brigade level, during my military career. During my very first Army assignment, one of my soldiers was murdered, and I closely watched as the criminal investigation and subsequent conviction unfolded. But at the unit level, we had no involvement in the investigation.

Later, one of my soldiers was charged with selling drugs in the barracks. He was immediately locked up in pretrial confinement, and the only thing that we did was make health and welfare visits to ensure that he was being properly treated.

Years later in 1997, when I was a major stationed in Hawaii, I was assigned as the investigating officer in three rape cases. I am not an MP [military police officer], a CID [U.S. Army Criminal Investigation Command], or JAG [Judge Advocate General], and I have no training in how to investigate a sex crime. Although I found the three soldiers who had been raped to be credible victims, the perpetrator, an NCO [noncommissioned officer], was eventually reassigned to another unit.

I juxtapose these experiences to illustrate the very different ways the military has approached how felony crimes have been handled over the years. Sex crimes against women have never been treated with the same level of outrage or professionalism as other serious

crimes. Fortunately, and to the credit of Members of Congress, the Army no longer allows an untrained officer to investigate cases of rape. But other problems persist.

First, while military officers and those selected to command receive a great deal of training, they have little legal training. Having taught at the two Army's premier service colleges, I can tell you that their legal training is superficial at best, and only senior-level commanders have JAG officers assigned to their staffs to advise them. And these JAG officers are generalists, they are not prosecutors, and they don't have expertise in sex crimes.

Furthermore, the JAG officers assigned to senior leaders are always junior and subordinate to the commanders that they advise. This means that they are evaluated and rated by their bosses and are therefore subject to command influence. They are not independent, nor are they experts in sex crimes.

Second, at SWAN [Service Women's Action Network], we hear from and work with survivors on a daily basis. Their stories are always similar. If they decide to come forward and report, they are generally not believed. They are seen as creating a problem where none existed before. And they almost always suffer retaliation. They consistently tell us that their commanders failed them in profound ways.

As a former commander, I can tell you that I would not want to have to decide if or when to move forward with the investigation of a sex crime because I know that my knowledge and expertise is limited in this area. In fact, in any criminal area.

Furthermore, there are simply too many possible conflicts of interest for commanders to be the best decision-makers in sex crimes—in sex crime cases, not to mention the fact that there are commanders themselves who have been perpetrators.

Finally, the next panel is going to sit here and say that commanders must stay in the decision-making process in order to maintain good order and discipline, a nebulous concept that they won't first define. However, all of our European allies, as it has been pointed out, have removed their commanders from the decision-making process, but good order and discipline has not melted away in their military organizations.

The panel will likely tell you that the U.S. military is exceptional and cannot be compared to our allies. If we are so exceptional, then why must our commanders have a degree of authority over their subordinates that our allies don't need, in order to maintain the same level of good order and discipline?

At SWAN we support removing commanders from the decision-making process, because doing so will send a signal that there are certain crimes for which they are not qualified to make decisions on.

Culture is ultimately at the root of our sexual assault problem in the military. Sexual assault is simply not seen as a serious crime. Until it is viewed as a serious crime and treated as a felony, it will continue to pervade our culture. Removing commanders from the decision-making process sends the signal that there are some crimes that are so severe, that commanders have no place in deciding if, when, or how they are prosecuted. I believe that will fundamentally shift how we view sexual assault and ultimately impact

our culture in a way that says this behavior is absolutely unacceptable.

Thank you. I look forward to your questions.

[The prepared statement of Colonel Haring can be found in the Appendix on page 59.]

Ms. SPEIER. Thank you, Ms. Haring.

Lieutenant Commander Elliott.

STATEMENT OF LCDR ERIN ELLIOTT, U.S. NAVY

Commander ELLIOTT. Good afternoon, Congresswomen and Congressmen. Thank you for inviting me here today. I appreciate the opportunity to speak about my experiences and share my thoughts.

I have been in the Navy for little more than 14 years now, and have served on six different ships and lived around the country and the world. In August of 2014, someone who I considered a close friend raped me. It was an extremely traumatic experience, one that nearly destroyed me.

Initially, I made a restricted report. I did not want my commanding officer to know, nor did I want law enforcement involved. I spent months in shock, and the only way I made it through was with the support of my good friends in the SAPR [Sexual Assault Prevention and Response] team. As I progressed in my healing, working through the PTSD [post-traumatic stress disorder], anxiety, and depression I was diagnosed with because of the assault, I moved to a new command with a new commanding officer, and I began to consider changing my report from restricted to unrestricted.

I was very lucky at my new command. I had a wonderful commanding officer and a great work environment. When I decided to change my report to unrestricted, I had the amazing support from my commanding officer, someone I consider the best leader I have ever known. He went above and beyond what was required of him in the situation.

Unfortunately, I would learn through my experience and through listening to other victims' experiences, that this support is not the norm. While I did not expect everyone to be the great leader he was—or he is, I did expect to be treated with the same dignity and respect he showed me, and I was not.

When I moved to a new duty station overseas, to become a commanding officer of a warship myself, it was made immediately apparent to me that the fact I was a sexual assault survivor was a burden and inconvenience to my bosses, and the upcoming court-martial for the person who raped me was a hindrance to them.

Due to appeals regarding a decision the presiding judge in the case made, when I reported to my new command, it was unknown when the court-martial would happen. One of the first things my new boss said to me regarding the court-martial was, "Well, I hope it is not during an important part of the ship's life," which all I could think is, "Well, next time I get raped, I will try to plan it better." This is the first of multiple comments that my boss has said to me, that not only revictimized me and were extremely insensitive, but made me seriously question continuing to move forward with the case.

One of the most degrading and humiliating occurrences was when my boss was forwarded a copy of the NCIS [Naval Criminal Investigative Service] report that discussed intimate details of the assault. I was called into his office, where he told me he had received and just read the report. After he handed it to me and I read it, I very seriously considered dropping the case, as I did not want my boss reading about my vagina.

And when I left my ship for a few weeks to be at the court-martial, my boss told me how he had to temporarily relieve someone in command for several months because they had had cancer and needed to get treatment. He told me he would much rather go through what I am going through than have cancer. I can tell you, after being diagnosed and treated for breast cancer last year, I would much rather go through that than through an assault.

Upon returning from the court-martial, nothing within the command environment got better. I was humiliated, ostracized, outcast, and ridiculed from people of every rank. There were multiple events for commanding officers that I was not invited to attend. My ship was given unfair scrutiny magnitudes greater than what any other ship was.

What nearly broke me, what was almost as bad as the assault itself, my personal information regarding the assault was divulged to my peers, including counseling information I had only discussed with my bosses, who would then use it to humiliate and demoralize me. If I could have gotten out of the Navy at that point, I would have, but I was in a contract and could not.

As commanding officers in the Navy, we are given a 3-day legal course in preparation for our tours. I was by no means a legal expert, but was equipped to deal with the minor infractions that affect good order and discipline. It is my belief, not just as a military sexual assault survivor, but as a former commanding officer myself, that some infractions are so grievous, so heinous, that they must be elevated to a higher level than just command level.

Sending sexual assault cases to trained military judges shows just how seriously this crime is taken, that we will not allow perpetrators to get away with this crime, and it reinforces to countless victims that they will be taken seriously.

Additionally, victims will feel more comfortable coming forward, knowing their bosses will not be reading the intimate details of the assault.

Thank you for your time, Congresswomen and Congressmen, for allowing me to share a small piece of my story with you today.

[The prepared statement of Commander Elliott can be found in the Appendix on page 71.]

Ms. SPEIER. Thank you, Lieutenant Commander Elliott.

Ms. Hanson.

STATEMENT OF NELLI HANSON, PRODUCT SUPPORT MANAGER, U.S. AIR FORCE

Ms. HANSON. Thank you, Chairwoman Speier, Ranking Member Kelly, and distinguished members of a subcommittee, for the opportunity to speak to you before today as a victim of military sexual assault and harassment. I am Nelli Hanson, product support manager for the Air Force.

I have dedicated my career to serving our country, first as a United States Marine, and then as a civil service Air Force employee. I have always believed in my work and dedication to our United States military. And I still do. But when I followed the military procedures for reporting my sexual assault, the system failed to protect me and provide me with the justice that I and all Active Duty and DOD employees deserve.

I have been stationed all over the world, to include Japan, the Pentagon, and Gunter Annex in Montgomery, Alabama. I arrived at Gunter in 2014 as the director of logistics. I developed a close working relationship with the colonel, who would eventually become my assailant.

The working relationship started out as professional, but by the following spring, the colonel had started to relentlessly sexually harass me. I did my best to keep things professional by ignoring his lewd texts, inappropriate behavior, and ensuring I was never alone with him and telling him multiple times to stop. Eventually, he physically assaulted me, and I reported it to my civilian Senior Executive Service supervisor.

My supervisor instructed me to file a report with the Air Force's Sexual Assault Response Coordinator. A day after I filed the sexual assault complaint against the colonel, I received a text message from him, admitting to his misconduct, and conceding that he abused his position of power over me.

I followed the procedures, but it only made the workplace hostile. I noticed that I was treated differently by my colleagues and my supervisor. I was left off of important meetings and emails, further straining my career.

Once the Air Force investigation was underway, I was told by my general that several media inquiries had been made. I was informed that he planned to give the media a watered-down version to make them lose interest. I protested. If anything should be released to the media, I said, it should be my assailant's official charge sheet. I wanted the assailant to be held accountable for his actions and not have his inappropriate behavior downplayed. But the general ignored my wishes. Even worse, the general gave his same watered-down statement to my fellow colleagues and Air Force staff at Gunter, further discrediting my report.

I requested that the general transfer the colonel to a neighboring base so that I could continue to do my job, but he refused. Instead, the colonel was moved only two buildings away, to the logistics division, where I performed portions of my daily workload.

Based on these series of events, I realized the general's interest was to protect his colonel, with complete disregard to me.

The general offered to transfer me to a new location. This meant I would have to transfer my children out of a community they loved, a strong church family, a great school, and a community they loved.

At the time of the report, I was on the cusp of being promoted to GS–15. But because keeping my current job had become unbearable for myself and my family, I was forced to relinquish the promotion and transfer to Eglin Air Force Base in Florida to start the healing and rebuilding process.

As for the colonel, the investigation showed that he self-admitted to sending over 400 text messages, sexually graphic voicemails and photos, and using his position of power as intimidation. Unlike, perhaps, many sexual assault cases, the evidence here was overwhelming.

To my special victims' legal counsel, I made it clear that any action taken against the colonel should include a finding that he sexually assaulted me. The general ignored my wishes and allowed my assailant to retire honorably from the Air Force.

At every turn, the Air Force went out of its way to shield him from the consequences of his misconduct and let me endure his punishment. After my assailant was allowed to walk away scot-free, I was informed that the Air Force considered the colonel's character and record of military service in making his disposition determination, which I understood is a violation of the law.

I am rebuilding my career and making a home for my family in Florida, but I have lost faith in the system that I have devoted my life to. I followed protocol and expected to be treated fairly. Instead, I was humiliated and ostracized for being a victim of a predatory supervisor. And ultimately, my assailant was allowed to retire with honor, against my express wishes.

I will hope that you will reconsider the inherent conflicts of interest in allowing my chain of command to make legal decisions, and I urge you to critically examine the role of the commander in sexual assault prosecutions.

Thank you for the opportunity to speak to you today, and I look forward to answering any questions you have.

[The prepared statement of Ms. Hanson can be found in the Appendix on page 80.]

Ms. SPEIER. Thank you, Ms. Hanson.

Now, Ms. Bapp.

STATEMENT OF ANGELA BAPP

Ms. BAPP. Chairwoman Speier, Ranking Member Kelly, distinguished guests, thank you for the opportunity to speak before you today as a survivor of military sexual assault. I am here to share my story and to shine light on the systemic failures that made justice impossible in my case.

I graduated from the top 3 percent of my class at West Point and soon after arrived at Ft. Rucker, Alabama, to begin my career as an aviation officer. Throughout my flight training, I became close friends with a mentor and fellow flight school classmate of mine who was going through a divorce. He arrived at flight school married to an officer who was given a leadership role in our battalion. After some time, his wife became my company commander.

In a completely unrelated situation, a different flight school classmate of mine sexually assaulted me. When it occurred, my classmate was the only one who I trusted enough to tell what had happened to me, to discuss filing a report, and to care for my well-being.

I knew that making an unrestricted report in order to hold my assailant accountable would mean that my commander would be notified and automatically involved in matters of my sexual assault. That was enough for me to delay reporting by several days.

Despite the potential personal conflict, I trusted in her professionalism and in the system's ability to treat an issue such as sexual assault with pure objectivity. My trust was misplaced.

The sexual assault occurred on a Sunday, and I reported it the following Tuesday. On Friday, I was informed that Ft. Rucker's criminal investigative division was investigating me for adultery, with my commander's husband, not even 3 days after I reported my sexual assault.

My commander's position of authority gave her immediate access to the higher levels of my command, my prosecutor, the investigators, and my cadre members.

Prior to my report, my commander contacted the prosecutor who would eventually be assigned to my case about her personal business, seeking advice for a private investigator to investigate her husband. When her husband came forth as a witness in my sexual assault case, the prosecutor linked my case to my commander's personal situation.

My commander also had a preexisting relationship with the installation commanding general, the two-star convening authority responsible for deciding if my sexual assault case would go to trial. She requested his audience about matters of her divorce prior to my sexual assault investigation concluding. This, too, I believe, hurt my case's ability to move forward to trial.

Unfortunately, I did not have a unit commander who was able to serve in the best interest of a sexual assault victim, due to these and several other personal conflicts. The inherent conflict of interest in my chain of command made it impossible for me to have a truly objective case.

Ultimately, my case did not move forward because the system failed to provide me with a conflict-free process I deserve. As for me, I was given a general officer memorandum of record, which was filed in my permanent record and effectively ended my career.

A subsequent Army internal investigation into Ft. Rucker found that the command subordinate relationship in my case showed an obvious conflict of interest, which led to a lack of lower-level command support for me, and confirmed my complaint of feeling isolated.

While the finding confirmed what I already knew, it does nothing to give me my career or life back. I am sometimes asked what we can do together to address military sexual assault within our ranks.

First, we need to believe victims. Believing a victim does not mean charging or convicting the innocent. But the systemic fallacy of victims making false reports and accusations needs to stop. As a survivor, I was plagued by this false belief, based on my personal circumstances with my commander's husband. It is absolutely disgusting and absurd that this belief is so common. Commanders absolutely have a role in addressing sexual assault within their unit. They are still responsible for the good order and discipline, along with decency and respect that comes from their soldiers. We need to encourage our commanders to act more when they can, and not expect them to be professional law authorities and experts on the psychological complexities of sexual abuse.

We need to raise our commanders to speak up and to take action when insensitive or misogynistic comments are made, and reward them when they do.

In my experience, those who utter sexually inappropriate remarks are more likely to commit acts of sexual violence. If my assailant had been reported on the spot for every misogynistic or sexual comment, he would have been out of the Army long before he had the opportunity and access to rape me.

All I ever wanted to do is to serve my country, lead American soldiers, and fly the Apache helicopter. The loss of my military career and my inability to trust larger organizations, such as our military, has deeply impacted who I am today. I struggle with accomplishing even minor daily tasks, and my quality of mental and emotional health has greatly deteriorated. I deserve better, and the Army lost a warrior.

I am hopeful that my testimony here today will aid this committee in continuing to fight the scourge of sexual assault within our ranks. Thank you again for your time, and I will be happy to answer any questions you may have for me. Thank you.

[The prepared statement of Ms. Bapp can be found in the Appendix on page 89.]

Ms. SPEIER. Thank you, Ms. Bapp.

Ms. Darpino.

STATEMENT OF LTG FLORA DARPINO, U.S. ARMY (RET.)

General DARPINO. Thank you, Chairwoman Speier, Ranking Member Kelly, other members of the committee. I am Flora Darpino, and I support——

Ms. SPEIER. Have you turned on your microphone?

General DARPINO. I am on?

Ms. SPEIER. You are on.

General DARPINO. I did the gratuitous "thank you all" for inviting me here today, and I just wanted to let you know that I am Lieutenant General, retired, Flora Darpino. I served over 30 years in the Army. I had important military justice positions. I also was a staff judge advocate at the two-star, three-star, and four-star level, and twice in a combat zone.

Prior to my retirement in 2017, I had the honor of serving as the 39th Judge Advocate General of the Army. The military often has problems translating our concepts into plain English, and so I want to just take a minute to explain what it means by good order and discipline, command authority, and accountability.

A commander is often equated with a parent. A commander, like a parent, is responsible for everything regarding their soldiers. Commanders must ensure that their soldiers are fed, clothed, and housed, just like a parent. They are responsible for their soldiers 24 hours a day, 365 days a year, just like a parent. And like a parent, they are responsible to hold their soldiers accountable, when they do not follow the rules.

So as a parent, when you set curfew at midnight, and your son comes home at 1:00, you meet him at the door and you inform him that he is grounded for the weekend. You ensure good order and discipline in your home, and you do that by having disciplined that individual and hold them accountable.

Now, imagine if you as a parent had the authority to—did not have the authority to ground your child. You would meet him at the door and you would state, Son, you broke curfew, tomorrow morning I am going to go next door and ask the lawyer if I can ground you. That is what happens when you set the responsibility for good order and discipline from the ability to hold someone accountable.

Now, that is not a perfect example, but it is just to give you an idea what we mean when we say good order and discipline, and the ability to hold someone accountable, and how they are inextricably intertwined.

Pulling authority for court-martials away from commanders does not just affect a small number of commanders as previously stated.

First, Congress has withheld the authority to convene general courts for very serious crimes, to a level where we have commanders that have extraordinary experience, and they are advised at every step of the way, by extraordinarily experienced staff judge advocates. That is a good thing.

But, commanders at each level exercise court-martial authority. At the lowest level, that authority may be exercised through the preferral of charges that are forwarded up the chain of command to the appropriate level to convene a court.

Even with nonjudicial punishment, a commander seeking to impose it does so with a commitment that they will try the offenses at a court-martial, should the soldier decline the Article 15 nonjudicial punishment. So pulling court-martial authority from commanders affects every level of command.

Additionally, proposed legislation that I have looked at includes broad swaths of crimes, classic indiscipline offenses such as barracks larcenies, serious fights between soldiers, drug offenses. And, again, while some would argue a commander could still impose nonjudicial punishment in those cases, she only has the authority when she asks the lawyer's permission and the lawyer commits to try that case, should the soldier turn it down.

Truthfully, when you walk into a unit, the first thing you see is a line of pictures, and the soldiers know that that represents the chain of command and the chain of authority. Orders run down that chain, and enforcement of discipline comes from that chain. No commander should have to go next door to ask a staff officer if they may discipline their soldier. I look forward to discussing this issue with you.

[The prepared statement of General Darpino can be found in the Appendix on page 99.]

Ms. SPEIER. Thank you.

Let me start off by asking the three very courageous women here a very simple question. Was the response of the military in your reporting your sexual assaults, worse than the rapes itself? Just raise your hand. So all three of you basically saying that while as horrendous as the sexual assault was, the process that the military used to provide justice was worse?

[Nonverbal response.]

Ms. SPEIER. Lieutenant Commander Elliott, you had indicated to me that you had been recently providing training at various loca-

tions. Could you tell us a little bit about that and what has happened since?

Commander ELLIOTT. Yes, ma'am. For the past couple of years, I have been invited to speak by different groups, down in Norfolk, at U.S. Strategic Command, just to share my experiences, and what I went through as a military sexual assault survivor. And I have always worked through the unit COs [commanding officers] and their respective SARCs [Sexual Assault Response Coordinators] to give this training, and I have received lots of positive feedback, from the most junior enlisted up to vice admirals.

Last week, I received an email telling me that I am no longer allowed to do this for any type of SAPR event or training and that my talking points were inconsistent with the current Navy SAPR program. And when I called to speak to this person who sent me this email, I was told basically that I was too raw, it was too real, and that—there was a lot of negative, because there is a lot of negative in my story, but that I could work on this, and if I wanted to talk about the positives, that would be okay.

And I think that is sugar-coating the issue. I mean, the reason, you know, we don't address it seriously with training right now, and this is part of the problem, is we don't want to address what it really is.

Ms. SPEIER. Ms. Bapp, do you think that your case would have been handled differently if it was given to a different commander who didn't have a conflict of interest?

Ms. BAPP. Entirely, wholly, yes, I do. And you know, it doesn't go down to there are good commanders and there are bad commanders. It goes down to the fact that commanders are people. We are fallible. We are humans. And it is not that my commander was a bad commander. I am sure she wouldn't want that on her plate either, but it is just there is an inherent conflict of interest. And it is one thing for me to trust someone who eventually was my assailant, but for me to trust the command and the system that I signed to risk my life for, in order to serve my country; when that fails me, and my trust was misplaced, that has a huge impact on just the outcome of everything and our psychological well-being. And I—even if my assailant wasn't prosecuted, I just think believing and trusting in the system would have just been a wholly more adequate response, yes.

Ms. SPEIER. Ms. Hanson, you indicated that you received over 400 text messages that were sexual in nature. Were there also videos or photographs that were sent to you?

Ms. HANSON. Yes, ma'am. He sent explicit voicemails, and also on a government computer, sent inappropriate emails. He would also set up meetings, and so when I would inquire what the purpose of the meeting was, he would be like, oh, just to get you alone. And then I would make sure that I had another overlapping meeting so that way I couldn't attend his meetings. And any time I did have to attend a meeting with him, I would make sure other people were in the room, and I was never alone with him.

But he self-admitted to every bit of it. He self-admitted to physically attacking me, to sending voicemails, to sending—to sending text messages, every bit of it.

Ms. SPEIER. Did you ask that the case be sent to court-martial?

Ms. HANSON. Yes, ma'am, I did.

Ms. SPEIER. And what happened?

Ms. HANSON. It was not sent to court-martial. He received an Article 15 and was allowed to retire from the Air Force.

Ms. SPEIER. And he gets full benefits, I trust?

Ms. HANSON. Yes, ma'am.

Ms. SPEIER. Colonel Christensen, you had, in your testimony, indicated that when all is said and done, less than 1 percent of the convening authorities actually used their prosecutorial authority for purposes of a court-martial. Is that correct?

Colonel CHRISTENSEN. One percent of commanders, yes. So——

Ms. SPEIER. Of commanders?

Colonel CHRISTENSEN. Right. And so I disagree with the lieutenant general. I do not agree that the prosec—or, excuse me, a commander can punish without the permission of a JAG. It absolutely is not true. Every action that a commander takes to punish a JAG—or punish a member has to be reviewed by—for legal sufficiency by the JAG. A commander convening authority cannot send a case to trial without—to a general court-martial without their staff judge advocate giving them legal advice that meets the requirements of Article 34. So they have to get the advice, and I think it is dismissive to call them staff officers—to get the advice of JAGs when to do this, and they have to have permission of JAGs to do certain things.

What they do not have to have permission of is to not do anything. So the commander wants to do nothing, there is nothing a JAG can do to force him to do it. So that is where the disconnect is. Commanders, because of the inherent abuse of authority that has existed over the last 230 years, many restraints have been placed on the commanders' ability to punish, but there is not the same kind of restraints on their ability to ignore, as in Ms. Hanson's case, where the evidence was overwhelming, the accused had confessed, and the victim is asking, demanding, sent a very personal email to the convening authority, please, begging him to send it to court, and instead, because he liked that colonel and thought he was a good person, allowed him to retire. That is what the issue is.

And I think it is also offensive to consider this the equivalent of a parent and child relationship. A parent is not qualified, just like a commander isn't, to criminally prosecute their children, and no parent ever would criminally prosecute their children. That is the problem. The inherent bias of command is the problem.

Ms. SPEIER. The recent DOD IG [Inspector General] report audited 82 sexual assault cases, and found that in 77 of them, victims were either not asked their preference on where their case would be tried, or that the preference wasn't recorded. Are you concerned by this failure to comply with the Federal law, and what does it mean to you that there is no system of recording victims' preference?

Colonel CHRISTENSEN. Yeah, I am very concerned. Protect Our Defenders FOIA'd [Freedom of Information Act] this information in July of 2017. Every branch responded and said they didn't track the numbers, they had no idea how many people had been informed, or whether they were even informing them. Our experience

at Protect Our Defenders is, survivors were not told, or if they were told, they were talked out of going to the civilians.

Congress made this very important change to law to give survivors greater choices. There are times when a victim would be much better off having their case adjudicated by the civilian authorities than the military. There are times when it would be better off having the military do it. That is a choice that a victim has been given by you. It is not up to the government, not up to the military, to ignore that choice. I am very concerned. We put them on notice a year—almost 2 years ago, that this was an issue. And it wasn't until this DOD IG report came out last week that they suddenly seemed to care.

And this isn't the only time that Congress has imposed new laws and imposed new requirements on the DOD, and they have ignored them. For example, the DOD was told specifically by Congress, you will no longer send penetrative sex cases to specials or summary courts. They will only go to general courts.

But the DAC–IPAD report that came out last week showed that there are a number of occasions where penetrative sex assault cases are going to special courts, and summary courts, what aren't even a real court, and that is done in direction violation of law that was passed by this Congress.

Ms. SPEIER. Colonel Haring, do you have any comments?

Colonel HARING. No, not at this time.

Ms. SPEIER. All right. I guess my last question would be for each of you, what changes should we make in the UCMJ, or what provisions should we put in the NDAA to rectify some of these circumstances, short of taking these cases out of the chain of command?

Colonel CHRISTENSEN. Well, I can go first. Another issue that Congress has addressed is to increase the quality of the prosecutors; you have mandated that the services create litigation tracks for prosecutors. I, against—going, swimming upstream, was able to prosecute and defend cases in my entire career. I was an extreme rarity. The average Air Force JAG quits after its 2- or 3-year point, and we have a few that might go on to a second or third assignment. There are very, very, very few really experienced prosecutors. So that is one thing. Push these gentlemen behind me for answers why they have not created senior litigators. The Air Force has not had a colonel going to a court-martial since I left. Why is that the case?

The second thing—and I think, Mr. Kelly, you would agree with me—that the investigative stage is the most critical part of the criminal-justice process. No matter how good a lawyer is, if there is a bad investigation, it is hard to overcome. Our investigators, like our lawyers, are often experienced, they are very eager, they try hard, but these are complex cases, and you need good investigators.

I would say to the Congress, you need to ask the tough questions of the Chiefs of Staff, why have you not prioritized real experience with your investigators, and a 3-year-and-out tour is not enough. It needs to be something that is a career track for investigators as well.

Ms. SPEIER. Are you suggesting that they should be civilian, then?

Colonel CHRISTENSEN. Well, there are civilian investigators in every one of the investigative services. I think what you need to do is to give those who are in the military great opportunity to continue in that track. I know it goes against their career model. But it is 2019. Using a career model from 1940 is probably not the best thing to do. Let investigators be investigators for their entire career.

Ms. SPEIER. Thank you.

Colonel Haring.

Colonel HARING. Thank you. This is a hard question, because I don't think that a solution here is in the justice system at all. Once it gets to the justice system, we have already had an assault. I think the problems lie within our culture, and we have not, one, acknowledged that we have got a cultural problem; or two, how do we address a cultural problem that allows for harassment and assault to exist in the first place?

One of the things that our organization has long worked toward is systemic military culture change, and one of the places that we have called attention to is that when soldiers, sailors, airmen, and Marines first join the military services, they are indoctrinated early, when they are very young, at basic training. And we continue to see the highest rates of harassment assault exist in the one service that continues to segregate men and women during basic training, and that is the Marine Corps. I think that this needs to begin at the entry level and go all the way through in our training and education systems. I don't think that incremental changes to the justice system are the answer to, or a solution to this problem.

Ms. SPEIER. Lieutenant Commander.

Commander ELLIOTT. Yes, ma'am. Two things I really recommend is, first one being training. You know, we talk about training, we all have training every year. And it is depending on the trainer who gives it, but we still don't take things seriously that we need to be. For example, whenever we do the training in the Navy, we have, you know, women are raped and men are groped. We never talk about men being raped by women or men. And I feel like we are not addressing, again, the nitty, the uncomfortable issues. We just gloss over them.

Also, a discussion I had after one of the presentations I did with the—with the vice admiral is, I feel part of the problem, when we are doing this training, is, we do a lot of consequences-based training, like, don't do this because if you do this, your career is over, or you could get in trouble, or you could do this; whereas it is supposed to be, it should be, we don't do this because we are good people, and we are good sailors, and we take care of each other. And I think we need to focus on that more, saying, Hey, this is why we don't do it, because this is wrong.

Additionally, I feel like, I know there has been some changes, you know, adding retaliation to the UCMJ and that sort of thing. I believe retaliation and reports of retaliation need to be looked at completely outside the chain of command. Because when you have people inside the chain of command looking at the retaliation with-

in their command, I mean, that sort of defeats the purpose because they don't want a bad climate, they don't want a—you know, they might not necessarily see that. And I feel like—and I am not saying it needs to be a huge organization, but it needs to be someone who is not in there at all. You know, they don't know these people, and they are coming to truly look if there is some type of retaliation going on.

Ms. SPEIER. Ms. Hanson.

Ms. HANSON. I also agree with your comments. I believe that retaliation is prevalent, and it is relevant in all of our cases. But when I go to the chain of command to report it, I am reporting it to the same people that retaliated against me. That is really basically ineffective.

Our training, we are required to sit through training every year, and it is basically "here we go again." We have to go back through these slides, and it is just—they call it death by PowerPoint, and click through them where they go through the slides, and jokes are made about it. I believe that the training needs to be revamped. I am not saying that more training needs to have—happen, but it needs to be realistic and up to date. It is not just throw a couple of things up on the slides and we just talk to those and then we are done, and then we walk out the door and forget everything that everybody said.

Ms. SPEIER. Thank you.

Ms. Bapp.

Ms. BAPP. Yes, ma'am. My biggest piece of advice would be zero tolerance. And I know that word has been thrown around. I am not talking about zero tolerance with sexual assault. That is clearly—I think everybody in this room can agree zero tolerance for sexual assault, but how can we actually breed in the culture and get everybody on the same page? It starts with zero tolerance of the smallest level.

And as I mentioned how crude and lewd comments were made and just how they are so easily thrown around of a sexual nature, demeaning, misogynistic, that is what needs to stop. And I am not saying we need to negatively—we need to punish the soldiers, necessarily, who do that. We need our commanders—we need to positively reinforce the commanders to step up and stand up and say, hey, cut that out. That is not right.

Because in a similar situation, you know, with gay comments, for me, personally, I don't hear that as much. There is a commercial on it, and kids were shopping, and they saw a sweater they didn't like, and he was, like, oh, that is so gay. But the commercial was stepping up and saying at the smallest instance, hey, by gay, do you mean lame? Like, no. Let's change that word. Let's change that culture.

So we need to—that is how we can empower our commanders. I don't know what the system would be in place, but to truly believe in that, because I do believe that most people who join the military are good people at heart, and they mean well, and they want to have effective combat missions. And in order to do that, we need to have this positive culture, so we need to stamp out all of the comments. That doesn't make you a better soldier. That

doesn't make you more of a man or a woman if you, you know, made those crude comments.

We are professionals, and that needs to be constantly reminded. So maybe integrating that within our training and think of ways to incentivize our commanders to lead in that capacity, rather than just laying on the hammer.

Ms. SPEIER. Lieutenant General.

General DARPINO. Thank you. And the culture discussions that we were talking about and how commanders are responsible in solving that culture are well taken, and thank you, ladies, for sharing that and also with the training that you have done when it comes to educating the force.

You know, I think part of it is that the DAC–IPAD that just came out last week that had looked at multiple, multiple cases of sexual assault, and these are done by Federal judges and civilian prosecutors. And they reviewed them down to the nitty gritty, and they found that commanders are making both appropriate decisions when it came to preferral, sending them to trial, and in not sending them to trial.

