

BACKGROUND

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Changing the Military Justice System: Proceed with Caution

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Abstract

Despite the recent flurry of sensational headlines related to United States v. Lt Col James H. Wilkerson III, Congress should be circumspect in its approach to the military justice system. While some parts of Secretary of Defense Chuck Hagel's proposed modification have merit, others could undermine the unique role given to the system's convening authority. Congress should review the unique nature of the military criminal justice system—especially the role of a convening authority—before changing the law and eliminating a convening authority's discretion to overturn a conviction. To do anything less would be a disservice to the men and women of the United States armed forces.

Secretary of Defense Chuck Hagel has proposed amending the legal authority that empowers commanding officers to bring order and discipline to the military criminal justice system. The authority in question, currently authorized by Congress, is Article 60 of the Uniform Code of Military Justice (UCMJ). Hagel's proposal stems from a U.S. Air Force case in which a military jury convicted an officer of sexual assault,¹ but the officer responsible for reviewing the conviction, a lieutenant general,² overturned the jury's verdict using his Article 60 powers as the convening "authority."

Some commentators have criticized the general's decision, calling it unprecedented and offering it as further proof that an "old boys' network" dominates the military. In response to this incident, Secretary Hagel has proposed making two substantive changes in Article 60. The Secretary's proposal would:

KEY POINTS

- Secretary of Defense Chuck Hagel's proposed changes in the military justice system would essentially eliminate the discretion of a convening authority to change the findings of a court-martial.
- The role of the convening authority is one of the most important differences between the civilian and military justice systems.
- Before eliminating a convening authority's discretion to overturn a conviction, Congress should fully understand the unique nature of the military criminal justice system, the role of a convening authority, and the potential consequences of changing the law.
- The notion that one commander is alleged to have misused his Article 60 authority and overturned a conviction where none was arguably merited is no reason to remove a key aspect of the military justice system for all future convening authorities.

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1. Eliminate the discretion of a convening authority to change the findings of a court-martial, except for minor offenses that would not ordinarily warrant a court-martial, and
2. Require a convening authority to explain in writing any changes made in court-martial sentences, as well as any changes in findings involving minor offenses.³

The intent of these changes is to “ensure that convening authorities are required to justify—in an open, transparent, and recorded manner—any decision to modify a court-martial sentence.”⁴

The Secretary’s proposal is not without merit. Indeed, requiring a convening authority to explain in writing why he overturned a conviction from a court-martial or modified a sentence could add an important layer of transparency to the military justice system.

For this reason, Congress should give the second part of the Secretary’s proposal strong consideration. But before acceding to the first part by eliminating a convening authority’s discretion to overturn a conviction, Congress should fully understand the unique nature of the military criminal justice system, the role of a convening authority, and the potential consequences of changing the law.

Unique Nature of the Military Criminal Justice System

There are fundamental differences between the civilian criminal justice system and the military justice system. Yet far too many people fail to understand those differences and the rationale for them.

The civilian system operates to protect the populace and punish those who violate the law. The military justice system operates under a similar

premise but relies on commanding officers to maintain good order and discipline within the armed forces. This separate system is necessary and justified for several reasons:

- The need for instant mobility of personnel,
- The need for a speedy trial to avoid loss of witnesses due to combat and deployment needs,
- The peculiar nature of military life, and
- The need for disciplined personnel.⁵

In the military, each person reports to another in the chain of command. Those in command have extraordinary responsibilities that include, but are not limited to, the responsibility to train, equip, and lead personnel under their command. Order and discipline are integral components of the chain of command and must be maintained.

To that end, commanders have a myriad of tools to effectuate their duties. With respect to maintaining order and discipline, commanders have administrative,⁶ quasi-criminal,⁷ and criminal law solutions⁸ to address the entire range of personnel activity.

There are clear and important distinctions between the civilian and military justice systems, yet some continue to conflate or equate the two systems, thereby evincing a fundamental misunderstanding of the unique and weighty responsibilities endemic to military command.

Role of the Convening Authority

In the civilian criminal justice system, depending on the state, the prosecutor or police file charges against an accused. Those charges are filed in a trial court, such as a state superior or district court.

1. *United States v. Lt Col James H. Wilkerson III*. All documents are available at <http://www.foia.af.mil/reading/thewilkersonfoiacase.asp> (accessed April 30, 2013).

2. Lieutenant General Craig A. Franklin, USAF, Commander, Third Air Force, was the convening authority who overturned Lieutenant Colonel Wilkerson’s conviction.

