

Senate Bill 967: Military Justice Improvement Act of 2013

Sponsor: Senator Kirsten Gillibrand (D-NY)

Date introduced: May 16, 2013

Last Major Action: Referred from the Personnel subcommittee to the Senate Armed Services Committee (SASC) but not included in the FY14 NDAA as passed by the SASC.

Co-sponsors: 38 cosponsors (31Ds, 6Rs, 1I).

Companion Bill to S. 967: HR 2016 (introduced in the House of Representatives on May 16, 2013, by Rep Dan Benishek (D-MI); 63 cosponsors (37D, 26R).

Overview:

Section 2:

1. Section 2 subsection (a)(1): Modifies the authority to determine whether to proceed to trial by courts-martial for offenses for which maximum punishment authorized includes confinement for more than one year (“Gillibrand offenses”), with certain exceptions identified in section 2 subsection (a)(2).
2. Section 2 subsection (a)(2): Identifies offenses that are excluded from the list of offenses falling under section 2 subsection (a)(1). Excluded offenses include Articles 83-91, UCMJ; Articles 93-117, UCMJ; and Article 133, UCMJ. Note: Senator Gillibrand’s draft floor amendment to the FY14 NDAA adds to the list of excluded offenses Article 92, UCMJ; and Article 134, UCMJ.
3. Section 2 subsection (a)(3): Disposition of the Gillibrand offenses shall be made by an O-6 or higher who is available for trial under Article 27, UCMJ, has significant experience in general or special courts-martial, and is outside the chain of command of the member. The officer with disposition authority determines whether to try the charges by a special or general court-martial. The determination on how to proceed is binding on any applicable convening authority and must be free from any unlawful or unauthorized influence or coercion. A determination not to proceed to trial shall not preclude a commanding officer from either referring such charges for trial by summary court-martial or imposing non-judicial punishment.
4. Section 2 subsection (a)(4): Nothing in this bill alters the disposition of charges that allege an offense triable by court-martial for which the maximum punishment authorized is one year or less.
5. Section 2 subsection (a)(5): Secretaries of military departments are to revise policies and procedures to comply with this bill. The DoD General Counsel shall review the revised policies and procedures to ensure that any lack of uniformity in policies and procedures does not render unconstitutional any policy or procedure as so revised.
6. Section 2 subsection (a)(6): SECDEF shall recommend changes to the MCM to ensure compliance with this law.
7. Section 2 subsection (b): Requires that NLT 180 days after enactment of the Act, SECDEF submits report to Congress on revisions of policies and procedures necessary to comply with subsection (a); and shall include recommended changes to MCM.

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8. Section 2 subsection (c): Provides that subsection (a) and the revisions required by that subsection shall take effect 180 days after the enactment of this Act.

Section 3: Amends MCM Rule 306 to eliminate character and military service of the accused from the factors to be considered by the disposition authority in disposing of charges. Note: Section 565 of S. 1197 includes this provision.

Section 4:

1. Section 4 subsection (a): Amends Article 22, UCMJ, which lists officers authorized to convene general and special court-martial by striking paragraphs (5) through (8), and adding “officers in the offices established pursuant to section 4(c) or officers in the rank of O-6 or higher who are assigned such responsibility by the Chief of Staff of the Army, the Chief of Naval Operations, the Chief of Staff of the Air Force, or the Commandant of the Marine Corps.”
2. Section 4 subsection (b): Prohibits any officer in the chain of command of the accused or the victim from serving as the convening authority.
3. Section 4 subsection (c): Requires each Chief of Staff of the Armed Forces (and Commandant of the Marine Corps) to establish an office which shall convene general and special courts-martial, and detail judges and members. The newly created office (“Office”) will be staffed with civilian and military personnel detailed to the office from personnel billets in existence on the date of enactment of the Act.

Section 5: For general or special courts-martial on the Gillibrand offenses, the military judge shall call the court into session pursuant to Article 39 of the UCMJ no later than 90 days after the date on which the authority determines to try such charges by court-martial. Note: This provision is not included in the draft Amendment.

Section 6:

1. Section 6 subsection (a): Requires written justification by the convening authority when taking action (other than approving a sentence) on the findings of a court-martial.
2. Section 6 subsection (b): Convening authority or other person acting on findings of a court-martial may not dismiss any charge or specification by setting aside a finding of guilty or changing a finding of guilty to guilty of a lesser included offense.
3. Note: Section 555 of S. 1197 includes similar provisions as section 6, above.

Section 7: A commanding officer who receives a report of a sex-related offense involving a member of the armed forces in the chain of command of such officer shall immediately refer the case to the appropriate military criminal investigative organization. Note: Section 541 of S. 1197 includes this provision.

Section 8: Requires the Response Systems Panel (RSP) to monitor and assess the implementation and efficacy of this Act and its amendments.

