

ALTERNATIVE AUTHORITY FOR DETERMINING WHETHER
TO PREFER OR REFER CHARGES FOR FELONY OFFENSES
UNDER THE UNIFORM CODE OF MILITARY JUSTICE

A Shadow Advisory Report to the
Senate Committee on Armed Services
and the House Committee on Armed Services

Shadow Advisory Report Group of Experts (SARGE)

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Introduction

Section 540F of the National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, 133 Stat. 1198 (Dec. 19, 2019) (FY20 NDAA), calls for a report by the Secretary of Defense on a proposal affecting the authority to prefer¹ and refer² felony-level charges in military criminal cases. To assist the Secretary in the preparation of that report and to assist the Committees on Armed Services in their eventual review of the Secretary's report, the authors, each of whom is an expert in military justice, have prepared this "shadow" advisory report. We anticipate preparing a supplemental shadow report once the Secretary's report has been submitted and made public.

BLUF: A pilot program may be unnecessary because there is already ample reason to enact the § 540F alternative system or something like it on a permanent basis, but we recognize that such a program could yield real data and useful insights that would enrich congressional consideration of proposals for permanent change. The Committees should conduct a substantive hearing before establishing a pilot program, require progress reports, make those reports available for public comment, and conduct a further hearing after the program is completed and the Secretary has submitted an after-action report.

Section 540F

Section 540F is one of several military-justice-related provisions in the FY20 NDAA. It provides:

SEC. 540F. REPORT ON MILITARY JUSTICE SYSTEM INVOLVING ALTERNATIVE AUTHORITY FOR DETERMINING WHETHER TO PREFER OR REFER CHA[R]GES FOR FELONY OFFENSES UNDER THE UNIFORM CODE OF MILITARY JUSTICE.

(a) REPORT REQUIRED.—

(1) IN GENERAL.—Not later than 300 days after the date of the enactment of this Act, the Secretary of Defense shall submit to the Committees on Armed Services of the Senate and the House of Representatives a report setting forth the results of a study, conducted for purposes of the report, on the feasibility and advisability of an alternative military justice system in which determinations as to whether to prefer or refer charges for trial by court-martial for any offense specified in paragraph (2) is made by a judge advocate in grade O-6 or higher who has significant experience in criminal litigation and is outside of the chain of command of the member subject to the charges rather than by a commanding officer of the member who is in the chain of command of the member.

(2) SPECIFIED OFFENSE.—An offense specified in this paragraph is any offense under chapter 47 of title 10, United States Code (the Uniform Code of

¹ See Rule for Courts-Martial (R.C.M.) 307.

² See R.C.M. 601.

Military Justice), for which the maximum punishment authorized includes confinement for more than one year.

(b) ELEMENTS.—The study required for purposes of the report under subsection (a) shall address the following:

(1) Relevant procedural, legal, and policy implications and considerations of the alternative military justice system described in subsection (a).

(2) An analysis of the following in connection with the implementation and maintenance of the alternative military justice system:

(A) Legal personnel requirements.

(B) Changes in force structure.

(C) Amendments to law.

(D) Impacts on the timeliness and efficiency of legal processes and court-martial adjudications.

(E) Potential legal challenges to the system.

(F) Potential changes in prosecution and conviction rates.

(G) Potential impacts on the preservation of good order and discipline, including the ability of a commander to carry out nonjudicial punishment and other administrative actions.

(H) Such other considerations as the Secretary considers appropriate.

(3) A comparative analysis of the military justice systems of relevant foreign allies with the current military justice system of the United States and the alternative military justice system, including whether or not approaches of the military justice systems of such allies to determinations described in subsection (a) are appropriate for the military justice system of the United States.

(4) An assessment of the feasibility and advisability of conducting a pilot program to assess the feasibility and advisability of the alternative military justice system, and, if the pilot program is determined to be feasible and advisable—

(A) an analysis of potential legal issues in connection with the pilot program, including potential issues for appeals; and

(B) recommendations on the following:

(i) The populations to be subject to the pilot program.

(ii) The duration of the pilot program.

(iii) Metrics to measure the effectiveness of the pilot program.

(iv) The resources to be used to conduct the pilot program.

There is no detailed legislative history on § 540F. The descriptions found in the Senate Report³ and the Conference Report⁴ do not add to the enacted language. The President's December

³ S. Rep. No. 116-48 (2019).

⁴ H. Conf. Rep. No. 116-333 (2019).

20, 2019 signing statement⁵ makes no reference to the provision. Protect Our Defenders, an NGO, has cited the measure as one of its 2019 legislative achievements.⁶

The following sections of this report track the required elements set forth in § 540F(b).

Procedural, Legal, and Policy Implications and Considerations

The alternative system⁷ has procedural, legal, and policy implications. These are manageable, and the benefits exceed the costs.

Procedurally, the alternative system would leave in place the overall concept of the convening authority, rather than abolishing them or shifting to a standing courts paradigm. It would, however, sever for a class of “specified offenses”—those that can lead to more than a year’s confinement⁸—the relationship between operational command and the disposition power.⁹ This is a bridge that has already been crossed repeatedly. Thus, the UCMJ permits commanders to refer for trial charges against personnel who are not of their command, or even in the same armed

⁵ Donald J. Trump, Statement by the President, Dec. 20, 2019, *available at* <https://www.whitehouse.gov/briefings-statements/statement-by-the-president-34/>.

⁶ Protect Our Defenders, 2019 Annual Report 7 (2020).

