TO RECEIVE TESTIMONY ON SEXUAL ASSAULT IN THE MILITARY

Wednesday, March 24, 2021

U.S. Senate
Committee on Armed Services
Subcommittee on Personnel
Washington, D.C.

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

Committee Members Present: Gillibrand [presiding], Hirono, Warren, Tillis, Hawley, and Tuberville.
OPENING STATEMENT OF HON. KIRSTEN GILLIBRAND, U.S.

SENATOR FROM NEW YORK

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

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

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

The first panel of witnesses include Ms. Natalie Khawam, the Founder and President of Whistleblower Law Firm; Ms. Amy Braley Franck, the Founder of Never Alone; Ms. Amy
Marsh, a survivor of sexual assault and advocate; and Mr. Quinton McNair, a survivor advocate who retired from the Army after 24 years of service as a senior drill sergeant and sexual assault response coordinator.

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

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

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

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

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

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

We must do better for the people who sacrifice so much for our country. I first introduced the Military Justice Improvement Act in 2013, with the goal of professionalizing the way the military prosecutes rape, sexual misconduct, and
other complex crimes. Every year since, military leadership has come before us and said that the chain of command would solve this problem. They are not solving the problem. They have failed.

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

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

The military justice system simply is in the wrong hands. The Military Justice Improvement Act would put these serious criminal cases in the hands of senior, experienced military prosecutors. It would eliminate command bias and
create a fair, impartial system. It is our duty to our servicemembers to solve this problem. I invite my colleagues to recognize the lack of progress made over the past 10 years and to support our effort to rethink this system and professionalize the way the military handles these cases.

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

Senator Tillis.
STATEMENT OF HON. THOM TILLIS, U.S. SENATOR FROM NORTH CAROLINA

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

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

While today's hearing is about focusing on our military, it is important to remember that this is not just a Department of Defense problem. If it is an epidemic in the Department of Defense, then it is even more so in our society. If we are to have any hope of fixing the issue for our military, we need to tackle this issue more broadly.

Each year, about 180,000 young Americans enlist for active duty service in the armed forces. Statistics show that sexual assaults are most prevalent among our youngest servicemembers, those who are newest to the military, generally ages 18 to 24. In comparison to similarly aged college and non-college students, the rate of sexual assault is lower in the military, the rate of reporting a sexual assault is higher in the military, and the rate of sexual assault prosecutions is higher. In fact, colleges and
universities -- I was at a gathering in Annapolis a year or so ago -- are coming to the Department of Defense and asking, "Help us. Show us how we can start fixing this problem."

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

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

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

I told the service secretaries, in the most recent
conversations about a month ago, that you need to come with a credible proposal, because in the wake of the Fort Hood incidents there are members that are beginning to wonder whether or not we should keep the current structure.

Senator Gillibrand, you and I did not get to have an opportunity to talk about the data. I am a data person, and I am trying to figure out, it seems like sometimes in our hearings we hear different views on different sets of data. But I think one of the things we have to do, when I hear that the conviction rate is lower, I hear that. On the other hand, I hear DAC and IPAD say that the number of prosecutions are higher, the conviction rates lower. So it seems like, under the current structure, one argument against moving it from the command is that more go to court martial than the DAC-IPAD would expect. And if you have got more going through prosecution, then you would naturally expect that maybe the conviction rate, or the acquittal rate would be higher.

So I hope that as we hear the witnesses today, understand that it disgusts me, so much so that 2 years ago I started -- we do our nominations process for service academy nominees. About 2 years ago, I said, inspired, in part, by the concerns that you have raised, that I want a -- this is a joyous occasion. These are young men and women who want to go to the service academies. You would
generally want it to be a joyous occasion, hand them off a certificate, and say, "We are going to work hard to get you appointed."

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

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

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

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

[The prepared statement of Senator Tillis follows:]
Senator Gillibrand: Well, thank you very much, Mr. Ranking Member, and I would just respond with two points. The reason why I think this legislative idea is so important is because a lot of rapists and sexual assaulters are recidivists. So if you want to prevent more sexual assault, put more recidivists in jail, so it is a measure of prevention. And two, because I have found that a lot of unfortunately, people mislead on this topic. The rate of convictions since 2010 -- I am going to read it off, going year by year, from 2010 to 2019 -- rate of conviction in 2010 was 24 percent; 2011, 13 percent; 2012, 14 percent; 17 percent; 16 percent; 15 percent; 9 percent; 8 percent; 7 percent. We are at 7 percent. Raw numbers, in 2019 we convicted 264 cases. In 2014, we convicted 433 cases. So these numbers really are not going in the right direction, and so I would not want you to be misled by any data that is incorrect.

