

Congress of the United States
Washington, DC 20515

September 14, 2020

The Honorable Adam Smith
Chairman
House Armed Services Committee
2216 Rayburn Office Building
Washington, D.C. 20515

The Honorable Mac Thornberry
Ranking Member
House Armed Services Committee
2216 Rayburn Office Building
Washington, D.C. 20515

The Honorable Jim Inhofe
Chairman
Senate Armed Services Committee
205 Russell Senate Office Building
Washington, D.C. 20510

The Honorable Jack Reed
Ranking Member
Senate Armed Services Committee
228 Russell Senate Office Building
Washington, D.C. 20510

Dear Chairman Smith, Ranking Member Thornberry, Chairman Inhofe, and Ranking Member Reed:

As House and Senate conferees negotiate the final Fiscal Year 2021 National Defense Authorization Act (NDAA), we encourage you to include Section 550 of the House-passed bill, which creates a 4-year pilot program to test an independent prosecutor for special victim offenses at the Military Service Academies. The section passed by a vote of 38 to 18, with seven Republicans voting in favor.

The military's efforts to combat sexual assault at the service academies and in the active force have failed. In 2017–18, 15.8% of female cadets and midshipmen and 2.4% of male cadets and midshipmen experienced unwanted sexual contact.¹ Despite spending hundreds of millions of dollars on concerted efforts to fight assault over the last decade, the last 4 years of data show that the number of cadets and midshipmen experiencing unwanted sexual contact doubled,² reports of sexual assault nearly doubled,³ and reporting rates for sexual assault—a barometer for the troops' confidence in the system—decreased from 16% in 2013–14 to 12% in 2017–18.⁴ Meanwhile, reporting rates for regular active-duty troops is more than twice as high, 30%.⁵ Less than half of women indicated that they trusted their academy to protect their privacy, ensure their safety, or treat them with dignity and respect if they reported a sexual assault.⁶

¹ Sexual Assault Prevention and Response Office (SAPRO), *Annual Report on Sexual Harassment and Violence at the Military Service Academies: Academic Program Year 2017 – 2018* (DoD, Washington, DC: January 2019), Appendix D, 11.

² SAPRO, *Annual Report on Sexual Harassment and Violence at the Military Service Academies: Academic Program Year 2017 – 2018*, 8-10

³ SAPRO, *Annual Report on Sexual Harassment and Violence at the Military Service Academies: Academic Program Year 2018 – 2019* (DoD, Washington, DC: January 2020), 15.

⁴ SAPRO, *Annual Report on Sexual Harassment and Violence at the Military Service Academies: Academic Program Year 2018 – 2019*, 16

⁵ SAPRO, *Annual Report on Sexual Assault in the Military: Fiscal Year 2018* (DoD, Washington, DC: April 9, 2019), 5.

⁶ Office of People Analytics, *2018 Service Academy Gender Relations Survey*, 49, 85, 122.

The data for sexual harassment is even worse. In the most recent survey, half of female cadets and midshipmen said they had been sexually harassed in the last year, yet not one of them formally reported it.⁷ DoD's reports tell us that sexual harassment creates a climate that makes sexual assault more likely.⁸ The culture is broken. The data proves what survivors have been telling us for years: what we are doing is not working. As members of Congress, we help send these men and women to our academies to serve, and they are not safe when they get there. We are failing them. We cannot continue to cling to excuses for perpetuating the status quo, and we must do better.

This pilot is carefully designed to fit into the existing military justice system. The new Office of the Chief Prosecutor would have authority over investigations and make binding recommendations about the referral of charges for special victim offenses. Panel selection would be randomized. The rest of the process continues to be governed by the UCMJ. The Department is left with some discretion to establish the best practices for implementation.

