

Testimony of  
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Before the a Hearing of the Senate Committee on the Judiciary  
Subcommittee on Crime & Terrorism

**Campus Sexual Assault: the Roles and Responsibilities of Law Enforcement**

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Chairman Whitehouse, Senator Graham, members of the Subcommittee, thank you for calling this hearing and inviting me to share my perspective on the roles and responsibilities of law enforcement in addressing sexual assault on college campuses. I am Kathy Zoner, Chief of the Cornell University Police. I have been with Cornell Police for 23 years, and have been Chief since 2009.

As I begin, I want to stress that Cornell University recognizes sexual violence is a serious campus and public health issue that affects every member of our community. It deserves the thoughtful attention of policymakers, and we commend the Subcommittee for taking a closer look at the complex interplay between law enforcement and campus adjudication procedures. I particularly want to thank my Senator, Kirsten Gillibrand, for her tireless work on behalf of survivors, and for her willingness to work with the campuses in New York State. I, like everyone at Cornell, share your goal of preventing sexual assaults on our campuses, and look forward to working with you as you.

Cornell University is a privately endowed research university and a partner of the State University of New York. It is the federal land-grant institution in New York State, with seven undergraduate colleges and four graduate and professional schools on the main campus in Ithaca, three graduate and professional schools in New York City, an agricultural research campus in Geneva, NY, and a medical school in Doha, Qatar. We enroll approximately 21,600 students (14,400 undergraduate and 7,200 graduate and professional) across all campuses. The main campus, which is under my jurisdiction, sits on over 2,000 acres and has more than 260 major buildings.

## **Cornell Police**

I'd like to say a word about my department, as it is important for the Subcommittee to understand the role and authority of campus security personnel. The Cornell University Police ("CUPD") employs sworn peace officers who function as special deputy sheriffs in Tompkins County. The force is composed of 49 sworn officers; 24 support staff including 911 dispatchers, analysts, and administrative personnel; and 30 auxiliary (non-sworn) officers who work less than 20 hours a week. CUPD has full powers of arrest on Cornell property – places that are owned, supervised, administered, or controlled by Cornell – as well as the roads that cross or are adjacent to those areas. Those adjoining distances are not defined in law, and we use a "reasonableness in the conduct of duty" standard to determine when it is appropriate for us to take action. Our authority on non-campus property is limited. CUPD is accredited by the International Association of Campus Law Enforcement Administrators (IACLEA).

The mission of CUPD is "*Service.*" We perform the same basic activities as any municipal police department, in addition to the activities particular to Cornell. Not only do I and my officers provide required police services, preserve the peace, protect life and property, and recover lost and stolen property, but also we enforce, in a fair and impartial manner, the Cornell Campus Code of Conduct, as well as local, State, and Federal laws. We appreciate our role in enhancing the quality of life at Cornell to foster a safe and secure environment, which is the cornerstone of academic freedom. We also recognize that justice is the foundation for peace, and to this end, CUPD is built on a foundation of community service and crime prevention which respect and preserve the dignity of all the individuals we serve – students, faculty, staff, alumni, neighbors, and visitors to our campus.

## **Cornell University's Approach**

A little more than a year ago, Cornell substantially revised its policies that deal with sexual assault and harassment. During that process, campus leaders realized that it would take more than just new judicial and administrative procedures to change the culture around these issues. President David Skorton established the Cornell University Council on Sexual Violence Prevention ("CSVP") in September 2013 to develop a campus- and community-wide approach to preventing and effectively responding to sexual violence. The Council is co-chaired by Vice President for Student and Academic Services, Susan Murphy and Vice President for Human Resources and Safety Services, Mary Opperman. I am a member of the Council and convene the Public Safety Advisory Committee ("PSAC"). As an aside, the composition of the PSAC was mandated by New York State Education Law (Article 129A § 6431) many years ago, and has not been updated to include all voices. The CSVP is a much more inclusive body, and is comprised of staff and faculty members, students, alumnae, and local service providers.

