THE ASSISTANT SECRETARY OF DEFENSE
WASHINGTON, DC 20301-1300

LEGISLATIVE
AFFAIRS

JAN 28 2014

The Honorable Barbara Jones
Chair, Response Systems to Adult Sexual Assault Crimes Panel
One Liberty Center
875 N. Randolph Street, Suite 150
Arlington, VA 22203-1995

Dear Judge Jones:

I am responding to the Response System Panel's request for the Department of Defense's views on S.1752, the revised version of Senator Gillibrand's "Military Justice Improvement Act". The Department has significant concerns with the legislation, which the Department does not believe would assist in the goal of eradicating sexual assault and which would alter the military justice system upon which commanders rely to maintain mission readiness and combat effectiveness.

The Department of Defense fully shares the goal of eliminating sexual assault from the military while ensuring a capable, fair, and professional justice system to address those offenses that do occur. The Department also understands the need to reform a system whose credibility has suffered both within the military and with the general public from which our nation's all volunteer force is drawn. In the last few years, and particularly with the National Defense Authorization Act for Fiscal Year 2014 signed into law in December 2013, the military justice system has undergone major reforms.

While preserving commanders' prosecutorial discretion over the whole range of UCMJ offenses, Congress narrowed that discretion in sexual assault cases in important ways. First, it provided that a commander can refer a sexual assault charge only to a general court-martial, not to either a summary or special court-martial. Second, it required higher-level review of any decision by a commander not to refer a sexual assault case to a general court-martial. Third, it required that a sentence in any sexual assault case include a punitive discharge and eliminated commanders' authority to commute the sentence to eliminate a punitive discharge. Fourth, it eliminated commanders' authority to set aside a court-martial's finding of guilty to a sexual assault offense, as well as most other offenses. The Secretary of Defense has also mandated that only judge advocates may serve as Article 32 investigating officers in sexual assault cases. This will ensure that military commanders' exercise of prosecutorial discretion over sexual assault cases is fully informed by the advice of two judge advocates – the Article 32 investigating officer and the staff judge advocate providing the Article 34 advice. The Department believes that these reforms, as well as those like the adoption of robust victim legal representation programs, will have a positive impact on an effective response to sexual assault in the military, thereby aiding in the prevention effort by identifying offenders and taking appropriate action before they offend again.

The Department does not believe that the changes proposed by S.1752 will effectuate the goals of encouraging reporting of sexual assault offenses (restricted or unrestricted) or promoting the prosecution of appropriate cases. Significantly, there is no empirical support for the proposition that removing prosecutorial discretion from commanders will encourage reporting of sexual assault offenses or lead to more sexual assault prosecutions. Indeed, this Panel expressed the consensus view that it "found no evidence that the removal of the commander from the decision making process of non-U.S. military justice systems has affected the reporting of sexual assaults." Nor is there any empirical support for the notion that a system in which lawyers exercise prosecutorial discretion would be more likely to prosecute a sexual assault allegation than one in which commanders make that decision. On the contrary, anecdotal evidence suggests that commanders have referred a number of cases to trial even when legal counsel has recommended dismissal of charges.

In addition, the Department believes that reducing the tools available to commanders—who are indispensable to achieving a culture change within the military – could weaken our ability to combat sexual assault within the ranks. Our service members take the military justice system with them wherever they perform their duties. Thus, our military justice system must be portable and deployable to a far greater extent than that of any other nation's military. Commanders are called upon every day to make difficult decisions to accomplish their assigned missions while at the same time preserving the wellbeing of their subordinates. The authority that commanders exercise under the Uniform Code of Military Justice (UCMJ) is important to achieving these goals. The Department believes that military commanders – who are entrusted with the lives of their subordinates and the security of our nation – can be trusted to exercise this well-informed, narrowed discretionary authority.

While the bill's supporters contemplate that it would allow commanders to continue to exercise prosecutorial discretion over military-specific and disciplinary offenses, in reality it would remove commanders' authority over many common disciplinary-type offenses, such as bouncing checks at a base club or commissary, using a false pass, and, in many instances, stealing thefts from shipmates or barrackmates. These limitations would apply even to units in combat zones and ships at sea. Such restrictions could degrade our ability to maintain an effective fighting force. As the Supreme Court has observed, the military's "law is obedience. No question can be left open as to the right to command in the officer, or the duty of obedience in the soldier." *Parker v. Levy*, 417 U.S. 733, 744 (1974) (quoting *In re Grimley*, 137 U.S. 147, 153 (1890)).