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

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

Senator Gillibrand: Thank you. I would now like to turn to the first panel. You can each introduce yourselves.
STATEMENT OF NATALIE KHAWAM, PRESIDENT AND FOUNDER, WHISTLEBLOWER LAW FIRM

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

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

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

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

I represent many members of the military. Senator
Tillis, you probably remember in your office a year ago with Sergeant First Class Richard Stayskal, the Green Beret, highly decorated Green Beret, who is dying of lung cancer.

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

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

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

There needs to be accountability. You know, when I see these headlines and these soldiers are committing suicide after being raped or assaulted or hazed, and I get these phone calls in my office from families asking how I can help their loved one, their daughter or their son, that is at
Fort Hood, at Fort Bragg. I sit there and I just think about how much is going on in our society and how many people do not get these calls that I get every day, all day. You know, the reason I have taken this case is an immigrant, the Guillen family are immigrants. I knew that DoD is a very complicated area, and that they were just going to be railroaded. They were not going to get answers. They were not going to get results. And I knew we needed one thing, and that was legislation on this matter.

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

What happened to Vanessa at Fort Hood, a 20-year-old, beautiful young lady, that just wanted to serve our country proudly, she was bludgeoned to death. She was murdered, a horrific murder that should never have happened on the base. Daytime -- daytime -- in the armory room. And there was cover-up after cover-up, lies after lies. This family went through so much, and they are still going through. Look at
these reports that are coming out. They still do not have answers.

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

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

Senator Tillis, you were absolutely correct. We do not want to scare anyone from joining. I absolutely agree. But you also want to give them the morale to join. You want them to say, "Hey, look, it is a better tomorrow for everyone." We are here to help you guys like you are helping us. We are here to protect you like you are
protecting us. And I speak from the heart, as an attorney, not as a politician.

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

[The prepared statement of Ms. Khawam follows:]
Senator Gillibrand: Thank you. Ms. Franck?
STATEMENT OF AMY BRALEY FRANCK, FOUNDER, NEVER ALONE

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

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

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

This evidence was reported to the Office of Special
Counsel and the DoD IG. The Army's internal 15-6 process has impeded justice for my victims and myself. This internal investigative process does not allow for transparency and should be abolished.

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

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

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

Staff Sergeant Morgan Robinson's first offender is still serving in the Oklahoma Army National Guard. Staff Sergeant Robinson's report of nine Special Forces soldiers
playing a cover over her head, dragging her out of a tent, and gang-rapeing her in Afghanistan has never been investigated. An outstanding soldier committed suicide. She was not protected.

LaVena Johnson's brutal murder has never been investigated. The Army still states it was a suicide. Sixteen years later, the toxic culture again exposed in the murder of Vanessa Guillén.

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

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

Fort Bliss, 31 December 2020. Private First Class Asia Brown was found dead. Her offender is identified as an accused serial rapist, walking free, no pretrial confinement. He continued to live in the same barracks, on the same floor with Asia, and was moved from Echo Company into Headquarters Company with his victim, until her untimely death. Asia's leadership failed to protect her
after she reported her rape in February of 2020, not June.

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

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

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

I was raised in the military, and I am a proud mother of veteran of the Army. I will not stop until our military
is safe. Sexual misconduct is an abuse of power and a force protection issue. The inability of commanders to execute essential command functions of protection is a significant threat to the United States military's ability to protect this great nation. Soldiers should never be alone.

Thank you. I yield to any questions.

[The prepared statement of Ms. Franck follows:]
Senator Gillibrand: Thank you. Our next panelist, Ms. Marsh.
STATEMENT OF AMY MARSH

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

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

I kept my trauma secret for months because I had not yet understood what had happened to me. Once I understood this was a sexual assault I was afraid of what would arise if I said anything at all. After careful reflection of what reporting this meant for me and my family, I decided to file an unrestricted report. We initially had hope, because I immediately was assigned an SVC and we had an expedited
transfer to Davis Monthan Air Force Base, where I could be near family.

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

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

To us, all of this felt like retaliation for having reported the assault and for not backing down when the command did not prefer charges against the offender. The only reason my husband's chain of command knew about the
allegations that led to him being punished is because we made the decision to file the unrestricted report.

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

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

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

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

Because of what we experienced, we have decided not to continue with the military couple life that we really did once cherish. But I do hope that my testifying here today shows that we remain committed to helping improve justice
for survivors, and that it can finally become safe for survivors to report sexual assault in the military. Thank you.

[The prepared statement of Ms. Marsh follows:]
Senator Gillibrand: Thank you. Our last speaker, Mr. Quinton McNair.
STATEMENT OF QUINTON McNAIR

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

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

Although I am retired I will always consider those that serve as my brothers and sisters in arms, and right now they face an old enemy that is eating away at the integrity and the proud history of our armed forces, an enemy who takes its toll on and off the battlefield and whose wounds scar deep. This enemy is sexual assault. To fight sexual assault we must continue to make strides to change the culture. As a SARC, I was at the front lines of that fight.
I used SHARP guidelines to create informative and open discussions about sexual assault. Soldiers responded well to that and it resulted in a decrease in incidents and an increase in reporting in my unit. I see support and awareness everywhere and we have come a long way from when I took my first class as a young soldier. However, I find this shift ineffective, especially if and when we fail at accountability.

