

# Gillibrand Proposal

## I. Proposed legislation: “Military Justice Improvement Act of 2013”

**A. Purpose:** “To further improve procedures relating to courts-martial under the Uniform Code of Military Justice.”

**B. Primary effect:** Modifies the authority to determine whether to refer a case to court-martial by creating a separate system for most offenses for which the maximum authorized punishment exceeds one year. Disposition authority under the new system would be held by a commissioned officer of rank O-6 or higher who is: available as trial counsel (i.e., JAG officer), has significant trial experience, and is outside the chain of command of both the accused and the victim. The disposition officer’s decision would be binding on any applicable convening authority.

**C. Aspects of commanders’ role that would remain:**

1. When the new O-6 convening authority decides not to refer a case to court-martial, the commanding officer may still either refer the case to trial by summary court-martial or impose non-judicial punishment.
2. The new O-6 convening authority would have jurisdiction over sexual assault offenses but not other specified offenses.

## II. Senator Gillibrand’s Congressional Comments and RSP Public Meeting Testimony

**A. Sen. Gillibrand’s comments identifying enhanced objectivity/expertise as goal of her proposal**

1. Now, the reason why we’ve suggested this solution is because it’s what the victims have said over and over and over again. In cases where they didn’t report or in cases where they have their own experience, they’ll say the problem is that our only decision maker is in the chain of command. They know the victim. They know the perpetrator. They have too many reasons to be biased. So it’s their suggestion. *Transcript of Testimony, Response Systems Panel (“RSP”) Public Meeting at 339-40 (Sept. 24, 2013).*
2. “There has to be independent oversight over what’s happening in these cases. Simply put, we must remove the conflicts of interest in the current system, the system in which a commander can sweep his own crime or the crime of a decorated soldier or friend under the rug, protects the guilty and protects serial predators. It harms the military readiness. . . . [U]ntil leadership is held accountable, it won’t be corrected. To hold leadership accountable, it means there must be independence and transparency in the system. Permitting professionally trained prosecutors rather than commanding officers to decide whether to take sexual assault to trial is measured with a first step towards accountability. I have no doubt the command climate, unit cohesion, and readiness will be improved by these changes.” *Transcript*

*of Testimony, RSP Public Meeting at 302 (Sept. 24, 2013) [quoting Lt. Gen. Claudia Kennedy, U.S. Army (ret.)].*

3. “As a former commander, endorsing a change that removes certain authority from military commanders has been a tough decision. It was driven by my conviction that our men and women in uniform deserve to know without doubt that they are valued and will be treated fairly with all due process should they report an offense and seek help or face being accused of an offense. When allegations of serious criminal misconduct have been made, the decision of whether to prosecute should be made by a trained legal professional. Fairness and justice requires [sic] sound judgment based on evidence and facts independent of preexisting command relationships.” *Transcript of Testimony, RSP Public Meeting at 304 (Sept. 24, 2013) [quoting Gen. Martha Rainville, USAF (ret.)].*
4. I think what we need so urgently is transparency, and accountability, and an objective review of facts by someone who knows what they’re doing, who is trained to be a prosecutor, who understand [sic] prosecutorial discretion. And these cases on a good day for any prosecutor in America to get right is difficult. So why would we be giving it to someone who doesn’t have a law degree, who knows nothing about sexual assault, who may have a bias against women in the military, who may have a bias against gays in the military, who may know the perpetrator, who may know the victim? The possibility for bias is so severe. I think we’re kidding ourselves if we think leaving the status quo in place, having these commanders have this responsibility is just naïve. *Transcript of Testimony, RSP Public Meeting at 312-13 (Sept. 24, 2013).*
5. [W]hen we are talking about serious crimes, serious crimes like rape and murder, crimes that have penalties of more than a year or more, what several of us are asserting and arguing today is we think you should do what other countries around the world who we fight with every day, that are our allies. They are side-by-side with us in combat – Israel, the UK, Australia, Germany.

They have taken the serious crimes out of the chain of command for precisely this reason because the commander, while you are all so dedicated and determined, not all commanders are objective. Not every single commander necessarily wants women in the force. Not every single commander believes what a sexual assault is. Not every single commander can distinguish between a slap on the ass and a rape because they merge all of these crimes together.

*Transcript of Testimony, Senate Armed Services Committee, Oversight Hearing to Receive Testimony on Pending Legislation Regarding Sexual Assaults in the Military at 49 (June 4, 2013).*

6. [A]t the end of the day, you want to have as close to an unbiased system as possible. I don’t want to weigh the scales of justice in favor of the victim. I don’t want to weigh the scales of justice in favor of the defendant. I want it to be even. I want it to be even. I want justice to be blind. That’s the whole point. And in today’s system, it is not blind. It is too often this or this.

