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NOT HELPING: HOW CONGRESSIONAL TINKERING HARMS VICTIMS DURING THE POST-TRIAL PHASE OF A COURT-MARTIAL

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INTRODUCTION

Congress made many changes to the Uniform Code of Military Justice[1] (UCMJ) in the National Defense Authorization Act for Fiscal Year 2014.[2] Among these are two changes to Article 60 of the UCMJ that address the participation of victims in the post-trial phase of a court-martial. The first change enacts an explicit requirement that a victim have the opportunity to submit matters to a convening authority (the military commander who acts on the results of a court-martial).[3] The second change prohibits a convening authority from considering any submitted matter that relates to the character of a victim unless that matter was admitted into evidence during the trial.[4]

Broadly captioned as enabling victim participation in the clemency phase of a court-martial, these two changes add little while subtracting much. Victim submissions to a convening authority are nothing new; the UCMJ has always permitted such submissions as part of a convening authority's review of the sentence imposed by a court-martial.[5] But the censorship of submissions that relate to a victim's character is a unique limitation on the scope of that review. As such, these changes impose significant costs while yielding few benefits, and rather than helping

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1. 10 U.S.C. §§ 801–946 (2012).

2. Pub. L. No. 113-66, 127 Stat. 672 (2013).

3. Id. § 1706(a).

4. Id. § 1706(b).

5. See infra Part I (exploring convening authority's ability to consider matters outside trial record when taking action on results of court-martial).

victims of offenses tried by courts-martial, they will prove detrimental to both victims and the accused.[6]

These changes are just the most recent legislative intervention into a military justice system that many claim insufficiently addresses alleged misconduct by members of the armed forces, particularly allegations of sexual assault.[7] Sexual-assault prosecutions at courts-martial and the treatment of military crime victims became a political crisis early in 2013 after Air Force Lieutenant General Craig Franklin used his command authority to reverse the sexual-assault conviction of Air Force Lieutenant Colonel James Wilkerson.[8] General Franklin's action prompted close scrutiny by Congress and the Secretary of Defense.[9] Soon afterward, the Senate Armed Services Committee conducted two hearings on the issue of sexual assault in the military, considering numerous legislative proposals.[10] Senator Carl Levin, Chairman of the Senate Committee on Armed Services, opened the second such hearing with the observation that over the past few years, Congress had taken "a number of steps to address the problem of sexual assault in the military to ensure the aggressive investigation and prosecution of sexual offenses and to provide victims of sexual assault the assistance and support that they need and should have."[11] Many of these steps were thoughtful

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6. See infra Part IV (suggesting potential unintended consequences of legislative changes).

7. See, e.g., Editorial, Broken Military Justice, N.Y. Times (Oct. 8, 2013), http://www.nytimes.com/2013/10/09/opinion/broken-military-justice.html (on file with the *Columbia Law Review*) (describing military review as "seriously flawed"); Editorial, Our Military Justice System Needs More Reform, Wash. Post (Mar. 24, 2014), http://www.washingtonpost.com/opinions/our-military-justice-system-needs-more-reform/2014/03/24/cc178402-b384-11e3-8cb6-284052554d74_story.html (on file with the *Columbia Law Review*) (urging Congress to address problems in military's handling of sexual-assault claims).

8. See Nancy Montgomery, Air Force Pilot's Sex Assault Dismissal Sparks Cries for Reform, Stars & Stripes (Mar. 3, 2013), http://www.stripes.com/news/air-force-pilot-s-sex-assault-dismissal-sparks-cries-for-reform-1.210371 (on file with the *Columbia Law Review*) ("Third Air Force commander Lt. Gen. Craig Franklin's decision to reinstate Lt. Col. James Wilkerson was a stunning example of structural problems in an outdated military justice system rife with bias that discounts victims while emboldening offenders, advocates said.").

9. See James Risen, Hagel to Open Review of Sexual Assault Case, N.Y. Times (Mar. 11, 2013), http://www.nytimes.com/2013/03/12/us/politics/hagel-to-open-review-of-sexual-assault-case.html (on file with the *Columbia Law Review*) (discussing Hagel's decision to review Franklin's reinstatement of Wilkerson).