⁷ The term “alternative system” may be a misnomer because § 540F leaves the architecture of the military justice system largely intact. The only thing that will necessarily change is that for serious offenses the last word on whether to charge and prosecute a member will lie with a legally-trained senior officer outside the member’s chain of command. At present, such cases require advice from a judge advocate, and that advice can effectively kill a general court-martial prosecution if certain findings are not made. Art. 34(a)(1), UCMJ, 10 U.S.C. § 834(a)(1) (2018). Under § 540F, instead of a judge advocate having that *veto*, a judge advocate will have to make *an affirmative decision* to prefer charges and proceed with a trial for specified offenses. Since, however, § 540F describes this as an alternative system, we use that term.

⁸ Depending on their gravity, offenses under the law of war might also be subject to the alternative system. Thus, general courts-martial have jurisdiction not only over violations of the punitive articles by persons subject to the UCMJ, but also “jurisdiction to try any person who by the law of war is subject to trial by a military tribunal and may adjudge any punishment permitted by the law of war.” Art. 18(a), UCMJ, 10 U.S.C. § 818(a) (2018); R.C.M. 201(f)(1)(B), 203; *see also* Art. 21, UCMJ, 10 U.S.C. § 821 (2018). “In cases tried under the law of war, a general court-martial may adjudge any punishment not prohibited by the law of war.” R.C.M. 1003(b)(1). In practice, the United States does not use general courts-martial to try offenses against the law of war, whether committed by our own personnel or by enemy personnel. The former are prosecuted under the applicable punitive article of the UCMJ, *See* Dep’t of Army, Pamphlet 27-1, *Treaties Governing Land Warfare* ¶ 507(b) (Dec. 7, 1956) (“Violations of the law of war committed by persons subject to the military law of the United States will usually constitute violations of the Uniform Code of Military Justice and, if so, will be prosecuted under that Code.”); *e.g.*, *United States v. Calley*, 22 U.S.C.M.A. 534, 48 C.M.R. 19 (1973); for the latter, the United States could use a military commission.

⁹ What fraction of the military justice caseload would come within the ambit of § 540F is impossible to determine from publicly-available data. The Army’s Article 146a, UCMJ, 10 U.S.C. § 946a (2018), report for FY18 states (at 9) that “[o]f the 502 cases in which findings were entered in FY18, 246 of them, or 51 percent, included sexual misconduct related offenses (Articles 120, 120b, and 120c).” The maximum punishment for offenses under each of those punitive articles qualifies them as specified offenses under § 540F(a)(2). Since some *non-sex-offense* cases in which findings were entered during the same period would also have entailed serious potential maximum punishments under the *Manual for Courts-Martial*, the alternative system will apply to more than a bare majority of courts-martial. (The Army’s report also does not quantify the larger number of cases that were preferred or referred.) The Committees should obtain complete and, importantly, *comparable* data from all of the services in order to gauge how much of the overall military justice caseload would be subject to the alternative system.

force.¹⁰ At least since *Tailhook*, the armed forces have relied on the Consolidated Disposition Authority model when personnel from more than one command or armed force face charges that grow out of a single or related set of circumstances. What is more, the Navy has relied on regional commanders to exercise the powers of a general court-martial convening authority over personnel who are assigned to operational naval commands of every description. There is therefore nothing new in the idea that for some offenses the disposition decision need not be made by an officer in the accused's operational chain of command. That being the case, there can be no objection in principle to that decision being made by an officer who has no operational role at all.¹¹

Brig. Gen. John S. Cooke, one of the most gifted judge advocates of recent times, explained the 1983 UCMJ reforms as part of progress toward “a true judicial system” for military justice:

In essence, enacting the UCMJ was the beginning of an effort to erect a true judicial system within the body of the military organization. This marked a radical shift. Instead of asserting, as General Sherman and many others did, that civilian forms and principles of justice are incompatible with military effectiveness, this effort rested on the largely untested precept that military effectiveness depends on justice, and that, by and large, civilian forms and principles are necessary to ensure justice.¹²

Despite this, there are those who resist any shift away from the commander's historic central role in military justice, a role that dates to the American Articles of War the Continental Congress copied from George III's 1774 Articles of War. Over the last century and more, that role has been cabined in a host of ways with no adverse effect on the good order and discipline or effectiveness of America's armed forces. Examples include requiring a pretrial investigation (now called a preliminary hearing),¹³ prescribing qualifications for members¹⁴ and (non-binding) guidance for disposition decision-making,¹⁵ requiring review by higher authority (notably, for the last 100 years, in capital cases)¹⁶ and pretrial advice from a judge advocate,¹⁷ abandoning the traditionally unfettered post-trial clemency “for any reason or for no reason,”¹⁸ prohibiting

¹⁰ R.C.M. 201(e).

¹¹ The convening authority for military commissions, *see* Military Commissions Act of 2009, 10 U.S.C. § 948h (2018); R.M.C. 401, has no operational mission. *See* Dep't of Defense, Regulation for Trial by Military Commission ¶ 2-3 (2011 ed.). That official need not even be a military officer.

¹² Brigadier General John S. Cooke, *The Twenty-Sixth Annual Kenneth J. Hodson Lecture: Manual for Courts-Martial 20X*, 156 MIL. L. REV. 1, 8-9 (1998) (internal citation omitted).

¹³ Art. 32, UCMJ, 10 U.S.C. § 832 (2018).

¹⁴ Art. 25(e)(2), UCMJ, 10 U.S.C. § 825(e)(2) (2018).

¹⁵ Art. 33, UCMJ, 10 U.S.C. § 833 (2018); *Manual for Courts-Martial, United States* (2019 ed.), App. 2.1.

¹⁶ National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1744, 127 Stat. 980 (2013), *as amended by* Carl Levin and Howard P. “Buck” McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 541, 128 Stat. 3371 (2014).

