

## **An Open, but Difficult, Challenge: Finding the Rationale for a Commander's GCMCA for all Offenses**

Readers of this site know well by now that in the 2020 NDAA, [Section 540F](#), Congress tasked the DoD to conduct a feasibility study of a proposed “alternative” justice system, including the feasibility of a pilot program to test beta versions of such a system. This alternative would remove Court-Martial Convening Authority for all “felonies” from commanding officers and shift it to senior, experienced judge advocates. As [Michel Paradis wrote](#), this would be a significant paradigm shift with dramatic practical consequences. As I [wrote previously](#), the 540F proposal would be an escalation from the usual talk of taking such power away for sex crimes, but was actually quite limited in scope. It did not ask the DoD to differentiate UCMJ crimes based on anything more than the felony/misdemeanor distinction, thereby ignoring potentially relevant differences between “martial” and “non-martial” offenses (I define “martial offenses” as those military-nexus offenses with *no civilian analogue* like AWOL, malingering, trainee abuse, disobedience, conduct unbecoming an officer, and various others that may be “prejudicial to good order and discipline”). Nor did it task DoD to critically analyze or justify the myriad other investigative, prosecutorial, and quasi-judicial authorities currently invested in commanding officers *other than* court-martial convening authority, like the power to authorize searches and seizures, to arrest, to detain, to confine pre-trial, to decide what to charge, to dismiss charges, to approve plea deals, and to select panel members. Nor did it require the DoD to conduct any empirical survey or study to collect and quantify useful and relevant data (like, do commanders – at all echelons – actually understand their legal authorities, or do they default to reliance on their judge advocates anyway, and do they want those legal authorities?). The DoD’s Joint Service Committee’s ad hoc subcommittee for the “Prosecutorial Authority Study” (PAS) completed the 540F task and [submitted its Report](#) earlier this month, which Brenner Fissell recently summarized and critiqued [here](#).

I offer another form of critique, for the PAS report appears to have largely repeated the same core arguments that the Service Chiefs of Staff and their Judge Advocates General have given in Congressional testimony over the last decade. It goes something like this: Commanders need obedient, disciplined soldiers, sailors, airmen and Marines to accomplish the *raison d'être* of a military – to prepare to fight, to fight if necessary, and to win; Commanders need the UCMJ to ensure they have an adequate pool of obedient, disciplined soldiers, etc; Commanders need to be the sole authorities making decisions within the UCMJ system because Commanders understand the effect of crime on their unit and their unit’s mission; if Commanders are not the center of gravity or hub around which the forms of military justice orbit, troops will lose confidence in their commanders, lose trust in each other, depress morale, stretch unit cohesion to the breaking point, and ultimately weaken readiness; Commanders are aided and advised by experts with licenses to practice law, and anyway are bound by rules, regulations, and the same criminal laws their troops are – but such constraints are unnecessary because Commanders, as a rule, always follow the Rule of Law; ultimately, if Americans can entrust the lives of their sons

and daughters to their care, then surely we can entrust them with the duty to carefully and fairly investigate, prosecute, and punish crime allegedly committed by their sons and daughters.

This argument, or at least the bulk of it, certainly seems to [have support](#) in a [long line](#) of [Supreme Court cases](#), even after the adoption of the UCMJ and the beginning of military justice's bumpy road of "[civilianization](#)." Not surprisingly, the PAS characterized the 540F "alternative" as profoundly unsettling: unsettling because it would disturb long-held beliefs about the both the role and ability of commanders, and because it would disturb a significant number of existing processes and policies. To the PAS members, such a plan would be "the most sweeping change to military justice in the United States since the inception of the UCMJ in 1950." (It should not go unnoticed that of PAS consisted of 15 members, a mix of judge advocates and former commanders from all the armed services, and civilian attorneys. Though the primary effects of the 540F alternative would be felt as a reduction in legal power and discretion by those commanders with General Court-Martial Convening Authority, no members of the PAS have ever held such authority).

