Prepared Statement of

EUGENE R. FIDELL

on the

Military Justice Improvement Act of 2021

Subcommittee on Personnel
Senate Committee on Armed Services
March 24, 2021

Chair Gillibrand and Ranking Member Tillis:

Thank you for affording me an opportunity to testify on the proposed Military Justice Improvement Act of 2021. The time has come to improve confidence in the military justice system by transferring the critical charging decision to independent uniformed lawyers and transferring the equally critical functions of convening courts-martial and detailing panel members to specialized offices rather than commanders.

My specialty is military justice. I served as a judge advocate in the U.S. Coast Guard, graduating with honor from the Naval Justice School. I have been both a trial counsel and a defense counsel, and have represented personnel of each of the armed services other than the U.S. Space Force. I have written extensively on military justice, including Oxford University Press's *Military Justice: A Very Short Introduction*. I co-edited all three editions of the casebook *Military Justice: Cases and Materials* and all 20 editions of the *Guide to the Rules of Practice and Procedure for the U.S. Court of Appeals for the Armed Forces*. I co-founded the National Institute of Military Justice in 1991 and served as its president for 20 years. In 2014, I founded the Global Military Justice Reform blog, which I continue to edit. I have chaired the Rules Advisory Committee of the Court of Appeals for the Armed Forces and the Committee on Military Justice of the International Society for Military Law and the Law of War.

I have taught military justice at Harvard Law School, Yale Law School (where I remain a senior research scholar), NYU Law School (where I am an Adjunct Professor of Law), and the Washington College of Law. At Yale, I convened the international workshop that developed the Yale Draft, an updated version of the 2006 Draft UN Principles Governing the Administration of Justice Through Military

Tribunals. Last year I chaired the Shadow Advisory Report Group of Experts (SARGE), which submitted a detailed report in response to section 540F of the National Defense Authorization Act for Fiscal Year 2020.[1]

As everyone in this hearing knows, it has long been a matter of dispute whether our country should continue to vest the power to decide who, in the armed forces, gets prosecuted for what and at what level of gravity. The idea of shifting that power was seriously proposed by Senator Birch Bayh in the early 1970s. You, Madam Chair, have of course been a strong proponent of this overdue change.

There are, I think, three basic questions the Subcommittee should address.

First, should the disposition power be transferred from non-lawyer commanders to uniformed lawyers independent of the chain of command?

Second, if so, which kinds of cases, if any, should remain in the hands of commanders?

Third, what other changes are needed to achieve the overall goal?

I will address each of these questions briefly:

Should the disposition power be transferred? The answer is Yes. I say this not only because sexual assaults continue to plague the armed forces, or because a startling percentage of sex-offense prosecutions in recent years have resulted in acquittals (surely a devastating outcome from the complainant's perspective), or because Congress's efforts have generated concern about unlawful command influence – even though all of these are true. Rather, the disposition power should be transferred because, in this day and age, it is indefensible that commanders who have so much else on their plate and who with only the rarest exception lack legal training are called upon to make charging decisions in anything other than minor disciplinary matters. Where criminal sanctions are possible, a system of justice must be independent and impartial. That cannot be the case as long as an armed force can – as the Army does – plausibly instruct its commanders that the military justice system is "owned and operated" by them.

Country after country, including the UK, on whose system ours is based, have abandoned commander-centric decision making at the charging phase. In addition to the UK, the list includes such democratic countries as Canada, Australia, New

[1] Shadow Advisory Report Group of Experts (SARGE), Alternative Authority for Determining Whether to Prefer or Refer Charges for Felony Offenses under the Uniform Code of Military Justice (Apr. 20, 2020).

Zealand, South Africa, Ireland, Israel, and Brazil. These are functioning democracies with highly functional militaries.