¹⁷ Art. 34, UCMJ, 10 U.S.C. § 834 (2018).

¹⁸ *See* R.C.M. 1107(d)(1) (former version); *see* Arts. 60a, 60b, UCMJ, 10 U.S.C. §§ 860a, 860b (2018).

convening authorities from requiring reconsideration¹⁹ (much less directing a particular outcome on reconsideration),²⁰ creating and empowering military judges²¹ (who are now vested with pretrial powers),²² providing tier upon tier of appellate review,²³ and attempting (albeit with limited success) to root out command influence.²⁴ All of these actions and a host of others large and small have, in one way or another, reduced commanders' original sweeping authority over the administration of military justice. The alternative system is a justified incremental step in the same overall direction. It leaves in commanders' hands the things that belong there, and it provides a mechanism for ensuring that the invaluable insights they will have on how any particular case may impact on such critical matters as mission readiness, command climate, and unit cohesion are taken into account in the disposition decision. We believe the result is a win-win.

Implementation and Maintenance of the Proposed Alternative Military Justice System

A. Legal personnel requirements

The alternative system should impose few if any additional requirements for legal personnel. Unless a different approach were adopted, each service will need to dedicate one or more O-6-or-above judge advocates to make disposition decisions. These can be assigned from among current personnel rather than having to add bodies or "rob Peter to pay Paul." Our impression is that it would be no problem for each armed force to shift an existing O-6 billet from, for example, its Court of Criminal Appeals, or some other qualified member(s) of its roster of senior staff judge advocates.

B. Changes in force structure

We have no information on whether the alternative system would entail changes in force structure. A § 540F judge advocate will need a small staff.

C. Amendments to law

The alternative system should not be implemented without a careful review of both the Uniform Code of Military Justice and the *Manual for Courts-Martial* for any necessary corresponding changes. For example, the non-UCMJ measures Congress has enacted for further

¹⁹ See Art. 62, UCMJ (former version).

²⁰ *United States v. Ware*, 1 M.J. 282 (C.M.A. 1976) (invalidating *Manual for Courts-Martial, United States* (1969 ed.) ¶ 67f).

²¹ Arts. 26, 39(a), UCMJ, 10 U.S.C. §§ 826, 839(a) (2018).

²² Art. 30a, UCMJ, 10 U.S.C. § 830a (2018).

²³ Arts. 66, 67, 67a, UCMJ, 10 U.S.C. §§ 866, 867, 867a (2018); 28 U.S.C. § 1259 (2018).

²⁴ Art. 37, UCMJ, 10 U.S.C. § 837 (2018); *but see* FY20 NDAA § 532 (clarifying for future effect that the rule of harmless error applies to command influence).

review of disposition decisions in cases involving sex offenses²⁵ would presumably be suspended *pro tanto* during a § 540F pilot program and repealed as no longer needed if the alternative system were enacted on a permanent basis.

It would be anomalous for a commander to retain the power to detail members for the trial of specified offenses over which they lack disposition power. The convening authority's power to detail members has proven to be an invitation to seemingly endless corner-cutting, mischief, and, inevitably, litigation.²⁶ Deck stacking²⁷ and the exclusion of statutorily-eligible personnel in higher or lower pay grades²⁸ aside, few general court-martial convening authorities under the current system are in a position to determine whether potential members are "best qualified" for purposes of the critical statutory trait of "judicial temperament."²⁹ Congress might wish to create a court-martial administrator (as other countries have done) and end the dangerous fiction that pervades today's largely unenforceable³⁰ member selection standards.

It would also be anomalous for anyone other than the § 540F judge advocate to wield the power to enter into pretrial agreements or act on requests for administrative separation in lieu of trial in cases in which the disposition power was vested in a § 540F judge advocate.

*D. Impacts on the timeliness and efficiency of
legal processes and court-martial adjudications*

The military justice system moves too slowly. The alternative system should somewhat reduce case processing times since the decision maker will be an attorney fully and intimately aware of the system and the standards that govern charging decisions, instead of having to come up to speed. At present, few if any convening authorities can claim that kind of familiarity. Additionally, the § 540F judge advocate will not have to balance the complex demands of making disposition and related decisions with the host of duties—many of them both urgent and time-consuming—that necessarily compete for commanders' limited time. Whatever knowledge base a convening authority may accumulate under the current system, routine personnel turbulence means that much of that experience must be regained with every new commander. In contrast, the alternative system is predicated (we hope) on the notion that the charging official will enjoy a stable, if not a fixed, tour of duty. Pilot program § 540F judge advocates should remain in their billets throughout the life of the program in order to achieve consistent decision-making and provide as rigorous test of the alternative system as possible.

²⁵ National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1744, 127 Stat. 980 (2013), as amended by Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 541, 128 Stat. 3371 (2014).

²⁶ See generally EUGENE R. FIDELL, ELIZABETH L. HILLMAN, JOSHUA E. KASTENBERG, FRANKLIN D. ROSENBLATT, DWIGHT H. SULLIVAN & RACHEL E. VANLANDINGHAM, *MILITARY JUSTICE: CASES AND MATERIALS* § 11.2 (3d ed. 2020).

²⁷ E.g., *United States v. Riesbeck*, 77 M.J. 154 (C.A.A.F. 2018).

²⁸ E.g., *United States v. Kirkland*, 53 M.J. 22 (C.A.A.F. 2000).

²⁹ Art. 25(e)(2), UCMJ, 10 U.S.C. § 825(e)(2) (2018).

³⁰ See, e.g., *United States v. Sullivan*, 74 M.J. 448 (C.A.A.F. 2015) (violation of Art. 25(d)(2), UCMJ, 10 U.S.C. § 825(d)(2), found harmless).