10. See Oversight Hearing to Receive Testimony on Pending Legislation Regarding Sexual Assaults in the Military Before the S. Comm. on Armed Servs., 113th Cong. (2013) [hereinafter Oversight Hearing] (discussing proposed legislation relating to sexual assault in military); Hearing to Receive Testimony on Sexual Assaults in the Military Before the Subcomm. on Pers. of the S. Comm. on Armed Servs., 113th Cong. (2013) (receiving testimony on sexual assault in military from current and former service members and other experts).

11. Oversight Hearing, supra note 10, at 3 (statement of Sen. Levin, Chairman, S. Comm. on Armed Servs.).

approaches to the criminal-justice system that enforces good order and discipline among the more than 1.4 million active-duty members of the armed forces.[12] But the recent changes to Article 60 apply undesirable fixes to nonexistent problems.

The changes emerged from separate proposals by the House and Senate Committees on Armed Services to modify Article 60 to address the participation of victims in the post-trial phase of a court-martial. Both proposals stated an intent to give a victim the ability to submit matters to a convening authority: The House Committee sought to "enable a complaining witness . . . to submit matters for consideration by the convening authority,"[13] while the Senate Committee sought to "afford a complaining witness an opportunity to submit matters to the convening authority."[14] But neither committee acknowledged that a victim already had the ability to submit such matters,[15] and the final text of the National Defense Authorization Act for Fiscal Year 2014 was passed as a last-minute compromise without an opportunity for substantive amendments or floor debate.[16] As a result, Congress hastily finalized changes to the UCMJ that ultimately make it harder for victims to participate in the post-trial phase of a court-martial.

In order to understand the meaning and effect of these changes, this Essay reviews the history of a convening authority's ability to consider matters outside the record of trial when taking action on the results of a court-martial in Part I; analyzes the submission of matters under the new Article 60(d) in Part II; analyzes the censorship of submissions that relate to a victim's character by the new Article 60(b)(5) in Part III; and considers these changes from a practical perspective, revealing some consequences that are presumably unintended, in Part IV.

I. CONSIDERATION OF MATTERS OUTSIDE THE RECORD OF TRIAL

A. *The* Goode *Rule*

A convening authority acts on both the verdict (called the findings) and the sentence adjudged by a court-martial. Before any punishment may be imposed, the convening authority must approve both the find-

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12. Def. Manpower Data Ctr., Armed Forces Strength Figures for May 31, 2014 (2014), available at https://www.dmdc.osd.mil/appj/dwp/reports.do?category=reports&subCat=milActDutReg (on file with the *Columbia Law Review*) (under "Active Duty Military Strength by Service" category, click on "Service Totals—current month" hyperlink to download).

13. H.R. Rep. No. 113-102, at 162 (2012).

14. S. Rep. No. 113-44, at 113 (2012).

15. See infra Part II (discussing inconsequentiality of new Article 60(d)).

16. See 159 Cong. Rec. S8548 (daily ed. Dec. 9, 2013) (statement of Sen. Levin, Chairman, S. Comm. on Armed Servs.) (discussing time pressures in drafting, negotiating, and voting on compromise defense bill).

ings and the sentence.[17] When Congress established the UCMJ in 1950[18] as an integrated criminal-justice system for the armed services, it allowed a convening authority to approve only findings of guilt that the convening authority determined were correct in law and fact.[19] This limitation forced the convening authority to conduct an appellate review of the legal and factual sufficiency of a military prosecution "in the field."[20] A convening authority also determined what, if any, portion of the adjudged sentence "should be approved."[21] These determinations were guided by a written legal opinion prepared by either a staff judge advocate or a legal officer who reviewed the case after the trial.[22] The opinion was not binding on a convening authority, but it was entitled to significant deference.[23] Neither the UCMJ nor the Manual for Courts-Martial (MCM) required service of the written opinion upon an accused or defense counsel.[24] Rather, the opinion was akin to a privileged communication between a lawyer and a client.[25]

A convening authority had the power to disapprove a finding of guilt or reduce a sentence for any reason or "for no reason at all."[26] If the

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17. See 10 U.S.C. § 860 (2012). Some parts of the sentence are imposed automatically, possibly before the convening authority acts. See id. § 857.

