COMMENT

REVISION OF ARTICLE 60 AND THE MILITARY CONVENING AUTHORITY'S CLEMENCY POWER: AN ALTERNATIVE TO THE ENACTED LEGISLATION

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INTRODUCTION

Over the last two years, the U.S. military received a firestorm of criticism for its alleged inability to address sexual assault in the armed forces.[1] Social interest in the issue ignited following a quick succession of multiple sexual assault accusations.[2] A 2012

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[1] *See* Michael Doyle & Marisa Taylor, *Military Sexual Assault Case Triggers Political Furor*, MCCLATCHY DC (Mar. 8, 2013), http://www.mcclatchydc.com/2013/03/08/185271/military-sexual-assault-case-triggers.html; *see also* Jackie Speier, *Military Justice Bungles Sex Cases*, CNN (Mar. 20, 2014, 3:00 PM), http://www.cnn.com/2014/03/20/opinion/speier-military-prosecution/; Craig Whitlock, *Air Force General to Retire After Criticism for Handling of Sexual-Assault Case,* WASH. POST (Jan. 8, 2014), http://www.washingtonpost.com/world/national-security/air-force-general-criticized-for-handling-of-sexual-assault-cases-to-retire/2014/01/08/9942df96-787d-11e3-b1c5-739e63e9c9a7_story.html.

[2] This included the Lackland training base assaults. For more on these assaults, see *Lackland Sex Scandal Prompts U.S. Air Force to Discipline Former Commanders*, CBS

Department of Defense ("DoD") report[3] estimated a thirty-four percent increase in reported incidents involving unwanted sexual contact from fiscal year 2010 to 2012.[4] With heightened concern for assault victims and the salience of publicized military sexual assaults already in the public psyche, one high profile military case has even captured the attention of Congress.[5]

This case, *United States v. Wilkerson*,[6] has been the subject of dispute since it was decided in 2012. Lieutenant Colonel ("Lt Col") James Wilkerson was accused of sexually assaulting a woman in his home.[7] The court-martial[8] jury, consisting of four colonels and one lieutenant colonel, concluded Wilkerson was guilty.[9] However, upon review of the evidence, witness testimony, and other items of consideration, Lieutenant General Craig Franklin exercised his rights as the convening authority[10] and overturned the conviction based on

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NEWS (May 2, 2013, 1:06 PM), http://www.cbsnews.com/8301-201_162-57582551/. Seventeen military training instructors at Lackland were convicted of misconduct with trainees, from fraternizing to sexual assault. *Id.*

[3] This report's mathematical data and legal definitions have been disputed as inaccurate. *See* Lindsay Rodman, *The Pentagon's Bad Math on Sexual Assault*, WALL STREET J., May 19, 2013, *available at* http://online.wsj.com/news/articles/SB10001424127887323582904578484941173658754.

[4] Lorelei Laird, *Military Lawyers Confront Changes as Sexual Assault Becomes Big News*, A.B.A. J., Sept. 1, 2013, *available at* http://www.abajournal.com/magazine/article/military_lawyers_confront_changes_as_sexual_assault_becomes_big_news/.

[5] Doyle & Taylor, *supra* note 1.

[6] Molly O'Toole, *James Wilkerson, Air Force Pilot Convicted of Sexual Assault, Reassigned*, HUFFINGTON POST (Apr. 2, 2013 7:57 AM), http://www.huffingtonpost.com/2013/04/02/james-wilkerson-air-force-sexual-assault_n_2994998.html. For Wilkerson's trial records, see United States v. Wilkerson, GCMO No. 10 (HQ 3 AF, Ramstein AB, Germany, Feb. 26, 2013), *available at* http://www.foia.af.mil/shared/media/document/AFD-130403-023.pdf.

[7] O'Toole, *supra* note 6.

[8] According to Black's Law Dictionary, a court-martial is "[a]n ad hoc military court convened under military authority to try someone, particularly a member of the armed forces, accused of violating the Uniform Code of Military Justice." BLACK'S LAW DICTIONARY 413 (9th ed. 2009).

[9] O'Toole, *supra* note 6.

[10] A convening authority is a military commanding officer that has the authority, among other responsibilities, to refer charges to and convene a court-martial. *See* Charles D. Stimson, *Sexual Assault in the Military: Understanding the Problem and How to Fix It* 3 HERITAGE FOUND. (Nov. 6. 2013), http://thf_media.s3.amazonaws.com/2013/pdf/SR149.pdf. Under the Uniform Code

his own determination that factual evidence of Wilkerson's guilt was not beyond a reasonable doubt.[11] Outcry over Franklin's decision led to a vociferous call from members of Congress to amend sections of Article 60 of the Uniform Code of Military Justice ("UCMJ"),[12] namely those that authorize the convening authority's control over case rulings and punishments.[13] Perhaps in response to growing political pressure, Secretary of Defense Chuck Hagel also publicly acknowledged that revisions to Article 60 of the UCMJ were needed.[14] Hagel's proposed alterations called for greater transparency and accountability,[15] largely in line with the sentiments of lawmakers. Proposed legislation was folded into the National Defense Authorization Act for fiscal year 2014 ("NDAA"), which was passed by Congress in late 2013.[16] The relevant portion of the NDAA strips the convening authority of his[17] ability to alter court-martial findings for most major offenses[18] and requires him to submit

of Military Justice, a commanding officer, as the convening authority, has the power to oversee every step of a court-martial, from the referral of charges to final approval of the verdict and sentencing. *Id.* For more on the convening authority, see *infra* Part I.

[11] *See* O'Toole, *supra* note 6; *see also* Memorandum from Lt Gen Craig Franklin to Michael Donley, Sec'y of the Air Force (Mar. 12, 2013) [hereinafter Franklin Memorandum], *available at* http://www.foia.af.mil/shared/media/document/AFD-130403-022.pdf.

[12] The UCMJ is codified at 10 U.S.C. §§ 801–946 (2012).

[13] *See* Jennifer Hlad, *Congress Looks to Force Change in Military on Sexual Assault*, STARS & STRIPES (May 14, 2013), http://www.stripes.com/news/congress-looks-to-force-change-in-military-on-sexual-assault-1.220879.

[14] Charles D. Stimson & Steven P. Bucci, *Changing the Military Justice System: Proceed with Caution* 1, HERITAGE FOUND. (May 9, 2013), *available at* http://thf_media.s3.amazonaws.com/2013/pdf/bg2795.pdf.

[15] *Id.*

[16] Stimson, *supra* note 10, at 1. When this Act was signed into law, its relevant portions did not take effect until 180 days after the Dec. 26, 2013 enactment date; until then, the previous U.S. Code was operational. *Id.*

[17] A gender-neutral term should be used whenever referring to the convening authority. However, for the sake of brevity, "his" will be used in place of "his or her" and "he" will be used in place of "he or she" throughout this Comment when discussing the convening authority.

