



March 6, 2014

Vote YES for the Military Justice Improvement Act of 2013 (S. 1752)

Dear Senator:

On behalf of the American Civil Liberties Union (ACLU), we write to express our support for the Military Justice Improvement Act of 2013 (S. 1752) and urge you to vote in favor of the bill when it comes to the Senate floor.

The ACLU has a long history of advocacy on behalf of the men and women who serve in our armed forces.¹ We have also sought to hold governments, employers and other institutional actors accountable so as to ensure that women and men can lead lives free from violence. Additionally, the ACLU has long fought for a criminal justice system, both civilian and military, that is free of bias and that treats both the complainant and the accused fairly.

These core interests lead us to support the Military Justice Improvement Act (MJIA), a measure that offers the promise of improving service members' access to justice, safeguarding the integrity of the military justice system, and restoring confidence in the administration of justice within the military. The legislation would achieve these goals by amending the Uniform Code of Military Justice so as to reform the role of the convening authority in the prosecutorial decision-making process and in the selection of court-martial panels.

We have previously expressed support for the MJIA.² We continue to support this legislation because we believe that the independence and integrity of the justice system is essential to the appearance as well as the reality of due process in our armed forces and in the civilian world. The current role of the convening authority does not serve the interests of justice and due process.

As one study noted:

“The far-reaching role of commanding officers in the court-martial process remains the greatest barrier to operating a fair system of criminal justice within the armed forces. . . .The combined power of the convening authority to determine which charges shall be preferred, the level of court-martial, and the venue where the

¹ The ACLU has participated as amicus curiae in many important military cases and has testified before Congress on a number of military justice matters. See also AM. CIVIL LIBERTIES UNION, FACT SHEET: THE ACLU'S WORK TO END DISCRIMINATION IN THE ARMED FORCES (April 2013), available at https://www.aclu.org/files/assets/aclu_military_fact_sheet_april_2013_website.pdf.

² Letter from Laura W. Murphy, Director, ACLU Washington Legislative Office, to U.S. Senate (Nov. 18, 2013), available at https://www.aclu.org/sites/default/files/assets/aclu_letter_in_support_of_military_justice_improvement_act_s._967_11-19-13_final.pdf.

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charges will be tried, coupled with the idea that this same convening authority selects the members of the court-martial to try the cases, is unacceptable in a society that deems due process of law to be the bulwark of a fair justice system.”³

The MJIA addresses one of these key criticisms by giving legally-trained, experienced military prosecutors outside the chain of command, rather than senior, non-lawyer commanders, the authority to refer charges to special or general courts-martial when serious crimes are alleged (except those that are uniquely military in nature).⁴ This change would improve the integrity of the judicial process by removing any actual or perceived bias towards the complainant or the accused. It would demonstrate to service members that the prosecutorial decision-making process is grounded in facts, evidence, and the law—not on external factors, pre-existing relationships, or the unstated but well-understood expectations of the chain of command.⁵

Those who do not yet support the MJIA mistakenly assert that the current command-centric model of military justice is necessary to maintain good order and discipline within the military. Therefore, they reason, any erosion of that authority would have unknown consequences on the very nature of our armed forces and military effectiveness.⁶ They also assert that there is no evidence that prosecutions of sexual assault would increase under the leadership of trained military prosecutors rather than a convening authority. Some have also stated that we must wait to see if the reforms Congress and the Department of Defense have passed will yield results before instituting the MJIA reforms. These arguments are misguided and must be rejected.

First, there is no concrete evidence to support the proposition that a commander’s authority is based solely or largely on her ability to refer cases to courts-martial or select court-martial panel members. There is no evidence to suggest that service members will fail to follow a commander’s orders just because a military prosecutor, rather than the senior commander serving as convening authority, makes the decision whether to proceed to a court-martial. Indeed, the evidence strongly suggests

³ HONORABLE WALTER T. COX III ET AL., REPORT OF THE COMMISSION ON THE 50TH ANNIVERSARY OF THE UNIFORM CODE OF MILITARY JUSTICE, 6-8 (May 2001).

⁴ The MJIA applies to crimes where the maximum punishment is confinement for more than one year. It allows commanders to exercise nonjudicial punishment where appropriate.

⁵ Some have argued that removing the prosecutorial function from the convening authority is unnecessary because commanders almost always adopt the advice of their staff judge advocates. That, however, does not change the structural flaw in the system. Additionally, as one commentator has noted “[o]rganizationaly, many military attorneys, including SJAs, not only work for, but also receive their all-important performance evaluations from, their non-lawyer commanders, who also serve as convening authorities. SJAs have the right to communicate freely with more senior command SJAs and with the Judge Advocate General, a right designed to protect the integrity of the lawyer, important enough to be guaranteed in Article 6(b) of the Code. This right, however, may provide little solace when the SJAs’ usual military responsibility, and the desires of the commander/CA (e.g. staff officers shall support command), conflict with the SJAs’ legal responsibilities (e.g. to advise the CA that the charges may not legally go forth to a court-martial).” Kevin J. Barry, *A Face Lift (And Much More) for an Aging Beauty: the Cox Commission Recommendations to Rejuvenate the Uniform Code of Military Justice*, 2002 L. REV. M.S.U.-D.C.L. 57, 115-116 (2002).

⁶ See *Oversight Hearing to Receive Testimony on Pending Legislation Regarding Sexual Assaults in the Military: Hearing Before the S. Comm. on Armed Servs.*, 113th Cong. 7-21 (2013); see also Barry, *supra* note 5, at 97 n. 153 (noting that DoD and the services have opposed even modest reforms and quoting one commentator who observed that “traditional opinion within the service has always held that each successive reform would bring ruin and collapse.”).

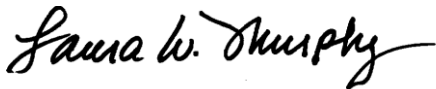
otherwise.⁷ At its core, this argument is grounded in an appeal to tradition and a fear of the unknown. But Congress should not allow tradition or fear to stand in the way of meaningful reforms that modernize our military justice system and improve justice.

Second, the purpose of the MJIA is emphatically *not* to increase prosecutions of sexual assault or other serious crimes or increase the rate of convictions. It is *not* intended to tip the scales of justice towards a particular outcome. Instead, it offers the opportunity to eliminate actual or perceived bias or conflicts of interest in the administration of justice and thereby give the complainant, the accused, the military community, and the general public greater confidence that justice is being sought and achieved. The goal of the MJIA is to safeguard the integrity and independence of the decision-making process and the judicial system so that when a decision is made to prosecute or not, to convict or acquit, there is as much faith in the process and the outcome as there can be.

Finally, a call to delay or to wait many more months or years does a disservice to the men and women in our armed forces who are under the jurisdiction of the current military justice system. They deserve a better system, one that is free of bias and conflicts of interest, and is committed to achieving justice. Additionally, many of the recently enacted reforms are laudable but none, except the MJIA, address the structural weaknesses of the current military justice system. There is no reason to wait or delay.

We urge Senators to support the Military Justice Improvement Act (S. 1752). Please do not hesitate to contact Vania Leveille at vleveille@aclu.org or 202-715-0806 should you have any questions.

Sincerely,



Laura W. Murphy
Director
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⁷ See SERVICE'S WOMEN ACTION NETWORK, IRAQ AND AFGHANISTAN VETERANS OF AMERICA & VIETNAM VETERANS OF AMERICA, FACT SHEET: MILITARY JUSTICE IMPROVEMENT ACT OF 2013 (S. 967), *available at* <http://servicewomen.org/wp-content/uploads/2013/11/MJIA-Informational-Flyer.pdf>.