The Honorable James M. Inhofe
Ranking Mamber
United States Senate
Committee on Armed Services
Washington, DC 20510-6510

2 8 OCT 2013

Dear Senator Inhofe,

This responds to your October 15, 2013, letter seeking our views on the ability of the Services to implement the attached draft legislative proposal. We have chosen to write in unison as our concerns about the legislative proposal are shared across the Services. We are joined in this response by the Judge Advocate General of the Coast Guard, the Coast Guard being similarly affected by revisions to the Uniform Code of Military Justice (UCMJ). In fact, as currently drafted, the legislative proposal stands to affect the Coast Guard more acutely by precluding all Coast Guard officers from convening general courts-martial to try any offenses under the UCMJ.

The UCMJ is a composite of interconnected statutes that form our military justice system. Fundamental changes to the system's framework, such as those proposed by the draft legislation, cannot be undertaken without a comprehensive assessment of the broader effects those changes may have on the system as a whole. Enactment of the legislative proposal would require extensive statutory amendments and implementing executive orders. Without careful study of the proposal's effects, additional statutory changes, and significant revisions to the Rules for Courts-Martial through implementing executive orders, implementation of the draft legislation poses considerable risk to the stability of the military justice system. The legislative proposal could, for example, place convictions at risk for appellate reversal, much like what occurred following the 2006 revisions to Article 120, UCMJ. The following paragraphs illustrate some of the most significant concerns.

The proposal effectively establishes two parallel systems of justice: the status quo is purportedly maintained for military-specific and misdemeanor-type offenses, while for felony-type offenses, the legislative proposal creates a new office headed by an O-6 judge advocate to make case disposition decisions. However, the UCMJ is not neatly divided between misdemeanors and felonies as civilian systems are. For example, Article 134 includes both misdemeanor and felony level offenses, yet the proposed amendment indiscriminately prescribes the same treatment for all Article 134 offenses, without regard to the nature of each specified offense. The result is a mismatch between the offense and the judicial structure for handling the offense.

As a related matter, the legislative proposal fails to establish the process for disposition of cases in which the two systems intersect, i.e., in cases involving multiple offenses that fall into both systems. Such cases arise quite frequently in our practice. On its face, the legislative

proposal would result in parallel prosecutions for such cases, doubling the prosecution's caseload. The alternative is for one system to take the case in its entirety, which could give rise to jurisdictional problems given the proposed legislation's explicit provisions and would further erode a commander's authority over good order and discipline. In fact, the legislative proposal actually removes almost every military commander's authority to convene general courts-martial for members of their command, even for military-specific offenses. So, for example, the Division Commander of an infantry Soldier or Marine who refused an order to engage the enemy could not refer charges against his or her subordinate for trial by court-martial.

We are also concerned about the effect of the legislative proposal on the commander's ability to employ non-judicial disciplinary measures in instances of minor misconduct involving "included" offenses. A primary disciplinary tool presently available to commanders is Article 15, UCMJ, non-judicial punishment (NJP). NJP is the mechanism used by commanders to immediately hold service members accountable for misconduct of a nature and degree that does not warrant a criminal prosecution and conviction. Summary courts-martial provide another disciplinary tool to address minor misconduct; the summary court-martial is a trial but does not ordinarily result in a civilian conviction because of diminished due process rights for the accused. A service member has the right to demand trial by court-martial in lieu of either NJP (unless assigned to a vessel) or summary court-martial. This means that for cases sent back to the accused's commander for action because the O-6 judge advocate determines court-martial is not warranted, a service member's subsequent decision to invoke his right to demand trial by court-martial effectively removes the case from the commander's purview because the commander cannot convene a special or general court-martial. The legislative proposal is unclear as to what, if any, courses of action remain available to the commander.

As in the federal and state criminal justice systems, the military justice system uses plea bargaining to encourage judicial economy. The draft legislative proposal limits our ability to efficiently and effectively plea bargain. The increased complexity and ambiguity of separate trial systems, and the complicated interactions and division of authority between the convening authority and O-6 judge advocate, will introduce significant uncertainty into the process. Plea bargaining under this system will be less efficient, more cumbersome, and more expensive. The result will almost certainly be fewer plea bargains and more contested trials, which on many occasions is inconsistent with a victim's desire to avoid testifying at trial if a just result can be otherwise reached.

The draft legislative proposal fails to address an essential jurisdictional requirement for all general courts-martial, which are the military courts with authority to adjudge dishonorable discharges and confinement for more than one year. Specifically, before a case can be referred to trial by general court-martial, Article 32, UCMJ, requires a pretrial investigation (unless waived by the accused). The legislative proposal fails to make clear whether a pretrial investigation remains a statutory requirement and, if so, who has the authority to appoint an investigating officer to conduct that investigation. Additionally, the legislative proposal fails to address whether Article 34 staff judge advocate pretrial advice is still required prior to referral to general court-martial. These gaps in the legislative scheme create the possibility that an appellate court would overturn court-martial convictions.

This legislative proposal also raises constitutional due process concerns regarding the selection of court-martial personnel. It appears that it intends to give a single office the authority to appoint prosecutors, defense counsel, judges, and members (the military equivalent of jurors), to try each case. Appellate litigation might invalidate such a consolidation of power in one office. Additionally, the legislative proposal does not indicate how court members will be detailed; instead, the proposal references two unrelated articles of the UCMJ that address detailing of trial and defense counsel and military judges. Even if the proposal referenced only the articles that cover detailing military judges and trial and defense counsel, it would still face constitutional challenges.

Finally, the legislative proposal provides that implementation of the new system will be cost-neutral. Based on our input as to how each service would implement this proposal, the Department of Defense office of Cost Assessment & Program Evaluation determined that the additional personnel required by this proposal would cost the government an additional $113 million per year. The requirement for full-time O-6 judge advocate disposition authorities and the requirement that they be outside the chain of command exceeds the existing personnel inventory of the Services and does not consider the administrative support required for the creation and maintenance of these new duties. Implementing the draft legislative proposal on a cost-neutral basis would significantly impact other capabilities. While standing up entirely new offices that require O-6 judge advocate leaders with substantial military justice training creates baseline administrative costs, the more pressing concern for our communities is the cost in terms of diverted expertise we require elsewhere. The requirement for full-time O-6 judge advocates to serve as disposition authorities necessarily removes these officers from critical billets as military judges, senior prosecutors and defense attorneys, and staff judge advocates for our senior commanders, and the development of an adequate pool of replacement judge advocates is a process that will take years to complete.

In sum, we have grave concerns about this draft legislative proposal and we thank you for the opportunity to provide these comments. As leaders of our respective legal communities we must continue to ensure the effective administration of military justice within our Services. The draft legislative proposal puts that important end state in jeopardy. We are grateful for your continued interest in ensuring that our justice system holds offenders appropriately accountable, protects the due process rights of the accused, provides justice to victims, and maintains the highest standards of discipline.

Sincerely,

FLORA D. DARPINO
Lieutenant General, U.S. Army
Judge Advocate General of the Army

NANETTE M. DeRENZI
Vice Admiral, U.S. Navy
Judge Advocate General of the Navy

RICHARD C. HARDING
Lieutenant General, U.S. Air Force
Judge Advocate General of the Air Force

VAUGHN A. ARY
Major General, U.S. Marine Corps
Staff Judge Advocate to the
Commandant of the Marine Corps

FREDERICK J. KENNEY
Rear Admiral, U.S. Coast Guard
Judge Advocate General of the Coast Guard