

# Congress of the United States

Washington, DC 20510

November 30, 2021

Dear Chairman Smith, Chairman Reed, Ranking Member Rogers, and Ranking Member Inhofe,

We are writing to ensure that Section 561-570 of Senate Bill 2792, the *Military Justice Improvement and Increasing Prevention Act*, as passed by the Senate, remains in the conference reported version of the Fiscal Year 2022 National Defense Authorization Act (NDAA). The bill is bipartisan and bicameral legislation with 220 co-sponsors in the House and 66 co-sponsors in the Senate. It is outrageous that the Senate and House Armed Services Committees would even consider stripping out a provision that is backed by a bipartisan majority in both chambers and has been included in the Senate version of the bill. Sexual assault in the military is a serious concern and demands a real solution, not a watered-down provision slipped in the final bill behind closed doors. Retaining the full provision will ensure that the will of this strong majority of members is respected. This provision is the only reform that will provide true independence for prosecutors in the military justice system and is essential to ensure that victims, accused, and the public all have full faith and confidence in the military justice process.

A Congressional Research Service [report](#) from October 18 comparing the three different approaches in the House and Senate version of the NDAA identifies MJIIPA as the only legislation in which the designated judge advocate is “serving outside the chain of command of the accused and victim” and in which the court-martial convening authority is “outside the chain of command.”<sup>1</sup>

Putting serious criminal cases in the hands of independent military prosecutors is a commonsense reform that will professionalize our military justice system. The consensus among experts is that this reform will improve the system.<sup>2</sup> All of our major allies have made a similar, or more drastic, change to their military justice systems.<sup>3</sup> Twenty-nine Republican and Democratic state attorneys general have called on Congress to make this change.<sup>4</sup> And the

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<sup>1</sup> Congressional Research Service, *Military Justice Disposition Delimitation Legislation in the 117th Congress*, 18 October 2021, available at <https://www.crs.gov/reports/pdf/R46940>

<sup>2</sup> Shadow Advisory Report Group of Experts, *Alternative Authority for Determining Whether to Prefer or Refer Charges for Felony Offenses Under The Uniform Code Of Military Justice*, at Appendix, 20 April 2020, available at [https://www.caaflog.org/uploads/1/3/2/3/132385649/shadow\\_advisory\\_report\\_april\\_20\\_2020\\_.pdf](https://www.caaflog.org/uploads/1/3/2/3/132385649/shadow_advisory_report_april_20_2020_.pdf); Bruce Ackerman, Dennis E Curtis, et al., *Law Professors’ Statement on Reform of Military Justice*, 7 June 2013, available at [https://www.gillibrand.senate.gov/imo/media/doc/LawProfessors\\_LetterSupport.pdf](https://www.gillibrand.senate.gov/imo/media/doc/LawProfessors_LetterSupport.pdf).

<sup>3</sup> National Institute of Military Justice, *Prosecutorial Discretion Under the Uniform Code of Military Justice*, 12 May 2021, available at [https://web.archive.org/web/20210513171211/https://nimj.org/uploads/1/3/5/5/135587129/nimj\\_dispositional\\_authority\\_position\\_statement\\_12\\_may\\_2021.pdf](https://web.archive.org/web/20210513171211/https://nimj.org/uploads/1/3/5/5/135587129/nimj_dispositional_authority_position_statement_12_may_2021.pdf).

<sup>4</sup> Kwame Raoul, Doug Peterson, et al; *Re: The Military Justice Improvement and Increasing Prevention Act* available at [https://portal.ct.gov/-/media/AG/Press\\_Releases/2021/Military-Justice-Improvement-Act-111021-FINAL.pdf](https://portal.ct.gov/-/media/AG/Press_Releases/2021/Military-Justice-Improvement-Act-111021-FINAL.pdf).

Independent Review Commission established by the Department of Defense (DoD) recommended independence in all crimes in the limited set of crimes they reviewed; in response, Secretary Austin asked “Congress to amend the Uniform Code of Military Justice (UCMJ), removing the prosecution of sexual assaults and related crimes from the military chain of command.”<sup>5</sup>

Currently, only one-third of victims of sexual assault in the military are willing to come out of the shadows to report their crime. That shows a clear lack of trust in the current system’s ability to be unbiased and deliver justice without retribution. The only way we will be able to reassure victims that they will get an impartial review of their case is to make experienced judge advocates the convening authority in their cases. Without the duties inherent to convening authorities, the perception and reality of commanders influencing the outcome will be unavoidable.

