

MARKUP OF THE NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2014

WEDNESDAY, JUNE 12, 2013

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

The committee met, pursuant to notice, at 2:05 p.m. in room SD-106, Dirksen Senate Office Building, Senator Carl Levin (chairman) presiding.

Committee members present: Senators Levin, Reed, Nelson, McCaskill, Udall, Hagan, Manchin, Shaheen, Gillibrand, Blumenthal, Donnelly, Hirono, Kaine, King, Inhofe, McCain, Chambliss, Wicker, Ayotte, Fischer, Graham, Vitter, Blunt, Lee, and Cruz.

Committee staff members present: Peter K. Levine, staff director; Travis E. Smith, chief clerk; and Leah C. Brewer, nominations and hearings clerk.

Majority staff members present: Jonathan D. Clark, counsel; Gabriella E. Fahrner, counsel; Gerald J. Leeling, general counsel; Jason W. Maroney, counsel; John H. Quirk V, professional staff member; and Bradley S. Watson, special assistant for investigations.

Minority staff members present: John A. Bonsell, minority staff director; Steven M. Barney, minority counsel; William S. Castle, minority general counsel; Samantha L. Clark, minority associate counsel; Allen M. Edwards, professional staff member; and Gregory R. Lilly, minority clerk.

Staff assistants present: Lauren M. Gillis and Jennifer R. Knowles.

Committee members' assistants present: Carolyn Chuhta, assistant to Senator Reed; Jeff Fatora, assistant to Senator Nelson; Stephen Hedger and Jason Rauch, assistants to Senator McCaskill; Casey Howard, assistant to Senator Udall; Christopher Cannon, assistant to Senator Hagan; Mara Boggs, assistant to Senator Manchin; Patrick Day and Chad Kreikemeier, assistants to Senator Shaheen; Moran Banai, Brook Gesser, Brooke Jamison, and Kathryn Parker, assistants to Senator Gillibrand; Ethan Saxon, assistant to Senator Blumenthal; Marta McLellan Ross, assistant to Senator Donnelly; Nick Ikeda, assistant to Senator Hirono; Karen Courington and Mary Naylor, assistants to Senator Kaine; Steve Smith, assistant to Senator King; Joel Starr, assistant to Senator Inhofe; Margaret Goodlander and Paul C. Hutton IV, assistants to Senator McCain; Lenwood Landrum, assistant to Senator Sessions; Todd Harmer, assistant to Senator Chambliss; Joseph Lai, assist-

ant to Senator Wicker; Brad Bowman, assistant to Senator Ayotte; Peter Schirtzinger, assistant to Senator Fischer; Craig Abele, assistant to Senator Graham; Joshua Hodges, assistant to Senator Vitter; Charles Prosch, assistant to Senator Blunt; Robert Moore, assistant to Senator Lee; and Jeremy Hayes, assistant to Senator Cruz.

OPENING STATEMENT OF SENATOR CARL LEVIN, CHAIRMAN

Chairman LEVIN. Good afternoon, everybody.

The Armed Services Committee meets today to begin its consideration of the National Defense Authorization Act for Fiscal Year 2014.

I thank our subcommittee chairmen and our ranking members for the way in which they have worked together over the last 2 days and for the strong starting point that they have given us for our full committee markup.

This committee has a strong bipartisan tradition of cooperation and hard work in the markup process, which Senator Inhofe and I will make every effort to continue through the markup.

We begin today in open session to address the issue of sexual assault in the military. There is strong public interest in the sexual assault provisions. They are easily segregable from the other provisions and issues in the mark, and there is no likelihood of any classified aspect of this issue. We have had an open markup in the past on similarly segregable issues, including the Wounded Warriors Act, the Weapons Systems Acquisition Reform Act, and the first Military Commissions Act.

In accordance with the committee's practice, we will use the sexual assault provisions reported by the Personnel Subcommittee as the vehicle for our markup. Once we have discussed these provisions and voted on amendments, I expect that we will have a roll call on the sexual assault legislative package as amended, if amended. After a short break, we will then return to our committee room to resume our normal markup procedures.

Now, after I call on Senator Inhofe for his opening remarks, following our usual procedure, I am going to turn then to Senator Gillibrand and to Senator Graham as the chairman and ranking member of the Personnel Subcommittee to present the sexual assault provisions that are included in the subcommittee mark. At that point, the sexual assault provisions in the mark will be open for discussion and amendment. I intend to offer an amendment on behalf of myself and others, including Senators Inhofe, McCaskill, McCain, Reed, Graham, Kaine, Ayotte, and King, and this amendment will address the role of the chain of command in the prosecution of sexual assault offenses.

Senator Inhofe.

STATEMENT OF SENATOR JAMES M. INHOFE

Senator INHOFE. Thank you, Mr. Chairman. I appreciate your leadership as the committee begins its efforts to mark up the National Defense Authorization Act for Fiscal Year 2014.

The purpose of our open session today is to discuss the various provisions contained within the Personnel Subcommittee mark that relate to combating sexual assault in our military. There is agree-

ment among all of us that sexual assault is a cancer in our military. It undermines unit readiness and effectiveness, hurts morale, and breaks the sacred trust with the men and women who volunteer to defend our country.

I commend my colleagues for their efforts to combat the scourge of sexual assault. However, I am concerned by some of the provisions in the bill, particularly those that would severely restrict our commanders' authority under the Uniform Code of Military Justice to make decisions with input from their staff judge advocates to swiftly and fairly deal with the misconduct and to preserve readiness.

I look forward to working closely with the members of this committee to ensure that we approach these important issues in a thoughtful and deliberate matter.

Thank you, Mr. Chairman.

Chairman LEVIN. Thank you very much.

Senator Gillibrand, will you now present these sexual assault provisions of your mark?

Senator GILLIBRAND. Mr. Chairman, thank you.

As you said, the Personnel Subcommittee met yesterday and adopted the chairman's mark, as amended, as the subcommittee mark. I want to thank you for holding this open session. The Personnel Subcommittee mark was held in open session yesterday, and it is appropriate that this very important legislation be marked up in open session.

The provisions in this mark comprehensively address the issue of sexual assaults in the military. The provisions include from the Military Justice Improvement Act a provision that would establish new JAG 06 disposition authority and a new separate convening authority for serious offenses except for specified military-unique offenses.

It removes the character of the accused from rule 306 of the Rules for Court Martial as a factor a commander could consider in deciding how to dispose of an offense.

And it requires commanders to report allegations of sexual-related offenses to criminal investigation organizations for investigation.

It includes provisions from the Military Justice Improvement Act, a bill offered by Senator McCaskill, Shaheen, Kaine, and Klobuchar, a provision that would amend article 60 of the UCMJ to prohibit convening authorities from changing findings for certain serious offenses and requires written explanation for changes in sentences.

From a bill offered by Senators Klobuchar and Murkowski, a provision that would express the sense of the Senate that rape, sexual assault, and forcible sodomy offenses should be tried by court martial.

It requires that the disposition of substantiated sexual-related offenses be noted in personnel records of the offenders and requires the retention of forms regarding both restricted and unrestricted reports for 50 years.

From a bill offered by Senators Murray, Ayotte, and Blumenthal, provisions that would require all military departments to establish special victims counsel, enhance responsibilities for a DOD Sexual

Assault Prevention and Response Office, require the Secretary of Defense to submit proposed legislation to prohibit sexual acts and contacts between military instructors and trainees, and ensures the availability of sexual assault response coordinators for members of the National Guard and Reserve.

From a bill offered by Senators McCaskill and Klobuchar, a provision that would require the comprehensive review of training, qualifications, and experience of individuals responsible for the sexual assaults prevention and response programs.

The mark also includes a provision that would amend the military whistleblower protection statute to require inspectors general to investigate allegations of reprisals for reporting sexual assault.

Finally, yesterday at the subcommittee markup, we adopted six amendments related to the issue of sexual assaults including a Shaheen amendment requiring the Independent Panel on Sexual Assaults in the Military to report in a year instead of 18 months; a Shaheen, Fischer, and Udall amendment improving requirements for selection and assignment of SAPR billets; a McCaskill amendment requiring additional duties for the Independent Panel on Sexual Assaults in the Military; a Blumenthal amendment requiring the Independent Panel of Judicial Proceedings under the UCMJ to address victim compensation; a Blumenthal amendment extending crime victims' rights to victims of offenses under the UCMJ; and a Udall amendment number 153, as modified, which would express the sense of the Senate regarding discharges in lieu of court martial for sexual offenses.

Now, I want to thank my colleagues for their absolute determination to stamp out the scourge of sexual assaults in the military that are truly undermining our military readiness. And there are so many important and good ideas in this bill that will certainly make a difference.

But to reverse this crisis, I do not believe it will be enough if we do not seize the opportunity and embrace the kind of systemic reform that will truly increase accountability and objectivity and trust in the military justice system by having trained legal military professionals handle the serious crimes from the beginning. This is not a radical idea. It is a common sense proposal that is carefully crafted to leave many crimes within the chain of command, including 36 serious crimes that are unique to the military. It is simply the right thing to do and it has been done throughout the world by our closest military allies without any negative consequences.

But you do not have to take it from me or my colleagues who support this measure. Take it from the victims who have said to us over and over again that they do not report because they do not trust the chain of command. Take it from the military leaders who just testified in front of us that they themselves say, quote, they do not trust us. If we are going to achieve our goal of reducing the number of unwanted sexual contacts, sexual assaults, and rapes that are 26,000 a year, we have to start by increasing the reporting of such cases up from the current rate of 3,300. Then we have to get those assailants out of the uniforms that they do not deserve the honor of wearing.

The chain of command has told us for decades that they will solve this problem, and they have failed. We have heard the words,

“zero tolerance” for over 2 decades, starting with Secretary Dick Cheney in 1992 when he said, well, we have a major effort underway to try to educate everybody to let them know that we have a zero tolerance policy where sexual harassment is involved. That was over 20 years ago. It is our duty to act on behalf of the sons and daughters, husbands and wives, mothers and fathers who so bravely serve in our military and make us proud.

Senator Graham, would you like to give your opening remarks?

Senator GRAHAM. One, I think we were on the verge of coming up with a solution that really moves the ball forward.

First, the goal should be for the men and women in the military who have been sexually assaulted or treated improperly—sexual advances, improper conduct, bad workplace environment—and the two are very different—is to create the most supportive environment in the United States to come forward.

Now, you have to ask yourself in the town you live and the State in which you live, is it difficult for a sexual assault or rape victim to come forward. Yes, it is. It is very difficult. Our civilian communities struggle with this. We have sexual predators in the military. They get through the screening and we need to know the difference between a sexual predator and off color remarks and inappropriate behavior. Now, Senator McCaskill said you can solve one through just vigorous prosecution. The other, you have to start changing the climate.

