

Gillibrand Floor Amendment to Senate Bill 1197

Sponsor: Senator Kirsten Gillibrand (D-NY)

Date introduced: TBD

Last Major Action: This legislative proposal is expected to be introduced as a floor amendment when S.1197 is debated in the Senate.

Co-sponsors: According to Senator Gillibrand's website, the amendment to S. 1197 is supported by 46 Senators.

Summary of bill:

Section 568:

1. Section 568 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 568 subsection (a)(2).
2. Section 568 subsection (a)(2): Identifies offenses that are excluded from the list of offenses falling under section 568 subsection (a)(1). Excluded offenses include Articles 83-117, UCMJ; and Articles 133-134, UCMJ.
3. Section 568 subsection (a)(3): The disposition of the Gillibrand offenses shall be made by an O-6 or higher who is available for trial under Article 27, 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 568 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 568 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 568 subsection (a)(6): SECDEF shall recommend changes to the MCM to ensure compliance with this law.
7. Section 568 subsection (b): Subsection (a) and the revisions required by that subsection shall take effect 180 days after the date of enactment of this Act; and shall apply to charges preferred under Article 30, UCMJ.

Section 568A:

1. Section 568A 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."

Gillibrand Floor Amendment to Senate Bill 1197

2. Section 568A subsection (b): Prohibits any officer in the chain of command of the accused or the victim from serving as the convening authority.
3. Section 568A 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 568B: Requires sections 568 and 568A to be carried out using personnel, funds, and resources otherwise authorized by law; sections 568 and 568A are not to be construed as authorizations for personnel, personnel billets, or funds for the discharge of the requirements in those sections.

Section 568C: Requires the 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, as established by each Service Chief (and the CMC). The officers authorized to convene general or special courts-martial 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 entirely 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

Gillibrand Floor Amendment to Senate Bill 1197

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.

Changes from S.967:

- Adds Articles 92, UCMJ and Article 134, UCMJ, to the list of excluded offenses.
- Removes requirement that, 180 days after enactment of the Act, SECDEF submit a Report to Congress on revisions of policies and procedures necessary to comply with subsection (a) as well as recommended changes to MCM.
- Removes provision that would amend 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: The character provision was incorporated into the FY14 SASC defense authorization, S 1197, at section 565 and was therefore unnecessary in this version.
- Adds language stating that no additional funds personnel or resources will be provided to carry out these requirements; rather, members and personnel detailed to the new office “shall be detailed or assigned from personnel billets in existence on the date of enactment of this Act.” Gillibrand floor amendment to S.1197, section 568A(c)(2) and section 568(B).
- Removes S.967 section 5 deadline for military judge to call general and special courts-martial into session “not later than 90 days after the date on which the authority determines to try such charges by court-martial.”
- Removes S.967, section 6, modification of authority of convening authority when taking any action other than approving sentence, requiring written justification that becomes part of record. Note: A similar provision is included in S.1197 at section 555 and was therefore unnecessary in the floor amendment.
- Removes S.967, section 7, requiring immediate command action, referral of report to the appropriate MCIO, on reports of sexual offenses. Note: S.1197, section 541 contains same provision and thus not necessary in the amendment.

Additional Considerations:

- 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.
- 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.
- 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.
- At the SASC Personnel hearing on June 4, 2013, the military Service Chiefs testified against the fundamental elements of Senator Gillibrand’s bill.

