May 5, 2016

The Honorable John McCain
Chairman
Committee on Armed Services
United States Senate
228 Russell Senate Office Building
Washington, D.C. 20510

The Honorable Jack Reed
Ranking Member
Committee on Armed Services
United States Senate
228 Russell Senate Office Building
Washington, D.C. 20510


Dear Chairman McCain and Ranking Member Reed:

On behalf of the American Bar Association (“ABA”), which has over 400,000 members, I am writing to express our views regarding important proposals by the Department of Defense (“DoD”) to change the Uniform Code of Military Justice (“UCMJ”) in the Fiscal Year 2017 National Defense Authorization bill. The ABA commends the Department of Defense for the comprehensive approach it recently took to appoint the Military Justice Review Group to analyze the UCMJ and to use its analysis to make recommendations for potential reforms to the Armed Services Committees. We believe that the vast majority of the recommended changes represent a positive step forward for the military justice system while maintaining the unique aspects that are necessary for an expeditionary force. We are concerned, however, that some of the recommended reforms involving sentencing and appellate rights could cause unintended consequences, including infringing on the rights of servicemembers accused of crimes in the military. Therefore, we request that you consider these consequences as you craft legislation aimed at improving this unique system of justice.

The ABA’s efforts to help improve military justice began in 1946, when the Secretary of War asked the ABA to help reform the system. Since that time, ABA entities have helped shape military legal policy through meaningful analysis and advocacy, especially during the drafting of the 1950, 1968, and 1983 versions of the UCMJ and other subsequent UCMJ revisions. The ABA recognizes that the military justice system has historically afforded those facing criminal charges and prosecution more extensive rights and protections than most civilian jurisdictions. This is to balance the interests of justice while simultaneously upholding good order and discipline—and ultimately combat readiness and national security—throughout the military services.

The recent legislative proposals to reform the UCMJ include major changes to court-martial sentencing procedures that would eliminate an accused’s choice of sentencing forum by either court members or a military judge, at the election of the accused – a right that has existed since 1968. Instead, the current DoD legislative proposals would mandate judge-alone sentencing in all non-capital cases. The ABA has serious concerns regarding this DoD proposal, and it is contrary to our policy that supports servicemembers retaining “the option to be tried and sentenced by military
judge alone, or to be tried and sentenced by a Court composed of members.” Giving a servicemember accused of a crime in the military justice system this option provides the positive features of judge-alone sentencing, while also providing an additional choice for the protection of the servicemember. Preserving broad rights like this afforded to servicemembers prosecuted in the military justice system is essential to meeting its overarching goals of justice, good order, and discipline, while maintaining public confidence in its fairness and integrity. Therefore, we urge the Committee to maintain the current UCMJ provisions that give a servicemember the right to elect his or her sentencing forum and to not adopt proposals that would diminish that right.

Simultaneous with mandating judge-alone sentencing, the proposed UCMJ reforms would require segmented sentences for each charge resulting in a conviction in the court-martial process (instead of the unitary sentencing process currently used) and the development of sentence parameters for sentences that include confinement. While the ABA takes no formal position on these proposals, we question whether implementing segmented sentences and sentence parameters at the same time is appropriate. A shift to segmented sentencing in the military marks the beginning of the period in which sentencing data can be collected for further evaluation of possible modifications to sentencing procedures. Providing time to accumulate military sentencing data under this new process would allow a careful analysis of empirical sentencing data before a possible shift to sentencing parameters and mandatory judge-alone sentencing. DoD proposes having regular UCMJ reviews to look at discrete issues every four years, with a complete review every eight years that could result in critical sentencing data. Extensive data collection and analysis proved crucial to the development of federal sentencing guidelines and other parameters in civilian jurisdictions and is consistent with ABA Criminal Justice Standards. The military justice system has unique aspects that could benefit from similar data analysis and help minimize the potential for unintended consequences of immediate sentencing parameter implementation.

The proposed UCMJ reforms also recommend rescinding the automatic appeal rights that servicemembers currently have in the military justice process. While the ABA takes no position on this proposal, we urge the Armed Services Committee to proceed with caution before acting on proposals that take any material rights away from an accused. In non-capital trials, an accused servicemember can be convicted by a less than unanimous vote at court-martial and yet, under the current proposals, must be sentenced by the military judge alone. Automatic appeals to appellate courts outside the local command structure add an additional level of confidence and integrity for those convicted in the UCMJ system and also improve the public perception of the military’s trial process. We ask the Committee to consider whether there is a compelling justification to rescind or diminish this important right at this time.

While the majority of the recommended changes to the UCMJ represent positive steps forward for the overall military justice system, we urge the Senate Armed Services Committee not to rescind an accused servicemember’s right to elect his or her sentencing forum in the National Defense Authorization Act for Fiscal Year 2017. As the Committee drafts this critical piece of legislation, we also ask it to consider carefully whether it needs more data collection and analysis before including sentence parameters in the bill and whether there is a compelling justification for rescinding an accused’s automatic appeal rights.
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Thank you for considering the ABA’s views on these important issues involving the military justice system. If you have any questions regarding our position, please contact ABA Governmental Affairs Director Thomas Susman at (202) 662-1765 or Principal Deputy Director of Governmental Affairs Holly Cook at (202) 662-1860.

Sincerely,

Paulette Brown

cc: Members of the Senate Armed Services Committee