



DEPARTMENT OF THE AIR FORCE
HEADQUARTERS UNITED STATES AIR FORCE
WASHINGTON DC 20330

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HQ USAF/JA
1420 Air Force Pentagon
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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 Chairwoman Jones:

You have asked for my opinion regarding concerns about how the Air Force would implement and resource Senator Gillibrand's amendment to the National Defense Authorization Act for Fiscal Year 2014, S1197, introduced on 20 November 2013 ("The Amendment"), specifically with regards to revisions made over previously proposed versions of the Amendment. I very much appreciate the opportunity to provide input on the very important topic of sexual assault and how we adjudicate cases in the military. As I and other Air Force senior leaders have previously stated, we are committed to ensuring that sexual assault crimes in the Air Force are thoroughly investigated, zealously prosecuted, and that victims receive the support they need. This is a top priority for the Air Force and we have taken, and continue to take, significant steps to address this issue.

Although the Amendment at issue differs slightly from its predecessor, removing commanders from the military justice process remains its cornerstone. As such, I do not find that the changes made remove the overall concerns I have had since its original proposal. I continue to believe it is vitally important that commanders maintain the central role in the military justice system. Sexual assaults are an obvious impediment to mission accomplishment, and commanders have a vested interest in ensuring victims are cared for, perpetrators are held accountable and climates of respect and trust flourish. There is only one person in every unit with the authority, both moral and statutory, to address problems such as sexual assault, and that is the unit commander – if that person fails, we must hold him or her accountable. Restricting the commander's authority over the military justice system does the opposite – it impedes our ability to hold the commander accountable for responding to sexual assault and eliminating it from our ranks.

While I disagree with removing even one offense from the purview of commanders, the Amendment continues to cover a broad range of offenses which will result in nonsensical consequences. For example, if someone commits perjury during a court-martial previously convened by a commander, that commander would not be able to convene a court to prosecute the perjury offense (Article 131, Perjury). Likewise, other offenses such as a disgruntled military member setting fire to his or her dorm room (Article 126, Arson); an enlisted servicemember striking an officer (Article 128, Assault on a Commissioned Officer); a servicemember committing barracks larceny of more than \$500 (Article 121, Larceny and Wrongful Appropriation); and a military member filing falsified travel vouchers (Article 132, Frauds Against the US), would fall outside of

the commander's authority and be sent to a Judge Advocate (JAG), who is often half a continent away, for disposition.

Moreover, the effects of the JAG disposition authority's (JAG-DA) decision continues to be a problem for implementation. If the JAG-DA's decision is binding, commanders will be precluded from imposing non-judicial punishment (NJP) or referring charges to Summary Court-Martial (SCM). The proposed legislation provides no mechanism for the disposition authority to later reconsider his or her decision. For example, if the disposition authority returned the case without a binding referral to a General Court-Martial or Special Court-Martial, the commander has the option of a SCM or NJP. However, the accused has a right to demand trial by court-martial when offered NJP and the right to refuse trial by SCM outright. This may result in a situation where Airmen can – or believe they can – refuse NJP or SCM with impunity. This section will also impede, or seriously delay, the ability of convening authorities to enter into pre-trial agreements because of the previously binding decision of the disposition authority.

Finally, the proposed legislation specifies that no additional personnel, funds, or resources are to be afforded to establish the necessary infrastructure for execution of the proposal's mandates. Our estimates to the Department of Defense Office of Cost Assessment & Program Evaluation, which I understand you have been previously provided, delineate the cost of implementing this Amendment and how the Air Force would do so. Resourcing a parallel military justice system for certain offenses with no new billets or funds will require other processes within our legal offices to suffer, such as support to the warfighting mission and providing advice on critical command issues. Nothing in this new Amendment changes how we previously stated we would implement it. Numerical estimates and dollar impacts do not take into account the very real and lasting impact of removing our most experienced senior JAGs from their current assignments advising our most senior commanders, to staff the proposed JAG-DA office. No supplemental appropriation from Congress can buy the much-needed expertise in the form of experienced O-6 JAGs needed to stand up a parallel system of military justice envisioned in the bill.

I am not averse to change. I advocated for adoption of the Special Victims' Counsel Program as an Air Force pilot program, and today it has been adopted throughout the Department of Defense. I supported changes to Article 60 proposed by the Secretary of Defense; I believe that the time has come to reexamine the Article 32 investigation process, and I support a holistic review of the entire military justice system. This Amendment, however, creates an unworkable framework that will not lead to meaningful and lasting change for victims – it will erode trust in commanders, remove the one person in a unit in the best position to support a victim and generate more long-term difficulties than it solves. I thank you for the opportunity to comment and trust that your review and assessment will lead to valuable recommendations in how we eliminate this crime from our ranks.

Sincerely,


RICHARD C. HARDING
Lieutenant General, USAF
The Judge Advocate General