[18] National Defense Authorization Act of 2014, Pub L. No. 113-66, § 1702, 127 Stat. 672, 954-58 (2013) (to be codified as 10 U.S.C. § 860) [hereinafter NDAA]. This section states that the convening authority may not change findings of a court-martial where the maximum sentence of confinement is greater than two years or the sentence adjudged includes a dishonorable or bad-conduct discharge or

written justification for changes made to minor cases, where his authorization to alter findings remains.[19] While the 2014 changes to Article 60 in the NDAA also address the convening authority's power to refer charges, as well as other parts of the pre-trial process,[20] this Comment focuses on his power during the post-trial process—namely the power to review and revise courts-martial decisions.[21]

The newly legislated changes to Article 60, while attempting to address the apparent abuse of clemency power in sexual assault cases,[22] do not honor the original purpose of the convening authority's role in the military justice process,[23] and are thought by some to be a knee-jerk reaction to social pressures.[24] Accordingly, this Comment contends that the newly enacted revision to strip reviewing power from the convening authority goes too far in curtailing commanders' sensible supervision of general courts-martial, and therefore must be reconsidered. As an equitable compromise, the instatement of a specially appointed review board, closely presiding over the convening authority's decisions and actions, offers a more balanced and pragmatic solution in the rare case that the convening authority should seek to overturn the findings of a court-martial.[25] In consideration of the convening authority's responsibility to fulfill the greater needs of the military, lawmakers seeking to refine Article 60 in future legislation should reinstate and preserve the convening authority's longstanding power of clemency, with the condition that an oversight board be created to

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confinement for more than six months. *Id.* If the convening authority is authorized to act on the findings, he is required to submit a written explanation giving the reasons for the action. *Id.*

[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] Mark R. Strickland, *Rush to Justice: Amending Article 60 of the Uniform Code of Military Justice*, 60 FED. LAW. 56, 57 (2013) (stating that proposed changes to Article 60 attempted to address sexual assault in the military). *See also* Stimson & Bucci, *supra* note 14, at 1-2.

[23] *See* Stimson & Bucci, *supra* note 14, at 2-4.

[24] *See* Strickland, *supra* note 22, at 56.

[25] Doyle & Taylor, *supra* note 1 (citing Col. John Baker, USMC, the Chief Defense Counsel of the Marine Corps, stating that it was very rare for convictions to be dismissed); Stimson & Bucci, *supra* note 14, at 4.

supervise those extraordinary instances when the authority's clemency power is exercised.

Part I of this Comment contains a brief history of the convening authority's role in the UCMJ court-martial process. Part I also examines a few rare instances where the convening authority has acted to change or dismiss a court-martial sentence. Part II of this Comment evaluates popular critiques of Article 60, as well as the legislation revising it, highlighting the legislation's merits and flaws. Part III examines the importance of the convening authority's role in the military and proposes an effective solution to improve the recently revised Article 60. This solution recognizes the importance of the convening authority's review power, while also providing oversight of the convening authority's decisions to reduce or overturn a general court-martial sentence.

I. BACKGROUND: CONVENING AUTHORITY UNDER THE UCMJ PRIOR TO RECENT LEGISLATION

From its inception under General George Washington, the U.S. military justice system has been fundamentally different from its civilian counterpart.[26] Throughout its various revisions, the convening authority's power to review court-martial sentences granted by Article 60 remains unique to the military justice system.[27] Congress first enacted the UCMJ in 1950, later modified it, and made it part of Title 10 of the U.S. Code in 1956.[28] Article 60 has since been revised once, in 1983; however, scrutiny over the large role of the convening authority led to recent and significant changes to

[26] *See* Strickland, *supra* note 22, at 56-57. *See also* WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 17-56 (2d ed. 1896) (detailing a history of American military justice); 1776 Articles of War, reprinted in WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 976 (2d ed. 1920 reprint).

[27] Charles W. Schiesser & Daniel H. Benson, *A Proposal to Make Courts-Martial Courts: The Removal of Commanders from the Military Justice Process*, 7 TEX. TECH. L. REV. 559, 595 (1975-1976); *see* Stimson & Bucci, *supra* note 14, at 4.

[28] Henry Rothblatt, *Military Justice: The Need for Change*, 12 WM. & MARY L. REV. 455, 461-62 (1971); Strickland, *supra* note 22, at 56.

Article 60, which were signed into law on December 26, 2013, and became effective on June 26, 2014.[29]

Whereas the civilian system focuses on the enforcement of the peoples' laws and is punitive in nature, the military exists solely for national defense, emphasizing mission effectiveness through the good order and discipline of its troops.[30] This difference of purpose is exemplified by the distinctive role of the convening authority.[31] A convening authority is a military commanding officer with the authority, among other responsibilities,[32] to refer charges to and convene a court-martial.[33] This officer could be any military commander, as well as the President as Commander-in-Chief or other high-ranking officer in the military, provided he is appointed prior to acting in this capacity.[34] Because most courts-martial involve minor offenses, the convening authority is generally the accused's senior commanding officer and several ranks removed from the accused.[35] Whether on the battlefield or in the barracks, a military leader cannot fulfill the responsibilities entrusted to him without the obedience and discipline that his authority requires.[36] As convening authority, the UCMJ grants a commanding officer the power to oversee every step of a court-martial, from the referral of charges to final approval of the verdict and sentencing.[37] Perhaps surprisingly to those outside of the military, convening authorities have rarely used their broad discretion to overturn convictions.[38]

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[29] *See* Strickland, *supra* note 22, at 56; *see also* NDAA § 1702.
[30] Stimson, *supra* note 10, at 2-3.
[31] *Id.* at 3; *see* Stimson & Bucci, *supra* note 14, at 2-4.
[32] Stimson, *supra* note 10, at 3. The convening authority also has the responsibility to detail members for court-martial duty, decide whether a non-judicial punishment is more appropriate, accept or reject requests for expert witnesses, and decide whether to accept plea agreements. *Id.*
[33] The convening authority does not file charges, but rather, refers them to a court-martial. UCMJ art. 22-24.
[34] *Id.*
[35] *Id.*
[36] *Id.*
[37] Strickland, supra note 22.
[38] Doyle & Taylor, *supra* note 1 (citing Col. John Baker, USMC, stating that it was rare for convictions to be dismissed).

Regardless of how infrequently clemency authority is exercised by commanders,[39] recent legislation has revised large swaths of this power in an attempt to halt its perceived abuse, particularly in sexual assault cases.[40] In order to understand the revisions to Article 60, it is first imperative to understand the Article 60 system as it previously operated and the general power that was given to convening authorities.[41]

A. The Role of the Convening Authority in the Court-Martial Process

Convening authorities have the power to decide the type of court-martial in which to bring charges against an accused.[42] These courts-martial range in severity from summary court-martial, in which the maximum punishment imposed can include confinement for up to thirty days, forfeiture of two-thirds pay for one month, and reduction to the lowest pay grade (E-1), to general court-martial, which is often reserved for only the most severe infractions. For servicemembers who are taken to general court-martial, the maximum sentence can range from life in prison to death, as well as a total forfeiture of pay and allowances and a reduction in pay grade to the rank of E-1.[43] In general, the convening authority does not refer a charge to a court-martial if the charge fails to state an offense, is unsupported by available evidence, or when there are other valid reasons why trial by court-martial is not appropriate.[44] Prior to the

[39] *Id.*

[40] Stimson, *supra* note 10, at 1 (referring to the reforms contained in the newly enacted NDAA).

[41] To clearly reflect the fact that the following section concerns solely the convening authority's pre-amended Article 60 powers, all sentences related to such powers will be in the past tense. Of course, some aspects of the role of the convening authority in the court-martial process were unchanged by the recent legislation. *See infra* Part II.B for a full description of the relevant aspects of the court-martial process the legislation altered. Other revisions to the convening authority's power are outside of the scope of this Comment.

