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United States Senate
COMMITTEE ON ARMED SERVICES
WASHINGTON, DC 20510–6050

October 15, 2013

Lieutenant General Flora D. Darpino, JAGC, USA
Judge Advocate General, United States Army
2200 Army Pentagon, Room 3E542
Washington, DC 20310-2200

Vice Admiral Nanette M. DeRenzi, JAGC, USN
Judge Advocate General, United States Navy
1300 Navy Pentagon, Room 4C642
Washington, DC 20350-1300

Lieutenant General Richard C. Harding, JAGC, USAF
Judge Advocate General, United States Air Force
1420 Air Force Pentagon, Room 4C915
Washington, DC 20330-1420

Major General Vaughn A. Ary, USMC
Staff Judge Advocate to the Commandant of the Marine Corps
3000 Marine Corps Pentagon (JA)
Washington DC 20350

Dear General Darpino, Admiral DeRenzi, General Harding, and General Ary:

We would appreciate your comments on any practical difficulties and/or unanswered questions that might arise in the implementation of the attached draft legislative proposal that we expect to be offered as an amendment to the National Defense Authorization Act for Fiscal Year 2014. For example, but not limited to:

1. What impact, if any, would this proposal have on a commander's authority to impose punishment under Article 15, UCMJ:
    a. before a determination on whether to proceed to trial by court-martial by the authority designated in the proposal to make such a determination, and
    b. after a determination by this authority not to proceed to trial by a general or special court-martial?
2. Who, if anyone, would have the authority to convene an Article 32, UCMJ, investigation?
3. Who, if anyone, would have the authority currently exercised by a court-martial convening authority to enter into pre-trial agreements with the accused?
4. Who, if anyone, would have authority to serve as a General Court-Martial Convening Authority for serious "excluded" offenses, such as aiding the enemy (Article 104, UCMJ), spying (Article 106, UCMJ), espionage (Article 106a, UCMJ), and negligent homicide (Article 134, UCMJ)?

5. What resources would be required to implement this provision? Can it be effectively implemented with the personnel, funding, and resource constraints contained in the proposal?

   Please respond with your views as expeditiously as possible.

James M. Inhofe
Ranking Member

Carl Levin
Chairman

Attachment:
As stated.

AMENDMENT NO._____ Calendar No._____

Purpose: To further improve procedures relating to courts-martial under the Uniform Code of Military Justice.

IN THE SENATE OF THE UNITED STATES—113th Cong., 1st Sess.

S. 1197

To authorize appropriations for fiscal year 2014 for military activities of the Department of Defense, for military construction, and for defense activities of the Department of Energy, to prescribe military personnel strengths for such fiscal year, and for other purposes.

Referred to the Committee on _____ and ordered to be printed

Ordered to lie on the table and to be printed

AMENDMENTS intended to be proposed by Mrs. GILLIBRAND

Viz:

Strike section 552, relating to the review of decisions not to refer charges of certain offenses to trial by court-martial.

At the end of subtitle E of title V, insert the following:

PART IV—ADDITIONAL MILITARY JUSTICE MATTERS

SEC. 568. MODIFICATION OF AUTHORITY TO DETERMINE TO PROCEED TO TRIAL BY COURT-MARTIAL ON CHARGES ON OFFENSES WITH AUTHORIZED MAXIMUM SENTENCE OF CONFINEMENT OF MORE THAN ONE YEAR.

(a) MODIFICATION OF AUTHORITY.—

(1) IN GENERAL.—With respect to charges under chapter 47 of title 10, United States Code (the Uniform Code of Military Justice), that allege an offense, other than an offense specified in paragraph (2), that is triable by court-martial under that chapter for which the maximum punishment authorized under that chapter includes confinement for more than one year, the Secretary of Defense shall require the Secretaries of the military departments to provide for the determination under section 830(b) of such chapter (article 30(b) of the Uniform Code of Military Justice) on whether to try such charges by court-martial as provided in paragraph (3).

(2) EXCLUDED OFFENSES.—Paragraph (1) does not apply to an offense as follows:

(A) An offense under sections 883 through 917 of title 10, United States Code (articles 83

through 117 of the Uniform Code of Military Justice).

(B) An offense under section 933 or 934 of title 10, United States Code (articles 133 and 134 of the Uniform Code of Military Justice).

(3) REQUIREMENTS AND LIMITATIONS.—The disposition of charges pursuant to paragraph (1) shall be subject to the following:

(A) The determination whether to try such charges by court-martial shall be made by a commissioned officer of the Armed Forces designated in accordance with regulations prescribed for purposes of this subsection from among commissioned officers of the Armed Forces in grade O–6 or higher who—

(i) are available for detail as trial counsel under section 827 of title 10, United States Code (article 27 of the Uniform Code of Military Justice);

(ii) have significant experience in trials by general or special court-martial; and

(iii) are outside the chain of command of the member subject to such charges.

(B) Upon a determination under subparagraph (A) to try such charges by court-martial, the officer making that determination shall determine whether to try such charges by a general court-martial convened under section 822 of title 10, United States Code (article 22 of the Uniform Code of Military Justice), or a special court-martial convened under section 823 of title 10, United States Code (article 23 of the Uniform Code of Military Justice).

(C) The determination to try such charges by court-martial under subparagraph (A), and by type of court-martial under subparagraph (B), shall be binding on any applicable convening authority for a trial by court-martial on such charges.

(D) The actions of an officer described in subparagraph (A) in determining under that subparagraph whether or not to try charges by court-martial shall be free of unlawful or unauthorized influence or coercion.

