WASHINGTON
LEGISLATIVE OFFICE

June 10, 2015

Vote YES for Amendment 1578 (Military Justice Improvement Act of 2015) to FY16 National Defense Authorization Act

Dear Senators:

On behalf of the American Civil Liberties Union (ACLU), a nonpartisan public interest organization, and its more than a half million members and activists and 53 affiliates nationwide, we write to express our support for Senate Amendment 1578, the Military Justice Improvement Act of 2015, and urge you to support the amendment when it comes to the floor during Senate consideration of the FY16 National Defense Authorization Act.

This legislation is an important step towards strengthening public confidence in the administration of justice in the armed forces. Currently, commanders play a significant role in the military justice system and that has raised serious doubts about the integrity of the system. The Military Justice Improvement Act (MJIA) amends the Uniform Code of Military Justice and places appropriate limits on the role of the convening authority in the prosecutorial decision-making process, in the selection of court-martial panels, and after a trial has ended.

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 complainants and accused people fairly. These core interests lead us to support the 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 MJIA Improves the Independence and Integrity of the Military Justice System

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. Congress recognized this fundamental truth decades ago when it responded to widespread criticisms of the military system – which at the time gave commanders virtually unfettered powers and service members few legal protections – by adopting the Uniform Code of Military Justice (UCMJ) in 1950. Additional statutory reforms in 1968 and 1983 further strengthened the system.[2]

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[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] *See* 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, 70-75 (reviewing history of UCMJ) (2002).

The landmark reforms of the UCMJ created a fairer system of justice but they did not fundamentally alter the expansive role of the commander in the military justice system. 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 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]

These structural weaknesses within the military justice system have recently received greater scrutiny because of the persistence of sexual harassment, sexual assault and rape in the armed forces. According to the Department of Defense, not only has the number of reported unwanted sexual contacts increased, but there is little doubt that many more incidents go unreported.[4]

While the statistics alone are alarming, the problem of sexual violence is compounded by the perception and, too often, the reality of a military justice system that fails to mete out actual justice in these cases because it is rife with conflicts of interest and because the search for truth and accountability are undermined by a commander's discretion or competing interests. This causes a lack of faith in the system that not only poisons the integrity of the process but also arguably erects barriers to engaging with the criminal justice system thereby diminishing the likelihood that sexual assault, rape and harassment will be reported. And while it is true that the scourge of sexual assault has illuminated critical flaws in the military justice system, the deficiencies have a negative impact on the adjudication of *all* serious crimes in the armed forces.

The MJIA addresses these criticisms in several ways. First, it gives legally-trained, experienced military prosecutors outside the chain of command, rather than 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).[5] 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.[6] Relieving a commander of disposition authority

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[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] In 2013, the Defense Department's annual report on sexual assault in the military revealed that an estimated 26,000 service members experienced unwanted sexual contact in 2012, up from 19,300 in 2010. DEPARTMENT OF DEFENSE, SEXUAL ASSAULT PREVENTION AND RESPONSE, DEPARTMENT OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY: FISCAL YEAR 2012, 25 (2013), *available at* http://www.sapr.mil/public/docs/reports/FY12_DoD _SAPRO_Annual_Report_on _Sexual_Assault-VOLUME_ONE.pdf. One study estimates that 75% of servicewomen who have been raped do not report it. Sadler et al., *Factors Associated with Women's Risk of Rape in the Military Environment*, 43 AM. J. OF INDUS. MED. 262, 266 (2003).

[5] 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.

[6] 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]rganizationally, 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

for serious crimes (and arguably all crimes) is a necessary step toward achieving a fair and impartial system of military justice.