[42] *See* UCMJ art. 22-4.

[43] *Id*. at art. 18, 20.

[44] *See* the "Discussion" following MANUAL FOR COURTS-MARTIAL, UNITED STATES, pt. II, Ch. IV, ¶ 401(c) (2012) [hereinafter MCM]. A convening authority may decide to dismiss charges if a trial would be detrimental to the war effort or for national security concerns. *Id.*

recent revisions to Article 60, a convening authority could even dismiss courts-martial charges in favor of other administrative action, if he deemed it appropriate.[45]

Presently, for all courts-martial, the accused is given the option of being represented by military defense counsel, or he can request a civilian attorney at his own cost.[46] The convening authority can administer other administrative forms of discipline, including non-judicial punishment, to the accused.[47] Non-judicial punishment options provide the commander an administrative alternative for disciplining a military member that is usually less severe than a court-martial.[48] A convening authority also has the option of offering formal or informal counseling as a tool to enforce good order and discipline of those under his command.[49] This type of punishment is typically reserved for lesser offenses or first-time offenders.[50]

Before a general court-martial can be convened, the convening authority is required to submit the charges to his staff judge advocate ("SJA"), a military attorney who provides legal counsel, for consideration and advice.[51] The SJA is frequently lower in rank than the convening authority and can fall under the same chain of command.[52] As both an officer and a lawyer, the SJA acts as an advisor for the convening authority, expressing his conclusions regarding each specification and giving the convening authority

[45] MCM, *supra* note 44, at pt. II, Ch. IV, ¶ 401(c).
[46] UCMJ art. 20.
[47] This type of punishment is outside the military judicial system and is instead imposed by the commanding officer. UCMJ Article 15 (nonjudicial punishment) allows the commander to impose disciplinary sanctions for minor offenses in place of a court-martial. *Id.* at art. 15.
[48] Stimson, *supra* note 10, at 3.
[49] *Id.* at 2.
[50] UCMJ art. 15(b).
[51] UCMJ art. 34(a)-(b).
[52] Rothblatt, *supra* note 28, at 462.

written advice.[53] This advice extends to both the referral of charges and the review of court-martial sentences.[54]

Because there is no standing court at the trial-level in the military, a new court must be convened for each court-martial.[55] This situation, unique to military justice, requires the convening authority to select or "detail" jurors under his command, or choose from those made available by the juror's respective commanders.[56] During a court-martial, the convening authority approves or disapproves requests for expert witnesses made by either party in the trial.[57] The convening authority can also enter into a pretrial agreement with the accused.[58]

Following a conviction at court-martial, the assigned trial counsel, or the appointed officer in the case of a summary court-martial, submits the findings and sentence to the convening authority for review.[59] Before the convening authority takes action on the recommended sentence, he is required to obtain a written recommendation from his SJA.[60] This recommendation is meant to provide guidance to the convening authority as to whether or not he should affirm the findings and sentence as adjudged and order them executed (except for the case where a sentence includes punitive discharge from the military, which may only be executed after the appropriate service court's appellate review).[61]

Under previous versions of Article 60, the convening authority could take action on the judgment or sentence as he

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[53] *Id*. at 461-62.
[54] *Id*.
[55] *See id.* at 465.
[56] MCM, *supra* note 44, at pt. II, Ch. V, ¶ 503(a)(3).
[57] *See generally* MCM, *supra* note 44, at pt. II, Ch. VII, ¶ 703.
[58] MCM, *supra* note 44, at pt. II, Ch. VII, ¶ 705(a). Under the new legislation pretrial agreements are further limited, and are only discussed briefly in this paper. *See* UCMJ art. 60; *see also infra* Part II.B.
[59] UCMJ art. 60. This Article has been amended by the provisions in the NDAA for fiscal year 2014 and will be discussed in more detail later in this paper. *See infra* Part II.B.
[60] *Id*.
[61] UCMJ art. 60.

deemed appropriate, after receiving the SJA's recommendation.[62] This action could include a reduction of the adjudged sentence, or it could result in the convening authority's complete disapproval of portions of the adjudged sentence.[63] While the convening authority could issue clemency for a guilty verdict—resulting in a decreased sentence or even the setting aside of findings of guilt entirely—he could not increase the sentence in any way or levy punishment for a not guilty verdict.[64] Such actions were unreviewable by a court of appeals or any other judicial process; however, the convening authority rarely disregarded or circumvented the recommendation of his assigned SJA, emphasizing the importance of the SJA's recommendations and legal guidance.[65] Notably, the convening authority was not required to provide an explanation for reducing a sentence or vacating a judgment.[66]

In general, convening authorities under previous versions of Article 60 were implicitly obligated to base their determination upon the record of trial but also to act in accordance with any pretrial agreements and consider any clemency matters submitted by the accused.[67] This could include materials not reviewed by the military judge, as well as statements submitted post-trial.[68] Also post-trial, convicted servicemembers were allowed to submit any matters or written statements to the convening authority that could be deemed relevant to the findings or sentence adjudged at court-martial.[69] Such

[62] *Id*.
[63] *Id*. Stimson, *supra* note 10, at 3.
[64] UCMJ art. 60.
[65] R. CHUCK MASON, CONG. RESEARCH SERV., R43213, SEXUAL ASSAULTS UNDER THE UNIFORM CODE OF MILITARY JUSTICE (UCMJ): SELECTED LEGISLATIVE PROPOSALS (2013), *available at* http://fas.org/sgp/crs/natsec/R43213.pdf (stating that the clemency authority and decision by the convening authority to disapprove, commute, or suspend a sentence, or to set aside a finding of guilty, is not appealable by the United States, and as a matter of command prerogative, is final upon issuance).
[66] *See* MCM, *supra* note 44, at pt. II, Ch.XI, ¶ 1107(d) (2012).
[67] *See* UCMJ art. 60 (2012).
[68] *See id.*
[69] *See id.*

statements could include mitigating evidence or statements not included in the court-martial record.[70]

The responsibility given to the convening authority to review the adjudged findings and sentence confirmed his ability to use sound judgment to ultimately ensure the good order and discipline of his subordinates.[71] As a result, the authority to modify the findings and sentence of a court-martial was deemed a matter of "command prerogative involving the sole discretion of the convening authority."[72] The many duties and responsibilities granted by the UCMJ highlight the convening authority's integral role in the court-martial process.

B. Exceptional Cases where the Convening Authority has Acted to Change or Reduce the Sentence of a Court-Martial

The "pervasive power"[73] afforded to commanders during court-martial sentence review had continued relatively unchallenged for years.[74] However, in the years leading up to the recent revision of Article 60, a small number of cases—particularly those where findings of sex-related crimes were overturned or reduced—placed the convening authority's role in the military justice system under public scrutiny.[75]

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[70] "In a clemency review, the commander looks not only at the record of trial but other evidence the defense puts forward, which can include character letters and evidence ruled inadmissible at trial." Kristin Davis, *Court-Martial, then Clemency: Is this Justice?*, AIR FORCE TIMES (Mar. 11, 2013), http://www.airforcetimes.com/article/20130311/NEWS/303110001/Court-martial-then-clemency-justice-. Under the amended Article 60, the victim of the crime will also be allowed to submit a statement to the convening authority before his review decision is made. NDAA § 1706.

[71] *See* Stimson, *supra* note 10, at 2.