Gillibrand Floor Amendment to Senate Bill 1197

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
Article 85, Desertion	Article 81, Conspiracy
Article 86, Absence without leave	Article 82, Solicitation
Article 87, Missing movement	Article 118, Murder
Article 88, Contempt toward officials	Article 119, Manslaughter
Article 89, Disrespect toward a superior commissioned officer	Article 119a, Death or injury of an unborn child
Article 90, Assaulting or willfully disobeying superior commissioned officer	Article 120, Rape and sexual assault generally
Article 91, Insubordinate conduct toward warrant officer, NCO or petty officer	Article 120a, Stalking
Article 92, Failure to obey order or regulation	Article 120b, Rape and sexual assault of a child
Article 93, Cruelty and maltreatment	Article 120c, Other sexual misconduct
Article 94, Mutiny and sedition	Article 121, Larceny and wrongful appropriation
Article 95, Resistance, flight, breach of arrest, and escape	Article 122, Robbery
Article 96, Releasing prisoner without proper authority	Article 123, Forgery
Article 97, Unlawful detention	Article 123a, Making, drawing, or uttering check, draft, or order without sufficient funds
Article 98, Noncompliance with procedural rules	Article 124, Maiming
Article 99, Misbehavior before the enemy	Article 125, Sodomy
Article 100, Subordinate compelling surrender	Article 126, Arson
Article 101, Improper use of countersign	Article 127, Extortion
Article 102, Forcing a safeguard	Article 128, Assault
Article 103, Captured or abandoned property	Article 129, Burglary
Article 104, Aiding the enemy	Article 130, Housebreaking
Article 105, Misconduct as a prisoner of war	Article 131, Perjury
Article 106, Spies	Article 132, Frauds against the United States
Article 106a, Espionage	
Article 107, False official statements	
Article 108, Military property of the U.S. – sale, loss, damage, destruction, or wrongful disposition	
Article 109, Property other than military property of the U.S. – waste, spoilage, or destruction	
Article 110, Improper hazarding of vessel	
Article 111, Drunken or reckless operation of	

Gillibrand Floor Amendment to Senate Bill 1197

vehicle, aircraft, or vessel	
Article 112, Drunk on duty	
Article 112a, Wrongful use, possession, etc., of controlled substance	
Article 113, Misbehavior of sentinel or lookout	
Article 114, Dueling	
Article 115, Malingering	
Article 116, Riot or breach of peace	
Article 117, Provoking speeches or gestures	
Article 133, Conduct unbecoming an officer and gentlemen	
Article 134 (Abusing public animal)	
Article 134 (Adultery)	
Article 134 (Check, worthless, making and uttering-by dishonorably failing to maintain funds)	
Article 134 (Cohabitation, wrongful)	
Article 134 (Correctional custody-offenses against)	
Article 134 (Debt, dishonorably failing to pay)	
Article 134 (Disorderly conduct-drunkenness)	
Article 134 (Drinking liquor with prisoner)	
Article 134 (Drunk prisoner)	
Article 134 (Drunkenness-incapacitation for performance of duties through prior wrongful indulgence in intoxicating liquor or any drug)	
Article 134 (False pretenses, obtaining services under)	
Article 134 (Firearm, discharging-through negligence)	
Article 134 (Firearm, discharging-willfully, under circumstances as to endanger human life)	
Article 134 (Fleeing scene of accident)	
Article 134 (Gambling with subordinate)	
Article 134 (Impersonating a commissioned, warrant, noncommissioned, or petty officer, or an agent or official)	
Article 134 (Jumping from vessel into the water)	
Article 134 (Parole, Violation of)	
Article 134 (Quarantine: medical, breaking)	
Article 134 (Reckless endangerment)	
Article 134 (Breaking restriction)	
Article 134 (Seizure: destruction, removal, or disposal of property to prevent its seizure)	

Gillibrand Floor Amendment to Senate Bill 1197

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)	
Article 134, General Article	
Article 134 (Assault- with intent to commit murder, voluntary manslaughter, rape, robbery, sodomy, arson, burglary, or housebreaking)	
Article 134 (Bigamy)	
Article 134 (Bribery and graft)	
Article 134 (Burning with intent to defraud)	
Article 134 (Child endangerment)	
Article 134 (Child pornography)	
Article 134 (Disloyal statements)	
Article 134 (False or unauthorized pass offenses)	
Article 134 (False swearing)	
Article 134 (Fraternization)	
Article 134 (Homicide, negligent)	
Article 134 (Impersonating a commissioned, warrant, noncommissioned, or petty officer, or an agent or official)	
Article 134 (Indecent language)	
Article 134 (Kidnapping)	
Article 134 (Mail: taking, opening, secreting, destroying, or stealing)	
Article 134 (Mails: depositing or causing to be deposited obscene matters in)	
Article 134 (Misprison of serious offense)	
Article 134 (Obstructing justice)	
Article 134 (Wrongful interference with an adverse administrative proceeding)	
Article 134 (Pandering and prostitution)	
Article 134 (Perjury: subornation of)	
Article 134 (Public record: altering, concealing, removing, mutilating, obliterating, or destroying)	
Article 134 (Self-injury without intent to avoid service)	
Article 134 (Soliciting another to commit an offense)	
Article 134 (Stolen property: knowingly	

Gillibrand Floor Amendment to Senate Bill 1197

receiving, buying, concealing)
Article 134 (Testify: wrongful refusal)
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)