Statement of Senator Claire McCaskill before the Response Systems to Adult Sexual Assault Crimes Panel

January 30, 2014

As the members of this panel are well aware, in December Congress passed into law sweeping changes to Department of Defense policy and the military justice system in an aggressive and historic effort to assist the military in combating the problem of sexual assault and rape in the United States military. I have been proud to play a central role in advocating policies that will effectively protect and empower victims, hold military commanders accountable, and put more sexual predators behind bars.

Today, you are meeting to deliberate the role senior military commanders should play in combatting sexual assault as it pertains to the military justice system. This is an issue that, like you, I have studied extensively over the past year. I have been informed by my experiences as a courtroom prosecutor in Jackson County, Missouri, where I prosecuted hundreds of sex crimes. To my knowledge, I am the only member of the Senate Armed Services Committee who has prosecuted such cases. I have used my experience in the civilian justice system to question many aspects of the military's system. I have met with countless military commanders, prosecutors, defense attorneys and many others to educate myself about the military justice system and how military sexual assaults are reported, investigated and prosecuted. At times, I have found flaws in the military's system, especially those aspects of a commander's authority that might have made sense 60 years ago, but, with the professionalization of the Judge Advocates General corps and the evolution of the military justice system, are no longer necessary to protect the rights of the accused. Specifically, I introduced legislation reforming Article 60 of the Uniform Code of Military Justice to curtail a commander's role in the post-trial review process, eliminating, in most cases, a commander's ability to overturn convictions. This change has since been adopted into law and embraced by the services. In a system that has developed a professional defense bar and a robust appeals process, commanders do not need to be in the business of having the final say over guilt or innocence, especially when you consider the fact that they were never in the courtroom and never heard the testimony.

As aggressively as I advanced reforms to Article 60—and for additional historic reforms recently enacted into law—I have fought equally as hard against proposals that I believe would weaken protections for victims, and result in fewer prosecutions. Most significantly, I have opposed stripping commanders of their ability to launch a court-martial. I believe removing this tool from commanders would result in fewer prosecutions, leave victims of sexual assault more at risk from retaliation, and weaken the military justice system. These outcomes would further depress reporting of sexual assaults in the military, rather than engender the type of confidence in victims that would lead to increased reporting and more prosecutions.

The Proposal to Remove Military Commanders' Convening Authority Power Will Result in Fewer Prosecutions of Military Sexual Assaults

Senator Kirsten Gillibrand, as Chairman of the Senate Armed Services Committee's Personnel Subcommittee, has championed the well-publicized effort to remove court-martial convening

authority from commanders. Under her proposal, only military prosecutors would be vested with disposition authority, or the authority to determine whether or not a case should go to a court-martial.

It is clear to me, as a former prosecutor and someone who has studied the military system that prosecutors and commanders frequently take different approaches to disposing of these cases. A prosecutor will look at a case, evaluate the evidence, and make a call on whether he or she believes expending the significant time and resources of going to trial will likely produce a conviction. We are all aware that many sexual assault cases present evidentiary challenges. For cases in which a conviction might be difficult, many prosecutors will opt to not go forward with prosecuting a case, even in some close cases. This is not uncommon in the civilian justice system, where many prosecutors consider their "win-loss" ratio.

Commanders, on the other hand, weigh a broader set of factors than prosecutors. Commanders have a distinct interest in seeing those who pose a risk to their units and jeopardize combat effectiveness with criminal behavior be prosecuted to the fullest extent of the law. They are responsible for setting an appropriate command climate in which victims of sexual assault feel safe and supported when they report the crimes committed against them. And they are responsible for doing this, in many cases, while commanding forces in a combat theater. A commander may, for example, see the benefit of sending a case to trial even when winning a conviction will be difficult, because of the message it can send to wrongdoers within the command alongside the message it sends to victims that they will receive their day in court—that they will be empowered and supported. This can both reduce incidences of sexual assault and enable increased reporting by victims.

The facts show that commanders send many sexual assault cases forward even when prosecutors independently decline to take cases to trial. Ninety-three cases in just the past two years have been taken to trial in the military when a prosecutor declined. In a recent case at the United States Naval Academy, the Commander with convening authority similarly directed that the case proceed to trial even as the prosecutors recommended against trial. The victims in these cases got their day in court because a commander, not a lawyer, had the ability to move a case forward. If we create a system in which prosecutors have the only say, we will see fewer cases go to courts-martial.

Under the Gillibrand alternative, the military lawyer would get the final say. There is no recourse for the victim if a lawyer doesn't want to go thru with the case. The broader interests of a commander, which works to benefit both the victim and the unit, would be lost. For these reasons, I share the view of many others that leaving to prosecutors alone the decision on whether or not to give a victim his or her day in court will result in fewer prosecutions in the military, and, accordingly, less victims coming forward.