[72] Michael Waddington, *Courts Martial: Process and Procedure*, 246 NEW JERSEY LAW. 16 (2007). UCMJ art. 60.

[73] Schiesser & Benson, *supra* note 27, at 565.

[74] *Id. See* Strickland, *supra* note 22, at 57 (stating that convening authorities have "unfettered clemency power" under the UCMJ).

[75] Doyle & Taylor, *supra* note 1 (stating that the *Wilkerson* case has brought sexual assault in the military to the public's attention, resulting in proposed legislation from Congress).

Few cases exist where the convening authority has exercised the power to overturn a conviction in a sexual assault related trial.[76] In the Air Force for example,[77] a convening authority granted clemency in only five of the 327 sexual assault convictions in the last five years—less than two percent of the time.[78] But against a backdrop of disparate high profile sexual assault cases, the very nature of the crime garners disproportionate attention from the media and in turn, congressional legislators.[79] In one such sexual assault conviction that ended in clemency, *United States v. Gurney*, Air Force Chief Master Sergeant ("CMSgt") William Gurney was accused of sending explicit texts and photos to a subordinate on his cellular phone, among other acts of sexual misconduct.[80] He pleaded guilty to thirteen specifications, despite having no plea deal.[81] At the close of the court-martial, CMSgt Gurney pleaded guilty to, or was convicted of, fifteen specifications, including charges of failing to maintain a professional relationship, adultery,[82] and indecent conduct.[83] CMSgt Gurney was sentenced to twenty months in confinement, a dishonorable discharge, and a reduction in rank to airman basic.[84]

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[76] *Id.* (citing Marine Corps Col. John Baker, the chief defense counsel of the Marine Corps, stating that it was very rare for convictions to be dismissed); Stimson & Bucci, *supra* note 13, at 4.

[77] Hlad, *supra* note 13. There are other cases from other services, but for this discussion, this Comment will be focusing on two recent Air Force cases.

[78] Kristin Davis, *Court-martial, then Clemency: Is this Justice?*, AIR FORCE TIMES (Mar. 11, 2013), http://www.airforcetimes.com/article/20130311/NEWS/303110001/.

[79] Doyle & Taylor, *supra* note 1.

[80] Scott Fontaine, *Witnesses: E-9 sent Racy Texts, Nude Photos*, AIR FORCE TIMES (Jan. 25, 2011), http://www.airforcetimes.com/article/20110125/NEWS/101250301/Witnesses-E-9-sent-racy-texts-nude-photos.

[81] *Id.*

[82] Under Article 134 of the UCMJ, adultery is a punishable criminal offense. UCMJ art. 134.

[83] Michelle Lindo McCluer, *Significant Clemency for Chief Gurney*, CAAFLOG (Apr. 21, 2011), http://www.caaflog.com/2011/04/21/significant-clemency-for-chief-gurney/ (last visited Aug. 24, 2014).

[84] Michelle Lindo McCluer, *Chief Gurney Sentence Announced*, CAAFLOG (Jan. 28, 2011) [hereinafter *Gurney Sentence*], http://www.caaflog.com/2011/01/28/chief-gurney-sentence-announced/ (last visited Aug. 24, 2014). In this case, the accused held one of the highest ranks possible for enlisted personnel, and was then reduced

Upon review of the record and other related materials, the convening authority for this case, Lieutenant General ("Lt Gen") Robert Allardice, reduced CMSgt Gurney's confinement from twenty months to four and reduced the dishonorable discharge to a bad-conduct discharge.[85] While the action on its face may seem questionable, the convening authority did have access to the complete record as well as other materials not entered as evidence during the court-martial.[86] The convening authority's action was unreviewable by the Air Force Court of Criminal Appeals or any other judicial process.[87] Without formal oversight of the convening authority's decision, or explanation of his rationale for reducing Gurney's punishment,[88] Lt Gen Allardice left the public to guess what material swayed his judgment or why the sentence was reduced.[89]

Given the publicized nature of its circumstances and the high-ranking officers involved, another case example, *United States v. Wilkerson*, underpins more recent discourse about Article 60 revisions than *United States v. Gurney*.[90] In *Wilkerson*, Lt Col James Wilkerson was convicted at a general court-martial of sexual assault for assaulting a woman in his own home during a party.[91] The jury

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in rank to airman basic, the lowest rank possible for Air Force enlisted personnel. *United States Military Enlisted Rank Insignia*, DEP'T OF DEF., http://www.defense.gov/about/insignias/enlisted.aspx (last visited Aug. 24, 2014).

[85] However, any punitive discharge would not take effect until the completion of appellate review. *Gurney Sentence*, *supra* note 84.

[86] *See* Davis, *supra* note 72; *see also* UCMJ art. 60 (2012).

[87] MASON, *supra* note 65. The clemency authority and decision by the convening authority to disapprove, commute, or suspend a sentence, or to set aside a finding of guilty, is not appealable by the United States, and as a matter of command prerogative is final upon issuance. *Id.*

[88] Article 60 does not require the convening authority to give an explanation for reducing the sentence. *See* Scott Fontaine, *Sentence Reduced for Convicted Command Chief*, AIR FORCE TIMES (Apr. 21, 2011), http://www.airforcetimes.com/article/20110421/NEWS/104210337/Sentence-reduced-for-convicted-command-chief (quoting Air Force unit spokesperson Maj. Michael Meridith stating that Lt Gen Allerdice "exercised his independent judgment in deciding on the proper disposition").

[89] Zachary D. Spilman, *Top Ten Military Justice Stories of 2013 – #1: Changes to the UCMJ*, CAAFLOG (Jan. 1, 2014), http://www.caaflog.com/2014/01/01/top-ten-military-justice-stories-of-2013-1-changes-to-the-ucmj/ (last visited Aug. 24, 2014).

[90] Doyle & Taylor, *supra* note 1; O'Toole, *supra* note 6.

[91] O'Toole, *supra* note 6.

sentenced Wilkerson to a year in jail, dismissal from the military, and total forfeiture of pay and allowances.[92] The convening authority in this case, Lt Gen Craig Franklin, disapproved the findings and overturned the conviction of the accused.[93]

Against a backdrop of public awareness and condemnation of sexual assault in the military, the convening authority's actions in each of these respective cases prompted calls for a change to Article 60, namely, stripping the convening authority of the power to dismiss charges or change court-martial sentences.[94] In response to this fervor, Lt Gen Franklin wrote a memorandum in which he cited the inconsistencies in testimony and a lack of physical evidence that led to his reasonable doubt of Wilkerson's guilt.[95] Though he knew his decision would be scrutinized, he stated that he could not commit the "cowardly" act of signing off on a guilty conviction he did not agree with.[96] Franklin's painstaking examination of the evidence and careful deliberation of testimony demonstrates that his assessment was not made lightly.[97] His memo, however, fell short of defending the overall power of the convening authority from its critics.[98] Indeed, the memo was denounced for being "filled with selective reasoning and assumptions from someone with no legal training,"[99] and lawmakers cited it as further proof of the need to curtail the convening authority's power.[100] Thus, despite Franklin's earnest and candid explanation of his decision, *Wilkerson* served as a rallying point for legislative change to Article 60, particularly during the 2013

