

The Military Justice “Improvement” Act of 2020

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Last month Sen. Kirsten Gillibrand (D-NY) introduced the [Military Justice Improvement Act of 2020](#) (MJIA 2020) as an amendment to the National Defense Authorization Act (NDAA). Similar to multiple predecessor “MJIA’s” Sen. Gillibrand has introduced over the last six years, MJIA 2020 would amend the Uniform Code of Military Justice (UMCJ) and transfer authority from the commander to a judge advocate (JA) to prefer, dispose of, and refer certain charges to trial by court-martial.

Because the core objective of MJIA 2020 - creating a system where the commander and a JA split prosecutorial discretion depending on the offense - represents fundamental change to our military justice system, its proponents bear the burden to justify why this is truly necessary and beneficial. That means providing persuasive evidence that 1) the current approach is significantly flawed and 2) that the proposed change would be a substantial improvement.

Fundamental change proponents have failed to carry their burden.

Additionally, fundamental change proponents don’t acknowledge, let alone distinguish, the reports and recommendations of multiple Federal Advisory Committee Act of 1972 (FACA) committees which considered various aspects of military justice and whether to recommend an analogous modification of the role of the commander. Nor does DoD’s position on this modification seem relevant, as Sen. Gillibrand refused to wait for DoD to submit a Congressionally directed report on the feasibility of a MJIA like alternative military justice system before introducing MJIA 2020.

This dysfunctional cycle should stop. Ignoring the informed opinions from expert studies by Congressionally created committees wastes untold Congressional and DoD resources and committee members’ time and effort. Those resources could and should have been spent on better implementing the recent laudable statutory and policy changes to the military justice system regarding sexual assault and harassment.

Many of these changes were designed to enhance the likelihood that victims of sexual misconduct will report these unacceptable incidents without hesitation so that senior level commanders vested with court-martial convening authority may evaluate if and when such incidents should be subjected to prosecution. The tragic irony is that while Sen. Gillibrand claims that MJIA 2020 will improve the military’s response to sexual misconduct, the opposite is true. MJIA 2020, in removing authority from commanders, would actually undermine recent ongoing efforts to improve the military’s response to sexual assault and harassment.

Finally, as explained at the end, Sen. Gillibrand’s obvious misunderstanding of military justice as reflected in both her comments and MJIA 2020 undermines the credibility for her demands to adopt this major change. Her recent remarks on the Senate floor reflect this lack of basic knowledge about the military justice system and the import of MJIA 2020. As a result, Sen.

Gillibrand's negative assessment of the current military justice system and her rosy claims of MJIA 2020 improvements lack meaningful significance.

This post provides an overview of MJIA 2020 followed by positioning this year's MJIA in context of previous iterations and FACA committee reports. The post then assesses MJIA 2020 and responds to some of Sen. Gillibrand's recent claims.

MJIA 2020 Overview

MJIA 2020 would shift responsibility for deciding on:

- 1) the preferral of charges;
- 2) the disposition of charges; and
- 3) the referral of charges

from the commander to an O6 (Army/Marine Corps/Air Force Colonel; Navy/Coast Guard Captain) or higher JA.

In terms of military offenses covered, MJIA 2020 applies to offenses for which the maximum authorized punishment exceeds a year. MJIA 2020 excepts out a number of military offenses. MJIA doesn't apply to articles 83-117, 133 or 134 with the following exceptions. MJIA *does* apply to Articles 93a (prohibited activities with military recruit or trainee by person in position of special trust), Article 117a (wrongful broadcast or distribution of intimate visual images), and the 134 offenses of child pornography, indecent conduct, negligent homicide and pandering/prostitution. Where MJIA applies to an offense, that includes inchoate variants (conspiracy, solicitation and attempt) of that offense. Similarly, when MJIA does not apply to an offense, it doesn't apply to the inchoate variants.

MJIA 2020's "Backstory"

MJIA 2020 cannot be fully and appropriately discussed in isolation. This proposal is similar to previous, unsuccessful, efforts in [2019](#), [2017](#), [2016](#), [2015](#), [2014](#) and [2013](#). The label unsuccessful refers to the effort to transfer prosecutorial authority from the commander to a JA. Depending on the year, while the prosecutorial authority change didn't pass, a number of important statutory and policy changes to military justice did result as part of the still ongoing effort to improve the military's response to sexual assault and harassment.

In between these proposals, Congress, through the 2013 and the 2015 NDAAs, directed various committees and panels be formed pursuant to the FACA to consider and report on the effectiveness of the military justice system used to investigate, prosecute and adjudicate sexual assault and related offenses. These committees held hearings, discussed matters and issued detailed reports and recommendations.

