

COMMENTS ON THE JOINT SERVICE SUBCOMMITTEE
PROSECUTORIAL AUTHORITY STUDY

October 2, 2020

Eugene R. Fidell*

On December 20, 2019, President Trump signed the National Defense Authorization Act for Fiscal Year 2020. Section 540F called on the Secretary of Defense to submit a study by October 15, 2020 on the feasibility and advisability of an alternative military justice system in which charging decisions for offenses punishable by more than a year's confinement would be made by a senior judge advocate rather than by a nonlawyer commander. Responsibility for preparation of the report was assigned to the Joint Service Committee on Military Justice on February 4, 2020. On April 20, 2020, a group of American and foreign experts—the Shadow Advisory Report Group of Experts (SARGE)—submitted [a shadow report](#) to the cognizant congressional committees and the General Counsel of the Defense Department. Two law professors submitted a competing report. If other comments have been submitted, they have not been made public.

The Joint Service Committee established a subcommittee to conduct a Prosecutorial Authority Study (JSS-PAS). That study was completed on September 2, 2020. This memorandum offers four initial comments on the study. It reflects my personal views as well as comments received from several SARGE members. It has not, however, been approved by the Group of Experts.¹

* Adjunct Professor of Law, NYU Law School; Senior Research Scholar, Yale Law School; Of Counsel, Feldesman Tucker Leifer Fidell LLP.

¹ Professor Brenner M. Fissell of Hofstra Law School has also commented on the study at [CAAFlog](#). I agree with his comments.

BLUF: The study does not satisfy the requirements stated in § 540F. It offers a circular account on core issues and a highly misleading one on others, and should be read with great skepticism.

1. Although the study was submitted early, it is incomplete. Its authors explicitly refused to make recommendations as to the development or implementation of a pilot program, despite Congress's requirement, because they unilaterally decided that the proposed alternative system is neither feasible nor desirable. This is shortsighted and a missed opportunity to assist the Congress and help shape future events.

2. The study dismisses the experience of American allies on spurious grounds. For example, it observes that (a) nations that have transferred charging decisions to lawyers outside the chain of command experienced no increase in sexual assault reports or prosecutions; (b) the Canadian conviction rate for sexual assaults was 14% in 2015-18; and (c) after Australia reduced commanders' military justice role, the country had to do without a military justice system because the High Court found the legislation unconstitutional.

Section 540F is not confined to sex offenses; it covers all UCMJ offenses for which the maximum authorized punishment exceeds a year's confinement. Whether or not the proposed alternative system leads to more charges or prosecutions or convictions, or stiffer sentences, is not the point, as SARGE pointed out. Moreover, the numerous countries that transferred disposition decisions to lawyers did not do so in order to drive up prosecution or conviction rates or sentences; they did it because charging decisions in this day and age are properly made by persons with legal training. Shockingly, the study explicitly disavows (at 58) the very notion that American military personnel policy should reflect human rights interests: "ensuring the U.S. system complies with human rights obligations is undoubtedly not a U.S. concern." The reason our allies did not report

on the effect of their reforms on sexual assault outcomes is simple: that's not why they abandoned George III's "non-compliant" system in the first place.

The study's reference to the Australian experience (at 73, 82) is wildly misleading. The High Court's invalidation of reform legislation in [Lane v. Morrison](#) was not predicated in any way on the role of the commander; it rested squarely and exclusively on the fact that the new Australian Military Court would have exercised the "judicial power of the Commonwealth" but did not satisfy the requirements of Chapter III of the Australian Constitution (comparable to Article III of the United States Constitution). Chapter III requires that judges exercising the judicial power of the Commonwealth enjoy tenure through age 70 and protection from diminution in salary. Australia was indeed left with a mess, and had to revert to its former legislation, but the affair had nothing to do with which official would have charging power. Indeed, even now, disposition authority in Australia rests with a lawyer outside the chain of command.²

The study's suggestion (at 73, 83) that the Australian experience should give Congress pause because it might sound the death knell for the military justice system is beyond implausible. The Supreme Court has consistently deferred to congressional judgment with respect to the organization of the military justice system. Anyone who claims that a § 540F alternative system would run the slightest risk of being found unconstitutional has not studied *United States Reports*.

