Yale Law School

March 17, 2013

Hon. Howard P. "Buck" McKeon
Hon. Adam Smith
Committee on Armed Services
2120 Rayburn House Office Bldg.
Washington, DC 20515

Re: *Military Justice Reform*

Dear Chairman McKeon and Ranking Member Smith:

I read with interest your letter to Secretary Hagel concerning the powers of convening authorities under the Uniform Code of Military Justice (UCMJ). The important questions you raise deserve careful consideration.

I served as a judge advocate in the United States Coast Guard from 1969 to 1972, have taught military justice at three law schools (Yale, Harvard, and American University), and was president of the National Institute of Military Justice for 20 years. I was a military prosecutor (trial counsel) while on active duty and a defense counsel both on active duty and as a civilian attorney. I have represented members of every branch of the armed forces as well as the Public Health Service and NOAA commissioned corps. I wrote the *Guide to the Rules of Practice and Procedure for the United States Court of Appeals for the Armed Forces* (1st ed. 1978 to 13th ed. 2010), co-authored *Military Justice: Cases and Materials* (LexisNexis 2d ed. 2012), and edited *Military Court Rules of the United States* (LexisNexis 2012). I served as a public member of the statutory Code Committee on Military Justice and for many years was a member of the Rules Advisory Committee of the U.S. Court of Appeals for the Armed Forces. I am a member of the board of directors of the International Society for Military Law and the Law of War and president of the Society's Committee on Military Justice.

In offering these comments, I want to emphasize that the views expressed in this letter are solely my own and should not be imputed to any organization with which I am or have been associated. Additionally, although the current legislative and executive attention to convening authority powers arises from a particular case (*United States v. Wilkerson*) and a particular type of offense (sexual assault), I have no view on either Lt Col Wilkerson's guilt or innocence or the wisdom of Lt Gen Franklin's exercise of his discretion under Article 60, UCMJ, in that case.

On December 11, 2012 (long before Lt Gen Franklin's action in *Wilkerson*), I wrote to the United States Commission on Civil Rights:

P.O. BOX 208215 · NEW HAVEN, CONNECTICUT 06520-8215
COURIER ADDRESS 127 WALL STREET · NEW HAVEN, CONNECTICUT 06511

One of the suggestions that has been made as part of the ongoing public debate over what to do about sexual assault in the armed forces is to transfer the power to decide which cases to prosecute to higher commanders or, indeed, to remove that decision from the chain of command in general. These suggestions have come in response to reports of cases that have been swept under the rug at relatively low echelons where the commander may not wish to destroy the career of a favored subordinate by subjecting him or her to formal disciplinary action.

I do not believe the answer is to carve out sexual assault cases for special treatment. These are only one category—albeit an important one—of serious crime within the armed forces. It would be a grave error to establish a special prosecutorial decision making mechanism solely for this category of offense.

That of course does not mean nothing should be done. In my opinion, it is time to take an overall look at who makes prosecution decisions in general in the United States armed forces. From the earliest days of the Republic (and drawing on the model provided by British military justice under George III), the power to decide who shall be prosecuted for what has been vested in military commanders. We have adhered to this command-centric model even while other countries with which we share basic legal traditions and constitutional values have moved towards giving this important power to lawyers. Thus, countries such as the United Kingdom, Canada, South Africa, Ireland, Australia, and New Zealand have created Directors of Military (or Service) Prosecutions, with power to initiate criminal proceedings, just as they have Directors of Public Prosecutions or their equivalent for civilian criminal cases.

Professor Philip Alston, the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, wrote in 2008:

> One possible response to some of these distortions ["some sentences appear too light for the crime committed, and senior officers have not been held to account in the same way that enlisted men have been"] would be to explore the creation of a position of Director of Military Prosecutions. Rather than permitting commanding officers [to decide] whether to prosecute their own soldiers, this official would make those decisions. This has been done in recent

> years in various states, including Australia, Canada, Ireland, New Zealand and the United Kingdom. The goal is to ensure independent decisions as to prosecution and to distance the convening authorities from decisions in which they and the troops serving under them can be considered to have a direct and potentially conflicting interest.

http://www.unhchr.ch/huricane/huricane.nsf/view01/73409531EE29EEF8C12574780053EFC2?