To develop my critique, I'd offer the following challenge to members of the PAS or Congress:

Assume the following hypothetical facts:

- An Army Private First Class, age 23, male, married, assigned as a combat engineer ("sapper") in the 1st Cavalry Division at Fort Hood, Texas. He lives off-post in Killeen, Texas, in an apartment he shares with his wife, who is unemployed and pregnant.
- He is arrested by civilian law enforcement from the county sheriff's department, on suspicion that he set his car aflame in a public field, called in a false police report alleging his car had been stolen, and later fraudulently filed an insurance claim.
- The soldier is arrested after he posts an incriminating photo and less-than-cryptic note on his public Twitter page, both of which are viewed by his apartment manager (who happened to be owed two months' worth of rent by said Private First Class) who subsequently calls the Sheriff's office.
- Assume that the Sheriff's office has, on duty, a military liaison whose responsibility is to facilitate the relationship between local authorities and military investigators on Fort Hood for off-post allegations of criminal activity in which the suspect is a service-member assigned to Fort Hood.
- Assume that this military liaison, per standard operating procedure, contacts the Fort Hood Provost Marshal's Office and forwards the arrest report. The desk sergeant at the Provost Marshal's Office then contacts the Private's Company Commander and First Sergeant upon receiving the initial report and record of the arrest.
- Assume that the suspect's division commander – e.g., the Major General commanding the 1st Cavalry Division has General Court-Martial Convening Authority per the current UCMJ and 2019 MCM.
- Assume that Fort Hood has concurrent jurisdiction with Killeen and Bell County, Texas, and exclusive jurisdiction only for misconduct occurring on military property.

- Assume that the Division Commander’s GCMCA extends to this Private First Class by virtue of his duty assignment and Active Duty status, per the current UCMJ’s personal jurisdiction under Article 2.

With these facts to play with, explain *why* a hypothetical Division Commander is an appropriate authority to determine whether *this* Soldier should be exposed to the stigma and consequences of a federal conviction and punishment through a court-martial.

However, here is the real challenge: you must answer *without* relying on any of the following:

- Historical convention or custom
- Anecdotal experience
- Norms of practice at Fort Hood
- Preferences of the Bell County, city of Killeen, or the state of Texas law enforcement or public officials
- Preferences of the Commanding General, or any other leader in the soldier’s chain-of-command
- Preferences of the Office of the Staff Judge Advocate
- Resources (time, personnel, funding, etc.) of either Fort Hood’s CID and Office of the Staff Judge Advocate or those of Bell County, Killeen, or Texas
- Conviction rates for similar offenses in civilian jurisdictions compared to military jurisdictions

But, let me make this a bit more complex. If your answer includes the phrase “good order and discipline” anywhere in it, you must (a) define this phrase [you won’t find a definition in the UCMJ or Manual for Courts-Martial or case law]. For reference and comparison, here’s what the PAS had to say about the relationship between commander and “discipline:”

“Military discipline, simply put, is the respect for authority and absolute obedience to lawful orders. The purpose of discipline stems from the necessity of combat. Against their natural instincts and personal risk, service members must adhere to the orders of their superiors to kill other human beings and risk being killed in harsh and chaotic battlefield conditions.... [M]ilitary justice is meant to inculcate service members in the necessity of good order and discipline. The UCMJ must be an effective tool for commanders to quickly reinforce the absolute necessity for their unit personnel to follow orders.”

And you must (b) explain *how this* alleged misconduct undermines the good order and discipline in the Division, and (c) explain *how* the use of military justice authorities, rules, and resources to investigate, prosecute, and potentially punish *actually* will positively effect “good order and discipline.” If you can only speculate as to the probability of such a positive effect, what is your *empirical basis* of support for that claim?

If your answer includes reference to the commander's accomplishment of a military mission, readiness to execute that mission, or obedience to lawful orders, you must (a) explain *how this* alleged misconduct damages the commander's ability to accomplish a military mission and (b) *how* the use of military justice authorities, rules, and resources to investigate, prosecute, and potentially punish with a punitive discharge and incarceration, *actually* will positively mitigate that damage or reduce its risk.

If your answer is not *premised* on assuring a commander's accomplishment of a military mission, readiness to execute that mission, or obedience to lawful orders, then you must justify why you are ignoring the rationale underlying the constitutionality of the separate military justice system, described in [Parker v. Levy](#).