The Council is charged with studying and evaluating the campus environment, prevention strategies, policies, procedures, and services. CSVP advises the Executive Committee on Campus Climate, Health, and Safety and other campus leaders on

ways to improve the campus environment, reduce risk, and increase support for individuals and communities affected by sexual violence. In April, CSVP workgroups recommended a comprehensive approach to sexual violence prevention and response, including expansion and improvement of data collection; educational programs and other prevention initiatives for students, faculty and staff; and comprehensive support services for survivors. Cornell provides information about its sexual violence programs, resources, and services on a comprehensive website called “Sexual Assault and Harassment – Response and Education.”  
<https://www.share.cornell.edu>

### **Recent Legislative and Regulatory Changes**

Cornell’s recent actions have been informed by and designed to comply with new laws and regulations. The reauthorization of the *Violence Against Women Act* (“VAWA”) in 2013, which included the *Campus SaVE Act*, significantly expanded the existing sexual assault and sexual violence reporting and policy requirements of the Clery Act. The Department of Education’s Office of Civil Rights (“OCR”) issued additional guidance in 2014 to help campuses comply with Title IX obligations to address sexual assault as a form of sexual harassment. This builds upon a Dear Colleague Letter issued in April 2011 and guidance issued in 2001. In addition, the White House Task Force to Protect Students from Sexual Assault recommended a series of best practices and put campuses on notice that the Administration is increasing its oversight and enforcement of the Clery Act and Title IX.

### **Proposed Legislation**

Senator Claire McCaskill (D-MO) introduced the *Campus Safety and Accountability Act* (“CASA,” S. 2692) in July. The bill proposes a number of steps to combat sexual assault at colleges by stepping up enforcement, providing better services to victims, improving information and transparency, and greatly increasing penalties for noncompliance. To the point of this hearing, two provisions of CASA are most relevant:

1. The bill would significantly expand the reporting requirements for sex offenses under the Clery Act, requiring institutions to report how many cases are investigated by the institution, referred for a disciplinary proceeding at the institution, referred to local or State law enforcement, the number of respondents found responsible/not responsible pursuant to an institutional disciplinary proceeding, a description of the sanction imposed for each offense, and the number of institutional disciplinary proceedings closed without resolution. In addition, CASA increases the civil penalties for Clery Act violations to \$150,000 per violation, up from the current level of \$35,000.
2. The bill would require institutions to enter into a Memorandum of Understanding (“MOU”) with local law enforcement agencies “to clearly delineate responsibilities and share information.” Failure to enter into an MOU would be punishable by a civil penalty up to 1 percent of an institution’s operating budget. The Department of Education would be able to waive the

penalty if an institution can certify why, in good faith, it was unable to obtain an MOU.

It is within this framework that many questions have arisen about the interplay between law enforcement and campus adjudication procedures for allegations of sexual assault. I am pleased to be able to share some of my experience and make some recommendations to the Subcommittee.

**Adjudication: Law Enforcement and Administrative**

Sexual assaults occurring in a campus community can be investigated pursuant to two types of adjudicative processes – administrative and law enforcement. The *Campus SaVE Act* clarified that survivors may pursue both types of investigations concurrently; they may also choose to pursue only one (or neither). This law requires institutions to provide victims with information on how to file a police report and support in that process, but leaves the decision of whether to pursue a criminal action firmly with the survivor.

**Administrative Proceedings:** Administrative investigations of allegations of sexual violence are made pursuant to applicable campus policies and conducted by campus officials. Administrative proceedings are governed and informed by a number of laws, regulations, and sub-regulatory guidance, including OCR's April 11, 2011 Dear Colleague Letter and FAQ issued on April 28, 2014. A formal complaint is necessary to open a campus adjudicative proceeding.

This proceeding will include a fact-finding investigation conducted by campus officials, followed by a hearing and/or decision-making process that a school uses to determine whether the alleged conduct occurred, and if it did, what actions the school will take. During the investigation, the fact-finder will interview witnesses and gather evidence, including text messages and social media screen snaps. This process happens very quickly as compared to a law enforcement investigation. The OCR recommends that the entire process – including the investigation and hearing and/or decision-making process – take place within 60 days.

**Law Enforcement:** Law enforcement investigations, on the other hand, are conducted by the law enforcement agency with jurisdiction in the location where the alleged sexual violence took place. This could be a municipal police force or on-campus law enforcement agency, depending on the campus. At Cornell, CUPD has the geographic responsibility to investigate allegations of sexual violence occurring on Cornell property. Law enforcement investigations look into allegations of crimes as defined by a state's penal code, not campus policy or Title IX, and may be worked jointly with another governmental law enforcement agency.

