INFORMATION PAPER

FOR: Legal Counsel to the CJCS

FROM: Deputy Legal Counsel, Legislative Affairs

SUBJECT: Senator Gillibrand Floor Amendment to S. 1197

1. Purpose. This information paper provides analysis of Senator Gillibrand's proposed floor amendment to the National Defense Authorization Act of Fiscal Year 2014. First, this paper will provide a list of statutory concerns with the bill, i.e. ways in which this bill contradicts other sections of the Uniform Code of Military Justice. Second, this paper will address other serious (non-statutory) impediments to implementation. This paper does not address cost or additional resources required to implement this draft legislation.

As a result of Congress's constitutional authority under Article I, Section 8 to "constitute tribunals inferior to the Supreme Court;" "make Rules for the Government and Regulation of the land and naval Forces;" and "To provide for the organizing, arming, and disciplining, the Militia," the Articles of War, and eventually, the UCMJ, were passed into law. The hallmark of the UCMJ, historically and in its current form, is the nature of command authority; military commanders are primarily responsible for the maintenance of good order and discipline in the armed forces. Courts-martial are not standing entities, but rather, ad hoc judicial bodies which only exist after formal action at the behest of a commander authorized to convene courts. It is not clear what second and third-order effects the proposed legislation would have by statutorily erasing the authority of the military's top-commanders to convene courts without a fully-developed system to fill the void.

2. Statutory Flaws in the Proposed Legislation

a. Articles 22 & 23.

(1) Title 10, Section 822 (Article 22) establishes general court-martial convening authority (GCMCA). This proposed legislation removes all commanding generals that currently have GCMCA from the list in 10 U.S.C. § 822. Section 823 establishes special court-martial convening authority (SPCMCA), and is not addressed by the proposed legislation. Section 823 refers back to the list in § 822 that establishes general court-martial convening authorities (GCMCAs), and incorporates that list by reference, stating that those commanders also have SPCMCA. The same is true for Summary Court-Martial Convening Authority (SCMCA) as provided in 10 U.S.C. § 824. Therefore, under this proposed legislation, no general within the Service chain of command may convene any court-martial: general, special or summary. This change therefore would preclude oversight by the commanding general on court-martial matters in his or her subordinate units, including in cases where the commanding general disagrees with a subordinate's decision to dispose of misconduct at a low level, where a superior general seeks to take control of a case due to its gravity, or when the general or admiral has relieved a subordinate commander. This is also problematic for personnel who are assigned to headquarters staffs. Any service member who is assigned to division (or equivalent) staffs or higher, including on deployment, would be without a convening authority, unless the relevant Secretary concerned were to convene courts.

(2) This change to § 822 also undermines an important means of civilian oversight of the military justice system. Section 822 currently provides that GCMCA devolves from the Secretary of the military department by designation, if not provided in the statute itself. The proposed legislation would shift that authority to the military Service Chief, who would make the assignments to the new convening authority office. Therefore, the civilian Secretary has lost his or her control over the convening of military courts, an important aspect of control over the military justice system.

(3) This proposed legislation conflates the original disposition decision and the level of disposition. The original disposition decision is the combined question of what to charge, and what forum is appropriate for the adjudication. Level of disposition refers to *who* is making that decision. The UCMJ currently contemplates that the original disposition decision may change, as the process moves toward trial, as more information is known, and perhaps as plea bargain negotiations are conducted. This proposed legislation makes the original disposition decision binding, which creates an inflexibility present in no other criminal justice system.

b. Article 32 Investigations. This proposed legislation does not contemplate investigations under 10 U.S.C. § 832 (Article 32), and therefore contradicts existing statutory procedures. The investigation process under § 832 does not have a direct analogy in the civilian justice system, but has been described as a hybrid of a grand jury investigation and a preliminary inquiry. It is a due process right of the accused to have all charges vetted by an impartial officer before they can be referred to a GCM.

(1) Who will appoint the Article 32 Investigating Officer (IO)? Section 833 implies that the SPCMCA is expected to appoint the Article 32 IO. Most service regulations require the SPCMCA or the summary court-martial convening authority to appoint the IO. In the proposed legislation, that authority is ambiguous, and possibly does not rest with anyone.