[92] *Id.*
[93] *Id.*
[94] Doyle & Taylor, *supra* note 1.
[95] Franklin Memorandum, *supra* note 11, at 1.
[96] *Id.* at 6.
[97] *See generally id.*
[98] Press Release, Senator Claire McCaskill, Senator McCaskill's Statement on General's Explanation for Overturning Jury Verdict in Aviano Sexual Assault Case (Apr. 10, 2013), *available at* http://www.mccaskill.senate.gov/?p=press_release&id=1866.
[99] *Id.*
[100] *Id.*

Senate Armed Services Committee hearing on sexual assault in the military.[101]

From an external perspective, *Wilkerson* and *Gurney* seem to typify a wanton abuse of power within the military justice system, eliciting public cries for reform of the UCMJ. On the contrary, *Wilkerson* and *Gurney* exemplify only those rare and exceptional instances where the convening authority has acted to reduce or overturn the conviction of a sex-related crime following a court-martial.[102] Instead of viewing these cases as aberrations from the norm, lawmakers have held them out as examples of unacceptable military injustices under the UCMJ against a backdrop of social stigma surrounding sexual assault in the military.[103]

II. CRITIQUES OF PRE-AMENDED ARTICLE 60 AND CONGRESS' INCOMPLETE SOLUTION

The aforementioned critiques and concerns regarding Article 60 led Congress to revise this portion of the UCMJ.[104] Admirably, some of these changes aim to direct greater oversight of the convening authority's decisions.[105] However, the following discussion illustrates critical ways in which this zealous diminution of the convening authority's power ultimately hinders the commander's ability to effectively govern the unit as a whole, inhibiting the good order and discipline of his troops within the unique environment and circumstances of the military.[106]

A. The UCMJ Pre-Revised Article 60 Under Fire

The most pervasive critique of the convening authority's power to review court-martial sentences is that, as a military

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[101] *Sexual Assaults in the Military: Hearing Before the Subcomm. on Pers. of the S. Armed Services Comm.*, 113th Cong. (2013) [hereinafter *Senate Hearing*], *available at* http://www.armed-services.senate.gov/hearings/oversight-sexual-assaults-in-the-military.

[102] Doyle & Taylor, *supra* note 1.

[103] *Id.*

[104] *Id.*

[105] NDAA § 1702.

[106] *See* Stimson, *supra* note 10, at 23.

commander, the convening authority has no legal training or legal background.[107] This criticism often buttresses arguments against the convening authority's role in the military justice process as a whole.[108] These commanders are trained to "command, control and operate military units," yet are asked to perform the function of a judge and jury.[109] One scholar argues that military commanders do not have sufficient legal expertise to separate hearsay from other evidence.[110] Still another scholar suggests that because the convening authority lacks legal training, he is ill-equipped to "pay the necessary deference to the legal niceties inherent in the concepts of probable cause and prima facie evidence."[111] These scholars also dismiss the input of the convening authority's SJA,[112] given that the convening authority is not required to follow the SJA's recommendation.[113] Though one scholar admitted that, ordinarily, the convening authority follows the SJA's advice, "the point is [that the] convening authority need not do so."[114] As a result, although critics acknowledge that the convening authority does not normally eschew the advice of his SJA, they are still quick to dismiss this counterpoint.[115]

The argument that a convening authority needs not follow the advice of his SJA is often suggested in tandem with the proposition that Article 60 creates the predicament of unlawful command influence.[116] This reasoning suggests that the convening authority could exert undue influence, purposefully or not, over the SJA to submit a recommendation he would approve of, rather than one that is legally sound.[117] The SJA, due to his lower rank, would be "disposed to recommend whatever he believes the commander

[107] *See* Schiesser & Benson, *supra* note 27, at 561.
[108] Laird, *supra* note 3.
[109] Schiesser & Benson, *supra* note 27, at 562.
[110] *Id.* at 561.
[111] Rothblatt, *supra* note 28, at 461.
[112] *Id.* Schiesser & Benson, *supra* note 27, at 573.
[113] UCMJ art. 60 (2012).
[114] Schiesser & Benson, *supra* note 27, at 572-73.
[115] *Id.*
[116] *Id.* at 564-65.
[117] *Id.*

wishes to hear."[118] Scholars have suggested that the structure of the military justice system "virtually ensures" that unlawful command influence will be "present in a variety of situations."[119] However, if the logic of this critique were followed, it would suggest that every officer in the military could exert undue influence over a lower-ranking service member simply because of their rank.[120] This flawed logic assumes that a military member lacks integrity, and will defer to what he thinks his commander will want to hear even if the very ethics binding his profession forbid this practice.[121] In some cases, the SJA and convening authority are the same ranks or under a different command structure, undercutting the argument that the SJA is even subject to undue command influence.

Another critique against the convening authority's ability to overturn or reduce the sentence of a court-martial is the "good old boys club" argument.[122] This logic posits that commanders inherently give leeway to their troops, especially in cases of sexual assault. This amity in turn tempts the commander when acting as a convening authority to reduce or overturn their sentences.[123] This line of thinking is discredited by the apparent separation of rank between the accused and convening authority, as explained most notably in the 2013 Senate Armed Services Committee hearing discussing personnel and sexual assault in the military.[124] Specifically, the convening authority of a sexual assault court-martial

[118] Rothblatt, *supra* note 28, at 461. Scholars argue that Article 60 gave so much power to the convening authority that he was "confronted at every turn by temptation to intervene unlawfully in the processes of military justice." Schiesser & Benson, *supra* note 27, at 565.

[119] Schiesser & Benson, *supra* note 27, at 565.

[120] *See id.*

[121] An organization would cease to function if its members all behaved according to the assumptions made by this argument.

[122] *See* Stimson, *supra* note 10, at 23.

[123] *See* Strickland, *supra* note 22, at 57.

[124] *Senate Hearing*, *supra* note 101. Senator Levin requested each branch to list statistics on the usual ranks of convening authorities, suggesting that the convening authority's high rank "removes him" from the lower ranking accused. *Id.*

is normally a high-ranking general officer, and several ranks removed from the accused in the majority of cases.[125]

B. New Legislation

Given recent criticism of the military justice process in light of the *Wilkerson* case, Congress and the Secretary of Defense both proposed changes to Article 60 of the UCMJ.[126] These changes, largely incorporated into the 2014 NDAA,[127] became effective on June 26, 2014.[128] Article 60, as amended, truncates a large portion of the convening authority's sentence review responsibilities, transforming the convening authority's role in the military justice process.[129]

The amended Article 60 strips the convening authority's power to change a sentence for all but the most minor cases, and requires the convening authority to submit a written statement justifying certain decisions,[130] similar to Franklin's statement following the *Wilkerson* decision. The relevant portion of the legislation revising sentencing authority provides:

> (4)(A) Except as provided in subparagraph (B) or (C), the convening authority or another person authorized to act under this section may not disapprove, commute, or suspend in whole or in part an adjudged sentence of confinement for more than six months or a sentence of dismissal, dishonorable discharge, or bad conduct discharge.[131]

The exceptions in subparagraph (B) and (C) state that the convening authority may reduce a sentence of six months or greater only if there is an existing pretrial agreement, subject to certain