Important as they are, timeliness and efficiency are not the only perspectives from which the impacts of the alternative system should be evaluated. More fundamental is the positive impact the alternative system would have on trust and confidence in the military justice system among those who are subject to it (and their families).

E. Potential legal challenges to the alternative system

Congress has authority under Article I, § 8, cl. 14, of the Constitution to “make rules for the government and regulation” of the armed forces. Its legislative choices will not be disturbed by the courts unless there are factors “so extraordinarily weighty as to overcome the balance struck by Congress.”³¹ If it enacts the alternative system either permanently or merely as a pilot program, we know of no basis on which it could be found unconstitutional. This is not to say that the alternative system will not spawn legal issues of one kind or another—experience teaches that it will—but challenges, if any, to the validity of the system itself will be fruitless. In particular, a Fifth Amendment equal protection³² challenge based on the notion that during the pilot program some major offenses would be subject to the alternative system while others would not be subject to it would fail. “[R]eform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. The legislature may select one phase of one field and apply a remedy there, neglecting the others.”³³

F. Potential changes in prosecution and conviction rates

Without a pilot program, there is no way of knowing whether the alternative system would affect the number of prosecutions. As a matter of logic, one can posit that some convening authorities under the current command-centric system elect not to pursue some cases because they know and either like or value the accused or because they do not wish superiors to believe that their command is rife with criminality. On the other hand, some convening authorities under the current system may pursue cases, especially sex cases, that might not genuinely merit prosecution because they fear congressional ire.³⁴ Or they may send a marginal or undeserving case to trial simply in order to afford the victim his or her “day in court.” Above all, because there are multiple convening authorities, referral decisions may vary dramatically from command to command. The alternative system would reduce the variation, and presumably the § 540F judge advocate would feel less vulnerable to congressional pressure. That official would also be immune to other factors such as concern over an operational command’s reputation for criminality, personal familiarity with the accused, or the accused’s value to the operational command. In our opinion, however, the

³¹ *Weiss v. United States*, 510 U.S. 163, 177-78 (1994) (quoting *Middendorf v. Henry*, 425 U.S. 25, 44 (1976)).

³² See *Bolling v. Sharpe*, 347 U.S. 497 (1954).

³³ *Williamson v. Lee Optical*, 348 U.S. 483, 489 (1955).

³⁴ Congress should take steps to deter improper congressional influence on the administration of justice in individual cases. The Committees may wish to develop an internal code of conduct or some other memorialization of a norm that would discourage members, committees, and staff from seeking to influence decision-making in pending cases. For a potential model see N.Z. Parl. Standing Orders 115-16 (2017), available at https://www.parliament.nz/en/pb/parliamentary-rules/standing-orders-2017-by-chapter/chapter-3-general-procedures/#_Toc490062854.

effect of the alternative system on the prosecution rate is immaterial because the goal must not be merely to drive up that rate but to foster more consistent disposition decision-making and improved public confidence in the administration of justice.

The alternative system may increase conviction rates because disposition decisions by an attorney are more likely to weed out cases that are marginal in terms of successful outcomes at trial or on appellate review. The current spike in acquittals in sex cases is concerning because it reduces general deterrence (*i.e.*, some potential malefactors may be tempted to take their chances) and in general degrades public confidence in official decision-making. That said, the alternative system should be evaluated not in terms of its actual or potential impact on the conviction rate for serious cases (assuming that impact could ever be assessed more than impressionistically over a reasonable period) but in terms of its impact on fairness, consistency of decision-making in the disposition of offenses, and above all, public confidence in the administration of justice.

Congress should not expect that at the end of the pilot program it will be presented with hard numbers that will suggest, much less prove, that the alternative system will increase or decrease or have no effect on prosecution and conviction rates (or, for that matter, sentences). There are simply too many variables and any effort to distill the experience into anything resembling a hard delta between the current system and the alternative system is certain to be picked to death. Congress should instead view the alternative system as reflecting a policy judgment reflecting contemporary American values and experience as to who should make charging decisions in criminal cases, not as an arid exercise in number crunching.

*G. Potential impacts on the preservation of good order and discipline,
including the ability of a commander to carry out nonjudicial
punishment and other administrative actions*

The alternative system would, if anything, improve good order and discipline by providing a criminal justice process that is faster, smarter, and less vulnerable to unlawful influence and command- or commander-specific variation. As discussed below, the alternative system should provide for commanders to inform the § 540F judge advocate of any accused-, victim-, or command-specific considerations that could affect good order and discipline or unit morale or cohesion. Congress should make clear that the alternative system leaves fully intact the commander's important existing nonjudicial punishment authority over (as Congress has long provided)³⁵ minor cases as well as the administrative separation process as well as the full range of customary corrective measures that do not constitute disciplinary action within the meaning of the UCMJ.³⁶

³⁵ Art. 15(b), UCMJ, 10 U.S.C. § 815(b) (2018); *Manual for Courts-Martial, United States* (2019 ed.), Pt. V, ¶ 1e.

³⁶ See *Manual for Courts-Martial, United States* (2019 ed.), Pt. V, ¶ 1d.(1). "Article 15 and Part V of this Manual do not apply to, include, or limit use of administrative corrective measures that promote efficiency and good order and discipline such as counseling, admonitions, reprimands, exhortations, disapprovals, criticisms, censures, reproofs, rebukes, extra military instruction, and administrative withholding of privileges. See also R.C.M. 306. Administrative corrective measures are not punishment and they may be used for acts or omissions which are not offenses under the code and for acts or omissions which are offenses under the code." *Id.* ¶ 1g.