Moreover, we’ve recently seen that despite a congressional mandate for the use of Special Victim Prosecutors (“SVP”), DoD relegates their involvement in many cases. The Special Victim Prosecutors provisions in this year’s NDAA alone will be insufficient to address the magnitude of the problem. A November 10, 2021 DoD IG report outlined several disturbing findings, including that, in violation of federal statute and regulation, the military: (1) Did not “consistently assign certified lead investigators for investigations of covered offenses,” (2) Did not “consistently document communications with Special Victim Investigation and Prosecution members about covered offenses” and, in Finding D, (3) did not “consistently assign specially trained prosecutors to cases involving covered offenses.” The report found that across the Armed Services, 58% of cases did not have properly trained prosecutors—and in the Air Force, the number was 94%.<sup>6</sup>

The MJIIPA provisions are as important for defendants as they are for survivors. Our service members deserve the equal protection under the law that is afforded to every other member of society. Accusations of serious crimes carry serious consequences. When we empower military officers to take a year or more of liberty from our service members, the service member has a right to a professional and impartial process. Infantry officers, who joined the military to battle our enemies, cannot provide that process. Judge advocates, who joined the military to excel at military justice, who have studied the law, and receive specific training, can. It is unrealistic and untenable to leave these complex legal decisions to commanders whose expertise relates to warfighting, not the minutiae of the law. We have seen the military justice system is not immune to biases.<sup>7</sup> This is unavoidable when we leave the system up to untrained commanders instead of professional prosecutors.

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<sup>5</sup> United States Department of Defense, Secretary of Defense Lloyd J. Austin III Statement on the Conclusion of Independent Review Commission, 22 June 2021, available at <https://www.defense.gov/News/Releases/Release/Article/2667381/secretary-of-defense-lloyd-j-austin-iii-statement-on-the-conclusion-of-independ/>

<sup>6</sup> United States Department of Defense Inspector General, *Evaluation of Special Victim Investigation and Prosecution Capability Within the Department of Defense*, 10 November 2021, available at [https://media.defense.gov/2021/Nov/10/2002891359/-1/-1/1/DODIG-2022-035\\_.REDACTED.PDF](https://media.defense.gov/2021/Nov/10/2002891359/-1/-1/1/DODIG-2022-035_.REDACTED.PDF)

These issues have been plaguing the military for decades, despite countless congressional mandates, \$1 billion of funding, and promises from leadership that they would address it. Our service members do not have years or decades more to wait for the DoD to solve this problem. The Report of the Fort Hood Independent Review Committee is undeniable proof that the funding we have provided and the trust that we have given to the Department have not resulted in the changes necessary for our service members to feel safe.<sup>8</sup>

We must act with an urgency that meets this moment and urge you to ensure the NDAA provides true independence for prosecutors in the military justice system and covers all major offenses in the UCMJ.

We thank you for your consideration of this request and your commitment to ensuring that our armed forces represent the values on which our country was founded and to which we continue to aspire to meet.

Sincerely,



Kirsten Gillibrand  
United States Senator



Charles E. Grassley  
United States Senator



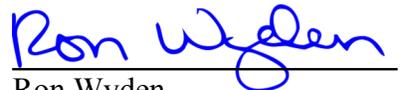
Richard Blumenthal  
United States Senator



Anthony G. Brown  
Member of Congress



Michael F. Bennet  
United States Senator



Ron Wyden  
United States Senator

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<sup>7</sup> United States Government Accountability Office, *MILITARY JUSTICE: DOD and the Coast Guard Need to Improve Their Capabilities to Assess Racial and Gender Disparities*, May 2019, available at <https://www.gao.gov/assets/gao-19-344.pdf>.

<sup>8</sup> *Report of the Fort Hood Independent Review Committee*, 6 November 2020, available at [https://www.army.mil/e2/downloads/rv7/forthoodreview/2020-12-03\\_FHIRC\\_report\\_redacted.pdf](https://www.army.mil/e2/downloads/rv7/forthoodreview/2020-12-03_FHIRC_report_redacted.pdf)



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United States Senator



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United States Senator



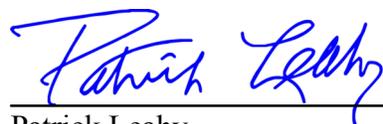
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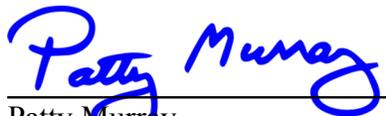
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United States Senator



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Tina Smith  
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Elizabeth Warren  
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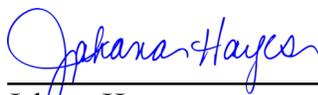
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John Garamendi  
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Chair, Subcommittee on  
Readiness



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Member of Congress



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Marc A. Veasey  
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Ro Khanna  
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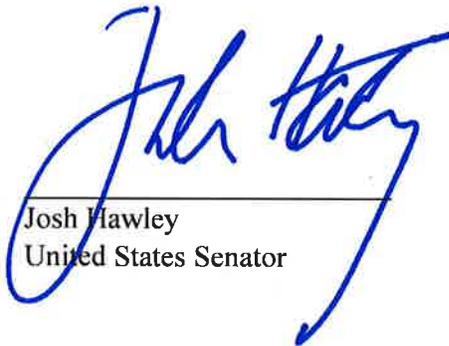
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Ted Cruz  
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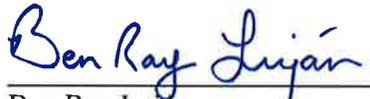
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Debbie Stabenow  
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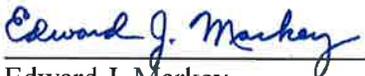
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Alma S. Adams, Ph.D.  
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