

Remarks of Senator Kirsten Gillibrand

Keynote Address: National Institute of Military Justice 30th Anniversary Symposium

Thursday, Oct. 28, 2021

Hello, everyone, and thank you, Professor VanLandingham for the kind introduction and all of your work. I want to start by thanking the National Institute of Military Justice for spearheading this event, and Georgetown Law's Center on National Security and the Law and the Georgetown student groups for helping to bring us all together this afternoon. I look forward to seeing all of the ideas that come out of this conference and the symposium essays.

And it's a great privilege to be joining you here at this time and talking about these efforts when the NDAA could be moving forward in the next two weeks and as we continue to refine the work we've been doing. I've really been on this issue for such a long time. And Georgetown and your professors here, specifically Gene Fidell, they've been working with me for the last 10 years.

Gene cofounded this institute in 1991; it was the same year as the Tailhook scandal. When Navy Lieutenant Paula Coughlin reported being sexually assaulted at the annual Tailhook Symposium. She was not alone – 90 service members were found to have been assaulted over the course of that one weekend. And I've met with Paula – she's a woman of extraordinary courage and strength, but this has been a long, long journey. And the work we've been doing here is not a small amount. It's something that has been intensive, continuous and purposeful.

After Tailhook, the armed services promised that they would reform the system. They made the same promise you've heard over and over again: zero tolerance. We've heard that from the U.S. military since Dick Cheney was secretary of defense: zero tolerance for sexual assault in the military. Every single one of them says it. And pretty much every president that's asked about it says the same thing. And I don't doubt that they believe it. I don't doubt that when they say those words, that they say it with sincerity, that they mean it, that they want to have zero tolerance for sexual assault. But the truth is, they haven't put in place the tools or the measures it would take to actually have zero tolerance.

In the 30 years since Tailhook, we've scandal after scandal – constant tragedy. Okinawa in 1995, Aberdeen Proving Ground in 1996, the U.S. Air Force Academy in 2003, U.S. Air

Force Basic Training from 2009-2012, Fort Sill in 2021. None of these are isolated scandals, they're all part of a pattern. And these are just the ones that came to light. These are the ones that were reported on, that we in the national conscience were able to absorb. But it is evidence that, as an institution, that the armed services isn't equipped to properly address the epidemic on their own.

Congress has given the military more than a billion dollars, enacted – since I've been there – over 250 specific laws, specific measures to work on this. We've had I don't know how many panels – dozens, let's say dozens, it's a good number. We have had commissions. We've had advisory committees. We've had reports – binders and binders of reports, a lot of reports. And none of this has actually moved the ball forward.

It's frustrating. Because, you know, our U.S. military is formidable. And when you give our U.S. military a problem, they solve it. They know how to solve it. You give them a mission, they complete the mission, they resource the mission, they practice the mission, they train for the mission, they complete the mission. It's what we do – we're really good at it. But when it comes to this, we're not good at it. Because to complete the mission and to train for the mission and to do what's necessary, it would mean changing the status quo in a way that the leadership of our military is not prepared to do. And that's really what this is about – it's about: are you willing to change the status quo to change the outcome?

In the hearings that I've been in over the many, many years, the typical tone – and every time we have a new leader, they assume that because they believe they're up to the challenge, because they believe that they're going to take it seriously, they're going to fix it. And again, the sincerity is there. So the testimony is always, 'I got this. We've got this ma'am. We've got this. This is the year. We've got this.' And they don't, because it's bigger than them. It's part of the culture, it's part of – it's almost baked in the cake, because it's how the structure is set up.

And there was no better example of what we're up against than the Fort Hood Report. So the Fort Hood report said it really directly. It found the world's largest Army base was “a permissive environment for sexual assault and sexual harassment.” So that's a pretty bad indictment, to say that your largest base has a permissive environment for both assault and harassment. I don't think it could get worse. That's in 2020, maybe it was 2021, that's a recent report.

Over the last 10 years I've heard 'Oh, ma'am, just give us time, we have all these new changes. They're going to work, let them work, let them work.' Okay. So now I've been on the committee 10 years. You've had plenty of time for all of these changes to work. And you've got that report? Clearly what we've done is not enough.

And I've always had this view that one of the best ways to change the culture on sexual assault and sexual harassment, is just put predators in jail. There's no clearer or easier way to send a message that sexual assault is not tolerated than putting a sexual predator in jail. And that's what's not being done. If you look at just the data, just the data alone – and the DoD is great, because they will keep the data, they will actually track the data for you so you can study it and know what you're up against – over the last 10 years, it's ranged from as high as 24,000 estimated sexual assaults and unwanted sexual contacts a year, I think it got to as low as 15,000, last estimated number was 20,000 again. But the number of actual convictions? Around 200. That's really bad. You couldn't come up with a worse rate. It's about 1%. It's terrible.