If your answer includes a reference to military values of honesty, trust, or integrity, you must explain why the breach of a professional value warrants criminalization by that profession and requires it in *this* case.

If your answer includes "justice," you must (a) define this word [you won't find it in the UCMJ or MCM or case law], and (b) explain how the use of military authorities, rules, and resources to investigate, prosecute, and potentially punish *actually* protects, serves, or improves this "justice" and (c) *how* this would be distinguished by the "justice" achieved through civilian prosecution.

If you answered (c) above, by saying that the "justice served" is essentially indistinguishable between the two systems, then you are accepting the rationale of the Court in [Ortiz v. United States](#), which equated the "integrated court-martial system" to state criminal law systems in their functions and purpose ("for justice") (but not in their forms). However, the Court clearly also stated that "discipline" and "obedience to orders" are positive outcomes from the use of the court-martial system, but only in the sense that these are agreeable and helpful by-products incidental to the workings of "justice." In so doing, the Court de-emphasized the interest of the commanding officer, and ignored all the procedurally distinct characteristics of military justice, including the investigative, prosecutorial, and quasi-judicial roles they play. You must therefore explain how you square your answer to (c) with the reasoning in *Ortiz*.

...That may have been too tough an exam question...

If you had difficulty in producing a coherent, reasoned, and persuasive explanation for giving the Major General his opportunity to exercise GCMCA over *this* case, in light of my constraints and the follow-on explanations I "required," take heart: the PAS had difficulty with it too, or at least I assume so because they did not attempt to rationalize their disagreement for the 540F alternative in such a context. Of course, you may counter that these hypothetical facts are unrealistic, or that it is unrealistic to assume that the Division Commander would even want "to take the case."

The law currently affords that commander this authority to make a discretionary call; whether he or she does so often or ever is largely beside the point. And if *this* fact pattern has no obvious or easy explanation, then *no* fact pattern involving "non-martial" misconduct has an obvious or easy explanation. This means that the 540F task was an inadequate tool of Congressional oversight

and discovery – the analysis it called for, and the analysis it got in return, was limited and resulted in a recapitulation of the same, now well-rehearsed, argument: (1) commanders are by law responsible for “suppressing indiscipline and disobedience;” (2) the actions of those under their command can be influenced by the use, or threat of use, of criminal law; (3) only commanders now how, when, why, and whom to influence in this way; (4) even if they are uncertain, they have competent legal advisors, and any abuse or misuse of their power is checked by both higher command authorities and the courts; (5) their lawful use of their power is already constrained by rules and limits imposed by statute or regulation; (6) if commanders lose this authority, they will lose the trust and confidence of their subordinates, loosen cohesion, and lead to military defeat; and (7) “trust us.”

This, unfortunately, assumes too much. It assumes that all service-member misconduct has similar characteristics and consequences *from the perspective of the commander and mission*; it assumes that criminal law is, in its use or threat of use, a reasonable and legitimate way to induce the adoption of professional values and norms that are distinctive and not prescriptive in civilian society; it assumes that criminal misconduct of any kind reflects on the professional values and martial ideals expected of service-members; it [assumes wrongly that criminal misconduct of any kind is inherently prejudicial to good order and discipline](#) simply because of who committed it; it assumes we can all agree on what the “purpose” of military justice is, and that – whatever it is – it is something that remains static and non-contextual. Even David Schlueter has waffled on this question, at [one point](#) arguing that justice is dominant, [while later claiming that good order and discipline is the primary purpose](#).

If that fundamental, usually underappreciated, question is still open to reasoned and nuanced debate, then *everything* that follows from that purpose is open to reasoned and nuanced debate. These assumptions I just listed above may very well be true and supported. But nobody has yet *demonstrated* so, beyond reflexively defending the system as is and calls to “trust us, based on our experience.” Congress certainly could have asked this of DoD, and the PAS certainly could have provided it and made a convincing, nuanced, case for retaining a commander’s convening authority when and where it matters. We can do better – and if we assert that such a unique system of law, so different than its civilian counterparts, deserves to be cared for (or at least not tampered with for the sake of change alone), we should do better.

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