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We're creating a climate through these hearings, through this Panel, through this issue, where I think it's going to be very difficult for any commander not to move forward to a trial. I think he's going to feel, oh, well, if I don't move forward or if I disagree with my lawyer, it's going to be appealed, and then I'm going to my [sic] slapped because I didn't move forward. That's not blind justice. That is weighing the scales in favor of any victim over any defendant even if that defendant is innocent. And we don't want that either.

*Transcript of Testimony, RSP Public Meeting at 325-26 (Sept. 24, 2013).*

7. So I assert to all of you that removing this second legal decision, this Article 30 decision of whether to go to trial, is something that should be removed so we have objectivity and no bias, and will not undermine the commander's ability to instill good order and discipline. *Transcript of Testimony, RSP Public Meeting at 310 (Sept. 24, 2013).*
8. [W]hy wouldn't you let someone who is experienced to make that decision, who is a prosecutor, so that you have an objective reviewer, someone who can't be biased in any way? Why wouldn't you allow that to happen, to instill better discipline and order? Because if you don't have trust, you have nothing. *Transcript of Testimony, Senate Armed Services Committee, Hearing to Receive Testimony on Sexual Assaults in the Military at 92 (June 4, 2013).*

**B. Sen. Gillibrand's comments as to effect of her proposal on reporting:**

1. We don't know whether this will increase reporting. The victims tell us they believe it will. Maybe it won't. But having this reform is a very good first step. And so, that's why I think it's so important because without creating an unbiased review, you're lacking objectivity, and then you're lacking faith in the system. So we don't know what is enough. I think it's a good approach, and I think it's one that can be done without undermining unit cohesion, good order and discipline. *Transcript of Testimony, RSP Public Meeting at 331-32 (Sept. 24, 2013).*
2. [W]hen we are talking about serious crimes, serious crimes like rape and murder, crimes that have penalties of more than a year or more, what several of us are asserting and arguing today is we think you should do what other countries around the world who we fight with every day, that are our allies. They are side-by-side with us in combat – Israel, the UK, Australia, Germany.

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So my point to you is this has been done before by our allies to great effect, and in fact, in Israel, in the last 5 years because they have prosecuted high-level cases, you know what has increased by 80 percent? Reporting.

*Transcript of Testimony, Senate Armed Services Committee, Oversight Hearing to Receive Testimony on Pending Legislation Regarding Sexual Assaults in the Military at 49 (June 4, 2013).*

3. After speaking to victims, they have told us that the reason they do not report these crimes is because they fear retaliation. More than half say they think nothing is going to be done, and close to half say they fear they will have negative consequences. They will be retaliated against. Of the victims who actually did report, 62 percent said they actually did receive some retaliation.

And unfortunately, the reports that we do have, the incidence of reporting has actually dropped in comparison to the number of cases. It has dropped from 13 percent to under 10 percent of the vague estimate of 26,000 incidents. We don't know how many are rapes and sexual assaults and how many are unwanted sexual attempts.

*Transcript of Testimony, Senate Armed Services Committee, Oversight Hearing to Receive Testimony on Pending Legislation Regarding Sexual Assaults in the Military at 48 (June 4, 2013).*

4. Given these kind [sic] of [victims'] stories, . . . the statements from your commander, Marine Corps General Amos, saying that sexual assault victims do not report because, "They don't trust us. They don't trust the command. They don't trust the leadership." Even the Commandant of the Marine Corps say [sic] the trust of the chain of command does not exist now. *Transcript of Testimony, Senate Armed Services Committee, Oversight Hearing to Receive Testimony on Pending Legislation Regarding Sexual Assaults in the Military at 92 (June 4, 2013).*
5. Senators from both sides of the aisle have listened to the victim's [sic] voices and agreed that what's right is not just tweaking the status quo, but a real transformational change required to give victims the hope of a fair shot at justice so that they are willing to come forward and report the heinous crimes committed against them. *Transcript of Testimony, RSP Public Meeting at 297-98 (Sept. 24, 2013).*

### **C. Sen. Gillibrand's comments as to current number of prosecutions**

1. What Chairman Levin suggested is if the commander disagrees with their lawyer who does the investigations for them, then those cases get immediately appealed. I believe that is a solution without a problem because the commanders and their lawyers only disagree in approximately one percent of the cases. *Transcript of Testimony, RSP Public Meeting at 318 (Sept. 24, 2013).*
2. So it's not about just moving more cases forward. It's about creating a system that's objective, honest, and that justice is possible so victims come forward. I'm not worried about that handful of cases where the lawyer and the commander disagree. I'm not. That case has been reported. There's now a record of it. Something will be done.