CUPD, as is custom with most sworn agencies, does not begin any investigation, including one of sexual assault, without a formal, written complaint signed by the complainant. Once a complaint is in hand, my officers begin a fact-finding investigation that includes discussions with the District Attorney, the gathering of

physical evidence, collecting witness statements and accused statements, and corroboration of facts cited within the statements, among other things. Most often, the investigation works best if its discoveries and progress are kept largely confidential, as something as simple as notifying an alleged perpetrator of potential involvement can lead to the destruction of evidence. Police are not required to release information, even to the media, about an ongoing investigation. If elements of a crime are established, the case is turned over to the District Attorney (“DA”) for review. The DA may request further investigation or evidence to support the allegations. The DA ultimately decides what, if any, charges are filed.

There are several key differences between a campus adjudication proceeding and a law enforcement investigation.

- 1. Standard of Proof.** The OCR’s April 2011 Dear Colleague Letter stated that “preponderance of the evidence” is the only appropriate standard of proof for campus disciplinary proceedings concerning alleged sexual misconduct. Campus fact-finders and decision makers need only find that it is more likely than not that a violation occurred. This 51-percent standard is the lowest burden of proof that can be employed in civil judicial proceedings. Adoption of “preponderance of evidence” marked a significant change for many campuses, including Cornell. Law enforcement proceedings, however, use “beyond a reasonable doubt” as the legal standard of evidence required to validate a criminal conviction. This is the highest standard, with a much greater burden of proof than preponderance of the evidence.
- 2. Evidence.** In campus administrative investigations, the fact-finders and decision makers consider a broad range of evidence, including evidence that would not be admissible in a law enforcement proceeding. For example, evidence that would be inadmissible hearsay in a criminal prosecution is allowed in administrative investigations. Similarly, campus investigators are also allowed to consider unauthenticated evidence.
- 3. Cross Examination.** There is no opportunity for cross-examination of complainant by respondent (or vice versa) in administrative investigations and adjudicative proceedings. Cross-examination, however, is one of the cornerstones of a criminal trial, guaranteed by the Sixth Amendment.

### **Investigative Tensions**

There are inherent tensions between law enforcement and campus adjudicators when we are investigating the same incident at the same time, regardless of our willingness to work together. Simultaneous investigations were always possible, but they are now more likely to happen because of two key compliance directives from the Department of Justice and the Department of Education.

1. As noted above, the *Campus SaVE Act* requires schools to inform students reporting sexual assault, domestic violence, dating violence, and stalking of

their options to pursue criminal or campus proceedings. This also includes information on how campus authorities can assist a student in notifying law enforcement. This is a clear directive that it only the complainant can decide how to move forward.

2. OCR has instructed schools that it is never appropriate to delay a Title IX investigation pending the conclusion of a law enforcement proceeding. A school *may* delay the fact-finding portion – and only the fact-finding portion – of a Title IX investigation while police are gathering evidence. After that, while the DA is considering charges or preparing for trial, a Title IX investigation must move forward, without waiting for the disposition of any criminal proceedings.

OCR's directive has a tremendous potential impact on law enforcement. The confidentiality of a criminal case will be markedly affected by the necessary transparency of the administrative case, which must be concluded within 60 days. In addition, while the OCR demands that all options remain open to the complainant, the order and timeliness in which they choose to pursue each type of investigation can greatly affect the outcome of both.

Concurrent investigations raise tricky issues for law enforcement and campus adjudicators to navigate. Campus police will, more likely than not, gather evidence that could be useful to the Title IX investigation. As a law enforcement officer conducting an investigation, my biggest concern is that sharing evidence may undercut a criminal case – which is on a much longer timeline – against a respondent. The collection and maintenance of evidence for a criminal prosecution is tightly controlled by procedural rules. This is not the case with administrative proceedings. The way that campus officials receive and treat evidence in an administrative investigation can negatively impact its admissibility in court, potentially undermining a criminal case. Additionally, if evidence is discovered after an administrative case is closed that would affect or overturn a decision, both parties may have already suffered irreparable consequences.

In addition, OCR's aggressive timetable for adjudication can be a source of conflict. On the administrative side, my colleagues have found that parties are less willing to cooperate and be candid while a criminal investigation is pending. From a police perspective, the administrative investigation will always outpace a criminal investigation. It nearly always takes more than 60 days to process physical evidence for DNA because of backlogs in crime laboratories. The recent renewal of the *Debbie Smith Act* to address this backlog will help. I'd like to thank the Subcommittee for your efforts to provide much needed resources to crime labs across the country.