(2) How would the commanding officer forward charges in Article 33? In Article 33, the "commanding officer" is expected to forward charges to the GCMCA. If the commanding officer is no longer the initial disposition authority, then how would one ensure that investigations under 10 U.S.C. § 832, an integral piece in general court-martial practice and an important due process right of the accused, are incorporated into this new military justice system?

(3) Whose staff judge advocate (SJA) writes the letter required by 10 U.S.C. § 834 (the Article 34 advice letter)? Where does it go? Section 834 requires the SJA to provide advice to the convening authority. The SJA's client is the command, and he or she serves a general counsel-type role for the commanding general. Every current GCMCA has the advice of an SJA, who provides this letter. Charges cannot be referred to a GCM without the Article 34 advice letter.[1] The above three sets of questions about the Article 32 investigation process are unaddressed by the proposed legislation, which means the process remains a due process right of the accused, without a mechanism to ensure that it can be provided. In addition, Article 34 creates a jurisdictional hook – a general court-martial cannot go forward without the SJA having satisfied Article 34 – which means this proposed legislation could create a basis for challenging convictions on appeal.

[1] The most likely resolution of this conflict, so as to comply as closely as possible with the new statute, would be to require the new disposition authority, who is an attorney, to have an SJA as well. That would effectively double the cost associated with the added manpower requirement established in this proposed legislation.

c. Article 60 Convening Authority's Action (CAA) and the role of the Staff Judge Advocate (SJA).

(1) This proposed legislation does not contemplate the requirements in 10 U.S.C. § 860 (Article 60). Section 860 establishes the framework for post-trial convening authority's action. The procedures established in § 860 are "a matter of command prerogative involving the sole discretion of the convening authority." It is unclear how to apply such a statute when the convening authority is not exercising command prerogative.

(2) How do clemency procedures work with the new convening authority? A "Staff Judge Advocate's Recommendation" (SJAR) is an integral part of the post-trial process. Statutorily, the SJA has to weigh in, prompting a similar problem as that presented by the Article 34 advice letter.

(3) Post-trial processing is the most common issue taken up on appeal. These statutory flaws in the proposed legislation (even if they were merely ambiguities) virtually guarantee a substantial uptick in remands and appellate relief. Much like the Article 32 investigation process, this process is left intact by the proposed legislation, but without conforming amendments. Therefore, it represents another statutory right for the accused without a process through which it can be provided.

d. Article 15 Non-Judicial Punishment (NJP). NJP is a leadership tool providing military commanders a prompt and essential means of maintaining good order and discipline, established in 10 U.S.C. § 815. In order to impose NJP, a service member is notified by the commander of the nature of the misconduct of which he is accused, the evidence supporting the accusation, and the commander's intent to impose NJP. The commander holds a hearing where the accused may offer evidence and have a spokesperson on his behalf. Section 815 affords the service member a right to turn down NJP and demand trial by court-martial. NJP itself is not a criminal conviction, it is an administrative punishment. Under the proposed legislation, the ability of the commander will be compromised in a few ways.

(1) The proposed legislation's Felony Court-Martial Decision Authority (FCMDA)[2] would not have non-judicial punishment authority under § 815 because it only inures to commanders. The FCMDA cannot tell the commander how to exercise his/her decision-making authority, especially where the commander is a flag officer and therefore outranks the FCMDA. However, under this legislation, commanders may not be able to make the decision to NJP for non-excluded charges. The proposed legislation is not clear about how charges that will not end up at court-martial should be handled. Perhaps most importantly, there is no mechanism to address NJP refusal (demand of trial by court-martial). NJP is rendered a useless tool if the commander cannot follow-up on its refusal.

(a) For example, 10 U.S.C. § 923 (Article 123) is the military's punitive forgery statute, and has a maximum punishment of five years. Under the proposed legislation, a commanding officer would not have authority to instill discipline related to forgery-related misconduct. Forgery can be anything from

[2] This term was created for the purposes of this information paper for ease of reference. The authority is not given a title in the proposed legislation.

falsifying an order, an inherently military defense but a serious one, to trying to alter a liberty card,[3] a disciplinary infraction that must be punished, but is not likely to be viewed as a felony-level offense. Both of these examples are most appropriately handled within the command. For the liberty card example, one likely outcome under the current system could be non-judicial punishment, at the discretion of the commander, but that outcome might be precluded by this proposed legislation.