I would just end with this thought. There is no problem in the military that will ever be solved without commander buy-in. We have the finest military in the world for a reason: it works. This is a problem. It is an aberration. It goes to the heart and soul of who we are in the military and every member of the military has to own solving this problem or it will never get solved. Everybody has to believe that their reputation is at stake when a sexual assault is committed that goes unreported or there is a bad result in the unit.

Now, what we have done legally is try to impress upon the commanders how seriously we view this and how seriously society views it. I have been a judge advocate for over 30 years, and the one thing I can tell you if you want to get somebody's attention, talk about your issue or your presentation going to the highest level in the command chain. You lose sleep about what you are going to say because you know it matters.

So we have the proposal—Senator Levin, you have been terrific—that if a judge advocate recommends prosecution and the unit commander says I do not think so, that decision goes automatically to the secretary of the service involved. I cannot think of a more chilling statement to make and empowering a lawyer more than having the commander's decision reviewed by the secretary of the service in question. That is a huge, dramatic step in the right direction that stays within the chain of command. If there is agreement by the JAG and the commander this is not the right case to go forward, you automatically have the commander's commander look over their shoulder. I think we are making great progress.

Victim advocates that Senator Ayotte and others have supported, making sure that the moment you come out of the shadows and you make an allegation, someone will be there for you and no one

else. They will be your guide. They will be loyal to you. Their job is to help you through the system.

There are so many good things that our members have come up with. Senator McCaskill, Senator Gillibrand, your passion has brought a lot of attention to this. So I really appreciate your passion.

But to my colleagues, the decisions we make on how to solve this problem have wide-ranging effects of how our military operates. At the end of the day, it is going to be our commanders who decide who goes into battle and who stays behind. They have a lot of hard decisions. Prosecuting a sexual assault case is a big decision, but it is one of many very difficult decisions that they have to make. I trust our commanders are going to do better because we are going to hold them more accountable. The worst thing we could do is deal them out of the game because we will never get the results we want.

Thank you.

Chairman LEVIN. Now, there is a package of cleared amendments, I understand, Senator Gillibrand, which I would ask you to offer at this time, and then I am going to offer my amendment, and then we will open this up to debate.

Senator GILLIBRAND. We have an additional 10 amendments to the mark relating to sexual assault that have been cleared by both sides. They include:

McCaskill number 21, as modified, authorizing service secretaries to provide guidelines for temporary reassignment or removal of a member on active duty who is accused of committing a sexual assault offense;

McCaskill 22, as further modified, assigning additional issues for consideration by the independent panel on sexual assault in the military;

Shaheen amendment 176 requiring DOD to conduct a comprehensive review of civilian law enforcement best practices in sexual assault prevention and response;

McCaskill amendment 192 eliminating the 5-year statute of limitations on trial by court martial for certain sexually related offenses;

McCaskill amendment 194 expressing the committee's concern with the use of imprecisely defined terms to present statistics on the number of incidents of rape, sexual assault, forcible sodomy, and other unwanted sexual acts in the military;

McCaskill 200 including the Coast Guard in the requirement to develop regulations to provide the expedited transfer of sexual assault victims;

Manchin-McCain amendment 205 directing the Secretary of Defense to report on the prevalence of servicemembers being convicted of sexual offenses in the civilian justice system without command knowledge;

Udall amendment 208, as modified, directing the Secretary of Defense to submit a report outlining the Department's plan to ensure that health care providers are appropriately trained, accredited as necessary, and located as

necessary to properly manage sexual assault victims' medical needs;

Inhofe number 148, as modified, requiring the Independent Panel on Sexual Assaults in the Military to consider all legislative proposals considered by the committee;

McCain number 220, as modified, codifies the prohibition on military service by individuals convicted of sexual offenses.

I move that these amendments to the mark be adopted.

Chairman LEVIN. Thank you.

Is there a second?

Senator INHOFE. Second.

Chairman LEVIN. There is a second.

Is there any discussion? [No response.]

All in favor, say aye. [Chorus of ayes.]

Opposed, nay? [No response.]

The ayes have it.

Senator GILLIBRAND. Mr. Chairman, I move the adoption of this portion of the Personnel Subcommittee mark as amended and subject to further amendment.

Chairman LEVIN. That is our usual procedure.

It is now open to amendment, and I would now call up my amendment number 183 which, as I have indicated, is cosponsored by Senators Inhofe, McCaskill, McCain, Reed, Graham, Kaine, Ayotte, and King.

Our amendment would replace the provision in the Personnel Subcommittee package that removes from the chain of command the authority to prosecute serious offenses. In its place, our amendment requires an independent review by the next higher level of the chain of command in those cases where a commander decides not to prosecute a sexual assault allegation, and it addresses the problem of retaliation by making retaliation a crime and establishing an expectation that commanders will be held accountable for failure to establish a climate in which victims can report such offenses without fear of retaliation.

We all know that we have a serious problem with sexual assault in the military. We have a problem with the underreporting of sexual assaults. We have a problem with the inadequate investigation of sexual assaults. We have a problem with the lack of support for victims of sexual assaults. We have a problem with retaliation, ostracism, and peer pressure against such victims. And we have a problem with a culture that has taken inadequate steps to correct this situation.

The members of this committee have worked to come up with a strong response to these problems. Senator Gillibrand, as chair of the Personnel Subcommittee, scheduled her first subcommittee hearing on this issue and has been a force for change in the months since. Senator McCaskill has devoted hours and hours to addressing the problem of sexual assault in the military and the mechanics of the military justice system, and many others, perhaps all of us, but surely most of us on both sides of the aisle have made important contributions to this legislative initiative.

The Personnel Subcommittee language before us is drawn from bills, as Senator Gillibrand said, introduced by many Senators to

address these problems. For example, a bill establishing special victims counsels to provide legal advice and assistance to victims of sexual assaults in all of the military services, a bill requiring that commanders refer all allegations of sexual-related offenses to the Criminal Investigative Service for investigation, a bill requiring the Inspector General to investigate allegations of reprisals for reporting sexual assaults, and a bill ensuring that commanders cannot overturn guilty verdicts. And I and—we now have had a vote on this—all of us support those provisions.

However, I do not support removing the authority of commanders to prosecute sexual assault cases and putting that decision in the hands of military lawyers outside of the chain of command, as the Personnel Subcommittee provision would do. I believe that doing so would weaken our response to sexual assault and actually make it less likely that sexual assaults would be prosecuted. The provision in question would also unwisely remove the power of the commander to prosecute other kinds of serious crime, including allegations ranging from homicide to barracks larceny.

Removing prosecution decisions from the chain of command would likely weaken our response to sexual assault by taking the responsibility for prosecution away from military commanders who are actually more likely to prosecute and instead transferring the responsibility to military lawyers who are less likely to prosecute.

We learned last week that military commanders have often prosecuted sexual assault cases even when civilian authorities declined to do so. We also learned that military commanders have insisted on prosecuting sexual assault cases, even with the military lawyers recommended against proceeding. We have been told by senior and junior military commanders alike that they have prosecuted sexual assault cases against the recommendation of their military lawyers because of the importance of the message that such prosecution sends to their troops. But it is military lawyers who would make prosecution decisions under the Personnel Subcommittee provision.

For example, Air Force Colonel Jeannie Leavitt forcefully testified before us that the message sent by a prosecution is often more important to a commander than the issues of prosecutorial resources and burdens of proof that weigh heavily on prosecutors. She told our committee that she could, quote, absolutely see the scenario where a prosecutor may not choose to prosecute a case because of the uncertainty of a conviction that, quote, as the commander I absolutely want to prosecute the case because of the message it sends so that my airmen understand that they will be held accountable.

Removing disciplinary authority to prosecute an offense from commanders would also take away an important tool that they need to change a culture that surely needs change. Colonel Leavitt told the committee that it is, “critical that the commander has the ability to prosecute offenses, and she said, you know, they say that actions speak louder than words. I need to be able to back up my words. And she ended by saying, when I say there is absolutely no tolerance for sexual assault, I need to have the ability to back that up.”

Now, some say that taking authority away from the chain of command would somehow reduce retaliation and increase reporting

of sexual offenses. However, the provision in the subcommittee mark would address only the issue of who decides whether to prosecute sexual assault allegations once they have been reported and investigated. And that decision takes place long after the victim reports the attack and is made by a senior officer who is likely to be many levels of command removed from the victim. In the meantime, the victim would still work with the same people and report to the same NCOs and officers as before without new avenues to escape peer pressure and ostracism.

It is the chain of command that can establish that zero tolerance policy for sexual offenses. It is the chain of command that has the authority and responsibility to take on problems with command climate that foster or tolerate sexual assault. It is the chain of command that can protect victims of sexual assaults by ensuring that they are appropriately separated from the alleged perpetrators during the investigation and prosecution of a case. And it is the chain of command that can and must be held accountable if it fails to change an unacceptable military culture. It is harder to hold someone accountable for failure to act if you reduce their power to act.

The chain of command has achieved cultural change before. For example, two generations ago, when we faced problems with racial dissention in the military and more recently with the repeal of Don't Ask Don't Tell, they did it and they can do it again.

Those are the basic reasons that the amendment that we are offering would not remove the chain of command from prosecution decisions. Our amendment takes a different approach and we believe a more effective approach.

First, our amendment helps ensure that all sexual assault cases that should be prosecuted are prosecuted by requiring higher level review of a decision of a commander not to prosecute a sexual assault case. This review would be conducted by the next higher commander, usually a general officer following Secretary Panetta's ruling that the decision whether or not to prosecute sexual assault cases is now made by an O6 convening authority. That is a colonel or a Navy captain. And in the rare event, as Senator Graham said, that the military lawyer recommends that the case be prosecuted and the commander decides not to do so, our proposal would require the independent review be conducted by the service secretary.

Second, our amendment addresses the problems of retaliation, ostracism, and peer pressure against those who report sexual assaults by directing the Secretary of Defense to prohibit retaliation against a victim for reporting a sexual assault and for the first time will make such retaliation a criminal offense, punishable under section 92 of the Uniform Code of Military Justice.

We expressed a sense of Congress as well that commanding officers are responsible for establishing a command climate in which a victim can report criminal activity, including sexual assault, without fear of retaliation and should be relieved of command if they fail to do so.

This is not an issue on which there is a division between those who advocate strong action to address sexual assault in the military and those who do not. No member of this committee accepts the status quo in which we have thousands of sexual assaults in the military every year. Every member of this committee wants to

act forcefully to drive sexual assault out of the military. The question for us is how can we most effectively achieve this objective, and I believe that our alternative will be more effective in attacking this problem than this provision in the subcommittee mark.