And with that in mind, you know, what—really to get after this, I think we often have to look at the other recommendations that the DAC–IPAD had which have to do with expedited transfers and how we can ensure that we are having expedited transfers. We are moving the accused in a case where you had a great commander, and you didn't want to leave, or a great job, and you didn't want to leave. So we have to look at ways to assist victims still. We are not done there.

And then we also have to help ourselves find offenders. And when we have restricted cases, we often don't know who that offender is because it is in a database that we can't touch, that commanders can't see. And so if we are able to link the different offenders together and then go back to our victims and say, you know, it has happened to someone else, would you like us to prosecute that? And so I think there are places that we can improve our system. Something has to be done, other than the DAC–IPAD had some great recommendations, even though they did, in fact, support the commander in the system.

Ms. SPEIER. Thank you.

Mr. Kelly.

Mr. KELLY. I thank each of you victims again for sharing your story. I don't know how difficult that is, but I appreciate how difficult that is. Maybe that is a better way to say that.

Lieutenant Commander Elliott, offline, if you would provide me with information, the name of the person who told you it is too raw, I would love that to have follow up with, if you will provide that offline.

Commander ELLIOTT. Yes, sir, I will.

Mr. KELLY. That is inappropriate, and I am sorry that that happened. Provide it, and we will see if I can get a different response.

The realistic training, Ms. Hanson, trust me, I have gone through those briefings, and we have got to work on that. I mean, we have got to get it so that it is right, so that people aren't making jokes and doing that. So thank you all. That is a very, very valid point.

Mr.—Colonel Christensen, thank you. I think a professional CID and law enforcement at the level who knows what they are doing at that early stage is—that is critical to every case that I have ever prosecuted anywhere. So thank you. Very valid comment.

And the only comment I have is going back to you, Lieutenant Colonel—Lieutenant Commander. I am sorry. I am an Army guy—Lieutenant Commander Elliott, is retaliation. We just need to make sure folks understand there is an IG out there that gets you outside the chain of command. And I think that we already have an organization in place. We just have to make sure that folks know how to use it.

General Darpino, I think there is a perception that commanders make UCMJ decisions in a vacuum. What roles do lawyers play in advising the commander on whether a case should go forward or not, and what happens if a lawyer and a commander disagree?

General DARPINO. Well, I think that an earlier speaker actually mentioned this, and I think it was Colonel Christensen. And Colonel Christensen stated that lawyers are involved in these processes at every level, and they are advising commanders at every level. Just like a lawyer presents to a grand jury, which is a group of civilians, and they present all the evidence of the case and they lay it out for them, that is what lawyers do for our commanders, and they lay out the case and give them advice on what is the appropriate disposition. The commander, however, who is the one who is responsible for discipline, can make that decision.

Now, in a sexual assault case, should a commander decide against the advice of their staff judge advocate not to send that into trial? That goes to the next level commander to review, to an even higher level commander to review. Should in a sexual assault case a staff judge advocate say yes, this, in fact, should go to trial, and—or I am sorry, should not go to trial, and the commander agrees this should not go to trial, that case goes up also for further review. In fact, if they don't follow your advice of your attorney, it goes all the way up to the Secretary of the military department concerned.

And if we are concerned that prosecutors are somehow being sidelined in these cases, if a prosecutor out there believes a case is being brushed under the rug and should, in fact, be tried, they can refer that to the chief prosecutor of their military service, and that can be acted on by the Secretary. And so these cases are now controlled and pulled up to the highest level, reviewed by the best lawyers, and commanders cannot brush them under the rug.

Mr. KELLY. Some have said that removing the commander from sexual assault prosecutions would solve the problem of unlawful command influence. Could you explain what unlawful command influence is and whether it would be eliminated if we removed commanders from sexual assault cases, Lieutenant General Darpino?

General DARPINO. Okay. So unlawful command influence has the word "command" in it. And so a lot of people think that unlawful command influence can only be accomplished by a commander, and case law is very, very clear that that is not the case.

And while Colonel Christensen mentioned that there are a number of recent cases where the court found unlawful command influence, 50 percent of those cases had to do with a lawyer being the

one who unlawfully influenced that court. A commander was not involved.

The third case actually had to do with a deliberation where it was a panel member who brought politics into a deliberation room. So it is really only one of those recent cases that had to do with a commander that had committed unlawful command influence. So forget the word "command" in our system. It means when somebody unlawfully influences a case that has a position of authority, and lawyers can do it too.

Mr. KELLY. Thank you. And what is the lowest level of command that can make a decision regarding whether a sexual assault offense should go to trial and the rank or rank equivalent of that, Lieutenant General Darpino?

General DARPINO. So that is withheld by Congress and rightfully so. The services have already withheld it to this level because they thought it was the right answer, and that is at the O–6 level, which would be a brigade commander, someone who—in the other services, it would be a commander. Is that right?

Mr. KELLY. A captain.

General DARPINO. A captain. I am sorry. Thank you. I looked at her. A captain. And so it is already withheld to the very, very highest level, and they have lawyers who advise them at that level. They are not doing it blind.

Mr. KELLY. And just—I am kind of a glass half full kind of guy. And so lots went wrong in each one of yours—each one of you survivors. It went wrong. So—but let's learn from the things that went right too. So for you—you survivors. I don't like victims. You all aren't victims, you are survivors, and you are much better than that.

But what part of the process worked good for you? What part—if none, that is fine, but what part worked well for you?

Commander ELLIOTT. I will say, you know, when I did first go unrestricted in my first command, I did have a very supportive commanding officer, and he went way above and beyond anything that he should have ever been required to do, and that made—that helped me a lot.

And then we won't talk about the bad part that happened afterwards, but also, I will say we have the Victims' Legal Counsel program that was started several years ago, and I know Ms. Bapp had a different experience with that, but I had a very positive experience, and she was able to—she was my lawyer. She represented my interests as opposed to the prosecutor who represents the government's interest, and she was able—she walked me through every step. Everything we did, she was always there with me, and that was a very good part of the program which—a very positive change that I think—you know, I know they are very overworked, most VLCs [victims' legal counsel]. And if that is something we could expand upon, I think that would help a lot of people.

Mr. KELLY. Ms. Hanson.

Ms. HANSON. I was also assigned a special victims' counsel by the Air Force. She assisted me. She was there with me every step of the way. One part that they could kind of tweak a little bit on that one is that she was assigned to me as a captain, and she was going up against a full-bird colonel, a three-star general, an SES [Senior

Executive Service]. She was great. She was absolutely phenomenal and amazing, but she also ran into rank issues and admitted it along the way as well.

Mr. KELLY. Ms. Bapp.

Ms. BAPP. I had a different experience with getting to my SVC [special victims' counsel] that I had outdated paperwork, and the SVC collateral misconduct was never mentioned on mine. However, once I found my way through the advice of a family member, I had a phenomenal experience with him. He was supportive. So basically, everything outside of my chain of command, the resources that were made available to me. My therapist, she was a saving grace, just an absolutely phenomenal woman. My SVC, up until the point where there appeared to be a conflict of interest because it is a very small installation, and he represented my commander in a completely unrelated instance, so he had to remove himself from being my SVC, so I lost an integral support structure. But then I got another one, and he was also fabulous, so those two were really positive. But I also had a chain of command. No one believed me. So, you know, but they believed me and they wanted to help, and that was the most important experience that I had in a positive manner.

Mr. KELLY. Thank you each for your amazing service to this Nation and for your warrior spirit.

And with that, Madam Chairwoman, I yield back.

Ms. SPEIER. Lieutenant General Darpino, I can't get around the decision made in Ms. Hanson's case. There was cold evidence. She wanted a court-martial. It never went to court-martial, and he got to retire with full benefits. How do you explain that, and how is that sound command control influence?

General DARPINO. Well, I don't know enough about Ms. Hanson's case except for what she said here today, and I don't know who made the decisions in those cases, so I really can't say. But I can go back to what I saw and what the DAC–IPAD found where they reviewed actual cases, not theoretical cases but actual cases, and they found that the decision of the commander to prefer or not prefer those cases was sound.

Ms. SPEIER. Well, I——

General DARPINO. And so I think that there are a number of cases where we don't get it right and that people don't get it right because it is a human system, and lawyers make mistakes too. And so it isn't a cure-all to just replace one person with another. You are still going to have human error.

Ms. SPEIER. So I have a lot of high regard for the DAC–IPAD, but I think what you are referring to is a situation where the standard that they used was "reasonable," and they didn't define reasonable. So in reviewing the cases, they had two people that would review each case, and the likelihood was that they would make the finding that it was reasonable, but it wasn't based on some standard. It was a very subjective review.

All right. Mrs. Davis, you are next.

Mrs. DAVIS. Thank you, Madam Chair, and thank you to all of you for being here.

And it is really the testimony and the women, and some men, like you that came forward a number of years ago that some of the

changes were created. It is a result of that, so I think we have to continue, you know, to go beyond that. And the special victims' counsel particularly was one that came out of those discussions. And the thing that I think I found so disgusting was that the few individuals who have been assigned to help out victims were treated so poorly, and part of what I think we discovered was that we need to have people who are given the benefit of good, solid training in order to play a significant role.

And what I would like to know, because a lot of you have mentioned, whether there has been any erosion of that, to your knowledge. And maybe you don't know. Colonel Christensen, maybe you have a sense of this, whether they are playing that vital role or, in fact, in some cases, they are not seen as, I don't know the word, professional, whatever that might be in order to play it.

Do you think that—and you have all—most of you have testified that actually you think that was helpful. And we want to be sure that it continues to be helpful and that the person has the tools to be able to advocate so strongly.

Colonel CHRISTENSEN. Congresswoman Davis, again, thank you so much because you and Congresswoman Speier, Chairwoman Speier, have been two of the most leading—I think the earliest voices on this, and your leadership has meant so much to the survivor community. So thank you.

But, yes. The SVC and the Victims' Legal Counsel program I think have been one of the most significant, if not the most significant change that has been made to the military justice process. I want to make it perfectly clear. The military was not happy about it. I was there when it happened. Some of the people that are going to testify to you today about how great it was specifically called it stupid and unneeded, but now they have changed their tunes. It is an amazing program.

The biggest, I think, weakness comes from a lack of experience, because too many of the SVCs, the first survivor they ever talked to in their life is their first client. That is not good. Again, there are people that think having inexperienced lawyers is great. I don't think so. I think you get better with experience, just like you get better practicing medicine with experience.

And then I also think, as was pointed out, the huge rank disparity that Ms. Hanson pointed out. We have—and this is one of the problems also with the prosecutors. There are captains or majors going up against a lieutenant general. It is a huge rank disparity, and it tamps down dissent.

Mrs. DAVIS. Yeah. Thank you very much. I am going to move on quickly because of time constraints. But certainly, I mean, that is—in terms of rank, I think that is important. But talk to me a little bit more about—you know, the retaliation is such an important concern here, and we have some, I think, training to try and help people, if they see a problem, you know, to intervene. You know, it is almost like, you know, don't let your friend drive drunk. I mean, don't watch somebody doing something stupid and just let them continue to do it. I mean, intervene.

But this retaliation piece. I mean, where would it change if we were making a difference in terms of who—without going up the chain of command, and you are going to judges. Because I think

one of the things that I kept hearing during the last number of years and certainly as we started these discussions, is that in many cases, it is the commander that wants to bring the case to trial, because the judges—well, if we had those judges, there are very few, as you mentioned, but the JAGs were looking at it more like they would if they were, you know, a prosecutor in the community. They wanted cases that they could actually deliver on.

So where do you see that coming down that, actually—and in some cases, the commanders are actually more aggressive about wanting to make sure that this case goes to a court-martial. Lieutenant Commander.

Commander ELLIOTT. Well, in my personal opinion, I mean, that is another reason that they should go to trained military judges, because the system's broken on both sides, right. As survivors, we feel—we have, we have been mistreated a lot, but when you look on the other side of it, they are saying the same thing. They are like, you know, commanding officers are being too aggressive, you know. We need to go to someone who is actually trained.

Mrs. DAVIS. How would that affect the retaliation?

Commander ELLIOTT. I feel like with retaliation—and retaliation is at every level. It can be from your peers. It can be from anybody. But with retaliation, when you remove it outside the chain of command, it is no longer, oh, well, we don't like this person because, you know, she put this boss in this bad situation where she—he had to choose between this sailor and that sailor or whatever. It is no longer—it is completely removed.

Mrs. DAVIS. Yeah. I guess part of the concern, and I certainly yield, is that there are many of these cases that go on, probably most of the time. I mean, I think that what we have to be focused on is command climate and being very clear that people are accountable for what goes on in their unit. And any—you know, that kind of discussion, that kind of activity is just not acceptable and will be punished. Because I am not sure we have the judges to be able to deal with all of those individual accounts that occur, and we have to kind of deal with them on the ground. The extent to which we can do that, give us the tools. We are happy to respond to those questions. That is really important to all of us. Thank you.

Ms. SPEIER. Mrs. Luria.

Mrs. LURIA. Well, thank you all for being here today. And especially, thank you to the three of you for sharing these stories, because I know that they are very difficult situations and this is very difficult to do in a very public context.

And you know, having been a commanding officer myself, and I know that several other people who may not be present right at this moment on the committee as well have been in command in the military, you know, I value the tools that the UCMJ gave to me as a commanding officer and as an O–5, so any case relative to sexual assault, I would have had to refer to the O–6, the next in my chain of command. But, you know, as the lieutenant general stated, that was a recommendation that I made reviewing the full facts of the case to the next level in the chain of command.

And, you know, I really appreciate the remarks that Lieutenant General Darpino made, and I know that she didn't read her statement in full, but, you know, as she says in her written statement,

and, you know, as I was thinking about this leading up to the hearing, we trust our commanders to take our sons and daughters into war. We trust them to make decisions when people are risking their lives. But yet we are sitting here questioning whether we trust them to make decisions such as this about the well-being of the people who they command and to apply the UCMJ fairly.

So I believe that there is a disconnect there, and as the lieutenant general mentioned in her comments, that those duties of responsibility and accountability are inextricably tied to command.

So, Colonel Christensen, can you just elaborate on the statement that you said, that I trust military lawyers to make that decision, meaning the decision about these cases, more than I trust commanders?

Colonel CHRISTENSEN. Yeah. Sure. We trust commanders to make decisions, life and death, when it comes to combat because that is their profession. That is what they are trained in. You are a fighter pilot. You have trained your entire career as a fighter pilot to lead that fighter pilot squadron, and that is what you have done. You have gone to Red Flag. You have done all these other things. You have not——

Mrs. LURIA. Throughout that leadership and that time that you took to get to that position of command, and especially when we are talking about the level of a general court-martial convening authority, the 30-plus years that that commander has had to get to that position, do you not acknowledge that they have had to go through numerous decisions where they had to take into account the good order and discipline of their command and the UCMJ and the use of that?

My biggest concern, and Lieutenant General Darpino, if you can comment on this in the last couple of minutes, is that there is many tools in the commander's toolkit outside of convening a court-martial. And, you know, reviewing the background material that we were given by the staff before this case, which included the subcommittee of the Judicial Proceedings Panel, a report on Barriers to the Fair Administration of Sexual Military Justice in Sexual Assault Cases, sorry, long title, the 2017 study that was done by the DOD is basically that when these—I am sorry. I lost my train of thought.

But that there is numerous things within these cases that we have changed in our policies and procedures, such as the nature of an Article 32 hearing, such as, you know, when it is not referred to a court-martial, the commander—because there is not enough evidence, because there is not enough evidence like others referred to for it actually to reach a conviction, that there are other tools that a commander has. And other than on a ship, you know, a sailor or a soldier or an airman can refuse NJP [non-judicial punishment] or Article 15, and therefore, you find yourself in a position where people sort of sea lawyer the situation as an accused to find themselves where it is on the track to a court-martial.

But a commander has a lot of other tools that they can use, especially in the case where there is not enough evidence, but the case is still on track for a court-martial and someone can plea bargain. And therefore, the commander can use tools such as, you know, non-judicial punishment, administrative action, separation from

service, reduction in rank, all of these things that are way more punishment than can ever happen in the civilian system because in the civilian system or outside of the chain of the command, those tools don't exist.

So in time remaining, could you please comment on that?

General DARPINO. And thank you for those comments, because it is—these are extraordinarily difficult cases to try, and I am not speaking about the three victims' cases here today. But when you look at what these cases and the majority are, they are—the victims are junior enlisted women. The offenders are either junior enlisted soldiers or junior NCOs. They occur in barracks on Fridays and Saturday nights, alcohol is involved, and there is no one else present. And those are extraordinarily difficult cases to try, and that is why the prosecution rates are lower in the civilian sector.

And because, as we heard from a DA [district attorney] previously, a grand jury is typically not going to. A commander, however, because it affects good order and discipline, with the advice of counsel, the Army is currently trying 50 percent of their cases. Fifty percent of their trials are sexual assault cases. Conviction rates aren't relevant to this discussion because it is lawyers who try cases, not commanders, so conviction rates aren't relevant, but 50 percent go to trial. And those that they are not able to, we track every single case, and we send a spreadsheet to the Hill every year of every single case, and we tell you exactly what we did with them. And we use those other tools, non-judicial punishment, kicking someone out of the military. It isn't a perfect system. It isn't a perfect system, but you don't throw away an entire system, the baby out with the bath water, when you already have made so many changes and rewrote the whole thing that just went in effect 3 months ago.

Ms. SPEIER. Thank you.

Mrs. Trahan.

Mrs. TRAHAN. Thank you. Thank you, Chairwoman, for holding this hearing. And thank you for coming in and sharing your stories. It is our obligation now to make it better, so I appreciate you coming in.

So how do we actually monitor variation in how commanders deal with these offenses? And I will just elaborate. I believe when Lieutenant Commander Elliott says that when she started her case, her—I believe it was your first commander, you had a lot of confidence that you were going to be taken care of, but then that changed, right? And provided we are giving tools, I am sure we are, I am sure there is different acceptance rates of those tools, there is ways to fix that variability.

So I am just wondering, what are we doing today to take the variation out of the problem?

General DARPINO. And so, you know, that is why we have all these surveys that we have, that we conduct in the military, and that is why, you know, we are kind of often like the canary in the coal mine, you know. You see a lot of the issues and problems raised and seen with the mirror that the military is of society because we have all these surveys.

One of the surveys that goes directly to that issue is that we have command climate surveys within all the services, and we ask

a series of questions. And we ask them, you know, do they trust their command? Do they promote a climate of sexual—against sexual assault? Do they walk the talk, you know, and act appropriately? And we poll soldiers on that and service members, and, you know, I can give you a number that sounds great out of four for all ages, but if we just focus on the victims and the offenders, which is our junior enlisted and our NCOs both, that number out of 4 is 3.4 or 3.3.

And so we use these surveys, and then guess what? The next level commander who actually does the rating of that individual officer gets to see that survey, and if they see problems, that is how they know.

Mrs. TRAHAN. So it is an anonymous survey.

General DARPINO. Anonymous surveys.

Mrs. TRAHAN. And so do we take time to figure out, like, to really go into a deep dive on the 3.3, right? I mean——

General DARPINO. Yes. A series of questions, Congresswoman.

Mrs. TRAHAN. Okay. You know, the systemic military culture change, does anyone on this panel know, is this an internally run culture change that we are—or is this—are we bringing outside experts in to help with the culture change? Can someone speak to that?

Colonel HARING. So in recent years, the military, DOD, has hired a number of external experts and brought them inside the military. At the last panel at the SASC [Senate Armed Services Committee], Dr. Van Winkle spoke. I don't know what degree of latitude they are able to exercise once they have been brought in. I don't know of any external monitoring organization. Now, RAND does do some of the research, but they are quasi-independent.

So what I would love to see is for DOD to hire a truly expert, say a red team type of external organization to evaluate and analyze the work that they are doing.

Mrs. TRAHAN. It would be great if we could have visibility into the culture change process just only because it is—I have never seen a stronger culture, and, you know, there is movies about how strong the culture is. I mean, the levers are so—are so clear to me in terms of changing the culture that I don't feel as though it is a 3-year process. It is likely more closer to an instant.

My last question is on the Special Victims Counsel program. My predecessor played a key role, along with the chairwoman and Congresswoman Davis, in its creation. Like any program, I am sure it requires improvement, and I am sure we have learned a lot as it has been, you know—since its inception. Besides the rank disparity, or maybe you have suggestions on how we fix the rank disparity, but are there suggestions in terms of us making that process better?

Colonel CHRISTENSEN. Well, I think one thing is it has to be made clear to the special victims' counsels and the VLCs that their duty is entirely to their client. They are not there to make services look better or to avoid embarrassment. That is something we have heard from a number of VLCs and SVCs that that is what they are getting from the top down is that they are just to get the victim through the process.

So, for example, it may be very beneficial for a victim to come to Congress or to go to the media, but I think most VLCs and SVCs feel like they cannot do that.

Mrs. TRAHAN. Okay. Thank you. I am out of time.

Ms. SPEIER. All right. Colonel Christensen, Colonel Haring, Lieutenant General Darpino, thank you for your participation.

And to Lieutenant Commander Elliott and Ms. Hanson, Ms. Bapp, I hope everyone who is here, particularly the TJAGs [The Judge Advocates General] that are going to come afterwards, are going to have burnished in their minds your comments that the process that you endured after your rapes was worse than the rapes itself. So I want to thank you for the courage that you have shown. I apologize on behalf of the United States Government and our military that you have endured what you have endured, and I want to make sure that you have every level of support that you need as you move forward. And I hope you will always feel comfortable coming to me, in particular, if you have any problems in that regard.

Before closing this down, Mr. Cisneros has returned, so he is going to have his 5 minutes of questioning.

Mr. CISNEROS. Thank you, Madam Chair. Sorry I had to stop and go to another—make an appearance at another committee hearing and ask my questions there. But I want to thank you all for being here today, and I want to thank the three of you especially for sharing your story here. I know it is very brave of you to do that.

Lieutenant General Darpino, I was troubled by your analogy, the parents and the commanding officer of good order and discipline. I totally agree it is the job of the commanding officer to maintain good order and discipline, and he is given things like NJP in order to help him do that, just like a parent is able to discipline their child when they come home late and they miss curfew. And the commanding officer, through NJP, can do those certain things too if, you know, somebody misses a curfew. I was in the Navy, so on a ship or for whatever reason, they are allowed to do that.

But, you know, if that child goes and commits a serious crime, the parent is not to say—allowed to say, well, you know what, I am just going to discipline him, and I will take care of it. So why would we do it any way different with a commanding officer? If there is a serious crime, why do we still allow the commanding officer to go and to make that determination as to how he is going to discipline and make the decision?

General DARPINO. Yes. Thank you. And as I said, it wasn't a perfect analogy, and it was really one to demonstrate how command authority is linked to the ability to hold someone accountable. And I do understand exactly what your point is, and I did not intend for it to be used as the perfect example.

But I think an example that might help to illustrate it that has to do with what we do, a core element of what we do as warfighters, is that in the case of a law of war violation in combat, it is the commander that you would expect to be able to send that message to everyone else that to go out into the village and murder citizens is not acceptable. You would expect that a commander would be the one who would stand before the troops and send that message by sending that case to a court-martial.

And so that analogy—that example is an example where the two are linked based upon exactly what it is that we do as an Army in our service to our Nation.

Mr. CISNEROS. You know, I hear your analogy, right, but a lot of these aren't situations that are—they are not happening in a wartime situation. And I can recall a situation where there was an officer who committed, we will call it a crime, was removed from the ship next day, and the CO had nothing to do with it.

Lieutenant Commander Elliott, you were a commanding officer, so I have this question for you. In your view, are commanding officers adequately trained to handle sexual assault allegations in their units, in their commands?

Commander ELLIOTT. Absolutely not. We are trained as commanding officers to provide the response and provide the training of—you know, to prevent sexual assault, and we are trained how to take care of our victims if they are assaulted, but we are not judges. I mean, I had a 3-day legal course before I became a commanding officer, and that was the extent of my legal training.

So I feel like we are given good tools to address the program. We could for sure improve, and like anything else, it depends on who is providing us the training and what our bosses find important. But I do not feel that we are trained as commanding officers to be able to make these decisions about, you know, felons by any means.

Mr. CISNEROS. Okay. And I just have one last question for all of you. And, Colonel Haring, you kind of mentioned this in your opening remarks, but I am just going to read it back. Where is it?

Sex crimes against women have never been treated with the same level of outrage or professionalism as other serious crimes.

Do you all agree with that? Colonel Christensen.

Colonel CHRISTENSEN. I think it generally true, yes, but there are some that are—some units are better, some legal offices are better, others aren't. So I think there is a general belief—a view of disbelief.

Mr. CISNEROS. Colonel, you made the statement, so I am going to assume you agree with it.

Colonel HARING. Not only do I agree, but I think that history is replete with examples, not just within the military, but across our institutions where sex crimes against women are just not treated—perpetrators are not held to levels of—the same levels of accountability as other types of crimes.

Mr. CISNEROS. Lieutenant Commander Elliott.

Commander ELLIOTT. Yes, sir, I would agree with that. And as an example, it just happened less than 2 years ago. I witnessed a young lady I mentored, someone very hard-grabbed her rear end, which would be abusive sexual contact, and the person that did that got a slap on the wrist. He was an E–6 and who later that—2 months later found out he made chief, and they allowed him to go ahead and become a chief petty officer; where there were two E–5s that broke curfew, weren't doing anything wrong, they were just out past curfew, and they are now E–4s. So the joke in command is like it is okay to sexually assault somebody and still have a career, but it is not okay to break curfew. So, yes, I do not feel we treat these crimes seriously.

Mr. CISNEROS. I am out of my time, but if we could just real quick, a yes or no, Ms. Hanson and Ms. Bapp.

Ms. HANSON. I agree as well. In my case, mine was my boss and my full-bird colonel. And then when a congressional was made about my case, Secretary Heather Wilson made the statement in an official written statement that his character in service and his record was taken into consideration in the disposition of his case. I believe that we have lost the bubble and control of where we need to be at.

Mr. CISNEROS. Ms. Bapp.

Ms. BAPP. Real quick, I just think it is less about the prosecution and the understanding of the actual criminal act, but the psychological complexities around sexual abuse and the cycles of abuse of power. I think that is what is misunderstood and is at the core root. So I would say that is the bigger issue than sex crimes.

Mr. CISNEROS. Lieutenant General Darpino.

General DARPINO. I definitely think there is more work to be done, and violence against women is a problem in society, and, you know, high school, Hollywood, and the halls of Congress, and that we need to continue to focus on this issue and not take our eye off the ball.

Mr. CISNEROS. Thank you very much, Madam Chair.

Ms. SPEIER. Lieutenant Commander, you indicated that you had 3 days of legal training. How much of that was set aside for sexual assault?

Commander ELLIOTT. I believe it was about a 2-hour block.

Ms. SPEIER. Two hours out of 72 or——

Commander ELLIOTT. Two hours out of about 28, 29, so about maybe 10 percent—or less than 10 percent.

Ms. SPEIER. Less than 10 percent.

Commander ELLIOTT. Yes, ma'am.

Mr. KELLY. May I ask a question?

At what level did you command, what level?

Commander ELLIOTT. I was a lieutenant commander when I was in command.

Mr. KELLY. That is an O–4, correct?

Commander ELLIOTT. Yes, sir.

Mr. KELLY. And the lowest level in which decisions on sexual assault are made is the O–6 level. Is that correct?

Commander ELLIOTT. Yes, sir.

Mr. KELLY. And I don't mean—but there are different levels of command and different levels of training. I got a pre-command course before going to battalion command, so there are different levels, and you commanded at the O–4 level.

Commander ELLIOTT. That is correct, sir. And I am not exactly sure how the other services, but I know with the Navy, we had O–6s that were going to command in the same legal class. I don't know if they got anything additional.

Mr. KELLY. Thank you.

Commander ELLIOTT. Yes, sir.

Ms. SPEIER. Mr. Bacon.

Mr. BACON. Thank you, Madam Chairwoman.

I appreciate all of you being here today. And I got to hear most of the testimony up front, but I am also on the Ag Committee, so

I had to run out real fast. But it was heartbreaking stories and testimonies of what happened to you, and so I just—I feel the pain and the hurt from that, and I just thank you for sharing. I think it is important for our society and the folks watching to know this.

I think Ms. Bapp made a very important statement, though, that speaks to me is that we have infallible people. Infallible commanders. I would also just say, though, we have infallible judges—or I should say fallible judges. I am sorry. We have fallible commanders, we have fallible judges, fallible district attorneys, and we see imperfection everywhere we go in this area, though it is never acceptable.

I was a five-time commander with the Air Force, and I inherited one unit that had the highest sexual assault rates I think we had in the Air Force at Ramstein. And so I—my first week in command, it is, like, what are we going to do about this? We can't just sit idly by. I have to build a plan. So I studied it, and I just knew that education was vital, but also make it clear I would hold people accountable.

And what we ended up doing is if we didn't have a verdict that was certain, we went to court-martial. The victim had her chance—typically her—to speak in front of a jury but also the accused, and our conviction rates went up, and we ended up having one of the lowest sexual assault rates in the Air Force after about a year.

Another thing I did is every time I got a conviction, I put a picture of the guilty and how many years in jail they got, and I wanted every squadron to see it. I wanted deterrence out there as well.

So I guess my whole point is I think there are examples of failures, but I think there is also thousands of examples of conscientious commanders who pour their hearts out to get this right every time.

And so I just—I would like to ask one question of General Darpino. Do we have—would we have any more confidence that a judge in a local locality or a district attorney would have any more infallibility than what we see with our commanders who, for the most part, 99 percent of the time, love their service, love their units? Just your thoughts.

General DARPINO. I think you have hit on a key point, which is what I was saying earlier, is that this is—the violence against women is a societal problem, and society as a whole has to grapple with this. We are the canary in the coal mine, whatever it is that you want to say, and there are a lot of organizations out there that do a lot of work to track this kind of stuff.

And what we find is, and I am just looking for my card where I write down numbers because I am—even though I am a lawyer, I am, in fact, a number person, you know, like the Rape, Abuse, Incest National Network, the RAINN, which considers themselves the largest anti-sexual violence organization, their numbers are horrifying. And when 50 percent of our cases—our court-martials are sexual assault cases, 995 of 1,000 women—accused walked free in the civilian sector. You know, one out of six women are attempted rapes outside.

And so, if having lawyers in charge of this system would fix the system, we wouldn't see numbers like this in civilian society. And so, no, I don't believe that lawyers are any better. And when we

send our folks for training that do these sexual assault cases to DA's office and sexual crimes units, that too is what they see, because prosecution rates matter to attorneys. Conviction rates matter to attorneys.

Commanders care about good order and discipline, and it is not perfect. And there is a lot of discussion about commanders, and we are talking about company command and below. We are not talking about the O–6 and above who handles the sexual assault cases. And I don't mean to minimize in any way the other panel members' testimony.

Mr. BACON. Madam Chair, thank you for your time. I belong to two other subcommittees, but this is an important issue, and I appreciate you giving me a chance to join you.

Ms. SPEIER. Okay. Thank you.

Again, our gratitude to all of you for participating in the panel, and you are now free to go.

And we will reorganize for the next panel. Thank you.

Ms. SPEIER. All right. We are going to have votes shortly, so we are going to get started.

Okay. Our second panel consists of Lieutenant General Charles Pede, if I am pronouncing that right. No? Pede. He is the Judge Advocate General for the U.S. Army; Vice Admiral John Hannink, the Judge Advocate General for the U.S. Navy; and Lieutenant General Jeffrey Rockwell, the Judge Advocate General for the Air Force; and then Major General Daniel Lecce?

General LECCE. Lecce, ma'am.