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

I can see the culture has shifted. We now teach consent and intervention. But to end sexual assault we have to do more than shift; we have to change the culture that feeds it. To change the culture that feeds it we have to hold those that commit these acts accountable. Changing the hearts and minds of every single person who may commit sexual assault is a difficult task, I would dare say an impossible task. But we do have the power to hold them accountable. People who commit sexual assault are like sharks hunting -- you often are not aware of them until they
attack. Through accountability, we can make the waters so hostile to the sharks that they are afraid to hunt. On the other hand, lack of accountability emboldens them. All of the efforts put into intervention by SARCs and Victim Advocates around the world are lost when we fail to hold people accountable.

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

When a sexual assault is reported the first call is made to CID who, independent of the unit, starts a criminal investigation. The findings of that investigation are turned over to the unit for adjudication. While most commanders and their legal team handle cases with integrity, the response is not uniform across the board. I believe this has been a point of failure far too many times. The
effects of a mishandled case are far reaching, and the
damage is irreparable. Maybe it is time to try something
new. Perhaps the answer to restoring the faith of our
servicemen and women in the SHARP and SAPR programs is to
handle the adjudication the same way as the investigation,
by an entity outside of the unit where the incident
occurred.

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

I dedicated 24 years of my life in service to this
country and its values. I am very embarrassed that the U.S.
military, where the best of the nation call home, has a
problem with protecting its women and men. How do I
encourage others to make the same sacrifice I made when I
cannot guarantee their safety, not from foreign enemies, but
their leaders and fellow servicemembers. I have two
daughters, ages 20 and 23. Their names are Destiny and
Tiana. They are extremely proud of my service, and at one
time both considered following in my footsteps. Sadly, I
discouraged them, because despite the honor of wearing the
uniform and all of the benefits that come along with
serving, there is no honor in going to combat and coming home to be assaulted by the same people you fought beside. I have seen first-hand, no benefit is enough to heal the emotional scarring that comes with that.

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

[The prepared statement of Mr. McNair follows:]
Senator Gillibrand: Thank you very much. Thank you to all the witnesses for your profound testimony.

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

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

So reporting has three issues: (a) Will I be believed? (b) Am I betraying my brother, or sister, whomever is the assailant? (c) Why are you reporting this? Are you sure
this happened? Were there any witnesses? Suck it up, buttercup, those kinds of responses. And worst of all, they know the retaliation that goes with it for reporting alone. The reporting itself becomes its own animal. You become a victim -- you become re-victimized as a victim, because now you are put through this channel of questions, doubt, character assassination. You know, you heard it from the other witnesses here.

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

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

Ms. Khawam: Yes. When I was retained by the Guillen
family Vanessa was missing at the time. We did not know where she was, and I came in to help find Vanessa. Unfortunately, as we all know, she was murdered. But here statements to her family and her friends, and, actually, her fellow soldiers, were that she was being sexually harassed, she did not like the way they were talking to her, they were saying very inappropriate, vulgar statements, and this was several of her fellow soldiers, sergeants, that did this to her.

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

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

Senator Gillibrand: Thank you. Mr. McNair, thank you for your testimony today. In your written testimony and
your oral testimony you discussed the difference between actual buy-in from military leaders versus forced buy-in. Can you explain for the members here what you mean by that and why it is important in combatting sexual assault?

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

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

Senator Gillibrand: Senator Tillis.

Senator Tillis: Thank you, Chairwoman Gillibrand. Ms. Marsh, when you reported sexual assault can you give me any idea of the support that you got, just recovering from the trauma?
Ms. Marsh: Yes. Thank you for the question. I did receive help from a Victim Advocate, when we were still at Travis, as well as an SVC, and then we moved to Davis Monthan and I received support from a victim advocate temporary there as well, as well as an SVC, Special Victims' Counsel. She was my lawyer, essentially. But I did receive support from them. The commander did check in on me once, but not since then.

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

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

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

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

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

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

Senator Tillis: Mr. McNair, I mentioned in my opening comments that members of the DoD, either service secretaries or various people in different levels of the chain of command will uses data that says we prosecute more,
therefore, our conviction rate is lower. What kind of insight can you give me to say that is a red herring?

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

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

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

Senator Gillibrand: Thank you, Senator Tillis.

Senator Hirono from Webex.