Finally, campus law enforcement has dual roles, both as "responsible employees" under Title IX and as criminal investigators. This raises concerns around our participation in administrative investigations and the confidentiality of campus proceedings. If I, as a "responsible employee," learn of facts alleging sexual

misconduct, I am required to bring that information to the appropriate university officials under Title IX, sometimes against the wishes of the complainant. For example: statements collected by and taken from campus law enforcement may become part of the campus investigation record, and lend themselves to early discovery.

I've tried to set out for you briefly how the different legal requirements of our roles can make this a delicate process to navigate. If a person initiates simultaneous criminal and administrative investigations, we have case management meetings, including with the District Attorney, to navigate evidence issues. Even so, the DA will often be unable to prosecute a case where a respondent has been found responsible in a campus administrative proceeding because the lower standard of proof necessary for a finding of "responsibility" may not meet the much higher "beyond a reasonable doubt" standard. The compressed timeframe for the administrative investigation may also taint admissible evidence and accelerate discovery in a way that negatively impacts the complainant in a criminal proceeding.

### **Best Practices for Law Enforcement**

In the face of these difficult issues, you asked me to talk about some best practices for law enforcement so that all students are treated fairly.

**Be a Good Neighbor:** Cornell's main campus lies within several governmental jurisdictions. Approximately two-thirds of the land owned by Cornell is located within Tompkins County, which includes the Towns of Dryden, Lansing, and Ithaca. While only about one-third of Cornell's land is located in the City of Ithaca, more than 80 percent of our static population resides within the city limits. A small portion of our land is located in the Village of Cayuga Heights, adjacent to the campus. Taken together, these jurisdictions employ about 140 full time officers.

At Cornell, our cooperative efforts with local law enforcement begin long before a crime is reported. Leaders and supervisors meet and talk on a regular basis, building relationships so information sharing happens naturally, and not only on an ad hoc or emergency basis. Establishing regular and open lines of communication with our counterparts increases our confidence and trust to share information on cases that go across jurisdictional lines. We also collaborate with biweekly investigator meetings, a monthly Tompkins/Cortland Law Enforcement Administrators Group meeting, joint patrols with the Ithaca Police Department ("IPD"), providing annual Clery training to IPD officers, countywide Rapid Response training, three explosive detection K9s (one supported by the Ben Roethlisberger Foundation), issuance of joint press releases and interviews, and effective community policing engagement.

**MOU:** A Memorandum of Understanding, or MOU, with local law enforcement is often highlighted as a best practice. It was a key recommendation in the report of President Obama's Task Force to Protect Students from Sexual Assault, and is also included in *CASA*. I agree that an MOU can be helpful, but entering into one is not a

simple procedure. MOUs with campus law enforcement are limited in some states, and some governmental agencies have policies prohibiting them from entering into them. If we can reach an MOU, there is no guarantee that local law enforcement will cooperate, nor are there consequences if they do not. Additionally, a complainant has no obligation to tell municipal law enforcement that he or she is one of our students, and in fact may initially choose not to do so in order to protect confidentiality. It's possible that we would find out later, but after the opportunity to investigate has passed; for example, if one or both of the parties involved has graduated.

Given the one-sided nature of an MOU and the amount of time and resources it takes to secure one, lawmakers should consider carefully the benefits to be gained from an MOU before making a sweeping mandate. There might be a better, less costly, more balanced way to achieve the same goals. Indeed, the White House Task Force has yet to publish the model MOU it promised to have ready by end of June. In any case, the penalty proposed in *CASA* – up to 1 percent of a school's operating budget – for failure to secure an MOU, goes too far. Although the legislation allows the Department of Education to waive the penalty if an institution demonstrates a good faith effort, it gives the Department far too much discretion in making that determination.

**Trauma-Informed Investigations:** We know that only a small percentage of sexual assaults are reported to the police. This is largely because victims believe they will not be treated fairly or will be re-traumatized throughout the process. Law enforcement has been and will continue to look for better, more effective ways to address sexual assault and to increase victims' comfort level with our procedures. As more investigators – both law enforcement and campus judicial investigators – are trained in trauma-informed investigation techniques, I believe that the perceptions of the way we handle campus sexual assault cases will improve.