18. Uniform Code of Military Justice, Pub. L. No. 81-506, 64 Stat. 107 (1950).

19. Id. art. 64.

20. Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed Servs., 81st Cong. 1183 (1949), reprinted in Index and Legislative History: Uniform Code of Military Justice (1950) [hereinafter 1950 UCMJ Hearings] (testimony of Mr. Larkin, Assistant General Counsel, Office of the Secretary of Defense).

21. Uniform Code of Military Justice art. 64.

22. Id. art. 61. Article 61 applied only to general courts-martial. Article 65(b) required identical treatment of special courts-martial with an approved bad-conduct discharge, though under limited circumstances such a record could be forwarded directly to higher appellate authorities, bypassing the requirement for a written opinion by a staff judge advocate or legal officer. See H.R. Rep. No. 81-491, at 31 (1949) (discussing Article 65 and reasons for its provisions); S. Rep. No. 81-486, at 27 (1949) (same); see also United States v. McElwee, 37 C.M.R. 206, 208 (C.M.A. 1967) (reversing and remanding decision where supervisory authority failed to conduct post-trial review of case); United States v. McGary, 26 C.M.R. 24, 27 (C.M.A. 1958) (holding same officer cannot serve both as court-martial convening authority and subsequently as reviewing supervisory authority). These provisions did not apply to summary courts-martial.

23. Manual for Courts-Martial, United States ch. XVII, ¶ 85c (1951) [hereinafter MCM (1951)] (discussing weight given to initial opinion and scope of convening authority's discretion).

24. Id. However, it was customary to share the opinion with the trial counsel (military prosecutor), the law officer (predecessor to a military judge), and the special court-martial convening authority (in the case of a special court-martial). Id.

25. Charles L. Decker, History, Preparation and Processing, Manual for Courts-Martial, United States 143 (1951). Neither the UCMJ nor the MCM required that a staff judge advocate or legal officer be an attorney. Id. at 137.

26. 1950 UCMJ Hearings, supra note 20, at 1183–84 (testimony of Mr. Larkin, Assistant General Counsel, Office of the Secretary of Defense). This power was

written opinion recommended disapproval of a finding of guilt due to insufficient evidence, a convening authority could not look outside the record of trial for additional evidence to sustain the conviction.[27] But there was no such limitation on a convening authority's action on the sentence, where the convening authority had an unlimited power to grant clemency, and where "an accused [was] entitled as a matter of right to a careful and individualized review of his sentence at the convening authority level."[28]

During this review of the sentence, a convening authority could consider practically anything.[29] This included the opinions of other persons, regardless of their connection to the case, even if that person were just some "guy named Joe."[30] Higher appellate authorities were also permitted to review matters considered by a convening authority, regardless of their source, as "justice is fostered by giving the reviewing authorities power to go outside the record of trial for information as to the sentence."[31]

This power soon presented military courts with a problem: A convening authority could consider matters potentially adverse to an accused and not presented at trial—such as a submission from a victim—without the accused's knowledge. In its 1957 decision *United States v. Griffin*, the Court of Military Appeals reviewed a conviction for two specifications of unauthorized absence for which the appellant was sentenced to confinement at hard labor for thirty months, total forfeitures, and a dishonorable discharge.[32] The legal officer recommended against granting clemency based on new information about the offenses discovered in the record of trial of a different accused, and the convening authority agreed with that recommendation and approved the entire sentence.[33] Appellate

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substantially limited by Congress in the National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1702(b), 127 Stat. 672, 955 (2013).

27. See United States v. Duffy, 11 C.M.R. 20, 22–23 (C.M.A. 1953) (discussing procedure for review of trial record).

28. United States v. Wise, 20 C.M.R. 188, 192 (C.M.A. 1955).

29. See MCM (1951), supra note 23, ch. XVII, ¶ 88b ("The sentence approved should be that which is warranted by the circumstances of the offense and the previous record of the accused."); see also United States v. Fields, 25 C.M.R. 332, 337 (C.M.A. 1958) ("On the question of appropriateness of sentence . . . the convening authority is unhindered as to the subjects he may consider."). But see United States v. Mann, 22 M.J. 279, 280 n.2 (C.M.A. 1986) ("[T]he staff judge advocate cannot present to the convening authority information which he knows to be unreliable or misleading.").