H. Other considerations

Section 540F(a)(1) requires that the judge advocate exercising disposition authority over covered offenses have “significant experience in criminal litigation.” Congress should either define that term or require the Secretary to do so. The same standard should apply to each service. The following criteria could usefully be considered:

- Admission to the bar of a state or federal court for at least 10 years
- Practice of criminal law in a civilian or military capacity for at least five years (*i.e.*, excluding out-of-specialty assignments)
- Service as trial, defense, or victims’ counsel for at least five years, including being lead counsel in ten or more contested cases
- Service as a staff judge advocate to a general court-martial convening authority for at least two years
- Service as a military judge or appellate military judge for at least three years
- Possession of an LL.M. in criminal law
- A clean record of civilian and military bar discipline

Section 540F(a)(1) also provides that the judge advocate exercising disposition authority over covered offenses be “outside of the chain of command of the member subject to the charges rather than by a commanding officer of the member who is in the chain of command of the member.” We wonder if there is a simpler way to say this, such as, simply, “outside the chain of command of the charged individual.” “Individual” is preferable to “member” since “member” refers to those who form the court-martial panel and in rare circumstances the accused may not be a member of the armed forces.³⁷

The Committees should focus carefully on the effective date of the pilot program. In particular, must or should it apply only to offenses committed after enactment of the authorizing legislation or can and should it extend to offenses committed before then? In our view, the alternative system can and should be applied without regard to the date of offense. Otherwise, the pilot program would be starved of cases and the data on which Congress would have to evaluate it from the standpoint of whether to make the alternative system permanent would be diminished. To avoid this, Congress would need to make the pilot program longer, and the longer the program the less it looks like a test run and the more it looks like a permanent change. Because the alternative system would not adversely affect any right currently enjoyed by offenders, Congress need not be concerned about a legal challenge to the inclusion of pre-enactment cases in the pilot program.

The alternative system may have implications for the funding of courts-martial. Will the serious-offenses decision maker be able, in effect, to spend the accused’s command’s money? Or will § 540F judge advocates have their own funding? What role does cost currently play in the disposition of what would be specified offenses under § 540F? What role *should* cost play in disposition decision-making and triage for major cases? Is it sufficient to afford the accused’s command an opportunity to note budgetary implications when commenting to the alternative

³⁷ *E.g.*, *United States v. Ali*, 71 M.J. 256 (C.A.A.F. 2012).

system disposition authority on the traditional offense- and accused-specific factors? Budgetary and accountability issues should be examined, and we assume they will be noted in the Secretary's report. Since the services have already faced these issues in connection with the Consolidated Disposition Authority mechanism, they are not an insuperable obstacle.

Comparative Analysis of Military Justice Systems of Relevant Foreign Allies

Section 540F(b)(3) calls for a comparative analysis of the military justice systems of "relevant foreign allies" and the current United States system and the proposed alternative system.

The gist of the alternative system is easily described. No offense for which the maximum authorized punishment exceeds one year's confinement may be tried or even preferred without the approval of an O-6 or above judge advocate who is outside the accused's chain of command. The current U.S. system is far more complicated.³⁸ Generally speaking, the ultimate decision as to how charges of any kind should be disposed of under the UCMJ rests with a commander, called a convening authority. Convening authorities need not be lawyers, and vanishingly few are.³⁹ Over the years, Congress has imposed a variety of constraints on the convening authority's disposition power. These include requirements for a pretrial investigation (now called a preliminary hearing)⁴⁰ and pretrial advice from a staff judge advocate before a case can be referred to a general court-martial.⁴¹ Under current law, a convening authority may not refer a case to a general court-martial unless the staff judge advocate finds that the specification alleges an offense under this chapter; that there is probable cause to believe that the accused committed the offense charged; and that a court-martial would have jurisdiction over the accused and the offense.⁴² An adverse finding on any of these prevents a convening authority from referring the case to trial. Congress has also enacted provisions that are limited to sex offenses and further dilute the convening authority's power to dispose of charges.⁴³

How does this system compare with those of "relevant foreign allies"? Section 540F(b)(3) does not define that phrase. There is no single official list of America's allies,⁴⁴ much less one that identifies allies by their relevancy or not for military justice comparative purposes. As a result,

³⁸ See generally Eugene R. Fidell, *Rube Goldberg and Military Justice*, Just Security, Apr. 6, 2020.

³⁹ An alternative to the proposed alternative system would be to create for each armed force a "Court-Martial Command" or a "Military Justice Command" commanded by a uniformed lawyer and to require that all charges of a given nature or gravity be referred to that commander for disposition. See Eugene R. Fidell, *Military Justice Reform, the 2020 Pledge, and the President's Power*, Just Security, Feb. 14, 2020. This could be tested on a trial basis without any change in the UCMJ.

⁴⁰ Art. 32, UCMJ, 10 U.S.C. § 832 (2018).

⁴¹ Art. 34(a)(1), UCMJ, 10 U.S.C. § 834(a)(1) (2018).

⁴² *Id.*

⁴³ National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1744, 127 Stat. 980 (2013), as amended by Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 541, 128 Stat. 3371 (2014).