Impact:

- This legislative proposal removes the convening authority that is presently held by certain commanders, and places that authority with certain individuals within a separate office,

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as established by each Service Chief (and the CMC). The officers authorized to convene general or special courts-martial under this legislative proposal include officers within the newly established office or officers in the rank of O-6 or higher who are assigned such responsibility by the Service Chief (or CMC).

- The Commandant of the Coast Guard is not mentioned in the list of Service Chiefs tasked with creating a new office under section 568A(a)(2); and therefore it is unclear who will have the authority to convene courts-martial for the Coast Guard. This gap could be resolved by adding the Commandant of the Coast Guard to the Service Chiefs listed at section 568A(a)(2).
- *Referral of Charges.* The binding recommendation to refer the Gillibrand offenses to courts-martial will be made by an officer in the rank of O-6 or higher who is available for detail as trial counsel, has significant experience in general or special court-martial, and is outside the chain of command of the member subject to those charges. For all other offenses, it is unclear who makes the recommendation whether to refer offenses to courts-martial.
- The legislation seems to indicate that the O-6 referring charges for the Gillibrand offenses is also the prosecutor for those offenses, though it is not explicitly clear. The first requirement for this referral authority is that they “are available for detail as trial counsel” – which seems to indicate that this person will also serve as trial counsel.
- *Commander’s Authority.* The proposed legislation continues to allow commanders to refer charges to summary court-martial and to impose non-judicial punishment, though that authority appears to be triggered, at least for the Gillibrand offenses, once the new convening authority has declined to prosecute the specified charge by general or special court-martial. Service members currently have the right to refuse summary court-martial or non-judicial punishment (except for service members attached to or embarked in vessels). Under current law, if a service member refuses summary court-martial or non-judicial punishment, the commanding officer then has the prerogative to refer the charges to a special court-martial. Under the proposed legislation, the service member’s decision whether to refuse summary court-martial or non-judicial punishment is made only after the new convening authority decides not to pursue a general or special court-martial. If the service member refuses the summary court-martial or non-judicial punishment, the legislation does not address the manner in which charges are handled at that point.
- *Judge and Members.* The proposed legislation places the authority to detail judges and members in the new office created by each Service Chief (and CMC). The section that appears to place the authority to detail members references section 827 of title 10 and article 26, UCMJ, in the same sentence (section 4, subsection (c)(1)(C)). Section 827 of title 10 refers to detail of trial counsel and defense counsel; and article 26 refers to detail of judges. It appears that the use of “827” and “26” may be errors in the legislative drafting. Nonetheless, this section needs to be re-written in order to clarify the intent.

Additional Considerations:

1. The Defense Advisory Committee on Women in the Services (DACOWITS) recommended to DoD that it support legislation to remove the decision whether to prosecute sexual assaults and other serious crimes from the chain of command, which is consistent with Senator Gillibrand’s proposal.

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2. Senator Gillibrand’s proposal is supported by the groups Protect Our Defenders, the Service Women’s Action Network, and Iraq and Afghanistan Veterans of America.
3. Lieutenant General Claudia Kennedy (Ret), Major General Martha Rainville (Ret), Brigadier General Loree Sutton (Ret) and Brigadier General David McGinnis (Ret) each wrote letters to Senator Gillibrand in support of Senator Gillibrand’s proposal.
4. At the SASC Personnel hearing on June 4, 2013, the military Service Chiefs testified against the fundamental elements of Senator Gillibrand’s bill.
5. According to GovTrack, this bill had a 55% chance of making it through the committee and a 22% chance of being enacted.ⁱ While the bill is moot at this point, Senator Gillibrand has indicated she will introduce an amendment to S 1197 when it is taken up on the floor of the Senate.

All Other Offenses	Gillibrand offenses
Article 83, Fraudulent enlistment, appointment, or separation	Article 78, Accessory after the fact
Article 84, Effecting unlawful enlistment, appointment, or separation	Article 80, Attempts (if underlying crime attempted has max punishment of confinement for more than 1 year)
Article 85, Desertion	Article 81, Conspiracy
Article 86, Absence without leave	Article 82, Solicitation
Article 87, Missing movement	Article 92, Failure to obey order or regulation
Article 88, Contempt toward officials	Article 118, Murder
Article 89, Disrespect toward a superior commissioned officer	Article 119, Manslaughter
Article 90, Assaulting or willfully disobeying superior commissioned officer	Article 119a, Death or injury of an unborn child
Article 91, Insubordinate conduct toward warrant officer, NCO or petty officer	Article 120, Rape and sexual assault generally
Article 93, Cruelty and maltreatment	Article 120a, Stalking
Article 94, Mutiny and sedition	Article 120b, Rape and sexual assault of a child
Article 95, Resistance, flight, breach of arrest, and escape	Article 120c, Other sexual misconduct
Article 96, Releasing prisoner without proper authority	Article 121, Larceny and wrongful appropriation
Article 97, Unlawful detention	Article 122, Robbery
Article 98, Noncompliance with procedural rules	Article 123, Forgery
Article 99, Misbehavior before the enemy	Article 123a, Making, drawing, or uttering check, draft, or order without sufficient funds
Article 100, Subordinate compelling surrender	Article 124, Maiming
Article 101, Improper use of countersign	Article 125, Sodomy
Article 102, Forcing a safeguard	Article 126, Arson
Article 103, Captured or abandoned property	Article 127, Extortion