Ms. SPEIER. Lecce—Staff Judge Advocate to the Commandant of the Marine Corps.

All right. General Pede, would you like to begin?

STATEMENT OF LTG CHARLES N. PEDE, USA, JUDGE ADVOCATE GENERAL, U.S. ARMY

General PEDE. Chairwoman, Ranking Member Kelly, and members of the committee, thank you.

We have the best Army in the world because of commanders, not in spite of them. Our Army is the most effective force on the battlefield because our commanders and our soldiers are the products of a justice system that for 243 years has rested in the hands of those who fight and win our wars, commanders.

I have worked for over 15 years of my professional life, often directly with this committee, confronting sexual assault, especially with the tectonic changes to Article 120 in 2007. I was personally involved in Secretary Garin's efforts to resource this fight and had a direct hand in the establishment of our Special Victim Prosecution program, as well as the Special Victim Counsel program. I, therefore, thank this committee for its continued commitment and leadership on this issue.

I appear before you recognizing there is still much work to do. While I disagree with the characterization of individual lapses as systemic failures, one omission or failure is too many. I recognize there is much the Army and the services can still do. As the Army Judge Advocate General, I tell you that we are relentless, relentless in getting after this problem, protecting victims, our communities, and of course, the rights of those accused.

In short, the commander has always been and will always be the fulcrum to any solution in the Army at every level of command, and so it is and must be with sexual assault. All of us in this room recognize there is no easy solution. I have been fighting this crime hand in hand with commanders for 31 years, but certainly no solution excludes military commanders. And singling out the supposed 1 percent who convene general court suggesting these are the only ones affected by the proposed legislation fundamentally misses the point about command authority and the sublime relationship between the leader and the led.

Look at our current housing crisis. We outsource responsibility for housing our soldiers. Who do our families look to for solutions? Who do you look to to drive change? Soldiers look to their commanders. Every townhall is hosted by a commander. This is because there is no set of leaders on this Earth better trained, better educated, resourced, and more consistently successful than the American commander.

The notion that stripping commanders of authority over serious crimes will reduce crime, result in more or better prosecutions or higher conviction rates is simply not supported by any empirical evidence. Indeed, the proposition, in my view, is actually disapproved by the empirical evidence.

We know this. In the multitude of congressionally mandated studies where diverse panels of experts have exhaustively examined the military justice system, hearing from hundreds of witnesses who gave thousands of hours of testimony, they reported back to you one critical, consistent conclusion: The commanders should not be removed from the justice system.

In fact, the DAC–IPAD's third annual report issued just last week that has been referenced determined that in 95 percent of the cases reviewed, commanders acted correctly in charging decisions. They found, and I quote, no systemic problem with command decision-making regarding preferral of charges for penetrative sexual assaults.

I am often told in response, General Pede, you haven't moved the needle, and it is getting worse. Ten years ago, sexual assault trials comprised 18 percent of trials in Army courtrooms. The needle—and my apologies. In 2018, that percentage is now 50 percent, 5-0. The needle has indeed moved, and this is because commanders at all levels have set priorities, established expectations, and have driven culture change. This is not a coincidence.

The scope of sexual assault crisis in our society—in our Army is as big as the society from which we draw our soldiers. As you know, our Army is refreshed every year with 70,000 new soldiers from every city in America, and we draw from that society, and we face the common problems. A highly esteemed university recently released a study that showed 48 percent of their females experience sexual assault during their time at the university. Within that 12-month period, 18 to 22 percent had reported an assault.

I share these statistics not to place blame elsewhere or to distract from the 4 percent—4.4 percent prevalence rate in the Army, but simply to reflect that it is a societal problem, and it is a demographic issue, in many respects, that we all own and have to address, because we do. The Army owns this problem. Discipline is

the soul of the Army, as George Washington said, and it still is. It is in our DNA.

In my professional view, taking away a commander's decision over discipline, including the decision to prosecute and court-martial, will fundamentally compromise—fundamentally compromise—the readiness and lethality of our Army today and on the next battlefield. And let's remember, you are trying to give this authority to those sitting before you. One hundred twenty years of legal experience on this panel is saying our Nation will regret it in the next battlefield.

The Justice Act of 2016 you passed fundamentally altered our justice system starting just 12 weeks ago. We spent the last 18 months training those changes. The changes only began 12 weeks ago. I would appreciate—while I appreciate the desire to see change, with a criminal justice system, we must exercise some measure of strategic patience to ensure our changes have healthy consequences.

Further, we cannot forget our obligations to those accused of crime. We each in this room have——

Ms. SPEIER. You have already exceeded your time by a minute, so could you wrap up, please?

General PEDE. Yes, ma'am.

We have a sacred obligation to protect those accused of crime as well, ma'am. And I fully acknowledge we are not perfect, but we are truly an accountable system.

I thank your committee for the time, ma'am.

[The prepared statement of General Pede can be found in the Appendix on page 107.]

Ms. SPEIER. Thank you.

Vice Admiral Hannink.

STATEMENT OF VADM JOHN G. HANNINK, USN, JUDGE ADVOCATE GENERAL, U.S. NAVY

Admiral HANNINK. Madam Chair, Ranking Member Kelly, and members of the subcommittee, thanks for the chance to appear before you today.

The testimony of the first panel reminds everyone of the importance of our efforts to reduce sexual assault with the goal of eliminating this crime from our ranks. April is Sexual Assault Awareness Month, and it is worthwhile to keep in mind that we all share this goal, even when there are multiple views on the precise steps that will help us get there.

In my written statement, I outline the role of the commander in the adjudication of sexual assault charges in the Navy. First, there is an independent investigation by the Naval Criminal Investigative Service and then an independent prosecution merits review by Navy prosecutors. This information, the investigation, the prosecution merits review, along with input from the victim or victim's legal counsel, then goes to an O–6 commander for disposition decision. And if the case proceeds in the military justice system, there are further reviews involving both lawyers and commanders.

These commanders are known as the Sexual Assault Initial Disposition Authority and the General Court-Martial Convening Authority, and I support the role these commanders have in making

the initial disposition decision on charges and in referring cases to court-martial.

My written statement also noted what I think are some threshold questions in considering whether to remove the role of the commander.

Question one, would removing commanders' convening authority decrease the prevalence of sexual assault?

Question two, would it increase the reporting of sexual assault incidents?

And, question three, would it improve case disposition decisions?

Now, on the first two questions, whether a change would decrease the prevalence or increase the reporting of sexual assault, we have the benefit of the 2014 report of the congressionally directed Response Systems Panel. And after studying changes to the military justice system of our allies and hearing from many witnesses on both sides of the argument, this was the conclusion shared by seven of the nine panel members: that the evidence does not support the conclusion that removing convening authority from senior commanders will reduce the incidents of sexual assault or increase reporting of sexual assault.

And today, when I speak with leadership of our Victims Legal Counsel program, their sense is similar. Based on their work, they don't think that the convening authority issue is a significant barrier to reporting.

Now, on the third question, whether removal of convening authority would improve case disposition decisions, as mentioned before, we have the benefit of the recent report of the DAC–IPAD. In its review of 164 sample cases, DAC–IPAD concluded that the disposition decision of commanders were reasonable in 95 percent of them.

As noted before, the committee concluded that its review revealed no signs of systemic problems with the reasonableness of commanders' decisions on whether to prefer charges in cases involving a penetrative sexual assault.

And I look forward to the report that the DAC–IPAD will submit next year in March 2020, that will expand its work to include the 2,000 investigative cases it is reviewing.

I am grateful for these studies that have been conducted. The military justice system might be the most studied criminal justice system over the past decade, and we welcome the scrutiny. That scrutiny benefits everyone who serves in the Armed Forces, those who are victims, those who are accused of crimes, and those who work within the system to achieve its objectives, to be a system of justice and a system that enables commanders to maintain good order and discipline.

I am also grateful for the support of this subcommittee and the organizations represented by the first panel to ensure we continue to make improvements to our response systems and prevention efforts. Thank you, again, Madam Chair and Ranking Member Kelly.

[The prepared statement of Admiral Hannink can be found in the Appendix on page 119.]

Ms. SPEIER. Next—thank you—Lieutenant General Rockwell.

STATEMENT OF LT GEN JEFFREY A. ROCKWELL, USAF, JUDGE ADVOCATE GENERAL, U.S. AIR FORCE

General ROCKWELL. Chair Speier, Ranking Member Kelly, distinguished members of the panel, military commands, led by commanders, are responsible for executing our National Defense Strategy to defend the Nation and win America's wars. Throughout our history, we have accomplished this because of four simple yet key components: the best training, the best equipment, the best—excuse me—people, and, fourth, the most important element that binds together the other three, discipline.

Discipline lies at the heart of command and control. Commanders command and control airmen, armed with the best training and equipment, to execute our national defense missions. Discipline is commanders' business, since they have the ultimate responsibility to build, maintain, and lead the disciplined force necessary to succeed in combat across multiple domains. Discipline makes us ready. Discipline makes us lethal.

To build this disciplined force to execute these missions, the military justice system works to strike a careful constitutional balance between the competing equities and the justice process. That balance is best struck when, at every critical junction of the process, a commander is armed with the relevant facts, including victim input, and advised by a staff judge advocate before making a decision on the next critical step in the process.

We also know that good order and discipline is best when command operates and executes discipline across the entire continuum of discipline. From prevention efforts and setting standards, duties, and command climate on the left side of that continuum, to the response of courts-martial, on the right side, when standards aren't met, and operating everywhere in between those two points.

This disciplinary continuum embodies the concepts of unity of command, unity of effort, and command and control needed to build a ready, lethal, and disciplined force to execute the missions the Nation asks of us.

This committee and Congress have been instrumental in our efforts to improve military justice with regard to sexual assault. You have focused a system to be more fair and timely, to appropriately address allegations of misconduct that fosters progressive discipline designed to deter and rehabilitate wrongdoing, to respect the dignities—the dignity of victims of crime, to protect the rights of the accused, and to maintain the trust of airmen and the American people.

We have increased our commander training to ensure they are better prepared to exercise all of their authorities. Before taking command, all commanders receive extensive legal training so they fully understand their responsibilities under the code and the manual. Officers receive similar training at all levels of their professional military education, as do all enlisted members.

Most importantly, as a matter of process, safeguards have been incorporated and gaps closed to maximize legal advice during every key phase or decision point of a case, through investigation, adjudication, and final disposition. The existing authority of the Judge Advocates General mandate that this critical legal advice be independent.

Command decisions are informed and evidentiary standards are applied at each stage of the process with the advice of a staff judge advocate, along with input from a prosecutor, a victim, and the accused.

A critical component to our fight against sexual assault in the military has been our obligation to build trust and confidence in victims. We know that victims must be empowered at every stage of the process. Survivors must believe that their privacy can be protected and that they can regain a sense of control in their lives.

Sexual assault is a personal violation and victims must be heard without having the process itself further making them feel victimized. Victims must know that they have a say before any decision is made.

Our special victims' counsel have become a vital teammate in our sexual assault prevention and response arsenal.

Our work must continue to prevent and respond to criminal behavior within our ranks. Our next steps, I believe, should focus on addressing evolving issues of retaliation, collateral misconduct, timeliness, and education on the general deterrent effect generated by the cases tried.

While there has been much progress, we as judge advocates remain committed to survivors of sexual assault. We remain committed to airmen, and we remain committed to providing sound, independent, legal advice to our commanders in a military justice system that has made us the most ready, lethal, and disciplined force in the world.

Thank you for hearing us today.

[The prepared statement of General Rockwell can be found in the Appendix on page 132.]

Ms. SPEIER. Thank you.

General Lecce.

STATEMENT OF MAJGEN DANIEL J. LECCE, USMC, STAFF JUDGE ADVOCATE TO THE COMMANDANT OF THE MARINE CORPS, U.S. MARINE CORPS

General LECCE. Madam Chair, Ranking Member Kelly, and distinguished members of the subcommittee, thank you for the opportunity to testify today. As fit given the title of this hearing, I would like to focus on commanders.

The ethos of the Marine Corps is every Marine a rifleman, and this ethos demands that every Marine officer be capable of leading Marines in combat, including judge advocates. I have been very privileged to have been selected for command, both as a lieutenant colonel, as the commanding officer of Marine Security Guard Company in the Middle East, and as a colonel, as a commanding officer of Marine Corps Base Camp Lejeune, North Carolina.

For Marines, and I believe the other service, the pinnacle of a career is serving as a commander. But with the mantle of command comes great responsibilities. Commanders are both responsible and accountable for the morale, welfare, and discipline of the unit. These are not just words, but the foundational tenet of life in the military.

At the end of the day, a commander is responsible for preparing and leading his or her Marines into combat, where the cohesion

and discipline of the unit may literally be the difference between life and death.

When mothers and fathers of this Nation send their sons and daughters to become Marines, we make a sacred promise: that we will train their sons and daughters to the utmost of our ability, that we will protect their welfare, and if we must go into harm's way, these young men and women will be ready mentally, physically, emotionally to fight and win this Nation's wars.

As a commander, it is your obligation to be fully invested in the welfare of your Marines, to know each one of them, to employ them as a team, to treat them as the family that they are. You must be confident that if you are ordered into combat, your Marines go as a team, as a family.

In the Marine Corps, you commit your adult life to preparing to becoming a commander, preparing so that you are ready to meet the highest of obligations and to ensure that you uphold the promise you made to the mothers and fathers of your Marines.

As a commanding officer of Marine Corps Base Camp Lejeune, I was a general court-martial convening authority responsible for bringing charges in the most serious criminal cases, including sexual assault cases. Upon taking command, I trusted my staff judge advocate and my legal support teams to provide the advice I required to execute my duties, including my role as convening authority.

But perhaps just as important to me was my equal opportunity advisor, because he helped me keep my finger on the pulse of the command. My equal opportunity advisor provided me invaluable counsel, keeping me connected to all echelons of the command, from assisting me in developing, administering, and interpreting, and debriefing required command climate surveys, to highlighting areas of concern, to identifying Marines who required individualized attention. My equal opportunity advisor helped me fulfill my obligation to know my Marines and look out for their welfare.

My point is, highlighting these facts, is that although our judge advocates are highly trained and capable professionals, they are not commanders. They do not carry the responsibility and obligation to stay connected to the command, to build a team, to build a family. Commanders, and commanders alone, carry this responsibility. Judge advocates provide legal advice. To remove the commander from the military justice system robs the commander of a critical tool for ensuring discipline is enforced, welfare is ensured, and justice is served.

As the most senior commander in our Marine Corps, the Commandant has been intensely focused on improving our culture. Unequivocally, he has stated on countless occasions that one sexual assault is too many, retaliation is unacceptable, and that ostracism is antithetical to our warrior culture.

To combat these destructive behaviors, the Commandant issued a Marine Corps Order on prohibited activities and conduct. This order, published in June of 2018, criminalizes a wide spectrum of destructive behaviors, including sexual harassment, hazing, discrimination, retaliation, bullying, ostracism, as well as misconduct committed online or via social media.

While the Commandant's efforts over the last years have positively reinforced a culture where sexual assault and retaliation are not tolerated, more remains to be done, and the Marine Corps is prepared to do it.

In the Marine Corps, we never lose sight of the fact that our Marines are our greatest assets. We are obligated to ensure each Marine's welfare and to return our Marines to their loved ones and back to this great Nation better for having served.

Thank you once again for allowing me to testify. I look forward to working with you and answering your questions.

[The prepared statement of General Lecce can be found in the Appendix on page 145.]

Ms. SPEIER. Thank you all.

Let me first say how grateful we are for the service—for your long service in the military. You have each, on one level or another, expressed how you feel that one sexual assault is too many, but we have 15,000 of them a year. And as you know, only 5,000 of them report, and of those, maybe 500 go to a court-martial, and of those, only about 250 are convicted.

You heard the testimony of these three victims. They were telling the truth, and yet they were treated so poorly that the process was worse than the rape.

I would like to have each of you comment on what you heard from each of them. Lieutenant General Pede.

General PEDE. Yes, ma'am. Thank you. It is—it is a difficult thing to listen, and I respect the members of the first panel. I—it is an unfortunate, worse than that, experience, that they endured. And I think that is, frankly, ma'am, what motivates all of us. It has always motivated me as a professional, as an officer, as someone in law enforcement and the profession of law, to right the wrongs that we——

Ms. SPEIER. So what would you do differently, having heard their stories?

General PEDE. Ma'am, exactly. One, I would—and it is what we try and do every day, which is to, once reported, provide a level of care to them that provides a restorative process, that gets them back where they need to be, and then holds the right person accountable. So it is a robust, well-resourced, well-trained investigative process.

And then from a prosecution and a defense standpoint, ma'am, as a very well-educated, resource-trained bar, that includes an extraordinary bar of special victim counsel now as well.

So what we are trying to do is bring all of those resources to bear on the very cases that they bring to our attention.

Ms. SPEIER. Vice Admiral, is there anything that you would recommend based on what you heard from those victims?

Admiral HANNINK. Madam Chair, from Lieutenant Commander Elliott, my takeaway was that, as is reflected in the last military survey on investigations and the justice process, discretion really matters. And I think we have to be sure that we have people fully trained. The one commander that she mentioned that didn't keep discretion, I could see how hurtful that was in this circumstance.

What we owe Lieutenant Commander Elliott, and everybody like her, is her story about the previous commanding officer, though,

the one that supported her, as she called it, beyond the call of duty. And as General Pede indicated, the Victims' Legal Counsel program that she also indicated was a great support.

Ms. SPEIER. Lieutenant General Rockwell.

General ROCKWELL. Madam Chair, as attorneys, we are process people, and when—because you are a process person, sometimes you lose empathy. And as you sit and listen to the victims, as they go through this process—and this process of reporting through investigation, through adjudication, that gets you ultimately to accountability—it is easy to focus on the process and lose the fact that the empathy that you need to have for somebody walking through that process.

You ask what we can do better. I think it is an integration. It is an integration with regard to, as you walk through that process, we have a lot of people trying to help along the way. And as we look at how we integrate throughout that process, from what SARCs do, to what victim advocates do, to what investigators do, to what prosecutors, defenders, and special victims' counsel do, there is methodologies to look at to better integrate that. That better integration gives you more speed, and I think it gives you empathy for the victim in a case or, for that matter, a witness in any case, who is actually the one walking through it.

Ms. SPEIER. All right. Major General Lecce, we are going to have to go and vote and then we will return. Do you have a quick comment you would like to make?

General LECCE. Ma'am, I can't speak as to why this happened to the survivors that testified——

Ms. SPEIER. No, but I mean, based on what you heard, I want to know if you have gleaned anything from it that you would take back and want to do differently.

General LECCE. Well, first of all, as I stated in my opening statement, commanders need to be held accountable. They are accountable for what happened here.

Ms. SPEIER. What happened to that commander who was conflicted, who continued to handle the case, and now we have a West Point grad, who we invested a lot of money in, who is no longer serving?

General LECCE. Ma'am, I can't speak to that specific case. But what I can say is, there are systems in place to deal with these things. As the ranking member said, the IG, the Inspector General, we have a very robust practice—I am not the IG, but I work very closely with him—for these retaliation and ostracism cases. By regulation, only the IG can handle a reprisal or retaliation case. And that is one step.

Echoing what General Rockwell said, we have professionalized our victim advocates, our victims' legal counsel, our Victim Witness Assistance program to be more robust and more supportive of victims along the way in the process.

Ms. SPEIER. All right. Thank you. We are going to return.

[Whereupon, at 4:18 p.m., the subcommittee was adjourned.]

A P P E N D I X

April 2, 2019

PREPARED STATEMENTS SUBMITTED FOR THE RECORD

APRIL 2, 2019

Chairwoman Speier Opening Remarks
4.2.19

The hearing will now come to order. I want to welcome everyone to this hearing of the Military Personnel subcommittee on the commander's role in prosecuting sexual assault cases.

I have been fighting the epidemic of sexual assault in our military since 2011. We have made meaningful, if fitful, progress addressing this scourge. Survivors have more resources and there is more accountability for some commanders who would prefer to sweep assaults under the rug.

We have also made important changes to the legal process, so that it more closely resembles the civilian justice system. Commanders can no longer unilaterally throw out convictions, the "good soldier" defense is gone, though one of our witnesses suggests not all commanders are following the law, and survivors don't have to suffer through excruciating Article 32 processes that required them to endure up to 48-72 hours of cruel cross examination absent normal legal checks. These reforms have undoubtedly made the system better for survivors and more credible overall.

Yet, assault rates remain far too high—nearly 15,000 in fiscal year 2016—and reporting rates perilously low—only 32% that year. The experience of some survivors is better, but it's not good. More service members trust female and male survivors when they report assaults or harassment, but a culture of endemic retaliation and doubt persists—45% of all students who reported assault at the Military Service Academies suffered from ostracism. Too many of our servicemembers live and work in toxic cultures characterized by pervasive, unrelenting harassment and assault. Victims of sexual assault spend the rest of their lives coping with the mental and physical after-effects of their attack. Perpetrators often get off scot free, get promoted, and collect accolades. Many survivors resign from service humiliated and dejected.

I believe that the Department and services care about fixing this problem. I just think they've tied their own hands by refusing to admit current efforts aren't working. Incremental solutions are not good enough. Something here is fundamentally broken, and we need to act, urgently.

Reforming this system requires balancing justice for survivors, the rights of the accused, and commanders' ability to build effective units with diverse and inclusive cultures and minimal sexual assault.

I am convinced finding this balance must involve keeping decision-making in the military but transferring the decision to try special victim cases from commanders to an independent prosecution authority. Our allies in the United Kingdom, Canada, Australia, and Israel already exclude commanders from sexual assault prosecutions and it works. Giving a special prosecutor this responsibility would make it easier for survivors to receive just outcomes, reduce aimless

prosecutions, and allow commanders to better focus on addressing and improving their units' cultures.

A special prosecutor would be better for survivors. Survivors would know that an authority not influenced by conflicts of interest, readiness concerns, or outside perceptions would decide whether to prosecute their cases. Too often those factors, not legal concerns, drive the military criminal justice process. There are countless cases of commanders abusing their power to issue favorite subordinates wrist slaps, ignore victim preference for trial jurisdiction, or who are culpable themselves. Sen. McSally's commander raped her No one in her chain of command should've decided whether her case was prosecuted. Limiting the commander's legal role would encourage more survivors to report, to trust the system, and to believe that, no matter the outcome of their case, they had been given a fair shake.

A special prosecutor would also be better for the accused. Over the last few years, I've heard that commanders never countermand their lawyers when the recommendation is to try a case. That the commander brings charges in every case in which a survivor wants to proceed. I've heard that commanders are trying cases district attorneys would never touch.

Those are not signs of a healthy system, they are the sign of a system that has overcorrected. In which the pendulum has swung wildly to an opposite extreme. Most years, less than 5% of sexual assault cases are referred to courts-martial and, of those cases, only 20% result in successful convictions. Clearly, many commanders are far better at trying cases to dodge political pressure than they are doing the hard work of preferring charges when it's most appropriate. That approach wastes time and money and makes the system less credible.

I don't want the military to try a case every time a survivor names a perpetrator. I want the military to believe the survivor, provide them the resources they need, and investigate the offense. If there is sufficient evidence to prefer charges, then charges should be preferred. I trust military lawyers to make that determination far more than I trust commanders.

Commanders would also be freer to fight sexual assault if they didn't also serve as convening authorities. In a string of recent decisions, the Court of Appeals for the Armed Forces has raised the specter of unlawful command influence in a shocking number of sexual assault cases. They have thrown out convictions because the court believed the commander compromised proceedings by preferring charges or choosing jury members in response to political pressure.

Having the commander make prosecution decisions jeopardizes convictions. And commanders' awareness of this legal risk limits their ability to vocally and actively stamp out sexual assault in their units. Loudly opposing assault today can get a conviction thrown out tomorrow.

If a special prosecutor instead determines whether to try cases, it would remove those risks. Commanders could trade something they are not experts in—making legal decisions—for what they do very well: setting tone and expectations. Commanders could more freely build and enforce their unit cultures,

while still being held accountable for fixing the problem. Senior commanders could mentor their subordinates on the frontline to help them fight the problem without worrying about legal ramifications. This isn't a slippery slope, it's a way to strengthen the foundation of military criminal justice.

Today we will be joined by two panels, including three brave survivors who will tell us about their experiences reporting their sexual assaults and the way their chain of command responded when they did. I encourage my colleagues to learn about their experiences and how the commander's role in the justice system complicated the legal response. These survivors will be joined by outside military legal experts. I'm interested to hear what they view as the military justice system's strengths and weaknesses responding to sexual assault and changes they would propose. After a quick break, we'll be joined by the top judge advocates from each service. I will be eager to hear how they think commanders can participate most effectively in the military justice process, especially given recent rulings about unlawful command influence.

Chairwoman Speier, Ranking Member Kelly and distinguished members of the subcommittee, thank you for the opportunity to appear before you to examine the role of the commander in sexual assault prosecutions. As a brief introduction, I retired after 23 years service as an Air Force JAG, and during that time, I served twice as a defense counsel, multiple times as a prosecutor, including as the chief prosecutor for Europe and Southwest Asia, and as the chief prosecutor for the Air Force. I have served as a trial judge and had been selected to serve as an appellate judge when I elected to retire. For the last four years I have served as the president of Protect Our Defenders, a human rights organization that fights for survivors of military sexual trauma. We provide attorneys free of charge, and I myself represent clients going through the often-hostile military justice process. During this time I have talked with hundreds of survivors.

I am glad you are holding a hearing on this topic, as the role of the commander is greatly misunderstood. I believe the common misconception is that all commanders have prosecution authority, which is entirely not true. Prosecution authority vests in a tiny subset of commanders called convening authorities. Convening authorities are the only commanders who have the traditional prosecution authority to send a case to a court-martial, to add or dismiss charges or to approve a pretrial agreement or plea bargain. Based on recent changes to the law convening authorities are the only ones who can dispose of sex assault and rape cases. To put this in perspective, the DoD has around 14,5000 commanders but only 393 commanders have general court-martial convening authority and only 139 actually used this authority to convene a court according to the most recent DoD data that I am aware of from FY13. In other words, less than 1% of all commanders exercised prosecution authority for the most serious level of court. Approximately 600 special court-martial convening authorities referred a special court, or about 4% of all commanders.

I bring these numbers to your attention because it is important to understand that despite what you may hear today, prosecution authority is not integral to being a commander. 95% of commanders do their job every day without the ability to send someone to a court-martial. These commanders have a wide range of tools to allow them to set and enforce standards without using a court-martial. These include non-judicial punishment, administrative counseling and discharges, ordering pretrial restraint and confinement, and issuing protective orders. The commanders without convening authority have the greatest impact on a disciplined force because they are the commanders the rank and file work directly for and know. Convening authorities are many layers removed from the rank and file and may be geographically separated by thousands of miles.

Moreover, the reality is courts-martial are almost never used for purely discipline issues such as disobedience or AWOL. Instead, over the last 230 years courts-martial have transitioned to an almost exclusive process for prosecuting common crimes. By this I mean conduct that would be both a crime in the military and in civilian society. Additionally, the use of courts-martial has and is plummeting. According to the most recent data from the DoD, in FY15 the entire military convened less than 2000 general and special courts. This is a dramatic drop from FY2000 when the military prosecuted almost 5000 special and general courts. Despite the military only being 4.65% smaller now, general courts fell

31% and specials plummeted 73%. If we look back to FY90, the drops are even more dramatic. That year the military prosecuted almost 10,000 special and general courts. In the late 50s, the Army alone did almost 50,000 courts a year despite being the same relative size as it is today.

It is clear the military has transitioned away from the court-martial as a discipline tool to a criminal justice process. Yet, the military has demanded that non-lawyer convening authorities retain control over a process they are simply not qualified to administer. The ABA has set out a clear standard that prosecution decisions should be made by lawyers admitted to a bar and subject to ethics standards. The reason for this standard is obvious – only lawyers are qualified to act as prosecutors and make prosecution decisions. The military's insistence that convening authorities are more qualified is indefensible. There is nothing inherent to command that qualifies someone to make prosecution decisions. Someone does not become qualified to make prosecution decisions from a PowerPoint briefing and talking with a staff judge advocate anymore than they are qualified to perform surgery because they have taken a Red Cross first aid course. It is time to accept the practice of law is a profession in which commanders should not be engaged.

Congress has spent millions addressing military sexual assault. Multiple reforms have been enacted to the UCMJ and victim services have been dramatically enhanced. Still, the military is failing when it comes to stopping retaliation and bringing offenders to justice. Despite reports being at an all time high, prosecution rates have plummeted, convictions are anemic and sentences are pathetic. According to data provided by the DAC-IPAD only 21% of penetrative offenses in FY17 before a judge resulted in a conviction for a sex offense and only 35% tried by court members resulted in such a conviction. For contact offenses the numbers were even worse with only 3.6% convicted before a judge and only 21.6% when tried by members. The chairwoman of the DAC-IPAD who has over 30 years of experience prosecuting sex cases called the conviction rates "god-awful" and worse than she has seen in any civilian jurisdiction. And she made it clear these were the results of the very few allegations that actually ever go to trial. This should serve as a wakeup call for the military. It is time to stop deflecting from this horrific failure with non-responsive bumper sticker slogans such as "commanders are the solution." Clearly, they are not. The one constant in the plummeting use of courts-martial and the dramatic failure to hold offenders accountable is the convening authority process. It is time to recognize that the practice of law is complex and sexual assault prosecutions require experienced attorneys with years of in court practice making decisions. In 2019 it is time to move away from the idea convening authorities are the solution.

I look forward to any questions you may have.

Biography

DON M. CHRISTENSEN, COLONEL, USAF (Ret.)

Col Don Christensen, USAF (*ret.*) is President of Protect Our Defenders. In his role as President, Col Christensen has appeared regularly in broadcast and print media to advocate for rights of crime victims, including appearances on CNN, CBS, NBC, ABC, MSNBC, Fox News, and the BBC, in addition to the *New York Times*, the *Washington Post*, the *Los Angeles Times*, *USA Today*, *Time*, and *Newsweek*. He also serves as a *pro bono* attorney for victims of military sexual assault in EEO complaints, law suits under the Federal Tort Claims Act, and as a special victims counsel. He served as chief prosecutor for the United States Air Force between 2010 and 2014. Before that he served alternatively as trial counsel, defense counsel, and as a military judge for every year of his 23-year career in the United States Air Force.

Christensen has served as an Assistant Staff Judge Advocate, Area Defense Counsel, Circuit Defense Counsel, Deputy Chief Circuit Defense Counsel, and Deputy Staff Judge Advocate, as a deployed Staff Judge Advocate, Chief Circuit Trial Counsel, and Staff Judge Advocate and as a Military Judge. He has tried over 150 courts-martial as a trial and defense counsel and has presided over 100 trials as a military judge.

He was born in Sturgis, South Dakota and received his law degree from Marquette University Law School. A third generation Air Force officer, he received his commission as a second lieutenant through ROTC and entered active service on 15 July 1991. Christensen is licensed to practice law before the Supreme Court of Wisconsin.