(E) The determination under subparagraph (A) not to proceed to trial of such charges by general or special court-martial shall not operate to terminate or otherwise alter the

authority of commanding officers to refer such charges for trial by summary court-martial convened under section 824 of title 10, United States Code (article 24 of the Uniform Code of Military Justice), or to impose non-judicial punishment in connection with the conduct covered by such charges as authorized by section 815 of title 10, United States Code (article 15 of the Uniform Code of Military Justice).

(4) CONSTRUCTION WITH CHARGES ON OTHER OFFENSES.—Nothing in this subsection shall be construed to alter or affect the disposition of charges under chapter 47 of title 10, United States Code (the Uniform Code of Military Justice), that allege an offense triable by court-martial under that chapter for which the maximum punishment authorized under that chapter includes confinement for one year or less.

(5) POLICIES AND PROCEDURES OF THE MILITARY DEPARTMENTS.—

(A) IN GENERAL.—The Secretaries of the military departments shall revise policies and procedures as necessary to comply with this subsection.

(B) UNIFORMITY.—The General Counsel of the Department of Defense shall review the policies and procedures revised under this paragraph in order to ensure that any lack of uniformity in policies and procedures, as so revised, among the military departments does not render unconstitutional any policy or procedure, as so revised.

(6) MANUAL FOR COURTS-MARTIAL.—The Secretary of Defense shall recommend such changes to the Manual for Courts-Martial as are necessary to ensure compliance with this subsection.

(b) EFFECTIVE DATE AND APPLICABILITY.—Subsection (a), and the revisions required by that subsection, shall take effect on the date that is 180 days after the date of the enactment of this Act, and shall apply with respect to charges preferred under section 830 of title 10, United States Code (article 30 of the Uniform Code of Military Justice), on or after such effective date.

SEC. 568A. MODIFICATION OF OFFICERS AUTHORIZED TO CONVENE GENERAL AND SPECIAL COURTS-MARTIAL.

(a) IN GENERAL.—Subsection (a) of section 822 of title 10, United States Code (article 22 of the Uniform Code of Military Justice), is amended—

(1) by striking paragraphs (5) through (8);

(2) by inserting after paragraph (4) the following new paragraph (5):

"(5) the officers in the offices established pursuant to section 568A(c) of the National Defense Authorization Act for Fiscal Year 2014 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; or"; and

(3) by redesignating paragraph (9) as paragraph (6).

(b) NO EXERCISE BY OFFICERS IN CHAIN OF COMMAND OF ACCUSED OR VICTIM.—Such section (article) is further amended by adding at the end the following new subsection:

"(c) An officer specified in subsection (a)(5) may not convene a court-martial under this section if the person is in the chain of command of the accused or the victim.".

(c) OFFICES OF CHIEFS OF STAFF ON COURTS-MARTIAL.—

(1) OFFICES REQUIRED.—Each Chief of Staff of the Armed Forces specified in paragraph (5) of section 822(a) of title 10, United States Code (arti-

cle 22(a) of the Uniform Code of Military Justice), as amended by subsection (a), shall establish an office to do the following:

(A) To convene general and special courts-martial under sections 822 and 823 of title 10, United States Code (articles 22 and 23 of the Uniform Code of Military Justice), pursuant to paragraph (5) of section 822(a) of title 10, United States Code (article 22(a) of the Uniform Code of Military Justice), as so amended.

(B) To detail under section 826 of title 10, United States Code (article 26 of the Uniform Code of Military Justice), judges of courts-martial convened as described in subparagraph (A).

(C) To detail under section 827 of title 10, United States Code (article 26 of the Uniform Code of Military Justice), members of courts-martial convened as described in subparagraph (A).

(2) PERSONNEL.—The personnel of each office established under paragraph (1) shall consist of such members of the Armed Forces and civilian personnel of the Department of Defense as may be detailed or assigned to the office by the Chief of Staff concerned. The members and personnel so detailed or

assigned, as the case may be, shall be detailed or assigned from personnel billets in existence on the date of the enactment of this Act.

SEC. 568B. DISCHARGE USING OTHERWISE AUTHORIZED PERSONNEL AND RESOURCES.

(a) IN GENERAL.—The Secretaries of the military departments shall carry out sections 568 and 568A (and the amendments made by section 568A) using personnel, funds, and resources otherwise authorized by law.

(b) NO AUTHORIZATION OF ADDITIONAL PERSONNEL OR RESOURCES.—Sections 568 and 568A (and the amendments made by section 568A) shall not be construed as authorizations for personnel, personnel billets, or funds for the discharge of the requirements in such sections.

SEC. 568C. MONITORING AND ASSESSMENT OF MODIFICATION OF AUTHORITIES ON COURTS-MARTIAL BY INDEPENDENT PANEL ON REVIEW AND ASSESSMENT OF PROCEEDINGS UNDER THE UNIFORM CODE OF MILITARY JUSTICE.

Paragraph (2) of section 576(d) of the National Defense Authorization Act for Fiscal Year 2013 (Public Law 112–239; 126 Stat. 1762), as amended by section 546 of this Act, is further amended—

(1) by redesignating subparagraph (M) as subparagraph (N); and

(2) by inserting after subparagraph (L) the following new subparagraph (M):

"(J) Monitor and assess the implementation and efficacy of part IV of subtitle E of title V of the National Defense Authorization Act for Fiscal Year 2014, and the amendments made by that part.".