

TECHNICAL CONCERNS WITH SENATOR GILLIBRAND'S PROPOSAL TO MODIFY MILITARY JUSTICE SYSTEM

- 1. No officer in the Coast Guard would be authorized to convene a general court-martial.** Senator Gillibrand's proposal eliminates most general and flag officers' authority to convene general courts-martial, including that of every Coast Guard flag officer who is now a general court-martial convening authority. The bill authorizes the Chief of Staff of the Army, the Chief of Naval Operations, the Chief of Staff of the Air Force, and the Commandant of the Marine Corps to appoint convening authorities to, in essence, replace most of the current general court-martial convening authorities. But the proposal does not authorize the Commandant of the Coast Guard to do so. As a result, absent authorization by the President, no one in the United States Coast Guard would be able to convene a general court-martial under Senator Gillibrand's proposal. While this oversight could be cured by amending the legislation to authorize the Commandant of the Coast Guard to appoint convening authorities, the accidental elimination of the Coast Guard's general court-martial convening authority is indicative of the practical difficulties that the legislation would create and the lack of understanding of how its provisions would affect the military justice system in practice.
- 2. The prerequisites for a general court-martial are unclear.** The UCMJ currently requires an Article 32 pretrial investigation and the convening authority's Article 34 advice letter before a convening authority can refer a case to a general court-martial. The proposed legislation does not alter those requirements. Yet it provides that the new judge advocate disposition authority's decision to try charges and choice of court-martial level (i.e., general or special court-martial) "shall be binding on any applicable convening authority for a trial by court-martial." The resulting inconsistencies could give rise to successful jurisdictional challenges by service members who are charged with offenses referred under the new procedures.
- 3. The proposed legislation would diminish commanders' nonjudicial punishment authority.** Nonjudicial punishment is an important tool commanders use to correct inappropriate and unacceptable behavior by subordinates and is crucial to maintaining mission readiness and good order and discipline. The proposed legislation would diminish its effectiveness. The new judge advocate disposition authorities that the legislation creates would not have nonjudicial punishment authority, which by statute must be imposed by "commanding officer[s]." Art. 15, UCMJ, 10 U.S.C. § 815 (2012). While the proposed legislation purports to allow commanding officers to refer a charge to a summary court-martial or impose nonjudicial punishment after the judge advocate disposition authority has declined to prosecute the charge by general or special court-martial, the legislation creates practical impediments to doing so. First, service members have the right to refuse to be tried by summary courts-martial or, except for those attached to or embarked in vessels, to be subjected to nonjudicial punishment. Under current law, a major incentive for a service member to submit to nonjudicial punishment or trial by summary court-martial is the knowledge that if he or she refuses, the special court-martial convening authority may then refer charges against them to a special court-martial. Under the

legislative proposal, however, the service member's decision whether to accept nonjudicial punishment or trial by summary court-martial would be made only after the judge advocate empowered to refer the charge to a special or general court-martial has elected not to do so. At best, this will result in major delays before commanders can impose nonjudicial punishment for covered offenses, thus substantially diminishing nonjudicial punishment's utility as a corrective tool. At worst, it will result in a situation where service members can – or believe they can – refuse nonjudicial punishment with impunity. A less mission capable, less disciplined military would be the result.

4. **Speedy Trial Concerns.** Article 10 of the UCMJ, 10 U.S.C. § 810, 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.

5. **Jurisdictional Challenges.** The proposed legislation allows commanders to refer some types of charges – largely but not exclusively military-specific offenses – to court-martial. Yet the proposed statute precludes a commander from referring any attempt or conspiracy offense to a general or special court-martial, even if the commander would have the authority to exercise jurisdiction over the completed offense. What happens, then, when the prosecution seeks to prove a completed military offense but succeeds in proving only an attempt? Under current law, the court-martial could find the accused guilty of attempt. But under the proposed legislation, the defense could make a potentially meritorious argument that the court-martial has no jurisdiction over an attempt because the convening authority had no power to refer an attempt charge to the court-martial. The legislation also presents practical difficulties because many criminal acts involve violations of multiple articles of the UCMJ, some of which may be within a commander's power to refer and some of which may not. Will the same criminal act then become the subject of two different courts-martial? If so, the defense may be able to advance a potentially meritorious double jeopardy challenge. The 2006 amendments to Article 120 led to years of uncertainty, delay in trials due to widespread interlocutory appeals, and, ultimately, the loss of convictions that would have been unassailable under the previous law. This legislation creates the potential for a similar outcome.

6. **Plea bargaining.** As in most criminal jurisdictions, plea bargaining plays an important role in the military justice system. Plea bargaining not only promotes the timely resolution of charges, but also often shields victims from potentially traumatic testimony and cross-examination. Separations or resignations in lieu of trial, nonjudicial punishment, and summary courts-martial are all important tools in plea negotiations, as is the authority to accept a plea of guilty to an attempt rather than the completed offense. Those powers currently reside with the commander. 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 nonjudicial punishment or summary court-martial, or an admission of guilt and a discharge, often with a negative characterization of service. Other pretrial agreements resolve the case by allowing the accused to plead guilty at a court-martial to a lesser offense – which may no longer fall within the commander’s authority under the proposed legislation. Because commanders can exercise authority over all of those disposition methods, they are able to contract with the accused in a PTA. 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 time, money, manpower, and trauma to victims who would prefer that the case be resolved without a trial on the merits) due to commanders’ diminished ability to enter into binding plea bargains.

7. Convening Authority Office’s Power to Pick the Judge, Prosecutor, and Defense Counsel. The military justice system protects its integrity by separating the power to select each court-martial’s military judge, prosecutor, and defense counsel. The legislative proposal would revert to a previous era by consolidating the power to detail those three disparate positions in the office of the convening authority. No American civilian criminal justice system would concentrate the power to appoint those positions in one official. Nor should the military justice system. (This portion of the proposed bill also misidentifies section 827 of title 10, United States Code as “article 26 of the Uniform Code of Military Justice,” further suggesting the lack of understanding of the system with which the bill was drafted.)