(b) Under the proposed legislation, a forged "hall pass" offense under § 923 would have to be forwarded to the FCMDA, who is likely not collocated with the command, from anywhere around the world, before it can be resolved through NJP. Each service has many thousands of NJPs issued each year. If roughly half of the UCMJ offenses are left to the FCMDA's disposition, then roughly half of those would have to be processed through Washington before they could be adjudicated locally.

(2) If a service member is presented with the decision of whether to accept NJP, especially for cases that involve an offense listed as under the FCMDA's purview, the commander does not have an enforcement mechanism. Currently, the chain of command enforces the commander's decision to impose NJP. If NJP is refused, either that commander, or a commander within the chain, would take that service member to court-martial. The configuration established by the proposed legislation – with an attorney outside the chain of command making decisions about court-martial – undermines the commander's use of NJP as an administrative disciplinary tool, and it is unclear in practice how to apply 10 U.S.C. § 815 under the circumstances.

(a) Under the example provided above, where a small potatoes forgery case must be vetted through an outside unit for disposition decision before there can be an NJP, that decision is also, according to the statute, a binding decision. Therefore, if the accused service member refuses NJP, then he or she will not be held accountable.

(3) NJP is particularly useful as a disciplinary tool because of its expeditiousness. In the Navy, shipboard service members cannot demand a court-martial in lieu of NJP (as other service members can) because of the impracticality and delay associated with NJP refusal. For many offenses under this proposed legislation, if misconduct is committed aboard a ship that is under way, the disposition decision will not lie with the officers on that ship, thus creating a serious impediment to maintenance of good order and discipline at sea.

e. Summary Court-Martial (SCM). This is the lowest level of court-martial in the military justice system. It is similar to NJP in that it is an administrative hearing that promptly adjudicates minor offenses, and does not result in a criminal conviction. Typically, SCMs are handled internally in the command, taking advantage of the expeditiousness of this process. A SCM conviction, because of the looser due process protections for the accused, is not equivalent to a civilian conviction, whereas SPCMs and GCMs do follow service members on their criminal records once they leave service.

(1) The FCMDA may have the authority to convene a summary court-martial (SCM) if he or she is the convening authority, but cannot tell the commander how to exercise his/her decision-making authority. Under this proposed legislation, commanders may not be able to make the decision to convene a summary court-martial for non-excluded charges, much like the scenarios discussed above with respect

[3] A pass for OCONUS bases that establishes different curfews to service members in different liberty statuses.

to NJP. Also like NJP, there is no mechanism to address summary court-martial refusal (demand of trial by special or general court-martial). Even in most foreign militaries that have removed the commander from the justice system, including our Commonwealth allies, summary trial authority remains within the command.

(2) There are many potential articles implicated by this proposed legislation that would provide impasses to justice. Other examples of frequently used offenses that the commander could no longer bring to NJP or SCM (aside from Article 123 (Forgery) as discussed above) are: 10 U.S.C. § 927 (the military's punitive extortion statute), which criminalizes any communicated threat to extort anything of value or advantage; many types of assaults under 10 U.S.C. § 928 (the punitive statute that encompasses all assaults and batteries aside from sexual assault) that could arise in a bar fight-type environment have maximum punishments of greater than two years; and barracks larcenies under 10 U.S.C. § 921 (the punitive statute that addresses larcenies and wrongful appropriation, i.e. all theft charges) allhave maximum punishments of greater than two years confinement.