And today's record is not horrible. One in 10 go to trial, and then once they go to [sic] trial, the conviction rate is extremely high. That's not the problem in the system. The problem in the system is no one trusts the system, so they don't enter the system. They don't trust they can possibly have justice. And that's why creating an independent system is what's meaningful.

*Transcript of Testimony, RSP Public Meeting at 328 (Sept. 24, 2013).*

**D. Sen. Gillibrand's counterarguments to commanders' objections:**

1. A second argument you will hear about this will let commanders off the hook. That could not be farther from the truth. Only commanders are responsible for setting command climate. Only commanders are responsible for good order and discipline. And now with the underlying NDAA bill, we are making retaliation a crime.

But what I can tell you is this is where commanders are failing. They are not maintaining enough good order and discipline because we had 26,000 rapes, . . . unwanted sexual contact and assaults a year, and only 3,300 reporting. That means under the current command climate, it is not sufficient to prevent these rapes. The current command climate is not sufficient for retaliation not to happen. And under the current command climate, it is not sufficient for victims willing to come forward.

The last point I want to make. [“]Only commanders can possibly protect victims if they come forward, so you must leave this under the commander’s authority.[”] Well, there, too, we see enormous failure because of the 3,300 cases that were reported last year, 62 percent of the victims were retaliated against. So in 62 percent of the cases, those commanders did not protect the victim, did not have his or her back to make sure no retaliation could happen. So I see no reason why you’d think that commanders are protecting these victims and only commanders can protect these victims if they are the ones deciding the case.

*Transcript of Testimony, RSP Public Meeting at 310-12 (Sept. 24, 2013).*

2. [Question from Judge Jones]: So, my question is, would it be wiser to, as I believe is conceded already by the Secretary of Defense, remove the Article 60 clemency power, and then take a look at how court martials panels are staffed, and perhaps a number of other suggestions that have been made – and not suggestions. They’re all in the legislation. And give those a chance before we remove the commanders, because . . . the thought in my head from the beginning is that we’re swapping one set of JAGs for another. . . .

[Response of Sen. Gillibrand]: Well, other senators have looked at this issue for decades, and even Olympia Snowe said 10 years she tried to change the system because everyone said the same thing then: let’s just try these reforms and see how it goes. And she said that she regrets that she didn’t get more because the military continually asks to be in charge. The keep saying we’ve got this, we’ve got this, let us do this, we can fix anything, and they keep failing.

So I just don’t want one more victim to be on our heads because we didn’t do enough. I don’t want one more victim to have to suffer through the current system and not trust her commander enough to report her case.

*Transcript of Testimony, RSP Public Meeting at 336-38 (Sept. 24, 2013).*

3. Now, you may be told, you know, these other jurisdictions, they don't have less sexual assault than ours. They don't have – we don't have records that their system is working. That's not why we're citing them. We're citing them because their militaries didn't fall apart. Just look at Israel. Look at the UK. Look at Australia. Yes, they're different militaries than us. You can have a panoply of differences. But they still have good order and discipline and have been able to maintain a command climate without this one legal decision. *Transcript of Testimony, RSP Public Meeting at 329 (Sept. 24, 2013).*
4. [ ] I know you've heard testimony from other jurisdictions who have removed this decision making from the chain of command, the UK, Israel, Australia being some of them. And they do not see a lack of good order and discipline because this one legal decision isn't being made in their chain of command. They will not tell you that they lack good order and discipline. They will not tell you that their militaries have fallen apart. They will not tell you that their commanders have no ability to set the command climate without this one ability to make a legal decision. *Transcript of Testimony, RSP Public Meeting at 309 (Sept. 24, 2013).*
5. I am extremely disturbed, based on the last round of question and answer, that each of you believes that the convening authority is what maintains discipline and order within your ranks. If that is your view, I do not know how you can say that having 19,000 sexual assaults and rapes a year is discipline and order. I do not understand how you can say that of those 19,000 cases, to only have approximately 2,400 even reported because the victims tell us that they are afraid to report because of retaliation and the blame they will get and the scorn they will get from their colleagues is order and discipline. And I really cannot understand how 2,400 cases, only 240 of which go to trial, can result in you believing that that authority is giving you discipline and order. It is the exact opposite of discipline and order. *Transcript of Testimony, Personnel Subcommittee, Senate Armed Services Committee, Hearing to Receive Testimony on Sexual Assaults in the Military at 54 (Mar. 13, 2013).*
6. And I do agree with you, U.S. commanders are essential to this. I don't think you can get this done if you are not 100 percent dedicated to eliminating the scourge of sexual assault. So I would like you to say, and starting with General Dempsey, how do you feel about those two decision points? And why can't you maintain good order and discipline without those two decision points?