⁴⁴ See generally Lindsey Ford & James Goldgeier, *Who are America's allies and are they paying their fair share of defense?*, Policy 2020, Brookings Inst., Dec. 17, 2019.

some judgment must necessarily be exercised in defining the § 540F(b)(3) class. In 2017 *The New York Times* reported on a survey that listed the top 15 countries Americans consider our allies.⁴⁵ The Appendix to this report sets forth the arrangements in place in those countries for the disposition of serious offenses by military personnel. As far as we have been able to determine, not one of those countries permits non-lawyer commanders to order the trial of serious offenses by court-martial.⁴⁶ A number no longer use courts-martial at all, relying instead on civilian law enforcement to prosecute cases. All of them recognize the doctrine of command responsibility; none have found it necessary for commanders to retain disposition authority in order to accommodate that doctrine.⁴⁷

Although § 540F(b) does not require a comparison with domestic civilian arrangements for decision-making on who shall be prosecuted for serious criminal offenses, such a comparison is worth keeping in mind. It shows that the alternative system is consonant with contemporary American legal institutions. In the federal courts, the Fifth Amendment requires indictment by grand jury for felonies.⁴⁸ The defendant may of course waive that right,⁴⁹ in which case the decision to prosecute rests with lawyers employed by the Department of Justice. Federal grand jurors need not be (and typically are not) lawyers, but even if that lay body returns an indictment, it remains within the authority of the federal prosecutors to try the case.⁵⁰ Federal prosecutors may refuse to prosecute on an indictment without the consent of the grand jury or the approval of a judge. In the state courts, the due process clause of the Fourteenth Amendment⁵¹ does not require indictment by

⁴⁵ See Josh Katz & Kevin Quealy, *Which Country Is America's Strongest Ally?*, N.Y. Times, The Upshot, Feb. 3, 2017, *permalink* <https://nytimes.com/2017/02/03/us/politics/which-country-is-americas-strongest-ally/>.

⁴⁶ For earlier comparative studies see Law Library of Congress, Military Justice System, <https://www.loc.gov/law/help/militaryjustice/index.php>; Gov't of Israel, The Public Commission to Examine the Maritime Incident of 31 May 2010 (Turkel Commission), 2d Report, Israel's Mechanisms for Examining and Investigating Complaints and Claims of Violations of the Laws of Armed Conflict According to International Law, Annex C (2013), available at https://www.gov.il/BlobFolder/generalpage/downloads_eng1/en/ENG_turkel_eng_b1-474.pdf.

⁴⁷ A commander who puts charges into the hands of a functioning, non-sham military prosecution system will have done what international humanitarian law demands. "With respect to necessary and reasonable measures to ensure the punishment of suspected war criminals, the [International Criminal Tribunal for the Former Yugoslavia] held in the *Kvočka* case in 2001 that the superior does not necessarily have to dispense the punishment but 'must take an important step in the disciplinary process' [§ 714]. In its judgment in the *Blaškić* case in 2000, the Tribunal held that 'under some circumstances, a commander may discharge his obligation to prevent or punish an offence by reporting the matter to the competent authorities' [§§ 709, 757]." Int'l Comm. of the Red Cross, IHL Database, Customary IHL, R. 153, Command Responsibility for Failure to Prevent, Repress or Report War Crimes, available at https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule153#Fn_91BB58A0_00033 (footnotes omitted). See generally *Situation in the Central African Republic* (Case of Jean-Pierre Bemba Gombo), ICC01/05-01 A (ICC App. Ch. June 8, 2018).

⁴⁸ U.S. Const. amend. 5.

⁴⁹ Fed. R. Crim. P. 7(b).

⁵⁰ Leave of court is required to dismiss an indictment or information. Fed. R. Crim. P. 48(a); see also U.S. Dep't of Justice Manual §§ 9-2.040, 9-2.050. The court cannot compel a United States Attorney to sign an indictment. *United States v. Cox*, 342 F.2d 167 (5th Cir.) (en banc), cert. denied, 381 U.S. 935 (1965). "[T]he Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case." *United States v. Nixon*, 418 U.S. 683, 693 (1974) (dicta).

⁵¹ U.S. Const. amend. 14.

grand jury,⁵² and few states require indictment by grand jury for felonies as a matter of state law. In any event, the decision to prosecute a felony charge remains with lawyer prosecutors, subject to dismissal if a judge finds a lack of probable cause. Federal and state prosecutors have power to *nolle prosequi* a charge without court approval. The non-lawyer convening authority's current power to compel a court-martial on a felony-level offense is thus a substantial departure from contemporary American civilian criminal procedure.

Feasibility and Advisability

A. Pilot program

The pilot program outlined in § 540F(a) is feasible. In our opinion, Congress could proceed directly to enactment of the alternative charging system, rather than deferring action for a lengthy period on the longstanding structural issue related to the charging process. Effecting this overdue reform in two steps will unquestionably complicate military legal instruction for both commanders and judge advocates. We recognize, however, that the interim measure of a pilot program, if properly framed and executed with a make-it-work mindset, may be productive in the sense of, first, affording members of both Houses as well as military leaders and other responsible Executive Branch officials a basis for confidence in the desirability of the change and, second, improving the prospects for its long-run success on the ground.

The pilot program should be sufficiently capacious and of sufficient duration to afford reasonable assurance that, when it is complete and the results have been fully documented, Congress will have a firm basis on which to decide whether the alternative system should replace the current system for the disposition of charges. Advance buy-in to these criteria will thwart predictable claims that the pilot program was not sufficiently probative.

To this end, the Group of Experts recommends:

1. The pilot program should be conducted in at least two armed forces. The service chiefs should be asked to volunteer their branches for this purpose. If fewer than two service chiefs volunteer their branches, the Secretary of Defense, in consultation with the Chairman of the Joint Chiefs of Staff, should determine which branch or (if there are no volunteers) branches shall participate in the pilot program. Because of its size, the U.S. Coast Guard should not be included in the pilot program. Military departments that include more than one armed service (the Department of the Navy and the Department of the Air Force) may limit the pilot program to a single service.⁵³

⁵² *Hurtado v. California*, 110 U.S. 516 (1884).