30. United States v. Coulter, 14 C.M.R. 75, 81 (C.M.A. 1954) (Brosman, J., concurring) ("[The convening authority, in determining the appropriateness of a sentence,] is entirely free to consult, say, a member of his medical staff, the president of the court-martial which returned the findings of guilty, or 'a guy named Joe.'"); see also United States v. Beatty, 64 M.J. 456, 458 n.4 (C.A.A.F. 2007) (quoting *Coulter*). There is no indication that the facts of *Coulter* involved anyone in particular named "Joe."

31. United States v. Lanford, 20 C.M.R. 87, 95 (C.M.A. 1955).

32. 24 C.M.R. 16, 16–17 (C.M.A. 1957).

33. Id.

defense counsel complained, and the board of review (an intermediate appellate tribunal) reduced the dishonorable discharge to a bad-conduct discharge and the term of confinement by nine months.[34] The Court of Military Appeals affirmed the board's reduction of the sentence, agreeing that "unquestionably it was error for the convening authority to consider, in his deliberations on the sentence, adverse matter from outside the record without affording the accused an opportunity to rebut or explain that matter."[35]

And yet, at that time no rule required, nor was there any mechanism for, such an opportunity to rebut or explain new information discovered post-trial. Rather, as the Court of Military Appeals observed the following year, "there is a void in this field which should be filled."[36] The court felt that the written opinion that guided a convening authority's action should be served upon the accused and the accused afforded an opportunity to respond.[37] The court later explained that such a practice "is no more than a practical application of the well-recognized maxim that there are two sides to every story."[38]

While a convening authority's ability to consider matters beyond the evidence presented at trial was firmly embraced, a standardized process to get the other side of the story was elusive. Over the next seventeen years, the Court of Military Appeals patiently returned to this issue time and again, considering the facts of individual cases to determine whether the circumstances of a convening authority's consideration of new matters was unfair to the accused.[39] That patience ran out in 1975 when, in *United States v. Goode*, the Court of Military Appeals used its authority

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34. Id. The board presumed that the appellant was prejudiced and reassessed the sentence in the absence of the new information. Id.

35. Id. at 17. The court concluded that the board of review's action reducing the sentence adequately cured the error. Id.

36. United States v. Vara, 25 C.M.R. 155, 158 (C.M.A. 1958).

37. Id.

38. United States v. Smith, 25 C.M.R. 407, 409 (C.M.A. 1958).

39. See, e.g., United States v. Roop, 37 C.M.R. 232, 235 (C.M.A. 1967) ("[W]e once again say . . . that as a matter of fairness and eventual expedience, the uninformed accused should be given an opportunity in each and every instance to rebut matters seemingly adverse to him as they appear in the staff judge advocate's review."); United States v. McCoskey, 31 C.M.R. 207, 209 (C.M.A. 1962) ("Of course, if the convening authority considers detrimental matter not found in the record of trial, he must afford the accused an opportunity to rebut it. That opportunity was granted here . . . ." (citation omitted)); United States v. Owens, 29 C.M.R. 56, 59 (C.M.A. 1960) ("It stretches the rule of fairness beyond reasonable limits to impose upon the convening authority the duty to ask for an explanation of previous misdeeds by the accused for which he was officially punished."); United States v. Barrow, 26 C.M.R. 123, 126 (C.M.A. 1958) ("[T]he information was furnished by the accused, and it would be of no substantial benefit to afford him an opportunity to deny it."); United States v. Sarlouis, 25 C.M.R. 410, 411–12 (C.M.A. 1958) ("The accused maintains that he was deprived of an opportunity to rebut adverse matters set out in the review. . . . If these facts are derogatory, the accused must be accorded an opportunity to meet them.").

