

## **Open Letter From Former U.S. Military Commanders & Judge Advocates to the Committees on Armed Services of the U.S. Senate and the House of Representatives**

### **Commander Authority to Administer the UCMJ is Required for an Effective U.S. Military**

We, the undersigned, former U.S. military commanders and judge advocates, write to emphasize our consensus opinion that commanders must retain their existing authority to make the ultimate decision on if, when, and for what offense service-members will be tried by court-martial. As Congress has recognized since our nation's inception, this authority is inextricably linked to the commander's responsibility to ensure the military readiness essential for mission accomplishment. Ultimately, stripping commanders of this authority would jeopardize the national security of the United States.

In §540F of the 2020 National Defense Authorization Act, Congress directed the Secretary of Defense to study and report on the advisability and feasibility of an alternate military justice system. Specifically, §540F requires assessment of a proposal by which a senior military lawyer (a Judge Advocate (JA) in the grade of O-6 or higher with significant criminal litigation experience) decides whether to initiate (prefer) charges in violation of the Uniform Code of Military Justice (UCMJ) or to direct (refer to) trial by court-martial any offense where the maximum authorized punishment includes more than one year confinement. Among the required elements of the study is that the Secretary will conduct a comparative analysis of the U.S. military justice system with that of relevant foreign allies.

The underlying objective of §540F is to, at a minimum, invert the current collaborative relationship between commanders and military lawyers on matters of criminal discipline, transforming the commander into the advisor and the lawyer into the decision-maker for the vast majority of military criminal offenses. Taken to its potential conclusion, §540F would cut out the commander from even that advisory role. In a radical reversal of centuries of military criminal law practice, this proposal would diminish U.S. military combat capabilities by vesting the lawyer, and not the accused service-member's chain of command, with the ultimate say on whether court-martial prosecution serves the interests of good order and discipline in the unit.

Our goals in writing are two-fold; 1) alert members to §540F's sweeping potential to undermine military effectiveness by removing the commander's long-standing military prosecutorial authority and 2) provide our collective view that §540F's proposal is neither advisable nor feasible.

### **Disciplinary Authority is a Fundamental and Indivisible Aspect of Military Command and Control**

The U.S. military's legal and moral obligation is to fight and win our Nation's wars. Every aspect of military society is dictated by this purpose, and commanders at all levels work to ensure the military is capable of meeting this obligation.

Military command is a sacred trust. Commanders determine who will do what jobs, when units will rest or work, who will receive awards, what units or individuals will engage in combat operations, and, in a very real sense, who may live and who may die. Commanders are responsible for mission accomplishment and held accountable for everything their command does and fails to do.

The corollary to commanders being accountable is that they must be vested with the authority to initiate disciplinary action using all the tools historically validated as contributing to this objective. Military effectiveness requires that service-members have the discipline to follow their commander's orders, which is why Congress entrusted commanders with the authority to address disciplinary infractions through court-martial prosecution and why it is a mistake to remove that authority. As then Army Chief of Staff General Dwight D. Eisenhower wrote to the House Armed Services Committee in 1946, a commander's grave responsibility "can be fully discharged only by the exercise of commensurate authority without which the effectiveness of the command will be seriously impaired." It is contradictory and illogical to entrust military commanders with decisions that place subordinates in mortal risk in the service of their nation but strip commanders of their long-standing and carefully calibrated role in the military justice process.

A misunderstanding of the true nature of "good order and discipline" and the role of the commander in leveraging military criminal law to contribute to this vital aspect of unit effectiveness seems to be central to the proposed change in authority §540F directs the Secretary of Defense to study. We recognize that the relationship between command prosecutorial authority and discipline is often misunderstood. We believe the explanation the U.S. Army provided in the 1960 Committee on the UCMJ, Good Order and Discipline Report (Powell Report), effectively captures the relationship and remains as compelling today as it was in 1960.

If we start with the truism, "discipline is a function of command", we are at once at the core of one of the chief reasons for misunderstanding between civilians and service-[members] concerning the needs and requirements of an effective system of military justice. To many civilians discipline is synonymous with punishment. To the military [service-member] discipline connotes something vastly different. It means an attitude of respect for authority developed by precept and by training. Discipline - a state of mind which leads to a willingness to obey an order no matter how unpleasant or dangerous the task to be performed - is not characteristic of a civilian community. Development of this state of mind among soldiers is a command responsibility and a necessity. In the development of discipline, correction of individuals is indispensable; in correction, fairness or justice is indispensable. Thus, it is a mistake to talk of balancing discipline and justice - the two are inseparable.