Your letter to Secretary Hagel posed two large questions and requested data and analysis under three headings. My own responses are as follows:

> **How is a convening authority's ability to overturn the adjudged sexual assault conviction and sentence of a General Court-Martial, as in the case of Lieutenant Colonel James Wilkerson, United States Air Force, appropriate and consistent with justice, good order and discipline, and the Department's policy of zero tolerance for sexual assault?**

I wrote in a recent blog post that "it would be wrong to harass or penalize Lt Gen Franklin. His action, whatever the reason(s) for it, was plainly authorized. Congress granted him sole discretion and he used it. To probe his reasons is to repudiate the statute. It is also a form of legislative 'command influence' calculated to affect others' exercise of discretion, and as such no more appropriate than 'unlawful command influence' exerted by senior officers." *Aviano II*, Balkinization, Mar. 9, 2013, http://balkin.blogspot.com/2013/03/aviano-ii.html.

Whatever adverse effect Lt Gen Franklin's Article 60, UCMJ, action may have in terms of the national goal of deterring sexual assaults, its impact on public confidence in the administration of justice within the armed forces is grave and broader in scope. This is so because it undermines so much of the work Congress has done over the last six decades to upgrade military justice. To quote my blog post,

> our system . . . includes not only a rough replica of the jury system, but also a military trial bench, two tiers of specialized appellate courts, and a clemency and parole system. The convening authority's post-trial power of review is a throwback to an earlier age and fundamentally discordant with other, more modern aspects of the military justice system. What are the members of courts-martial – our uniformed jurors – to think if they know that a commander can set aside the verdict they

> have painstakingly rendered after hearing the evidence, perhaps asking questions of their own (as military law permits), applying the military judge's binding legal instructions, and deliberating in secret?

Particularly in an All-Volunteer Force era, public confidence in the administration of military justice is critical if we are to attract and retain personnel. I can think of few more effective ways to erode that confidence than permitting commanders to nullify court-martial verdicts.

What changes, if any, should be made to Article 60 of the Uniform Code of Military Justice?

Convening authorities should play no role in the post-trial review of courts-martial. Requiring an explanation of actions like that taken by Lt Gen Franklin does not get even close to the heart of the problem, even though I readily acknowledge the victim's strong interest in having *some* explanation. But I would by no means consider the Committee's work done if all it did was modify Article 60 to require an explanation in cases like *Wilkerson*. Indeed, such a half-measure would be particularly unfortunate if it deflected attention and legislative energy from larger structural issues

Here I will again quote from my *Balkinization* post:

> If it conducts th[e suggested] examination of the *back* end of the military justice system, Congress should also look at the *front* end, where non-lawyer convening authorities enjoy equally broad discretion to decide which cases will be referred for trial by court-martial. To bring the one up to date and into sync with other aspects of the UCMJ while leaving its mate hard aground in the 18th century would make no sense. Congress could do as other democratic countries have done in the last several decades, and move the prosecution decision to a legal official such as a director of military or service prosecutions and away from commanders. Under a reformed system, commanders could of course express their views as to how any particular case should be handled, but they would have to do so in writing and the actual decision would lie with a trained, independent prosecutor.

Convening authorities enjoy a host of important powers under the UCMJ. The entire bundle should be re-examined. In addition to the power to decide who shall be tried, on what charges, before what level of court-martial, and with what maximum possible punishment (including death for some offenses), they include such key matters as convening the court-martial, detailing and changing the members, ordering mental examinations and depositions, granting immunity, making

pretrial agreements (plea bargains), designating the place of confinement, deferring service of a sentence to confinement, and suspending sentences.