3. A central premise appears on page 19: "Because of [*sic*] the purpose of the UCMJ is to strengthen national security through the promotion of justice and preservation of good order and discipline, referral of charges and court-martial convening decisions are inherently command decisions." This is a *non sequitur*: no one disputes that good order and discipline are required for

² See [Defence Force Discipline Act 1982](#), § 103 (Austl.).

an effective fighting force.³ But it simply does not follow that disposition decisions for major offenses—some of which are not inherently military in nature and at times have nothing to do with military service aside from the identity of the accused—are “inherently command decisions.” They are only “inherently military decisions” if one happens to believe that as an article of faith. *See also* p. 69 (“Removing disciplinary decisions from the commander and giving them to an unchecked lawyer would seriously compromise the commander’s inherent responsibility and authority.”).⁴

Similarly, the study asserts (at 21) that “[u]nlike civilian systems, the unique nature of the military justice system requires a commander to both initiate and conclude the proceedings.” The experience of our allies shows that a country can have an effective fighting force while placing charging power in the hands of a lawyer outside the chain of command. As for the commander’s post-trial role, the study fails to take account of the changes Congress enacted in 2016, that took

³ The study takes subtle liberties even on this. The authors state (at 87 & n.528) that “[c]ommanders have a statutory duty to maintain the good order and discipline of their units in order to achieve mission accomplishment,” but the only Act of Congress they cite is 10 U.S.C. § 7233. The closest the statute comes to the point for which it is cited is paragraph (3), which requires commanding officers and others in authority “to guard against and suppress all dissolute and immoral practices, and to correct, according to the laws and regulations of the Army, all persons who are guilty of them.” Many of the punitive articles of the UCMJ criminalize conduct that most people would think of as properly punishable but not necessarily “dissolute” or “immoral.” This may seem a small point, but it shows that the study’s references are unreliable. For another illustration, the study cites (at 87 & n.532) a 2014 Response Systems Panel report that referred to a retired general officer’s September 25, 2013 Response Systems Panel testimony for the proposition that “he observed the lack of allies’ military justice authority resulted in tentative decision making and actions on the battlefield.” What he *actually* testified to was that for some unnamed allies that rely on independent disposition arrangements, high profile or sensitive cases had to be tried back home. This made prosecution of such cases “inefficient, costly, and less effective,” but “[m]ore importantly, in [his] opinion, it made for tentative actions on the battlefield or on decision making in general.” Sept. 13, 2013 Tr. at 11 (testimony of LTG (Ret) Michael Linnington). Fairly read, what he was pointing to was not that disposition decisions were made by lawyers outside the chain of command, but that “these unique cases” were being tried back home. He offered to respond to questions, but no one on the RSP’s committee probed his assertion.

⁴ The study’s reference to “disciplinary decisions” suggests that there is no difference between minor UCMJ violations that are properly considered merely “disciplinary” and those that involve more than a year’s imprisonment. A § 540F alternative system would preserve commanders’ power to deal with true disciplinary offenses. As for serious offenses, commanders will be free to communicate their views to the lawyer decision maker (on notice to the accused and any victim). Given current communications technology, that input will be available essentially instantaneously regardless of the geographical distance between the commander and the § 540F judge advocate.

effect in 2019. The commander's post-trial role is essentially a thing of the past. A nonlawyer convening authority is not needed to designate a place of confinement for personnel convicted of serious offenses that would be covered by the § 540F alternative system.

4. On pp. 72-73, the study takes a leaf from law professors who have sought to palm off the urban myth that transferring the disposition power to attorneys outside the chain of command will somehow expose commanders to liability under the Law of Armed Conflict (LOAC) doctrine of command responsibility. This suggestion is unfounded, as explained on pages 1-3 of SARGE's July 8, 2020 [Supplemental Memorandum](#). It could not be clearer that commanders whose military justice powers over serious offenses are limited to referring charges to a non-sham justice system have no exposure under the doctrine of command responsibility. Please refer in this regard to the definitive [International Criminal Law Guidelines: Command Responsibility §§ 8.2-8.3 \(Jan. 2016\)](#) and GUÉNAËL METTRAUX, *THE LAW OF COMMAND RESPONSIBILITY* § 11.2.4.2, at 250 & n.97, 252-53 & nn.107 & 110, 255 & n.121 (2009). I am surprised that the authors of the study, speaking for the Defense Department, have given Congress such an inaccurate account of the law on this important subject. It casts doubt on the entire study.