3. Press release, “Statement from Secretary Hagel on Sexual Assault Prevention and Response,” U.S. Department of Defense, April 8, 2013, <http://www.defense.gov/releases/release.aspx?releaseid=15917> (accessed April 30, 2013).

4. *Ibid.*

5. Francis A. Gilligan and Fredric I. Lederer, *Court-Martial Procedure*, 3rd Edition (Newark, N.J.: LexisNexis, 2006), Vol. 1, pp. 1-3 and 1-4.

6. See *Manual for Courts-Martial United States (2012 Edition)*, rule 306(c)(2), http://www.loc.gov/rr/frd/Military_Law/pdf/MCM-2012.pdf (accessed April 30, 2013). A commander’s administrative actions include corrective measures such as counseling, admonition, reprimand, exhortation, disapproval, criticism, censure, reproach, rebuke, extra military instruction, or the administrative withholding of privileges or any combination of the above.

In the military justice system, however, there are no standing courts such as a superior court or district court. For every single court-martial to happen, a court must be “created.” The entity that creates a court-martial is called the convening authority.

The convening authority creates a court-martial by issuing a convening order.⁹ The convening authority¹⁰ can be the President of the United States, the Secretary of Defense, or other high-ranking officers in the military. Typically, the convening authority for a general court-martial is a flag or general officer.

The convening authority plays an integral role in almost all aspects of courts-martial, including but not limited to:

- Detailing military personnel as members (jurors) for each court-martial that is convened;¹¹
- Deciding which charges are filed;¹²
- Deciding whether to bring those charges to a felony court (called a general court-martial) or a misdemeanor court (called a special court-martial); or
- Disposing the case through other means.¹³

During the pretrial stages of a case, it is the convening authority who approves or disapproves of requests for expert and other witnesses from either the trial or defense, and it is the convening authority who approves of any plea offers from the accused.

In the event of a conviction, Article 60 of the UCMJ requires the findings and sentence of the court-martial to be reported to the convening authority.¹⁴ Convicted defendants may submit to the convening authority matters for consideration with respect to the findings and sentence.¹⁵ Defense counsel routinely submits these petitions for clemency to convening authorities.

The convening authority is also required to take action on the sentence of a court-martial.¹⁶ This requirement includes all summary, special, and general courts-martial. The authority to modify the findings and sentence of a court-martial is a matter of command prerogative involving the sole discretion of the convening authority.¹⁷

Under the law, the convening authority may approve, disapprove, commute, or suspend the sentence in whole or in part¹⁸ and may dismiss any charge or specification by setting aside a finding of guilty.¹⁹ Article 60 is an acknowledgement that the military court system is not immune to legal errors and miscarriages of justice, and it therefore provides a method to correct such errors. Without the power

7. See Uniform Code of Military Justice (hereinafter UCMJ), article 15, Non-Judicial Punishment. This provision, not found in the civilian criminal justice system, allows any commanding officer, in addition to or in lieu of admonition or reprimand, to impose one or more of the following disciplinary punishments for minor offenses without the intervention of a court-martial: restriction to specific limits for up to 30 days; arrest in quarters for not more than 30 days; forfeiture of not more than one-half of one month's pay per month for two months; if imposed on a person attached or embarked on a vessel, confinement on bread and water or diminished rations for not more than three consecutive days; and other remedies short of court-martial.

8. In addition to special courts-martial, which are typically reserved for misdemeanors, and general courts-martial, which are for felonies, commanders may subject their personnel to a summary court-martial under *Manual for Courts-Martial*, rule 1301. The function of a summary court-martial is to “promptly adjudicate minor offenses under a simple procedure.” A summary court-martial is composed of one commissioned officer on active duty, who impartially hears both sides of the matter and decides the case. There is no civilian criminal justice equivalent to a summary court-martial.

9. See *Manual for Courts-Martial*, rule 504.

10. See *Ibid.*, rule 103(6), and UCMJ, art. 22.

11. See *Manual for Courts-Martial*, rule 503(a)(1).

12. Charges are “filed” by the prosecutor in the civilian criminal justice system. In some jurisdictions, prosecutors seek indictments from a grand jury, and the grand jury issues an indictment. In the military, prosecutors do not “file” charges. Rather, the convening authority “refers” charges to a court-martial. See *Manual for Courts-Martial*, rule 407.

13. Other means include, but are not limited to, administrative processing. Administrative processing is a process by which the government attempts to terminate the individual from employment within the armed services.

14. UCMJ, art. 60(a).

15. UCMJ, art. 60(b)(1).

granted by Article 60, a convening authority would have no choice but to force a wrongly convicted service member to endure the time and anxiety of the appeals process.