Our Nation has a no stronger vehicle for achieving the difficult and the dangerous than our military. When we ask, they answer no matter how hard the task, no matter what sacrifice they must make. The message we must send to our military is that there is no more important mission today than purging the plague of sexual assault from the ranks and that we are calling on them and counting on them to win this battle. If we give them the tools they need, they can and will win it.

Senator Inhofe.

Senator INHOFE. Thank you, Mr. Chairman.

My commitment to the integrity of the commanding officer goes all the way back to my service in the Army in the JAG Corps before a lot of you guys were even born, and at that time, that was the thing we talked about. We did not want to do anything that is going to take away the authority that the commander has.

And I really commend those who put this together, primarily the chairman that came up with this compromise that I think does take care of the needs.

It has been explained already by Senator Graham and the chairman, but I call your attention to the third example of what could happen. If both the JAG and the commander recommend a specific sexual offense should not go to trial, it still goes up to the superior general of court martial. And I think that is significant to point that out, and I strongly support this amendment.

Chairman LEVIN. Senator McCaskill?

Senator MCCASKILL. Thank you, Mr. Chairman.

First, let me say with all my heart how much I respect Senator Gillibrand's leadership on this issue. She and I have the same goals and candidly we have the same passion for this issue, and I admire her greatly for the work she has done on this.

We have an honest disagreement on how best to accomplish our shared goal of putting predators in prison and supporting victims during the most difficult moments of their lives.

My years of experience as a courtroom prosecutor handling hundreds of these cases guide my decisions today. No one on this panel has spent more time holding hands of victims, crying with victims, explaining difficult decisions to victims, and no one has more often looked a jury in the eye and asked them to take away the freedom of someone who has been accused of rape or sodomy.

A couple of points I want to make about the proposal I am supporting today.

First, I think it is very important to note that if the commander disagrees with the lawyers, it does not go to a uniform. It goes to the top person in that branch of the military that does not wear a uniform. I think our military is strong for many reasons, but one of them is that we believe that civilians should be the top decision-maker in each branch of our military. I think it is very important with this that the ultimate decider, if a commander disagrees, is in fact a civilian.

I think it is important to point out that in this provision there is another review even if the lawyers say no. Frankly, that goes further than I ever dreamt we would be able to go, that when the lawyers say do not go ahead, it gets another review. I think that is very important.

And the other thing that is different about this provision is the crime of retaliation.

We have heard no evidence that there is data that supports the notion that commanders are refusing to move forward when advised to move forward by their legal advice. That has not been a problem that we have found. In fact, as has been pointed out by the chairman and others, we heard testimony to the opposite effect that there are times that the lawyers said no and the commander said yes. Under the subcommittee's proposal, it would be over when the lawyer said no. There would be cases that had their day in court that would never see court under the subcommittee's proposal because we know for a fact that cases have moved forward even when lawyers say no.

And believe me, prosecutors say no all the time to these cases. Many of these cases are "he said/she said," consent defenses. It is who is believable. I cannot tell you how many prosecutors there are in the military system and the civilian system that cannot get their arms around that evidentiary challenge. So there are hundreds of these cases that are being turned down today in this country by civilian prosecutors. And there are a lot of cases that are turned down by civilian prosecutors that will be taken up under these proposals by the military.

We also have heard no data that would indicate that by removing the command completely from any role here, that that is going to have a positive impact on retaliation. If you look at the surveys, a lot of the victims talk about retaliation. In the civil system, it is more that it is painful and personal and private, and the kind of moment you never want to have to say out loud. In the military, it is all that plus what impact will it have on my career.

So what I really tried to look at is where would the victim be most protected from retaliation. A victim goes back into the unit. Are they more protected from retaliation if this case is going to trial because some outside prosecutors that nobody knows said it should? Or are they more protected from retaliation when the commander of that unit says we are going to court martial? We are having a trial. I can make a strong common sense argument that the latter is true, not the former.

Not only does common sense tell me this is true. It is also what I have been told in numerous conversations with military prosecutors and with victims. I honestly do not believe that the chain of command at the disposition phase, which in the military means at the beginning not at the end, is not our main problem. Our main problem is the military does not even know how many rapes and sodomies they have. They have no idea because the only anonymous information they are gathering is under the broad title of sexual contact. So people anonymously are saying whether they have had unwanted sexual contact. Well, that could be a lot of things that are not criminal and that are certainly not rape and sodomy.

So first, we need accurate data as to how big the problem is, and then we have to make sure that the mission that the chairman referred to is getting after that. It is a lack of focus on supporting victims that is the problem. It is a lack of resources of high-level investigations. It is an inability to track offenders because of restricted reports. I have news for everybody. It is very unusual for anybody to do this one time. And what a better place to be a roving predator than a military that moves you all the time from country to country, from base to base. If we do not get a handle on tracking these perpetrators in a more aggressive way, we will never accomplish this mission.

And finally, it is a lack of focus on prison for these cowards and long sentences and mandatory dishonorable discharge.

I know that there will be those that think that Senator Gillibrand and I do not agree, but we agree on one thing. We are not going to give up focusing on this problem. We are not going anywhere.

One word of advice to the military. Do not think this is over once this defense authorization bill becomes law because we have just begun. We have just begun to monitor. We have just begun to hold your feet to the fire. We have just begun to hold you accountable. We have just begun to make sure that it is a new day in the United States military when it comes to these horrific crimes.

I have watched our military accomplish missions that I did not think anybody could accomplish. This is a big one. Now it is time to show your stuff. Show that you can get after this problem in a way that supports victims and results in successful prosecutions, and we will get a handle on one of the most embarrassing moments our U.S. military has had in decades.

Thank you, Mr. Chairman.

Chairman LEVIN. Thank you very much, Senator McCaskill.

I look to this side if anyone wishes to add a comment at this time. Senator McCain?

Senator MCCAIN. Well, thank you, Mr. Chairman. A lot has been said on this issue, and so I will make my remarks brief except to say that I thank you and Senator McCaskill, Senator Ayotte, Senator Graham, Senator Inhofe for a lot of hard discussions and compromises. And I think we have come up with a legislative proposal that should be extremely effective.

I would like to remind my colleagues that this is a cultural problem, and so if we are really going to address this issue in an effective fashion, we are going to have to change the culture in the military rather than systems of review, which are important, but the culture is the problem.

And if you will indulge me for a moment, I would like to remind our colleagues that during and following the war in Vietnam, when we still had a draft-based conscript force, we had problems of the utmost seriousness that were racial in nature to the point where we had race riots on our aircraft carriers and we had fragging during the conflict in Vietnam. And we did not solve the problem by taking away the responsibility of the commanding officer. What we did was place additional responsibilities and embarked on a very, very vigorous program of indoctrination, of instruction, of explaining to the men and women in the military what was acceptable and

what was not, and those who violated those regulations concerning the practice of racism were punished with the utmost severity and rapidity.

I have great faith in our commanding officers. I believe that when we have the responsibility of sending young men and women into combat at the risk of their very lives, that we also should have some confidence in their ability. I strongly support a system of review that has been adequately described here, but I also believe that when we give these men and women the responsibilities of command, that we should have them exercise those responsibilities.

And I would point out, by the way, in the hearing that we had, I asked Vice Admiral DeRenzi what her view was about the problem in the military, and she stated unequivocally that there have been significant improvements in her view in this whole culture and environment.

So I think it is up to us to do what we can as legislators, but we also should hold those responsible for an attitude and a climate that rejects this kind of behavior and, if necessary, if they cannot carry out those responsibilities, we find leaders that can.

And I thank you, Mr. Chairman, for your leadership again on this issue and, Senator Inhofe, for yours. And I think that at least this will be a major step forward in trying to address what is an unacceptable situation in our military today. Thank you, Mr. Chairman.

Chairman LEVIN. Thank you very much, Senator McCain.

Senator Reed.

Senator REED. Well, Mr. Chairman.

First, let me commend Senator Gillibrand for her extraordinary efforts in this regard. So many of our colleagues have dealt with this issue with intelligence and with passion, and I particularly want to recognize Senator McCaskill for her experience and bringing it to bear and in helping us, I think, move under the chairman's proposal to an approach that is going to be effective.

This is a plague, as the chairman indicated. It undermines fundamental trust, and without that trust, no military unit can function.

And I will second Senator McCain's observations because I commanded during the post-Vietnam era, and we had to deal with a serious set of issues. And ultimately it was about a chain of command being effective because our goal here is prevention, proactive prevention. That can only be accomplished by the chain of command. And that process entails every step and they have to be engaged. Induction of military personnel, training of military personnel, evaluation of military personnel, promotion of military personnel, inspecting constantly, and, yes, in cases where there have been violations of good order and discipline of the UCMJ charging those personnel and then, because they are involved in every phase, holding commanders responsible, accountable for everything they do or fail to do.

This accountability cannot be merely rhetorical, a zero policy, a zero tolerance. It has to be measured in a very simple metric. If a commander does not measure up, he or she is relieved of their command. That will, I think, provide the kind of proactive cultural change that Senator McCain referred to and is necessary.

I think the chairman's amendments reach this objective by making wise changes to procedure but ultimately making it clear to every level of command it is your job, no one else's. You have to make this work. Ultimately this translates into combat effectiveness, unit cohesion, unit loyalty, and the ultimate value I think that soldiers, sailors, marines, and airmen have to have, and we have all alluded to it. They have to trust the soldiers, sailors, marines, and airmen on their right and left, and they certainly have to trust their commanders. And I think with this language, we can move forward.

Thank you, Mr. Chairman.

Chairman LEVIN. Thank you, Senator Reed.

Senator Chambliss.

Senator CHAMBLISS. Thank you, Mr. Chairman.

You know, as we heard last week in the testimony before the full committee, the military does not have a more serious problem than this issue. And I commend the Senator from New York for making sure that the issue stayed at the profile that it deserved as we have been through this process. And, Mr. Chairman, I commend you for standing up and providing the right kind of leadership to address this serious problem.

Now I think it is going to be up to this committee, as we move through the conference to ensure that whatever the end product is—and hopefully this will be it—that the proper oversight is done in this area to make sure that the problem does, in fact, get solved.

So I look forward to supporting this, Mr. Chairman.

Chairman LEVIN. Thank you.

Senator Nelson.

Senator NELSON. Well, I have wrestled with this one because I think a lot of our commanders did not get it. And that was borne out by a survey that the military took, of which 50 percent of the victims said that they do not report because they do not think that it does any good.

My conclusion is—and I too served during that Vietnam era. My conclusion is if you cannot get the command system to work, then the whole thing crumbles, and accountability has to be held, and the people that are responsible and accountable are the commanders. And so I will support the Levin amendment.

Chairman LEVIN. Senator Ayotte?