Certain technical problems in the bill highlight the difficulties in creating a new system that can withstand legal challenge, particularly without a comprehensive review of the system. For example, the bill would make the judge advocate disposition authority's decision whether to refer a case to court-martial and, if so, the level of court-martial, "binding on any applicable convening authority." S.1752 § 2(a)(4)(D). The legislation, however, does not amend Article 34, which establishes three prerequisites for referring a case to a general court-martial,[1] which

[1] "The convening authority may not refer a specification under a charge to a general court-martial for trial unless he has been advised in writing by the staff judge advocate that – (1) the specification alleges an offense under [the UCMJ]; (2) the specification is warranted by the evidence indicated in the report of investigation under section 832

may or may not be satisfied before the judge advocate disposition authority makes a "binding" decision. Likewise, the legislation contains internal inconsistencies concerning a judge advocate disposition authority's power to exercise prosecutorial discretion over excluded offenses where the accused is also suspected of a covered offense. Although section 2(a)(4)(C) appears to contemplate that the judge advocate disposition authority will sometimes exercise prosecutorial discretion over excluded offenses, section 2(a)(5) provides that section 2 should not be construed to "alter or affect the disposition of charges . . . for which the maximum punishment authorized . . . includes confinement for one year or less." The existence of provisions that are potentially irreconcilable could result in long delays in bringing some cases to trial and, if a conviction ultimately results, could produce still more years of appellate litigation, perhaps ultimately culminating in the conviction's reversal.

Establishing a new system for disposing of a wide array of charges would also significantly strain already overtaxed resources. The bill would require implementing the new system using only existing resources. The number of full-time O-6 (colonel or Navy captain) judge advocate disposition authorities that would be required, however, exceeds the Services' existing personnel inventory in that senior grade. Therefore, at a time when the Services are attempting to reduce their personnel costs to accommodate shrinking defense budgets, such as the Army and Air Force JAG Corps' plans to hold selective early retirement boards to reduce their number of colonels, this legislation would require the Services to expand their inventory of judge advocate O-6s.

The requirement that these positions be staffed using existing billets would remove these judge advocates from other critical responsibilities, such as supervising special victims' counsel and legal assistance attorneys, serving as trial and appellate military judges and chief trial or defense counsel, and advising commanders on operational matters in combat zones or when forward deployed for military missions. Standing up new offices to implement the bill would also involve significant personnel and administrative costs, further diverting resources from other important functions. Even if the Department had unlimited resources, developing a sufficient number of O-6 judge advocates with significant trial experience while maintaining other critical competencies would take years.

As previously noted, the bill would shift prosecutorial discretion for many common disciplinary offenses from commanders to the new judge advocate disposition authorities. Any nonjudicial punishment (NJP) or summary court-martial (SCM) for such offenses would be delayed until the judge advocate disposition authority considered the case. In most cases, however, service members have the right to refuse NJP and they always have the right to refuse trial by SCM. Thus, the judge advocate disposition authority's decision not to prosecute would eliminate the incentive for most service members to accept NJP or SCM. The command would then have to ask the judge advocate disposition authority to prosecute the case, notwithstanding his or her previous declination. The result would be, at best, delay, with the resulting danger to good order and discipline and mission readiness or, at worst, impunity, if the judge advocate disposition authority elects not to try the case following NJP or SCM refusal.

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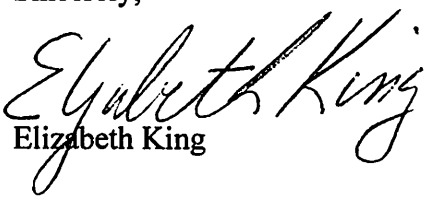
of this title (article 32) (if there is such a report); and (3) a court-martial would have jurisdiction over the accused and the offense." 10 U.S.C. § 834 (Article 34 of the Uniform Code of Military Justice).

Additionally, as in the federal and state criminal justice systems, the military justice system uses plea bargaining to encourage judicial economy. The bill limits the efficiency and effectiveness of plea bargaining. The increased complexity and ambiguity of separate disposition authorities, and the complicated interactions and division of authority between the convening authority and the judge advocate disposition authority, will introduce significant uncertainty into the process. Plea bargaining under the proposed system would be less efficient, less effective, and more cumbersome. The result will almost certainly be fewer plea bargains and more contested trials. An increase in contested trials will inevitably result in fewer convictions, while also requiring victims to testify in a number of cases where the victim would prefer not to if a just result could be reached through a plea bargain.

Military justice reform is best done thoroughly and in a deliberative manner and, in addition to the work by this Panel, the Department is comprehensively reviewing the UCMJ practices and procedures. While not limited to sexual assault, this review will identify areas where statutes and procedures can be modified to enhance victims' rights and better hold offenders appropriately accountable.

The Office of Management and Budget advises that, from the standpoint of the Administration's program, there is no objection to the presentation of this letter to the Response Systems Panel for consideration.

Sincerely,



Elizabeth King