[125] *Id.*
[126] Stimson & Bucci, *supra* note 14, at 1; Strickland, *supra* note 22, at 58.
[127] Stimson, *supra* note 10, at 1; Tom Vanden Brook, *Congress Aims to Fix Military Sexual Assault Crisis*, AIR FORCE TIMES (Dec. 10, 2013), http://www.airforcetimes.com/article/20131210/NEWS05/312100020/Congress-aims.
[128] Spilman, *supra* note 87.
[129] *Id.*
[130] NDAA § 1702(b).
[131] *Id.*

limitations,[132] or upon recommendation of the trial counsel where the accused has been of substantial assistance in the investigation or prosecution of the case.[133] The power to review excludes reductions of sentences for Articles 120 (rape and carnal knowledge) and 125 (forcible sodomy).[134]

In addition to sentencing, the convening authority is also restricted in his ability to act on the findings of a court-martial.[135] Under the new rules, a convening authority no longer has the ability to dismiss convictions for major offenses such as sexual assault,[136] leaving him no choice but to force a wrongly convicted servicemember to endure the time and anxiety of the appeals process.[137] Additionally, under the revised Article 60, the convening authority can only change a finding of guilty to that of guilty for a lesser-related offense if it constitutes a "qualifying" offense.[138] A qualifying offense is a type of minor violation where the maximum sentence of confinement is less than two years, the actual adjudicated sentence is less than six months, and there is no a punitive discharge.[139] In essence, under the new law, the convening authority is only able to modify or change the findings for certain minor offenses that might not warrant a court-martial in the first place.[140] Thus, not only is clemency power for major offenses removed, but additionally, if the convening authority is authorized by this new legislation to change the sentence of a case, he must provide a written explanation for this change.[141]

The revised legislation, however, does carve out certain allowances that keep some of the benefits of the convening

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[132] *Id.*
[133] *Id.*
[134] *Id.*
[135] *Id.*
[136] NDAA § 1702(b).
[137] *See* Stimson & Bucci, *supra* note 14, at 3, 4.
[138] NDAA § 1702(b).
[139] *Id.* This is almost never the case when adjudicating cases involving rape or sexual assault under Article 120. A qualifying offense is also not applicable to any offense under Article 120B or 125.
[140] *Id.*
[141] *Id.*

authority's review power intact.[142] For those cases where the accused has provided substantial assistance to the trial counsel, upon trial counsel's recommendation, the convening authority may disapprove, commute, or suspend the court-martial sentence.[143] This exception ensures the accused still has incentive to cooperate with the trial counsel during the court-martial process. The convening authority can also change the sentence of a court-martial where a pretrial agreement has been made allowing for such changes.[144] Again, this exception provides incentive to the accused to cooperate in a manner similar to the plea bargain system in the civilian criminal justice system. This authority under the pretrial agreement exception, however, is subject to restrictions; namely, if the accused has been found guilty of a charge where the mandatory minimum sentence is a dishonorable discharge, the convening authority may go no further than commuting the discharge to a bad conduct discharge.[145]

While the revisions severely limit the convening authority's role in the post court-martial review process, these revisions do contain some changes that will have a positive impact on this process. The revision requiring a convening authority to explain in writing any reasons or rationale for making changes to court-martial findings or sentences is one example.[146] In those minor cases where clemency power is still retained, convening authorities must explain in writing any changes they make to the findings or sentence of a court-martial.[147] The intent of this particular change is to "ensure that convening authorities are required to justify—in an open, transparent, and recorded manner—any decision [they make] to modify [the findings or sentences of] a court-martial . . . ."[148] This move adds much-needed transparency to the military justice process. The written justification is included in the record[149] and can provide

[142] *Id.*
[143] *Id.*
[144] NDAA § 1702(b).
[145] *Id.*
[146] *Id.*
[147] *Id.*
[148] Press Release, Sec'y of Def. Chuck Hagel, Statement from Secretary Hagel on Sexual Assault Prevention and Response (Apr. 8, 2013), http://www.defense.gov/releases/release.aspx?releaseid=15917.
[149] NDAA § 1702(b).

a useful means of tracking trends in convening authority decisions in the future. As was the case with Franklin's letter in the *Wilkerson* case, some statements may be contentious, but the requirement allows those questioning the military justice system to observe first-hand the reasoning behind a sentence modification. While increased oversight and transparency of the convening authority's actions is warranted, the proposal to strip most clemency abilities from major court-martial findings is too extreme of a remedy.[150]

III. THE CASE FOR A CONVENING AUTHORITY AND A SUGGESTED SOLUTION TO THE CONVENING AUTHORITY'S REVISION PROBLEM

The convening authority's role is vital to the military command and disciplinary structure.[151] The current revisions to Article 60 weaken the commander's ability to effectively lead his troops.[152] An alternative solution that balances the importance of the convening authority's review power with concerns for oversight of the convening authority's decisions is possible by modifying portions of recent revisions to Article 60.

A. Addressing Critiques of Article 60: Why the Military Justice Process Still Needs a Convening Authority

The convening authority is an important part of the military justice process.[153] Many supporters of the convening authority under Article 60 cite "good order and discipline" as a reason why he must retain influence,[154] but what does that mean? Essential to the successful functioning of the military is its rank structure and chain of command. In wartime environments, the rank structure is what keeps the military functional and efficient in an otherwise chaotic environment.[155] As stated by the prominent Union Army General

[150] Stimson, *supra* note 10, at 3.
[151] *See id.* at 3-4; *see also* FRANCIS A. GILLIGAN & FREDERIC L. LEDERER, COURT-MARTIAL PROCEDURE (3rd ed. 2006).
[152] Stimson, *supra* note 10, at 4.
[153] *Id.* at 2-3.
[154] Timothy W. Murphy, *A Defense of the Role of the Convening Authority: The Integration of Justice and Discipline*, 28 REPORTER 3 (2001).
[155] *Id.*

William Tecumseh Sherman, "[a]n army is a collection of armed men obliged to obey one man. Every enactment, every change of rules which impairs the principle weakens the army, impairs its values, and defeats the very object of its existence."[156] Commanders need this authority to conduct military operations, including holding courts-martial, in times of war and peace.[157]

The need for good order and discipline among the troops to complete the mission of the military does not fully address concerns that the convening authority lacks legal training. As mentioned previously, the convening authority is required to have input from his legally trained SJA, but is not required to follow the recommendation of the SJA.[158] However, this lack of legal training does not hinder the referral of charges to courts-martial.[159] The convening authority relies on a standard of probable cause to determine whether to refer charges.[160] This means that where a legally trained SJA might not pursue a case due to lack of evidence demonstrating guilt beyond a reasonable doubt, a commander may refer charges in a case where there is merely probable cause that the accused has committed the crime.[161]

Convening authorities rely on the recommendation of their SJA for both referral of charges and review of court-martial sentences in the vast majority of cases.[162] Occasionally, however, convening authorities have referred charges even though their SJAs advised against it due to a perceived lack of sufficient evidence.[163] Aside from

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[156] Major Donald W. Hansen, *Judicial Functions for the Commander?*, 41 MIL. L. REV. 1, 54 (1968).
[157] Stimson & Bucci, *supra* note 14, at 3.
[158] UCMJ art. 60 (2012).
[159] *See* Stimson, *supra* note 10, at 4.
[160] *Id.* Commanders need only "reason to believe that a member of command committed a crime." *Id.* One may not need formal legal training to determine probable cause.
[161] *See id.*
[162] Schiesser & Benson, *supra* note 27, at 595.
[163] Doyle & Taylor, s*upra* note 1 (stating that in their review of seventy military sexual assault cases, the convening authority has "aggressively pursued" a conviction even against the advice of investigators, resulting in a higher number of acquittals for these cases).