Senator AYOTTE. I want to thank the chairman. I want to thank my colleague, Senator Gillibrand from New York, for her passion and leadership on this issue and really in the Personnel Subcommittee having hearings early on that I think drove our understanding and a much better understanding of the public of the seriousness of this issue. And I think that is why we find all of ourselves here today with an agreement that the status quo is absolutely unacceptable for our military and for our country.

And I very much also want to thank Senator McCaskill for bringing her experience in prosecuting these types of crimes to bear in addressing this important issue.

I too was a prosecutor before coming here, and one thing that has struck me in all of this is I feel, from having the hearings that Senator Gillibrand championed, as well as the chairman had, that the military has been far too behind on this from work that has

been done in the civilian side and the prosecution, including how victims of sexual assault are supported within those systems.

In looking at this issue of how we deal with the initial charge and speaking as well to the commanders, as well as those who are at the colonel level, to have responsibility for whether or not they would make the decision as a dispositional authority on these types of cases, I believe firmly that the agreement, whether it was—certainly the work that has been done, that if there is a disagreement between the JAG and the commanding officer, that it will go up to the civilian authority in each force, that everything within this military is driven by the chain of command. And ultimately, we have to make sure, if commanders are not taking their responsibility for zero tolerance within their unit, that they are measured by that. And I think that bringing it up to the secretary of the service level will bring this to the highest levels of knowing that not only is it your responsibility to make sure that these cases are handled properly, that victims are fully supported, but that if you, within your unit, do not make zero tolerance a priority and do not have accountability for it, then you will be measured by that. And as Senator Reed said, you will be fired. You will lose your commanding authority. And I think by bringing this situation up to the Secretary of Service level, it brings it to the seriousness which it deserves.

So I will support the chairman of the committee on this issue.

But I want to also touch upon something that Senator McCaskill said that our military leaders need to understand. We are giving you more responsibility here, more accountability. In other words, we are not going to let you off the hook on this, and this is not something that we are going to pass something on here today and forget about because many of us, we hope, will continue to serve on this committee. We will expect to understand how the system is working. We will expect to hear real metrics back as to whether victims can come forward, how many victims are coming forward, how they are treated within the system. And this will not be the last time you will hear from Congress on this issue because it is not going to be again where we pass something and then 10 years later the issue comes up again or 2 years later. We will continue to have an oversight function on this on a continual basis, on a bipartisan basis to make sure that whatever is passed by this committee today to give the strongest laws that we can in place to make sure that this zero tolerance issue does go to the absolute culture of this military.

And I am married to an Iraq War veteran. And nothing has offended him more than knowing the scourge of sexual assault within our military. And I know that our men and women who serve every single day, most of them incredibly honorably—nothing offends them more than there would be this type of behavior within our military.

So I thank the chairman. I want to thank Senator Gillibrand for her leadership, Senator McCaskill, all of you who have worked so hard on this.

And I will be supporting what the chairman has done, and I think that this will make sure that the leadership within the military and the commanders are not let off the hook, that we will con-

tinue to make sure that they are held accountable, not just in this defense authorization but as we do our oversight function next year and through the summer and as this thing continues.

Thank you, Mr. Chairman.

Chairman LEVIN. Thank you, Senator.

Senator Shaheen.

Senator SHAHEEN. Thank you, Mr. Chairman.

I very much appreciate the work that you have done and this alternative amendment that you are going to be offering. I do hope it works because I know all of us on this committee believe that this is an issue that must be addressed.

I am not going to be voting for it, however. I am a cosponsor of Senator Gillibrand's provision and appreciate the work that she has done, appreciate the leadership that Senator McCaskill and others have shown on the committee.

I was interested that both Senator Gillibrand and you, Mr. Chairman, and I think Senator Reed and some others have referred to the zero tolerance policy within the military about sexual assault. Well, the fact is that that zero tolerance policy was actually established by the Secretary of the Navy, Lawrence Garrett III, in 1989, nearly 2½ decades ago. And then the Tailhook incident took place in 1991, and there was outrage then too. There was a call on the chain of command to step up and to fix what was going on. On June 2, 1992, Secretary Garrett wrote a memo to his military leaders that said, while each individual must be accountable for his or her own actions, commanding officers have a unique responsibility for leadership in ensuring appropriate behavior and attitudes of those under their command.

That was a moment I think much like the moment that we are in now. And yet, we are here 2 decades later. Congress has made modest changes during that time to try and address the culture within the military that has created the circumstances around sexual assault. The military justice system has remained unchanged during that period. Sadly what is also unchanged is the existence of sexual assault in the ranks.

So I think the question that we have to ask ourselves—and I appreciate all of the discussion about the importance of the chain of command and commanding officers and the necessity that they be part of changing the current culture. But the fact is if we do not have a fundamental change in how we address this issue, are we going to be back here in 2 more decades having the same conversation because we still have not seen the culture change that needs to happen?

I hope that is not the case. I hope that all of the efforts that we are making and members of this committee are making now and our leadership in the military is making will make a difference. And as others have said so eloquently, it is important to us to make sure that it does make a difference, that we follow what is happening so that this issue, once and for all, is stamped out and is no longer a stain on our men and women who are serving.

Thank you very much, Mr. Chairman.

Chairman LEVIN. Thank you.

Let me call on I think Senator Gillibrand and then Senator Kaine and then Senator Blumenthal.

Senator GILLIBRAND. Thank you, Mr. Chairman.

I want to start with my thoughts on your amendment because I think so many of the provisions in it, in fact, are very strong and are going a long way to providing transparency and accountability where none existed.

I particularly like the fact that retaliation is now going to be a crime. I think that is an extraordinarily good measure that I fully support, and I think it is an excellent step in the right direction.

I also support all of the levels of transparency for appeals. Taking it up to the secretary of the services I think is very, very wise.

I also appreciate the sense of Congress, although I wish we could have made it stronger. Right now, the sense of Congress says that commanding officers are responsible for establishing a command climate free of retaliation, free of fear of retaliation. Failure of the commanding officers to maintain such command climate is an appropriate basis for relief from that command position. Senior officers should evaluate subordinate commanding officers on how well they establish a command climate free of fear of retaliation. Those are excellent.

I wish those were actually required. And I hope we as a committee can move forward to make that actually a requirement, that command climate is part of the evaluation process of commanders as to whether or not they are doing a good job. And I also hope we can actually make that a requirement because, as Senator McCain said, we need to hold commanders accountable. They have to be part of this process. I think he was exactly right when he said that. And we need a measurable by which commanders can actually be held accountable if they are not showing a climate of command that is productive and actually values all of the men and women who are serving in our military. So I would like to, hopefully, change that ultimately to not just be a sense of Congress but actually make it a measurable within the review process. I hope we can work as a committee to do that.

Now, I want to address why I think this is insufficient.

There seems to be a misunderstanding that the commanders are not taking the judgments of their JAG. They are. In fact, they only disagree with their JAG 1 percent of the time, less than 1 percent. It is very rare when commanders are disagreeing with their JAG. That is not our problem. So all this transparency and review is excellent, but it is not solving the given problem. That is not a problem we have today.

The problem is very clear because the victims have told us what it is, and I am just distressed that the victims' voices are not being heard in this debate not nearly enough. The victims say it is the climate that they fear retaliation. Their commanders are not creating a climate where they feel they can report without being blamed, being retaliated against, being marginalized, having their careers be over. That is the commanders' responsibility. If they are creating a climate of fear and there is retaliation within their ranks, they are not maintaining good order and discipline. The victims tell us they do not report because of chain of command.

So I disagree with the statements today and previously that the chain of command at the disposition phase is the problem. It is not that their decision is wrong. It is that they are the decider, and the

victims have said, I am not reporting because it is within the chain of command. And for the JAG lawyers that are making these recommendations, those JAG lawyers are in the chain of command. It would be like my general counsel making a recommendation to me. It is entirely within the chain of command.

The reason why our bill is different is it is asking a set of JAG lawyers who do not report to the chain of command to make these decisions independently, so that the victims can perceive that it is not within the chain that the decision is made, because if you look at the victims' descriptions of what happens to them, their assailant is usually someone senior to them, someone up the chain, someone senior, more decorated, Purple Heart recipient, someone who has done great acts of bravery. And they see that the chain of command will not be objective. There is no objectivity in the decision that is being made about whether or not to prosecute.

It is not that the commander is disagreeing with his lawyer. It is that the victim fears retaliation. The statistics in the last report that we know, we just know, they said 50 percent said they do not think anything will be done with their case. That is why they did not report. Forty-seven percent said they feared some form of retaliation or it would not go well. Forty-three percent said I have actually witnessed someone who did report be retaliated against.

So that is their fear. It is the chain of command as the decision maker. And so that is why we believe that if you took it out of the chain of command, you would have the hope that you would increase reporting.

Now, I agree, commanders have done the extra job of moving more cases to trial, but it is not a meaningful number. If there are 26,000 unwanted sexual contacts, assaults, and rapes, and we do not know how many of those are assaults and rapes. What we do know is 3,300 were reported, huge falloff between incident number and reported, whatever the incident number of rape and sexual assault is. Thirty-three hundred are reported. Of the 3,300 that are reported, 70 percent are sexual assault and rape. So we know there are thousands of sexual assaults and rapes every single year reported. What we also know is only one in 10 go to trial.

So of the ones that go to trial, there are 302. So let us just say the commander said, I really want to go to trial more often than my lawyers tell me. Let us say he increased it by 25. Twenty-five more cases went to trial. That is a good thing. That is a really good thing. And I appreciate that the commanders actually make and take that step.

So we have 302 cases that go to trial. Pretty good conviction rate: 238 convicted. Pretty good. The problem is if you only 302 cases going to trial, but there is some number above 3,300 of cases actually taking place, it is their reporting that we need to change.

So we look at our allies, the allies we fight with every time we need an ally in war. Look at Israel. Look at the UK. Look at Canada. Look at Germany. Look at Australia. They have made this decision already because of the objectivity problem and because of reporting issues. In fact, in Israel, because they have done some high level prosecutions in the last 5 years, their reporting has increased by 80 percent. What would that mean if our reporting increased by

80 percent? It would mean we would not have 3,300 reported cases. We would have tens of thousands of reported cases.

And if that many reported, how many are going to go to trial? A lot more than 300. Even with an aggressive commander, you might get more. But a lot more are going to trial if you increase reporting. So to increase reporting, let us just listen to the victims. They say it is in the chain of command. That is why they are not reporting. So we can believe them or we can not believe them. Many here do not believe the victims. They do not believe the victims. They do not believe chain of command is the problem.

I urge people to support our original version of the personnel markup.