EDUCATION

1988 Bachelor of Science degree, *summa cum laude,* in history and speech communications, Black Hills State College
1991 Juris Doctor degree, Marquette University Law School
1996 Squadron Officer School (in residence) Air University, Maxwell AFB, Alabama
2002 Air Command and Staff College (correspondence) Air University, Maxwell AFB, Alabama
2008 Air War College (correspondence) Air University, Maxwell AFB, Alabama

ASSIGNMENTS

1. Jul 1991 - Mar 1994, Assistant Staff Judge Advocate, 28th Bomb Wing, Ellsworth AFB, SD
2. Mar 1994 - Jul 1995, Area Defense Counsel, USAF Judiciary, Central Circuit, Ellsworth AFB, SD
3. Jul 1995 - Jan 1998, Assistant Staff Judge Advocate, Ogden Air Logistics Center, Hill AFB, UT

4. Jan 1998 - Feb 2000, Circuit Defense Counsel, USAF Judiciary, Western Circuit, Travis AFB, CA
5. Feb 2000 - Sep 2000, Deputy Chief Circuit Defense Counsel, USAF Judiciary, Western Circuit Travis AFB, CA
6. Nov 2000 - Mar 2001, Staff Judge Advocate, 332nd Air Expeditionary Group, Ahmed Al Jaber AB, Kuwait
7. Oct 2000 - Jul 2002, Deputy Staff Judge Advocate, 436th Airlift Wing, Dover AFB, DE.
8. Jul 2002 – Jul 2005, Chief Circuit Trial Counsel, USAF Judiciary, European Circuit, Ramstein AB, Germany
9. Jul 2005 – Jul 2008, Staff Judge Advocate, 325th Fighter Wing, Tyndall AFB FL.
10. Jul 2008 – Jul 2010, Military Judge, USAF Trial Judiciary, McChord AFB WA.
11. Jul 2010 – July 2014 Chief, Government Trial and Appellate Counsel Division, Joint Base Andrews MD

AWARDS AND DECORATIONS

Legion of Merit
Meritorious Service Medal with five oak leaf clusters
Air Force Commendation Medal
Air Force Achievement Medal
Air Force Outstanding Unit Award with valor device and four oak leaf clusters
Air Force Organizational Excellence Award with four oak leaf clusters
National Defense Service Medal with one bronze star device
Armed Forces Expeditionary Medal
Global War on Terrorism Service Medal
Air Force Overseas Service Long Tour Ribbon
Air Force Expeditionary Service Ribbon with gold border
Small Arms Expert Ribbon

EFFECTIVE DATES OF PROMOTION

Second Lieutenant	18 May 1991
First Lieutenant	15 July 1991
Captain	15 January 1992
Major	1 August 1999
Lieutenant Colonel	1 July 2005
Colonel	1 May 2010

DISCLOSURE FORM FOR WITNESSES
COMMITTEE ON ARMED SERVICES
U.S. HOUSE OF REPRESENTATIVES

INSTRUCTION TO WITNESSES: Rule 11, clause 2(g)(5), of the Rules of the U.S. House of Representatives for the 116th Congress requires nongovernmental witnesses appearing before House committees to include in their written statements a curriculum vitae and a disclosure of the amount and source of any federal contracts or grants (including subcontracts and subgrants), or contracts or payments originating with a foreign government, received during the current and two previous calendar years either by the witness or by an entity represented by the witness and related to the subject matter of the hearing. As a matter of committee policy, the House Committee on Armed Services further requires nongovernmental witnesses to disclose whether they are a fiduciary (including, but not limited to, directors, officers, advisors, or resident agents) of any organization or entity that may have an interest in the subject matter of the hearing. Committee policy also requires nongovernmental witnesses to disclose the amount and source of any contracts or grants (including subcontracts and subgrants), or payments originating with any organization or entity, whether public or private, that has a material interest in the subject matter of the hearing, received during the current and two previous calendar years either by the witness or by an entity represented by the witness.

Please note that a copy of these statements, with appropriate redactions to protect the witness's personal privacy (including home address and phone number), will be made publicly available in electronic form not later than one day after the witness's appearance before the committee. Witnesses may list additional grants, contracts, or payments on additional sheets, if necessary. Please complete this form electronically.

Hearing Date: Tuesday, April 2, 2019

Hearing Subject:

Examining the Role of the Commander in Sexual Assault Prosecutions

Witness name: Don Christensen

Position/Title: President, Protect Our Defenders

Capacity in which appearing: (check one)

○ Individual ● Representative

If appearing in a representative capacity, name of the organization or entity represented:

Protect Our Defenders

Federal Contract or Grant Information: If you or the entity you represent before the Committee on Armed Services has contracts (including subcontracts) or grants (including subgrants) with the federal government, received during the current and two previous calendar years and related to the subject matter of the hearing, please provide the following information:

2019

Federal grant/ contract	Federal agency	Dollar value	Subject of contract or grant

2018

Federal grant/ contract	Federal agency	Dollar value	Subject of contract or grant

2017

Federal grant/ contract	Federal agency	Dollar value	Subject of contract or grant

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2019

Foreign contract/ payment	Foreign government	Dollar value	Subject of contract or payment

2018

Foreign contract/ payment	Foreign government	Dollar value	Subject of contract or payment

2017

Foreign contract/ payment	Foreign government	Dollar value	Subject of contract or payment

Fiduciary Relationships: If you are a fiduciary of any organization or entity that may have an interest in the subject matter of the hearing, please provide the following information:

Organization or entity	Brief description of the fiduciary relationship
POD	President, board member

Organization or Entity Contract, Grant or Payment Information: If you or the entity you represent before the Committee on Armed Services has contracts or grants (including subcontracts or subgrants) or payments originating from an organization or entity, whether public or private, that has a material interest in the subject matter of the hearing, received during the current and two previous calendar years, please provide the following information:

2019

Contract/grant/ payment	Entity	Dollar value	Subject of contract, grant or payment
Grant	Goldman Sachs Philan	10,000	general support
payment	Times Up fund	10,888	legal support

2018

Contract/grant/ payment	Entity	Dollar value	Subject of contract, grant or payment
grant	Silicon Valley Foundatic	80,000	general support
grant	BOA	25,000	general support
grant	Jewish Community	25,000	general support
grant	Community Foundation	24,000	general support

2017

Contract/grant/ payment	Entity	Dollar value	Subject of contract, grant or payment
Grant	Packard Foundation	150,000	General support
Grant	Sandler Foundation	125,000	General support
Grant	Weaver Foundation	380,000	General support
Grant	Community Foundation	80,816	General support

Hearing Opening Remarks

Dr. Ellen Haring, CEO

Service Women's Action Network

Thank you for allowing me to make remarks today on this important topic. I'm the CEO of the Service Women's Action Network. I retired from the Army in 2014 after 30 years of service. I'm a West Point Graduate and I have a master's degree in public policy and a PhD in conflict analysis and resolution from George Mason University. I have taught at the Army's Command and General Staff College, the Army War College and Georgetown University. My research and work focus on women and gender in the military.

I commanded 2 Army units during my military career. During my very first Army assignment one of my soldiers was murdered and I closely watched as the criminal investigation and subsequent conviction unfolded but at the unit level, we had no involvement in the investigation. Later, one of my soldiers was charged with selling drugs in the barracks. He was immediately locked up in pre-trial confinement and the only thing we did was make health and welfare visits to ensure he was being treated properly. Years later, in 1997, when I was a major stationed in Hawaii I was assigned as the investigating officer in 3 rape cases. I am not an MP/CID or a JAG and I have no training in how to investigate a sex crime. Although I found the 3 Soldiers who had been raped to be credible victims the perpetrator, an NCO, was eventually reassigned to another unit. I juxtapose these experiences to illustrate the very different ways the military has approached how felony crimes have been handled over the years. Sex crimes against women have never been treated with the same level of outrage or professionalism as other serious crimes. Fortunately, and to the credit of members of Congress, the Army is no longer allows an untrained officer to investigate cases of rape but other problems persist.

First, while military officers and those selected for command receive a great deal of training, they receive little legal training. Having taught at two of the Army's premier service colleges I can tell you that their legal training is superficial at best and only senior level commanders have JAG officers assigned to their staffs to advise them and these JAG officers are generalists, not prosecutors. Furthermore, the JAG officers assigned to senior leaders are always junior and subordinate to

the Commanders that they advise. This means that they are evaluated and rated by their bosses and are therefore subject to command influence. They are not independent nor are they experts in sex crimes.

Second, at SWAN we hear from and work with survivors on a daily basis. Their stories are always similar. If they decide to come forward and report they are generally not believed, they are seen as creating a problem where none existed before and they almost always suffer retaliation. They consistently tell us that their commanders failed them in profound ways. As a former Commander I can tell you that I would not want to have to decide if or when to move forward with the investigation of a sex crime because I know that I my knowledge and expertise is limited. Furthermore, there are simply too many possible conflicts of interest for Commanders to be the best decision makers in sex crime cases not to mention that fact that there are Commanders themselves who have been perpetrators.

Finally, the next panel is going to sit here and say that Commanders must stay in the decision-making process in order to maintain "good order and discipline" a nebulous concept that they won't first define. However, all of our European allies have removed their Commander's from the decision-making process but "good order and discipline" has not melted away in their military organizations. The panel will likely tell you that the US military is exceptional and cannot be compared to our allies. If we are so exceptional then why must our Commanders have a degree of authority over their subordinates that our allies don't need in order to maintain the same level of good order and discipline.

At SWAN we support removing Commanders from the decision-making process because doing so will send a signal that there are certain crimes for which they are not qualified to make decisions on. Culture is ultimately at the root of our sexual assault problem in the military. Sexual assault is simply not seen as a serious crime. Until it's viewed as a serious crime and treated as a felony it will continue to pervade our culture. Removing Commander's from the decision-making process sends the signal that there are some crimes that are so severe that Commanders have no place in deciding if, when or how they are prosecuted. I believe that it will fundamentally shift how we view sexual assault and ultimately impact our culture in a way that says this behavior is absolutely unacceptable.

I look forward to your questions.

Ellen L. Haring

Chief Executive Officer
Service Women's Action Network
Washington, D.C. 20036
646-569-5200

Senior Fellow/Program Director
Women in International Security
Washington, D.C. 20036
202-684-6010

EDUCATION

PhD in Conflict Analysis and Resolution
George Mason University, VA
M.S. in Public Policy
George Mason University, VA
M.A.in International Relations (incomplete; 24 credit hours completed)
Boston University, Heidelberg, Germany. Incomplete due to military transfer.
B.S. in General Engineering and Sciences
United States Military Academy, NY

PROFESSIONAL EXPERIENCE

Chief Executive Officer **October 2018-Present**
Service Women's Action Network, Washington, D.C.
Responsible for the strategic direction, policy development, programs and research, fundraising and operations of a national nonprofit that supports, connects and advocates for service women; past, present and future. Reports to a board of 12 directors, and supervises a staff of full-time and part-time consultants, volunteers and an array of vendors.

Director of Research **January 2016-September 2018**
Service Women's Action Network, Washington, D.C.
Led and directed programs and research that examine and support the needs of servicewomen and women veterans. Research includes conducting an annual needs assessment, hosting an annual research Summit, and publishing and disseminating research findings.

Senior Fellow/CII Program Director
Women in International Security, Washington, D.C. **January 2013-Present**
Leads and directs the Combat Integration Initiative (CII), an independent oversight body that provides research and recommendations on the US military's integration of women into ground combat occupations and units. Certified by NATO to teach gender topics to military organizations.

Adjunct Associate Professor **January 2017-May 2018**
Georgetown University, Washington, D.C.
Teaches electives on Women, Peace and Security and Human Security to Master's level students in the Security Studies Department of the Walsh School of Foreign Service.

Strategic Planner/Associate Professor
US Army War College, Carlisle, PA **January 2013-June 2014**
Provided strategic planning support in the Commandant's outreach and external affairs office. Designed and taught an elective on Women, Peace and Security to senior military leaders enrolled in the strategic studies program.

Ellen L. Haring

Joint Staff Officer
Joint Staff, J7, Solution Evaluation Directorate, Suffolk, VA **August 2011-December 2012**

Provided supervision and oversight of staff officers who conducted evaluation and testing of innovative approaches developed by field operating forces. Ensured that validated solutions were disseminated to the joint force.

Assistant Professor
Department of Joint, Interagency and Multinational Operations, U.S. Army Command and General Staff College, FT Belvoir, VA **July 2008-July 2011**

Provided graduate level education to mid-grade Army officers in topics including: peace operations, the strategic environment; culture and conflict; intergovernmental and multinational capabilities; military operational planning processes; and foundations of critical and creative thinking.

Commander
8th Brigade, 84th Training Command, Charlottesville, VA **January 2007-January 2008**

Provided supervisory direction to over 85 assistant professors and instructors supporting the ROTC departments at 24 universities and colleges in the Virginia, Maryland and D.C. region.

Executive Officer
6th Brigade, 80th Training Division FT Belvoir, VA **September 2005-December 2006**

Provided staff supervision and direction to a training brigade responsible for the training and education of mid-grade Army sergeants and mid-grade Army officers.

Various Military Assignments
US and Overseas (Germany, Japan, Korea) **May 1984-August 2004**

MILITARY PROMOTIONS

2nd Lieutenant	23 May 1984
1st Lieutenant	23 Nov 1985
Captain	01 Sep 1988
Major	23 Jun 1995
Lieutenant Colonel	08 Apr 2002
Colonel	20 Dec 2006
Retired	01 Jun 2014

MILITARY AWARDS, DECORATIONS, CERTIFICATIONS

US TOP SECRET Security Clearance updated 2013
Legion of Merit
Meritorious Service Medal (with 1 Oak Leaf Cluster)
Army Commendation Medal (with 6 Oak Leaf Clusters)
Army Achievement Medal
National Defense Service Medal
Joint Meritorious Unit Award

Ellen L. Haring

Army Service Ribbon
Overseas Service Ribbon
Army Reserve Components Overseas Training Ribbon
Army Air Assault Badge

SCHOLARSHIP

Published Articles & Reports
2018
"Access to Reproductive Healthcare: The Experiences of Military Women" (2018 Report) The Service Women's Action Network, Washington, D.C.
"Depression prevalence and geographic distribution in United States military women: Results from the 2017 Service Women's Action Network needs assessment". Thomas, K.H., McDaniel, J.T., Grohowski, M., Whalen, R., Albright, D.L., Fletcher, K., Haring, E. (Forthcoming). Journal of Military, Veterans and Family Health.
"The Mental Wellness Needs of Military Women: Community Driven Solutions" (2018 Report) The Service Women's Action Network, Washington, D.C.

2017
"Mental health needs of military and veteran women: An assessment conducted by the Service Women's Action Network" (October 2, 2017). *Traumatology.* Thomas, K.H., McDaniel, J., Haring, E., Albright, D.L., & Fletcher, K.
"Belonging and support: Women Veterans' perceptions of veteran service organizations". *Journal of Veterans Studies* (June 2017). Thomas, K.H., Haring, E., McDaniel, J., Fletcher, K., & Albright, D.L.
"Five Steps to a Better Marine Corps" *The San Diego Union Tribune*, (March 27, 2017)
"Equipping and Training Modifications for Combat Arms Women" Policy Brief, Women in International Security, Washington, D.C., January 2017.

2016
"The Combat Integration Handbook: A Leader's Guide to Success" Women in International Security, Washington, D.C. (September 2016). Rico, A., Haring, E., Washington, C., Brown, E.
"Make Women Register for the Draft" *US News and World Report*, (June 22, 2016)
"Integration of Women Depends on Male Leaders" *Army Times,* (May 2, 2016)
"Our Military Shouldn't Turn Its Back on Servicewomen Who Need an Abortion" *Huffington Post*, (April 30, 2016)
"Give Women All of the Rights of Citizenship, Including Selective Service" *Task and Purpose,* (February 26, 2016)

2015
"That Valor Isn't Yours to Defend" *Task and Purpose,* (March 18, 2015)
"Is the Marine Corps Setting Women Up to Fail in Combat Roles?" *Cicero Magazine* (February 18, 2015)
"Civilian leaders need to lead on women in combat," *The Hill Congress Blog*, (February 5, 2015)
"A Snapshot: Two Years in to Combat Integration," *Women in International Security,* (January 30, 2015)

Ellen L. Haring

2014
"Dear Berkeley women: It's time to lead the next revolution," *The Daily Californian,* (August 26, 2014)
"The Sea of Sameness in PME" *Joint Forces Quarterly* (July 2014)
"Deck Stacked Against Women in Experimental Task Force," *Marine Corps Times,* (July 6, 2014)
"Can Women Be Infantry Marines," War on the Rocks, (May 29, 2014)
"Combat Integration: Good but not good enough," *Army Times,* (January 2014)
"Rangers are NOT Leading the Way," *Foreign Policy,* (January 2014)

2013-2010
"A Col's View of Commander's Authority," *Foreign Policy,* (September 2013)
"Women and the Audie Murphy Model," *Armed Forces Journal* (August 2013)
"What Women Bring to the Fight," *Parameters* (Summer 2013)
"To Stop Sexual Assault in the Military-Add More Women," *Christian Science Monitor,* (June 24, 2013) "The Army's Disservice to Women," *The Washington Post* (June 21, 2013)
"Insights from the Women in Combat Symposium," *Joint Forces Quarterly,* (June 2013)
"Female Engagement Teams: A Rocky Start to an Enduring Requirement," *Peace and Stability Operations Journal* 3:1, (October 2012)
"Identity Based Conflict in the Pashtun Tribal Belt," *Small Wars Journal*, (March 2010)

Book Reviews
"Beyond the Band of Brothers: The US Military and the Myth that Women Can't Fight" Parameters, US Army War College (Winter 2015/2016)
"Ashley's War: The Untold Story of a Team of Women Soldiers on the Special Ops Battlefield," Parameters, US Army War College (Summer 2015)
"Gender, Military Effectiveness, and Organizational Change: The Swedish Model," Parameters, US Army War College (Autumn 2014)

Academic Awards
"Visionary Award" presented by George Mason University in recognition of my actions as a plaintiff in a law suit that challenged the Department of Defense's ban on women in combat. George Mason University, March 2013.
"Silver Pen" award presented by the Command and General Staff College, in recognition of a scholarly article of note published in the Small Wars Journal, June 2010.

Original Research
2018 Principle investigator in a reproductive health access survey of U.S. military women. Report is forthcoming, Fall 2018.
2017 Co-investigator of a mental wellness needs assessment of U.S. military women. Findings were published by the Service Women's Action Network.
2017-2021 Principle investigator for a longitudinal research project with oversight provided by Georgetown University IRB that monitors and assesses the integration of US Army women into ground combat occupations.
2016 In coordination with The Atlantic magazine and video production team I assisted in the development of a short documentary "Women in Combat: In Their Own Words"
2015 For my dissertation research I interviewed 30 US servicewomen who had engaged in combat and I conducted an online critical discourse analysis of reader comments to three articles.
2012 Interviewed and surveyed servicewomen who were members of Female Engagement Teams in Iraq and Afghanistan.

Ellen L. Haring

Papers Delivered

"Conflict Analysis and Military Planning" Cornwallis Group Conference, Vienna, Austria.Paper was published in the Workshop Proceedings (April 2009)

Public Speaking

Invited to present original, ongoing research on women integrating combat units in the US Army at the Bush School of Government and Public Service, Texas A&M, November, 2017.

Invited to speak at and provide training workshops for US Southern Command during their annual regional Women in Military Conference, 2016 and 2017.

Invited multiple times to address members of Congress and their staffs on topics related to women in the military.

Numerous foreign and domestic media appearances speaking on topics related to women in the US military: BBC Radio, CNN, PBS News Hour, NPR Radio, Voice of America, FOX International, and the Huffington Post.

Guest lecturer speaking on military topics at US Institute of Peace, George Mason University, Northern Virginia Community College, US Army War College, US Naval War College, National Defense University, Vietnam Veterans of America.

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Please note that a copy of these statements, with appropriate redactions to protect the witness's personal privacy (including home address and phone number), will be made publicly available in electronic form not later than one day after the witness's appearance before the committee. Witnesses may list additional grants, contracts, or payments on additional sheets, if necessary. Please complete this form electronically.

Hearing Date: Tuesday, April 2, 2019

Hearing Subject:

Examining the Role of the Commander in Sexual Assault Prosecutions

Witness name: Ellen L. Haring

Position/Title: CEO Service Women's Action Network

Capacity in which appearing: (check one)

○ Individual ● Representative

If appearing in a representative capacity, name of the organization or entity represented:

Service Women's Action Network

Federal Contract or Grant Information: If you or the entity you represent before the Committee on Armed Services has contracts (including subcontracts) or grants (including subgrants) with the federal government, received during the current and two previous calendar years and related to the subject matter of the hearing, please provide the following information:

2019

Federal grant/ contract	Federal agency	Dollar value	Subject of contract or grant

2018

Federal grant/ contract	Federal agency	Dollar value	Subject of contract or grant

2017

Federal grant/ contract	Federal agency	Dollar value	Subject of contract or grant

Foreign Government Contract or Payment Information: If you or the entity you represent before the Committee on Armed Services has contracts (including subcontracts or subgrants) or payments originating from a foreign government, received during the current and two previous calendar years and related to the subject matter of the hearing, please provide the following information:

2019

Foreign contract/ payment	Foreign government	Dollar value	Subject of contract or payment

2018

Foreign contract/ payment	Foreign government	Dollar value	Subject of contract or payment

2017

Foreign contract/ payment	Foreign government	Dollar value	Subject of contract or payment

Fiduciary Relationships: If you are a fiduciary of any organization or entity that may have an interest in the subject matter of the hearing, please provide the following information:

Organization or entity	Brief description of the fiduciary relationship
Service Women's Action Network	CEO of SWAN

Organization or Entity Contract, Grant or Payment Information: If you or the entity you represent before the Committee on Armed Services has contracts or grants (including subcontracts or subgrants) or payments originating from an organization or entity, whether public or private, that has a material interest in the subject matter of the hearing, received during the current and two previous calendar years, please provide the following information:

2019

Contract/grant/ payment	Entity	Dollar value	Subject of contract, grant or payment
Payment	Bryan, Cave, Leighton, and Paisner LLP	$2500	Donation

2018

Contract/grant/ payment	Entity	Dollar value	Subject of contract, grant or payment
Grant	Novo Foundation	$200,000	General Operating Funds
Grant	Mental Insight Foundation	$30,000	General Operating Funds
Grant	MKM Foundation	$20,000	General Operating Funds
Grant	Phillip Grand Fund	$25,000	CRM Transition
Payment	Robert Kaufman	$10,000	Donation

2017

Contract/grant/ payment	Entity	Dollar value	Subject of contract, grant or payment
Grant	Novo Foundation	$100,000	General Operating Funds
Grant	Mental Insight Foundation	$30,000	General Operating Funds
Grant	MKM Foundation	$20,000	General Operating Funds
Grant	Groundswell	$25,000	Program Support
Grant	Moriah Fund	$7,000	Research

Good afternoon Congresswomen and Congressmen-thank you for inviting me here today. I appreciate the opportunity to speak about my experiences and share my thoughts.

I've been in the Navy for a little more than 14 years and have served on 6 different ships and lived around the country and world. In August of 2014, someone whom I had considered a close friend raped me. It was an extremely traumatic experience--- and one that nearly destroyed me. Initially I made a restricted report -- I did not want my Commanding Officer to know, nor did I want law enforcement involved I spent months in shock and the only way I made it through this was with the support of my good friends and the SAPR team. As I progressed in my healing, working through the PTSD, anxiety, and depression I was diagnosed with because of the assault, I moved to a new command, with a new Commanding Officer, I began to consider changing my report from restricted to unrestricted. I was very lucky at my new command- I had a wonderful Commanding Officer and a great work environment. When I decided to change my report to unrestricted, I had amazing support from my Commanding Officer- someone I consider the best leader I have ever known. He went above and beyond what was required of him in this situation. Unfortunately, I would learn, through my experiences and through listening to other victims' experiences, that this support is not the norm. While I did not expect everyone to be the great leader he is, I did expect to be treated with the same dignity and respect he showed me, and I was not.

When I moved to my new duty station overseas, to be a commanding officer of a warship myself, it was made immediately apparent to me that the fact I was a sexual assault survivor was a burden and inconvenience to my bosses and the upcoming court martial for the person who raped me, was a hindrance to them. Due to appeals regarding a decision the presiding judge in the case made, when I reported to my new command, it was unknown when the court martial would happen. One of the first things my new boss said to me regarding the court martial, was "Well I hope it's not during an important part of the ships life" which to all I could think was "well the next time I get raped I will try to plan it better." This was the first of multiple comments that my bosses said to me that not only

re-victimized me and were extremely insensitive, but made me seriously question continuing to move forward with the case. One of the most degrading and humiliating occurrences was when my boss was forwarded a copy of the NCIS report that discussed intimate details of the assault. I was called into his office where he told me that he had received, and just read, the report. After he handed me the report and read it, I very seriously considered dropping the case as I did not want my boss reading about my vagina. And when I left my ship for a few weeks to be at the court martial, my boss told me how he had to temporarily relieve someone in command for several months because they had cancer and needed to get treatment. He told me that he would much rather go through what I went through than have cancer. I can tell you, after being diagnosed and treated for breast cancer last year, I would much rather go through that than an assault.

Upon returning from the court martial, nothing within the command environment got better. I was humiliated, ostracized, outcast, and ridiculed from people of every rank. There were multiple events for commanding officers that I was not invited to attend. My ship was given un fair scrutiny -- magnitudes greater than what any other ship was. What nearly broke me, what was almost as bad as the assault, my personal information regarding the assault, was divulged to my peers -- including counseling information I had only discussed with my boss, who then used it to humiliate and demoralize me. If I could have gotten out of the Navy at the point, I would have, but I was in a contract and could not.

As commanding officers in the Navy, we are given a 3 day legal course in preparation for our tours. I was by no means a legal expert but was equipped to deal with the minor infractions that do affect good order and discipline. It is my belief, not just as a military sexual assault survivor but as a former commanding officer, that some infractions are so grievous, so heinous, that they must be elevated to a higher than just the command level. Sending sexual assault cases to a trained military judge shows just how seriously this crime is taken, that we will not allow perpetrators to get away with this crime and it re-enforces to the countless victims that they will be taken seriously. Additionally, victims will feel more comfortable coming forward knowing their bosses will not be reading the intimate details of the assault.

Thank you for your time Congresswomen and Congressmen for allowing me to share a small piece of my story with you.

Lieutenant Commander Erin Leigh Elliott
United States Navy

A native of Abilene, Texas, Lieutenant Commander Erin Leigh Elliott graduated from Texas A and M University in 2004 with a Bachelor's of Science degree in Marine Engineering. She received her commission through Officer Candidate School in Pensacola, Florida in 2005.

Lieutenant Commander Elliott's first Naval sea assignment was aboard USS CARR (FFG 52) where she served as the Electrical Officer, Anti-Submarine Warfare Officer, and Assistant Operations Officer. Her second sea assignment was aboard USS ENTERPRISE (CVN 65) where she served as the ship's Production Analyst for the Extended Dry-Docking Selected Restricted Availability and as the Command IA Coordinator. As a Department Head, Lieutenant Commander Elliott served as the Operations Officer aboard USS HIGGINS (DDG 76) and USS COWPENS (CG 63). Following selection to early command, she served as the Commanding Officer of USS CHINOOK (PC 9) and USS MONSOON (PC 4), both homeported in Manama, Bahrain.

Ashore, prior to her current position at the Chief of Naval Operations Assessment Division as a Surface Warfare Analyst, Lieutenant Commander Elliott served as Flag Aide and Protocol Officer to Commander, Navy Warfare Development Command. She attended the Naval War College's 2012 Class of Naval Command and Staff where she earned a Master's of Arts Degree in National Security and Strategic Studies, participated in the Gravely Naval Warfare Research Group where she studied Ballistic Missile Defense, and completed JPME Phase I. She has also obtained a certificate in Systems Engineering from Naval Postgraduate School and pursued Master's studies in International Relations. Additionally, LCDR Elliott speaks around the country to Sexual Assault Victim Advocacy groups, military and civilian leaders, and various other groups to raise awareness and inspire change.

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COMMITTEE ON ARMED SERVICES
U.S. HOUSE OF REPRESENTATIVES

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Hearing Date: Tuesday, April 2, 2019

Hearing Subject:

Examining the Role of the Commander in Sexual Assault Prosecutions

Witness name: Erin Elliott

Position/Title: Lieutenant Commander

Capacity in which appearing: (check one)

● Individual ○ Representative

If appearing in a representative capacity, name of the organization or entity represented:

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Nelli Hanson's Testimony
House Armed Services Subcommittee on Military Personnel Hearing
"Examining the Role of the Commander in Sexual Assault Prosecutions"
April 2, 2019

Thank you Chairwoman Speier, Ranking Member Kelly, and distinguished Members of the Subcommittee for the opportunity to speak before you today as a victim of military sexual assault and harassment. I'm Nelli Hanson, Product Support Manager for the Air Force. I have dedicated my career to serving our country--first as a United States Marine and then as a civil service Air Force employee. I have always believed in my work and dedication to the United States military. I still do. But when I followed the military's procedures for reporting my sexual assault, the system failed to protect me or provide me with the justice that I and all active duty and DoD employees deserve.

I've been stationed all over the world to include Japan, the Pentagon and Gunter Annex in Montgomery, Alabama. I arrived at Gunter in 2014 as the Director of Logistics and developed a close working relationship with the Colonel who would eventually become my assailant. The working relationship started out as professional. But by the following spring, the Colonel started to relentlessly sexually harass me. I did my best to keep things professional by ignoring his lewd texts, inappropriate behavior, ensuring I was never alone with him and telling him to stop.

Eventually, he physically attacked me and I reported it to my civilian Senior Executive Service supervisor. My supervisor instructed me to file a report with the Air Force's Sexual Assault Response Coordinator. A day after I filed a sexual assault complaint against the Colonel, I received a text message from him admitting to his misconduct and conceding that he had abused his position of power over me.

I followed the procedures but it only made the workplace hostile. I noticed that I was treated differently by my colleagues and supervisor. I was left off important meetings and emails -- further straining my career.

Once the Air Force investigation was underway, I was told by my General that several media inquiries had been made. I was informed that he planned to give the media "a watered-down version" to make them lose interest. I protested. If anything should be released to the media, I said, it should my assailant's official charge sheet. I wanted my assailant to be held accountable for his actions and not have his inappropriate behavior downplayed. But the General ignored my wishes. Even worse, the General gave this same watered-down version to my fellow colleagues and Air Force Staff at Gunter, further discrediting my report.

I requested that the General transfer the Colonel to the neighboring base so that I could continue to do my job but he refused. Instead, the Colonel was moved only two buildings away to the Logistics Division where I performed portions of my daily workload.

Based on these series of events, I realized that the General's interest was to protect his Colonel with complete disregard for me.

The General offered to transfer me to a new location. This meant that I would have to transfer my children out of a community they loved—a strong church family, a great school and a community they loved. At the time of the report, I was on the cusp of being promoted to GS-15. But because keeping my current job had become unbearable for myself and my family, I was forced to relinquish this promotion and transfer to Eglin Air Force Base, Florida to start the healing and rebuilding process.

As for the Colonel, the investigation showed he self-admitted to sending over 400 text messages, sexually graphic voicemails and photos, and using his position of power as intimidation. Unlike perhaps many sexual assault cases, the evidence here was overwhelming. Through my Special Victim's legal counsel I made clear that any action taken against the Colonel should include a finding that he sexually assaulted me. The General ignored my wishes and allowed my assailant to retire honorably from the Air Force. At every turn, the Air Force went out of its way to shield him from the consequences of his misconduct and let me endure his punishment.

After my assailant was allowed to walk away scot free, I was informed that the Air Force considered the Colonel's "character and record of military service" in making his disposition determination -- which I understand is a violation of the law.

I'm rebuilding my career and making a home for my family in Florida. But I've lost faith in a system that I've devoted my life to. I followed protocol and expected to be treated fairly. Instead, I was humiliated and ostracized for being the victim of a predatory supervisor. And ultimately my assailant was allowed to retire in honor against my express wishes.

I hope you will reconsider the inherent conflict of interest in allowing the chain of command to make legal decisions, and I urge you to critically examine the role of the Commander in sexual assault prosecutions.

Thank you again for the opportunity to speak with you today, and I look forward to answering your questions.