Today, perhaps more than ever, effective joint operations are predicated on the actual and perceived legitimacy of U.S. efforts. This in turn only increases the commander's responsibility to ensure good order and discipline. Discipline remains an inseparable function of command, and that function is enabled by the existing role of commanders in the military justice process.

### **§540F Would Dilute Commanders' Prerogative to Respond to Serious Misconduct**

On June 30th, 1775, the Continental Congress established the Articles of War, the original American military criminal code, which empowered commanders to build a well-disciplined and combat effective force. The thread of the commander vested with disciplinary authority runs through every iteration of the U.S. military criminal code to this day. As reflected in the preamble to the Manual for Courts-Martial, "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." Yet §540F proposes a change that substantially dilutes the commander's authority to leverage military criminal law in pursuit of these vital objectives and distorts that law's true purpose.

Consistent with this long-standing relationship between command responsibility and military criminal law, commanders may currently utilize any of more than one hundred punishable UCMJ offenses in response to disciplinary infractions. But under §540F, commanders would retain exclusive authority to leverage only the nineteen punishable offenses where no variant is punishable by more than one-year confinement. By comparison,

lawyers would have exclusive prosecutorial authority over fifty-five punishable offenses where the maximum authorized punishment includes more than one-year confinement. As a result, military commanders would no longer have disciplinary authority regarding a range of offenses unique to military operations and the conduct of hostilities to include aiding the enemy, desertion, espionage, looting/pillaging, malingering, misbehavior before the enemy, mutiny/sedition, and spying. The untenable result will be that service-members look to a lawyer in an office when it comes to distinguishing between right from wrong instead of the officer entrusted with the responsibility of command and the accordant statutory authority to make this judgment. Commanders must remain the focal point for this exercise of prosecutorial discretion precisely because it is derived from their authority to lead.

### **§540F Would Incoherently Divide Authority Between Commanders and Lawyers**

Using the maximum authorized punishment as the demarcation line between commander's and lawyer's prosecutorial authority would yield unworkable disparities. When there are multiple criminal charges, who would possess authority to direct 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? Will a commander have to request permission from a lawyer and then wait to take lesser forms of disciplinary action, such as nonjudicial punishment, delaying the effectiveness of the corrective action envisioned in the use of those disciplinary tools?

Additionally, and as reflected in the chart appended to this letter, under §540F commanders and lawyers would have alternating authority to address variants of a host of offenses that traditionally negatively impact unit cohesion, respect for command authority and discipline and order in both garrison and on the battlefield. These offenses include absence without leave; disrespect towards/assault of a superior commissioned officer; insubordinate conduct toward warrant officers, noncommissioned officers (NCOs) or petty officers (POs); failure to obey orders or regulations; larceny; and assault. For example, if a service-member were to assault an NCO or PO and also a commissioned officer, §540F would divide disciplinary 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, a lawyer, not the commander, would decide whether to prosecute the service-member 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 or refer charges is obviously confusing, illogical, and problematic. 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. Military history has repeatedly demonstrated that split authority creates confusion in military operations which can lead to disastrous results.

### **Comparing Military Justice Systems is a False Equivalence**

Although §540F directed the Secretary of Defense to analyze the "military justice systems of relevant foreign allies," we caution Congress against placing any weight on the approaches of countries with different legal

systems and significantly smaller, less globally deployable, militaries than that of the United States. In short, we reject the suggestion that the processes utilized by foreign allies are relevant.

We have the utmost respect for our allies, alongside whom we have served and fought. We are aware that a number of our allies have limited or even removed the commander's military justice authority. But comparing our allies' approach to military justice to that of the United States is akin to comparing apples and oranges.

First, many of our allies underlying legal systems, whether civil law or inquisitorial system, are significantly different than that of the United States, where our common law adversarial system relies on juries (in the military justice context, a court-martial panel).

Second, regardless of the underlying legal system, there is no other country in the world with anything close to the globally deployed military as the United States. As reflected in the publicly assessable Defense Manpower Data Center website, as of March 2020, over 170,000 U.S. service-members were deployed to or stationed in over 170 foreign countries, which vastly exceeds the combined numbers of globally deployed servicemembers from all major U.S. allies. Our allies, as a general matter, lack both the ability and authority to hold extra-territorial criminal proceedings against their service-members. In complete contrast, and as the Department of Defense's Military Justice Review Group stated in its 2015 report, "[i]n the [U.S.] military there is a unique need to conduct trials in deployed environments during ongoing combat operations around the world, as well as in other nations where American Servicemembers are stationed."