Chairman LEVIN. Thank you, Senator Gillibrand. I am going to insert Senator Fischer here, so I am going to alternate back and forth where I have someone on this side that seeks recognition.

Senator Fischer?

Senator FISCHER. Thank you, Mr. Chairman. I certainly appreciate your leadership on this issue, and I will support the proposal that you have brought forward.

I would like to thank all the members on this committee who have worked on amendments, who have presented amendments. Senator Gillibrand, thanks to you. Senator Shaheen, Senator Ayotte.

I would especially like to recognize Senator McCaskill because I think you have brought forward from your experience as a prosecutor issues and a viewpoint that have been very, very helpful to me as we have heard testimony and as we have discussed this horrific issue that is before us. So thank you very much.

Sexual assault is unacceptable because it goes truly to the very core of our Armed Forces. And so, as I look around this table and I look at my colleagues, I know that each and every person here is going to continue to focus on this issue, and is going to continue to monitor how the military is behaving as we move forward. That is a good thing because I think it states to the military and it states to the public, but especially to the victims, that we are concerned, we do not take this lightly, and that we will continue to be there in the future because changes have to be made. And we need to solve this cancer that is taking place within the Armed Forces.

Thank you, Mr. Chairman.

Chairman LEVIN. Thank you, Senator Fischer.

The order now, if I can remember what I said, would be Senator Kaine next, and Senator Blumenthal, and then Senator Hirono. I believe that is what I announced.

Senator Kaine?

Senator KAINE. Thank you, Mr. Chair. One thing I feel very—

Chairman LEVIN. Let me interrupt for just 1 minute. If someone on the Republican side seeks recognition, I am going to insert them in that order. Thank you. Sorry for the interruption.

Senator KAINE. Thank you, Mr. Chair. One thing I feel very confident about sitting around this table is that everyone who is here, everyone who serves on this committee, believes the victims, believes the victims who have testified, and believes the victims who have been reported on in the surveys we have received. I do not think that distinguishes anyone on this committee from each other.

The testimony has been harrowing. I was at the Personnel Subcommittee hearing and at the lengthy hearing last week. Every last member of this committee, Democratic and Republicans, believes the victims.

We all believe that we have a major problem. We all believe that the problem of sexual misconduct is a stain on the military. And because it is a stain on the military, it is a stain on the Nation. We are short of heroes right now, and the military is as good as we get. And when our heroes have a problem like this that is so serious, it is not just a stain on the military, it is a stain on our country.

A positive development is that there is also much agreement on this committee about a whole series of significant and major reforms that we need to take. And for that I give credit to all my colleagues, but especially to the Personnel Subcommittee chair, Senator Gillibrand. We are agreeing, I believe, or poised to agree on a package of significant reforms to reporting, prevention, training, recruiting, anti-retaliation measures, investigation, prosecution, punishment, counseling, the provision of VA benefits, and protection for whistleblowers. We are poised to agree to a whole series of what I think are significant reforms. There is only one major policy disagreement, and that policy disagreement is should we remove from military command the decision to prosecute serious offenses, remove that decision to prosecute serious offenses from the chain of command. And for two reasons I do not think we should, and that is why I am supporting the chairman's amendment.

First, and this has been covered pretty significantly, I do not think removing this issue from the chain of command is the best way to fix the problem of sexual misconduct. I do not believe we are going to fix it by taking responsibility away from commanders. I think we need to give resources and tools to commanders. I think we need to force the chain of command to take this more seriously. We will not solve it by reducing their authority. We will solve it by increasing their authority and increasing our expectations.

If we take this power away from the chain of command, we send the message not just that you are doing a bad job. We are sending that message with the package of amendments we are about to embrace. We send the message we have no confidence you can fix this. That is the message we send if we take it away from the chain of command. We have confidence in 12 years of war, the longest period of war that our Nation has ever been in, we have had confidence in them making decisions. We have confidence in the chain of command to two ongoing cultural changes: the implementation of Don't Ask, Don't Tell, the implementation of the recent decision to remove barriers to women serving in combat positions. We are counting on the chain of command in those instances to change the culture. To send a signal of no confidence, we do not think you can get this right, I do not think is the right thing to do.

Second, I support the chairman's amendment because I think it maintains the focus on the issue, which is sexual misconduct. The proposed pre-amendment is to remove from the military chain of command the decision to initiate prosecution in all serious non-military offenses: murder, larceny, robbery, forgery, bad checks, arson, extortion, burglary, housebreaking, perjury, fraud against

the United States. The proposal is to remove from the chain of command the decision to initiate prosecution in all of those offenses.

Now, there are very smart people around this table—lawyers, prosecutors, those who have served in the military. But however smart we are, we have not heard one bit of evidence to suggest that the chain of command is not capable of handling all those kinds of offenses that I have just gone through. We have heard ample evidence about sexual misconduct. We have heard no evidence that the chain of command cannot handle these other serious offenses.

And so, to act on the basis of no evidence and pull all of this out of the military chain of command, we would lose the focus on the problem. The problem is sexual misconduct, both of the criminal variety, but also of hostile workplace, sexual discrimination. We have to solve all of it, but we will only solve it if we keep the focus on what is the problem.

And so, for those two reasons, we cannot fix this without the chain of command, and we should not try to fix problems that we have not yet heard exist. I support the chairman's amendment.

Chairman LEVIN. Thank you.

Senator Blumenthal, I believe, is next.

Senator BLUMENTHAL. Thank you, Mr. Chairman. And I want to join in thanking you for the very serious and hard work that you and others have done crafting this proposal, which I think is an effort to strike a balance. And we all recognize the competing interests at play here. And as Senator Kaine has just said very powerfully, we share this interest. We share the condemnation of this scourge, as the Secretary of Defense himself has called it, as every one of our service chiefs condemned it when they came before us.

And I just want to say that I think the military deserves some credit here. I think that attitudes are changing. The very powerful testimony that we heard on our committee from those service chiefs goes beyond just the rhetoric and the words. They are taking action. And just to give you one example, one of them informed me this morning that he is convening a group of his senior company commanders, colonels and lieutenant colonels, for a very extended session, which will include showing them the testimony and questions and statements during our hearing.

In that connection, I want to say thank you to Senator Gillibrand for her leadership, because I think her proposal has helped to move this debate. It has moved the line of consensus in favor of a more independent review with the knowledge that trust and credibility are everything here.

And I have some reservations about your proposal, Mr. Chairman, that will lead me to continue to support the Gillibrand proposal.

First of all, I think that we have to look at this problem from the standpoint not just of the commanding authority, but from the standpoint of the victim, how the system looks to him or her. And my fear is that it will look to the victim as though we are simply tinkering with the process. The system will remain for the victim essentially a black box. There will be little or no opportunity to participate, and virtually no information during this supposed system of review. And the review itself, in almost every case, will go

to the senior commanding authority, and never reach anybody in civilian authority. That just is the fact of the way the system will work because if the commander decides not to charge and the JAG supports not charging, then it goes to the senior commanding authority.

So I will continue to support the proposal to make a more demonstrative change in the current system. And I join in the view that the military leadership of this country will not be let off the hook, but they do not expect to be let off the hook. They will hold themselves accountable. And I look forward to their knowing that we will revisit this issue. In fact, I think that we are, in many respects, deferring to another day a real solution to this problem that will provide for trained and experienced prosecutors to be making these decisions.

And I would just finish on that point. As Senator McCaskill has said so eloquently, there is a real need to know how to do these cases because they are a very demanding and difficult, and, in some ways, unique kind of prosecution that the training and experience not only to make decisions, but review decisions, really requires. And I hope that we can continue to work to make the system worthy of the greatest military in the history of the world that is changing because we have a new generation entering, and because we are promoting more women, which I think may be the two decisive factors in changing the culture.

Thank you.

Chairman LEVIN. Thank you, Senator Blumenthal.

Senator HIRONO.

Senator HIRONO. Thank you very much, Mr. Chair. And I echo the sentiments of my colleagues in thanking you and the ranking member, but in particular thanking Senator Gillibrand for her leadership and, of course, Senator McCaskill and all the other of my colleagues here who have focused on this issue like a laser beam.

And this has been going on—sexual assault in the military has been going on for decades. And while I certainly appreciate the chairman's efforts to move us forward, I will not be supporting his amendment, although I acknowledge the improvements that the chair's amendment does constitute.

I think the people who suffer sexual assault in the military, when they think about reporting this, really have two great fears. One is the fear of not being believed because in these cases, it is usually he said, she said, or sometimes he said, he said, and the fear of retaliation. And while I acknowledge, Mr. Chair, that you have in your amendment provision that makes retaliation a crime, I note that the language in the amendment really focuses on retaliation as it relates to personnel matters and that, in your amendment, notes that that is just a minimum.

There are so many ways that retaliation can occur in this environment. You can retaliate—be retaliated on the basis of not so subtle or subtle harassment, or you can be retaliated by having to undergo a psychological evaluation that finds you somehow psychologically—having some kind of psychological disorder. So there are so many ways that retaliation can occur that it is really hard to define.

And so I acknowledge your efforts to try and define it, but I do think that that is one of the biggest, biggest barriers to reporting. And that really is a bottom line issue here, I believe, the non-reporting by thousands and thousands of people who have endured sexual trauma in the military.

And, yes, it is a cultural issue, and to change the culture, as one of my colleagues said, you have to change the culture. This culture has been going on for decades. And I do believe that sometimes the cultural change can more rapidly occur when you make a structural change, like the sort that Senator Gillibrand is proposing. And I certainly have nothing against the military and their efforts, and I acknowledge their service. But this truly is a very unique kind of crime that requires us to continue to focus in.

And again, I echo my colleagues in saying that we are going to continue to hold our commanders and the military leadership accountable. This is not the end of the discussion. We know that we are going to need to continue to provide oversight as we proceed. Thank you very much.

Chairman LEVIN. Thank you, Senator Hirono.

Senator Cruz.

Senator CRUZ. Thank you, Mr. Chairman. I would like to thank the committee for its good work in drawing attention to this very serious problem. Sexual assault in the military is a total violation of the obligation we have to the men and women who step forward to defend ourselves and to defend our Nation, defend our liberties. And I commend the good work of this committee working to improve reporting, to improve prosecution. I commend the chairman for his good work in crafting this amendment, which I think is working to improve the situation. I want to commend the leadership of a number of leaders on this committee, including Senator McCaskill, and Senator Shaheen, and Senator Ayotte.

And in particular I want to commend Senator Gillibrand. I am going to be voting against the chairman's amendment. And I am going to be voting against it because I was persuaded by the arguments that Senator Gillibrand presented in this committee a few moments ago. I think she made a powerful and effective argument that the lack of reporting is driven by a fear of not having an impartial third party outside the chain of command in which to report a sexual assault. And I think that argument was buttressed by her pointing to our allies that have implemented similar policies and seen significant increases in the reporting that has occurred when there is an impartial actor to lodge that report.