Nelli K. Hanson

Ms. Nelli K. Hanson is the Product Support Manager for the Direct Attack Division, Weapons and Armament Portfolio, Eglin AFB, FL.

Ms. Hanson is a 2006 graduate of Cameron University. She began her military service with the United States Marine Corps as a Maintenance Management Analyst. Ms. Hanson was stationed at numerous bases throughout the world. After an honorable discharge from the Marine Corps in 2000, she worked for the City of San Diego as a Maintenance Transit Analyst assisting with financial auditing and the operational and logistical support for 285 buses, 3400 stops and 29 fixed routes in two city divisions. In 2000, Ms. Hanson worked for the Navy as a Technical Writer for WLR-8 submarines. She then relocated to MCAS Cherry Point as the Hazardous Materials Manager for Resource Consultants for NADEP where she was responsible for cost analysis, contract compliance, and flight critical material certifications by laboratory personnel.

In 2007, Ms. Hanson began her civil service career with the Air Force at Hill AFB, UT as a Foreign Military Sales Analyst. She served as the Team Lead to provide analytical analysis of trends and as the liaison for Foreign Liaison Officers and Air Force Security Assistance Center for coordination of contracts and repairs. In 2010, Ms. Hanson moved to Wright-Patterson AFB, OH to serve on the Contract Depot Maintenance team and provided continuous monitoring of Organic Depot Workload Capacity/Capability metrics. Prior to her current position, Ms. Hanson was selected to the Logistics Career Broadening Program at The Pentagon, Washington, DC. While on the Career Broadening Program, Ms. Hanson assisted in the development of Weapons Systems Sustainment programming and budgeting actions to defend over $14B in requirements and as the Chief of Cost Per Flying Hour. In 2012, Ms. Hanson was the Logistics Organizational Senior Functional and Product Support Manager, Business Enterprise Systems, Air Force Life Cycle Management Center, Air Force Materiel Command, Gunter Air Force Base, AL. Ms. Hanson served as the organization's senior functional overseeing all functional activities for life cycle logistics and product support management. She represented Logistics on the Senior Acquisitions Team for Business Enterprise Systems.

EDUCATION

2000 Associates degree in Computer Programming, Craven Community College, New Bern, NC
2004 Bachelor of Science in Business Management, Park University, Parkville, MO
2004 Bachelor of Science in Computer Information Systems, Park University, Parkville, MO
2006 Master of Business Administration, Cameron University, Lawton, OK
2011 Air Command and Staff College, by seminar, Maxwell Air Force Base, AL
2011 Master of Science in Military Operational Art, Air University
2013 Air War College, by seminar, Air University

CAREER CHRONOLOGY

June 1996 – October 1996, Marine Corps Recruit Training, Marine Corps Recruit Depot, Parris Island, SC
November 1996 – November 1997, Marine Corps Maintenance Management System Analyst, Marine Tactical Air Command – 18, Marine Corps Air Station Futenma, Okinawa, Japan
December 1997 – June 2000, Marine Corps Maintenance Management Systems Supervisor, Marine Wing Support Squadron – 274, Marine Corps Air Station Cherry Point, Cherry Point, NC
July 2000 – December 2005, Navy technical writer, Resource Consultants, San Diego, CA
July 2002 – December 2003, Maintenance Analyst, San Diego Metropolitan Transit System, San Diego, CA
January 2006 – March 2007, Hazardous Materials Manager, Resource Consultants/SERCO, Naval Air Depot Cherry Point, Marine Corps Air Station Cherry Point, Cherry Point, NC
April 2007 – June 2010, Foreign Military Sales Analyst, 418th Supply Chain Management Squadron,

Ogden Air Logistics Center, Hill AFB, UT
April 2008 – June 2009, A-10 Program Manager, A-10 Thunderbolt II System Program Office, Ogden Air Logistics Center, Hill AFB, UT
June 2010 – July 2012, Contract Depot Maintenance Analyst, AFMC/A4D, Wright-Patterson AFB, OH
July 2012 – July 2014, Logistics Career Broadener, Chief, Cost Per Flying Hour and Centralized Asset Management, Weapons Systems Readiness Division, The Pentagon, Washington, DC
July 2014 – October 2016, Logistics Organizational Senior Functional and Product Support Manager, Business Enterprise Systems, Air Force Life Cycle Management Center, Gunter AFB, AL
October 2016 – Present, Product Support Manager, Direct Attack Division, Weapons and Armament Portfolio, Eglin AFB, FL

AWARDS AND HONORS

1997 Navy Sea Service Deployment Ribbon
1999 Marine Corps Certificate of Good Conduct
2000 Navy and Marine Corps Achievement Medal
2009 Air Force Global Logistics Support Center Unsung Hero
2011 AFMC Logistics Team Award – 4th Quarter
2012 Selected for Logistics Career Broadening, Pentagon AF A4/7PY
2015 AFLCMC LG Staff Logistics Support of the Year – Tier III

PROFESSIONAL MEMBERSHIPS AND AFFILIATIONS

Logistics Officers Association
Federal Managers Association
Armed Forces Communications and Electronics Association

CERTIFICATIONS AND OTHER TRAINING

2007 DISAM, Security Assistance Management CONUS Course Certificate
2007 DISAM, International Programs Security Requirements Course Certificate
2012 Program Management, Level 1, Acquisition Professional Development Program
2014 Life Cycle Logistics, Level 3, Acquisition Professional Development Program

(Current as of Sept 2017)

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Hearing Date: Tuesday, April 2, 2019

Hearing Subject:

Examining the Role of the Commander in Sexual Assault Prosecutions

Witness name: Nelli K. Hanson

Position/Title: Ms.

Capacity in which appearing: (check one)

● Individual ○ Representative

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Angela Bapp's Testimony

House Armed Services Subcommittee on Military Personnel Hearing

"Examining the Role of the Commander in Sexual Assault Prosecutions"

April 2, 2019

Chairwoman Speier; Ranking Member Kelly; distinguished Members of the Subcommittee -- thank you for the opportunity to speak before you today as a survivor of military sexual assault. I am here to share my story and to shine light on the systemic failures that made justice impossible in my case.

I graduated in the top 3% of my class at West Point and soon after arrived at Fort Rucker, AL to begin my career as an Aviation Officer. Throughout my flight training, I became close friends with a mentor and fellow-flight school classmate of mine, who was going through a divorce. He arrived at flight school married to an officer, who was given a leadership role in our battalion. After some time, his wife became my company commander.

In a completely unrelated situation, a different flight school student sexually assaulted me. When it occurred, my classmate was the only person who I trusted enough to tell what happened to me, to discuss filing a report, and to care for my well-being. I knew that making an unrestricted report in order to hold my assailant accountable would mean that my commander would be notified and automatically involved in the matters of my sexual assault. That was enough for me to delay my reporting by several days. Despite the potential personal conflict, I trusted in her professionalism and in the system's ability to treat an issue such as sexual assault with objectivity. My trust was misplaced.

The sexual assault occurred on a Sunday, and I reported it on the following Tuesday. On Friday, I was informed that Fort Rucker's Criminal Investigative Division was investigating *me* for adultery with my commander's husband—not even three days after I reported my sexual assault.

My commander's position of authority gave her immediate access to the higher levels of my command, my prosecutor, the investigators, and my cadre members. Prior to my report, my commander contacted the prosecutor who would

eventually be assigned to my case about her personal business—seeking advice for a private investigator to investigate her husband. When her husband came forth as a witness in my case, the prosecutor linked my case to my commander's personal situation.

My commander also had a pre-existing relationship with the installation Commanding General— the two-star convening authority responsible for deciding if my sexual assault case would go to trial. She requested his audience about the matters of her divorce prior to my sexual assault investigation concluding. This too, I believe, hurt my case's ability to move forward to trial.

Unfortunately, I did not have a unit commander who was able to serve in the best interests of a sexual assault victim due to these and several other personal conflicts. The inherent conflict of interest in my chain of command made it impossible for me to have a truly objective case.

Ultimately, my case did not move forward because the system failed to provide me with a conflict-free process I deserved. As for me, I was given a General Officer Memorandum of Record, which was filed in my permanent record and effectively ended my career. A subsequent Army internal investigation into Fort Rucker found that the Command-subordinate relationship in my case showed an obvious conflict of interest which led to a lack of lower level command support for me and confirmed my complaint of feeling isolated. While the finding confirmed what I already knew, it does nothing to give me my career or life back.

I am sometimes asked what we can do together to address military sexual assaults within our ranks. First, we need to believe victims. Believing a victim does not mean charging or convicting the innocent. But the systemic fallacy of victims making false reports and accusations needs to stop. As a survivor, I was plagued by this false belief based on my personal circumstances with my commander's husband. It is absolutely disgusting and absurd that this belief is so common.

Commanders absolutely have a role in addressing sexual assault within their unit. They are still responsible for the good order and discipline, along with decency and respect that comes from their Soldiers. We need to encourage our commanders to act more, when they can, and not expect them to be professional law authorities and experts on the psychological complexities of sexual abuse.

We need to raise our commanders up to speak up, and take action when insensitive or misogynistic comments are made. And reward them when they do.

In my experience, those who utter sexually-inappropriate remarks are more likely to commit acts of sexual violence. If my assailant had been reported on the spot for every misogynistic or sexual comment, he would have been out of the Army long before he had the opportunity and access to rape me.

All I ever wanted is to serve my country, lead American Soldiers, and fly the Apache helicopter. The loss of my military career and my inability to trust larger organizations such as our military, has deeply impacted who I am today. I struggle with accomplishing even minor daily tasks, and my quality of mental and emotional health has greatly deteriorated. I deserved better, and the Army lost a warrior.

I am hopeful that my testimony here today will aid this Committee in continuing to fight the scourge of sexual assault within our ranks.

Thank you again for you time and I will be happy to answer any questions you have.

Angela G. Bapp

U.S. Army Veteran pursuing a Doctor of Chiropractic Degree and a career in Chiropractic Medicine. Graduated with a degree in Biomechanical Engineering in top 3% of class of 2015, West Point, NY. Offers six years of leadership experience in the U.S. Army. Survivor of Military Sexual Assault and advocate of policy reform within the military.

EDUCATION

October 2018 – Present	Palmer College of Chiropractic, Port Orange, FL Doctorate of Chiropractic Program GPA: 4.0
June 2011 – May 2015	The United States Military Academy, West Point, NY BS: Mechanical Engineering, with honors GPA: 3.75
August 2010 – May 2011	Florida State University, Tallahassee, FL Biological Sciences, President's List GPA: 4.0

PROFESSIONAL EXPERIENCE

October 2018 – Present Student of Chiropractic, Palmer College, Port Orange, FL

- Full-time doctorate-level student developing critical thinking, clinical analysis, and application skills. Education focuses on human anatomy, understating complex systems, and providing patient care.

May 2015 – July 2018 United States Army Aviation Officer, Fort Rucker, AL

Aircraft Radio Transmission Operator, June 2017 – July 2018

- Coordinate, direct, and manage medical evacuation helicopters. Communicate with crews under high-pressure real-world medical emergencies.

Advanced Aircraft Training Class Leader, December 2016 – March 2017

- Maintained 100% accountability for sixteen co-workers, managed daily schedules, and coordinated with supervisors while conducting studies and flight operations.
- Operated Boeing's $65M Apache Longbow, applied principals of aerodynamics and aircraft systems to daily flights, and coordinated as an effective crew member.

Organizational Physical Fitness Programmer, June 2016 – December 2016

- Developed, trained, and supervised a comprehensive fitness program for 50+ employees of diverse abilities to increase company morale and physical readiness.
- Identified need for new fitness equipment, compiled master list, and conducted financial analysis and vendor coordination to meet supervisor's budget of $10K.

Initial Rotary Wing Training, August 2015 – May 2016

- Established technical foundation for military and civilian flight operations.
- Led a five-person team through intense military survival, enemy evasion, resistance, and escape training.

Career Note: May 2015 – July 2015. Spent forty days solo travelling to connect with different cultures and build self-confidence and twenty days preparing for flight school while on post-graduation leave.

QUALIFICATIONS

Aug. – Sept. 2015	Basic Leadership Development Course Completion
March 2015	NCEES Fundamental Exam Mechanical Passing Score
Aug. 2014 – May 2015	NSRDEC Sponsored Capstone Group Leader

CERTIFICATIONS

July 2017	CrossFit Level 1 Trainer **Health and Fitness**

Speaking Engagements

U.S. Senate Committee on Armed Services, "Subcommittee on Personnel," March 6, 2019

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Hearing Date: Tuesday, April 2, 2019

Hearing Subject:

Examining the Role of the Commander in Sexual Assault Prosecutions

Witness name: Angela G. Bapp

Position/Title: 1LT, U.S. Army, Ret.

Capacity in which appearing: (check one)

● Individual ○ Representative

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By way of introduction, I am Flora D. Darpino, a retired U.S. Army Lieutenant General. Thank you for giving me the opportunity to discuss with you the role of commanders in the military justice system. I served our nation on active duty for over 30 thirty years as a judge advocate. Throughout my career, I advised commanders, including two deployments to Iraq as a Staff Judge Advocate. I also litigated in military criminal courts and Federal civil courts. I served in a fellowship at the Department of Justice at the start of the Guantanamo Bay detainee cases. I was the Chief of the Criminal Law Division on the Department of the Army staff and Chair of the Joint Services Committee when Congress changed the military's antiquated rape statute. At the time of my retirement in 2017, I had the honor of serving as the 39th The Judge Advocate General of the United States Army. Based upon my experience, I unequivocally believe commanders are essential to the military justice system. And, I firmly believe taking the authority away from the commander to refer serious court-martial offenses to trial will negatively affect the efficiency and effectiveness of the United States military. I hope to succinctly explain my reasoning in this submission.

The commander is responsible to ensure their assigned troops are properly trained and ready for combat. Once in combat, the commander is responsible to ensure their assigned troops follow their orders and lawfully complete their mission. To meet this responsibility, the commander must ensure their assigned troops and equipment are in good order and their troops are disciplined when completing their tasks. Command responsibility to maintain good order and discipline requires a commander to hold accountable troops who do not keep themselves or their equipment in good order and troops who are not disciplined in their actions. These duties of responsibility and accountability are inextricably intertwined in command authority. Legislation that proposes to pull a commander's ability to hold their assigned troops accountable for failing to meet the requirements of good order and discipline breaks the link between command responsibility and the requirement of accountability. In breaking the linkage, command authority is shackled.

As an example, consider Soldiers whose assigned duty is to hold detainees in compliance with the Geneva Conventions. Instead of following the Geneva Conventions, those Soldiers abuse the detainees, including stripping them naked and shocking them with electricity. Upon discovery, Soldiers in the unit would look to the actions of the commander to determine if these detention techniques will be tolerated in combat. The commander, in turn, would understand the need to hold accountable those who violated the law of armed conflict in order to ensure her Soldiers recognized this conduct is not acceptable and it will not go unpunished. The commander is responsible for the troops and good order and discipline and she ensures it through holding accountable those violating the law. This command responsibility cannot be outsourced to a staff officer who does not have command authority. A lawyer assigned to an office cannot enforce the standard; it must be the commander.

And what do we achieve when we allow the lawyer to be the one who holds violators accountable? There is no true benefit. Under the current system, a lawyer is already fully involved in the process. The lawyer reviews the evidence, prepares the charge sheet, and advises the commander on appropriate action. Once sent to courts-martial, the lawyers are responsible to properly conduct the trial. A military judge presides at the trial. Military courts with lawyers review appeals. But what do we lose when we allow the lawyer to be the one who holds violators accountable? We no longer have a commander responsible for both good order and discipline and accountability. We no longer have a commander who holds those who violate the norms accountable by sending the case to court-martial. Commanders no longer have full command authority; they share it with a lawyer.

If the concern is the handling of sexual assault cases, I caution that it is often tempting to try to find a nonexistent quick fix to a complicated problem. But common sense tells me that if the commander's role in military justice was the cause of the problem of sexual assault, then the Rape, Abuse, and Incest National Network (RAINN) and other studies would not report one in six women experience an attempted rape or rape in civilian society where the commander has no role. If having commanders in the system discouraged victims from reporting, the military would not have 43% of their sexual assault reported while civilian society has 25%. And if having lawyers in charge of military justice meant more sexual assault cases would be tried, then RAINN would not report that 995 of 1000 rapist walk free in civilian society where lawyers already run the process.

I submit we need to continue to focus on targeted policies and statutory changes to address sexual assault instead of throwing out a system that has created the best military in the world – troops who are the epitome of good order and discipline in battle. The Congressional focus on the issue of sexual assault has already yielded targeted changes to the system. No longer can a commander fail to refer a case to trial, contrary to the advice of her Staff Judge Advocate, as the case is now reviewed by the Secretary of military service. No longer can a commander fail to refer a sexual assault case to trial, even if consistent with the advice of her Staff Judge Advocate, as it now reviewed by the next higher commander. No longer are military prosecutors sidelined as they may request the Chief Prosecutor of their service review any sexual assault case they believe should go to trial that has not been referred. No longer can a commander overturn a conviction. No longer can a commander freely adjust a sentence.

Victims also now have a stronger voice. They have reporting options that allow them access to assistance they need without involving their command or law enforcement. They have personally assigned lawyers and advocates. They can request their cases be tried in civilian courts instead of military courts. And they can request transfers to a different unit in a different country or state. And these are just a few of the changes made to address sexual assault in the military. There is still more work to be done.

We have identified sexual violence as a serious problem in our society at large. The military continues to conduct surveys and focus groups to help identify the root of the problem. The military continues to coordinate with experts and advocacy groups to help find solutions. We must continue to work to improve our system and the services for those assaulted. And, while the commander's role in military justice is different than the civilian system, we cannot lose sight of the fact that sexual assault is prevalent outside the military where commanders do not exist. Commanders are not the cause but they are essential to the solution. I firmly believe removing the commander from the system could exacerbate the problem. Because the result is the commander will have the responsibility to maintain discipline in her unit but she will no longer have the ability to hold violators accountable.

Lieutenant General Flora D. Darpino, USA (Ret.)

Flora D. Darpino is a retired Army general officer and military lawyer who served as the 39th The Judge Advocate General (TJAG), U.S. Army. General Darpino was appointed as TJAG on September 4, 2013, and served until July 14, 2017, where she was responsible for the Army Judge Advocate General's Corps, an organization with approximately 10,000 personnel. She was also the senior military legal advisor to both the Secretary of the Army and the Chief of Staff of the Army. She is the first woman appointed TJAG since the establishment of the Army in 1775. Prior to being selected as the 39th TJAG, General Darpino served as the Commander, The Judge Advocate General's Legal Center and School, Charlottesville, VA, Commander, The United States Army Legal Services Agency, Fort Belvoir, VA and, Chief Judge, United States Army Court of Criminal Appeals.

Directly commissioned into the Army JAG Corps in January, 1987, she served in a variety of developmental assignments both in Germany and the Washington, DC area, including litigating in both military criminal courts and Federal civil courts. Upon completing her L.L.M, Darpino was sent to be the Chief, Administrative Law, 101st Airborne Division (Air Assault), Fort Campbell, Kentucky. Following a tour at the Office of The Judge Advocate General (OTJAG) in the Washington, D.C. area as the Assistant Executive Officer and Chief, Judge Advocate Recruiting Office, she served as the Staff Judge Advocate, 4th Infantry Division (Mechanized), Fort Hood, Texas, deploying with her unit to Kuwait and Iraq in 2003. Subsequently, she served as the Deputy Staff Judge Advocate, III Corps at Fort Hood, Chief, Criminal Law Division, OTJAG, and Staff Judge Advocate, V Corps, in Heidelberg, Germany. Darpino then deployed to Iraq to serve as the Staff Judge Advocate, United States Forces – Iraq, in Baghdad, Iraq, where she was the senior military attorney in the country working with both the military and State Department.

Darpino graduated from Gettysburg College (B.A. with Honors, 1983) and Rutgers University (J.D. 1986). She has an L.L.M. in Military Law from The Judge Advocate General's School, U.S. Army, and served as an Army War College Fellow at the Department of Justice. She is a member of the Pennsylvania and New Jersey Bars. Her military awards and decorations include the Distinguished Service Medal, Defense Superior Service Medal, the Bronze Star Medal, the Legion of Merit, and the Meritorious Service Medal. She is a graduate of Air Assault School.

DISCLOSURE FORM FOR WITNESSES
COMMITTEE ON ARMED SERVICES
U.S. HOUSE OF REPRESENTATIVES

INSTRUCTION TO WITNESSES: Rule 11, clause 2(g)(5), of the Rules of the U.S. House of Representatives for the 116th Congress requires nongovernmental witnesses appearing before House committees to include in their written statements a curriculum vitae and a disclosure of the amount and source of any federal contracts or grants (including subcontracts and subgrants), or contracts or payments originating with a foreign government, received during the current and two previous calendar years either by the witness or by an entity represented by the witness and related to the subject matter of the hearing. As a matter of committee policy, the House Committee on Armed Services further requires nongovernmental witnesses to disclose whether they are a fiduciary (including, but not limited to, directors, officers, advisors, or resident agents) of any organization or entity that may have an interest in the subject matter of the hearing. Committee policy also requires nongovernmental witnesses to disclose the amount and source of any contracts or grants (including subcontracts and subgrants), or payments originating with any organization or entity, whether public or private, that has a material interest in the subject matter of the hearing, received during the current and two previous calendar years either by the witness or by an entity represented by the witness.

Please note that a copy of these statements, with appropriate redactions to protect the witness's personal privacy (including home address and phone number), will be made publicly available in electronic form not later than one day after the witness's appearance before the committee. Witnesses may list additional grants, contracts, or payments on additional sheets, if necessary. Please complete this form electronically.

Hearing Date: Tuesday, April 2, 2019

Hearing Subject:

Examining the Role of the Commander in Sexual Assault Prosecution

Witness name: Flora D. Darpino

Position/Title: Lieutenant General, U.S. Army (Retired)

Capacity in which appearing: (check one)

● Individual ○ Representative

If appearing in a representative capacity, name of the organization or entity represented:

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Federal Contract or Grant Information: If you or the entity you represent before the Committee on Armed Services has contracts (including subcontracts) or grants (including subgrants) with the federal government, received during the current and two previous calendar years and related to the subject matter of the hearing, please provide the following information:

2019

Federal grant/ contract	Federal agency	Dollar value	Subject of contract or grant
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2018

Federal grant/ contract	Federal agency	Dollar value	Subject of contract or grant
N/A			

2017

Federal grant/ contract	Federal agency	Dollar value	Subject of contract or grant
N/A			

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2019

Foreign contract/ payment	Foreign government	Dollar value	Subject of contract or payment
N/A			

2018

Foreign contract/ payment	Foreign government	Dollar value	Subject of contract or payment
N/A			

2017

Foreign contract/ payment	Foreign government	Dollar value	Subject of contract or payment
N/A			

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Organization or entity	Brief description of the fiduciary relationship
SWAN	Secretary, Board of Directors

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2019

Contract/grant/ payment	Entity	Dollar value	Subject of contract, grant or payment
N/A			

2018

Contract/grant/ payment	Entity	Dollar value	Subject of contract, grant or payment
N/A			

2017

Contract/grant/ payment	Entity	Dollar value	Subject of contract, grant or payment
N/A			

RECORD VERSION

STATEMENT BY

LIEUTENANT GENERAL CHARLES N. PEDE
THE JUDGE ADVOCATE GENERAL
UNITED STATES ARMY

BEFORE THE

SUBCOMMITTEE ON MILITARY PERSONNEL
COMMITTEE ON ARMED SERVICES
UNITED STATES HOUSE OF REPRESENTATIVES

FIRST SESSION, 116TH CONGRESS

SEXUAL ASSAULT PROSECUTION AND THE ROLE OF THE COMMANDER

APRIL 2, 2019

NOT FOR PUBLICATION UNTIL RELEASED BY THE
COMMITTEE ON ARMED SERVICES

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

Chairwoman Speier, Ranking Member Kelly, and members of the Subcommittee on Military Personnel, 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. 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. But, as the National Security Strategy wisely recognizes, "America's military has no preordained right to victory."

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 our DNA. In my professional view, taking away a commander's decision over discipline—including when appropriate, the decision to prosecute felony 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 and increased the tools available to commanders. Working closely with Congress, additional reforms within the Army, such as the Special Victim Prosecutor, Special Victim Teams, and the Special Victim Counsel program changed the landscape of accountability and improved the administration of justice. Within this framework, leaders developed a robustly resourced and 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 last 10 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 12 weeks ago.

Commander Authority and Accountability

An expeditionary Army requires a justice system that is portable, swift, and local. 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 offenses like disrespect or disobeyance of an order.

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.

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. We must remember it is commanders who send these cases to trial by court-martial, and often, panels of officers and enlisted members—not lawyers—judge them. These courts-martial not only hold the individual Soldier accountable—they send a clear message about the type of conduct expected of American Soldiers on the battlefield. This is a commander's message—not a lawyer's message. If it was to become a lawyer's message—as respected as uniformed lawyers are—the character of the expectations for our Soldiers will change over time. Simply put, we don't have to experience this devolution in order to understand that it will, with inexorable certainty, happen. This is what experience tells us.

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 – over the inconvenience of trying a case deployed - 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, trust, 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 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, and if they do that they are addressed

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. 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—is 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 non-uniformed 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 just 12 weeks ago. 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. Although sexual assault is a society-wide problem that demands a society-wide culture change, in the military, commanders drive the culture. Commanders, therefore, are our best solution.

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.

The Judge Advocate General
U.S. Army
Lieutenant General Charles N. Pede

Lieutenant General Charles N. Pede graduated from The University of Virginia receiving a commission through R.O.T.C. He thereafter attended the University of Virginia Law School. Lieutenant General Pede holds a LL.M in Military Law and a Masters Degree in National Security and Strategic Studies. He attended the Judge Advocate Officer Basic and Graduate Courses, the Army Command and General Staff College, and the Industrial College of the Armed Forces.

Lieutenant General Pede most recently served as the Assistant Judge Advocate General for Military Law and Operations at Headquarters, Department of the Army in the Pentagon, Washington, DC. His previous assignments include: Trial Defense Counsel, Mannheim Field Office, Germany; Chief, Criminal Law, and Chief, Administrative & International Law, 21st Theater Army Area Command, Mannheim, Germany and Army Forces-Turkey; Chief, Military Justice, 10th Mountain Division (Light Infantry), Fort Drum, New York and OPERATION RESTORE HOPE, Mogadishu, Somalia; Professor of Law, Criminal Law Department, The Judge Advocate General's Legal Center and School, Charlottesville, Virginia; Assignments Officer, Office of The Judge Advocate General; Assistant Executive Officer, Office of The Judge Advocate General, Washington, DC; Staff Judge Advocate, 10th Mountain Division (Light Infantry), Fort Drum, New York and Joint Task Force Mountain and Combined Joint Task Force-180, OPERATION ENDURING FREEDOM, Afghanistan; Legislative Counsel, Office of the Chief Legislative Liaison, Pentagon, Washington, DC; Chief, Criminal Law Division, Office of The Judge Advocate General; Staff Judge Advocate, United States Forces Iraq, OPERATION IRAQI FREEDOM, Baghdad, Iraq; Chief, Criminal Law Division, Office of The Judge Advocate General; Executive Officer to The Judge Advocate General of the Army, Washington, DC; Commander, United States Army Legal Services Agency and Chief Judge, United States Army Court of Criminal Appeals, Fort Belvoir, Virginia; and Commander of The Judge Advocate General's Legal Center and School in Charlottesville, Virginia.

Lieutenant General Pede's awards include the Defense Superior Service Medal, the Legion of Merit with three Oak Leaf Clusters, the Bronze Star with Oak Leaf Cluster, and the Meritorious Service Medal with six Oak Leaf Clusters. He is also entitled to wear the Parachutist Badge and the Army Staff Identification Badge.

Lieutenant General Pede is married and has one son.

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HOUSE ARMED SERVICES COMMITTEE

STATEMENT OF

VICE ADMIRAL JOHN G. HANNINK, U.S. NAVY

JUDGE ADVOCATE GENERAL

BEFORE THE

SUBCOMMITTEE ON MILITARY PERSONNEL

OF THE

HOUSE ARMED SERVICES COMMITTEE

ON

EXAMINING THE ROLE OF THE COMMANDER IN SEXUAL ASSAULT

PROSECUTIONS

APRIL 2, 2019

NOT FOR PUBLICATION
UNTIL RELEASED BY THE
HOUSE ARMED SERVICES COMMITTEE

Chairwoman Speier, Ranking Member Kelly, thank you for the opportunity to speak with you about my perspectives on the role of the commander in the adjudication of sexual assault cases.

I will address three topic areas. First, I will outline the process within which Navy commanders make disposition decisions on sexual assault cases. Second, I will describe the experience and training of these commanders. Third, I will offer observations to help you assess whether removing commanders from their role is likely to result in decreasing the prevalence of sexual assault, increasing the reporting of sexual assault incidents, or improving case disposition decisions.

The Process for Investigating and Adjudicating Sexual Assault Cases

A. Reporting

Victims of sexual assault have many ways to report. If desired, they can confidentially report the incident as a "restricted report," which may be made to a Sexual Assault Response Coordinator, a Victim Advocate, a Deployed Resiliency Counselor, or a medical provider. Restricted reporting is intended to allow a victim to access medical care and other services without requiring that law enforcement be made aware of the report.

Victims may also submit an "unrestricted report." Unrestricted reports may be made to the same entities that can receive restricted reports. In addition, unrestricted reports can be submitted directly to law enforcement organizations (Naval Criminal Investigative Service (NCIS) or base security), to an inspector general, to a chaplain, to someone in their chain of command. Any report of sexual assault that comes to a commander's attention must be treated as an unrestricted report and must be provided to NCIS. Commanders have no authority to ignore a report of sexual assault.

B. Investigation

Reports of sexual assault must be investigated by NCIS, which is an independent investigative organization that reports to the Secretary of the Navy. Commanders are required to cooperate in any NCIS investigation, and have no authority to direct how NCIS Special Agents conduct the investigation, collect evidence, or scope the investigation.

C. Prosecution Review

The Navy Judge Advocate General's Corps has nine Region Legal Service Offices (RLSOs), each with a Trial Department that provides independent prosecution support to NCIS and to commanders in their respective geographic areas of responsibility. A Special Victim Investigation and Prosecution (SVIP)-trained prosecutor is assigned in every Special Victim Crimes (SVC) case, either as lead counsel, assistant counsel, or supervisory counsel. Assignment occurs within the first 24 to 48 hours of report of the SVC case to the RLSO. NCIS is required to notify the local RLSO within 24 hours of the report of a SVC case, and within 48 hours the NCIS Case Agent is required to collaborate with an SVIP-trained prosecutor. The assigned prosecutor maintains a close relationship with the investigating agents, and tracks all active cases through an internal case management system database.

After receiving an investigation from NCIS, the prosecutor reviews the case and prepares a recommendation for the disposition authority. For cases involving penetrative sexual assault, the disposition authority – known as Sexual Assault Initial Disposition Authority (SAIDA) – must be an officer in the grade of O-6 who has special court-martial convening authority.

The RLSO practice is to provide a written Prosecutorial Merit Review (PMR) to SAIDAs for each sexual assault case. Victim input on disposition is solicited and included for consideration by the RLSO and the disposition authority. The RLSO PMR provides an outline of the case and offers an in-person briefing on the case. If the prosecutor recommends <u>not</u> preferring charges, the

PMR additionally describes the basis for that recommendation. PMRs that contain a recommendation not to prefer charges in cases involving penetrative sexual assault must be signed by the RLSO Commanding Officer (a command-screened O-6 judge advocate); in other cases, the PMR may be signed by the Senior Trial Counsel.