Senator Hirono: Thank you, Madam Chair. So, Madam Chair, I want to thank you for the persistence of your advocacy in dealing with the issue of sexual assault, harassment, and retaliation in the military, and in that I
have been proud to join you. The scourge of sexual
harassment and assault has been since, as you said, time
immemorial. The military keeps trying to make improvements,
but we do not see improvements. So here we are with yet
another 90-day commission to come up with some suggestions.
And I do think that some of the previous 90-day
commissioners made suggestions, and, in fact, I think one of
your panelists will talk about her GAO report, which
contains yet more suggestions.

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

Mr. Fidell: Yes. Yes, Senator Hirono. I believe that
we have got to continue to have these open conversations in
the training environment. The training needs to be changed.
We have to have senior leaders be accountable to be engaged with that training, that the Special Victims' Counsels and the Victim Advocates need to be in their own command so that they could not be harmed when they are fiercely advocating for their clients. That is a simple move, to mirror us like CID. That way we cannot be encapsulated.

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

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

Senator Hirono: I did ask all the panelists, but I am running out of time, and I assume that your comments would
be similar in terms of the steadfastness with which we have
to pursue the kinds of changes that we need to pursue.

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

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

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

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

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

Ms. Khawam: Was that for me, Senator?

Senator Hirono: Yeah.

Ms. Khawam: Senator, I wanted to answer your question.

Ms. Franck gave a great answer, but I am going to tell you
what I see the differences between, as they say, the
civilian world versus the military. And this answer is to
Senator Tillis' -- or this is to Senator Tillis' statement earlier, which is, you know, you have sexual harassment, this is a culture not just in the military world but it also exists in the civilian world. Absolutely correct.

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

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

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

Senator Hirono: I agree with you, and that is one of the provisions of the I am Vanessa Guillen Act, and I think we need to enable victims of sexual assault and harassment
to be able to pursue claims outside of the military and process. Thank you very much.

Ms. Khawam: Thank you, Senator.

Senator Gillibrand: Thank you, Senator. Senator Hawley.

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

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

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

Also the ability to forego the military all at once and visit places like the Rape Crisis Center for help. I have had soldiers who would come, and they did not want to have
anything to do with the chain of command, but they still
wanted that help so they could get back into the fight. So
our relationship with outside resources like the Rape Crisis
Center in Fayetteville was a great asset to our soldiers.

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

  Mr. McNair: Yes, sir.

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

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

  Senator Hawley: Wow. Yeah, that is incredible. From
your point of view, Mr. McNair, what are the most important things that Congress or the Department of Defense could do to strengthen the prevention of military sexual assault?

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

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

Senator Hawley: That is really helpful. Thank you.

Ms. Marsh, let me just, in the little bit of time I have left here, let me just ask you, in your own case, in your experience, would it have made, do you think, a big
difference to have had the decision whether or not to move forward with a prosecution be vested somewhere other than the unit commander? I mean, do you think that that -- and say if you know or say if you do not know, but I would just be curious what your own experience is there.

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

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

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

Senator Hawley: Very good. Thank you for your testimony. Thanks all of you for being here. Thank you,

Madam Chair.

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

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

Senator Gillibrand: We will now transition to the second panel. We will hear from our government witness, Ms. Brenda Farrell, the Director, Defense Capabilities and Management, Government Accountability Office. Ms. Farrell, you can start your testimony.
STATEMENT OF BRENDA S. FARRELL, DIRECTOR, DEFENSE CAPABILITIES AND MANAGEMENT, GOVERNMENT ACCOUNTABILITY OFFICE

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

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

My written statement is based on ongoing work identifying, among other things, the statutory requirements related to sexual assault prevention and response in the military, contained in the National Defense Authorization Acts from fiscal years 2004 through 2019, and our prior work in the area. I will briefly summarize my written statement that is presented in two parts.
The first part of my statement describes the statutory requirements concerning sexual assault that were contained in the NDAA from 2004 through 2019. We found that Congress enacted 249 statutory requirements related to sexual assault prevention and response to assist DoD in its efforts in this area. Most of these requirements are still in force.

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

Although the requirements cover a wide range of activities, we found that they generally related to two broad categories. First, victim assistance and advocacy, and second, management and oversight. These two categories cover 70 percent of the requirements. A smaller percentage of requirements, 9 percent, were related to prevention efforts.
The second part of my statement discusses whether there are areas where DoD can provide further focus to address sexual assault. While DoD has taken a number of considerable steps to address sexual assault, GAO's prior work has shown that there are areas in which DoD can focus to further the issues. With the exception of some more recent initiatives, DoD's efforts have been largely focused on responding to, rather than preventing, incidents of sexual assault.

For example, we found that the Department had not fully developed performance measures to assess the effectiveness of its sexual assault prevention efforts and make changes when needed and recommended that it do so. Recent DoD efforts in this area, in addition to congressional oversight and implementation of prior recommendations, could help DoD reduce the incidence of sexual assault. Further, additional actions are needed to strengthen DoD's efforts to address the needs of male servicemember victims who have been sexually assaulted, and the needs of DoD's workforce of nearly 900,000 civilian employees. For example, GAO found that DoD was not tracking all reported work-related sexual assaults involving civilian employees, and recommended that it issue guidance to help ensure more comprehensive tracking.