Proponents of the Gillibrand proposal, even some who have testified before this panel, have also argued that even if a military prosecutor declines to move forward on a case, the commander retains the authority to issue non-judicial punishment (NJP). However, this argument ignores the fact that an accused servicemember can decline NJP, and if the accused does so after the prosecutor has already decided against pursuing a court-martial, the accused would have no

incentive to accept punishment from his or her commander. This would result not only in the total lack of accountability for someone who could quite possibly be punished under the current system, but it clearly undermines a commander's ability to hold those within his or her command accountable.

The Proposal to Remove Military Commanders' Convening Authority Power Will Not Result in More Reporting

There is no evidence or data that's been offered to support the argument that adopting the Gillibrand approach and upending the military justice system will result in more victims coming forward. However, there is strong evidence to show that reforms aimed at protecting victims that have been enacted in recent years, while maintaining the commander's convening and disposition authorities, has encouraged victims to report. In fact, the military services saw a combined 50 percent increase in reporting from fiscal year 2012 to fiscal year 2013. This is a powerful indication that victims are gaining confidence in the military justice system and are increasingly willing to come forward to report assaults against them, even assaults that occurred before they joined the military.

Proponents of the Gillibrand alternative have also argued that we should remove commanders from their central role in the military justice system because a number of America's strategic allies have done so. However, the most limited review of why our allies changed their military justice systems exposes that our allies made changes out of concern for the *accused*, not victims. In addition, none of our allies have seen the type of increase in reporting promised by Senator Gillibrand. I know that your Panel has conducted extensive research into this area, and that you have received interim findings from your Subcommittee on the Role of the Commander that reached the same conclusion.

When testifying before your Panel in September, Senator Gillibrand herself admitted that she did not know if her proposal would result in more reporting.

Furthermore, when one looks at the reasons a victim chooses whether to report, the changes being proposed once again prove problematic. Victims choose not to report because they fear nothing will be done and because they fear retaliation, among other things. Since removing commanders from their role as convening authorities in military cases will both decrease prosecutions and increase retaliation, we can expect it will have a chilling effect on reporting, the exact opposite effect we desire.

The Proposal to Remove Military Commanders' Convening Authority Power Would Result in More Retaliation Against Victims

Senator Gillibrand and I are in complete agreement that retaliation against anyone who reports that they are the victim of a sexual assault is absolutely unacceptable, and far too many victims do not report the crimes committed against them because they fear retaliation. To combat retaliation, the Fiscal Year 2014 National Defense Authorization Act, signed into law in December, made retaliation a crime under the Uniform Code of Military Justice.

In another historic reform, the National Defense Authorization Act requires each of the military services to provide victims with their own lawyer. This lawyer is there to represent only the interests of the victim, including any legal issues that might stem from possible retaliation. This is a level of protection that is unheard of in the civilian justice system.

Senator Gillibrand's proposal, however, requires a prosecutor who could be on a separate continent from a victim to make decisions about how to charge a case. This change will newly isolate and expose a victim. By removing the commander, you are removing a commander's investment in the resolution of a case, and leaving a victim with even less protections. Further, studies show that victims fear retaliation from their peers and their immediate supervisors, not necessarily from the senior level commanders who possess General Court-Martial convening authority in sexual assault cases.

Removing authority to make disciplinary decisions from these senior level commanders and giving it to a prosecutor does nothing to address retaliation by peers and immediate supervisors, whereas a senior commander can respond to retaliation at these levels close to the victim. Finally, basic common sense tells you that a commander's decision will have much more sway over members of a unit than the decision of an outside lawyer, who is unknown to a unit and could be located half a continent away.

Historic Reforms Have Been Passed into Law

As stated earlier, the Fiscal Year 2014 National Defense Authorization Act, which Congress passed into law last year, contains sweeping, historic reforms aimed at caring for victims, holding commanders accountable, and putting perpetrators behind bars. These reforms include stripping commanders of their authority to overturn the guilty verdict of someone convicted of rape or sexual assault, requiring automatic higher-level review of any decision by a commander not to prosecute a sexual assault allegation, making it a crime under the Uniform Code of Military Justice to retaliate against a servicemember who reports a crime, providing a Special Victims Counsel to give independent legal advice to servicemembers who report a sexual assault, and requiring automatic discharge for a rape or sexual assault conviction.

There was broad support in Congress for these historic reforms. They were adopted during the Senate Armed Services Committee's markup of the Fiscal Year 2014 National Defense Authorization Act in the Personnel Subcommittee by a unanimous vote, 26-0. There was unanimous support because these reforms make sense and directly address the problems in the current system: fear of retaliation; victims' unwillingeness to report these crimes; lack of accountability for commanders; and the denial of justice. These are the central problems that must be fixed in order for us to effectively combat sexual violence within the military.