f. Plea Negotiations. Separations or resignations in lieu of trial, NJP, and summary court-martial are all important tools in plea negotiations. Those powers reside with the commander or commanding general. Many of the pre-trial agreements (PTAs) currently used throughout the military will take a case out of court-martial in exchange for a guaranteed guilty plea at NJP or summary court-martial, or an admission of guilt and a discharge, often with a negative characterization of service. Because the commander owns all of those processes, he or she is able to contract with the accused in a PTA. A commander outside the chain of command cannot bind the commander in his or her agreement with the accused, i.e. a convening authority outside the chain of command cannot make contractual promises on behalf of the commanding officer. Therefore, these types of PTAs would not be able to be negotiated in an enforceable manner under the proposed legislation. Many more trials are likely to be contested (at a large cost in terms of time, money, and manpower) because commanders will not have the authority to plea bargain. Many service members may end up with criminal convictions in cases where administrative punishment would have been more just, and many will not be held accountable because of the high burden of proof required for criminal conviction.

g. Unlawful Command Influence. All of the Services have moved toward ensuring that the chains of command for defense counsel, including officers who are responsible for detailing defense counsel, are distinct and separate from the commands of the trial counsel and the accused. Defense counsel must have the autonomy necessary to avoid command interference in representation of the accused. Similar concerns about the autonomy of judges have prompted greater professionalization over time of military judges. The proposed legislation assigns detailing for the trial counsel, defense counsel, and military judge all to the new convening authority office. In other words, the government can stack the deck by picking the attorneys serving in all three roles, risking unlawful command influence, conflict of interest and constitutionality problems.

(1) Detailing of Court-Martial Members, Trial Counsel, Defense Counsel, and Military Judges is Drafted Nonsensically. Section 568A(c)(1)(C) of the proposed legislation must have a typo in it – it should refer to only one of 10 U.S.C. § 825, 10 U.S.C. § 826, and 10 U.S.C. § 827, but instead appears to be referencing all three. Even if this is a typo and is corrected, these provisions reflect a return to an antiquated version of the military justice system, where detailing of all parties was done centrally, by one

authority. All of the services have moved away from this because of conflict of interest, moral and ethical concerns. There is a robust appellate case law establishing that the authority to appoint attorneys to serve as prosecutors, defense counsel, or judges, must be separate in order to protect the accused and the integrity of the process.

h. Article 10. Section 810 of Title 10 provides speedy trial rights to the accused if he or she is placed in pretrial confinement. The Sixth Amendment also provides constitutional speedy trial rights. Any proposed legislation that will lengthen prosecution processing times must consider the potential effect on the ability to meet speedy trial obligations. If the statutory or constitutional speedy trial clocks are violated, then accused service members who were likely placed in pretrial confinement due to their dangerousness could go free and unpunished.

i. Distribution of Included/Excluded Criminal Offenses. For the purposes of the discussion below, there are three types of offenses as established by the statute: 1) included offenses (10 U.S.C. § 880-882, 918-932 with maximum punishment greater than two years confinement), which reside with the FCMDA; 2) excluded offenses (10 U.S.C. § 883-917, 933-934), which reside with the commander; and 3) unmentioned offenses (10 U.S.C. § 880-882, 10 U.S.C. § 918-932 with maximum punishment of two years or less of confinement).

(1) How are cases that involve multiple charges, some of which would fall under the FCMDA's purview and others of which would fall under the SPCMCA's purview, handled? Would there have to be two courts-martial? What are the double-jeopardy implications of adjudicating different charges associated with the same set of facts in two different trials? Does the term "excluded offenses" preclude the disposition authority from considering those charges? These issues of ambiguity will jeopardize prosecutions, convictions and due process, including dragging cases along for victims who have an expressed interest in expeditiousness.

(2) Potential charges involved in a case are not always clear at the initial disposition phase. Further investigation by the military criminal investigative organization (MCIO) or an Article 32 investigation might yield a recommendation that different charges are more appropriate or perhaps simply more "provable." Does the process start over at that point? The statute is silent on how the included, excluded, and unmentioned offenses interact. What does that do to speedy trial rights of the accused, and the interest of expediting justice for the victim?

(3) Title 10, Section 880 (attempted commission of a UCMJ offense) is an included offense under the proposed legislation. Therefore, an attempt of a crime such as drug distribution, child pornography or espionage must be handled by the FCMDA, but the crime itself could be handled by the commander him or herself, creating obvious logical incongruities, as well as implementation problems.