Now, based on the comments of many senators at this hearing, it appears likely that the chairman's amendment is going to be adopted. And I would suggest that if that is the case, it may well prove that this amendment makes material progress in solving the problem. And if it does, I know all of us would celebrate that fact. If it does not, if going forward in a year or two or three we see the data and the reporting is still abysmal, it is still not working, there is still a fear of not having an impartial prosecutor, an impartial tribunal, then I would suggest it may well be in order for this committee to return to Senator Gillibrand's very good proposal.

And I would note that I thought Senator Kaine made a very good point about the breadth of the offenses, and in particular the of-

fenses not relating to sexual assault that I at least have not heard a predicate that there is the same problem with other offenses that appear to be present with sexual assault. So it may in the future make sense to consider the approach Senator Gillibrand has presented, but narrowed and focused on those offenses concerning sexual assault, which are certainly the heart of the concern of this committee.

And so I commend the good work of so many leaders around this committee, but I am going to vote no because I think Senator Gillibrand's proposal is a good one.

Chairman LEVIN. Thank you, Senator Cruz.

We will now—I am sorry, Senator King.

Senator KING. Mr. Chairman, thank you very much. I have to say, first, as a newcomer to the Senate and to this committee, this is one of the most impressive discussions I have been engaged in since I have been here. And this is the way these important decisions are supposed to be made with passionate and well-conceived arguments on all sides.

I find this a very tough call. I have gone back and forth, as Senator Gillibrand well knows as we have discussed this issue over the past several weeks. There is a natural tendency of any hierarchy, of any hierarchical organization to protect itself first, and I think that is an instinct, whether it is the Army or any other similar kind of organization. And that makes this a particularly tough call.

Another preliminary comment I want to make is I think it is really important that we focus on the fact that this is part of a package, and that there is a long list of initiatives in this bill, in the personnel bill and in the amendments, the 10 amendments that we adopted today, and all the controversy is about 1. And it should not take either our eyes or the public's eyes off the fact that this is the most comprehensive approach to dealing with this issue that, in my knowledge, has ever been taken by Congress. So I think that is a very important point of context.

Next, to me, the most—may turn out to be the most important part of your amendment is the retaliation section. I think that is what is one of the major things that is driving people not reporting. And the data is—they did not say we are not reporting because of the chain of command. They say we are not reporting because of fear of retaliation or because we do not think anything is going to be done. It is unclear. You can interpret the data in different ways. But clearly retaliation is part of the problem.

And at our hearing last week when we had the second panel with the officers who were actually hearing these cases, one of the witnesses actually testified and answered some questions that he believed that right now the more likely sort of grass roots response is some kind of retaliation against the complainant instead of against the perpetrator. And I thought that was a very damning, but honest, statement.

Ultimately, Mr. Chairman, I am going to support your amendment because I believe that in any organization, the leader sets the tone. And that is what we are talking about here is tone and culture. And if you take the commander of the unit out of the equation, then, as Senator Kaine mentioned, you are sending a message that we do not trust these folks. But also basically that commander

then can say, okay, this is not my problem anymore, and we want it to be their problem. And I think that the engagement of the leader of the group, whatever level, is a terribly important part of the solution of this problem.

The target is the failure to report, and I think if we can establish that retaliation itself is an offense, that, I believe, will be a very important contribution in addition to the safeguards that are the heart of your proposal that this will—there will be an alternative route if the decision is negative.

And finally, I think Senator Cruz said something very important, and I was thinking it and trying to figure out how I was going to put it, but you put it very eloquently. This is a test. This is not the end of this story. And I realize there is a long history to this, and it is no satisfactory to victims to say, well, we are going to try something for two years and see if it works. I think this is a very far reaching, comprehensive, and strong proposal. But if it does not work, if it we do not see an improvement, if we do not see higher levels of reporting and a change in the culture, then I think this committee is going to have very little option but to change fundamentally the ways these matters are handled. In a sense, I see this as a last chance for the chain of command to get it right.

And for all those reasons—again, I will go back to the beginning—I consider this a very tough and close call, but I think we have done something important here today. I commend Senator Gillibrand. I am so admiring of her passion and energy on this issue, and I do not think there is any question that we would not be where we are had she not been so strong on this. But on the other hand, I commend the chair and others who listened to both sides and found a solution that I think is creative and will be effective.

I will support your amendment.

Chairman LEVIN. Thank you all, and I will ask the clerk to call the roll.

The CLERK. Mr. Reed?

Senator REED. Aye.

The CLERK. Mr. Nelson?

Senator NELSON. Aye.

The CLERK. Mrs. McCaskill?

Senator MCCASKILL. Aye.

The CLERK. Mr. Udall?

Senator UDALL. No.

The CLERK. Mrs. Hagan?

Chairman LEVIN. No by proxy.

The CLERK. Mr. Manchin?

Senator MANCHIN. Aye.

The CLERK. Mrs. Shaheen?

Senator SHAHEEN. No.

The CLERK. Mrs. Gillibrand?

Senator GILLIBRAND. No.

The CLERK. Mr. Blumenthal?

Senator BLUMENTHAL. No.

The CLERK. Mr. Donnelly?

Senator DONNELLY. No.

The CLERK. Mrs. Hirono?

Senator HIRONO. No.

The CLERK. Mr. Kaine?

Senator KAINE. Aye.

The CLERK. Mr. King?

Senator KING. Aye.

The CLERK. Mr. Inhofe?

Senator INHOFE. Aye.

The CLERK. Mr. McCain?

Senator INHOFE. Aye by proxy.

The CLERK. Mr. Sessions?

Senator INHOFE. Aye by proxy.

The CLERK. Mr. Chambliss?

Senator INHOFE. Aye by proxy.

The CLERK. Mr. Wicker?

Senator INHOFE. Aye by proxy.

The CLERK. Ms. Ayotte?

Senator AYOTTE. Aye.

The CLERK. Mrs. Fischer?

Senator FISCHER. Aye.

The CLERK. Mr. Graham?

Senator GRAHAM. Aye.

The CLERK. Mr. Vitter?

Senator VITTER. No.

The CLERK. Mr. Blunt?

Senator BLUNT. Blunt votes yes.

The CLERK. Mr. Lee?

Senator LEE. Aye.

The CLERK. Mr. Cruz?

Senator CRUZ. No.

The CLERK. Mr. Chairman?

Chairman LEVIN. Aye.

The CLERK. Seventeen ayes, nine noes. The motion passes.

Chairman LEVIN. Thank you all. Now, we can have a roll call if it so desired. And I would particularly ask this—everyone just to concentrate on this. It is a little bit technical procedurally, but we can now have a roll call should it be desired on the sexual assault package, as amended, as a whole. Is there a desire for a vote on that?

Senator MCCASKILL. Mr. Chairman, there are some amendments that have been cleared that—

Chairman LEVIN. On this—

Senator MCCASKILL.—on the sexual assault portion of the bill.

Chairman LEVIN. I think we cleared all of them. Are there additional ones? There are a few left. I apologize.

Senator MCCASKILL. Yeah.

Chairman LEVIN. I apologize. Thank you.

Senator McCaskill.

Senator MCCASKILL. The first amendment that I would like to talk about is Amendment Number 17. Right now during the clemency phase of the trial, the convening authority receives a packet of materials prepared by defendant's counsel. There are no limitations on what can appear in that packet. It presents an opportunity for the defendant to attack the victim, which occurs almost in every case, except this time, without any ability to rebut.

This amendment does two things. First, it gives the victim the same opportunity as the defendant to provide information for clemency consideration. It gives a voice to the victim during the clemency phase. Second, this amendment prohibits the convening authority from reviewing any material that speaks to the character of the victim if that information was not presented as evidence at trial. This keeps the convening authority from being able to review materials the jury was not allowed to hear.

We have a rape shield statute in UCMJ, and the rape shield statute is that where the prosecutor and the defense lawyer argue to the judge whether or not prior sexual or post-sexual contact of the victim is relevant, and the judge makes a decision.

I learned in the Aviano case and many others that after the judge ruled that none of that was admissible, it went in the clemency pack, totally inappropriate. So this amendment would not only give a voice to the victim during the clemency process. It would make sure that no one is reading anything about that victim that was not deemed admissible in trial.

Senator GILLIBRAND. Mr. Chairman, I move for a voice vote.

Chairman LEVIN. Let me just see if there is other debate on this. This amendment I know has been cleared on our side, and I just want to hear from your side as to whether there is any objection.

Senator GRAHAM. Mr. Chairman, I have no problem. I think it is a good amendment.

Chairman LEVIN. Any further debate?

Hearing none, all in favor say aye? [Chorus of ayes.]

Opposed, nay? [No response.]

The ayes have it.

Next, the McCaskill amendment. There apparently are five and I had overlooked it.

Senator MCCASKILL. There are. The second amendment is 18, and this is—calls for mandatory—this is a provision that was in the bipartisan bicameral legislation that Senator Collins, Representative Turner, and Representative Tsongas and I introduced. This would require a mandatory discharge or dismissal with conviction of a sexual crime.

Senator GILLIBRAND. Mr. Chairman, I move for a voice vote.

Chairman LEVIN. Is there debate on this side? This has been cleared on our side, I know, but I do not—I think we have to hear from the other side. I am sorry, the one I have is number 19.

Senator MCCASKILL. Eighteen. This is number 18.

Chairman LEVIN. It is number 18, okay. This has also been cleared on our side, number 18.

Senator INHOFE. Okay. This has not been cleared on our side. I personally would oppose it. I think this provides no discretion to address circumstances where discharge may negatively impact the family of the accused. It could be a significant impediment in a guilty plea as I see it.

I would let anyone else make any comments that might make on it.

Senator GRAHAM. Mr. Chairman, I would like to look at it longer. I understand what Senator McCaskill is trying to do, but, you know, if you are going to mandate a discharge, I do not know how many times we do that in UCMJ. I would just like to look at it and

maybe we can, you know, if there is a problem with it, I can sit down with her. But I do not want to hold up progress here.

Senator MCCASKILL. And I also ask unanimous consent that Senator Blumenthal be added as a co-sponsor to this. He also had this in some of his legislation. I mean, if you want to hold this, Mr. Chairman, for us to vote on at a later time, assuming that the mark will remain open for purposes of—

Chairman LEVIN. I think Senator Graham said that we could modify it later on a voice vote. He would. That does not mean that my ranking member would—can we have a voice vote on this, pass it, and work on it later?

Senator INHOFE. Yeah, and it could be addressed on the floor, too.

Chairman LEVIN. Okay. So all those in favor, say aye? [Chorus of ayes.]

