

June 7, 2013

Committee on Armed Services
U.S. Senate
Washington, DC

Dear Senator:

I write to express the National Women's Law Center's strong support of the Military Justice Improvement Act, S. 967, bipartisan, bicameral legislation that would remove from the chain of command the prosecution and other key decision-making in military cases involving crimes punishable by confinement of one year or more, except crimes that are uniquely military, such as disobeying orders. This legislation, whose lead sponsors are Senator Kirsten Gillibrand and Senator Susan Collins, has the support of 23 members of the Senate, all of whom deserve thanks for their leadership on this critical issue.

This legislation would bring the United States military justice system in line with that of other modern militaries, including Australia, Britain, Canada, Israel, Germany, and Norway. Although it was prompted in part by the critical need to address the rising number of sexual assaults in the military, its provisions are long overdue reforms that would both improve our nation's military justice system and strengthen, not weaken the role of commanders in today's military.

To date, the military's efforts to address sexual assault have emphasized training and survivor assistance, which are important but insufficient to prevent what has been a persistent problem for decades – from the Navy's notorious Tailhook Convention in 1991 to the Army's intermediate training problems at Aberdeen in 1996 to the Air Force's recruit training problems at Lackland in 2012, as well as numerous incidents at the military academies. As the Defense Department's own statistics show, the problem is not getting better but worse. According to the FY 2012 report of the Sexual Assault Prevention and Response Office (SAPRO), there were an estimated 26,000 service members who experienced some kind of sexual assault in FY 2012, a 37% increase from FY 2010, the last time service members were surveyed on the issue. Yet only 3,374 sexual assaults were reported in FY 2012.

Why the disparity between the number of occurrences and the number of reports of sexual assault? Survivors of sexual assault in the military tell us and other advocates, as well as SAPRO and the Defense Advisory Committee on Women in the Services, that they lack confidence in the system – they believe that their complaints will not get a fair hearing, that the perpetrator will never be held accountable and that they themselves will suffer reprisals. And we have personally heard of far too many instances in which their fears have been justified -- and in which the system's shortcomings have been the basis for the lack of confidence. In two well-publicized cases in just the last few months, for example, commanding generals decided on their own, without explanation, to overturn court martial convictions for sexual assaults, decisions that were within their discretion to make under the current system.

A strong military justice system is essential to the prevention of sexual assault as well as other crimes. Research has expressly shown that the decision to commit sexual assault is influenced by the perpetrator's calculation of possible "costs," including legal consequences. Until perpetrators see that they will be held accountable for their acts, there is little chance that the number of sexual assaults will decrease. It is accountability that both deters assaults and encourages those who survive assaults to report their occurrence. Research from other areas supports the importance of accountability as well. A recent Department of Transportation study, for example, found that increased enforcement of the laws against talking on a hand-held cell phone while driving, coupled with a media campaign that communicated the

Letter to Senate Committee on Armed Services
June 7, 2013

increased enforcement, led to lower incidence of the law-breaking behavior. Enforcement of drunk-driving laws and speeding laws has had similar results.

Although Secretary of Defense Hagel has recommended that Congress improve accountability by amending the Uniform Code of Military Justice to remove the authority of commanders to overturn court martial convictions (a provision also included in S.967), his recommendation does not go far enough. Commanders would still have complete authority over how these often-complicated cases are handled in circumstances in which they may have both the victim and the perpetrator under their command. They would still have discretion to make prosecutorial decisions, decide on whether to convene a court martial and name the jury, and decide if and what kind of punishment is warranted. Nowhere else in our U.S. system of justice does one individual – particularly one with an inherent conflict of interest – have the authority to serve as prosecutor, judge and jury.

The Military Justice Improvement Act would reform the military justice system by moving the decision-making on whether and how to prosecute serious offenses, like sexual assault, out of the chain of command and give these decisions to trained, experienced military prosecutors. It would also move outside of the chain of command and into a specialized office the authority to convene courts-martial, empanel juries and choose judges to hear these cases, set deadlines for referring cases to prosecutors and convening courts martial, require decision-makers to provide written justification for their decisions, and, as noted above, prohibit the set-aside of a court-martial's guilty verdict and any change from a finding of guilty to a particular offense to a finding of guilty to a lesser offense.

Although the argument has been made that these changes would weaken the authority of the commander, with repercussions beyond the issue of sexual assault, these changes would, in fact, strengthen the authority of commanders. Under the current system, although commanders typically receive advice from judge advocates, commanders do not generally have legal training themselves. But the system requires them to make legal judgments, with potentially adverse consequences for all concerned if they make the wrong judgments. This is like asking a commander without flight training to fly a fighter jet or a commander without medical training to perform surgery. It is hard to see how putting a commander in such a position enhances the respect and authority the commander seeks and is due from those in his or her command. Similarly, it is hard to see how requiring that legal decisions be made by individuals with legal training undercuts a commander's authority in other realms. Equally important, particularly when it comes to sexual assault, there are critical areas in which a commander's expertise can and should be brought to bear. Separating military justice decision-making from the chain of command will, for example, make it possible for commanders to concentrate on improving the climate in their commands in ways that can help prevent sexual assaults, including by modeling the behavior they expect from those they command. This is the leadership job that commanders should be called upon to do and the job for which they have particular expertise.

For all these reasons, we urge you to support, and work to ensure, the enactment of the Military Justice Improvement Act.

Sincerely,



Nancy Duff Campbell
Co-President