In summary, greater focus on preventing sexual assault
incidents for all of DoD workforce, military and civilian, regardless of gender, could help reduce the number of incidents in the Department.

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

[The prepared statement of Ms. Farrell follows:]
Senator Gillibrand: Thank you so much for your testimony and thank you for your work.

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

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

Ms. Farrell: We are continuing to monitor the actions that DoD is taking in response to the Fort Hood recommendations. I note that in the Fort Hood investigation, accountability and leadership were highlighted as issues of concern. We know that commanders play an important role with climate assessments, and we have previously recommended that there be a mechanism to track the commanders' compliance with conducting the climate assessment surveys. This has been a longstanding issue. There have been other actions taken to try to encourage commanders to use this tool.
But this is very important, because commanders can influence a unit or an installation, and they can encourage, by supporting and promoting and enforcing the policies and the programs of the Sexual Assault Prevention and Response. So that is definitely one recommendation related to the climate environment, as well as leadership that crosses with what the Fort Hood investigation found.

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

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

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

Senator Gillibrand: You noted in your statement that since 2004, Congress enacted 249 statutory requirements related sexual assault, prevention, and response in the military. Further, GAO has made over 100 related recommendations to DoD, dozens of which remain open. What
else should DoD be doing to prevent and response to sexual assault, and the full continuum of unwanted sexual behaviors? Despite all of these changes, we have actually seen no change in DoD's ability to actually prevent sexual assault. What authorities does DoD need that we have not already given them?

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

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

For the protective factors, they did not align those
protective factors with the domain. They did identify the
protective factors, but it was collective. If DoD would
follow through and align the risk and protective factors,
the research that the CDC has done shows that then the
agency could take steps to mitigate the risk factors or
enhance the protective factors, thus reducing the incidence
of sexual assault.

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

Ms. Farrell: In 2015.

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

Senator Tillis.

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

Senator Gillibrand: Thank you.

Senator Tuberville: Thank you very much, Senator
Gillibrand. Thank you for your hard work on this very
important matter. Thank you, Ms. Farrell. Thank you for
being here.
I think we can all agree on two things. Sexual assault and harassment are unacceptable. I have been coaching all my life and dealt with a lot of it, and it is an ugly part of our society. We have got to do everything we can to get rid of it in our military.

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

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

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

We want to see, though, more put in place in terms of the framework with metrics, so that when the leadership changes over there is a framework in place, regardless of what happens with the leadership, they can make sure that
not only the victims are being tended to, but the incidents of sexual assault are being prevented.

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

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

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

Senator Tuberville: Do you feel good about that, the leadership and what they are doing? When we have changes do they usually step to the front on this, or do they take a
long time to look into matters? You know, again, I have
been in situations before where sometimes people let other
people make decisions, and somebody has got to start making
a decision on this. And sometimes leaders do not step up
front and do that. And it looks like, to me, our military
should be full leaders to make decisions on this, to stop
this.

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

Thank you very much. Thank you, Chairman.

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

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

I note that you referred to a 2015 GAO report, and it
appears that there were aspects of the recommendations that
were not followed. And I was very curious about the fact
that DoD was supposed to assign risk factor alignment with
each domain, and I think you said that the two domains,
military community and leadership, these two domains risk
factors were not identified? Why not? Those seem to be really big areas where the risk factors should have been identified, wouldn't you say?

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

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

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

Ms. Farrell: There are standard questions that are
asked in the climate surveys, regardless of where the
commander is. The commander, I think, does have the
opportunity to have additional questions if they wish. It
is my understanding that there are some questions on sexual
assault currently in the climate survey.

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

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

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

Ms. Farrell: Yes.

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

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

Ms. Farrell: Sure. The two domains for which we have
not seen risk factors, the military community and the
leadership -- I will give you an example of the military
community first. This is something that would be unique to
DoD, the active component versus the reserve component. So it is what are particular risk factors that are unique to the active versus the reserve component. There could be risk factors also for communities, such as the pilot community versus the medical community.

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

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

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

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

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

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

Senator Hirono: And if they do not even identify them, then there you go.
Can you think of any other example where Congress enacted 249 statutory changes over 17 years to address a problem and here we are, 17 years later, and there seems to be little progress being made. Can you think of any other situation where this is the case?

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

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

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

And with the indulgence of the chair I would just like to say that the GAO report is shocking, and over the last decade and a half we have worked faithfully with DoD to address this issue. Unfortunately, the facts are the fact, and it is clear that a bold, new approach is required to instill trust in how the military responds to and adjudicates sexual violence in the ranks. And it is time give professionally trained lawyers, military service judge
advocates, outside the chain of command, the authority to
make court martial adjudication decisions. And in my view
it is the only way we can ensure our servicemembers,
especially those junior in the ranks who are most at risk,
have enough trust in the system to come forward and report.
And we owe it to them to act now.