Opposed, nay? [No response.]

The ayes appear to have it. The ayes have it. And now we will go to McCaskill number three.

Senator MCCASKILL. This is about—Amendment 19 is about the victim interview. This amendment requires that defense counsel give notice to the—it does not limit access to the victim in any way. The victim still can get accessed by the defendant counsel. But it requires defendant counsel to give notice to the prosecutor before they interview a victim, which will give the prosecutor an adequate opportunity, if desired, to give support to the victim during that interview.

It also requires upon request the victim have counsel present for those interviews, reaffirming this right under this law.

Chairman LEVIN. Is there further debate on this?

Senator GRAHAM. Could you say that again—I am sorry—what it would do?

Senator MCCASKILL. It does two things. It requires that defense counsel give notice to the prosecutor before trying to interview the victim. It does not limit how often the defendant can interview the victim or the fact that they can, but just you have to give notice. And second, that if the victim requests, that they are entitled to have counsel present, their own counsel present, for the interview.

Senator GRAHAM. You got me on the first, but not the second, so I oppose this.

Chairman LEVIN. Is there further debate?

Senator GRAHAM. Yes, because, you know, we are trying to fix problems and not create other problems. I am not really sure I am ready to commit right now, having been a defense attorney, that the only time I can ever interview the person accusing my client of a crime that could put him in jail for life or other things, that I have somebody else in the interview. I am not so sure that that is—I do not know if it breaches attorney-client privilege. I do not know. This is a far-ranging change. There are two sides to every court martial or every trial.

Chairman LEVIN. If there is no objection, we are going to put this on for later—further discussion during the markup. If there is no objection, we will do it that way.

Senator McCaskill, number four?

Senator MCCASKILL. This is Amendment Number 193. This is a limitation on the convening authority in terms of their ability to grant clemency.

Chairman LEVIN. And what is the number on this one?

Senator MCCASKILL. 193.

Chairman LEVIN. 193.

Senator MCCASKILL. The mark already addresses the ability of a commander to overturn the findings of a jury. This would address a commander's ability to modify a sentence.

Under this amendment, a commander could modify a sentence only for cases where there is a pre-arranged plea bargain or where the defendant provides substantial assistance to the government in the investigation or prosecution of another matter.

We have heard a lot of concerns that clemency agreements are often used to provide some monetary assistance to the defendant's family and ease their burden. I agree that protecting military families is important, so my amendment would still allow for a commander to modify sentences of forfeiture of pay. So it would let the commander still modify forfeiture of pay issues to address family needs, but it would only allow them to modify sentences for plea agreements or cooperation with the government with the prosecutors on another investigation.

Chairman LEVIN. Senator Gillibrand?

Senator GILLIBRAND. Just a question. Is this for all felonies?

Senator MCCASKILL. This is for all felonies.

Chairman LEVIN. Senator Graham?

Senator GRAHAM. Mr. Chairman, I should have looked at these. I will blame myself, but I am not ready to commit. This strikes me as being basically unsound. But I will defer—

Senator MCCASKILL. But that is not possible. [Laughter.]

Chairman LEVIN. All right. If there is no objection, we are going to hold this—

Senator GRAHAM. A polite way of saying I do not like it.

Chairman LEVIN. If there is no objection, Senator McCaskill, we will hold this for later in the markup as well.

Senator MCCASKILL. Okay. And then my final Amendment 195, this is an offender database. And this may be one that we need to talk about, too.

But if you think about the civilian criminal justice world, can you imagine a situation where a rape victim comes forward and names a perpetrator, and then refuses to go forward and give any additional testimony, that that name would disappear into thin air? That is what happens in the military. That name disappears into thin air. That predator is free to strike again at another base, in another country, at another time.

This amendment would allow us to build an offender database for military law enforcement only, not for the public, and it would not identify the victims. But it would allow investigators to go back and see if they get a report at, you know, some base here in the United States. They go back and see, well, you know, this person over at Lejeune did something like this or was accused of doing something like this. And then you could actually maybe go back and find that victim and talk to that victim, and find the same MO, the same pattern.

And it would really enhance the ability to investigate these crimes and find the guilty parties and hold them accountable. And I think is something that is just common sense in the civilian world, and I was shocked to learn that it is not even—had not even been contemplated in the military system.

Chairman LEVIN. This is limited to sexual assault matters?

Senator McCASKILL. It is.

Chairman LEVIN. Is there further debate on this?

Senator GRAHAM. Yes. Actually it makes sense to me, quite frankly, that we are trying to—you know, you are not going to use an unfounded accusation to prove somebody guilty in a court martial. But if, you know, we have a sexual predator problem, you are dead right about that. In my time in the military, they actually talked to each other. There is a network of people out there who, you know, child abusers. And there are people out there who talk about where you go and, you know, what is the best bar to go to. Believe it or not, it is true.

And so, let us see if we can work on this. I like the idea of capturing for the system sake, not to be used, you know, against somebody being accused of something cannot be the end of your career. But it sure needs to be captured somehow.

Chairman LEVIN. Senator Nelson?

Senator NELSON. We are in a Nation that you are presumed innocent until proven guilty. And we are now—this is an allegation. This is not a conviction. So I—

Senator McCASKILL. Well, Mr. Chairman, let me just point out that under that scenario, we should not take any fingerprints of anyone who is accused of a crime, but where the crime is not brought to trial. We should never take DNA from anybody who is ever accused of a crime, but the case is not brought to trial. We should never keep their name on record if they have been accused of a crime, but not been brought to trial.

We are not talking about this being a public record. We are not talking about this being available. We are talking about within the law enforcement community, they being able to access this information. There are no rights that are going to be taken away from this person. It would not be available if someone asked for it.

So I just think you are really handcuffing your law enforcement capability within the military if you do not have some kind of database tracking this information.

Senator NELSON. Would the accused have been in the military court system? Would they have been actually charged by the prosecutor, or is this just an alleged offense because a victim comes forward—an alleged victim comes forward and says so?

Senator McCASKILL. Yes.

Senator GRAHAM. As I understand it, what she is saying is if someone comes forward and makes an allegation, but they do not want to go to trial—

Senator McCASKILL. Right.

Senator GRAHAM.—that this is captured. We actually do this in child abuse cases. There is a system that tracks child abuse complaints for adoption, for other things, because this is tough. I understand what you are saying. I do not want it to be used to deny someone a promotion. I do not want the promotion board to get ac-

cess to it. I do not want it to be used in a different trial. But if somehow we can find for law enforcement purposes only a way to keep track of the allegations, that strikes me as not a bad thing to do, given the fact that I believe sexual predators are organized and they just do not do it one time.

Chairman LEVIN. As I understand the amendment, this will allow law enforcement officials to identify people as possible sexual predators where victims at different times and at different places report that they were a victim of this person. It seems to me that that is reasonable going in.

I would suggest we adopt it by a voice vote.

Senator MANCHIN. Mr. Chairman, if I could ask a question.

Chairman LEVIN. Of course, Senator Manchin.

Senator MANCHIN. And back to what Senator Nelson is talking about. What is the database used for if they have not been convicted? Would it be used for to build a case against them? But what if they have not been convicted of anything?

Senator MCCASKILL. Here is what would happen. A woman comes forward and says, I was stalked outside the barracks last night, and then he—this man threw me up against the wall and brutally raped me. But I am not going to—I will tell you his name, but that is all I am going to do, and I will not do anything else. I do want to come forward. It is too personal. It is too painful.

Law enforcement in the military, the criminal investigations division could then go in a database and see if someone else made the exact same accusation against the same person the same way, the same way the crime was committed in another location at a different time. Then you have go back to that victim and say, you know what? This is not the first time he did this. Will you talk to us, and will you consider going forward?

And many, many times victims who will not come forward in isolation will come forward when they learn that there is another victim that is willing to come forward that had the exact same brutality committed upon her. And we cannot do that in the military because they do not track this information. We do it all the time in the civilian law enforcement world.

Senator NELSON. Would you—

Chairman LEVIN. Senator Nelson?

Senator NELSON. Would you explain that, please? In the civilian law enforcement why is that record is kept? You said fingerprints, DNA, and so forth, but that is not what this is. The arrest has not been made.

Senator MCCASKILL. Well, an arrest may have been made.

Senator NELSON. The allegation is made, but in your particular case, the lady—the alleged victim says that she is not going to prosecute.

Senator MCCASKILL. Within the law enforcement community, information is maintained when accusations are made. It does not mean that it is a public record. It does not mean that it impacts that person's life in any way. But they do not destroy information that comes to law enforcement just because the victim does not want to cooperate.

Senator NELSON. So in the civilian law enforcement community, there is an ability to track from one State to another the fact that

someone had an alleged crime committed, and yet the prosecutor never prosecuted—

Senator MCCASKILL. Do not let me misrepresent this. I am not saying this works perfectly in the civilian law enforcement world. And I am not saying there are not a whole lot of allegations that do not get captured. I am saying that I was shocked to learn there was not even an effort being made to capture the allegations for purposes of law enforcement reviewing and using as part of other investigations.

You know, it is very difficult in 50 States and all the different jurisdictions with Federal jurisdiction and State and local jurisdiction to have a system that is perfect in terms of sharing information among law enforcement. But in the military, when you know for sure that the perpetrators are going to be moved, they are not going to stay put, they are going to move around, it is even more imperative, especially because you have a closed system and you can protect the information and the rights of the accused because it is not going to get out into the mainstream, because you have a closed investigatory community.

Senator GRAHAM. Mr. Chairman—

Senator NELSON. May I respond to that—

Senator GRAHAM. Oh, I am sorry.

Senator NELSON.—just to say we have done so much good in what has been adopted, I would hate to see us start to mess it up getting into these very sensitive issues. As the Senator was speaking, I was thinking, well, do we have this kind of tracking in the civilian area, for example, with people that are in the State Department, or the same kind of thing, where they move around from place to place. I just do not know enough to be comfortable about getting into this area.

Senator INHOFE. Let me ask a question.

Chairman LEVIN. Senator Inhofe?

Senator INHOFE. Yeah. Let me just, for clarification, Senator McCaskill, are these—all five of these that you are bringing up or have brought up, were they discussed at the subcommittee level and then forwarded to the full committee?

Senator MCCASKILL. No.

Chairman LEVIN. They were filed on time here to be considered here, though.

Senator MCCASKILL. Yes. They were filed in a timely manner to be considered. You know, I am trying to get at this problem of restricted reports. Respecting the victim's right to not come forward is a very important thing. On the other hand, it is our huge enemy in this area. And so if someone wants a restricted report, but is willing to name their perpetrator, I think that name ought to be available to law enforcement down the line.