As noted above, different MJIA's have yielded important changes. But almost every expert involved in a Congressionally mandated study of the military justice system has rejected the idea of altering the prosecutorial decision-making process. Yet Sen. Gillibrand ignores the

recommendations of committees Congress directed be formed and near annually reintroduces MJIA legislation to remove the commander's authority.

Response Systems to Adult Sexual Assault Crimes

The 2013 NDAA required the establishment of two different FACA committees, the first being the [Response Systems to Adult Sexual Assault Crimes](#) (RSP). The RSP was to “conduct an independent review and assessment of the systems used to investigate, prosecute, and adjudicate crimes involving adult sexual assault and related offenses.... for the purpose of developing recommendations regarding how to improve the effectiveness of such systems.”

The RSP considered a number of proposals under MJIA 2013, including whether to shift preferral or referral authority from commanders to O6 JAs. Sound familiar? The RSP recommended against this proposal, stating

The existing pool of O-6 judge advocates who meet the statutory prosecutor qualifications is finite; and many of these officers routinely serve in assignments related to other important aspect of military legal practice. Therefore implementing MJIA's mandate, absent an increase in personnel resources, may result in understaffing of other senior legal positions.

Within the RSP was a [subcommittee](#) which reported on the role and effectiveness of commanders at all levels in the investigation, prosecution, and adjudication of crimes involving sexual assault and related offenses. The subcommittee included a retired four star general and legal professionals with extensive experience with the military and civilian justice systems, including a former Member of Congress who previously served as the District Attorney for Kings County/Brooklyn, the 4th largest DA's office in the country, and the Executive Director for the National Center for Victims of Crime.

The RSP subcommittee on the role of the commander, with only one-member dissenting, recommended that Congress retain the current role of the commander in the preferral *and* referral process. Essentially the subcommittee rejected the very change Sen. Gillibrand proposed, then and now, even though the proposal was persistently pressed by the one dissenting member.

The RSP submitted its [final report](#) to the Senate and House Armed Services Committee (SASC/HASC) in 2014. The following year, with no reference to and seemingly ignoring the Congressionally created RSP, Sen. Gillibrand, a SASC member, reintroduced another MJIA.

Judicial Proceedings Panel

The second FACA committee the 2013 NDAA directed be formed was the Judicial Proceedings Panel (JPP). The JPP was tasked to “conduct an independent review and assessment of judicial proceedings conducted under the [UCMJ] involving adult sexual assault and related offenses....”

Senator Gillibrand speaks of U.S. military justice as “shocking” and its outcomes as aberrations. The data, which Sen. Gillibrand willfully ignores, paints a very different picture.

In 2016, a noted criminologist and scholarly author submitted data and data analysis to the JPP, which, while acknowledging a number of difficulties in comparing civilian and military outcomes and punishments in sexual assault cases, reflected a higher overall conviction rate for referred cases, and a higher percentage of sentences including confinement, in the military justice system compared to civilian courts. The JPP submitted its [final report](#) to the SASC/HASC in 2017.

The following year, with no reference to and seemingly ignoring the Congressionally created JPP, Sen. Gillibrand, a SASC member, reintroduced another MJIA.

Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces

The 2015 NDAA directed yet another FACA be formed, the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces. The NDAA charged the committee with advising “the Secretary of Defense and the Deputy Secretary of Defense on the investigation, prosecution, and defense of allegations of rape, forcible sodomy, sexual assault, and other sexual misconduct involving members of the Armed Forces.”

At the core of Sen. Gillibrand’s criticism of military justice is her unsupported view that the military chain of the command is the problem, that commanders are incapable of impartiality and “not delivering justice.” The data paints a very different picture.

In a March 2019 report, the committee relayed the results of the first of its kind review of a random sample of military law enforcement investigations into allegations of penetrative sexual assault and found that military commanders’ prosecutorial decisions were reasonable in 95% of cases reviewed. The committee submitted its initial report to the SASC and HASC in [2017](#) and then annual reports in [2018](#), [2019](#) and [2020](#).

In 2019 and 2020, with no reference to and seemingly ignoring yet another Congressionally created committee, Sen. Gillibrand, a SASC member, reintroduced two MJIA’s.

2020 NDAA Section 540F

Through [Section 540F](#), the 2020 NDAA required DOD to study and report back to the SASC and HASC on the feasibility and advisability of an alternative military justice system similar to MJIA 2020. The report is not due to Congress until October 2020. Apparently, however, DOD’s assessment is now irrelevant — what it was instructed by Congress to assess (540F) is now before Congress (MJIA 2020) for a vote a full three months prior to the deadline.

