Chairwoman Speier, Ranking Member Kelly and distinguished members of the subcommittee, thank you for the opportunity to appear before you to examine the role of the commander in sexual assault prosecutions. As a brief introduction, I retired after 23 years service as an Air Force JAG, and during that time, I served twice as a defense counsel, multiple times as a prosecutor, including as the chief prosecutor for Europe and Southwest Asia, and as the chief prosecutor for the Air Force. I have served as a trial judge and had been selected to serve as an appellate judge when I elected to retire. For the last four years I have served as the president of Protect Our Defenders, a human rights organization that fights for survivors of military sexual trauma. We provide attorneys free of charge, and I myself represent clients going through the often-hostile military justice process. During this time I have talked with hundreds of survivors.

I am glad you are holding a hearing on this topic, as the role of the commander is greatly misunderstood. I believe the common misconception is that all commanders have prosecution authority, which is entirely not true. Prosecution authority vests in a tiny subset of commanders called convening authorities. Convening authorities are the only commanders who have the traditional prosecution authority to send a case to a court-martial, to add or dismiss charges or to approve a pretrial agreement or plea bargain. Based on recent changes to the law convening authorities are the only ones who can dispose of sex assault and rape cases. To put this in perspective, the DoD has around 14,5000 commanders but only 393 commanders have general court-martial convening authority and only 139 actually used this authority to convene a court according to the most recent DoD data that I am aware of from FY13. In other words, less than 1% of all commanders exercised prosecution authority for the most serious level of court. Approximately 600 special court-martial convening authorities referred a special court, or about 4% of all commanders.

I bring these numbers to your attention because it is important to understand that despite what you may hear today, prosecution authority is not integral to being a commander. 95% of commanders do their job every day without the ability to send someone to a court-martial. These commanders have a wide range of tools to allow them to set and enforce standards without using a court-martial. These include non-judicial punishment, administrative counseling and discharges, ordering pretrial restraint and confinement, and issuing protective orders. The commanders without convening authority have the greatest impact on a disciplined force because they are the commanders the rank and file work directly for and know. Convening authorities are many layers removed from the rank and file and may be geographically separated by thousands of miles.

Moreover, the reality is courts-martial are almost never used for purely discipline issues such as disobedience or AWOL. Instead, over the last 230 years courts-martial have transitioned to an almost exclusive process for prosecuting common crimes. By this I mean conduct that would be both a crime in the military and in civilian society. Additionally, the use of courts-martial has and is plummeting. According to the most recent data from the DoD, in FY15 the entire military convened less than 2000 general and special courts. This is a dramatic drop from FY2000 when the military prosecuted almost 5000 special and general courts. Despite the military only being 4.65% smaller now, general courts fell

31% and specials plummeted 73%. If we look back to FY90, the drops are even more dramatic. That year the military prosecuted almost 10,000 special and general courts. In the late 50s, the Army alone did almost 50,000 courts a year despite being the same relative size as it is today.

It is clear the military has transitioned away from the court-martial as a discipline tool to a criminal justice process. Yet, the military has demanded that non-lawyer convening authorities retain control over a process they are simply not qualified to administer. The ABA has set out a clear standard that prosecution decisions should be made by lawyers admitted to a bar and subject to ethics standards. The reason for this standard is obvious – only lawyers are qualified to act as prosecutors and make prosecution decisions. The military's insistence that convening authorities are more qualified is indefensible. There is nothing inherent to command that qualifies someone to make prosecution decisions. Someone does not become qualified to make prosecution decisions from a PowerPoint briefing and talking with a staff judge advocate anymore than they are qualified to perform surgery because they have taken a Red Cross first aid course. It is time to accept the practice of law is a profession in which commanders should not be engaged.

Congress has spent millions addressing military sexual assault. Multiple reforms have been enacted to the UCMJ and victim services have been dramatically enhanced. Still, the military is failing when it comes to stopping retaliation and bringing offenders to justice. Despite reports being at an all time high, prosecution rates have plummeted, convictions are anemic and sentences are pathetic. According to data provided by the DAC-IPAD only 21% of penetrative offenses in FY17 before a judge resulted in a conviction for a sex offense and only 35% tried by court members resulted in such a conviction. For contact offenses the numbers were even worse with only 3.6% convicted before a judge and only 21.6% when tried by members. The chairwoman of the DAC-IPAD who has over 30 years of experience prosecuting sex cases called the conviction rates "god-awful" and worse than she has seen in any civilian jurisdiction. And she made it clear these were the results of the very few allegations that actually ever go to trial. This should serve as a wakeup call for the military. It is time to stop deflecting from this horrific failure with non-responsive bumper sticker slogans such as "commanders are the solution." Clearly, they are not. The one constant in the plummeting use of courts-martial and the dramatic failure to hold offenders accountable is the convening authority process. It is time to recognize that the practice of law is complex and sexual assault prosecutions require experienced attorneys with years of in court practice making decisions. In 2019 it is time to move away from the idea convening authorities are the solution.

I look forward to any questions you may have.