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

Senator Gillibrand: Thank you, Senator Hirono.

Senator Tillis.

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

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

So what does that mean? That means that sexual
harassment is often used as an example that is on the
continuum of harm. We have seen studies where
servicemembers who have been sexually harassed or have
experienced gender discrimination have higher rates of
sexual assault than those who have not experienced sexual harassment. We have also seen a study where one-third of the servicemembers who were sexually assaulted were first sexually harassed by their perpetrator.

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

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

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

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

Ms. Farrell: That was about 3 years ago, sir.
Senator Tillis: And is there any evidence that although they were well received that they have been acted upon, on a systematic basis?

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

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

Ms. Farrell: Well, sexual assault crosses many functional lines. There are so many organizations involved -- the health care, the legal -- besides the immediate care through the Victim Advocates or the SARC for the victims. We would like to see, as I have noted, all of the statutory requirements actually implemented, as well as our recommendations. But we do think that the recommendations
in our prior report on preventing sexual assault could help DoD reduce the number of incidents. So we are pointing at those particular recommendations in terms of preventing sexual assault.

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

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

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

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

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

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

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

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

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

Senator Tillis: No. Thank you.

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

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

Ms. Farrell: Thank you.

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

Senator Gillibrand: Thank you, gentlemen. Mr. Fidell, would you like to start with your testimony?
STATEMENT OF EUGENE R. FIDELL, SENIOR RESEARCH SCHOLAR, YALE LAW SCHOOL ADJUNCT PROFESSOR OF LAW, NEW YORK UNIVERSITY LAW SCHOOL

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

Senator Gillibrand: Without objection.

[The information follows:]
Mr. Fidell: In my opinion, there are cogent reasons to transfer the disposition power from commanders to lawyers. I want to make four very brief observations in this regard.

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

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

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

And I can highlight a few of those. How able, for example, would a non-lawyer decision-maker be at the arcana
of social media, which play a remarkably salient role in the military justice throughput these days. Metadata. Free speech issues, including extremist speech -- timely subject -- your analysis issues, or another scientific issue, hair analysis, used in drug prosecution. The right to confront witnesses -- a very arcane subject, but constitutional law. Computer fraud. Child pornography, which seems to be -- talk about an epidemic, there does seem to be an epidemic of child pornography in the armed forces. Mental health issues. All of these are hardly what you would call the bread and butter of military command. They are much closer to involving the kinds of skill sets and analytical tools that lawyers are called upon to bring to bear.

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

Third, commanders' decision-making may, at times, be skewed by self-interest. It is not good for a commander, in career terms, if there is a crime epidemic in the unit, if the command climate is poor. These are the things that the services track very closely, and they do impact on
commanders' career opportunities, for example. Similarly, a commander may have an interest, for example, in preserving the viability of a fighter pilot, in whom the taxpayers may have invested a fortune in training costs. Or a very senior non-commissioned officer, a staff NCO or a master chief petty officer. These are valuable people, and a commander may be loath to give up the utility of such a member of the command.

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

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

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

Finally, to me, the most interesting challenge that I think the committee faces is not whether to make the transfer but where to draw the boundary line between those parts of the disciplinary system that are retained by commanders and those parts basically dealing with criminal matters are transferred to lawyer decision-makers outside the chain of command. In my view, I think it is quite important that this be kept simple, and to me, the simplest
boundary line is the one that we are all familiar with in the civilian community, and in the military community. If it is over a year's confinement as the maximum permissible punishment it should be on the criminal side of the line, handled by lawyers outside the chain of command, and if it is below that point -- somewhat arbitrarily but there it is -- it should be dealt with as a disciplinary matter.

Thank you very much.

[The prepared statement of Mr. Fidell follows:]
Senator Gillibrand: Thank you so much, Professor Fidell. Next, Colonel Christiansen, please.
STATEMENT OF COLONEL DON M. CHRISTENSEN, USAF (RET.),
PRESIDENT, PROTECT OUR DEFENCERS

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

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

The estimated number of sexual assaults and rapes of
active duty men and women has stubbornly hovered above
20,000 for almost every year that a prevalence survey has been administered, and as Senator Gillibrand pointed out, this does not include the thousands and thousands of civilian victims of military sexual assault.

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

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

It is important to point out, these are actual sex convictions. The military often inflates the rate of conviction by including charges that are completely unrelated to sex offenses. By fiscal year 2019, the number of unrestricted reports had leapt to 5,699, yet prosecutions and convictions plummeted to 363 -- and again, there were only 138 actual sex offense convictions in fiscal year 2019. This is a 50 percent reduction in both the rate of
prosecution and the rate of conviction. So they are taking fewer, not more, cases to trial and they are losing them at a much greater rate.

