

DEPARTMENT OF THE AIR FORCE
PRESENTATION TO THE SUBCOMMITTEE ON PERSONNEL
COMMITTEE ON ARMED SERVICES
UNITED STATES SENATE

SUBJECT: MILITARY JUSTICE AND SEXUAL ASSAULT

STATEMENT OF:

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Chairman Tillis, Ranking Member Gillibrand, distinguished members of the subcommittee; thank you for the opportunity to talk about military justice and how we are combatting sexual assault in the Air Force.

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

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

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

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

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

The Services fully implemented the **Military Justice Act of 2016, effective 1 January 2019**, in the Manual for Courts-Martial and their respective Service policies. The Act is the most significant overhaul of the military justice system since 1983. The Act preserves the foundational principle of the commander as convening authority. It also affects the entire spectrum of court-martial proceedings and related disciplinary proceedings. While we know that these sweeping changes to our military justice system will have significant impacts, we are still determining the long term effects, both positive and negative, on the overall effort to strengthen discipline and maintain the integrity of processes. We will continue to ensure the system and changes are properly challenged at trial and appellate levels to ensure that these changes are correct as a matter of law. We have yet to fully realize the effect of these changes because the system has not been provided the opportunity to evaluate the implementation of these reforms. New legislation coming at such a rapid pace limits our ability to see the results of changes made

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

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

Most importantly as a matter of process, safeguards have been incorporated and gaps closed to **maximize legal advice during every key phase or decision point of a case, through investigation, adjudication and final disposition.** 10 U.S.C. 806 and 8037, the statutory authorities of The Judge Advocates General, ensure that that this critical legal advice is independent. In practice, like with all decisions, commanders never make them in a vacuum. Their decisions are informed and evidentiary standards are applied at each stage of the process with the advice of a staff judge advocate, along with input from a prosecutor, victim, and accused. The attachment, *Military Justice Decision-Making Process*, walks through in detail how we accomplish this in the Air Force.

A critical component of our fight against sexual assault in the military has been our quest to build trust and confidence in victims. We know that **victims must be empowered** in this very difficult process. Survivors must believe that their privacy can be protected and that they can regain a sense of control in their lives. Sexual assault is a personal violation and victims must be heard without having the prosecutorial process itself further make them feel victimized. Victims must know that they have a say in the process before a decision is made. In 2013, the Department created and staffed the Nation's first large scale effort to provide trained attorneys to victims of sexual assault. The program was designed to give victim's the help, support, advice,

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

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

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

Commanders are selected based in part on their education, training, experience, length of service, temperament, judgment, and most importantly, their decision-making ability. Because of these qualities, commanders are entrusted with the authority and the responsibility to ensure a disciplined fighting force consistent with military standards, American values, and established

expectations. Moreover, commanders are trained in the military justice system, and checked and balanced with independent legal advice as they execute their decision-making responsibilities to ensure they are upholding standards and the military justice system. If commanders do not meet standards, they are held accountable for their actions or inaction by superior commanders.

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

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

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

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

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

2 Attachments:

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

Attachment 1: Military Justice Decision-Making Process

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

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

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

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

A victim may choose to communicate with investigators, judge advocates, and command through the Special Victims' Counsel. Airmen accused of a crime are provided an experienced Area Defense Counsel, and in cases involving serious misconduct a Circuit Defense Counsel, free of

charge to assist them. The defense counsel will frequently communicate on behalf of the accused to judge advocates, investigators, and members of command throughout the process.

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

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

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

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

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