Senator Gillibrand is taking dismissal of the DoD assessment of her proposal to a new level. History suggests Sen. Gillibrand would have ignored the DoD report which the SASC, of which Sen. Gillibrand is a member, had required DoD to complete. But in introducing MJIA 2020 months before the report’s deadline Sen. Gillibrand preemptively ignored DoD’s not yet

submitted input. This hardly reflects a collaborative and respectful relationship between co-equal branches of government.

MJIA 2020 Mechanics

Using the maximum authorized punishment as the demarcation line between commander's and lawyer's prosecutorial authority would yield unworkable disparities.

Under MJIA 2020, commanders and lawyers would have bifurcated authority to address offenses that traditionally negatively impact unit cohesion and discipline and order in both garrison and on the battlefield. These offenses include assault and larceny. Depending on the variation of the offense, under MJIA 2020 either the commander or the lawyer may have responsive prosecutorial authority. For example, if a service-member were to assault a non-commissioned officer (NCO) or petty officer (PO) and also a commissioned officer, MJIA 2020 would divide prosecutorial authority. For the assault of the NCO or PO the commander would retain disciplinary authority as the maximum punishment authorized is six-months confinement. But for the assault of the commissioned officer, the lawyer, not the commander, would decide whether to prosecute the service-members because the maximum punishment authorized exceeds one-year confinement.

That relatively small variation in the maximum authorized punishment for violating the same punitive article would dictate whether a commander or a lawyer decided whether to prefer and refer charges is obviously confusing, illogical, and most problematically, unnecessary. Such problems are only exacerbated when considering multiple servicemembers assigned to the same unit who are jointly involved in committing one or more crimes but with varying levels of culpability. The accused and members of the unit would no doubt perceive as arbitrary two different authorities deciding which service-members in a collective incident of misconduct faced trial by court-martial and which did not. The perception that similarly situated members of a unit were subjected to a fundamentally different military justice process would undermine command credibility, producing the exact opposite effect on good order and discipline that military law seeks to advance

When there are multiple criminal charges, who would possess authority to prefer and refer those charges to trial by court-martial when the maximum punishment authorized for one charge is a year or less, but more than a year for another charge? Where a service-member has been initially charged with an offense which falls under a lawyer's authority, who would decide whether to direct to trial a lesser included charge when that maximum authorized punishment falls under the commander's authority? Additionally, would commanders still select panel members, enter into pretrial agreements, approve administrative separations in lieu of court-martial and continue to fund court-martials if they are not the prosecution decision authority?

MJIA 2020 as an Unfunded Mandate

MJIA 2020 is clear that the legislation “not be construed as authorization s for personnel, personnel billets, or funds...” MJIA 2020 instructs the military to carry out MJIA “using personnel, funds, and resources otherwise authorized by law. “

Early iterations of MJIA contained similar restrictions, which led the role of the commander RSP subcommittee to report that

The Military Justice Improvement Act (MJIA) includes a statutory restriction on the expenditure of additional resources and authorization of additional personnel, yet ***implementing the convening authority mandate included in the MJIA will involve significant personnel and administrative costs. Resources are an issue of primacy for any legislation that creates additional structure.*** (emphasis added)

What Positions Should Go Unfilled to Resource MJIA 2020?

MJIA 2020 requires that an O6 JA make decisions on preferral, disposition, and referral of all covered offenses yet does not authorize any personnel resources. But the same officer, commander or lawyer, cannot prefer charges and then dispose or refer those charges to trial. As a result, under MJIA 2020 *not one but two O6 JAs would be required for any covered offense.*

Multiple former The Judge Advocate General’s (TJAGs) and Deputy Judge Advocate Generas (DJAGs) from the Army, Navy, Air Force and Coast Guard and multiple former Staff Judge Advocates to the Commandant of the Marine Corps [agreed](#) in an open letter that Section 540F, similar to MJIA 2020, was “not remotely feasible.” To be clear, Section 540F envisioned an O6 JA for either preferral *or* referral. Accordingly, the proposal the TJAGs and DJAGs said was not remotely feasible would require *half* as many O6 JAs as MJIA 2020.

Those general and flag officers expressed unqualified agreement that the disparity between O6 JAs with significant criminal litigation experience needed if JAs were to make preferral or referral decisions and the actual number of such JAs “cannot be overstated.” These former heads of the Service JAG Corps’ indicated that to accommodate such a proposed would require “a complete personnel restructuring of the JAG Corps.”