In preparing this testimony, I was struck by something Professor Fredric I. Lederer of William & Mary Law School wrote a few years ago in an article in the Army's *Military Law Review* that has been largely overlooked:

> . . . [I]f justice is the goal, the current structure of the military criminal legal system clearly needs further major change. At least at the general court-martial level, which deals with our most serious offenses, there is no contemporary justification in placing prosecutorial decision-making power and even more so juror selection power in commanders. It is not unreasonable for commanders intimately familiar with military life to make prosecutorial recommendations, and, in some compelling cases, decisions. Ordinarily, however, that value is heavily outweighed by concerns about untrained and potentially biased decision-making by non-legally trained officers whose primary goals are mission readiness and victory. Once a case reaches a general court, there should be no reason to believe that anything other than justice is appropriate. That does not negate the potential value in permitting commanders in exceptional circumstances to refer cases to trial or to discontinue a case for sound military reasons. . . .[2]

Professor Lederer is one of the country's leading scholars in the field. While I do not agree with parts of his preferred solution (specifically, his suggestion that commanders' powers under Article 15, UCMJ, be expanded and the accused's procedural protections reduced),[3] his overall judgment that it is time to turn the page on the central feature of George III's military justice system is plainly correct.

Opponents of this reform have generated a veritable cornucopia of arguments. Indeed, the sheer number and variety of purported justifications for retaining the commander-centric charging system are a classic case of "protest[ing] too much." On inspection, the proffered claims lack substance, are clearly wrong, or seek to change the subject by pointing to the acknowledged flaws of civilian criminal justice, as if that somehow insulates the military justice system from scrutiny.

---

[2] Fredric I. Lederer, *From Rome to the Military Justice Acts of 2016 and Beyond: Continuing Civilianization of the Military Criminal Legal System*, 225 MIL. L. REV. 512, 536 (2017) (footnote omitted).

[3] *Id*. at 538.

It has been suggested that the Military Justice Improvement Act is unnecessary because it will not drive up the number of sex offense prosecutions or convictions or the severity of sentences in such cases. This is a red herring. While attention has understandably focused on sex offenses in recent years, and that attention has called into question the role of commanders in making disposition decisions, the sex cases are a symptom of a larger *structural* flaw that applies to all serious military criminal cases. Not one of the democratic countries that has transferred the disposition power to an official outside the chain of command did so specifically in order to deter and punish sex offenses. Rather, they have done so because it is more in keeping with contemporary standards for the fair administration of justice.

In my opinion, if military personnel have greater confidence in the military justice system, they will be more likely than they are at present to come forward and put on report individuals who should be put on report. And that applies across the board, including but not limited to sex offenses.

It has also been suggested that commanders have a perspective that is critical to the sound administration of justice in the armed forces. Of course they do, but nothing in the bill language you are considering prevents commanders from communicating their concerns about the needs of good order and discipline in their command to the official who will have disposition authority. As Professor Lederer wrote, it is not unreasonable for commanders to make recommendations about the disposition of cases.[4] I would expect that if conditions unique to a particular command called for a particular approach to the disposition decision in a particular case, the commander would communicate those concerns, in writing, to the independent disposition authority — and would provide copies to the accused's attorney as well as any complainant. If the commander has a point – *e.g.*, if there were an epidemic of drug or child pornography or domestic violence offenses at a command – the independent disposition authority would give the commander's recommendation careful consideration.

In its report in response to section 540F of the National Defense Authorization Act for Fiscal Year 2020, the Joint Service Committee on Military Justice's Prosecutorial Authority Study Subcommittee asserted that "ensuring the military justice system complies with human rights obligations is undoubtedly not a U.S.

[4] *Id*. at 536.

concern."[5] I do not believe that reflects our country's longstanding policy – or our willingness to speak up when other countries disregard human rights.

Finally, it has been suggested that commanders must retain disposition authority because they have an obligation under the Law of Armed Conflict to, among other things, punish subordinates who commit war crimes. The theory is that depriving them of disposition power would unfairly subject them to LOAC culpability under the doctrine of command responsibility while depriving them of the necessary tools. This claim is unfounded. Command-responsibility jurisprudence makes it completely clear that if a commander lacks authority to personally dispose of charges (*i.e.*, to compel a trial), it is sufficient if he or she places the matter in the hands of a non-sham military or civilian justice system.[6] Nothing in the experience of the numerous allies whose military justice systems have shifted the disposition power to lawyers suggests that command responsibility has been or would be affected in any way by taking commanders out of the driver's seat for serious offenses.