Similarly, limiting a commander's post-trial powers of review, as the MJIA does, is another step towards safeguarding the integrity of the military justice system. As one military legal scholar eloquently stated:

> "The convening authority's post-trial power of review is a throwback to an earlier age and fundamentally discordant with other, more modern aspects of the military justice system. What are the members of courts-martial – our uniformed jurors – to think if they know that a commander can set aside the verdict they have painstakingly rendered after hearing the evidence, perhaps asking questions of their own (as military law permits), applying the military judge's binding legal instructions, and deliberating in secret? Particularly in an All-Volunteer Force era, public confidence in the administration of military justice is critical if we are to attract and retain personnel. I can think of few more effective ways to erode that confidence than permitting commanders to nullify court-martial verdicts."[7]

Certainly courts-martial need to be reviewed for legal error and sentences should be subject to clemency in appropriate cases. But legal errors ought to be corrected either by the trial judge or the appellate courts Congress created under the UCMJ. And clemency is available through service-wide clemency and parole boards. It is far preferable to provide clemency on a service-wide, uniform basis than to have numerous convening authorities granting (or withholding) sentence relief based on personal predilections.

Finally, the MJIA would empower a new court-martial office, rather than a senior commander serving as convening authority, to empanel court members to hear the case. This provision addresses one of the greatest defects of the military justice system. As the Cox Commission noted:

> "There is no aspect of military criminal procedures that diverges further from civilian practice, or creates a greater impression of improper influence than the antiquated process of panel selection. The current practice is an invitation to mischief. It permits – indeed, requires – a convening authority to choose the persons responsible for determining the guilt or innocence of a servicemember who has been investigated and prosecuted at the order of that same authority. The Commission trusts the judgment of convening authorities as well as the officers and enlisted members who are appointed to serve on courts-martial. But there is no reason to preserve a practice that creates such a strong

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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)." Barry, *supra* note 2, at 115-116.

[7] *See* Letter from Eugene R. Fidell to Rep. Buck McKeon & Rep. Adam Smith (Mar. 17, 2013) (on file with author). Professor Fidell teaches Military Justice at Yale Law School. He served as president of the National Institute of Military Justice, authored the Guide to the Rules of Practice and Procedure for the United States Court of Appeals for the Armed Forces, and is a member of the Board of Directors of the International Society for Military Law and the Law of War and chairman of the Society's Committee on Military Justice.

> impression of, and the opportunity for, corruption of the trial process by commanders and staff judge advocates."[8]

A system so vulnerable to surreptitious manipulation lacks the appearance of fairness necessary to deprive a service member of his life or liberty. Instituting this reform would be another critical step towards achieving, in appearance and reality, a fair and impartial system of military justice.

There is No Evidence that the MJIA Would Undermine Good Order and Discipline or Make Commanders Less Accountable for Eliminating Sexual Violence

Senior officers within the armed forces and others have opposed that part of the MJIA which relieves the convening authority of the power to refer serious cases to courts-martial. They assert -- often, forcefully and unsurprisingly -- that the current command-centric model of military justice is absolutely necessary to maintain good order and discipline within the military and therefore any erosion of that authority would have dire consequences on the very nature of our armed forces and military effectiveness.[9]

Yet no concrete evidence has been offered 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; or that service members will fail to follow a commander's orders because a military prosecutor, rather than the commander, makes the decision whether to proceed to a court-martial. Indeed, the evidence strongly suggests otherwise. As several veterans service organizations have pointed out, many service members responsible for maintaining good order and discipline cannot serve as a convening authority yet they have been more than capable of doing their jobs.[10] Additionally, the militaries of several allied nations, such as the United Kingdom, Canada, South Africa, Ireland, Australia, New Zealand, and Israel have moved away from command-centric models of justice without any apparent adverse impact on good order and discipline.

This particular protestation against the MJIA appears to be grounded in an appeal to tradition and dates back to the founding of our military. It is a view premised on the belief that the primary purpose of the military justice system is to serve as a tool commanders can wield to preserve their authority and thereby maintain good order and discipline.[11]

But this view is not universally shared.[12] Respected members of the military legal community have also stated, with equal certainty, that "[i]t is not proper to say that a military court-martial has a dual

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[8] HONORABLE WALTER T. COX III ET AL., *supra* note 3, at 7.