Any of these actions taken by the convening authority is separate and distinct from review by appellate courts and happens well before appellate review, which is automatic in the following types of cases:

- Where a sentence, as approved by a convening authority, extends to death;
- Where an officer, cadet, or midshipman is dismissed;
- Where a dishonorable or bad conduct discharge is adjudged; or
- Where there is a sentence of confinement for one year or longer.²⁰

In this age of the all-volunteer force, the military has been fortunate to recruit and retain highly qualified volunteers. The men and women who make up the enlisted and officer corps of today's military are the most qualified recruits our country has ever seen. As such, those who become involved in the military criminal justice system are first-time offenders, as the armed forces do not recruit individuals with criminal records. Defendants in the military justice system offer a sharp contrast with their counterparts in the civilian criminal justice system, many of whom are repeat offenders and recidivists.

Congress Should Proceed with Caution

The military criminal justice system is unique and necessary to ensure order and discipline in the armed forces. It is one of many essential tools available to those in command—the men and women who are responsible for dealing with misconduct. Any changes in the current law must be made carefully and not as a reaction to what is an otherwise isolated incident.

Education. Before acting on the current proposal, Congress should educate itself about the unique role of the convening authority in the military criminal justice system. As part of this process, Congress should review the responsibilities of all military leaders charged with enforcing order and discipline in the armed forces.

In reality, Article 60(c)(3)(A)—the law that gives convening authorities the power to dismiss any charge or specification by setting aside a finding of guilty—is rarely used by convening authorities. As part of its review, Congress should seek data from the service Judge Advocates as to how few times convening authorities have set aside convictions and, to the extent possible, why they did so in those particular cases.

Additionally, Congress should seek data on the number of times convening authorities have modified sentences in courts-martial. Any fair reading of military appellate case law reveals that in a large number of cases, convening authorities grant clemency in the form of modifying sentences to the benefit of the accused.

Carefully Tailored Modifications. Any modification of Article 60 should apply only to general and special courts-martial. Summary courts-martial are not presided over by a military judge, and accused service members are rarely represented by counsel. Most summary courts-martial are used for minor military misconduct cases. In the event of an injustice at a summary court-martial, a wrongly convicted accused service member should receive expedited justice that can be corrected quickly by the convening authority.

When considering Secretary Hagel's proposal, lawmakers should be aware that any ill-conceived modification of Article 60—specifically, those aspects of the law that grant the convening authority the ability to grant clemency—could harm an accused's ability to receive that relief that he is due. Furthermore, stripping all commanders of unique and appropriate plenary powers, including the power of clemency, weakens the military justice system,

16. UCMJ, art. 60(c)(2).

17. UCMJ, art. 60(c)(1).

18. UCMJ, art. 60 (c)(2).

19. UCMJ, art. 60 (c)(3)(A).

20. *Manual for Courts-Martial*, rule 1201.

harms future accused individuals in the military, and injects politics into an apolitical process.

Also, given that there is an ongoing investigation into the circumstances of the overturning of the conviction of the Air Force officer, Congress should not do anything that would disrupt, impede, or influence the investigation or results thereof.

Finally, promoting transparency and confidence in the military justice system is critical. Requiring a convening authority to justify in writing his or her reasons for setting aside charges or a conviction itself, or modifying a sentence, contributes to transparency and confidence in that system. The notion that one commander is alleged to have misused his Article 60 authority to overturn a conviction where none was arguably merited is no reason to remove a key aspect of the military justice system for all future convening authorities.²¹

Circumspect Changes

Despite the recent flurry of sensational headlines related to *United States v. Lt Col James H. Wilkerson III*, Congress should be circumspect in its approach

to the military justice system. While some parts of Secretary Hagel's proposed modification have merit, others could undermine the unique role given to the system's convening authority.

Congress therefore should review the unique nature of the military criminal justice system—especially the role of a convening authority—before changing the law and eliminating a convening authority's discretion to overturn a conviction. To do anything less would be a disservice to the men and women of the United States armed forces.

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21. Lieutenant General Franklin wrote a letter to Air Force Secretary Michael B. Donley in which he explained his rationale for overturning the conviction of Lieutenant Colonel Wilkerson. See Lieutenant General Franklin letter to Air Force Secretary Donley, March 12, 2013, <http://www.scribd.com/doc/135203535/Air-Force-General-explains-why-he-overturned-the-decision-in-sexual-assault-case> (accessed April 30, 2013).