What kinds of cases should remain in the hands of commanders? There are several ways the boundary could be drawn between those offenses that would be subject to disposition by an independent authority other than the commander and those that would remain in the commander's bailiwick. Any such boundary will be arbitrary, and Congress will have to make some hard decisions in this regard. Let me survey some of the alternatives.

One approach would be to shift responsibility only for sex offenses. I do not favor that because, even though some number of sex offense victims are men, many are women, and regardless of the raw numbers, it is *those* cases that have particularly captured the attention of the American public. It is my understanding that most unrestricted reports of sexual assault are made by women. Setting up what would be, in effect, a separate system for sex cases would therefore be inimical to unit cohesion because male personnel might have reason to conclude that a separate military

[5] Joint Service Comm. on Military Justice, Prosecutorial Authority Study 58 (Sept. 2, 2020).

[6] *See* Geoffrey S. Corn & Rachel E. VanLandingham, *Strengthening American War Crimes Accountability*, 70 AM. U. L. REV. 309, 361-62 & nn.216-20 (2020); Supplemental Memorandum of the Shadow Advisory Report Group of Experts (SARGE) 1-3 (July 8, 2020); Eugene R. Fidell, Comments on the Joint Service Subcommittee Prosecutorial Authority Study 5 (Oct. 2, 2020) (citing 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)).

justice system had been established for women. The whole concept of the Uniform Code of Military Justice is to have a single comprehensive system.

If only sex offenses were shifted to an independent disposition authority, would commanders be left with power over too few significant offenses to make a dual system viable? As it is, sex offenses make up a surprising, persistent fraction of the total throughput of the military justice system. In its most recent Term of Court, most of the 25 cases decided on full opinion by the Court of Appeals for the Armed Forces were sex or pornography cases. If this is any indication of the total military justice caseload, I would be concerned that commanders would be left with such a small cohort of cases for disposition that they would be unlikely to develop the kind of firm grip and solid base of experience in military justice prosecution decision making that was at least possible in an earlier era when caseloads were dramatically higher. If that concern is justified, then Congress should go the whole distance.

A second approach is to leave commanders with authority over offenses that are uniquely military. If the reasons for taking the disposition power away from commanders include their potential interest in sweeping criminality under the rug in order to improve their own chances for promotion or concern over possible favoritism, however, those concerns apply across the board and not only to so-called "military" offenses. An epidemic of "military" offenses within a command is just as unacceptable as a wave of serious garden-variety crimes, such as murder or drug trafficking – both are devastating to a unit's reputation, both bring discredit upon the commander, and both give the commander a reason to look the other way. Any perception that a valued aviator or a trusted senior NCO personally known to the commander had been afforded preferential treatment is inimical to confidence in the administration of justice regardless of whether the offense at issue is uniquely military.

Often the same conduct can be charged under one of the uniquely military punitive articles or under a punitive article that resembles a familiar civilian offense. If I assault a superior, for example, that could be viewed as a military offense or as a civilian offense. On which side of the line should "fragging" fall? Because of the potential application of the punitive articles that encompass familiar civilian crimes to conduct that has clear disciplinary implications, finding an entirely satisfying division between civilian and military offenses may be elusive.

For a surprising number purely military offenses, the death penalty is an authorized punishment.[7] Any capital case is certain to involve the kind of thorny legal issues that are best addressed by a lawyer-disposition authority, and any capital case is certain to be a significant drain on a busy and conscientious commander's time and attention. It would seem to follow that military-type offenses for which Congress has authorized the death penalty[8] should be removed from the commander's disposition power. Whatever overall boundary line Congress winds up drawing, non-lawyer commanders should not have disposition authority over any offense for which it has prescribed the death penalty as a potential punishment.

A third approach is to permit only the independent disposition authority to convene general courts-martial. This is tempting in its simplicity – and Congress should strive mightily for simplicity in settling on a boundary line – but it suffers from the fact that there is a judgment call to be made as to which level of court-martial many potential charges should be referred to. As a practical matter, this approach would mean that most serious cases, regardless of the type of offense, would wind up at the independent disposition authority, with some number being remanded because that authority concluded that a general court-martial was unwarranted.