Chairman LEVIN. I think what is unusual about this crime, though, that sets it apart from others, is that there is a reluctance for the reasons which have been referred to by many of us today. There is a reluctance often to come forward, an embarrassment. That is not true with other crimes, and surely an exception apparently has been made with child—cases involving children. And I think that there is a basis here for collecting in this kind of a limited restricted way, this kind of information because of the reason

of the reluctance that people have of coming forward in this type of crime, which does not exist with other kinds of crimes, like, you know, larceny, murder, et cetera. It is an unusual circumstance. We have all talked about it today, and I think this is a response to that circumstance.

I would suggest that we, if you are willing, take a voice vote. We can always—

Senator GRAHAM. Mr. Chairman, I think Mr. Barney would have some comments here. Could we—could I ask him if he had something to add?

Chairman LEVIN. Sure.

Mr. BARNEY. Thank you, Mr. Chairman. I would like to invite the attention of the committee to Amendment 22 that was previously adopted today as part of the package. As part of that amendment, it included a proposal that a similar provision would be sent to the Department as part of the 576 panel that was created in last year's National Defense Authorization Act to specifically look at this issue of how the information that is included in restricted types of reports may be considered for the purposes that Senator McCaskill has pointed out.

And I would also suggest that one of the reasons why this may be important for your consideration is that unlike the unrestricted reports, which were designed specifically to inform law enforcement purposes, restricted reporting was not designed for that purpose. It was designed primarily in the law to create an opportunity for those victims to pursue the types of treatment and counseling and other support that they need after a sexual assault without necessarily triggering that law enforcement action.

And so, for that reason, I wanted to ensure that you were aware that this has previously been adopted and is included in the mark as it would go to the 576 panel for review. Thank you.

Senator NELSON. So the question that you just said, if I may, Mr. Chairman, is that it is has been adopted that were going to study this question about keeping this kind of data.

Senator MCCASKILL. He is correct in that the amendment that was adopted was also my amendment. It is true that the committee is being asked to look at this. But I thought it was important to bring this forward because this is the equivalent of someone filing a police report and saying I will not give you any more information or cooperate with you any further, and in the civilian system, then destroying the police report. I do not think we should be destroying the police report. I think it should be available to law enforcement.

And I am happy to put this over, and we can talk about it later in the markup or defer it based on the other amendment. But I did not want this moment to pass without acknowledging that this is an issue for our law enforcement community and the military where they are really handcuffed. And there is no question that somebody who is moving around and a predator has the upper hand as long as they can continue to keep victims quiet.

Chairman LEVIN. Is there any further debate? [No response.]

My inclination would be to voice vote this, and then to—

Senator NELSON. Hold it over.

Senator INHOFE. Yeah, hold it over.

Senator NELSON. You want to hold it over?

Chairman LEVIN. Okay. The ranking member and Senator Nelson want to hold over. That is enough. We will hold this over for further debate during the markup or for the floor.

And are there any other amendments before we vote on the package of amendments that are involved in the sexual assault part of this personnel subcommittee?

Senator Graham.

Senator GRAHAM. Thank you. Mr. Chairman, we have talked a lot about trying to make the system more responsive, allowing the victim to come forward, feeling that there is a support network available, making the allegation through multiple channels so you do not have worry about your first sergeant or the NCOIC being the only person who can bring the case forward.

We have hotlines. We have many ways to capture the allegations now outside the traditional chain of command. But most of us have decided the chain of command is necessary to solve the problem and should be held more accountable, not less. And being a military lawyer for 30 years, I do understand exactly what the chairman and Senator McCaskill were saying. You look at this as a lawyer. There is a difference between being a lawyer and a commander. I know the difference. It is night and day.

And the reason I asked General Amos why do you take a case to trial when the lawyers do not think we can get there from here. I knew the answer, and I do not mean to bore the committee, but one of the first cases I dealt with as a young captain in the Air Force was involving a guy that was an alleged barracks thief. And if you want to create chaos in the barracks, just have people's property stolen. It really is bad for morale, and it is one of the worst things you can do.

Sexual assault is a thousand times worse because it does destroy the unit. But this trust that we are talking about in the military is real. You do not live where you would like. You live where you are assigned. You do not get individual rooms, and you do not pick your roommate, and you do not get a bunch of locks. You share the same everything. So when somebody breaches that trust and preys, in this case, on the property of people, it really is bad for that unit.

And here was the dilemma. They thought he did it because nobody liked him. He was the type guy that would do that. And the allegation, to me, was more about we do not like him than he actually did it. And I could remember the commander saying, well, if you do not scare the hell out of the—if you are not willing to go after somebody that might be innocent, you can never scare the hell out of the guilty. That was funny at the time, but not funny now, is it? We talked the commander down.

So Article 60 allows a commander, the convening authority, to send a case to trial, but also to provide clemency after it is over based on what is best for the unit. This guy got whacked too hard, I think we need to back up a little bit, or in the case of the Aviano case, the Article 60 powers would allow a convening authority to set aside a finding of guilt entirely or by specification.

In the Marine Corps, this Article 60 power of setting aside a finding of guilt in part or total, there have been no cases where that was exercised in a sexual assault allegation. As a matter of fact, there were seven cases—there were just a very few cases

where the convening authority set aside a finding of a court martial, but not involving sexual assault. In the Air Force, there were 40 cases set aside out of 3,713. Five of them involved sexual misconduct, sexual assault. In the Navy, none. In the Army, 68 cases out of 4,603, none involving sexual assault. So the Article 60 powers to set aside a finding of guilt in a sexual case is very rare.

But the Aviano case got a lot of attention. I have listened to the facts. Senator McCaskill has listened to the facts. Why would you give the commander the power to do this? All I can tell you is that we now know that commanders push cases that lawyers say you should not go there because they want to send a message. And desiring to make sexual assault zero in the military a noble goal, we have to remember that individual cases also have to have a chance of getting it right.

What I fear is that we are creating an environment where it is going to be almost impossible to be found innocent if we do not watch it. As we micromanage the system, as we try to correct the system, God knows it needs to be corrected. I just fear that we do not want to create a situation where there is a contested trial involving sexual assault, that the only outcome that people believe is acceptable is that of guilty, because all of you know every trial to be done right has two sides to the story. And that gets back to the role of defense counsel.

I have been both a defense attorney and a prosecutor, and I want to work with Senator McCaskill. You have been incredibly helpful. But I just do not know if I want to put the defense counsel in a situation someone has to be in the room. I will have to think long and hard about that.

So what I have done is I have modified our solution to the Article 60 powers. I have said that when it comes to the offenses that Senator Levin has outlined—rape and forcible sodomy and attempted rape and forcible sodomy—we are going to take the power away from the convening authority to set aside a finding of guilt, because we do have an appeal process. I just do not want to say that they have lost that power in every case where you have a year sentence or more.

To the military, the reason we are coming down on you so hard is you have not stepped up to the plate and done the right thing. To my colleagues, these reforms I think are going to create the most supportive environment of anywhere in America for somebody who has been sexually assaulted. But having said that, there will be a trial in many of these cases. I want to make sure that that trial is conducted in a fashion that those who are accused have their fair day in court, too.

So I am willing to restrict the Article 60 powers of the commander in these cases because of the way the system has been broken, but I just would not want to take it away for every case that involves a crime over here. I just think that is going too far, and that is what my amendment would do.

Chairman LEVIN. Is this an amendment you are offering now, or are you going to withhold this for later?

Senator GRAHAM. I can withhold it.

Chairman LEVIN. Has it been filed?

Senator GRAHAM. Yes. Why do I not just withhold it and talk to Senator McCaskill and others to see if we can agree on it?

Chairman LEVIN. I think the words of caution are welcome in terms of a fair trial. I think all of us want to make sure that victims of sexual assault feel free, comfortable to report those crimes. It is essential we change the culture and the dynamic. But we also always want to protect the right of a defendant to a fair trial. I do not think—I hope nobody wants ever in this country to change that. Your words of caution are welcome, and if you can withhold that, we can take a look at that later.

Is there any other discussion or debate before we vote now on the package of the sexual assault language, as amended, that came from the subcommittee? We are going to have a roll call vote. I think there has been a request for that. And so the clerk will call the roll.

The CLERK. Mr. Reed?

Senator REED. Aye.

The CLERK. Mr. Nelson?

Senator NELSON. Aye.

The CLERK. Mrs. McCaskill?

Senator MCCASKILL. Aye.

The CLERK. Mr. Udall?

Senator UDALL. Aye.

The CLERK. Mrs. Hagan?

Senator HAGAN. Aye.

The CLERK. Mr. Manchin?

Senator MANCHIN. Aye.

The CLERK. Mrs. Shaheen?

Senator SHAHEEN. Aye.

The CLERK. Mrs. Gillibrand?

Senator GILLIBRAND. Aye.

The CLERK. Mr. Blumenthal?

Senator BLUMENTHAL. Aye.

The CLERK. Mr. Donnelly?

Senator DONNELLY. Aye.

The CLERK. Ms. Hirono?

Senator HIRONO. Aye.

The CLERK. Mr. Kaine?

Senator KAINE. Aye.

The CLERK. Mr. King?

Senator KING. Aye.

The CLERK. Mr. Inhofe?

Senator INHOFE. Aye.

The CLERK. Mr. McCain?

Senator INHOFE. Aye by proxy.

The CLERK. Mr. Sessions?

Senator INHOFE. Aye by proxy.

The CLERK. Mr. Chambliss?

Senator CHAMBLISS. Aye.

The CLERK. Mr. Wicker?

Senator WICKER. Aye.

The CLERK. Ms. Ayotte?

Senator INHOFE. Aye by proxy.

The CLERK. Mrs. Fischer?

Senator FISCHER. Aye.

The CLERK. Mr. Graham?

Senator GRAHAM. Aye.

The CLERK. Mr. Vitter?

Senator VITTER. Aye.

The CLERK. Mr. Blunt?

Senator BLUNT. Aye.

The CLERK. Mr. Lee?

Senator INHOFE. Aye by proxy.

The CLERK. Mr. Cruz?

Senator CRUZ. Aye.

The CLERK. Mr. Chairman?

Chairman LEVIN. Aye.

The CLERK. Twenty-six in favor, no noes.

Chairman LEVIN. Thank you all very much. This has been a very, very, very good discussion, debate, and I believe a good resolution. But nonetheless, time will tell that.

We will now meet in room 222 at 4:30 pursuant to my previous notice.

Senator McCASKILL. Mr. Chairman?

Chairman LEVIN. Yes.

Senator McCASKILL. I just want to procedurally make sure I know when to make my motion to make the entire mark open.

Chairman LEVIN. That will be at the meeting that starts at 4:30.

Senator McCASKILL. Okay.

[Whereupon, at 4:08 p.m., the committee adjourned.]