⁵³ The pilot program should not include the National Guard. Congress has power “[t]o provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress,” U.S. Const. art. I, § 8, cl. 16, but has left it to the states and territories to decide what punishments should be authorized when the National Guard is in Title 32 status. 32 U.S.C. § 326 (2018). Fewer than 20 permit punishments that meet § 540F(a)(2)’s more-than-a-year threshold, but we doubt they actually try such offenses. If, down the road, Congress substitutes the alternative system for the current one, states and territories will likely follow suit voluntarily.

2. The service chiefs for the branches that will conduct a pilot program for the alternative system should be required to submit to the Secretary of Defense and the Committees a common protocol for the program. The common protocol will include a designation of the commands, regions or areas of responsibility that will employ the alternative system and a framework for data gathering, analysis and report generation. Data gathering and analysis must be consistent across branch lines.
3. Details of the pilot program should be the same for the participating branches. Any material disparities in implementation of the common protocol should be kept to the absolute minimum, fully disclosed in the pilot program initial and subsequent reports, and justified by objectively verifiable service-specific exigencies.
4. The pilot program should last three years. The three-year period should not include time spent in pre-program preparation or post-program analysis and should start and end on the same dates for both participating branches. Results from any shorter period will be subject to challenge on the ground that the trial was insufficient; a longer period will unduly delay congressional action on what is already an overdue reform.
5. The common protocol should be provided to the Committee at least four weeks before the pilot program's alternative system goes into effect. Periodic reports should be required every six months during the life of the pilot program, and a single, integrated joint final report, including the views of the Secretary and the Chairman of the Joint Chiefs of Staff, should be required no later than three months after expiration of the pilot program. The findings, reports, and recommendations should be made available to the public.

B. Alternative Military Justice System

The alternative system outlined in § 540F(a) is feasible and desirable, although a variety of features will need to be fleshed out.⁵⁴ The experience of other democratic countries that rely on courts-martial for the trial of serious offenses by military personnel with the charging power vested in a lawyer rather than a lay commander demonstrates that such a system can be put in place without compromising the effectiveness of the nation's defense capability. Judge advocates are bound by service and civilian professional responsibility, unlike lay commanders. While there are obviously various ways to define the class of offenses that would be subject to the alternative system, such as confining it to general court-martial referrals, use of the maximum permissible confinement for more than one year is a reasonable, logical, easy-to-administer yardstick that is consonant with familiar categories of American criminal law. If the pilot program suggests that some different yardstick would be better, we would be happy to consider it, but at this time we believe the one-year cut-off is a fair and easy to administer standard for distinguishing between cases that are essentially disciplinary and should therefore remain within the disposition power of commanders and those that should not.

⁵⁴ Further attention should in particular be paid to whether the alternative system should include the preferral phase, as § 540F contemplates. We have taken the measure as a given for purposes of this shadow report.

The alternative system should include the following protections:

1. The § 540F judge advocate should be afforded a fixed term of office and, equally importantly, included in the list of officials who are protected against command influence. At present, staff judge advocates are not included on that list.⁵⁵
2. The § 540F judge advocate should be an active member in good standing of the bar of the highest court of a state.
3. The § 540F judge advocate should apply the Non-Binding Disposition Guidance required by Article 33, UCMJ, and set forth in Appendix 2.1 to the *Manual for Courts-Martial, United States* (2019 ed.).
4. The § 540F judge advocate should be responsible for fulfilling all statutory and regulatory obligations toward victims with respect to referral and pretrial agreements.
5. The decision to prosecute should be governed by the same evidentiary standards as those that are applied by civilian federal prosecutors.
6. The § 540F judge advocate should be forbidden to engage in *ex parte* communications with commanders concerning specific cases or categories of cases.
7. The accused's commander should be afforded a reasonable opportunity to submit a statement in writing regarding whether the accused should be charged and pointing to any relevant considerations related to the effect of the accused's misconduct on the command's effectiveness and morale. Copies of any such submission should be provided in a timely fashion to the accused and any victim for comment. Because disposition authority will rest with an official other than the commander and the commander's submission will not be *ex parte*, the danger of unlawful influence will be reduced.
8. Conversely, the accused and any victim should be afforded a reasonable opportunity to submit a statement in writing regarding the disposition of the charge, a copy of which should be provided in a timely fashion to the command and either the victim or the accused, as the case may be.
9. All disposition decisions should be in writing (including a brief explanation), and copies sent, with any related submissions by commanders, defense counsel, and victim's counsel, to a single central repository for each service, such as the Clerk of Court of the Court of Criminal Appeals.

The Secretary's report should address the following additional questions:

1. Should there be more than one § 540F judge advocate in any service branch? Indeed, should there be a single "purple" § 540F judge advocate for all of the armed forces, by analogy to the Assistant Attorney General in charge of the Criminal Division? In this connection, the Committees may wish to consider whether the expense associated with having multiple § 540F judge advocates is

⁵⁵ Art. 37, UCMJ, 10 U.S.C.A. § 837; R.C.M. 104. Making § 540F JA duty a terminal assignment for a senior judge advocate would be an added protection against command influence and would help ensure that the incumbent brought the broad perspective and wealth of experience needed for the task.

justified given the specified offense caseload in each service and across the armed forces as a whole.⁵⁶ Mindful that despite having enacted a single disciplinary statute in 1950, Congress has permitted each of the armed forces to remain largely autonomous for military justice purposes, the Group of Experts believes that, as far as specified offenses are concerned, there is no basis for tolerating the application of different disposition standards from one service branch to another. If sexual assault in the 82d Airborne Division is as impermissible as it is in the 10th Mountain Division, so too, rape by a Soldier or sailor is as reprehensible as it is by a Marine or member of the Space Force.