(4) What would prevent an accused from making a jurisdictional complaint if charges are altered pre-referral, at court-martial, upon findings, or even after findings for sentencing? In other words, if an accused ends up convicted of a lesser included offense (LIO) or different offense than the one their disposition authority considered, that could be read as a cause for reversal if someone else should have been making the decision to take the case to court.

(5) Are offenses with a maximum punishment of less than two years of confinement that are not among "excluded offenses" (identified above as "unmentioned offenses"), a third category of offenses to which this legislation does not apply? Would whatever the interplay is between the FCMDA and the SPCMCA/commander therefore not apply to those offenses? These issues arise in cases that have more than one potential charge associated with them, which are common, such as a sexual assault case (10 U.S.C. § 920, punishable by more than 2 years confinement) that also involves possible adultery (10 U.S.C. § 934, punishable by 2 years confinement) and assault charges (10 U.S.C. § 928, depending on the type of assault, possibly punishable by less than 2 years confinement). LIOs are also implicated in this discussion – how do lesser included offenses factor into the analysis, especially considering that 10 U.S.C. § 880 (attempt of any crime) is an "included offense"? Attempt is an LIO of every crime and all LIOs are implied on the charge sheet, not explicitly written out or necessarily considered in the disposition decision. If the lesser offense (e.g. attempt) must be disposed of by the FCMDA, but the greater is disposed of by the commanding officer, and neither has the authority to do both under the proposed legislation, that will lead to implementation problems.

(6) There are many inconsistencies, some discussed above, in the distribution of offenses into the excluded, included, and unmentioned category. Another example is that indecent broadcasting (10 U.S.C. § 920c) is not excluded, but distribution of child pornography (under 10 U.S.C. § 934) is excluded. The lack of logic in the distribution makes interpretation of these statutes, including the question of what case should be reviewed by which authority (or aspect of a case, if cases are to be split into two for disposition), all the more difficult.

(7) The UCMJ is not easily divided into "felony" and "misdemeanor" crimes, or "military" and "common law" offenses. It appears that the division in the proposed legislation is meant to apply these civilian ideas to the military context. However, the end result is an attempt to fit a square peg in a round hole. Trying to think about the military justice system along these lines does not fit logically within the UCMJ – a much more comprehensive bill and study of the system would be the only way to accomplish such distinctions, if they are deemed necessary.

3. Concerns about Implementation and the Current Regulatory Regime. The Manual for Courts-Martial, which includes the Rules for Courts-Martial (RCMs), the Military Rules of Evidence, and other sources of guidance for the provision of military justice, has evolved over time and represents a robust set of intertwined and interdependent provisions. Adjustment to a new statutory scheme will not be without cost within the Executive Branch, as the Manual for Courts-Martial will require substantial revision to accommodate the changes made by this proposed legislation. Such revision will have to be done holistically.

a. Rank Inconsistency. The military is a hierarchy, based fundamentally on rank. This proposed legislation would reduce decisions that mostly reside with a flag officer to that of an O-6 officer. There are many considerations upon which the promotion to general or admiral is based, and many educational opportunities and resources are spent to ensure that our flag officers are equipped to make flag-level decisions. The GCMCA authority is not to be considered lightly, and should typically reside with a flag officer. Moreover, this new system would fundamentally put flag officers at odds with the decision of a lower-ranking officer, and allows the lower-ranking officer to trump the flag.

(1) Another ramification of this proposed legislation is that no one can challenge inaction on the part of the new convening authority. Under the current system, any commander, all the way up the chain, can second-guess the decision-making of his or her subordinate, and convene a court-martial. Under this proposed legislation, those tools for accountability will be precluded.

b. Time. This proposed legislation will increase the time associated with trying cases substantially.

(1) Currently there are some GCMCAs that are not geographically collocated with their units. Cases within those commands typically take longer to get to trial than an average case with a GCMCA with geographic proximity. There are operational reasons that necessitate spreading out some of these units, but the services minimize that practice to the maximum extent possible in the interest of efficiency, in order to honor the speedy trial rights of the accused, and to ensure that victims do not have to wait longer for justice than is absolutely necessary.[4] Currently, this is not a problem for smaller cases such as run-of-the-mill SPCMs involving a barracks larceny or a simple bar fight, which can be handled locally, but now those cases would also be delayed through this process because they will have to go to the National Capital Region for disposition.