Yet another approach, which I urge the Committee to consider, is to simply use the traditional dividing line between felonies and misdemeanors as the boundary, rather than try to weave a path through the punitive articles. Under this approach, any offense for which the maximum authorized period of confinement exceeds one year could be deemed a serious offense deserving of disposition by the independent disposition authority, while everything below that limit would be deemed a minor matter that could be disposed of by a nonlawyer commander in the current manner. This same dividing line is also found in military practice: the *Manual for Courts-Martial* treats as ordinarily "minor" "an offense for which the maximum sentence imposable would not include a dishonorable discharge or confinement for longer than 1 year if tried by general court-martial."[9] The independent disposition authority

---

[7] *See* Arts. 85(c), 89(b)(1), 90(1), 94, 95(a)(1), 99-103b, UCMJ.

[8] *See* Art. 18(a), UCMJ.

[9] *See Manual for Courts-Martial, United States* (2019 ed.), pt. V, ¶ 1e, at V-1 (nonjudicial punishment); *see also* R.C.M. 1301 (Discussion) (cross-referencing nonjudicial punishment definition in treatment of summary courts-martial). The same dividing line is found in R.C.M. 907(b)(2)(D)(iii), which authorizes the dismissal of a charge in the event of "[p]rior punishment

could have discretion to remand even a serious case to a nonlawyer commander if the gravamen of the matter proved to be disciplinary rather than criminal in nature. Some attention would have to be paid to the problem of hybrid cases, that is, cases in which some offenses were above the line, and some were below it. The better approach would be to require that all known charges, including those that would not independently be disposed of by the independent disposition authority, be disposed of by that authority.[10]

A final alternative would be to limit commanders to the imposition of nonjudicial punishment and the full range of informal sanctions they currently have authority to impose. Perhaps that is where the path of reform will ultimately lead, but both political realism and sober caution militate in favor of a more measured approach as we move away from the command-centric model.

What other changes are necessary? I am certain the Defense Department will provide constructive comments on the bill and corresponding changes that may be needed if the disposition authority is transferred. The biggest change that comes to mind is the selection of court-martial panel members, a function currently performed by the convening authority. That power is one of the most frequently criticized aspects of the Code, so it is important that the draft addresses this issue. I would suggest that even for whatever subset of offenses Congress decides to leave in commanders' hands for disposition purposes, responsibility for member selection for cases that go to court-martial should be transferred to independent administrators. *An official with charging power – quintessentially a prosecutorial function – has no business picking the jury*.

While not germane to the disposition of charges or the selection of panel members, there is a further reform that should be effected at the earliest opportunity. This is the discriminatory limitation on access to the Supreme Court of the United States for all but a handful of court-martial appeals. Under current law, military personnel can seek Supreme Court review only if the Court of Appeals for the Armed Forces has first granted discretionary review. For the last Term of Court, this meant that 89% of the military personnel who sought review by the Court of Appeals were barred from even asking the Supreme Court to review their cases. There is no

---

under Articles 13 or 15 for the same offense, if that offense was punishable by confinement of one year or less."

[10] This is consistent with current ordinary practice. *See* R.C.M. 601(e)(2); *Manual for Courts-Martial, United States* (2019 ed.), App. 2.1, ¶ 2.4, at A2.1-2.

comparable restriction on the availability of certiorari to state and federal criminal defendants or even, shockingly, those who are on trial before the military commissions at Guantanamo Bay. This matter is addressed in an article by Professor Brenner M. Fissell, Commander (ret) Philip D. Cave, and myself that will appear in a forthcoming issue of the *Yale Law Journal Forum*.[11] Congress would be seriously remiss if it were to address the disposition and member-selection issues without at the same time rectifying this indefensible discrimination against military personnel.

I will be happy to respond to your questions. I ask that the documents I have submitted with this statement be made a part of the hearing record.

[11] Eugene R. Fidell, Brenner M. Fissell & Philip D. Cave, *Equal Supreme Court Access for Military Personnel: An Overdue Reform*, 131 YALE L.J. FORUM ___ (2021) (forthcoming).