Because you have those two decision points today, and you do not have good order and discipline. You have, arguably, 26,000 attempts, either unwanted sexual attempts, assaults, or rapes. That does not define, by any of your definition, as stated today, good order and discipline. It goes to the heart of not having military readiness.

*Transcript of Testimony, Senate Armed Services Committee, Oversight Hearing to Receive Testimony on Pending Legislation Regarding Sexual Assaults in the Military at 92 (June 4, 2013).*

7. Critics say that moving these decisions outside the chain of command will diminish good order and discipline. The truth is our bipartisan bill is carefully crafted to leave 37 serious crimes that are unique to the military within the chain of command, such

as insubordination or going absent without leave, in addition to crimes punishable by less than a year of confinement under Article 15. *Transcript of Testimony, RSP Public Meeting at 308-09 (Sept. 24, 2013).*

8. "In my experience, mid-level commanders, department heads, and military leadership do not want this responsibility. They don't want the burden of convening a court martial, and the entire process is a distraction from their mission. These mid-level leaders are busy with operational demands, and handling complex sexual assault cases occupies their time and energy and is counterproductive to the mission of readiness." *Transcript of Testimony, RSP Public Meeting at 306 (Sept. 24, 2013) [quoting Tarin Meeks, USN JAGC (ret.), Executive Director of Protect Our Defenders].*

### III. Media Statements of Senator Gillibrand

**A. Press Release:** The Pentagon taking action is a good thing and these are positive steps forward but it is not the leap forward required to solve the problem. As we have heard over and over again from the victims, and the top military leadership themselves, there is a lack of trust in the system that has a chilling effect on reporting. 302 prosecutions out of an estimated 26,000 cases just isn't good enough under any metric. It is time for Congress to seize the opportunity, listen to the victims and create an independent, objective and non-biased military justice system worthy of our brave men and women's service. *Kirsten Gillibrand, "Gillibrand Statement on New Pentagon Sexual Assault Policy" (Aug. 15, 2013).*

#### **B. HuffPost Live, August 9, 2013**

1. [W]hen you ask the victims why aren't you reporting these crimes, you know, what's happening here, they say overwhelmingly, we don't trust the chain of command, we fear retaliation, we've seen someone else be retaliated against, we believe nothing will be done. So, we're trying to create more accountability, more objectivity. . . . Commanders often are biased and not objective, they may well know the victim, they may know the assailant. They may have reason to value the assailant because he's well-decorated or done great acts of courage, and even our commanders have said that.
2. Sexual assault and rape is [sic] prevalent across society, but what is different in the military is the reporting of those crimes is much more reduced. Less people report these crimes within the military than in other populations. And so we're trying to create an objective review so that you can have accountability.
3. That one legal decision, whether or not to go to trial, should be done by somebody objective, who's trained in the law, who actually knows how to weigh evidence, and can use prosecutorial discretion. If they are the ones in charge of this decision, I think thousands and thousands of more victims will come forward, and we'll have more trials, more prosecutions, more accountability.

*HuffPost Live (Aug. 9, 2013) (video available at <http://live.huffingtonpost.com/r/segment/kirsten-gillibrand-democrat-new-york/520506affe344467fa0000be>).*

#### **C. Morning Joe, June 24, 2013**

1. The reason why I'm arguing so strongly to take it out of the chain of command is because the victims have told us that they don't trust the chain of command. That, in fact, they don't believe they can receive justice if the only decisionmaker is their commander, their boss. . . . And until you see more prosecutions, more jury verdicts and more guilty verdicts and more people going to jail, you are not going to change the culture. The only way to do that is to take it out of the chain of command because until that's done, victims will not trust the system enough to report these crimes.
2. We want this decisionmaker to be not by a commander who may not be trained in the law at all. May not even believe sexual assault is a crime. That lack of

objectivity and training is the problem. So, if we could have a trained military prosecutor who actually could study sexual assault and rape, develop expertise and understand it, you're going to develop something more similar to the victims crime unit we have for example in the Manhattan D.A.'s office where the state-of-the-art law and investigations were developed.