Victim advocates on campus can help students navigate this process, explaining what to expect and providing support throughout the investigation. I am very concerned, however, that a provision in *CASA* would require confidential advisors to conduct forensic interviews with victims that can be used as evidence in a criminal prosecution or campus disciplinary proceeding. This requirement jeopardizes a client-centered support system that is so crucial for a survivor's healing process. Confidential advisors should focus on the return of absolute control to a victim. Placing them in a fact-finding role – such as gathering evidence or taking an official statement – is a conflict of interest, violates the trust of victims, and will interfere with a confidential advisor's ability to provide support.

Earlier this year, I participated in one of Senator McCaskill's roundtables with Detective Carrie Hull of Ashland, OR. She shared a number of best practices that she and her colleagues have adopted in the "You Have Options" program that would be beneficial in more jurisdictions. These include a commitment by the agency to:



- Adopt 20 victim centered and offender focused response procedures;
- Prioritize medical and advocacy resources for every victim who reports a sexual assault;
- Provide non-victim-blaming education to community members within the agency's jurisdiction;
- Train and hold accountable every member of the participating agency – sworn and non-sworn – for the same victim-centered and offender-focused response; and
- Promote an environment within the agency where victims of sexual assault are not judged or blamed for their assault and instead are treated with dignity, sensitivity, and courtesy.

I believe these steps can be customized to communities across the country, and should be widely adopted in other jurisdictions. I encourage the Subcommittee to provide resources for officers, university administrators, and community partners to receive this sort of training.

**Community Engagement.** Because municipalities – especially the smaller jurisdictions like the ones surrounding Cornell – are generally understaffed compared to campus agencies, they do not have the resources to be engaged fully with the campus population out of necessity. The problem is magnified in big cities. Large municipalities, like New York City, where two Cornell campuses are located, are understandably hesitant to use limited resources to pursue sexual assaults that will not result in prosecution, either because of lack of evidence or unwillingness of the victim to prosecute. The Boston Police Department's Sex Crimes Investigation unit has six people to cover the City of Boston and the 32 institutions of higher education within its jurisdiction. These range in size from a 180-person Seminary with very little security to the 32,000 students at Boston University who have sworn law enforcement empowered to take action both on and off campus. While this unit is working diligently to engage with all the campuses, the disparity of the resources available to each campus and the understandably different MOUs to be crafted and maintained is daunting.

Because resources are scarce for everyone, we should be doing more to share those that exist. For example, the New York State Police makes available its resources for evidence processing and crime scene investigation, adding greatly to CUPD's capacity in this area. On the other hand, many databases and other investigative support tools are not available to campus law enforcement because we are not considered to be governmental agencies by the state or municipal authorities that control those resources. Easier access to these resources would be a tremendous help to campus law enforcement.

## **Recommendations**

We know that Senators are concerned about the lack of resources at the Department of Justice and the Department of Education for enforcement and oversight of Title IX and the Clery Act. Efforts to beef up enforcement – including increased fines for noncompliance – should be coupled with incentives for higher education institutions for training, education, programming around prevention, law enforcement and administrative investigators, and research. In particular, resources to support training in trauma-informed investigations will benefit both campus adjudicators and law enforcement. The revenue raised through increased fines should be funneled back into these incentive programs. I am concerned, however, with the way the fine structure is proposed in CASA for violations of the Clery Act and Title IX. The bill does not differentiate between willful, knowing, and intentional conduct, but rather gives the Department great discretion to assess a penalty of up to 1 percent of an institution's operating budget. The bill also allows the Department to keep the fines it collects, creating a perverse incentive for over-enforcement. I strongly recommend that these provisions be revised to put the penalties in line with other civil rights laws, to differential between willful and inadvertent violations, and to direct the fines to research and training.

I also strongly urge you to target education and prevention programs at middle and high schools to begin to address cultural issues surrounding sex, alcohol and controlled substance usage, and consent before students arrive at college. Attitudes and perceptions about sex, healthy relationships, and gender roles solidify long before young people reach college age. The earlier we can begin education around respect and civility across gender lines at a more meaningful and impactful time, the better chance we have to make the sweeping cultural changes necessary to get at the root of this problem.

## **Conclusion**

Cornell University does not tolerate sexual abuse, rape, sexual assault, domestic violence, intimate partner violence, stalking, sexual coercion, or other forms of sexual violence by or against students, staff, faculty, alumni or visitors. We share the responsibility for creating a safer, more caring campus culture in which bias, harassment, and violence have no place. We thank you for your attention and careful consideration of the issues involved in preventing and responding to sexual violence on college campuses. I appreciate the opportunity for input into your deliberations, and would be pleased to answer any questions the Subcommittee may have.