Conclusion

Although the Group of Experts believes Congress could move to the alternative system or some variant now, we defer to the judgment of Congress and the President that a pilot program along the lines of § 540F and as elaborated here can be a worthwhile exercise. We hope this shadow report will be helpful to the Committees and the Secretary of Defense and would welcome an opportunity to testify on any hearings the Committees conduct on § 540F.

⁵⁶ Having a single § 540F judge advocate for all of the armed services would justify making this a terminal assignment for a flag or general officer. Such an officer, especially if afforded a nonrenewable fixed term of office at least as long as that of appellate military judges, would be more likely to be bombproof against command influence. An otherwise qualified retired flag or general officer judge advocate could be recalled to active duty for a fixed period for this purpose.

Appendix

Relevant Foreign Allies' Systems

Country	Comment
Australia	Charging decisions are made by the Director of Military Prosecutions, a serving general officer outside the chain of command.
Belgium	Belgium no longer has courts-martial. Criminal offenses by military personnel are prosecuted by regular civilian authorities.
Canada	According to § 165.1(1) of the <i>National Defence Act</i> (NDA), the Minister may appoint an officer with at least 10 years standing at the bar to be Director of Military Prosecutions (DMP). According to § 165.11, the DMP is responsible for preferring all charges to be tried by court-martial. According to subsection 165 (1), a person may be tried by court-martial only if a charge against the person is preferred by the DMP.
Denmark	Denmark abolished courts-martial in 1919. Serious criminal cases are tried in the regular civilian courts. The decision to prosecute is made by the Military Chief Prosecutor, subject to review by the Military Prosecutor General.
France	Offenses committed within the country in peacetime are tried in the regular civilian courts. Offenses committed outside the country are tried in selected regular courts by a special chamber but presided over by civilian judges. Charging decisions are made in either case by lawyers, not commanders.
Germany	Germany no longer has peacetime courts-martial. Criminal cases are tried in the civilian courts and charging decisions are made by regular civilian authorities. Venue for the trial of offenses by deployed personnel is centralized in the civilian court in Kempten, Bavaria. <i>See Act for Venue for Armed Forces Under Special Deployment Abroad, Jan. 21, 2013.</i>
Ireland	Charging decisions in serious cases are made by the Director of Military Prosecutions (DMP), a serving officer who is appointed by the Government and is subject to the supervision of the Attorney General. The DMP makes the final decision as to whether a case will be prosecuted before a court-martial. This mirrors the position in the civilian criminal justice system, where the Director of Public Prosecutions makes the final decision as to whether a case will be prosecuted before a civilian criminal court. The DMP is independent in the performance of his functions.
Israel	Charging decisions are made by judge advocates whose sole commander is the Military Advocate General (MAG), a general officer. IDF JAGs are not under the command of Area Commanders (Central, Southern, Northern, Home Front) or Force Commanders (Air Force, Navy). Decisions by the MAG are subject to review by the Israel Supreme Court sitting as the High Court of Justice.

Italy	Charging decisions in the Italian military justice system are made by judge advocates, who are professional military magistrates. They are attached to the military court system and are fully independent of the chain of command. The military justice system is organized along the same principles as the civilian criminal justice system and consists of nine Military Tribunals (of first instance) and a Court of Military Appeals in Rome, with so-called Branch Courts of Appeal in Verona and Naples. The civilian Court of Cassation acts as ‘Supreme Court’, also for military criminal cases. A ‘chamber’ of a military tribunal consists of two full-time military magistrates, one of whom presides, and one officer/lay-member, of at least the same rank as the defendant. Lay-members are chosen by lot and rotate every two months, to ensure independence and impartiality.
Netherlands	The Netherlands no longer has courts-martial. Criminal cases are tried in the military chamber of the Arnhem District Court, with charging decisions made by Public Prosecutors with broad experience in military cases, subject to oversight by the Chief Public Prosecutor attached to the Arnhem Courts. Charging decisions are subject to judicial review, including appellate review by the military chamber of the Arnhem Court of Appeal and the Supreme Court. Both Arnhem military chambers include a serving judge advocate in the rank of either Captain (N)/Colonel or Rear Admiral (lower half)/Air Commodore/Brigadier General, not subject to the military chain of command.
New Zealand	Charging decisions in serious cases are made by the Director of Military Prosecutions, a serving senior officer, subject to oversight by the Solicitor General.
Norway	Norway no longer has courts-martial. Criminal offenses by military personnel are prosecuted by the Military Prosecuting Authority, a specialized branch within the Norwegian Prosecuting Authority.
Sweden	Sweden no longer has courts-martial. Criminal offenses by military personnel are prosecuted by regular civilian authorities.
Switzerland	“Military criminal proceedings are initiated on the orders of the battalion commander or course commander, and by the Armed Forces Attorney General in the case of offences committed while not on duty or of violations of international law. Should a commanding officer refuse to initiate court proceedings where such proceedings are required in the opinion of the military examining magistrate, then the Armed Forces Attorney General may issue the order to conduct an investigation instead of the commanding officer.” “Other than in cases where the commanding officer is responsible, the Armed Forces Attorney General, in his function as chief prosecutor in matters of military criminal law under the military justice system, initiates criminal proceedings and supervises their proper conduct and completion.”
United Kingdom	Charging decisions in serious cases are made by the Director of Service Prosecutions, who may be either a civilian or a serving senior officer and is subject to supervision by the Attorney General.

Shadow Advisory Report Group of Experts (SARGE)

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