The RLSO objective is to ensure the disposition authority decision is informed by a thorough and independent prosecutor's assessment. Because the RLSOs report directly to the Deputy Judge Advocate General, commanders have no authority to control the RLSO case assessment or recommendation.

D. The Disposition Decision

RLSO recommendations are not binding on the disposition authority. In addition to the prosecutor's assessment, SAIDAs consult a Staff Judge Advocate (SJA). This SJA, whether or not a member of the SAIDA's staff, can help the SAIDA understand the prosecutor's assessment and also bring in perspectives that may be offered by the Victims' Legal Counsel (in addition to the RLSO's consideration of the victim's input as part of the PMR process) or a defense counsel for the person accused.

Since 2015, the UCMJ has restricted court-martial jurisdiction for the most serious sexual assault offenses – those involving penetration – to a general court-martial. After preferral of charges that may be tried at a general court-martial, a Preliminary Hearing Officer conducts an Article 32 preliminary hearing and submits a written report to the SAIDA, accompanied by comments and recommendations from the prosecutor. If the SAIDA determines that referral to a general court-martial is appropriate, the case is forwarded to the general court-martial convening authority with a recommendation for referral. The general court-martial convening authority considers the report of the Preliminary Hearing Officer along with any endorsements and

recommendations, as well as independent advice from his or her SJA, prior to deciding whether to refer charges to a general court-martial. Article 34, Uniform Code of Military Justice (UCMJ) provides that a convening authority may not refer charges to a general court-martial unless the SJA advises in writing that there is probable cause to believe the accused committed the offense charged. Further, convening authority decisions not to refer charges involving penetrative sexual assault are subject to higher level review under provisions instituted by the fiscal year 2014 NDAA. If the SJA recommends referral and the general court-martial convening authority declines to refer such a charge, the Secretary of the military department must review the case. And if the SJA recommends not referring a charge and the convening authority agrees, the case must be reviewed by the next superior commander authorized to convene general courts-martial.

If the SAIDA declines to forward penetrative sexual assault charges to the general court-martial convening authority, offenses other than penetrative sexual assault may be referred to a special court-martial or disposed of through other administrative measures such as nonjudicial punishment, an administrative separation board for enlisted personnel, or a Board of Inquiry for officers. The SAIDA may also decline to take any punitive or administrative action in a case. Following conclusion of any sexual assault case, whether through the military justice process, administrative measures, or no action, the case disposition is recorded in a Sexual Assault Disposition Report, and the victim is notified.

In making disposition decisions, commanders are aided by the non-binding disposition guidance issued by the Secretary of Defense pursuant to Article 33, UCMJ, as amended by section 5204 of the Military Justice Act of 2016 (fiscal year 2017 NDAA). The disposition guidance provides factors for consideration related to the disposition of charges, and several are worthy of specific note. First, consultation with a judge advocate is encouraged in every case (and, by

separate regulation, is required in all penetrative sexual assault cases pursuant to the Secretary of Defense's Memorandum of 20 April 2012). Second, the guidance clearly states that probable cause must exist for each charge referred to a court-martial. This protects the accused by ensuring commanders and judge advocates consider whether the probable cause threshold is met before a court-martial prosecution proceeds. Third, the guidance provides a list of factors that should be considered related to the "interests of justice and good order and discipline." Broadly grouped, these factors encourage a commander to consider, in consultation with a judge advocate:

- Whether admissible evidence will likely be sufficient to obtain and sustain a conviction in a trial by court-martial, input from law enforcement agencies involved in the case, and the truth-seeking function of a court-martial.
- In cases involving a victim under Article 6b, UCMJ, the views of the victim as to disposition, the extent of harm caused to the victim, and the availability of the victim and other witnesses to testify.
- The accused's criminal history or history of misconduct, the probable sentence or other consequences to the accused of a conviction, and the impact and appropriateness of alternative disposition options with respect to the accused's potential for continued service and the responsibilities of the command with respect to justice and good order and discipline.
- The mission-related responsibilities of the command; whether the offense took place in wartime, combat, or contingency operation; the nature, seriousness, and circumstances of the offense and the accused's culpability in connection with the offense; and the effect of the offense on the morale, health, safety, welfare, and good order and discipline of the command.

The guidelines also identify inappropriate considerations including political pressure to take or not take specific actions in a case, the possible effects of the disposition determination on their own career or personal circumstances, and personal feelings concerning the accused, or any victim or witness in the case.

Review of the above guidance in relation to the military justice system shows the important role of commanders, who have the fundamental responsibility of ensuring good order and discipline within their units.

Experience and Training of the Commanders Involved

Under guidance issued by the Secretary of Defense, only commanders in the rank of O-6 and who are authorized to convene special courts-martial are authorized to make an initial disposition decision in a penetrative sexual assault case. The authority to convene general courts-martial is even more limited, generally held by flag officers in command. In the Navy, most general courts-martial are convened by Navy Region Commanders.

These officers are **experienced**. Generally, O-6s in command have between 20 and 30 years of military experience and have held command on more than one occasion, and flag officers have between 25 and 35 years of experience. They are used to working in teams. Promotion and command screening boards evaluate a prospective commander's past performance, character, personal conduct, and their ability to lead personnel from widely varying backgrounds.

Commanders are **specially trained**. Each commander is required to attend Naval Leadership and Ethics Center's resident course for prospective commanding officers which focuses on communication skills, self-awareness, ethical standards, teamwork, and command climate to increase overall leadership effectiveness. All O-6 commanders are also required to

attend the Senior Leader Legal Course at the Naval Justice School, and many O-5 commanders also attend. All Region commanders receive Navy Sexual Assault Prevention and Response program training that includes a legal brief, program policy briefs, and orientation to the Chief of Naval Operations' Culture of Excellence campaign that combats a range of destructive behaviors, including harassment and sexual assault. Then, upon taking command, each commander is trained in person by a judge advocate and Sexual Assault Response Coordinator on retaliation, sexual assault initial disposition authority, and case disposition reporting requirements should a sexual assault allegation involve a member of their command, whether as perpetrator or victim.

Commanders are **constantly assessed and evaluated**. Within 120 days of assuming command, a Defense Organizational Climate Survey administered by the Defense Equal Opportunity Management Institute is conducted, with annual surveys of command climate thereafter. The survey results are reported to an immediate superior in command. Commanders are also constantly assessed by their warfare communities to ensure necessary certifications, capabilities, and readiness.

Considering the Role of the Commander in Sexual Assault Cases

When considering positive ways to reform military justice practice, and especially in considering what the role of the commander should be in military justice cases involving sexual assault allegations, some relevant questions are these: Would removing commanders' convening authority contribute to decreasing the prevalence of sexual assault in the military? Would it increase the reporting of sexual assault incidents? Would it improve case disposition decisions?

Congress established the Response Systems to Adult Sexual Assault Crimes Panel (RSP) as an independent Federal Advisory Committee to assess, among other issues, whether

commanders should continue to exercise their convening authority role in the military justice system. In its June 2014 Report, the RSP stated that "[t]he evidence does not support a conclusion that removing authority to convene courts-martial from senior commanders will reduce the incidence of sexual assault or increase reporting of sexual assaults in the Armed Forces" (22).

In particular, the RSP looked at the experiences of our allies. Israel, Canada, Australia, and the United Kingdom's militaries have each taken steps to remove aspects of convening authority from the chain of command, and none have seen a connection between those reforms and sexual assault reporting rates (Chair, Role of the Commander Subcommittee Memorandum for Members of the Response Systems Panel, 6 November 2013 at 3). To be clear, each of these countries removed such authorities from the chain of command over concern that their justice systems did not fully protect the rights of the accused. Nevertheless, the Commodore of Naval Legal Services Britain's Royal Navy saw "no discernible" effect on sexual assault reporting despite Britain's 1996 reforms removing convening authority review and prosecution authority from commanders, and subsequent civilianization of judgeships in 2006 (3). Israel, Canada, and Australia have each adopted variations on the independent prosecutor system (1-2), and yet none could identify discernible trends in how these actions affected reporting in the subsequent years (3-4). The Director General, Australian Defence Force Legal Service estimated that 80% of sexual assaults in their armed forces still went unreported between 2008 and 2011, following reforms to remove commanders' convening authority in 2003 and 2006 (3-4).

For our military, I am inclined to seek the input of the constituents we are trying to reach: victims of sexual assault. In an effort to do so, I regularly consult with our Victims' Legal Counsel Program (VLCP) leadership, who maintain awareness of the needs of the program's

client base. Our VLCP leaders tell me that their clients have concerns that affect their decision whether to report, but commanders making disposition decisions is not significant among them. Victims are concerned about retaliation, which we have and must engage further with improved understanding, policies, and advocacy. Victims are concerned about safety, which we have vowed to ensure through monthly case oversight meetings, military protective orders, and expedited transfers. Victims are concerned with having to relive their trauma, which we aim to minimize by ensuring access to medical and mental health services and advocacy. Our VLCP leaders report that victims often do not realize that commanders make disposition decisions on cases when they choose to report; this is an education challenge to be sure, but it also shows that removing commanders from their role as convening authorities is unlikely to increase reporting.

The Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (DAC-IPAD) convened with the purpose of offering an independent analysis of how the military justice system handles penetrative sexual assault offenses against an adult victim. The DAC-IPAD Case Review Working Group released a report on March 27, 2019. In a thorough review of a 164-case sample from fiscal year 2017, a majority of the reviewers determined that the commander's disposition decision regarding the penetrative sexual assault complaint was reasonable in 95% of cases (DAC-IPAD Third Annual Report, March 2019, at 29). The report explains that the remaining 5% "do not necessarily constitute cases in which charges should have been preferred," or not preferred, if they had been preferred; "rather, the reviewers felt they would need to consider more information before they could adequately evaluate whether the disposition decision was reasonable... However, the committee felt that such an endeavor would be unnecessary, since review of the 164 cases from the random

sample reveals no sign of systemic problems with the reasonableness of commanders' decisions on whether to prefer charges in cases involving a penetrative sexual assault" (30).

DAC-IPAD's Case Review Working Group continues in its work to identify trends in investigations, identify factors that may affect commanders' disposition decisions, and assess whether those decisions were reasonable. This independent analysis of 2,069 investigations in which a service member was accused of committing a penetrative sexual assault offense against an adult victim is the kind of detailed review – based on real cases – that can help answer the important questions, "How are we doing?" and "What changes should be considered?" This is especially vital as we execute the broad changes of the Military Justice Act of 2016 and seek to identify the impact that this law will have on sexual assault reporting and prosecution. Going further, results from DAC-IPAD and other information can be taken into account in future comprehensive reviews of the Uniform Code of Military Justice required by Article 140, UCMJ. Legislation mandates that the first such review is to be conducted is in fiscal year 2021, with subsequent reviews taking place during fiscal year 2024 and every eight years thereafter.

Readiness to Learn and Adapt

My focus as the Judge Advocate General is on implementing the comprehensive changes to the UCMJ that took effect on January 1, 2019. I am focused on the continued professionalization and development of our Victims' Legal Counsel Program, the Military Justice Litigation Career Track, and our Special Victim's Investigation and Prosecution capabilities. I am focused on driving down investigation and prosecution timelines through cooperation with NCIS. I am focused on contributing to the prevention of sexual assault by supporting the Chief of Naval Operations' Culture of Excellence initiatives and learning from other initiatives like the National Discussion on Sexual Assault to be held at the Naval Academy later this week. And I am ready

and willing to partner with any organization or entity to learn how we can enhance our effectiveness.

Vice Admiral John G. Hannink
Judge Advocate General
Judge Advocate General's Corps

Vice Adm. John G. Hannink is a 1985 graduate of the U.S. Naval Academy. He completed pilot training at Naval Air Station Kingsville, Texas. While assigned to Sea Control Squadron (VS) 33, he deployed to the Western Pacific and Indian Ocean onboard USS Nimitz (CVN 68). He served as the squadron's public affairs officer, quality assurance officer and nuclear safety officer.

Hannink then entered the Navy's Law Education Program, and graduated from Baylor Law School in 1994. He later earned a Master of Laws in International Law from George Washington University Law School.

Hannink has completed several assignments within Naval Legal Service Command (NLSC) and the Office of the Judge Advocate General (OJAG). NLSC assignments include personal representation attorney and prosecutor at Naval Station San Diego, and commanding officer of Region Legal Service Office Southeast. OJAG assignments include general litigation attorney, and executive assistant to the deputy judge advocate general and the judge advocate general.

He also served as assistant judge advocate general (Operations and Management) and chief of staff, Region Legal Service Offices.

Hannink's staff and operational experience includes deputy staff judge advocate (SJA) for U.S. 5th Fleet, SJA for U.S. 2nd Fleet, special assistant to the Secretary of the Navy, deputy legal counsel to the Chairman of the Joint Chiefs of Staff, special counsel to the Chief of Naval Operations, and SJA for U.S. Pacific Command. He also served as a fellow on the Chief of Naval Operations Strategic Studies Group, Newport, Rhode Island.

Hannink served from 2015-2018 as the deputy judge advocate general of the Navy and commander, Naval Legal Service Command. As commander, Naval Legal Service Command, he led the judge advocates, enlisted legalmen and civilian employees of 14 commands worldwide, providing prosecution and defense services, legal assistance services to individuals and legal support to shore and afloat commands.

Hannink is the 44th judge advocate general of the Navy. Hannink is the principal military legal counsel to the Secretary of the Navy and Chief of Naval Operations. He also leads the 2,300 attorneys, enlisted legalmen and civilian employees of the worldwide Navy JAG Corps community.

Hannink is a member of the state bar of Texas. His military awards include the Defense Superior Service Medal, the Legion of Merit and the Meritorious Service Medal.

Updated: 17 September 2018

DEPARTMENT OF THE AIR FORCE PRESENTATION

TO THE SUBCOMMITTEE ON MILITARY PERSONNEL

COMMITTEE ON ARMED SERVICES

UNITED STATES HOUSE OF REPRESENTATIVES

SUBJECT: EXAMINING THE ROLE OF THE COMMANDER IN SEXUAL ASSAULT PROSECUTIONS

STATEMENT OF:

LIEUTENANT GENERAL JEFFREY A. ROCKWELL
THE JUDGE ADVOCATE GENERAL, UNITED STATES
AIR FORCE

April 2, 2019

NOT FOR PUBLICATION UNTIL RELEASED BY THE
COMMITTEE ON ARMED SERVICES
UNITED STATES HOUSE OF REPRESENTATIVES

Lieutenant General Jeffrey A. Rockwell

Lt. Gen. Jeffrey A. Rockwell is The Judge Advocate General, Headquarters U.S. Air Force, Arlington, Virginia. In that capacity, General Rockwell serves as the Legal Adviser to the Secretary and Chief of Staff of the Air Force, and all officers and agencies of the Department of the Air Force. He directs all judge advocates in the performance of their duties and is responsible for the professional oversight of more than 2,200 judge advocates, 350 civilian attorneys, 1,400 enlisted paralegals and 500 civilians in the Total Force Judge Advocate General's Corps worldwide, overseeing military justice, operational and international law, and civil law functions at all levels of Air Force command.

General Rockwell entered the Air Force through the Direct Appointment Program in June 1987. He has served as the Deputy Judge Advocate General, Commander of the Air Force Legal Operations Agency, and as a Staff Judge Advocate five times. He has written on several national security law matters, advancing Department of Defense and United States government interests on a variety of topics to include: Military Justice; United States government liability for civilian use of the Global Positioning System; customary international law; European Union law; rule of law development in Romania; the Solidarity movement in Poland; an interagency legal capability for rule of law development and State-Building; and the politics of strategic aircraft modernization. He has also authored several chapters in the DoD Law of War Manual, the Army Operational Law Handbook, and the Air Force Operations and the Law Handbook, in addition to contributing to the Tallinn Manual on International Law Applicable to Cyber Operations, and current efforts to publish manuals on international law applicable to military uses of outer space.

EDUCATION
1984 Bachelor of Science, Accounting, summa cum laude, West Virginia University
1987 Juris Doctor, West Virginia University
1992 Squadron Officer School, Maxwell Air Force Base, Ala., by correspondence
1994 Air Command and Staff College, Maxwell AFB, Ala., by seminar
1996 Master of Laws, Air and Space Law, Dean's Honours List, McGill University, Montreal, Canada
2001 Air War College Maxwell AFB, Ala., by correspondence
2007 Master of Science, National Security Strategy, National War College, Fort McNair, Washington, D.C.

ASSIGNMENTS
June 1987 – January 1989, Assistant Staff Judge Advocate, 437th Air Base Group, Charleston Air Force Base, S.C.
January 1989 – September 1992, Deputy Staff Judge Advocate, 406th Tactical Fighter Training Wing, Zaragoza Air Base, Spain
September 1992 – June 1994, Labor Counsel, General Litigation Division, Air Force Legal Services Agency, Washington, D.C.
June 1994 – August 1995, Trial Attorney, General Litigation Division, Air Force Legal Services Agency, Washington, D.C.
August 1995 – August 1996, LL.M. Student, McGill University, Montreal, Canada
August 1996 – June 1998, Deputy Chief, Operations Law, International and Operations Law Division, Washington D.C.
June 1998 – June 2001, Staff Judge Advocate to the Defense Attaché and Commander-in-Chief, Pacific Command Representative to Australia, U.S. Embassy, Canberra, Australia
June 2001 – July 2003, Staff Judge Advocate, 48th Fighter Wing, RAF Lakenheath, U.K.
July 2003 – July 2004, Director of Staff, 48th FW, RAF Lakenheath, U.K.
July 2004 – July 2005, Chief, Military Justice Division, Air Force Legal Services Agency, Washington, D.C.
July 2005 – July 2006, Executive to The Judge Advocate General, Headquarters U.S. Air Force,

Arlington, Va.
July 2006 – June 2007, Student, National War College, Fort McNair, Washington, D.C.
June 2007 – June 2008, Staff Judge Advocate, Air Force Special Operations Command, Hurlburt Field, Fla.
June 2008 – July 2012, Staff Judge Advocate, U.S. Air Forces in Europe, Ramstein AB, Germany
July 2012 – May 2013, Staff Judge Advocate, Air Force Space Command, Peterson AFB, Colo.
May 2013 – May 2014, Commander, Air Force Legal Operations Agency, Joint Base Andrews, Md.
May 2014 – May 2018, Deputy Judge Advocate General, Headquarters U.S. Air Force, Arlington, Va.
May 2018 – present, The Judge Advocate General, Headquarters U.S. Air Force, Arlington, Va.

MAJOR AWARDS AND DECORATIONS
Distinguished Service Medal
Legion of Merit with oak leaf cluster
Defense Meritorious Service Medal
Department of State Meritorious Honor Award
Meritorious Service Medal with four oak leaf clusters
Air Force Commendation Medal with oak leaf cluster

EFFECTIVE DATES OF PROMOTION
First Lieutenant 29 June1987
Captain 29 Dec. 1987
Major 1 April 1995
Lieutenant Colonel 1 Aug. 2000
Colonel 1 April 2005
Major General 22 May 2014
Lieutenant General 18 May 2018

(Current as of January 2019)

Chair Speier, Ranking Member Kelly, distinguished members of the Subcommittee; thank you for the opportunity to talk with you about the important role of the commander in how we combat sexual assault in the Air Force.

I. The National Security Strategy, the National Defense Strategy, and Discipline. Military commands, led by **commanders**, are responsible for executing our National Defense Strategy to defend the Nation and, when called upon, win America's wars. Throughout our history, we have defended the Nation, fought and won our wars because of four simple yet key components: first, the best people; second, the best training; third, the best equipment; and fourth, the most important element that binds together the other three—**discipline**. Discipline lies at the heart of command and control, with commanders directing Airmen, armed with the best training and equipment, to execute our national defense mission. Discipline is commanders' business, since commanders have the ultimate responsibility to build, maintain and lead the disciplined force necessary to succeed in combat across multiple domains. Discipline makes the force ready. Discipline makes the force lethal.

To build this disciplined force to execute these missions, the **military justice system works to strike a careful constitutional balance** between all competing equities in the process, including the respect for and protection of the rights of victims of crime, and the rights of an accused. Based on years of experience, we know that a fully-empowered commander, advised and guided by judge advocates trained in the professions of law and arms, is the right approach to achieve this balance. That balance is best struck when, at every critical juncture of the process, a commander is armed with the relevant facts, including victim input, and advised by a judge advocate before making a decision on the next critical step in the process.

Good order and discipline is best met when command operates and executes to change behavior and hold Airmen accountable across the **entire continuum of discipline**, from prevention efforts in setting standards, duties, and command climate on the left side of the continuum, to the response of courts-martial on the right side when standards aren't met, and to operating and executing discipline everywhere in-between. This disciplinary continuum embodies the concepts of unity of command, unity of effort, and command and control needed to build a ready, lethal and disciplined force to execute the missions the Nation asks of us.

Judge advocates, as **members of both the professions of law and of arms**, are duty bound and committed to the principles that have enabled our country's system of laws and our military to thrive. We are duty-bound to a constitutionally sound and fair military justice system, committed to uphold the purpose of the military justice system and military law as captured in the Preamble to the Manual for Courts-Martial, "to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States." These first three – 'promoting justice, maintaining good order and discipline, and promoting efficiency and effectiveness' – although sometimes competing are inexorably linked. The three come together to provide what the Nation asks of us, to 'thereby strengthen the national security of the United States.' With these principles as our guide, we attack the scourge of sexual assault in our ranks.

II. Progress to Date. Over the last several years, this committee and Congress have been instrumental in our efforts to improve military justice, particularly with regard to rape, sexual assault and related offenses. You have focused the system to be more fair and timely, to appropriately address allegations of misconduct and foster progressive discipline designed to deter and rehabilitate wrongdoing, to respect the dignity of victims of crime, to protect the rights of accused, and to maintain the trust of Airmen and the American people.

The Services fully implemented the **Military Justice Act of 2016, effective 1 January 2019**, in the Manual for Courts-Martial and their respective Service policies. The Act is the **most significant overhaul of the military justice system** since 1983 and **preserves the foundational principle of the commander as convening authority.** The Act affects the entire spectrum of court-martial proceedings and other disciplinary proceedings. These sweeping changes to our military justice system will have significant impacts and we are still determining the long term effects, both positive and negative, on the overall effort to strengthen discipline and maintain the integrity of processes. We will continue to ensure the system and changes are properly challenged at trial and appellate levels to make certain that these changes are correct as a matter of law. As with previous legislation, it will take time to fully realize the effects of these changes as the system requires time to properly evaluate their impact. Often new legislation comes at such a rapid pace, it limits our ability to see and properly assess the results of changes made one,

two, or sometimes three years earlier. For example, Article 120 of the Uniform Code of Military Justice itself has undergone multiple substantive changes over the last several years. This has led to increased sexual assault litigation at the trial court level, the Services' Courts of Appeal, and the Court of Appeals for the Armed Forces. By ensuring the new legislation is valid through transparent judicial review, we ensure trust, confidence and reliability in the system.

Given commanders' critical and central role in this process, we have increased our **training** to ensure they are better prepared to exercise their authorities. Before taking command, all squadron, group, vice and wing commanders receive intensive legal training. This ensures they fully understand their responsibilities under the Uniform Code of Military Justice and Manual for Courts-Martial. All officers receive similar training at every level of their professional military education, throughout their careers, as do all senior enlisted and enlisted members.

Over the last several years, safeguards have been incorporated and gaps closed to **maximize legal advice during every key phase or decision point of a case, through investigation, adjudication and final disposition.** 10 United States Code Sections 806 and 8037, the statutory authorities of The Judge Advocates General, ensure that this critical legal advice remains independent. Commanders do not make military justice decisions in a vacuum. Their decisions are informed and evidentiary standards are applied at each stage of the process with the advice of a staff judge advocate, along with input from a prosecutor, victim, and accused. The attachment, *Military Justice Decision-Making Process*, walks through in detail how we accomplish this in the Air Force.

A critical component of our fight against sexual assault in the military has been our quest to build trust and confidence in victims. We know that **victims must be empowered in the process**. Survivors must believe that their privacy will be protected under the law and that they can regain a sense of control in their lives. Sexual assault is a personal violation and victims must be heard without having the prosecutorial process leave them feeling further victimized. Victims must know that they have a voice in the process before a disposition decision is made. In 2013, the Department created and staffed the Nation's first large-scale effort to provide trained attorneys to victims of sexual assault. The program was designed to give victims the help, support, advice, and tools they need to enable them to pursue what is in their best interests,

endure, and thrive. We believe the Special Victims' Counsel (SVC) Program has been a great success. SVCs deliver privilege-protected, victim-centered advice and advocacy through comprehensive, independent representation to sexual assault victims worldwide, assist them in obtaining support and recovery resources, and promote greater confidence in the military justice process and the United States Air Force. SVCs help champion victims' rights by representation at law enforcement interviews, trial and defense counsel interviews, pre-trial hearing, in trial and on appeal. They help enforce victims' rights to safety, privacy, and the right to be treated fairly and respectfully. As a testament to SVC capability and quality of service, in Fiscal Year 2018, according to our Air Force Victim Impact Surveys, 100% of responding victims were satisfied with their SVC representation and virtually 100% would recommend SVC representation to others. SVCs have become a vital teammate in our Sexual Assault Prevention and Response efforts.

III. Command-Based Military Justice. Removing command authority from this process would have a **negative effect on military discipline and readiness** while jeopardizing ongoing efforts to combat sexual assault through a holistic, command-based approach across the continuum of discipline, prevention and response.

Every day, across the spectrum of prevention, and response, we are committed to finding new solutions and approaches, being accountable and being transparent. Every Airman, from the commander down to the most junior member, is responsible for fostering and reinforcing a culture of respect and dignity in which criminal acts will not be tolerated. Commanders set the tone for their unit, and given their unique position and responsibilities, are best postured to significantly reduce sexual assault from our ranks. Unlike any other institution in the United States, military commanders have not only the legal authority but also the moral authority to set standards and enforce them. In the military, commanders and command authority are the solution, not the problem.

While every commander employs their command authority to effectuate change, create the proper climate, and enforce standards, only a select few of our most senior, experienced commanders decide which cases go to trial. Commanders are selected based in part on their education, training, experience, length of service, temperament, judgment, and decision-making

ability. Because of these qualities, commanders are entrusted with the authority and the responsibility to ensure a disciplined fighting force consistent with military standards, American values, and established expectations. Commanders are trained in the military justice system, and checked and balanced with independent legal advice as they execute their decision-making responsibilities to ensure they are upholding standards and the military justice system. If commanders do not meet standards, they are held accountable for their actions or inaction by superior commanders.

Removing commanders as a central disposition authority for offenses under the Uniform Code of Military Justice **sends conflicting messages to our Airmen and dilutes the holistic approach** required to achieve good order and discipline in a military organization. If commanders are trusted with the decision to send Airmen into harm's way, where command judgment may cost lives, they must also be trusted to discipline and hold accountable those who commit offenses. Responsibility to uphold the broad system of laws set out in the Uniform Code of Military Justice and Manual for Courts-Martial is not an additional duty; it is interwoven into the concepts of unity of command and unity of effort. Unity of command and unity of effort are indispensable elements of authority in a military unit and critical to achieve the mission. It is fundamental for our Airmen to have no doubts about who will hold them accountable for mission performance and adherence to standards, 24/7, both on and off duty. Furthermore, commanders are naturally incentivized to eliminate misconduct within the unit long before it metastasizes into criminal conduct as they operate across the continuum of discipline. Furthermore, bifurcation of jurisdiction over offenses would not only diminish the unity of the command efforts, but **would most likely delay processing of cases**, with the attendant negative effects all of concerned parties.

Evidence shows that the current system of command accountability, supported by highly-professional judge advocates, is essential to the military justice system. A Congressionally-formed and independent panel, the **Response Systems to Adult Sexual Assault Crimes Panel (RSP)**, studied the question and--after a year-long, deep and substantial review--concluded that commanders, advised by judge advocates, are best positioned to handle disposition decisions. Discussion of this issue should account for the vital and integral role of the staff judge advocate, who advises the commander throughout the life of a case, from report and investigation to

adjudication and disposition. Each disposition decision by a convening authority concerning a sexual assault case is subject to multiple levels of review by superior staff judge advocates and convening authorities.

A commander-based disciplinary system, with direct, candid and independent legal advice, is indispensable to building a ready, disciplined force to execute mission. Ultimately, experience indicates that commanders are well-positioned for the oversight, review, disposition and adjudication of cases because they also have responsibility and sensibilities for the larger national security efforts that military justice exists to support.

IV. In Conclusion. Our holistic focus on preventing and responding to sexual assault has seen promising results with increases in victims reporting and seeking services, as further evidenced by an increase in investigations, trial and appellate litigation, and accountability. When it comes to preventing and responding to misconduct and criminal behavior within our ranks, our work must continue. Our next steps, I believe, should focus on addressing evolving issues of retaliation, collateral misconduct, timeliness in investigations and adjudications, and education on the specific and general deterrent effect generated by the cases tried.

While there has been much progress, we, as judge advocates, remain committed to survivors of criminal acts like sexual assault. We remain committed to Airmen. And, we remain committed to providing sound, independent legal advice to our commanders in a military justice system that has made us the most ready, lethal and disciplined force in the world. Thank you for hearing us today.

2 Attachments:

1. Military Justice Decision-Making Process
2. Oversight, Involvement and Review of Military Justice Actions in the U.S. Air Force

Attachment 1: Military Justice Decision-Making Process

In the Air Force, squadrons, groups and wings located at installations around the world are our organizational building blocks. Wings and installations are generally under the command of a Numbered Air Force, and in turn a Major Command. Convening authorities are commanders authorized to convene courts-martial for serious violations of the Uniform Code of Military Justice. In the Air Force generally, wing commanders are Special Court-Martial Convening Authorities and numbered air force and center commanders are General Court-Martial Convening Authorities. Thus, the authority to make court-martial disposition decisions is limited to senior commanders who must receive advice from judge advocates before determining appropriate resolution. With this in mind, we provide the following overview of how cases are generally administered by commanders, advised by judge advocates at every step of the process. It is a process founded on due process with checks and balances at every step.

The installation or wing legal office is led by the Staff Judge Advocate who is the principal legal advisor to the convening authority. Both the Staff Judge Advocate and the Deputy Staff Judge Advocate are selectively assigned leaders who often have litigation experience in military justice, to include previous experience as trial counsel, Area Defense Counsel, and, often as Circuit Defense Counsel or Circuit Trial Counsel. Each military justice program at the installation level is further managed by a Chief of Military Justice who works for the SJA and whose primary responsibility is to oversee and manage the investigation and prosecution of courts-martial.

When an installation judge advocate, normally the Chief of Military Justice, becomes aware of a criminal allegation through law enforcement or a representative from the subject's command, the judge advocate or Chief of Justice assists with the investigation. Once the Staff Judge Advocate determines an allegation may result in a court-martial, the Staff Judge Advocate details a trial counsel who works the case in a prosecutorial capacity from investigation to conclusion. This approach leverages the "vertical prosecution model" and promotes consistency, reduces the risk of lost information, and enhances relationships with victims of crime. The vertical prosecution model was promoted under the *Child Abuse, Domestic Violence, Adoption and Family Service Act of 1992.*

During the investigative process, an installation judge advocate provides constant advice and feedback to the investigative agency conducting the investigation. Judge advocates also assist investigators by developing lines of investigation, discussing elements of relevant criminal offenses, providing assistance on evidentiary issues, and securing evidence through means such as subpoenas and search authorizations. In investigations involving complex criminal allegations like sexual assault, a Circuit Trial Counsel from the Air Force's cadre of prosecutors with the most experience in complex litigation, assist by providing advice in investigation development and potential charging considerations for any future criminal disciplinary action. For cases involving an allegation of sexual assault, this model of constant engagement is required as part of the Special Victims Investigation and Prosecution capability mandated in the National Defense Authorization Act for Fiscal Year 2013.