The cost to implement MJIA 2020 is not known, though the RSP description of “significant personnel and administrative costs” seems far more probative than the speculative assumptions central to what is proposed. This is one of many obvious reasons why it is so troubling Sen. Gillibrand elected not to wait for DoD to submit its study on the feasibility of the Section 540F proposal. Ultimately the question would become from where should DoD look internally to meet those significant, unfunded, resource needs? Contrary to popular myth, even in DC there are not piles of unallocated funds or JA O6s with no jobs. To listen to the former TJAGs and DJAGs, MJIA 2020 is not feasible. At a minimum, MJIA 2020 would come at the considerable expense of other DoD programs and positions.

Does Sen. Gillibrand Understand Military Justice and MJIA 2020?

On July 1, 2020, Sen. Gillibrand read prepared remarks about MJIA 2020 on the Senate floor. She has been involved in military justice and MJIA's for years and, as noted above, received countless reports and briefings on the topic. Yet in delivering her prepared remarks Sen. Gillibrand made a number of perplexing misstatements about the military justice system and mischaracterized her own legislative proposal. Several of her statements evidence either a significant and layered misunderstanding about how the military justice system operates, or a deliberate decision to misrepresent the system in an effort to bolster support for her proposal. Highlighted below are some of these remarks (with hyperlink to video from the Senate floor and the approximate time hack):

Sen. Gillibrand: “The same chain of command who will decide the case pick[] judge, jury, prosecutor, defense counsel.” (1:40)

This statement reflects a lack of basic knowledge of the structure and operations of the military trial judiciary, trial defense services and the doctrine of unlawful command influence. The only semi-correct portion of the statement is on selecting not the *jury* but the *panel* (considering MJIA is a signature cause for the Senator, one might expect use of the accurate designation). The chain of command does not select the panel members detailed to court-martial (who are then subject to challenges analogous to those in any other court), the Court-Martial Convening Authority does so, a general or admiral for a General Court-Martial (the GCMCA). The GCMCA is one individual, the chain of command refers to multiple levels of command. The GCMCA does not select the panel but the venire or potential panel members. The suggestion of bias and unlawful influence in this statement also overlooks, as noted above, that all detailed panel members are subject to voir dire questioning and strikes/removal by both prosecution and defense counsel; and that in military practice the military judge is normally quite liberal granting such challenges. Each party is also entitled to at least one peremptory challenge. The more accurate statement would be that the defense and prosecution contribute to the composition of the court-martial panel members who will actually hear the case under the supervision of an independent military judge bound by law and regulation to ensure an *unbiased* court composition. While the pool of panel members is indeed selected by the GCMCA based on the qualification criteria established by Congress in Article 25 of the UCMJ, beyond *offering* those members to the court the GCMCA plays no further role in the decision of whether they are unbiased and able to perform their duty with the impartiality required by law.

Sen. Gillibrand: “This [current] system is not delivering justice” (2:03); “These fundamental civil rights decisions need to be made somewhere else” [than by the chain of command] (2:20); MJIA 2020 “would professionalize how the military prosecutes serious crimes” by removing commanders. (7:00)

Senator Gillibrand believes that the current system is not delivering justice and that her proposal would be an improvement by divesting prosecutorial discretion from commanders empowered to convene courts-martial. The first portion of MJIA 2020, Section 539A, is titled “Improvement of determinations of dispositions of charges for certain offenses...” But why only for some offenses? If, as Sen. Gillibrand clearly asserts, the current system is not delivering justice and accordingly must be improved, why would *any* offense be exempted from this asserted imperative improvement? This reflects an obvious contradiction between Sen. Gillibrand’s

raison d'être – that commanders are incapable of delivering justice and cannot be entrusted with prosecutorial discretion – but only in regards to some offenses and not others, including offenses where the death penalty and confinement for life are possible outcomes. What this contradiction truly reveals, however, is not that the current system is incapable of ensuring justice in the military criminal prosecution decision-making process, but that Sen. Gillibrand simply prefers a system that looks more like the civilian criminal justice systems with which she may be more familiar.

Sen. Gillibrand: MJIA 2020 “would only move one decision literally one decision that only 3% of commanders have the right to make” (7:58)

That statement is both fundamentally flawed and inconsistent with her own legislative proposal. MJIA 2020 lays out the *three* decisions which would be removed from commanders and vested in JAGs:

- 1) the decision as to preferral of charges;
- 2) the decision as to disposition of charges;
- 3) the decision as to referral of charges.