their aforementioned tendency to refer charges based solely on probably cause, a commander may also be more willing than those legally trained to pursue charges if he believes that, regardless of the outcome, it is the right thing to do or that it will convey a strong message to his subordinate units.[164] A thorough examination of the case and deliberate execution of the military judicial process shows the units under his command that discipline is paramount, which in turn promotes the good order and discipline of his subordinates.[165] Thus, pursuing a court-martial where there may not have been sufficient evidence for a conviction can result in higher acquittal rates.[166] These statistics can create an impression that the military is lenient on sexual assault cases, when in fact the opposite is true.[167]

The significance of the convening authority's clemency power is also emphasized by the differences in the military justice process from that of the civilian judicial system.[168] Because our nation entrusts the military with the responsibility—and weaponry—to defend its freedom, military laws often hold its members to a higher standard of moral and ethical conduct than civilian laws.[169] For example, Article 134 criminalizes adultery, which is not considered a criminal activity for civilians in most states.[170] Adultery is criminalized because it can cause grave detrimental effects to the cohesiveness of a fighting unit, and its toleration undermines a commander's moral stature among those who entrust him with their lives.[171] In addition, Article 134 also contains a general clause which states "all disorders and neglects to the prejudice of good order and discipline" are subject to punishment depending on the severity of

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[164] Stimson, *supra* note 10, at 4.
[165] *See id.*
[166] Doyle & Taylor, s*upra* note 1.
[167] *Id*.
[168] Stimson & Bucci, *supra* note 14, at 2.
[169] *See id.*
[170] UCMJ art. 134 (2012). Adultery is only considered an offense if "under the circumstances, the conduct of the accused was to the prejudice of good order and discipline . . . or was of a nature to bring discredit upon the armed forces." *Id.*
[171] James M. Winner, Comment, *Beds With Sheets But No Covers: The Right to Privacy and the Military's Regulation of Adultery*, 31 LOY. L.A. L. REV. 1073, 1103 (1998) (asserting that adultery is a legitimate crime because of its effect on unit cohesion and fighting ability).

the action, effectively criminalizing any conduct that interferes with the commander's ability to effectively maintain good order and discipline, conveying even more importance to the commander's discretion and ability to lead.[172] Hence, the differences between civilian and military justice are based on the different purposes of the respective justice systems.[173] The separate military justice system supports the military's mission to defend the nation by facilitating the requirement for rapid mobility of personnel, a swift judicial process in locations worldwide, and the necessity for good order and discipline of troops.[174]

The structure of the jury panel of a court-martial further illuminates the vital role of the convening authority.[175] A civilian jury is comprised of twelve jurists for federal cases and no fewer than six in state cases.[176] A military court-martial panel, on the other hand, can be as sparse as three servicemembers for special courts-martial and as small as five servicemembers for general courts-martial.[177] This difference in jury size can have an impact on the due process afforded to the accused military member.[178] For example, a small number of jurists in a panel might not provide an adequate cross section of society, a Constitutional requirement in civilian law,

[172] UCMJ art. 134 (2012).
[173] Stimson & Bucci, *supra* note 14, at 2; Stimson, *supra* note 10, at 2. The civilian justice system focuses on the punitive aspects of justice for those who violate the law, while the focus of military justice is to support the primary goal of the military in its defense of the nation. Stimson, *supra* note 10, at 2.
[174] Stimson & Bucci, *supra* note 14, at 2.
[175] *See* Andrew S. Williams, *Safeguarding the Commander's Authority to Review the Findings of a Court-Martial*, 28 BYU J. PUB. L. 471, 474 (2014) (stating that the difference between military panels and civilian juries "materially effects the reliability of verdicts").
[176] FED. R. CRIM. P. 23(b)(1); Patton v. United States, 281 U.S. 276 (1930) (reversing conviction because the federal jury did not have 12 jurors).
[177] UCMJ art. 16 (2012). The accused may choose the composition of the court-martial except in capital cases, where members are required. MCM, *supra* note 44, at pt. II, Ch. II, ¶ 201(f)(1)(C).
[178] Williams, *supra* note 175 (citing *Ballew v. Georgia*, 435 U.S. 223 (1978) (setting aside a conviction because a five-person jury was too small)) (stating that a jury's size may affect the quality of its deliberations and that while a jury is supposed to represent a cross-section of the community at large, a smaller number of jurors makes this representation difficult).

but not military law. Thus, a convening authority's review of the sentence ensures the accused person's right to a representative jury and due process is protected.[179]

Even more significant than jury size is the difference in unanimity requirements between military panels and civilian juries for criminal sentencing and guilty verdicts.[180] In civilian federal courts at common law, a jury decision must be unanimous.[181] Contrary to these civilian criminal trials, only two-thirds of the members of a military court-martial must agree to find the accused guilty.[182] Thus, there are no "hung juries" in courts-martial.[183] Instead, clemency was built into the military system to offer a procedural safeguard for the convening authority to prudently exercise when a lack of evidence to support a unanimous guilty verdict calls into question the nature or severity of the crime.[184]

The convening authority review process is a tested and proven method to ensure justice within the military system.[185] In general, the position of the convening authority in the military justice process ensures the fairness of the trial and the rights of the accused by adding a layer of review in judgment and sentencing.[186] This added layer counterbalances the lower unanimity requirements and smaller jury panel characteristic of a military trial.[187]

Not only does this review process ensure due justice for the accused, but it allows a commander to consider implications of sentencing that go beyond merely punishing the accused.[188] For

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[179] *See* Williams, *supra* note 175.
[180] *Id.*
[181] MCM, *supra* note 44, at pt. II, Ch. IX, ¶ 921(c). The same is applicable to general courts-martial with the exception of offenses where the death penalty is mandatory, which require a unanimous verdict. UCMJ art. 52 (2012).
[182] R. CHUCK MASON, CONG RESEARCH SERV., R41739, MILITARY JUSTICE: COURTS-MARTIAL, AN OVERVIEW 2 (2013), *available at* http://fpc.state.gov/documents/organization/213982.pdf.
[183] Williams, *supra* note 175 at 496, 499-500.
[184] *See id.* at pt. IV.
[185] *Id.* at 503-05.
[186] *Id.*
[187] *See id.*
[188] *Id.*

example, the convening authority is given the opportunity to look beyond the offense itself and evaluate the accused's personal or family situation.[189] In doing so, the convening authority is afforded the latitude to change a convicted servicemember's sentence, which may provide relief for the servicemember's family.[190] This is especially relevant where the adjudged sentence contains forfeitures of pay and allowances, as very often, military spouses find a steady career difficult to maintain due to the location changes and deployments that come with their spouse's military commitment.[191] In instances where the servicemember is the sole monetary provider, the convening authority can grant clemency for this portion of the sentence, reducing the amount of pay forfeiture or stopping this portion of the penalty for a short time to allow the family to find other means of income.[192] Without the clemency aspect of the convening authority's power, mitigation would not be possible should the sentence withhold pay, leaving the military spouse without any monetary income—effectively forcing the military family to share punishment for the servicemember's crime.[193]

The convening authority review process ensures both fair treatment of the accused through due process and the holistic preservation of the overall wellbeing of the unit.[194] Outside of the unit, this clemency power also offers a means for a commander to ensure the accused's dependents are treated fairly in the military justice process.[195] A sweeping revision to Article 60 that does not acknowledge or account for the critical reasons that necessitate a