The system should be internally consistent. Piecemeal reform or, worse yet, simply "kicking the can down the road," would be most unwise as a matter of legislative policy – as well as infuriating to the many Americans from all walks of life who are troubled by the boxcar official numbers of sexual assaults in the military.

To further assist our deliberations in this matter, we request that you provide the Committee with the following, as soon as possible:

An analysis of the underlying rationale for the convening authority's role and responsibilities in the UCMJ?

The rationale for the current system (which I refer to as "command-centric") is that because commanders have responsibility for maintaining good order and discipline within their commands, they must have personal control over the military justice system. Quite simply, this is a non sequitur. It does not follow from the fact that a commander may send his or her personnel in harm's way that that commander must control the administration of military justice; this is not a case of the greater including the lesser.

First of all, there is nothing magical in the factors set forth in the *Manual for Courts-Martial* regarding how charging decisions should be made. *See* R.C.M. 306(b) (Discussion). To the limited extent they involve matters within the peculiar ken of the commander, I personally see no reason to prevent the commander from submitting his views to an independent prosecutor who, under a reformed system, would have charging authority, although I am aware of a respected foreign military justice system in which even that would be deemed highly improper as a threat to prosecutorial independence.

Beyond this, Congress has worked for over half a century to put in place a system of military justice worthy of the name, with

- lawyer counsel representing both sides at trial and on appeal
- legally-trained judges (including some – but inexplicably not those in the Air Force, Navy or Marine Corps – who have the benefit of terms of office) with the power to make binding rulings on legal issues
- provision for voir dire examination of members, followed by both challenges for cause and peremptory challenges
- strict rules of evidence

- two tiers of specialized appellate courts, followed (albeit in an indefensibly narrow class of cases)* by the potential for review by the Supreme Court of the United States
- a system of clemency and parole boards (as well as the usual presidential clemency)

Every American commander can send a criminal case into this system without being concerned in any degree that he or she might later be found not to have exercised proper supervision over subordinates.

A fact sheet I have seen refers to post-World War II statements by Generals Eisenhower and Collins. Whatever its value in 1947, the anecdotal information on which they relied for retaining George III's military justice architecture is unpersuasive in this day and age. The ability to empty the stockade to gain a few more soldiers for front-line duty in some future Battle of the Bulge seems a slender reed on which to predicate a basic element of the current system, and one that so clearly detracts from the independence of the court-martial as an institution.

What is more, even under a reformed system, commanders *in extremis* could still release prisoners and could still make promises to intervene with clemency officials for prisoners so released who distinguish themselves in combat. Can there be any doubt that such a promise – in the highly unlikely event the "we-need-everyone-to-grab-a-rifle" scenario were to recur – would be honored? To permit General Eisenhower's empty-the-stockade case to drive the train nearly three-quarters of a century later in a dramatically different world would be worse than allowing the tail to wag the dog; it would allow the flea on the tail to wag the dog. Congress should have none of it.

I have also seen it argued that the Article 60, UCMJ, power to disapprove findings of guilt makes sense when the adjudged sentence is so low that it could have been imposed as nonjudicial punishment (NJP). In such a case, the argument goes, a practical commander can quickly disapprove the court-martial and impose NJP with a view to having the member administratively separated for cause – presumably as part of a deal.

There is a great deal wrong with this theory. For one thing, it has no application to Lt Col Wilkerson's case. He was sentenced to a year's confinement and a

---

* Congress would be remiss if it did not at long last place military personnel on the same footing as all other federal and state criminal defendants (not to mention enemy combatants who are convicted by military commissions) with respect to access to the Supreme Court on writ of certiorari. This reform has nothing to do with the power of the convening authority but is seriously overdue unfinished business. Requiring terms of office for all military judges, as referred to in the second bullet above, should be an equally high priority.

dismissal, neither of which could have been awarded as NJP. NJP, of course, is also supposed to be for minor offenses, not offenses such as aggravated sexual assault. What is more, so far as I know, Lt Gen Franklin did not substitute NJP for Lt Col Franklin's conviction. Had he done so, it would be interesting to know if Lt Col Franklin would have remained subject to registration as a sex offender (as I assume he was as a result of his court-martial conviction).