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

Despite the objective data proving its failure, military leadership continues to vigorously argue that commanders alone are the solution to solving the cancer of sexual assault and harassment. In opposing reform, leadership argues that commanders need more authority, not less, yet I have never heard them explain what additional authority the need that they do not now possess that would drive down prevalence rates or increase accountability.
Over the last 30 years, scandal after scandal has been met with promises of zero tolerance and assurances that commanders will eradicate sexual assault from the ranks. The one constant in the ineffective response -- we can talk about the 250 pieces of legislation passed -- the one constant is the commander-controlled justice system. For most of our history, military justice had a reputation as a brutal and unfair process, and the abuses of commanders were the primary reason for this. Congress, almost always over the objections of military leadership, has continually reined in the power of commanders to provide a less draconian system of justice. Yet as recently as last November, a Federal judge warned that military justice was still a rough form of justice.

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

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

I look forward to your questions.

[The prepared statement of Colonel Christensen follows:]
Senator Gillibrand: Thank you. Our next speaker is
Colonel Lawrence Morris, United States Army, Retired, Chief
of Staff and Counselor the President of Catholic University.
STATEMENT OF COLONEL LAWRENCE J. MORRIS, USA (RET.),
CHIEF OF STAFF/COUNSELOR TO THE PRESIDENT, THE CATHOLIC
UNIVERSITY OF AMERICA

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

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

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

Permit me to make four quick points, after which I am
happy to answer any questions.

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

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

I do not think my experience was unique in gaining a commander's approval to trying the close cases where conviction was not certain. The October 2020 report of the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault validates that experience. It shows that commanders and convening authorities referred close cases to trial, reflecting greater acceptance of risk than it is likely to obtain in many civilian jurisdictions where conviction rates can be a manipulatable metric. So
the military's lower conviction rate, if it is, in fact, a lower conviction rate, can reflect fidelity to survivors and command seriousness.

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

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

Third point, respect due process. The military appellate courts are scrupulous in guarding against unlawful command influence, the creeping of the commander into the courtroom or deliberation room. It has taken generations to arrest this and to maintain the confidence of the rank and file. The courts commonly say there is no such thing as command influence the air. I am not so sure. A leader, or
lawyer, who is unduly attuned to pleasing the command might find his judgment distorted in a way that would drive the powerful prosecutorial machinery of the government. Such decisions require the unencumbered judgment of those entrusted to it, so the Senate should think carefully about the impact of legislation like this and the potential for those making disposition decision to absorb some of that command influence in the air, to the detriment of a servicemember's ability to receive a fair trial.

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

Finally, I have a very close relationship with two young officers, one of them about to take command of an Army infantry company, another who was recently commissioned as
an officer in the Marine Corps, having previously given 5
years of honorable enlisted service. I would like them, as
they take charge of soldiers and are entrusted with the care
of soldiers, to have all the tools needed to lead their men
and women.

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

[The prepared statement of Mr. Morris follows:]
Senator Gillibrand: Thank you all for your testimony. Mr. Morris, you say that you would make a comparison that you believe commanders are more likely to press the tight cases than the DA's would. Do you know if the Military Justice Improvement Act has anything to do with civilian DA's.

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

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

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

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

Senator Gillibrand: Let me give you the answer. Three percent of commanders have convening authority for felonies
and above, 3 percent. So your testimony is saying that 3 percent of commanders will have less tools in their toolbox. Does that, therefore, not say that 97 percent of commanders will have the same tools they have today?

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

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

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


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

Senator Gillibrand: Some. Exactly. And do you think
it is appropriate to have the legal advice of the equivalent of a junior associate on a case that has a conviction penalty of more than a year or above? Because if that is true, then you do not believe in defendants' rights, because for a junior lawyer, with very little experience in criminal justice, to be making recommendations to a commander, if you could be thrown in jail for more than a year is a serious issue of civil liberties, is it not?

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

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

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

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

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

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

Colonel Morris: Of course.

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

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

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

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

Colonel Morris: Of course.

Senator Gillibrand: Thank you.

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

Mr. Fidell: Before you do that, Senator, can I make an observation that is quite important in terms of your last -- one of the points that you raised with Colonel Morris. The military justice system includes a number of punitive articles that call for capital punishment, and I think this
hearing would be incomplete if there were no reference made to that possibility. The notion that a decision to move forward with a potentially capital case, that decision being made by a non-lawyer, is, to me, totally indefensible, and I think that should be part of the committee's deliberations.

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

Mr. Fidell: That is true.

Senator Gillibrand: Thank you.

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

Colonel Christensen: Yeah, well, we often hear, as Mr. Morris just said, that while commanders have all these other
tools that they do not have in the civilian world, and that is because unlike any other institutions in this country, the employer is also serving as the prosecutor. So of course they do. They have employment decisions they can make. The commander has the inheritability to administratively discharge someone, to administer a non-judicial punishment, to reprimand them, to counsel them, to give them no contact orders, to put them into pretrial confinement.