[189] *See* Strickland, *supra* note 22 at 58. Commanders often reduce monetary punishments to mitigate the negative impact on the servicemember's family. *Id.*
[190] *Id.*
[191] Molly Blake, *For Military Spouses, the Hard Road Between Careers and Family*, N.Y. TIMES (July 24, 2012), http://atwar.blogs.nytimes.com/2012/07/24/for-military-spouses-the-hard-road-between-careers-and-family/.
[192] UCMJ art. 58(b) (2012).
[193] *See id*.
[194] Williams, *supra* note 175, at 25.
[195] *Id*. *See also* Stimson & Bucci, *supra* note 14, at 3 (stating that Article 60 clemency power acts as a way for commanders to correct legal error or errors in the military justice process).

convening authority harms the military justice process and ultimately the effective functioning of the military.[196]

B. An Alternative to the Current Legislation

The recently enacted legislation offers a partial solution for convening authority oversight by requiring a written explanation for changing a court-martial sentence.[197] Although the Franklin letter failed to persuade an already-infuriated Congress, reforming Article 60 to include the requirement for this written explanation would indeed provide transparency to the post-trial process, stemming denouncements of unfairness or special treatment to those convicted.[198] Aside from this singular improvement, the new Article 60's broad denial of clemency power for all major courts-martial[199] constitutes a blunt, myopic solution for combating sexual assault merely by assuring maximum punishment of convicts including, occasionally, those wrongfully convicted by a misrepresentative jury or non-unanimous guilty verdict.

This Comment recommends an alternative solution that allows the convening authority to retain clemency power, while satisfying critics who believe this power is too often abused. A commander's decision for clemency need not be finalized in isolation. Instead, the convening authority's revision of a court-martial's findings could be subjected to a review board of qualified judges, hence alleviating public misgivings of wrongdoing or lack of legal training. This evaluation would institute a check to the power of the convening authority while still maintaining the convening authority's discretion in the outcome of a court-martial.

Ideally, review board members would be comprised of military appellate judges or even judges serving in the Court of Appeals for the Armed Forces. This would allow the convening authority's decision to be verified by those educated in the legal profession, mitigating the popular complaint that the convening

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[196] *See id.* at 5.
[197] NDAA § 1702.
[198] Stimson & Bucci, *supra* note 14, at 5.
[199] *See id.*

authority lacks the requisite legal training to decipher the nuances of law or make legally valid decisions. Staffing the review board with competent, widely respected judges would assure the public that it can stem any miscarriage of justice, yet leave intact the authority necessary for the good order and discipline of the troops. An appellate level review would also reinforce the credibility of the court-martial process at the trial level and underscore the sensible, deliberate judgment of a convening authority choosing to amend a court-martial decision, maintaining his command influence.

The board of review would only be called to examine those decisions that reverse or reduce the sentence of a conviction in a general court-martial. The current amendment to Article 60 in the NDAA severely limits the convening authority's ability to act on court-martial findings by only allowing changes to findings where the actual sentence was confinement for less than six months, the maximum possible confinement was less than two years (with a few limited exceptions),[200] and there was no requirement for punitive discharge.[201] The amendment to Article 60 also limits the convening authority's ability to disapprove, commute, or suspend an adjudged sentence.[202] The changes limit this authority, with a few exceptions, to those minor cases with adjudged sentences of confinement for less than six months and those sentences not containing dismissal, dishonorable discharge, or a bad conduct discharge.[203] The board of review solution not only offers oversight of the convening authority's decisions from these courts-martial, but it allows the convening authority to review all cases rather than just minor ones.

In order to preserve the commander's legitimate authority over the case, the board of review must analyze the convening authority's decision with a presumption that he has ethically completed due diligence by incorporating a meticulous examination of evidence and considered the recommendations provided by his

[200] As previously mentioned, these exceptions are limited to pretrial agreements for certain charges or upon recommendation of trial counsel based on the cooperation of the accused. *See supra* Part II.B.
[201] NDAA § 1702(b).
[202] *Id.*
[203] *Id.*

SJA. This presumption limits the board's scope to evaluating only the sound reasoning and legal suitability of the decision—not opinions about the accused's moral character or perceived commander biases. Not only would board decisions based on these opinions elicit public scrutiny, but the ethical and moral judgments that inform a clemency decision must remain with the commander, as only he can decide how best to maintain the discipline and overall well-being of his subordinates. The board's respect for the convening authority's moral judgment also mitigates concerns that the commander would lack real power under this revised system. The presumption ensures that the convening authority maintains the necessary command authority to lead troops while allowing truly questionable decisions to undergo validation for legal soundness.

Should the board of review exercise its ability to veto the convening authority's clemency on the basis that he abused his power, changes in findings or sentencing would revert to the original court-martial trial findings and sentencing.[204] Because the standard of review for this board would be "abuse of discretion,"[205] any changes to convening authority decisions would be few in number, limited only to those decisions with egregious flaws or those that are based on erroneous conclusions of law.[206] Abuse of discretion is an ideal standard of review when examining convening authority decisions because it can correct those decisions that are flawed from a legal standpoint while maintaining the discretion of the convening authority for most other decisions. Under this standard, abuse of discretion may be found when the convening authority's decision was clearly unreasonable or arbitrary, the decision was based on an erroneous conclusion of law, the convening authority's findings were clearly erroneous based on the record and materials relevant to the court-martial, or when the materials contained no evidence to rationally support the convening authority's decision.[207] Consequently, the abuse of discretion standard would afford the

[204] *See generally* Kevin Casey, Jade Camara, & Nancy Wright, *Standards of Appellate Review in the Federal Circuit: Substance and Semantics*, 11 FED. CIR. B.J. 279 (2002).
[205] *See id.* at 287.
[206] *Id.*
[207] *See id.*

convening authority the most deference possible, keeping his necessary command authority intact.

Granted, the review board solution may not fully assuage all fears that the convening authority may act improperly in reducing or commuting a sentence. Indeed, the convening authority would retain the ability to make these decisions based on his moral and ethical judgment, provided they are legally sound. Current legislation strips the convening authority of all but the most basic clemency powers, clearly undermining his ability to command troops, and taking discipline outside the chain of command.[208] As an ideal compromise, a review board would allow the convening authority to maintain this command authority while ensuring greater legal oversight of his decision.

IV. CONCLUSION

Sexual assault—particularly among our country's uniformed servicemen—is considered an immediate and intolerable problem. Enacting legislation stripping the convening authority of the ability to grant clemency will not solve this problem. Despite good intentions, knee-jerk lawmaking in response to political pressures cannot result in well-thought-out or justiciable laws. Although it admirably calls for widespread oversight of a commander's actions, the portions of legislation that restrain clemency authority from courts-martial convening authorities will substantially, and negatively, alter the military justice process. As a compromise, allowing a board of review to look at those decisions that reduce or reverse a conviction or sentence in courts-martial strikes a balance between the desire for oversight of the convening authority and allowing the convening authority to retain the necessary influence to effectively command troops. This proposed solution resolves concerns for both opponents and proponents of the new changes to Article 60, strengthening the military justice system and securing the overall success of our fighting men and women.

[208] *See* Stimson, *supra* note 10, at 23.