[9] *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 2, 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.").

[10] *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), *availabe at* http://servicewomen.org/wp-content/uploads/2013/11/MJIA-Informational-Flyer.pdf.

[11] *See, e.g.*, Major General William A. Moorman, *Fifty Years Of Military Justice: Does The Uniform Code Of Military Justice Need To Be Changed?*, 48 A.F. L. REV. 185, 187-189 (2000) ("In order to have a well-disciplined military, commanders must have appropriate tools at their disposal to ensure their authority is preserved and their lawful orders executed. . . . The military justice system provides commanders with a set of tools to preserve that necessary authority.").

[12] *See* David Schlueter, *The Military Justice Conundrum: Justice or Discipline*, 215 Mil. L. Rev. 1 (2013) (reviewing the numerous themes on the military justice/discipline paradigm expressed by courts and commentators);

function as an instrument of discipline and as an instrument of justice. *It is an instrument of justice and in fulfilling this function it will promote discipline*."[13] As one scholar has stated:

> "If 'discipline' is viewed as the final end-all for military justice, the stereotypes will live on. As long as discipline even is listed as a goal or purpose for military justice, there is a risk that the stereotypes will live on. The risk exists that if the ends are something other than 'justice,' those participating in the system will view it as nothing more than a rubber stamp for the commander. It is even more troubling, however, if the community views the commander as the rubber stamp for a legal system that gives the appearance of simply serving the needs of discipline."[14]

The MJIA provides the opportunity to correct the corrosive view that a commander's role in the military justice system serves other interests besides justice.

At the same time, there is nothing in the MJIA that prevents commanders from establishing policies and expectations that prevent sexual harassment, sexual assault, rape or other criminal behavior. Commanders are not impotent; they have the ability and the authority to create a climate where every service member knows that criminal activity will not be tolerated. Commanders can and should continue to be held accountable in that regard.

The MJIA Helps Both the Complainant and the Accused in a Criminal Case

As noted previously, the renewed attention to deficiencies within the military justice system were precipitated by the experiences of victims of sexual assault and the MJIA responds to those concerns. However, and equally important, the MJIA also protects the interests of the accused. In the case of sexual assaults and rapes, some have expressed grave concerns that the heightened scrutiny and public statements by numerous individuals – from the Commander-in-Chief, members of Congress, the Secretary of Defense, the Chairman of the Joint Chiefs of Staff, and the service chiefs – have created a climate where a commander's decision to prosecute will be greatly influenced by external factors, including the desire to be seen as "taking sexual assaults seriously."

This concern applies equally in other contexts where criminal behavior is alleged but where the limelight has not been as bright. In these cases, the accused must still contend with subtle pressures or suggestions generated by those within the chain of command that may bias the prosecutorial decision-making process.[15] Despite the prohibition against unlawful command influence in Article 37of the UCMJ, these concerns will linger until systemic changes are made to the military justice system.

The purpose of the MJIA is emphatically *not* to increase prosecutions of 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

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see also MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. 1, 3 (2012) ("The purpose of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States.").

[13] David A. Schlueter, *The Twentieth Annual Kenneth J. Hodson Lecture: Military Justice for the 1990s – A Legal System Looking for Respect*, 133 Mil. L. Rev. 1, 11 (1991) (quoting 1960 Powell Report) (emphasis added)

[14] *Id*. at 13.

[15] *See* Beth Hillman, *Chains of Command: The U.S. Court-Martial Constricts the Rights of Soldiers—And That Needs to Change*, LEGAL AFFAIRS, May/June 2002, at 50-52.

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.

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The men and women of our armed forces protect our values and our freedom and for this they have the appreciation and respect of a grateful nation. They deserve a better military justice system, one that is free of bias and conflicts of interests, and is committed to achieving justice. The Military Justice Improvement Act is an important step in that direction and we urge Senators to support it.

Please do not hesitate to contact Vania Leveille at vleveille@aclu.org or 202 715-0806 should you have any questions.

Sincerely,

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