(2) Case law mandates that post-trial processing be completed within certain timelines, or there is a risk of a constitutional due process violation.[5] Any delay to post-trial processing due to geographic constraints and distance increases the risk of appellate relief and potentially even reversal. These risks are substantial for deployed or forward based units.

(3) Pre-trial processing timelines, established in RCM 707, require the accused to be brought to trial within 120 days of preferred charges or pre-trial confinement. For service members who are confined, the additional time associated with sending a case for initial disposition to an outside organization could lead to dismissal for pre-trial delay under the existing rule.

c. Officer Cases. This bill will make it much more difficult to try officer cases. Officers cannot be confined or dismissed at SPCM, so as a matter of practice, all officer cases go to GCM, even for the most inherently military-related charges, or for the most misdemeanor-like cases. Therefore, under this proposed legislation, no officer will be accountable to his or her commander under the military justice system.

d. Pre-trial restriction or confinement can only be ordered by the commander, and can only be imposed with a view to court-martial. Under RCM 305, the accused cannot stay in confinement if the commander does not intend to bring that service member to trial. If the commander does not make the court-martial decision, then the commander statutorily (under 10 U.S.C. § 810) can no longer compel pre-trial restraint (restriction or confinement), a dangerous and untenable outcome.

e. Article 30(b) establishes current statutory disposition decision authority. It refers to preferral of charges as the first step, and disposition decisions coming after that. However, in practice, because the commander is the convening authority, the decision to prefer is done concurrently with the initial

[4] These are the military justice reasons to minimize geographical disparity. There are also, of course, operational reasons for a commanding general to be geographically collocated with his or her troops.

[5] The seminal decision in this case is *United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006).

disposition decision. This division of the two decisions would at the very least create bureaucratic delay. First, the decision would be made to prefer charges after some consideration, then the FCMDA would reconsider and do an additional analysis before making a disposition decision, and then the case would go to the convening authority for referral.

f. Every statutory objection above has at least one corresponding Rule for Courts-Martial that would be implicated. If this proposed legislation were to pass, RCM 304, 305, 306, 307, 401, 402, 403, 404, 405, 406, 407, 501, 502, 503, 504, 505, 506, 601, 603, 604, 702, 703, 704, 705, 706, 1101, 1105, 1106, 1107, 1108, 1109, 1112, 1113, 1114, 1210, 1301, 1302, 1306 would all require redrafting, and in many cases substantive revision. Practically, this means that procedures are not in place to effectuate the change in the proposed legislation. The Services will be faced with the choice between prosecuting under the wrong rules, using extended litigation efforts and longer trials to sort out discrepancies and hoping that any resulting convictions survive upon appeal, or grinding prosecutions to a halt while rewriting the Manual for Courts-Martial. Neither outcome is in the best interest of victims, nor is either outcome likely to increase confidence in the judicial process.

g. Appellate Litigation. If this proposed legislation passes, the appellate court system will be the only remaining tool to resolve the resulting statutory conflicts. That process is cumbersome, and it often takes many years to resolve and undo faulty legislation. Every change of the Uniform Code of Military Justice risks appellate scrutiny and potential overturning of convictions in the implementation. One example is the 2007 revision to 10 U.S.C. § 920, which had to be overhauled in 2012 because the Court of Appeals for the Armed Forces ruled that it contained an unconstitutional burden shift in 2011, after three years of litigation, during which sex offenders' convictions were challenged on appeal. Each of the statutory and regulatory concerns above could lead to appellate litigation, which would jeopardize convictions and ultimately undermine the military's ability to hold offenders accountable. If legislation is passed, it can avoid extensive appellate litigation by being well-drafted and statutorily consistent with the rest of the UCMJ.

h. Applicability to the Coast Guard. This proposed legislation does not contemplate application to the Coast Guard. That will either mean that no officer in the Coast Guard will have the authority to convene a general court-martial, or that the Navy will be expected to try all Coast Guard cases.