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**REPORT ON LEGISLATION BY THE  
MILITARY AFFAIRS & JUSTICE COMMITTEE  
AND THE SEX & LAW COMMITTEE**

**S.1752**

**Sen. Gillibrand**

To reform procedures for determinations to proceed to trial by court-martial for certain offenses under the Uniform Code of Military Justice, and for other purposes.

**Military Justice Improvement Act**

**THIS BILL IS APPROVED**

The Military Affairs and Justice Committee and the Sex and Law Committee of the New York City Bar Association support the Military Justice Improvement Act of 2013, S.1752 (“MJIA”) because it would amend the Uniform Code of Military Justice (“UCMJ”) to change the designation of key decision-making authority (“convening authority”) for courts martial.<sup>1</sup> In keeping with the practices many prudent commanders already follow, this revision puts legal decisions in the hands of experienced prosecutors independent from the chain of command, for serious crimes that are not uniquely military in nature. This much needed piece of legislation, which has received bipartisan support, offers an opportunity to modernize our military justice system and address the epidemic of sexual assault in our military.

Since 1775, the United States has continuously amended and modernized our military justice system. For example, in 1950, Congress passed the Uniform Code of Military Justice (“UCMJ”), creating a unitary, modern code for all of the Armed Services.<sup>2</sup> A year later, a joint committee of the services drafted a new Manual for Courts Martial (“MCM”).<sup>3</sup> Since 1950, Congress has passed periodic important reforms to the UCMJ and the MCM.

The Military Justice Improvement Act continues this tradition. The 1775 system, inherited from the British royalty, gave almost absolute discretion to the commander.

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<sup>1</sup> S.1752, 113th Cong. (1st Sess. 2013) (the Military Justice Improvement Act of 2013).

<sup>2</sup> United States Code, Title 10, Subtitle A, Part II, Chapter 47 (1950).

<sup>3</sup> Manual for Courts Martial, United States (1951), available at [http://www.loc.gov/rr/frd/Military\\_Law/pdf/manual-1951.pdf](http://www.loc.gov/rr/frd/Military_Law/pdf/manual-1951.pdf) (last visited Feb. 11, 2014).

Subsequent amendments, however, provided military members with assurance that they would not be subject to arbitrary or unfair actions at the hands of commanders—however rare—whose professionalism is not up to standard.<sup>4</sup>

The Act restores the United States' international leadership role in military affairs. In the words of one former career JAG a “revolution that has taken place and is taking place within the military justice systems of other democracies that share a common law tradition revolution,” changing the role of the commander.<sup>5</sup> Most world militaries that share this monarchy-derived tradition with us have revamped their military justice systems and removed the disposition of certain crimes outside of the chain of command to be handled independently by trained prosecutors or commissions.<sup>6</sup> For example, independent prosecutors in the British Military system make trial decisions for all crimes through the Service Prosecuting Authority within Britain's Ministry of Defence.<sup>7</sup> Further, for those countries that have shifted from a command-centered system reported, “[N]o evidence has been presented that the readiness or unit cohesion of these militaries has declined because commanders are not handling criminal cases.”<sup>8</sup>

There is widespread agreement that legitimacy is an essential feature of any system of criminal justice. When the criminal process is perceived as fair and legitimate, its decisions are more likely to be accepted as accurate.<sup>9</sup> Many sexual assault survivors cite a lack of confidence in the military justice system—concern that no conviction or even formal prosecution will result and fear of reprisals. Even the current top military leadership admits the current system is far from adequate for this purpose. As Commandant of the Marine Corps General James F. Amos stated in 2013, victims do not come forward because “they don't trust the chain of command.”<sup>10</sup>

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<sup>4</sup> Victor Hansen, *Changes in Modern Military Codes and the Role of the Military Commander: What Should the United States Learn from this Revolution?* 16 Tul. J. Int'l & Comp. L. 419, 421 (2007-2008); George Breckenridge Davis, *A Treatise on the Military Law of the United States* 339-43 (1913).

<sup>5</sup> Hansen, *supra* n.5, at 421.

<sup>6</sup> *Id.*; Military Justice: Adjudication of Sexual Offenses — Australia, Canada, Germany, Israel, United Kingdom, Law Library of Congress (July 2013), available at [http://www.law.yale.edu/documents/pdf/conference/MilitaryJusticeAdjudicationofSexualOffenses\\_LawLibraryofCongress.pdf](http://www.law.yale.edu/documents/pdf/conference/MilitaryJusticeAdjudicationofSexualOffenses_LawLibraryofCongress.pdf) (last visited Feb. 11, 2014); Eugene R. Fidell, *International Developments in Military Law*, 17 Can. Crim. L. Rev. 83 (2013).

<sup>7</sup> Ministry of Defence, Service Prosecuting Authority, <http://spa.independent.gov.uk> (last updated December 20, 2013).

<sup>8</sup> Center for American Progress, *Twice Betrayed: Bringing Justice to the U.S. Military's Sexual Assault Problem at 33* (November 2013), <http://www.americanprogress.org/wp-content/uploads/2013/11/MilitarySexualAssaultsReport.pdf>.

<sup>9</sup> See, e.g., Note, Prosecutorial Power and the Legitimacy of the Military Justice System, 123 Harv. L. Rev. 937, 942 (2010).

<sup>10</sup> Gidget Fuentes, “Tough talk tangles anti-assault effort”, Army Times (Oct. 1, 2012), available at <http://www.armytimes.com/article/20121001/NEWS/210010330/Tough-talk-tangles-anti-assault-effort> (last checked February 10, 2014).

The MJIA would improve the perceived fairness of courts-martial and ensure justice and accountability, by placing authority to prosecute and make other key decisions for serious, non-military crimes, in the hands of military prosecutors rather than the chain of command.

We believe that the visibly professional approach proposed in the MJIA would strengthen confidence in the military justice system and encourage more sexual assault survivors to report. In May 2013, the Department of Defense estimated that there were 26,000 service members who experienced sexual assault, a 37% increase from FY 2010. However, only 3,374 sexual assaults were reported in FY 2012.<sup>11</sup>

The recently signed National Defense Authorization Act (“NDAA”) FY 2014, as well as other proposed reforms, fail to address adequately the need to modernize the military justice system. The NDAA, as well as the Better Enforcement for Sexual Assault Free Environments Act of 2013, proposed by Senator McCaskill, seek to keep the decision making with respect to courts martial within the chain of command, yet in other respects single out sexual assault from other offenses. The Association joins with other learned military justice scholars in calling for a uniform approach to serious, non-military offenses.<sup>12</sup>

Towards this end, the MJIA will be a major step forward, maintaining a military justice system appropriate to our leading military. By eliminating the possibility or perception of undue command influence and maintaining the fairness, impartiality and integrity of disciplinary proceedings it provides our service men and women with visible guarantees of respect and dignity, preservation of basic freedoms, and safeguards of a justice system that protects their rights under the law

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<sup>11</sup> Sexual Assault Prevention and Response, Department of Defense, Department of Defense Annual Report on Sexual Assault in the Military, Fiscal Year 2012, *available at* <http://www.sapr.mil/index.php/annual-reports> (last visited Feb. 11, 2014).

<sup>12</sup> Law Professors’ Statement on Reform of Military Justice (June 7, 2013), *available at* <http://www.law.yale.edu/documents/pdf/conference/LawProfessorsStatement.pdf> (last visited Feb. 11, 2014).