The pilot program is well within Congress' constitutional authority and respects the rights of servicemembers. The Constitution gives Congress the power to "make rules for the government and regulation" of the Armed Forces.⁹ This authority is broad, well established, and rarely invalidated by the courts. The Supreme Court has said that courts must not disturb Congress' regulation of the military unless there are factors "so extraordinarily weighty as to overcome the balance struck by Congress."¹⁰

Opponents have suggested that the pilot program violates the doctrine of equal protection because commanders would have a different role in the courts-martial of cadets and midshipmen than in the courts-martial in the regular force. Equal protection "does not require things which are different in fact or opinion to be treated in law as though they were the same."¹¹ The law allows the legislature broad latitude to establish classifications depending on the nature of the issue, the competing public and private concerns it involves, and the practical limitations of addressing it.¹² Students at the service academies are not the same as the rest of the force. The sexual assault problem at the service academies is worse than in the rest of the force. The pilot program exercises Congress' broad authority to make an adjustment to the UCMJ tailored to a specific problem in a specific subset of the military. The pilot program may still result in some litigation—new law often does—but challenges to the validity of the pilot will fail. It is not unconstitutional.

Opponents have suggested that the pilot program disposes of all the rules and caselaw governing courts-martial, and in particular, jury member selection. That is facially untrue. Section 550 paragraph (c)(5) states that jury selection must still be done "in accordance with the applicable

⁷ SAPRO, *Annual Report on Sexual Harassment and Violence at the Military Service Academies: Academic Program Year 2017 – 2018*, 8-10, 25.

⁸ SAPRO, *Annual Report on Sexual Harassment and Violence at the Military Service Academies: Academic Program Year 2018 – 2019*, 4.

⁹ Article I, § 8, cl. 14

¹⁰ *Weiss v. United States*, 510 U.S. 163, 177-78 (1994) (quoting *Middendorf v. Henry*, 425 U.S. 25, 44 (1976)).

¹¹ *Tigner v. Texas*, 310 U.S. 141, 147 (1940).

¹² *Plyler v. Doe*, 457 U.S. 202, 216 (1982).

provisions of chapter 47 of title 10 United States Code (the Uniform Code of Military Justice).” The difference is simply that instead of commanders personally selecting each juror, commanders must “detail members of the Armed Forces as members thereof at random.” The rules governing availability and eligibility of jurors do not change.

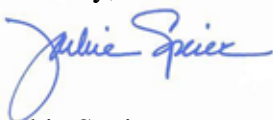
The services tell us that a commander’s prosecutorial authority is essential to maintaining good order and discipline, yet a review of our allies (Australia, Belgium, Canada, Denmark, France, Germany, Ireland, Israel, Italy, Netherlands, New Zealand, Norway, Sweden, Switzerland, United Kingdom) shows that none of their militaries continue to grant commanders similar prosecution authority over felony criminal offenses.¹³

The services have been telling us for years that solutions to these problems must be “command driven” and that part of the solution is to simply “hold commanders accountable.” In 2011, the Government Accountability Office (GAO) found that DoD did not have the structure in place to hold commanders accountable or assess whether DoD’s policies and programs were effective in combating sexual harassment.¹⁴ GAO made two recommendations, which DoD concurred with, on what needed to be done to establish that structure. Nine years later, in May 2020, those recommendations remained open and unresolved. Vague reliance on the accountability of commanders is the long road to nowhere. We must seek another way.

All of our military allies and every civilian jurisdiction in this country entrust prosecution decisions to trained attorneys. In the face of all the trauma and injustice, how can we be so certain that our idiosyncratic system is our only option? We cannot be so arrogant as to refuse to even test the majority approach.

Enough is enough. We cannot continue to sit on our hands and shout about this problem. We should all be tired of hearing the same excuses. This pilot would not abandon or damage the military justice system—it is a careful, measured approach that will help us understand how to strengthen it. We urge you to include Section 550 of the House-passed bill in the final version of the FY21 NDAA.

Sincerely,



Jackie Speier
Member of Congress



Veronica Escobar
Member of Congress



Anthony G. Brown
Member of Congress



Deb Haaland
Member of Congress



Gilbert R. Cisneros, Jr.
Member of Congress



Lori Trahan
Member of Congress

¹³ Shadow Advisory Report Group of Experts (SARGE), *Alternative Authority for Determining Whether to Prefer or Refer Charges for Felony Offenses Under the Uniform Code of Military Justice*, (April 20, 2020), 16-17.

¹⁴ Government Accountability Office (GAO), *Preventing Sexual Harassment: DOD Needs Greater Leadership Commitment and an Oversight Framework*, GAO-11-809, (Washington, D.C. Sept. 21, 2011).



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