

By way of introduction, I am Flora D. Darpino, a retired U.S. Army Lieutenant General. Thank you for giving me the opportunity to discuss with you the role of commanders in the military justice system. I served our nation on active duty for over 30 thirty years as a judge advocate. Throughout my career, I advised commanders, including two deployments to Iraq as a Staff Judge Advocate. I also litigated in military criminal courts and Federal civil courts. I served in a fellowship at the Department of Justice at the start of the Guantanamo Bay detainee cases. I was the Chief of the Criminal Law Division on the Department of the Army staff and Chair of the Joint Services Committee when Congress changed the military's antiquated rape statute. At the time of my retirement in 2017, I had the honor of serving as the 39th The Judge Advocate General of the United States Army. Based upon my experience, I unequivocally believe commanders are essential to the military justice system. And, I firmly believe taking the authority away from the commander to refer serious court-martial offenses to trial will negatively affect the efficiency and effectiveness of the United States military. I hope to succinctly explain my reasoning in this submission.

The commander is responsible to ensure their assigned troops are properly trained and ready for combat. Once in combat, the commander is responsible to ensure their assigned troops follow their orders and lawfully complete their mission. To meet this responsibility, the commander must ensure their assigned troops and equipment are in good order and their troops are disciplined when completing their tasks. Command responsibility to maintain good order and discipline requires a commander to hold accountable troops who do not keep themselves or their equipment in good order and troops who are not disciplined in their actions. These duties of responsibility and accountability are inextricably intertwined in command authority. Legislation that proposes to pull a commander's ability to hold their assigned troops accountable for failing to meet the requirements of good order and discipline breaks the link between command responsibility and the requirement of accountability. In breaking the linkage, command authority is shackled.

As an example, consider Soldiers whose assigned duty is to hold detainees in compliance with the Geneva Conventions. Instead of following the Geneva Conventions, those Soldiers abuse the detainees, including stripping them naked and shocking them with electricity. Upon discovery, Soldiers in the unit would look to the actions of the commander to determine if these detention techniques will be tolerated in combat. The commander, in turn, would understand the need to hold accountable those who violated the law of armed conflict in order to ensure her Soldiers recognized this conduct is not acceptable and it will not go unpunished. The commander is responsible for the troops and good order and discipline and she ensures it through holding accountable those violating the law. This command responsibility cannot be outsourced to a staff officer who does not have command authority. A lawyer assigned to an office cannot enforce the standard; it must be the commander.

And what do we achieve when we allow the lawyer to be the one who holds violators accountable? There is no true benefit. Under the current system, a lawyer is already fully involved in the process. The lawyer reviews the evidence, prepares the charge sheet, and advises the commander on appropriate action. Once sent to courts-martial, the lawyers are responsible to properly conduct the trial. A military judge presides at the trial. Military courts with lawyers review appeals. But what do we lose when we allow the lawyer to be the one who holds violators accountable? We no longer have a commander responsible for both good order and discipline and accountability. We no longer have a commander who holds those who violate the norms accountable by sending the case to court-martial. Commanders no longer have full command authority; they share it with a lawyer.

If the concern is the handling of sexual assault cases, I caution that it is often tempting to try to find a nonexistent quick fix to a complicated problem. But common sense tells me that if the commander's role in military justice was the cause of the problem of sexual assault, then the Rape, Abuse, and Incest National Network (RAINN) and other studies would not report one in six women experience an attempted rape or rape in civilian society where the commander has no role. If having commanders in the system discouraged victims from reporting, the military would not have 43% of their sexual assault reported while civilian society has 25%. And if having lawyers in charge of military justice meant more sexual assault cases would be tried, then RAINN would not report that 995 of 1000 rapist walk free in civilian society where lawyers already run the process.

I submit we need to continue to focus on targeted policies and statutory changes to address sexual assault instead of throwing out a system that has created the best military in the world – troops who are the epitome of good order and discipline in battle. The Congressional focus on the issue of sexual assault has already yielded targeted changes to the system. No longer can a commander fail to refer a case to trial, contrary to the advice of her Staff Judge Advocate, as the case is now reviewed by the Secretary of military service. No longer can a commander fail to refer a sexual assault case to trial, even if consistent with the advice of her Staff Judge Advocate, as it now reviewed by the next higher commander. No longer are military prosecutors sidelined as they may request the Chief Prosecutor of their service review any sexual assault case they believe should go to trial that has not been referred. No longer can a commander overturn a conviction. No longer can a commander freely adjust a sentence.

Victims also now have a stronger voice. They have reporting options that allow them access to assistance they need without involving their command or law enforcement. They have personally assigned lawyers and advocates. They can request their cases be tried in civilian courts instead of military courts. And they can request transfers to a different unit in a different country or state. And these are just a few of the changes made to address sexual assault in the military. There is still more work to be done.

We have identified sexual violence as a serious problem in our society at large. The military continues to conduct surveys and focus groups to help identify the root of the problem. The military continues to coordinate with experts and advocacy groups to help find solutions. We must continue to work to improve our system and the services for those assaulted. And, while the commander's role in military justice is different than the civilian system, we cannot lose sight of the fact that sexual assault is prevalent outside the military where commanders do not exist. Commanders are not the cause but they are essential to the solution. I firmly believe removing the commander from the system could exacerbate the problem. Because the result is the commander will have the responsibility to maintain discipline in her unit but she will no longer have the ability to hold violators accountable.