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Article 104, Aiding the enemy	Article 128, Assault
Article 105, Misconduct as a prisoner of war	Article 129, Burglary
Article 106, Spies	Article 130, Housebreaking
Article 106a, Espionage	Article 131, Perjury
Article 107, False official statements	Article 132, Frauds against the United States
Article 108, Military property of the U.S. – sale, loss, damage, destruction, or wrongful disposition	Article 134, General Article
Article 109, Property other than military property of the U.S. – waste, spoilage, or destruction	Article 134 (Assault- with intent to commit murder, voluntary manslaughter, rape, robbery, sodomy, arson, burglary, or housebreaking)
Article 110, Improper hazarding of vessel	Article 134 (Bigamy)
Article 111, Drunken or reckless operation of vehicle, aircraft, or vessel	Article 134 (Bribery and graft)
Article 112, Drunk on duty	Article 134 (Burning with intent to defraud)
Article 112a, Wrongful use, possession, etc., of controlled substance	Article 134 (Child endangerment)
Article 113, Misbehavior of sentinel or lookout	Article 134 (Child pornography)
Article 114, Dueling	Article 134 (Disloyal statements)
Article 115, Malingering	Article 134 (False or unauthorized pass offenses)
Article 116, Riot or breach of peace	Article 134 (False swearing)
Article 117, Provoking speeches or gestures	Article 134 (Fraternization)
Article 133, Conduct unbecoming an officer and gentlemen	Article 134 (Homicide, negligent)
Article 134 (Abusing public animal)	Article 134 (Impersonating a commissioned, warrant, noncommissioned, or petty officer, or an agent or official)
Article 134 (Adultery)	Article 134 (Indecent language)
Article 134 (Check, worthless, making and uttering-by dishonorably failing to maintain funds)	Article 134 (Kidnapping)
Article 134 (Cohabitation, wrongful)	Article 134 (Mail: taking, opening, secreting, destroying, or stealing)
Article 134 (Correctional custody-offenses against)	Article 134 (Mails: depositing or causing to be deposited obscene matters in)
Article 134 (Debt, dishonorably failing to pay)	Article 134 (Misprison of serious offense)
Article 134 (Disorderly conduct-drunkenness)	Article 134 (Obstructing justice)
Article 134 (Drinking liquor with prisoner)	Article 134 (Wrongful interference with an adverse administrative proceeding)
Article 134 (Drunk prisoner)	Article 134 (Pandering and prostitution)
Article 134 (Drunkenness-incapacitation for performance of duties through prior wrongful indulgence in intoxicating liquor or any drug)	Article 134 (Perjury: subornation of)

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Article 134 (False pretenses, obtaining services under)	Article 134 (Public record: altering, concealing, removing, mutilating, obliterating, or destroying)
Article 134 (Firearm, discharging-through negligence)	Article 134 (Self-injury without intent to avoid service)
Article 134 (Firearm, discharging-willfully, under circumstances as to endanger human life)	Article 134 (Soliciting another to commit an offense)
Article 134 (Fleeing scene of accident)	Article 134 (Stolen property: knowingly receiving, buying, concealing)
Article 134 (Gambling with subordinate)	Article 134 (Testify: wrongful refusal)
Article 134 (Jumping from vessel into the water)	Article 134 (Threat or hoax designed or intended to cause panic or public fear)
Article 134 (Parole, Violation of)	Article 134 (Communicating a threat)
Article 134 (Quarantine: medical, breaking)	All other unenumerated Article 134 offenses, to include federal and state crimes prosecuted under clause 3, Article 134 (e.g., Espionage Act, Internet Enticement of a Minor)
Article 134 (Reckless endangerment)	
Article 134 (Breaking restriction)	
Article 134 (Seizure: destruction, removal, or disposal of property to prevent its seizure)	
Article 134 (Sentinel or lookout: offenses against or by)	
Article 134 (Straggling)	
Article 134 (Unlawful entry)	
Article 134 (Weapon: carrying concealed)	
Article 134 (Wearing unauthorized insignia, decoration, badge, ribbon, device, or lapel button)	

*Note: Senator Gillibrand has indicated that any future legislation introduced would exempt Article 92 and Article 134 from the new system; those Articles are in bold, above.

ⁱ GovTrack uses statistical analysis (logistic regression) to determine the odds of a bill passing. It also identifies factors that hurt or help a particular bill. In this case, GovTrack identified the following factors as helping the bill's chances of passing: the sponsor is on a committee to which the bill has been referred, and the sponsor is a member of the majority party; and a cosponsor in the majority party has a high leadership score. <http://www.govtrack.us/congress/bills/113/s967>.