And then you can see how it breaks down. So if there's an estimated 20,000, about 7,000 are reported, about 5,000 unrestricted – meaning the survivor names the perpetrator, and about 2,000 restricted – meaning they report but they do so confidentially. Of that 5,000 that the command has to work with, let's say 3,000 complete their investigation. And let's say command actually considered maybe 2,000. And then court martial action is preferred, I don't know, maybe 500. And then cases that actually go to trial, maybe 250. Cases that end in conviction, maybe 125. So that's it. That's what the stats look like, approximately. And the stats, in that way, have not gotten better.

Over the last 10 years that I've been really tracking this: Has the rate of conviction gone up? Has the percentage of cases going to trial gone up? No. So under no measure are we getting better at prosecuting sexual assault, or getting better at picking the cases to go forward, or getting better at picking more cases to go forward. Under no part of this system are we improving. And then, the worst, the worst thing is in terms of conviction. We're just not convicting enough predators.

So that's what we're up against. That's our challenge – that's what it looks like. I've been working over the last 10 years with a lot of Democrats and Republicans. Washington can get things done, we can be bipartisan – you just have to start from common ground, and that starts

with conversations. And so the first time I started working on this bill, my ally across the aisle was Chuck Grassley, who as chairman of the Judiciary Committee cares deeply about criminal justice. On the committee, a surprising ally wound up being Ted Cruz, because he heard my argument in committee and said ‘That was persuasive, I’m signing on to her bill.’ So to have a bill that can have someone like Chuck Grassley and Ted Cruz and Rand Paul and Josh Hawley, but also earn the support of Bernie Sanders and Liz Warren, is significant because it shows there’s consensus. And what the consensus is, is that we need to change who makes the decisions, because the decision maker in this case doesn’t necessarily have the right information, doesn’t necessarily have the right training, isn’t necessarily unbiased, and certainly hasn’t come up with the right answer statistically or traditionally. That’s why we want trained military prosecutors to do it.

A trained military prosecutor is different than a commander in two ways. First, they’re lawyers, and highly trained in criminal justice. Second, they’re not in the chain of command of the victim or the accused. And so arguably – and you can just say arguably – they may be unbiased. They may not have a view of one service member being more valuable than the other, they might not have a view of which service member is more important to the unit or to winning the war or whatever mission they might be on. They may have less bias for or against males or females, less racial bias, we don’t know. But we do know that if you have a class of lawyers that are responsible for doing this and this alone, you can certainly train the shit out of them, because that’s what we do to lawyers. They’ve got to do CLE every year, they’ve got to be trained, they’ve got to have a certain number of cases, and that’s all they do. Whereas, God forbid you took that time from a commander, because he’s got a lot of other things to do: he’s got to train troops and he’s got to win wars.

So, I’d rather give this specialized function to a specialized group of service members who are committed to the exact same goal, to do this one unique task: review these hard cases. I want the bright line at felonies – that’s what Gene Fidell wants, because he’s the smart man in the room – to have a clear system. Allow cases to be looked at by these trained prosecutors, and they decide: yes, enough evidence; no, not enough evidence. If there’s enough evidence, then they’ll take that case to trial. And if not, then it goes back to the commander. And the commander can look at the case and say, ‘Well, these lower, lesser crimes have also been committed, I’m going to offer non-judicial punishment.’ And he’s going to do what he would’ve

done in the first instance, which is NJP nine out of 10 times. That's how the case is going to end. But because the case has been reviewed by the prosecutor, and he has a chance to be highly trained and unbiased, he may actually make a different judgment. And that is what I'm counting on: that beyond the actual choice, the perception by the survivor community, and hopefully by the predator community, is that justice is possible and there will be accountability. So that's the whole design behind the *Military Justice Improvement and Increasing Prevention Act*.

Now this year's been different than other years, because I've had an amazing ally in Joni Ernst. Joni Ernst is the only female Republican lawmaker who is a former commander and also a sexual assault survivor. So she's unique and she speaks with enormous authority. When I first approached her when she first got to the Senate six years ago – or now, eight years ago – she had mentioned this on the campaign trail that she would take it out of the chain of command, but once she got to the Senate, I couldn't quite get her there. She wanted to study the issue. She wanted to see what the committee had done so far. She wanted to really look into it. So during that six year period, we worked on lots of smaller reforms – a number of the 250 that did get passed into law and implemented – and we just kept working in good faith together.

And then when that report came out of Fort Hood, and Vanessa Guillen's murder was all over the front page, she just said, 'It's not working. What we are doing is not working and this has to change.' And so we started working on the bill together. We reformed it a bit, we changed a few more things, and we added some prevention measures – and that's why we reintroduced a reformed bill. And we got a bunch more people on it. So that's how we got to 66 cosponsors, which is extremely bipartisan – there's not a bill as bipartisan as that in the Senate. It's how we got it in the NDAA on Senate side; so, it is in the base bill and I don't think Senator Reed is going to take it out on the floor next week. There may be an effort to take it out in conference, because it's not on the House side, but I am going to object to that, of course. On the House side, we now have over 219 cosponsors, so we have a majority there, too. So, if necessary, we will ask for a floor vote, up or down, in both the House and the Senate and try to pass it as a standalone law.