Does Sen. Gillibrand not even understand that her proposed amendment to the UCMJ applies to three decisions, and that each is distinct? Does she understand the differences between who is currently authorized to make those decisions? Presumably the 3% is a reference to commanders serving as GCMCAs and who refer cases to trial by general court-martial. The 3% is not applicable to the decision to prefer charges, anyone subject to the UMCJ may prefer charges and in most cases that decision is made in a cooperative process between the first-level commander (normally not even a convening authority) and her advising JAG. Furthermore, these same commanders and others below a GCMCA may dispose of certain charges at levels below a general court-martial.

While the 3% point is unclear and misleading, taking it at face value undercuts Sen. Gillibrand's argument. MJIA 2020 would transfer the decision authority Sen. Gillibrand claims only 3% of commanders possess to a JA. How is it that the central problem is with chain of command decision making if 97% of the commanders are not making the problematic decision?

Sen. Gillibrand: MJIA 2020 “is a very small but important change” (9:52)

Reasonable minds may disagree as to what is meant by “a [singular] very small” change, but MJIA 2020 imposes sweeping changes [plural]. And this does not even account for 2d and 3rd order effects which may represent the most significant military justice change since the UCMJ's adoption. Three minutes after claiming MJIA 2020 as one very small change, Sen. Gillibrand referred to her proposal as “fundamental reforms.” (12:21) Fundamental reforms is a far more accurate way to refer to MJIA 2020.

Sen. Gillibrand: Commanders “are not trained to make this fundamental decision about whether a crime has been committed.” (8:45)

At a minimum that is a misleading statement. Military law enforcement and JAs make the technical determination that a crime has been committed. Commanders decide if that alleged crime merits a court-martial. Nor is it true that commanders are “not trained” on these responsibilities. To the contrary, both schoolhouse education and experiential learning substantially impact a commander’s understanding of law, policy, and command responsibility in this process.

Sen. Gillibrand: Under MJIA 2020, “when the commander wants to do non judicial punishment he gets to do it every time a [military] prosecutor says there is no case here” (9:18)

This statement so patently erroneous it requires no explanation. Suffice that it reflects a complete misunderstanding of the non-judicial punishment process and its connection to trial by court-martial.

Sen. Gillibrand: “This reform has done all across the world by our allies.” (10:50)

What exactly is the relevance to the United States that countries with different legal systems and significantly smaller, less globally deployable, militaries have modified the role of the commander in military justice? Civil law countries don’t use anything approximating the U.S. jury or the court-martial panel of members. Should we abandon that feature of military criminal justice? International war crimes tribunals do not utilize rules of evidence even remotely analogous to the Military Rules of Evidence. Should we allow a court-martial to consider anything it deems relevant no matter how feeble the evidentiary foundation? In some jurisdictions the accused sits remotely from their counsel. Should we have a military accused banished to the back of the court-room communicating with his counsel by text message? In short, if and how other nations dispense criminal justice for members of their armed forces is simply irrelevant to whether our system aligns with the values and principles central to fair justice in our nation.

To this end, it is instructive that the RSP previously considered our allies approach to military justice and concluded it did not impact preventing and responding to sexual assaults:

[T]he evidence does not indicate that the removal of the commander from the decision making process in non-U.S. military justice systems has affected the reporting of sexual assaults. In fact, despite fundamental changes to their military justice systems, including eliminating the role of the convening authority and placing prosecution decisions with independent military or civilian entities, our Allies still face many of the same issues in preventing and responding to sexual assaults as the United States military.

Conclusion

Exploring ways to improve military justice is itself uncontroversial and has over history substantially improved our system. However, proponents for change bear the burden to explain and support the claim that the current system is flawed and that their proposals are responsive to

those flaws and will produce substantial improvement. Part of that explanation should acknowledge FACA committee reports and recommendations which run contrary to the proposed change. MJIA 2020 fails this test and is difficult to coherently explain and defend.

Ultimately, we're left wondering as to the point of the cycle of MJIA proposals to remove the commander's prosecutorial discretion followed by committees, panels, and reports which undermine either that change or its rationale, followed by another MJIA proposal. Who knows, perhaps Sen. Gillbrand preemptively ignoring DoD's not yet submitted Section 540F report may alter this dysfunctional cycle.

But the larger, more important, question is whether the military and its members are better served by this annual hamster wheel like process or if that time, effort and resources were instead focused on implementing changes to improve the military's response to sexual assault and harassment?

Let's please give the hamster wheel a break and find out.