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

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

Senator Gillibrand: Thank you. Mr. Fidell, can I ask you to hold your answer so I can give Senator Tillis his turn, since I am over.
Senator Tillis: Thank you, Madam Chair. Mr. Morris and Mr. Christensen, thank you for your service. Mr. Morris, I want to give you an opportunity. You have heard things discussed today, and instead of asking a direct question, is there anything you have taken note on that you would to offer up as a counter view?

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

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

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

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

Colonel Morris: I sat on the Response Systems Panel
for the year and a half or so that it was in effect, and it was -- I mean, I was like at the kids' table intellectually with all the other people who served on it. But it was a really impressive, open-minded analysis of the system, and included a range of people, including some career-long, strong, informed critics of the system. And at the end of that examination all of them -- I think virtually all of them -- came to the same conclusion of the appropriateness of the convening authority structure.

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

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

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

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

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

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


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

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

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

Colonel Christensen: It has gotten worse, significantly.

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

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

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

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

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

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

Colonel Christensen: Absolutely not. One of the problems we have is because we have the commander-controlled justice system it is very difficult to find where the line
is to hold them accountable because then it crosses into unlawful command influence. That is one of the reasons it would be much better if we took prosecution authority out of their hands, because then you could more easily hold people accountable.

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

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

Thank you, Madam Chair.

Senator Gillibrand: Thank you, Senator Warren.

We are going to take a quick second round, if that is
okay with you, Senator Tillis.

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

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

Colonel Christensen: Absolutely. It happens every day. For example, in the Air Force, the commander that has the most immediate impact on the good order and discipline of a unit is the squadron commander. The squadron commander can use administrative punishments, can use counseling, but they cannot prosecute someone. They can charge them, but literally anybody can charge somebody under the Uniform Code of Military Justice. But they do not have the ability to send someone to court. All they have to do is the ability to say, to a superior, "Please prosecute this person." That would be no different under the Military Justice Improvement Act. There is nothing in that act that would prohibit that squadron commander from trying to convince a prosecutor, just as they have to try to convince a convening authority, that this case should be prosecuted.
Senator Gillibrand: Thank you. And Mr. Morris went on and on about the multiple panels that have looked into this, and that is true. There have been multiple panels. There are binders and binders and binders of recommendations. Every recommendation that has been made that is a legitimate, legal change that Congress can take up, we have actually made. I have made sure we made it.

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

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

What is really important about the Response Systems Panel, there were a lot of qualified people on it, but the Department of Defense overwhelmingly controlled who testified before the Response Systems Panel, and no surprise, those people who testified before the Response
Systems Panel, and I did myself, were there to support the convening authority system. If you look at the number of witnesses they talked to who were experts on prosecutions, or had a contrary view, who wore the uniform, it is minimal, because they were not allowed to speak.

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

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

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

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

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

And then the last thing I would say on that, Senator,
is that the vast majority of serious crimes that were committed in Afghanistan or Iraq would be covered by MJIA and were brought back to the United States and prosecuted.

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

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

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

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

Senator Gillibrand: Thank you. Senator Tillis?

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

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

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

Mr. Fidell: No. More than a year.

Senator Tillis: More than a year. And, Mr. Morris, just back on the follow-up question that Chair Gillibrand had with respect to the complexities of forward-deployed
situation, why would you disagree with what Mr. Christensen said? You alluded to it being difficult or complied to. Mr. Christensen said it is not really that much different. Did I just infer from your comment or the follow-up question a difference of opinion there?

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

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

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

Colonel Morris: Typically forward with the unit.

Senator Gillibrand: Mr. Christensen? Colonel Christensen?

Colonel Christensen: Well, it depends on the service.

Senator Gillibrand: Okay.

Colonel Christensen: For the Army their convening authority, Marine Corps convening authority was there. For the Navy, who knows, because the Navy ships are moving around. For the Air Force, it is Shaw Air Force Base, CENTAF. For general court martials there were special court
martial convening authorities there, but for felony-level
cases, for almost every deployed airman who was at CENTAF.

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

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

Senator Gillibrand: Thank you. Go ahead, Mr. Fidell.
Mr. Fidell: There is another source. You have heard
about a variety of reports. Let me simply mention another
one, for your idle hours. The Defense Legal Policy Board,
which existed under a prior administration, did a report on,
effectively, war crimes. I am having trouble remembering
the exact title, but part of that subcommittee report
addressed the question of where offenses were being tried,
that is, offenses committed in deployed operation, but some
were tried in country and some were tried back here in the
United States.
Senator Gillibrand: Thank you very much. Senator Tillis, any further questions?

Senator Tillis: No.

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

Thank you very much. Take care.

Mr. Fidell: Thank you.

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

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