In addition, the reforms that became law as part of the Fiscal Year 2014 Defense bill will implement several levels of review built in to ensure these cases are seeing the courtroom. For allegations of sexual assault, in the event a commander's legal counsel recommends that a case goes to a court martial and the commander says no, the case automatically gets kicked up to the civilian service secretary, the Secretary of the Army, the Secretary of the Navy, or the Secretary of the Air Force, for final disposition. In the event a commander's legal counsel recommends

against sending a case to a court martial, and the commander agrees, the decision is still given a higher level review by the next senior commander and judge advocate.

I am heartened that this panel has taken such a strong interest in studying in-depth the role of the commander in the military justice system. This panel has the opportunity and the ability to separate rhetoric from reality, and given the weight this panel's recommendations will have on any future Congressional action on this matter, I know you all understand the extraordinary burden you bear to get this right. I firmly believe that when all of the arguments are considered, this panel will conclude as I did; removing commanders' disposition authority would create a system that leaves victims less protected from retaliation, leaves commanders less accountable for combatting sexual assault, and results in more predators remaining within the ranks of our military.

Combatting Sexual Assaults in the Military

TOP MYTHS & FACTS

1. **Myth:** It's Senator Gillibrand's proposal or nothing.

   FACT: In December, Congress passed and the President signed into law a host of historic reforms—backed by Senator Gillibrand—and acknowledged by all sides as substantial and wide-reaching:

   - Commanders stripped of authority to dismiss sexual assault convictions
   - Retaliation against victims who report sexual assault made a crime
   - Mandated dishonorable discharge/dismissal for sexual assault
   - Elimination of statute of limitations in sexual assault cases
   - Required input from victim in clemency hearings
   - Elimination of military character as a consideration for case disposition
   - Guidance for moving of the accused from unit to protect victim
   - Making clear commanders failing to address sexual assaults should be relieved of command

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2. **Myth:** Victims don't report crimes because they must report to their commanders.

   FACT: Victims of sexual assault in the military currently have many options to report a sexual assault in an actionable (unrestricted) report, including:

   - Sexual Assault Response Coordinator (SARC)
   - Victim Advocate (VA)
   - Minister or member of the clergy
   - Civilian or military medical personnel
   - Military law enforcement outside of the chain of command

   NOTE: In practice, victims rarely choose to report an assault to a commander, choosing friends, medical providers, victim advocates and others. Nothing in current law or in the Gillibrand proposal will change this. Further, the senior level commander who holds disposition authority in sexual assault cases is rarely an individual a victim regularly personally interacts with, if at all.

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3. **Myth:** Senator Gillibrand's bill will make victims more comfortable reporting the crimes.

   FACT: Sen. Gillibrand, in testimony before the Response Systems Panel, stated that she did not know if her bill would lead to an increase in reporting. This contrasts with the fact that as the military services focused on protecting victims and holding perpetrators accountable, they saw a 50 percent increase in reporting in 2013.

NOTE: The Response Systems Panel is an independent panel created by Congress and tasked with providing an assessment of the systems in place within the military services to respond to allegations of sexual assault and provide recommendations for improvements.

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4. **Myth:** America's allies removed chain of command and it worked.

   FACT: Each of America's allies that removed chain of command from these cases did so to better protect the rights of *defendants*—not the rights of *victims*. None of those militaries saw the increase in reporting of sex crimes that supporters of Senator Gillibrand's proposal promise.

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5. **Myth:** Commanders aren't trusted because they decline courts martial that prosecutors want to pursue.

   FACT: No data has been offered to show that commanders decline to refer cases for court martial. Data does show that in the past two years, commanders referred 93 cases for court martial that prosecutors *declined* to pursue—meaning 93 victims who had their day in court because of commanders.

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6. **Myth:** The recent Naval Academy case demonstrates the need to adopt the Gillibrand bill.

   FACT: The prosecutors in this case recommended against going to court-martial. This case is only moving forward because the commander had the ability to override the advice of legal counsel and prosecutors, and convene a court-martial. Under the Gillibrand alternative, the commander would not have the authority to override the prosecutor and move the case forward, meaning this case would never have even reached a court-martial.

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7. **Myth:** In 1969, a legal decision removed many cases from the military justice system and "everything was fine" so returning to that posture will also be fine.

   FACT: The late 1960's and 1970's were a time in which the draft still existed; drug use, Soldier on Soldier violence and racial conflicts were prevalent in the services. The Vietnam era is considered one of the least disciplined periods in the history of our armed services. For instance, the 1980 DoD Health Behavior Survey found that almost 28% of service members used illegal drugs, compared to a current rate of about 2%. And contrary to Senator Gillibrand's assertions, the 1969 Supreme Court opinion in *O'Callahan v. Parker*, 395 U.S. 258, did not remove, in a majority of cases, command authority to decide which crimes to refer to court-martial. Commanders continued to send those under their command to military trials for such serious crimes as rape, sex with minors, forcible sodomy and murder. In 1987, the Supreme Court flatly rejected the prior ruling in *O'Callahan* in *Solorio v. United States*, 483 U.S. 435. In overruling *O'Callahan*, the Supreme Court specifically cited the widespread indiscipline problems in the military.