A victim may choose to communicate with investigators, judge advocates, and command through the Special Victims' Counsel. Airmen accused of a crime are provided an experienced Area

Defense Counsel, and in cases involving serious misconduct a Circuit Defense Counsel, free of charge to assist them. The defense counsel will frequently communicate on behalf of the accused to judge advocates, investigators, and members of command throughout the process.

Throughout the investigation, the installation Staff Judge Advocate remains responsible for updates and receives feedback from his or her functional chain of command, which includes the Numbered Air Force and Major Command Staff Judge Advocates. These updates are also provided through the command chain, as well as to the relevant entities and experts within the Air Force Legal Operations Agency, who serve as reach-back for the field, oversee the justice process, and advise The Judge Advocate General of the Air Force on the status of military justice cases. The installation judge advocates continue to coordinate with the Circuit Trial Counsel on the investigation and case development. The installation Staff Judge Advocate will also provide regular updates on the status of the investigation to the convening authority, commanders, and other interested members of command throughout the investigative process.

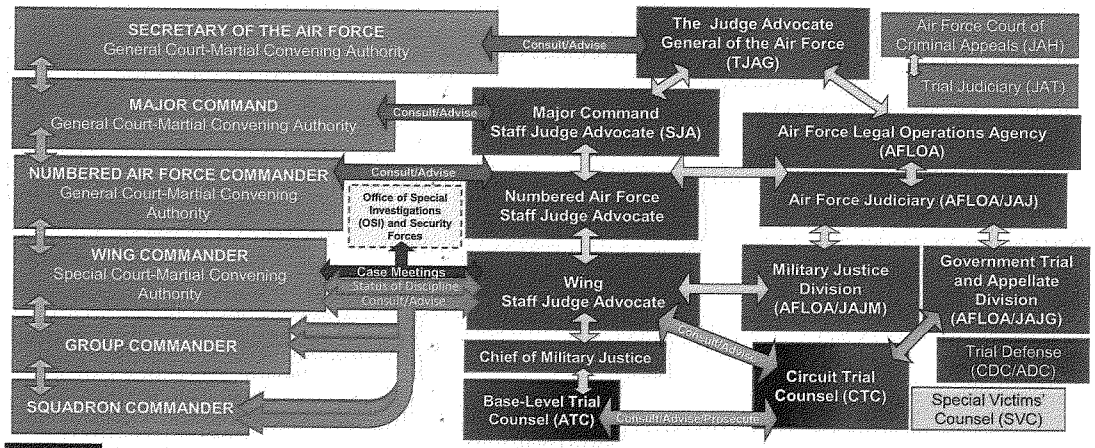
Once an investigation is complete, the investigation is reviewed with the subject's command. The commander, with the advice of a judge advocate, makes the final decision on disposition unless disposition authority has been withheld by a superior commander. The commander, advised by the Staff Judge Advocate, has the full benefit of any views communicated by any Circuit Trial Counsel or other judge advocate who has previously advised on the case during the investigatory stage. The input of any victim on disposition is communicated to command either through the judge advocate or, if involved, a Special Victims' Counsel. The command also considers any information provided by the defense counsel prior to disposition. If trial by court-martial is determined to be the appropriate disposition, an installation judge advocate, advised by a Circuit Trial Counsel in complex cases, drafts the charges and forwards them to the member's commander for preferral of charges. For sexual assault cases, charges must be reviewed by a Circuit Trial Counsel prior to preferral. The draft charges are also typically vetted through the General Court-Martial Convening Authority's Staff Judge Advocate, generally located at a Numbered Air Force, prior to preferral.

The Staff Judge Advocate advises the Special Court-Martial Convening Authority on whether subsequent referral of the preferred charges to a court-martial is appropriate. If a general court-martial is recommended, the Special Court-Martial Convening Authority, with the advice of his or her Staff Judge Advocate, will direct a preliminary hearing in accordance with Article 32 of the Uniform Code of Military Justice. The preliminary hearing is conducted by an independent experienced judge advocate, and in cases of sexual assault, a military judge is usually detailed. The installation Staff Judge Advocate ensures any views of the victim regarding disposition are communicated to the convening authority. Ordinarily, a Circuit Trial Counsel is assigned, if they had not been assigned sooner, to ensure he or she is available for all significant developments in the case. In the case of an anticipated general court-martial, upon conclusion of the preliminary hearing, the charges are forwarded to the General Court-Martial Convening Authority. Before making a recommendation on referral, the Staff Judge Advocate will provide the convening authority pretrial advice. This advice often includes input from the Circuit Trial Counsel or other judge advocates involved in this case. The standard of review for cases under Rule for Courts-Martial 601(d) is that there is probable cause to believe that an offense triable by a court-martial has been committed and that the accused committed it. Upon referral to a court-martial, the Staff Judge Advocate formally details trial counsel to the court-martial. This counsel is generally a judge advocate located at the installation and, as noted above, who has been involved in the

development of the investigation and case prior to appointment ensuring continuity in the prosecution. At the conclusion of any trial, the installation legal office personnel involved in the case review each with the Circuit Trial Counsel and investigators, as applicable, to identify best practices and areas for improvement in future cases.

This process of advice and action continues in the post-trial, convening authority action, and appellate phases, with the Staff Judge Advocate continuing to advise the convening authority at every decision point and stage of the process. See the Attachment 2 graphic, *Oversight, Involvement and Review of Military Justice Actions in the U.S. Air Force.*

Oversight, Involvement, and Review of Military Justice Actions in the U.S. Air Force



***Purpose of Military Law*: To promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby strengthen national security.**

Commanders are responsible for good order and discipline. Each commander has independent, yet overlapping personal discretion to dispose of offenses within the limits of that officer's authority. Commanders are selected based in part on their education, training, experience, length of service, and temperament. They are entrusted with the authority and the responsibility to ensure a disciplined fighting force consistent with military standards, American values, and established expectations. A superior commander who disagrees with a subordinate commander's proposed course of action may dispose of the matter at his or her own level.

JAT/JAH: Protect rights of Airmen and the Military Justice System

Wing-level commanders are periodically briefed by the SJA and OSI/Security Forces on pending cases and disciplinary issues. OSI coordinates and works with ATC/CTC throughout investigation as appropriate.

All wing-level commanders attend Status of Discipline (SOD) briefings to discuss completed justice actions and discipline.

Each level of command is advised by an experienced SJA, selectively assigned by TJAG, who keep commanders informed on ongoing cases.

SVCs: Represent sexual assault Victims world-wide

CDCs/ADCs: Defend Airmen world-wide

All ongoing justice cases are reported and monitored through the Automated Military Justice Analysis and Management System (AMJAMS). AMJAMS is used by judge advocates inside and outside command channels up through JAJM, JAJG, and JAJ to identify military justice issues and trends.

CTCs are assigned to regional Circuit Offices under JAJG and detailed to prosecute complex/complicated cases. CTCs work support base offices on military justice cases, to include training base-level counsel and litigating courts-martial requiring their expertise.

NOT PUBLIC UNTIL RELEASED BY THE
HOUSE ARMED SERVICES COMMITTEE

STATEMENT

OF

MAJOR GENERAL DANIEL J. LECCE

STAFF JUDGE ADVOCATE TO THE COMMANDANT OF THE MARINE CORPS

BEFORE THE

HOUSE ARMED SERVICES COMMITTEE

SUBCOMMITTEE ON MILITARY PERSONNEL

CONCERNING

"EXAMINING THE ROLE OF THE COMMANDER IN

SEXUAL ASSAULT PROSECUTIONS"

ON

2 APRIL 2019

NOT PUBLIC UNTIL RELEASED BY THE
HOUSE ARMED SERVICES COMMITTEE

INTRODUCTION

Madam Chair Speier, Ranking Member Kelly, and distinguished Members of the Subcommittee, thank you for the opportunity to testify today.

The past 15 years have seen the Uniform Code of Military Justice (UCMJ) undergo significant changes. These changes were necessary to safeguard victims' rights, ensure commanders were aware of their responsibilities, and guarantee counsel were qualified to handle complex sexual assault cases. The Military Justice Act of 2016, contained the most sweeping reforms to the UCMJ since its inception. Like all the Services, the Marine Corps is in the midst of implementing these changes.

My remarks today will begin with a discussion of Marine Corps sexual assault prevention and response measures, followed by an explanation of specialized training for Marine Corps judge advocates. In addition, I will describe the structure of the Marine Corps legal community and how that structure facilitates response mechanisms within the Marine Corps. I will then address the importance of retaining the commander in the military justice system. Finally, I will address the Marine Corps coordinated efforts over the past two years in addressing all forms of retaliation, including ostracism and bullying, which are of particular concern as these forms of misconduct often occur via social media. All of these efforts are individually and collectively focused on preventing sexual assault through increased awareness, intervention, victim support, reporting, thorough investigation, and the imposition of just accountability.

SEXUAL ASSAULT PREVENTION

Sexual assault is a stain on the honor of every Marine and the eradication of sexual assault, through training, is a top priority for the Marine Corps. The Marine Corps conducts comprehensive and specialized training across all ranks to ensure that all leaders have a clear

understanding of sexual assault prevention. This training promotes leadership action within the scope of each leader's responsibility. For example, Marine Corps "*Take A Stand*" training for Non-Commissioned Officers (NCOs) focuses on leadership action specific to NCO roles and responsibilities. *Take A Stand* training builds skills and characteristics primarily focused on the prevention of sexual assaults, such as effective communication techniques, empathy, by-stander intervention, and the fostering of healthy relationships.

Marines of all ranks receive annual training on the laws and policies governing sexual assault, reporting options, and retaliation. Sexual assault prevention training was recently enhanced to include small-group discussions and practical application exercises. Additionally, Marine Corps commanders receive specialized training on sexual assault prevention and response, as described below.

SEXUAL ASSAULT RESPONSE

Judge advocates in the Marine Corps play a prominent and important role in assisting commanders in responding to allegations of sexual assault. The education, training, and qualifications judge advocates obtain is critically important in responding to sexual assault allegations.

Ensuring Expert Litigation Training. Sexual assault cases are complex and require experience and expertise. The Marine Corps ensures expert litigation of sexual assault cases through both manning and training. Legal services, including litigation support, is provided through four Legal Services Support Sections (LSSS), each responsible for a geographic region. To litigate sexual assault cases, each region is able to capitalize on specialized resources, such as Regional Trial Counsel, Complex Trial Teams, Regional Trial Investigators, and Civilian Litigation Attorney Advisors.

The Marine Corps strives to develop and maintain skilled litigators. Central to this effort is our Master of Laws (LL.M.) degree program for criminal law. There are currently 62 Marine judge advocates with an LL.M. in criminal law. These Marines hold key leadership billets across the trial services, defense services, and victims' legal counsel organizations. Board-selected judge advocates receive their criminal law LL.M. from the Army's Judge Advocate General's Legal Center and School (TJAGLCS) or a civilian law school accredited by the American Bar Association. Judge advocates who obtain an LL.M. in criminal law receive the Additional Military Occupational Specialty (AMOS) of 4409, identifying them as uniquely qualified to serve in supervisory military justice billets and complex litigation billets wherein they handle special victim cases. Marines are eligible to pursue an LL.M. in criminal law as either a captain or a major, but only Marines serving in the grade of major and above are awarded the AMOS. This ensures that these judge advocates have a high level of maturity and experience—approximately 10 years of service for a major—in addition to specialized education.

The Marine Corps also assigns an AMOS to military judges. The military judge AMOS 4411 is awarded to Marines who are screened and certified by the Judge Advocate General of the Navy and are graduates of the Military Judge's Course at TJAGLCS. The AMOS ensures those performing the duties of military judge possess the requisite education, experience, and temperament, while also allowing for more effective tracking, assignment, and career development.

Prosecution of Sexual Assault Cases. Sexual assault cases are among the most challenging cases to prosecute. Due to the complexity of prosecuting sexual assault cases, the Marine Corps established a multi-disciplinary team to handle sexual assault allegations.

All trial counsel (TC) must meet the minimum requirements for Special Victim Investigation and Prosecution (SVIP) before being detailed to prosecute a sexual assault case. The minimum requirements a TC must have are:

- At least 6 months of services as a TC;
- Have prosecuted a SPCM as lead counsel, or a GCM as Assistant TC;
- Completed the Naval Justice School Article 32 Officer course;
- Served as Assistant TC during a special victim case;
- Attended an intermediate level trial advocacy training course; and,
- Received a recommendation from their leadership.

Each Regional Trial Counsel (RTC), who is the senior prosecutor within a given geographic region, also maintains a Complex Trial Team (CTT) built to prosecute the most complex sexual assault cases. The CTTs are comprised of SVIP-qualified attorneys, a senior legal services chief, a legal administrative officer, and a Regional Trial Investigator (RTI). The RTIs are law enforcement experts imbedded into the prosecution offices for the purposes of facilitating the prosecutors' continuing investigations and communication with Military Criminal Investigation Organizations (MCIOs). The CTT plays an important role not only for the prosecution of complex cases, but also for the mentorship of junior judge advocates.

Each region also benefits from the advice and guidance provided by Civilian Litigation Attorney Advisors (LAA). LAAs are civilian attorneys who possess extensive experience and expertise in the field of prosecuting special victim cases. The LAAs are stationed across the Marine Corps and each LAA is assigned to an RTC. The LAAs collaborate with TCs on the preparation of case analysis memos, charging documents, witness interviews, and affirmative and responsive government motions. They also help identify expert witnesses and help organize evidence to improve case presentation. Additionally, the LAAs work closely with the RTC and Marine Corps Trial Counsel Assistance Program (TCAP) to develop training and education programs for Marines seeking SVIP qualification.

TCAP is a program run from Judge Advocate Division at Headquarters Marine Corps, led by a major holding an LL.M. in criminal law. The mission of TCAP is to assist and train TCs on the full range of prosecution tasks, including pre-trial investigation, general trial advocacy, post-trial actions, and professional responsibility. Trial Counsel have 24/7 access to TCAP personnel and the TCAP web portal. TCAP also conducts an annual week-long SVIP training event focused on the best practices for prosecuting sexual assault at court-martial.

Victims' Legal Counsel (VLC). The Marine Corps established its Victims' Legal Counsel Organization (VLCO) in 2013 to provide legal representation to qualifying victims. The VLCO is comprised of 18 active duty full-time judge advocates and is headed by an O-6 judge advocate who serves as the Officer-In-Charge (OIC). Assisting the OIC is the Deputy OIC and four supervisory Regional Victims' Legal Counsel (RVLC). These counsel are distributed across the same four LSSS regions as their TC and defense counsel counterparts.

Marine Corps VLCs attend the Special Victims' Counsel Certification training at either TJAGLCS or the Air Force Judge Advocate General's School (TJAGS). Marine VLCs also receive specialized training on representing child victims, attend the annual VLCO training symposium, and participate in local quarterly training. In addition, VLCs have the opportunity to attend other military and civilian training courses throughout the year, including courses at the National Advocacy Center, the National Computer Forensics Institute, and the Naval Justice School. The VLCO also provided victim-specific legal training during Judge Advocate Division-directed MJA16 training, including instruction on the changes in victims' rights and training on Article 6b of the UCMJ, the Privacy Act, and Military Rules of Evidence 412 and 513.

Selection of Marine Corps VLCs includes a thorough nomination, screening, interview, and vetting process. This process satisfies the Department of Defense requirement that individuals

considered for VLC positions undergo an "enhanced screening" process before selection, including a review of the nominee's military record and background to ensure that the nominee does not have a disqualifying investigative or criminal record.

VLCs provided legal services to approximately 713 victims during FY18, including initial counseling and guidance. Of these victims, approximately 85% were victims of sexual assault, while approximately 15% were victims of other crimes, including domestic violence. The VLCO assisted approximately 655 and 661 victims in FY17 and FY16, respectively.

Defense Services. The American criminal justice system is based upon fundamental fairness to all involved in the process. Like its prosecutorial counterpart, the Marine Corps Defense Services Organization (DSO) provides legal services through the employment of teams of defense counsel (DC) located at each installation.

The Defense Counsel Assistance Program (DCAP) is the primary source for training Marine Corps DCs. A major possessing an LL.M. in criminal law leads DCAP, along with two civilian LAAs. The DCAP directly supports DCs in the field and advises on complex motions and best practices. DCAP maintains a secure website available to all personnel assigned to the DSO, this website includes a discussion forum where counsel can post questions and provide feedback in real-time, a motions database, copies of court rulings, standard forms and advice, and a variety of trial advocacy tools and templates.

DCAP also maintains a training program requiring counsel to attend formal week-long training events, such as Defense Counsel Orientation, Basic Trial Advocacy, and Defending Sexual Assault Cases courses. These Marine Corps specific training efforts are supplemented through civilian trial advocacy courses offered by the National Criminal Defense College, the Trial Lawyers College, and the National Association of Criminal Defense Lawyers. This training program ensures

DSO judge advocates possess the knowledge and experience needed to provide high quality representation in complex sexual assault cases.

Integrating Legal Resources in Responding to Sexual Assault. All members of the Marine Corps legal community are integrated in appropriate stages of the sexual assault response process. Whether the initial report is restricted or unrestricted, the Marine Corps will assign a VLC to ensure victims are advised on and able to assert their legal rights. In the case of unrestricted reports, the Staff Judge Advocate (SJA) advises the convening authority on command legal responsibilities related to providing support for victims and ensuring a fair and impartial military justice process for alleged offenders.

When advising a commander, the SJA receives input from the SVIP trial counsel, the Senior Trial Counsel, Regional Trial Counsel, and LAA. This team will provide factual detail and analysis for all sexual assault cases through consultation and completion of a Case Analysis Memorandum (CAM). The purpose of a CAM is to enable and enhance the advice of the SJA to a convening authority on the disposition decision through careful evaluation of the evidence in a case and potential charges. A CAM analyzes the type and strength of evidence in a particular case. In March 2018, the Marine Corps made significant improvements to the CAM process, which closely mirrors the practices and standards employed by federal civilian and state prosecutors. A CAM is required in all cases involving death, infliction of grievous bodily harm, or any sex offense. Additionally, the CAM must record the victim's preference regarding jurisdiction and disposition.

Protecting victims is an integral part of a commander's responsibility. All sexual assault response coordinators and victim advocates are required to inform victims on resources available to report retaliation, to request a transfer, and to request a Military Protective Order. Additionally, the Case Management Group (CMG), led by each installation commander and comprised of the

victim's commander, the unit's Sexual Assault Response Coordinator, the victim advocate, an NCIS representative, the SJA, the VLC, and a senior TC, meets monthly to address any concerns about retaliation or other victim concerns. Finally, VLCs have been instrumental in proactively working with commanders on behalf of victims to assist in eliminating retaliation by advocating for clients.

ROLE OF THE COMMANDER

The commander is ultimately responsible and accountable for the morale, welfare, good order, and discipline of his or her unit. This responsibility and accountability extends to every aspect of the command, including warfighting readiness and effectiveness and the discipline of the unit.

Marine Corps commanding officers are chosen through a rigorous selection process, based on merit and a career of outstanding performance. Commanders are entrusted with the Marine Corps' greatest asset, the individual Marine. Commanders must instill trust and confidence that offenders will be held accountable, victims will receive full support, and the military justice process will be fair and just. The commander is invested in ensuring due process for both victims and the accused.

Marine Corps commanders receive training at the Senior Officer Course and the "Cornerstone: The Commandant's Combined Commandership Course (Cornerstone)." The Senior Officer Course is provided by staff from the Naval Justice School located in Newport, RI. This training is open to company commanders, battalion- and squadron-level (and higher) legal officers, and senior enlisted Marines. During the three days of the course, attendees receive numerous hours of focused legal instruction, including at least two hours devoted to responding to sexual assault cases.

In addition, Marine Corps commanders also attend Cornerstone. This course is offered twice a year and attendance is mandatory for commanders either prior to or shortly after assuming command. During Cornerstone, the attendees receive a three hour block of instruction on legal issues, to include updates regarding victims' rights and military justice. The period of instruction is divided into a one-hour block of classroom instruction followed by a two hour block of scenario-based discussion led by a colonel (O6) and assisted by senior judge advocates in the rank of lieutenant colonel (O5) or major (O4).

The Military Justice Act 2016 (MJA16) represented a sea change to the military justice system, bringing significant change to the court-martial process. Many of these changes involved the enhancement of existing protections for victims throughout the military justice process. During 2018, the Marine Corps legal community completed a phased-training plan which included 24 hours of in-person instruction on the MJA16 changes. The training included significant instruction focused on protecting victim's rights, as well as preventing and punishing retaliation. Further, all staff judge advocates were required to train General Court-Martial and Special Court-Martial convening authority on changes to the law. A few of the significant MJA16 changes are: The creation of Article 132, criminalizing retaliation; a provision in Rule for Court-Martial 405 imposing greater restrictions on how evidence regarding a victim's sexual behavior or predisposition can be used at preliminary hearings; and, additional rules and procedures focusing on protecting a victim's privacy and ensuring victims have the right to be heard.

It is important to emphasize a commander is not making disposition decisions of sexual assault allegations in a vacuum. The commander is advised by his or her SJA, an experienced judge advocate well versed in the military justice system and able to advise the commander on the full spectrum of legal actions required during and after the investigation. Judge Advocates are involved throughout the entire sexual assault response process and their advice and support to commanders is

integral. For all unrestricted reports of sexual assault, a Marine Corps trial counsel works closely with the commander and criminal investigators to ensure unity between the investigative and prosecutorial functions of the military justice system.

Finally, in 2014, the Congressionally appointed Response Systems to Adult Sexual Assault Crimes Panel (RSP) studied and issued a report on the proposed concept of removing a commander's ability to respond to allegations of sexual assault within their unit. The RSP concluded there is no evidence that removing commanders from sexual assault cases will result in positive or negative consequences.

ADDRESSING RETALIATION

The Marine Corps has extended its holistic approach to sexual assault prevention into assessing and addressing retaliation for reports of sexual assaults and other crimes. Following widely-publicized social media incidents, the Commandant established both Task Force Purple Harbor and the Talent Management Executive Council (TMEC). Task Force Purple Harbor focused on initial responses to social media misconduct, including discrimination, harassment, and retaliation. The Task Force coordinated policy, focus, and resources across the Marine Corps. The work of the Task Force included a detailed assessment of over 150 initiatives impacting nearly every Marine Corps practice and program, from investigations of sexual harassment at the unit level to further integration of females in boot camp. The TMEC complements Task Force Purple Harbor efforts by harnessing senior leadership perspectives and experience in determining on how best to implement Task Force Purple Harbor efforts.

New punitive order addressing deplorable activities and conduct. Eliminating retaliation was a core concept integral to both the Task Force and TMEC. After careful review and staffing, the

Commandant published the Prohibited Activities and Conduct (PAC) order, Marine Corps Order 5354.1E. This order addresses a wide spectrum of conduct including bullying, ostracism, hazing, discrimination, sexual harassment, social media misconduct, dissident activities, and retaliation against victims or those who report criminal offenses. The PAC order requires commanders to investigate all complaints, protect complainants from retaliation, conduct follow-up assessments for substantiated and unsubstantiated dispositions, and to measure effectiveness of command implementation through regular surveys.

The PAC order was a major step forward in Marine Corps efforts to identify destructive and abusive conduct and hold offenders accountable through administrative, disciplinary, and criminal charges, where appropriate. The PAC order is an important part of our effort to further enhance a culture where sexual assault and retaliation are not tolerated.

CONCLUSION

Supported by the legal community, Marine Corps commanders are focused and ready to address the crime of sexual assault. The commander's role in the military justice process is fundamental to ensuring the preservation of good order, discipline, and welfare in the Marine Corps. As a result, commanders must remain central to the process. Marine Corps judge advocates support the commander in every step of the military justice process with advice and legal services support. I am committed to ensuring the Marine Corps legal community continues to be best manned, trained, and equipped to support commanders in addressing sexual assault and eliminating it from our ranks. I look forward to working with Congress to meet our goals.

Major General Daniel J. Lecce
Staff Judge Advocate to the Commandant of the Marine Corps

Major General Daniel J. Lecce was born and raised in Pittsburgh, Pennsylvania. He is a 1984 graduate of the University of Pittsburgh and was commissioned a Second Lieutenant in the United States Marine Corps in 1986. He received his Juris Doctorate from the University of Pittsburgh School of Law in 1987.

He first served at Camp Pendleton, California, where he was assigned as civil law attorney and trial counsel. He later served as the Commanding Officer, Headquarters and Service Company, Marine Corps Base, Camp Pendleton. He was transferred to the 3rd Force Service Support Group, Okinawa, Japan, in 1992 and served as a legal assistance attorney and trial counsel. Major General Lecce next served as an Assistant Professor, United States Naval Academy (Leadership and Law), from 1993 to 1996. He was selected and attended the Judge Advocate General of the Army School from which he received a Masters of Law in Operational and International Law in 1997.

In 1997 Major General Lecce was transferred to 1st Force Service Support Group at Camp Pendleton, California, where he served as Senior Defense Counsel and Officer-in-Charge of Legal Assistance. In 1999 he deployed as the Staff Judge Advocate, 15th Marine Expeditionary Unit, and participated in the United Nations' Operation Stabalise (East Timor) and Operation Southern Watch (Persian Gulf). He was later transferred to Norfolk, Virginia, and served as Deputy Staff Judge Advocate, United States Marine Corps Forces, Atlantic, from 2000-2003.

In 2003, Major General Lecce was selected and served as the Commanding Officer, B Company, Marine Security Guard Battalion (United Arab Emirates) responsible for all Marine detachments posted at United States embassies and consulates throughout the Middle East and the Indian subcontinent. He left command in 2005 to serve as the Branch Head, Operational and International Law, Office of the Staff Judge Advocate to the Commandant, Headquarters, U.S. Marine Corps. In 2006 Major General Lecce was selected as the Marine Fellow to Johns Hopkins University School of Advanced International Studies. He graduated with a Masters of International Public Policy in 2007 and was designated a Regional Area Officer (Middle East/North Africa).

He was assigned as the Staff Judge Advocate, 2d Marine Aircraft Wing, in 2007. In 2009 Major General Lecce deployed with II Marine Expeditionary Force (Forward) in support of Operation Iraqi Freedom. After returning to the United States in 2010, Major General Lecce served as the Commanding Officer, Marine Corps Base, Camp Lejeune. After command, he served as the Staff Judge Advocate to the Combatant Commander, United States Southern Command (SOUTHCOM).

He assumed duties as the Assistant Judge Advocate General, Military Justice, in June 2014, overseeing all courts-martial appellate litigation within the Department of the Navy and military justice policy for the Navy. In July 2018, Major General Lecce was promoted to his current rank and assumed the billet of Staff Judge Advocate to the Commandant of the Marine Corps.

His personal awards include the Defense Superior Service Medal, the Legion of Merit, the Meritorious Service Medal, and the Navy-Marine Corps Commendation Medal.

DOCUMENTS SUBMITTED FOR THE RECORD

April 2, 2019

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United States Senate

March 18, 2019

The Honorable Patrick Shanahan
Acting Secretary of Defense
1000 Defense Pentagon
Washington, DC 20301-1000

Dear Acting Secretary Shanahan,

Thank you for your commitment at last week's Senate Armed Services Committee (SASC) hearing to partner with me to tackle sexual assault in the military through a focused effort of experts and military leaders. Thousands of sexual assaults continue to be reported each year, yet very few are held accountable at trial. Although much effort has been put towards prevention and response to military sexual assault, these numbers are just intolerable.

As an Air Force Academy graduate; 26-year military veteran; former squadron commander; and military sexual assault survivor myself, I have a unique perspective on this issue. I strongly believe we cannot take responsibility away from commanders due to the unique role commanders play in culture, readiness, good order and discipline, and mission. ***However, we cannot accept the status quo.*** SASC will be marking up the National Defense Authorization Act (NDAA) in the coming weeks, and we need to explore new initiatives and changes that will make a difference immediately and permanently.

Sexual assault is a crime that is often difficult to prove in civilian and military courts even if reported right away. However, based on my own experiences in the military and on testimony from others, I believe we need to take a fresh look at how these crimes are investigated and prosecuted in the military to ensure the highest chance of success while preserving due process for both the victim and the accused. I have already been engaging with the Air Force Secretary, Chief of Staff, TJAG, and IG on this topic, but we shouldn't limit solutions and ideas to just one military service.

To that end, I request an opportunity to speak with you right away to discuss this matter further. I also request you form a Task Force comprised of myself, representative experts from all military services, and specialized civilian experts, to take a deep dive into this issue. I ask that this Task Force begin meeting immediately with a goal of having recommendations ready for SASC NDAA committee markup. I also request that the Task Force meet the week of March 25 with me personally in order to gauge progress on ideas and reviews.

Thank you for your commitment to combat sexual assault in the military. There are many other aspects in prevention, education, and development of commanders, culture, retaliation, and other topics we must explore as well—but let's start by taking a fresh look at how these crimes are investigated and prosecuted, and by whom, to increase the chances that justice may be served.

I look forward to hearing back from you immediately due to the urgency of this matter.

Sincerely,

Martha McSally

Martha McSally
U.S. Senate

QUESTIONS SUBMITTED BY MEMBERS POST HEARING

April 2, 2019

QUESTIONS SUBMITTED BY MS. SPEIER

Ms. SPEIER. How feasible is it for your service to develop an independent prosecution chain, along the lines of the Marines' reform?

General PEDE. An independent prosecution chain—as I understand the question—is not feasible—and I do not view the Marine Corps as having such a system. If the intent is to have an independent rating scheme, Army prosecutors are already rated by legal supervisors. While some of those supervisors are rated by commanders or a chief of staff, the prosecutors themselves are supervised by lawyers. In accordance with both Army regulations and The Judge Advocate General's Corps policy, all trial counsel have at least two, more senior, judge advocates in their rating chain; exceedingly few trial counsel rating chains also include a commander. Moreover, the Army's special victim prosecutors are always rated only by other judge advocates and not by the commanders they advise. In short, Army trial counsel are already almost wholly supervised by judge advocates, and not commanders. The Army organizes to best meet its unique combat responsibilities in support of the joint force. The Army is also unique among the services—it tries as many courts-martial as the other Services combined, and it tried more than 800 cases in a deployed setting from 2003 to 2011. Ensuring these requirements are met requires the flexible assignment of Army prosecutors. Finally, it is a requirement of law—both arising from statute and the code of professional responsibility—as well my own expectation, that every judge advocate, trial counsel or not, will offer the best legal advice possible in support of their client, whether that client be the U.S. government, a Soldier, or a Family member, independent of the interests of any specific commander or unit.

Ms. SPEIER. What happens when a prosecutor's ethical and legal expertise contradict commanders' opinions? What happens when justice demands that case be brought forward, and the prosecutor is unable to because the commander refuses to act?

General PEDE. In 31 years of active duty service, I have yet to encounter this situation—and therefore counsel against any policy change that uses this basis as a cause for change. As judge advocates and commanders have repeatedly testified before congressional oversight committees, they cannot think of a case in which a Staff Judge Advocate recommended referral of charges to courts-martial and the commander refused, triggering statutorily required review by the service secretary required by Section 1744 of the Fiscal Year 2014 National Defense Authorization Act. A commander's decision whether to prosecute a case is informed by an ongoing dialogue with his or her judge advocate. When necessary, that dialogue can be extended up the chain of command and along the judge advocate technical chain. There is almost never a disagreement that cannot be resolved in this process. If there is, there is a process for that—Section 541 of the Fiscal Year 2015 National Defense Authorization Act permits a local prosecutor to send a case to the Army's chief prosecutor for review and, if necessary, referral to the Secretary of the Army for action.