3. Senator McCaskill . . . believes that the decision point should be made by the commander. The reason why I disagree with her is because that's what the victims tell us. Of the victims who have reported, 62% say they were retaliated against. Of the thousands and thousands who never even reported, they say the reason is because they either think justice won't be done, they don't trust their commanders, or they've seen someone being retaliated against. Those are the reasons. So until you can create a more appearance [sic] of objectivity by having these prosecutors take it, you're not going to have reporting. Until you have the reporting, you're not going to have the trials and convictions and people going to jail.
4. As a last point, the reason why I feel so confident that this can work, is because all the allies that we fight side by side with have already made this change. Israel, the UK, Canada, Australia, Germany. They've all said in order to have justice within the military system, you need decision making about whether to go to trial done by trained prosecutors. All felonies and above, serious crimes, have been taken out of their chains of command into trained military prosecutor systems.

*MSNBC Television Broadcast (June 24, 2013) (video available at <http://video.msnbc.msn.com/morning-joe/52294442>).*

#### **D. The Last Word with Lawrence O'Donnell, May 10, 2013**

1. So there's a huge gap between how many incidents there are and how many people have the courage and ability and feel that [ ] they will be taken seriously and not be marginalized or retaliated against. And so we need to increase the reporting, and that's what we're trying to do. We're trying to write a bill that will change how men and women who are assaulted report these crimes so they feel that justice could be done.
2. [R]ight now, the way it is in the military, if you were raped or assaulted, you have to report it to your boss, or your boss's boss, and you can imagine a victim saying, 'I don't want to do that, because my boss may know the person who assaulted or raped me. He may think that I'm the troublemaker. He may retaliate against me because it's going to reflect badly on him.' There's too many issues at stake, so it should be somebody independent, outside of the chain of command, who's specifically trained to understand these issues. Let them do the investigation. Let them make the judgment of whether this should go to trial. I think in that instance, more men and women will feel comfortable reporting, you'll have a better reporting rate, and justice will be done in more cases.
3. [W]e believe, and many senators are working on this bill now, that if we allow [victims] to report outside the chain of command, allow that decision-making to be made by a prosecutor, not the commanding officer, you will see justice done

more often, and you will see more confidence in the system that justice is possible for them.

*The Last Word with Lawrence O'Donnell (MSNBC Television Broadcast May 10, 2013) (video available at <http://tv.msnbc.com/2013/05/09/why-military-sex-crimes-arent-reported-theyre-afraid-of-retaliation/>)*

#### **IV. Independent Groups' Endorsements of Senator Gillibrand's Previously-introduced Legislation**

##### **A. *Protect Our Defenders, May 16, 2013***

The reforms put forth in this bill are crucial to protecting victims from bias and intimidation, and will give them a fighting chance to achieve justice and prevent further attacks. The authority to decide which cases go to trial, and to determine the ultimate outcome of a court-martial, must be taken out of the chain of command.

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Currently, the United States Military has a system of justice which gives commanders unfettered power to decide when and if to administer justice in sexual assault cases. In recent high profile cases, we have seen commanders act unilaterally to overturn jury convictions in sexual assault cases. This is a system fraught with personal bias, conflicts of interest, abuse of authority, and a low regard for victims who report sexual assault. *"Protect Our Defenders Applauds Bipartisan Legislation to Reform Military Justice System" (May 16, 2013) (available at <http://www.protectourdefenders.com/protect-our-defenders-testifies-at-senator-gillibrands-press-conference-announcing-new-legislation-to-reform-military-justice/>).*

##### **B. *Service Women's Action Network (SWAN), May 16, 2013***

At a press conference in Washington today, Senator Kirsten Gillibrand (NY) and Senator Barbara Boxer (CA) introduced the Military Justice Improvement Act, a landmark bill that would change the way the military prosecutes crimes, including crimes involving sexual assault. Under the current military justice system, commanding officers maintain the authority to control criminal cases as they move through the military courts. This has led to a system that does not provide justice for victims or proper due process rights for the accused. This has been seen recently in the military's consistent mishandling of sexual assault cases.

The bill would move the authority to determine which cases to send to trial and the selections of judges and juries to professional prosecutors and court administrators in cases involving serious crimes. *"Landmark Legislation Introduced to Professionalize the Military Legal System" (May 16, 2013) (available at <http://servicewomen.org/wp-content/uploads/2013/05/SWAN-Sen-Gillibrand-MilJustice-Bill-Press-Release.pdf>).*