We did do the same thing in repealing Don't Ask, Don't Tell. Because, at the time, there was politics where Republicans did not want to repeal Don't Ask, Don't Tell, so it was taken out

of the NDAA, so we voted on that bill up or down. And we had exactly 60 votes in the Senate and that's how we repealed Don't Ask, Don't Tell.

I am committed to seeing this reform through. Do I think it will be the silver bullet? No. Do I think it will reform the system? Absolutely. Am I worried that it is going to undermine command control? Definitely not. And the reason I'm not worried about that is because our allies have already done it, and they wrote letters to our committees saying 'No diminution in command control. No diminution in command authority.' They did it for civil liberties reasons. They did it for defendants' rights.

When the UK implemented a similar measure with taking all felonies out of the chain of command, they did it for defendants' rights. In a murder case, a defendant was being prosecuted and he said, 'My commander thinks I'm guilty. I could go to jail for the rest of my life. It's not fair that he chooses my judge, my jury, my prosecutor and defense lawyer. If he's got it in for me, I'm dead.' And the UK government said, 'You're right – that means you have no civil liberties.' So they guaranteed that the review be done by somebody independent and outside the chain of command. And so I don't think it's going to undermine our military readiness or our command culture or our command control. I think it's just going to lighten the caseload of our commanders – and it's something many commanders, particularly colonels, do not want to be doing because they have so much other work to do.

I think this will be easy to implement, not hard. The other thing the DoD pushes back on, they say 'Oh this is going to take us' – I think now they've asked for – '8 years to implement this change.' That's absurd. Not only do we have enough lawyers already working for the U.S. military, with the criminal justice billet, with O6 and above seniority, we have over 200 that are criminal justice lawyers O6 and above. We only use about 150 convening authorities today to do all serious crimes – only 150 convening authorities today. Two hundred O6 and above attorneys could do that same work. They already exist, they're already trained, they're already in the services. So you have the personnel today to do this now. You do not need to hire new people and train them up. They're there, they just need to be given this task and organized into a unit within each of the services.

I believe we can get this done. I believe this is the year to do it. This is something that President Biden said he wanted to do. He said, when asked would you take serious crimes out of

the chain of command – crimes like rape, murder, and child abuse – he said, “Yes, yes, yes.” All of them. So, I think it’s time, I think we should do it.

We’ve tried everything else and I think this is the one change with a chance at not only addressing bias when it comes to sexual violence, but we also think it may well address bias when it comes to sentencing with regard to Black service members. Because we’ve had data for about 50 years from the DoD, but a lot of data in the last three years. And the same type of surveys that we’ve asked of men and women who are victims, or are survivors, of sexual violence – if they feel that the justice system works for them, and they’ve said no – we’ve done surveys, the DoD’s done surveys, of Black service members and said, ‘Does the military justice system work for you?’, and they answer the same way: ‘No.’ They feel bias and they feel justice is not possible. It’s the same. The way they feel is very similar to this specific community. So I think you’d have a benefit, if you did professionalize the system, you’d have the benefit of making it fairer for everyone.

And then for my colleagues who desperately just want to do sexual assault and harassment and start there, the reason we don’t want to do that is we think it will further marginalize women. Because even though men are sexual assault survivors, too, and would use this system, the perception of service members is that victims are women. And so if they see that women are getting special treatment or a special court, it’s just going to further marginalize them. They’re going to continue to be seen as special, continue to be seen as ‘kid gloves’ and ‘not tough enough’ and ‘not the same.’ And I just don’t think we should be doing that to our female service members.

I also think it’s unfair to privilege one set of plaintiffs and one set of defendants over all others. You should give the same privilege to every plaintiff and every defendant. And I think it would be wise to do it as a bright line, starting today and build from there. You have a president who wants to do it. The DoD does not want to do it – it doesn’t take eight years, and we’re the last one of our allies who hasn’t done it, so there’s really no reason, it’s not complex. So that’s where we are.

Last reason, just to complete the thought, Vanessa Guillen really did put this into very fine focus. She never reported to her command that she was being harassed or assaulted. She told her family she was being harassed. When she was missing, her family said, ‘You have to

investigate this. We're worried. She was being harassed.' The DoD did not investigate it; they resisted and said, 'No, we have no evidence of her being harassed.' And once the family went to the press and insisted upon it, they finally did and they obviously found her having been killed. She would never have had the review of a special prosecutor or been given this form of justice.

And what a commander may never know, because he's not trained to know, is that in these cases of sexual violence and cases of domestic violence, oftentimes the indicators of the violence are hidden. The harassment isn't reported. What might be reported is: 'My husband stole my credit card. My husband closed my bank account.' What might be reported is a fire. So those people who are really expert in domestic violence and sexual violence – other crimes are used constantly to cover it up. Murder, arson, financial fraud – these are tools of predators to cover up sexual violence; there's no better case than Vanessa Guillen.

The reason why we started out with these serious crimes, this circle of serious crimes, is because a lot of them were deeply related to this one crime of sexual violence and sexual assault. But as we've been working on this issue over time – the bright line is better for a hundred reasons, the bright line is necessary for the first reason, which is to get sexual predators. Thank you, I'm happy to answer questions.