Ms. SPEIER. Two weeks ago, the Department of Defense Inspector General released a report revealing that in 77 of 82 cases reviewed, DOD officials either did not ask or did not document that they asked victims of sexual assault whether they want cases prosecuted in military or civilian courts. Why did this failure occur? Can you each commit to me that your services will rapidly put in place a system to ensure victims are asked whether they prefer their cases to be tried in civilian or military courts?

General PEDE. I disagreed with the findings in the Department of Defense Inspector General (DOD IG) report. The DOD IG equated a failure to document the victim's preference with the failure to ask about that preference. The law does not require documentation and therefore the report's conclusions are misleading. In all but a few cases reviewed, we demonstrated that we had, indeed, asked the victim their preferences and those cases were resolved in the forum the victim supported. Additionally, Special Victim Counsel represented all but a few of the victims. That said, the Army moved beyond the requirements of Section 534 of the Fiscal Year 2015 National Defense Authorization Act statute and beginning in 2018, required

memorialization of the victim's preference. It is also worth noting, as the DOD IG report did, that the statute as drafted raises multiple practical concerns with its implementation. For instance, when a civilian prosecutor's office with jurisdiction declines to prosecute a case early in the investigation, it effectively means there is no option for a civilian prosecution. Yet, in that circumstance, the statute requires the victim to be asked to express a preference when there is no real choice. This is not practical and it is not helpful to a victim. Finally, when a victim exercises their right to decline to participate in any prosecution, there will likely be no documentation of the victim's expressed preference for venue (such was the case for three of the Army cases without documentation). Anecdotally, the Criminal Law Division of the Office of The Judge Advocate General conducted a data call in August of 2018 to get a sense of preferences expressed by victims. In that data call, 79% of victims expressed a preference for military prosecution, 3% of victims expressed a preference for civilian prosecution, and 18% of victims expressed no preference. This overwhelming support of our system is consistent with anonymous DOD-wide survey data in which servicemembers who have reported a sexual assault rated "civilian law enforcement" with the lowest satisfaction rates of all personnel involved, including commanders, military law enforcement, Victim Advocates, healthcare personnel, and Special Victim Counsel.

Ms. SPEIER. Are you aware of penetrative offenses under your jurisdictions being sent to special and summary courts martial while statute requires them to be tried at general courts martial? What is the cause of these failures to comply with the law? Can you commit to more closely tracking these cases to ensure compliance and eliminating these instances?

General PEDE. I believe the Army is fully compliant with the law and I have no information to suggest we are not. I understand that the recent Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (DAC–IPAD) report may have implied that multiple penetrative offenses were referred to summary or special courts-martial in violation of the NDAA. It is my understanding, however, that the DAC–IPAD will be sending a letter to your committee to clarify that report on this specific issue. The Army will continue to monitor all referrals to ensure compliance with Section 534 of the Fiscal Year 2015 National Defense Authorization Act.

Ms. SPEIER. Do you believe recent expansions of the concept of apparent unlawful command influence hampers commanders and compromises their ability to set the necessary cultures within their units? How would your recommend changing the definition of UCI?

General PEDE. The concern underlying the judicially created doctrine of apparent unlawful command influence—namely, that a well-informed member of the public would believe that the court-martial process is fair, to the accused, to the victim, and to the community—is of vital consequence to our system. It is a bedrock principle of justice that justice must not only be fair, it must also appear to be fair. As the Supreme Court has recognized, all are entitled to a fair trial, not necessarily a perfect one. The harmless-error doctrine reflects this balance. On March 27, 2019, however, the Department of Defense submitted Legislative Proposal Number 337. Consistent with Judge Ryan's dissent in United States v. Barry, this proposal, if enacted, would re-institute the harmless-error analysis into the apparent unlawful command influence doctrine. It would also provide clearer guidelines for Commanders in how they can build a culture of dignity and respect without violating the necessary restrictions on unlawful command influence. I believe that the proposal merits serious consideration by the Congress.

Ms. SPEIER. Are the recent decisions from CAAF jeopardizing convictions?

General PEDE. A conviction that is not consistent with the requirements of the law is not a conviction that should stand. The justice systems in the United States, both civilian and military, rest on the ability of our independent courts to make determinations of guilt, free from any consideration other than the parties' arguments, the evidence, and the law. Military justice is also a process, a case-by-case, appeal-by-appeal adjudication. Over time, that process may reveal that it is appropriate to amend the underlying law. Any evaluation to amend the underlying law must be holistic and thorough, as reform efforts' second- and third-order effects can be counterproductive or even harmful and those negative effects are not always identifiable in advance. Any reform must be consistent with the requirements of fundamental fairness; it must reflect our concern for the dignity and respect of all persons.

Ms. SPEIER. One area I am concerned with regarding the SVC program is the ability of the special victims lawyer to operate independent of any command, similar to defense counsel. Do you agree that special victim's counsel should not serve in billets that challenge their duty to their client? From what I understand, many of the Army's SVC are also legal assistance attorneys. Does this present a conflict?

General PEDE. I agree, special victim's counsel (SVC) should not serve in billets that challenge their duty to their client. I also do not believe there is a conflict created by SVCs serving part of their time as legal assistance attorneys. Every judge advocate who is authorized to and does enter into an attorney-client relationship with an individual—whether that judge advocate be a defense counsel, SVC, or legal assistance attorney—owes that client a duty to zealously advocate for that client's interests—even when those interests conflict with the chain of command or the Government. This is a bedrock principle of the legal profession. While SVCs do provide legal-assistance services, when a judge advocate provides legal assistance services, they are working on behalf of their client and not the government. Legal assistance attorneys are evaluated on how well they advocate for their clients, not based on their support to the government, which is not part of their job in legal assistance billets. More importantly, the priority for a SVC serving in an authorized SVC position is representation of their special victim clients. In addition, the SVC program continues to refine its procedures to ensure that these standards are met. In June 2018, I directed the assignment of field grade officers to serve as dedicated SVC regional managers. These regional managers provide technical supervision and guidance to the SVCs in their region. The SVC program office, which oversees and sets policy for the SVC program, discusses the importance of SVC independence at all certification and staff judge advocate courses. I have also directed the SVC program office to conduct site visits to continually iterate the importance of SVC independence to all staff judge advocate offices in the Army. We will continue to assess these efforts to ensure the independence of our SVCs

Ms. SPEIER. Would you agree that following the Air Force's model and providing the SVC program with additional resources like dedicated paralegals will help strengthen the program's role in the military justice process? Will you commit to expanding the use of paralegals?

General PEDE. I am committed to maximizing the use of paralegals for SVCs, though there are resource limitations affecting their availability. Since the SVC program's inception five years ago, we have trained 113 military and civilian paralegals in the same certification course we send all SVCs. In addition, in January 2017, we added a dedicated SVC paralegal-specific break-out training at each SVC certification course. SVC paralegals also participate fully in annual regional SVC training to familiarize themselves with key players in the local support systems, investigative offices, and military justice arenas. Army paralegals are a highly trained and motivated resource, and they are, consequently, a much-sought after asset. The Army will continue to assess the distribution of its paralegal assets to ensure that every attorney is effectively supported in his or her mission.

Ms. SPEIER. How feasible is it for your service to develop an independent prosecution chain, along the lines of the Marines' reform?

Admiral HANNINK. The Navy's prosecution chain of command is set up similarly to the Marine Corps' prosecution chain of command. The Navy uses nine Region Legal Service Offices (RLSOs), with each managing the trial counsel for the particular region. Each RLSO has a Trial Department that is supervised by the Senior Trial Counsel (STC). All trial counsel receive Fitness Reports from the RLSO Commanding Officer, who is an O–6 judge advocate reporting to Commander, Naval Legal Service Command/Deputy Judge Advocate General of the Navy.

Ms. SPEIER. What happens when a prosecutor's ethical and legal expertise contradict commanders' opinions? What happens when justice demands that case be brought forward, and the prosecutor is unable to because the commander refuses to act?

Admiral HANNINK. As described in my written testimony, prosecutors in the Navy provide Prosecution Merits Review to inform the decision of disposition authorities. Likewise, Preliminary Hearing Officers and Staff Judge Advocates inform and make recommendations to convening authorities. It is uncommon for a commander to deviate from a prosecutor's recommendation but that authority ultimately lies with the commander subject to a few constraints imposed by statute. For example, Article 34, UCMJ states that a convening authority may not refer a specification under a charge to a general court-martial unless the staff judge advocate (SJA) advises in writing that there is probable cause to believe that the accused committed an offense. And under the provisions of the FY14 National Defense Authorization Act, if the SJA recommends referral and the general court-martial convening authority declines to refer such a charge, the Secretary of the military department must review the case. Finally, all Judge Advocates are bound by the rules of professional responsibility within the Navy as well as the state where they are licensed to practice law. The Navy JAG Corps' professional responsibility rules require any judge advocate who knows that an official intends to act in a manner that is adverse to the Department of the Navy's legal obligations must take reasonably necessary

measures to address the situation. These measures may include asking the official to reconsider, seeking an additional legal opinion, or raising the matter to higher authority in the chain of command. If there are further questions about this process and the prosecutor's role in it, the Chief Prosecutor of the Navy and the Head of the Navy Trial Counsel Assistance Program are available to provide further explanation.

Ms. SPEIER. Two weeks ago, the Department of Defense Inspector General released a report revealing that in 77 of 82 cases reviewed, DOD officials either did not ask or did not document that they asked victims of sexual assault whether they want cases prosecuted in military or civilian courts. Why did this failure occur? Can you each commit to me that your services will rapidly put in place a system to ensure victims are asked whether they prefer their cases to be tried in civilian or military courts?

Admiral HANNINK. In most of the Navy cases reviewed by the DOD IG, the victim's preference was sought but not effectively documented. In some cases, preference was not sought because civilian authorities already turned down the cases. In those circumstances, the statute does still require the victim to be asked to express a preference, though there is no real choice involved. There were also instances where we could not establish whether we asked victims their preference at all, but it is worth noting that in all but one of the cases reviewed by the DOD IG, a Victim's Legal Counsel was assigned to assist victims in understanding and advocating for their rights in the process. The Navy is committed to ensuring victims are asked about their preference for civilian or military prosecution. Since the report was released, our Region Legal Service Offices have adjusted their practice to document victim preferences in each case, regardless of whether prosecution by civilian authorities is an option.

Ms. SPEIER. Are you aware of penetrative offenses under your jurisdictions being sent to special and summary courts martial while statute requires them to be tried at general courts martial? What is the cause of these failures to comply with the law? Can you commit to more closely tracking these cases to ensure compliance and eliminating these instances?

Admiral HANNINK. There are no known penetrative offenses in the Navy that have been referred to a summary court-martial or a special court-martial. The DAC–IPAD identified a few cases in which an Article 120 penetrative offense was charged at the beginning of the process and the case was later referred to a special court-martial or a summary court-martial. We have confirmed that in each of the cases identified by the DAC–IPAD, the penetrative offense(s) was in fact dismissed prior to referral to a special court-martial or summary court-martial. Additionally, we conducted a review of all cases in which a penetrative offense was charged and confirmed there are no instances where a penetrative offense was referred to a special court-martial or a summary court-martial.

Ms. SPEIER. Do you believe recent expansions of the concept of apparent unlawful command influence hampers commanders and compromises their ability to set the necessary cultures within their units? How would your recommend changing the definition of UCI?

Admiral HANNINK. Commanders are responsible for good order and discipline, and must be able to speak candidly about destructive behaviors while not interfering in individual cases. At a minimum, court rulings have forced commanders to examine how their actions, including candid discussions on culture, might adversely impact the due process of a service member. The issue of unlawful command influence was researched and discussed by the Joint Service Committee (JSC) on Military Justice and based upon that research, the DOD and the Administration submitted a legislative proposal to modify Article 37, UCMJ. The legislative proposal clarifies the ability of a commander to address cultural issues within their unit. I support this proposal.

Ms. SPEIER. Are the recent decisions from CAAF jeopardizing convictions?

Admiral HANNINK. CAAF is an independent court responsible for performing an independent review of cases arising under the military justice system. CAAF must ensure that lower court decisions are legally correct and consistent with due process. It is within their authority to set aside convictions.

Ms. SPEIER. One area I am concerned with regarding the SVC program is the ability of the special victims lawyer to operate independent of any command, similar to defense counsel. Do you agree that special victim's counsel should not serve in billets that challenge their duty to their client?

Admiral HANNINK. Navy Victims' Legal Counsel (VLC) are only assigned duties within the Victims' Legal Counsel Program (VLCP) and therefore are completely independent. The VLCP has operated as an entirely separate chain of command since its inception in 2013. The VLCP has a Chief of Staff who is independent of

all Commanding Officers for the fleet, Region Legal Service Offices and the Defense Service Offices. The VLCP Chief of Staff reports directly to Commander, Naval Legal Service Command/Deputy Judge Advocate General of the Navy, and is directly responsible for and signs all Officer Fitness Reports and Enlisted Evaluations for the program. Based on the completely separate chain of command, the VLCP avoids any conflicts of interests with other interested parties.

Ms. SPEIER. Would you agree that following the Air Force's model and providing the SVC program with additional resources like dedicated paralegals will help strengthen the program's role in the military justice process? Will you commit to expanding the use of paralegals?

Admiral HANNINK. The Navy is committed to properly resourcing the Victims' Legal Counsel Program (VLCP), including providing the right number and type of support personnel. The Navy provided administrative (Yeoman) support personnel to VLCP attorneys from the early phases of the VLC Program. The Navy JAG Corps commits to periodically reevaluating the support requirements of VLCP attorneys, including whether paralegals (Legalman) should replace or add to the Yeomen currently assigned.

Ms. SPEIER. How feasible is it for your service to develop an independent prosecution chain, along the lines of the Marines' reform?

General ROCKWELL. The Air Force has two separate reporting chains of lawyers involved in military justice—the functional chain attached as legal advisors to the command chain and the litigation support chain that reports to the commander of the Air Force Legal Operations Agency. Developing another "prosecution chain" would be an inadvisable triplication of effort. Furthermore, the Air Force organizes, trains, and equips to execute its mission sets. Legal support follows mission, which results in having individual legal offices at Air Force installations across the United States and around the world. Experienced Staff Judge Advocates with military justice experience provide candid legal advice on the ground to installation commanders, with reach back to expert trial counsel at our regional Circuit litigation offices, which fall under an independent chain of command.

Ms. SPEIER. What happens when a prosecutor's ethical and legal expertise contradict commanders' opinions? What happens when justice demands that case be brought forward, and the prosecutor is unable to because the commander refuses to act?

General ROCKWELL. In our experience, commanders value the sage advice of their Staff Judge Advocates (SJAs) and work in concert with them and the attorneys prosecuting their cases. Legal limitations and oversight measures built into the military justice system guard against potential abuses of commander authority. As a matter of law, a convening authority may not refer any case to a general court-martial (GCM) if the SJA determines that probable cause does not exist. Art. 18(a), UCMJ. Thus, if an SJA finds a lack of probable cause, the convening authority is prohibited from referring a case to a GCM. Conversely, if an SJA believes a penetrative sexual assault case should be referred to a court-martial, but the general court-martial convening authority (GCMCA) refuses to refer it, the case must be forwarded to the Secretary of the Air Force for review. The Secretary will conduct an independent review of the case file and make a decision on referral. FY14 NDAA, 1744(d). To date, no GCMCA has gone counter to their SJA and refused to refer a case. Additionally, the Chief of the Air Force's Government Trial and Appellate Counsel Division (AFLOA/JAJG) may request that the Secretary of the Air Force review any decision not to refer a penetrative sexual assault case to court-martial, regardless of whether the SJA and convening authority agree or disagree on referral. FY15 NDAA, 541. See also Air Force Instruction (AFI) 51–201, Administration of Military Justice, para 9.11. Moreover, per SECDEF policy, only special court-martial convening authorities in the grade of O–6 or above have initial disposition authority over penetrative sexual assault cases. Complementary Air Force policy further requires that a general officer serving as a general court-martial convening authority review all initial disposition decisions in penetrative sexual assault cases. These two policies in tandem ensure that sexual assault cases get the attention of at least two high-level commanders with significant command and military justice experience, and prevents a single commander from disposing of a case without review. It is critical to recognize that, although an SJA works for their commander, their obligation to provide independent legal advice is derived from The Judge Advocate General's statutory authority under 10 U.S.C. §§ 806 and 9037 to provide independent legal advice to the Secretary of the Air Force and Chief of Staff of the Air Force and is consistent with their ethical obligations as licensed attorneys. A subordinate judge advocate who believes his or her commander is acting unethically has the right and the responsibility to raise that issue through legal channels to superior judge advocates who can work with senior commanders to promptly intervene.

A subordinate judge advocate always has the right and responsibility to push critical issues up through the JA chain, if warranted.

Ms. SPEIER. Two weeks ago, the Department of Defense Inspector General released a report revealing that in 77 of 82 cases reviewed, DOD officials either did not ask or did not document that they asked victims of sexual assault whether they want cases prosecuted in military or civilian courts. Why did this failure occur? Can you each commit to me that your services will rapidly put in place a system to ensure victims are asked whether they prefer their cases to be tried in civilian or military courts?

General ROCKWELL. The FY15 NDAA established the requirement to solicit a victim's preference on jurisdiction for specific enumerated offenses alleged to have occurred within the United States. FY15 NDAA, Sec. 534. Air Force policy implemented this requirement on 30 July 2015 through Air Force Guidance Memorandum 2015–01 to Air Force Instruction (AFI 51–201), Administration of Military Justice. This guidance required Air Force authorities to solicit the input of a victim of sexual assault (or attempt thereof) as to preference on civilian or military prosecution; however the guidance did not require the solicitation or the victim's response be in writing or otherwise documented. Consultation with a victim is required in all cases alleged to have occurred in the United States. However, the Air Force legal offices audited by the DOD IG for purposes of the report erroneously believed that consultation was not required for cases which were under exclusive federal jurisdiction and victims were not consulted about their preference for prosecution in those cases. The Air Force has implemented additional safeguards to ensure that victim preference is requested. The 18 January 2019 update to AFI 51–201 amended this requirement to document a victim's preference as to prosecution by a court-martial or a civilian court in writing and to seek a victim's preference prior to requesting jurisdiction from a civilian entity. AFI 51–201, para 4.18.2.3 and 4.18.2.4. Additionally, as of June 2019, all wing legal offices will be inspected under Article 6, UCMJ, to ensure they are seeking, documenting, and maintaining victim preferences. Moreover, legal offices must follow case preparation checklists, all of which require soliciting a qualifying victim's preference. Finally, standards promulgated pursuant to Article 140a, UCMJ, will require the Services to collect data showing whether victim preference was solicited in qualifying cases.

Ms. SPEIER. Are you aware of penetrative offenses under your jurisdictions being sent to special and summary courts martial while statute requires them to be tried at general courts martial? What is the cause of these failures to comply with the law? Can you commit to more closely tracking these cases to ensure compliance and eliminating these instances?

General ROCKWELL. The Air Force is not aware of any penetrative offenses being sent to special or summary courts-martial in violation of the statutory requirement to refer qualifying offenses to a general court-martial. FY14 NDAA, Sec. 1705, limited jurisdiction over penetrative sexual assault and forcible sodomy offenses to general courts-martial. The provision went into effect on 24 June 2014 and applied to qualifying offenses committed on or after that date. Since 1 January 2013, the Air Force has referred 946 adult and child penetrative sexual assault offenses to courts-martial. None of those cases resulted in a penetrative offense being referred to a special or summary court-martial after Sec. 1705 went into effect. We note the Third Annual Report of the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (DACIPAD) found two instances where penetrative offenses were referred to a special court-martial (one in FY15 and one in FY16). Closer review of these cases shows that neither instance violated Sec. 1705. One case was originally referred to a general court-martial, but was reduced to a special court-martial pursuant to a pretrial agreement (for other non-sexual offenses) after the victim withdrew her participation. The other case went to an Article 32 hearing with an eye towards referral to a general court-martial, but the victim withdrew her participation prior to referral. The remaining drug charges were subsequently referred to a special court-martial. This is consistent with the clarification letter provided by the DACIPAD to the House Armed Services Committee, dated 23 April 2019, which stated that in almost all instances across the Services, penetrative sex assault cases are only referred to a forum other than a general court-martial if the sexual assault allegation is dismissed or downgraded to a non-penetrative offense. Moreover, in both cases the sexual assault offenses occurred prior to 24 Jun 14, so they were not subject to Sec. 1705 despite the fact the convening authorities in both instances followed the spirit of the law. The military justice system contains multiple safeguards against referring penetrative cases to summary or special court-martial. For example, Article 34, UCMJ, requires the commander to consult with a judge advocate prior to referring charges to a special or general court-martial. Additionally, Air Force policy requires a general court-martial

convening authority to review initial disposition decisions on all penetrative offenses. Referral is considered initial disposition. Thus, if a special court-martial convening authority referred a penetrative sex offense to a special court-martial, the special court-martial convening authority would be required to notify the general court-martial convening authority within thirty days of referral. At that point, the general court-martial convening authority and his/her staff judge advocate would have an opportunity to intervene.

Ms. SPEIER. Do you believe recent expansions of the concept of apparent unlawful command influence hampers commanders and compromises their ability to set the necessary cultures within their units? How would your recommend changing the definition of UCI?

General ROCKWELL. Recent cases finding apparent unlawful command influence (UCI) have not compromised a commander's ability to instill good order and discipline or "set the necessary culture" within their command by expressing their general philosophy on all levels of misconduct and establishing overall behavioral expectations nor have the rulings hampered a commander's ability to take appropriate action in response to an Airman's misconduct. Judge advocates ensure commanders are educated on UCI and recent rulings to ensure commanders understand what is and is not acceptable messaging. UCI is a complex military legal concept. The outcome of an appellate case, or a motion at the trial level, is determined by the factual findings unique to that case, application of a consistent test for UCI, and a weighing of the totality of circumstances. The underpinnings of the prohibition against apparent UCI are rooted in the constitutional rights of an accused to receive due process and a fundamentally fair trial without the political pressure for a predetermined outcome. Historically, these appellate decisions have clarified the lines between what is and is not acceptable messaging by a commander to the unit. It is important to point out that changing who convenes a Court, prefers charges or refers a case would not change the dynamics of unlawful command influence. Judge Advocates can commit unlawful command influence. The case law is to ensure that political pressure and Command influence does not interfere with an accused's right to receive due process and a fundamentally fair trial. We also note a Department of Defense legislative proposal on unlawful command influence, making amendments to Article 37, UCMJ, has been transmitted to House and Senate Armed Services Committees for FY20 NDAA consideration. This proposal would amend the statutory unlawful command influence provision of the UCMJ to expressly permit convening authorities and commanding officers to engage in communications with subordinates that do not endanger the fairness of any military justice proceeding, thereby facilitating senior leaders' messaging to their subordinates concerning activities that harm good order and discipline, enhancing senior leaders' ability to deter misconduct by personnel subject to their authority. This will eliminate confusion regarding a senior military leader's ability to properly communicate with subordinate commanders on military justice matters.

Ms. SPEIER. Are the recent decisions from CAAF jeopardizing convictions?

General ROCKWELL. CAAF has recently overturned convictions in several sexual assault cases. Some of the overturned cases were due to their interpretation of new legislation regarding sexual assault. As with previous legislation, it takes time for the courts to determine whether the litigants and trial judges are properly interpreting the changes to the Uniform Code of Military Justice. Similarly, appellate courts also must review new legislation to determine whether it withstands constitutional scrutiny. Oftentimes, appellate courts render their decisions one, two, or sometimes three years after the trial occurs or takes place. Appellate courts are tasked with the responsibility of applying the law to the facts and circumstances of each individual case, and determining whether a verdict was improperly obtained due to error in the proceedings. With this responsibility comes the inherent potential to overturn convictions based on abuses of discretion by the trial court, changes in the interpretation of the law, or plain error committed during the court-martial. By ensuring the law is correct through transparent judicial review we ensure trust, confidence and reliability in the system.

Ms. SPEIER. One area I am concerned with regarding the SVC program is the ability of the special victims lawyer to operate independent of any command, similar to defense counsel. Do you agree that special victim's counsel should not serve in billets that challenge their duty to their client?

General ROCKWELL. Maintaining an attorney-client relationship that is free from any conflict of interest is a fundamental mandate of the Air Force Rules of Professional Conduct. To avoid potential conflicts, the Air Force has always had independent chain of command for special victims' counsel (SVCs) which runs through the Air Force Legal Operations Agency. SVCs do not report to any installation-level

commander. Victims' feedback has been, consistently, that having their own independent attorney is something they value very much.

Ms. SPEIER. Why did the Marine Corps reorganize their prosecution community in 2012? What objectives did it fulfill? What are the benefits of having prosecutors supervised by other prosecutors and not commanders?

General LECCE. The Marine Corps reorganized its entire legal community—not just its prosecutors—to optimize the delivery of legal services. The reorganization consolidated resources and legal experience into mutually supporting legal centers within a geographic area. These changes improved the ability of our senior judge advocates to train and mentor junior counsel, which in turn brought improvements not just in military justice practice but also in civil and administrative law and legal assistance matters. Allowing all legal counsel to be supervised by a more experienced attorney permits focused professional mentorship and accountability in order to ensure a fair military justice system. Even prior to the 2012 reorganization, senior prosecutors supervised Marine Corps trial counsel. However, it is important to note that every judge advocate is a member of a chain of command, though not necessarily the chain of command of the convening authority in a particular case.

Ms. SPEIER. What happens when a prosecutor's ethical and legal expertise contradict commanders' opinions? What happens when justice demands that case be brought forward, and the prosecutor is unable to because the commander refuses to act?

General LECCE. The Marine Corps has recorded no case in which a Commander acted against the advice of a Staff Judge Advocate (SJA) to refer a charge to court-martial. The law places significant limits on a Commander's discretion in order to protect victims and those accused of offenses. For example, a Commander's discretion is limited by Article 34, which prohibits sending a charge to general court-martial unless the SJA advises a Commander there is probable cause to believe the accused committed the offense. Where a Commander decides not to send certain sexual offenses to a court-martial against the advice of the SJA, the law requires this decision to be reviewed by the Secretary of the Navy. Similarly, if a prosecutor believes strongly that certain sexual offenses should be sent to a court-martial, that officer may request the Chief Prosecutor of the Marine Corps review the Commander's decision not to send the case to trial. Finally, a senior Commander in the chain of command, with the advice of legal counsel, may assume jurisdiction of a case if it becomes clear that a junior Commander is not acting in the interests of justice.

Ms. SPEIER. Two weeks ago, the Department of Defense Inspector General released a report revealing that in 77 of 82 cases reviewed, DOD officials either did not ask or did not document that they asked victims of sexual assault whether they want cases prosecuted in military or civilian courts. Why did this failure occur? Can you each commit to me that your services will rapidly put in place a system to ensure victims are asked whether they prefer their cases to be tried in civilian or military courts?

General LECCE. The Marine Corps consults victims on their jurisdictional preference for case disposition in every case required by law. In 18 of the 21 cases reviewed by Department of Defense Inspector General (DOD IG), the Marine Corps consulted with the victim to determine their preferences concerning prosecution of the case. These preferences were recorded in the Case Analysis Memo (CAM), a detailed analysis of the prosecutorial merit of a case. In three of the 21 cases, victims were not specifically asked about their jurisdictional preference because the civilian authorities had already declined to prosecute their cases. The Marine Corps requires prosecutors to solicit and document victim preference. Prosecutors document that preference in a CAM to inform SJA advice to the Commander on whether to proceed with a case, accord proper weight to that preference, and to enable its analysis in the proper context. My staff is currently in the process of publishing a major modification to our regulation on legal services. That modification provides updated guidance to judge advocates on all aspects of military justice, including specific independent documentation of victim preference for military or civilian jurisdiction which may be released to auditors.

Ms. SPEIER. Are you aware of penetrative offenses under your jurisdictions being sent to special and summary courts martial while statute requires them to be tried at general courts martial? What is the cause of these failures to comply with the law? Can you commit to more closely tracking these cases to ensure compliance and eliminating these instances?

General LECCE. The Marine Corps has sent no cases involving a penetrative sexual assault charge to either a special or summary court-martial since the implementation of Section 1705 of the National Defense Authorization Act of Fiscal Year 2014 (NDAA FY 14). The Defense Advisory Committee on Investigation, Prosecution, and

Defense of Sexual Assault in the Armed Forces (DAC–IPAD) identified several Marine Corps cases where penetrative offenses were initially charged but later went to trial at special or summary court-martial. In all but one of these cases, the penetrative offenses were dismissed prior to the court-martial as part of a pretrial agreement. The remaining case was tried at a special court-martial, but involved misconduct which occurred prior to the change in the law. That case also involved a pretrial agreement where the accused agreed to plead guilty to non-penetrative offenses. The Marine Corps is committed to closely tracking sexual assault cases to ensure our continued compliance with the law. To that end, the Marine Corps is currently evaluating several options to implement the standards recently approved by the Secretary of Defense pursuant to Article 140a.

Ms. SPEIER. Do you believe recent expansions of the concept of apparent unlawful command influence hampers commanders and compromises their ability to set the necessary cultures within their units? How would your recommend changing the definition of UCI?

General LECCE. A Commander's responsibility to maintain good order, discipline, and welfare includes the authority to set a healthy culture and address destructive behaviors in a meaningful way. While judicial decisions may cause Commanders to consider the impact of their actions on the fair adjudication of individual cases, that consideration is a valuable means of protecting the rights of accused service members. At the direction of the Secretary of Defense, the Joint Service Committee (JSC) recently drafted a legislative proposal to modify the definition of UCI contained in Article 37. The legislative proposal clarifies command authority to address destructive cultural issues and behaviors within their unit. I support that proposal.

Ms. SPEIER. Are the recent decisions from CAAF jeopardizing convictions?

General LECCE. The authority of CAAF to set aside convictions is an important legal safeguard. As with appellate courts in civilian jurisdictions, CAAF independently reviews the decisions of lower courts to ensure those decisions are legally correct.

Ms. SPEIER. One area I am concerned with regarding the SVC program is the ability of the special victims lawyer to operate independent of any command, similar to defense counsel. Do you agree that special victim's counsel should not serve in billets that challenge their duty to their client?

General LECCE. The Marine Corps Victims' Legal Counsel Organization (VLCO) has operated independently since its inception in 2013. Marine Corps Victims' Legal Counsel (VLC) report to a Regional VLC, who reports to the Officer in Charge of the VLCO. The Marine Colonel in charge of the VLCO reports directly to me. The supervisory VLC attorneys handle all matters related to performance evaluations and professional responsibility for Marine VLCs.

Ms. SPEIER. Would you agree that following the Air Force's model and providing the SVC program with additional resources like dedicated paralegals will help strengthen the program's role in the military justice process? Will you commit to expanding the use of paralegals?

General LECCE. The Marine Corps VLCO has long employed civilian paralegals. The nine civilian paralegals currently serving in the VLCO are instrumental to representation of VLCO clients. These paralegals work hand in hand with judge advocates to form a strong office team, and help provide continuity of operations. The VLCO recently added one civilian paralegal at Marine Corps Base Hawaii, and has plans to add another this year at Marine Corps Air Station Cherry Point. The Marine Corps fully supports the mission of the VLCO and will ensure it has adequate resources to support the program.

QUESTIONS SUBMITTED BY MRS. LURIA

Mrs. LURIA. 1. Can you elaborate on the statement, "I trust military lawyers to make that decision, meaning that decision about the cases, more than I trust commanders"?

2. Do you acknowledge that a 30-plus-year commander has had to go through numerous decisions where they had to take into account the order and discipline of their command and the UCMJ, and the use of that?

Colonel CHRISTENSEN. [No answer was available at the time of printing.]

Mrs. LURIA. Do you agree that there are many remedies available for these cases within the military chain of command? Can you elaborate on them?

General DARPINO. [No answer was available at the time of printing.]

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