Third, while we do not disparage our allies' approaches to military justice, we reject any implication that they are superior to ours. As the 2014 Role of the Commander subcommittee of the Response Systems to Adult Sexual Assault Crimes Panel (RSP subcommittee) concluded, our allies who have placed prosecutorial decisions with independent military or civilian entities "still face many of the same issues in preventing and responding to sexual assaults as in the United States Military."

It may well be that vesting authority in someone other than the commander is viable in a civil law, non-jury, criminal justice system with a smaller military and/or a military largely garrisoned domestically and where all criminal proceedings occur domestically. But that is simply not the case in and with the United States and our globally deployable military of over one million service-members.

### **Replacing the Commander with Senior Specialized Lawyers is Not Feasible**

In addition to being ill advised, §540F's proposal that O-6 or higher JAs with significant criminal litigation experience would make preferral or referral decisions is not remotely feasible. Under §540F's broad scope O-6 JAs would either prefer or refer *all charges throughout the armed forces* where the maximum authorized punishment exceeds one year. The number of commanders preferring charges and general court-martial convening authorities (GCMCA) referring those charges to trial by court-martial exponentially exceeds the numbers of JAs O-6 and higher with significant criminal litigation experience.

In 2012, Congress considered a number of military justice proposals as part of the Military Justice Improvement Act (MJIA) of 2013. One proposal was to shift preferral or referral authority from commanders to O-6 JAs but for a much smaller number of offenses than that proposed by §540F. The RSP recommended that Congress not adopt the MJIA's much more limited proposal:

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 aspects of military legal practice. Therefore, implementing MJIA's mandate, absent an increase in personnel resources, may result in under-staffing of other important senior-legal positions.

As the RSP made clear, to meet the MJIA's more limited requirements would necessitate either an increase in personnel resources or not staffing other important senior-legal positions. As applied to §540F's much broader proposal, the "increase in personnel resources" would be more accurately referred to as a complete personnel restructuring of the JAG Corps. The disparity between the number of O-6 JAs with significant criminal litigation experience needed under §540F and the actual number of such JAs cannot be overstated.

Setting aside that the personnel requirements of §540F cannot be met, we respectfully suggest to Congress that even if the impossible were possible, it would remain ill-advised. The majority of GCMCAs do not have a single O-6 JA physically present. The idea that charging or referral decisions would be made not only by a lawyer but one located hundreds of miles away from the alleged offense, offenders, and victims, with only a paper understanding of the unit, its mission and command climate is troubling. Additionally, §540F raises secondary and tertiary issues which would further erode commander's disciplinary authority. These include whether commanders would 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.

### **Section 540F's proposal is highly ill advised and not remotely feasible**

We do not understand why §540F completely omits any reference to or reliance on the extensive studies, hearings and reports provided by three separate Federal Advisory Committee Act committees considering various aspects of military justice, including commander's disciplinary authority.

In 2014, the RSP subcommittee, after more than a year of hearings and discussions, recommended, with only one member dissenting, that Congress retain the current role of the commander in the preferral and referral process. This diverse subcommittee included a retired four-star general and legal professional with extensive experience with the military *and civilian* criminal justice systems, including a former Member of Congress who also previously served as the District Attorney for Kings County/Brooklyn, the 4<sup>th</sup> largest DA's office in the country, and the Executive Director for the National Center for Victims of Crime, a prominent nonprofit organization advocating for victims' rights. The subcommittee's recommendation, which was included in the RSP final report, reflects an almost categorical rejection of what §540F now proposes.

In 2016, a noted criminologist and scholarly author submitted data and data analysis to the Judicial Proceedings Panel, 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. Similarly, in a March 2019 report, the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces 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.

In the end, we struggle to identify the military justice issue(s) which §540F would address. By removing the commander from the vast majority of charging and referral decisions, §540F would separate disciplinary authority from command and control, contravening the logic that has provided the foundation for more than two centuries of military criminal practice and seriously undermining the carefully calibrated relationship between commanders and their military legal advisors that has been refined over time to ensure that justice and discipline remain inseparable.

Accordingly, to preserve an effective, globally deployable, military force, the commander must retain authority to prefer and refer charges for trial by court-martial for all UMCJ violations.

Respectfully submitted,

/ SIGNED /

[For Appendix chart click on link below]

[APPENDIX – §540F Application to Selected UCMJ Offenses](#)



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