Beyond that, this easy way out – for that is what it is – may frustrate the interests of justice, not simply when it is taken without notice to the victim, but also whenever the offense itself is serious, regardless of the adjudged sentence. There is a moral reason for imposing the stigma of a criminal conviction. That interest is not vindicated by substituting NJP for a court-martial conviction. The suggested ploy would also permit the beneficiary to obtain review by the board for correction of military or naval records beyond that which is ordinarily available for courts-martial. *See* 10 U.S.C. § 1552(f) (2006) (permitting review of courts-martial only "to reflect actions taken by reviewing authorities under" the UCMJ or, with respect to sentences, "for purposes of clemency"). The Committee should ask the Departments of Defense and Veterans Affairs to report on the effect of such a *switcheroo* on the member's eligibility for VA benefits.

Finally, a court-martial that generates an NJP-level sentence will not qualify for review by the military appellate courts; all such a case typically gets is a file-folder review with neither appellate counsel, plenary briefing, nor oral argument before judges. Hence, such a case could receive the review it is entitled to under current law without substantial delay. This obviates the need for the suggested "easy out."

If other rationales are proffered to the Committee, I would appreciate an opportunity to comment.

As the Committee evaluates the rationale(s) offered for the convening authority's current powers, it may also want to bear in mind that those powers also have proven to be a source of endless litigation over "unlawful command influence" (UCI) in a host of contexts. Their elimination will reduce the incidence of UCI claims.

How has [the convening authority's role] developed over time?

Over time, the convening authority's role has been narrowed and subjected to procedural limitations. Here are some examples:

- requiring convening authorities to obtain (nonbinding) legal advice from their staff judge advocates
- abrogating the power to require a court-martial to reconsider a ruling

- transferring the power to select the military judge and counsel to judicial and JAG management
- forbidding certain kinds of retaliation against certain participants in the military justice process

A summary, by service, going back to 2008, of the cases and times when a convening authority in a general or special court-martial, exercised the authority under Article 60, UCMJ, to dismiss or disapprove either in full or in part the findings or sentence adjudged by the court-martial, or to change a finding of guilty in one charge to a finding of guilty to a lesser included offense, or to ordered a proceeding in revision or a rehearing on either the adjudged findings or sentence.

The requested data will include cases in which a convening authority takes action pursuant to a pretrial agreement. The Committee may therefore wish to refine its request to capture only cases in which Article 60, UCMJ, relief is granted without or beyond the requirements of a pretrial agreement.

An analysis of how other military justice systems address the role of the convening authority in courts-martial.

I assume the Department of Defense will provide specifics about the legislation by which democratic countries in the common-law tradition and elsewhere have abandoned the command-centric system to which we continue to cling. The following suggestions will save time and effort as the Committee reviews the Department's response, conducts its own independent research, and/or enlists the assistance of the Congressional Research Service and the foreign law specialists at the Law Library of Congress.

First, I recommend the scholarly comparative survey presented in the recently released second report of Israel's "Turkel Committee" (the Public Commission to Examine the Maritime Incident of 31 May 2010). The survey, which includes detailed information on the military justice systems of the United States, Canada, Australia, the United Kingdom, Germany and the Netherlands, can be found in Annex C to the second report, which is available online at http://www.turkel-committee.gov.il/files/newDoc3/Annex%20C%20-%20for%20Website.pdf.

Useful recent comparative information can also be gleaned from the responses received by the International Society for Military Law and the Law of War, which circulated a questionnaire in preparation for the International Conference on Military Jurisdiction the Society held in Rhodes, Greece, in September-October 2011. The national authorities' responses can be found online at

http://www.ismllw.org/conferences/QUESTIONNAIRE%20RHODES/Answers%20to%20the%20qustionnaire.php.

