Yale Law School

April 10, 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 am writing to follow up on my March 17, 2013 letter concerning the powers of convening authorities (CAs) under the Uniform Code of Military Justice (UCMJ). The purpose of this letter is to comment on Secretary Hagel's April 8, 2013 announcement of UCMJ changes he recommends in the aftermath of the *Wilkerson* case that has gripped public attention. According to Secretary Hagel, those changes "would help ensure that our military justice systems works fairly, ensures due process, and is accountable" and "increase the confidence of service members and the public that the military justice system will do justice in every case."

These are laudable, correct goals. Secretary Hagel's proposal, however, offers far less than half-a-loaf toward achieving them. This is because his original direction to his subordinates was unduly narrow. He ordered an assessment of whether changes should be made in Article 60, and that is what he got. The real problem is not just the one part of Article 60 that gave rise to the disturbing CA action in *Wilkerson*. Rather, it lies with the CA's overall role, which extends far beyond post-trial actions.

A three-point approach is called for if Congress is going to achieve the goals identified by Secretary Hagel and give American military personnel the 21st century military justice system they have a right to expect.

- ✓ **CA functions should be reassigned.**

  Under present law, the CA performs a variety of functions before and after trial, including not only post-trial review under Article 60, but the pretrial functions of deciding who should be prosecuted for what, negotiating pretrial agreements (plea bargains), convening courts-martial, and detailing the members (jurors).

  There is no need for CAs. The charging and plea-bargain functions should be performed by an independent chief trial counsel outside the chain of command. Both the convening function (assuming Congress is not disposed to

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create standing courts-martial) and the member-selection function are ministerial and should be performed by a court-martial administrator, who would function as a jury commissioner. Post-trial, appellate review would be performed by the existing appellate courts and clemency would be determined by the established military and presidential clemency processes.

✓ **All military judges should have the protection of fixed four-year terms of office.**

Under present law, trial and appellate military judges have no statutory or constitutional tenure in office. Two of the five armed forces (the Army and the Coast Guard) have given their judges brief (three-year) terms by regulation. Judges in the other branches serve on an at-will basis. It is irrational for members of two armed forces to have the benefit of fixed-term judges, while members of the other three are tried by at-will judges. Justice Antonin Scalia has written that the Supreme Court would hold that due process requires "the structural protection of tenure in office" for state felony court judges.

A departmental spokesperson has stated that the CA must retain post-trial power in order to give effect to pretrial agreements. The UCMJ does not require that such agreements be negotiated by a CA; that is simply how the process has unfolded. Pretrial agreements negotiated by a chief trial counsel could be implemented by the military judge following sentencing.

✓ **Appellate court review of courts-martial should be made "robust" by extending it to all courts-martial and removing the current limits on Supreme Court jurisdiction.**

Under present law, courts-martial that do not result in a death sentence, a sentence of at least a year's confinement, or a punitive discharge are not entitled to review as of right by the military appellate courts. They are merely given an office review, without appellate counsel, briefs, or oral argument before judges. Worse yet, personnel whose cases do qualify for appellate court review, cases in which the United States Court of Appeals for the Armed Forces does not grant discretionary review or an extraordinary writ cannot even apply for certiorari review by the Supreme Court. Current appellate arrangements therefore cannot accurately be described as "robust," as Secretary Hagel did in his March 7, 2013 letter to Senator Boxer, announcing the Department's review.

In sharp contrast to the current law governing military appeals, every state and federal criminal defendant has a right to apply for a writ of certiorari from the Supreme Court. So do the unprivileged enemy belligerents under prosecution before the military commission at Guantanamo. The disparity in treatment of our own military personnel is completely indefensible.

Please let me know if you have any questions on these important matters.

Very truly yours,

Eugene R. Fidell

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