Part II of 1 FEDERICO ANDREU-GUZMÁN, INTERNATIONAL COMMISSION OF JURISTS, MILITARY JURISDICTION AND INTERNATIONAL LAW: MILITARY COURTS AND GROSS HUMAN RIGHTS VIOLATIONS (2004) summarizes thirty national military justice systems. It is available online at http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2004/01/Military-jurisdiction-publication-2004.pdf. GEORG NOLTE, EUROPEAN MILITARY LAW SYSTEMS (2003) summarizes ten Western European systems. Even though these books are only about ten years old, parts are probably already out of date given the worldwide pace of military justice reform. That said, I know of no change in the direction of command-centrism – only away from it.

My own research and informal inquiries regarding countries such as Israel, Greece, Switzerland, the Netherlands, Norway, Brazil, New Zealand, Ireland, and South Africa, as well as the other materials cited above convince me that our system is seriously out of step with other democratic countries. In the Netherlands, for example, reforms introduced in 1991 moved the decision to prosecute from the Auditor General, whose decision was at least influenced by the "Commanding Admiral/General" to the fully independent Office of the Prosecutor of the Criminal Court of First Instance at Arnhem. That office includes an advisory bureau of military lawyers who provide military expertise, but is fully independent in its decisions to prosecute. In Israel, the decision of the Military Advocate General to prosecute, and for what offenses, is itself subject to judicial review in the civilian High Court of Justice.

The following extract from the landmark decision of the European Court of Human Rights in *Morris v. United Kingdom*, 34 Eur. Hum. Rgts. Rep. 1253 (2002), is also pertinent to the Committee's final question:

> 73. In relation to the applicant's complaints about the role played by the "reviewing authority", the Court recalls that the power to give a binding decision which may not be altered by a non-judicial authority is inherent in the very notion of "tribunal". The principle can also be seen as a component of the "independence" required by Article 6 § 1 (see *Findlay* [*v. United Kingdom*, 24 Eur. Hum. Rgts. Rep. 221 (1997)], cited above, p. 282, § 77, and *Brumarescu v. Romania* [GC], no. 28342/95, § 61, ECHR 1999-VII). In *Findlay*, the role played by the "confirming officer" under the pre-1996 Act court-martial system was found to be contrary to this well-established principle.
>
> 74. In the present case, the applicant's sentence and conviction were subject, under changes introduced by the 1996 Act, to automatic re-

> view by the "reviewing authority". The Court notes that the authority was empowered to quash the applicant's conviction and the sentence imposed by the court martial. More importantly, it had powers to reach any finding of guilt which could have been reached by the court martial and to substitute any sentence which would have been open to the court martial, not being in the authority's opinion more serious than that originally passed. Any substituted verdict or sentence was treated as if it had been reached or imposed by the court martial itself.
>
> 75. The Court considers that the very fact that the review was conducted by such a non-judicial authority as the "reviewing authority" is contrary to the principle cited at paragraph 73 above. The Court is particularly concerned by the fact that the decision whether any substituted sentence was more or less severe than that imposed by the court martial would have been left to the discretion of that authority. The Court's concerns are not answered by the Government's argument that the existence of the review serves the interests of convicted soldiers such as the applicant, nor by the essentially fair procedure followed by the authority when conducting its review.

Our military justice system is highly change-resistant, but that should not dissuade the Committee from giving serious attention to whether we should move from the current 18th century model to a 21st (actually, 20th) century model. Public confidence in the administration of military justice would be enhanced by such a shift. The first step is for the pros and cons to be identified and critically examined. As I wrote in a letter to the editor that was published in the *New York Times* on March 20, 2012, "It's time for [Congress] to take a fresh look at the whole [military justice] system, not just the way the military deals with sexual assault." I therefore strongly applaud the Committee's efforts.

Please let me know if you have any questions. I would be happy to testify at a hearing on these matters.

Very truly yours,

Eugene R. Fidell

Eugene R. Fidell
Senior Research Scholar in Law and
Florence Rogatz Visiting Lecturer in Law