under Article 67 to take broad corrective action.[40] The court declared that in all future cases the written opinion prepared by a staff judge advocate or legal officer must be served on counsel for the accused and the accused must be provided the opportunity to correct or challenge any erroneous, inadequate, or misleading matters, or to make any other comment.[41] The court subsequently expanded this rule to include supplemental written opinions discussing matters not previously addressed.[42]

B. *The Military Justice Act of 1983 and the Modern Practice*

Significant changes were made to the UCMJ in the Military Justice Act of 1983.[43] Congress eliminated a convening authority's mandatory review of the legal and factual sufficiency of the case (but retained a convening authority's discretion to overturn a finding of guilt), requiring only that a convening authority act on the sentence.[44] Congress also replaced the comprehensive written opinion prepared by a staff judge advocate or legal officer with a mere recommendation.[45] And Congress specifically adopted the *Goode* rule for service of that recommendation upon an accused.[46] The MCM was also revised, creating the modern Rules for Courts-Martial that govern both the recommendation and the action.[47] One rule explicitly authorized the inclusion of "matters outside the record" in the recommendation.[48] Another rule explicitly authorized a convening authority's consideration of "[s]uch other matters as the convening authority deems appropriate."[49] But if the recommendation or an addendum thereto included discussion of any new matter, or if a convening authority considered matters from outside the record of trial that were adverse and unknown to an accused, the rules required

40. 1 M.J. 3, 6 (C.M.A. 1975).

41. Id.

42. United States v. Narine, 14 M.J. 55, 57 (C.M.A. 1982); see also United States v. D'Aiello, 7 M.J. 539, 541 (N.C.M.R. 1979) ("[H]ad new matters been introduced in the supplemental review there would have been a requirement that appellant and his counsel be afforded an opportunity to submit new comments.").

43. Pub. L. No. 98-209, 97 Stat. 1393 (1983) (codified as amended in scattered sections of 10 U.S.C.).

44. H.R. Rep. No. 98-549, at 14–15 (1983); S. Rep. No. 98-53, at 7 (1983). The power to modify a finding of guilt was further limited by Congress in the National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1702(b), 127 Stat. 672, 955 (2013).

45. H.R. Rep. No. 98-549, at 14–15; S. Rep. No. 98-53, at 7.

46. H.R. Rep. No. 98-549, at 15; S. Rep. No. 98-53, at 7.

47. Exec. Order No. 12,473, 3 C.F.R. 201, 201–02 (1984).

48. Manual for Courts-Martial, United States, R.C.M. 1106(d)(5) (1984) [hereinafter MCM (1984)].

49. Id. R.C.M. 1107(b)(3)(B)(iii).

additional notice to the accused with an opportunity to respond.[50] These rules are substantially unchanged in the current version of the MCM.[51]

These changes formalized, rather than altered, then-existing law. The use of matters from outside the record of trial, or even inadmissible matters discussed in the record, was (and still is) a prohibited basis to sustain a finding of guilt,[52] while a convening authority was (and still is) free to consider practically anything when determining the appropriateness of a sentence,[53] including a submission from a victim. It is this law that Congress modified in the National Defense Authorization Act for Fiscal Year 2014.

II. THE INCONSEQUENTIALITY OF ARTICLE 60(d)

Section 1706(a) of the National Defense Authorization Act for Fiscal Year 2014 created a new subsection (d) within Article 60. The new subsection contains five paragraphs. Paragraph (1) states the basic rule:

> In any case in which findings and sentence have been adjudged for an offense that involved a victim, the victim shall be provided an opportunity to submit matters for consideration by the convening authority or by another person authorized to act under this section before the convening authority or such other person takes action under this section.[54]

Paragraph (5) includes as a victim anyone who has "suffered a direct physical, emotional, or pecuniary loss" as a result of an offense tried by the court-martial.[55] Paragraphs (2) through (4) establish time limits for a victim's submission and detail other procedural measures.[56]

The definition of a victim in paragraph (5) is superfluous unless a convening authority intends to prohibit a person who claims to be a victim from making a submission. Any claim of loss is more than adequate to show a greater connection to the case than that of the "guy named Joe," whose input has long been a proper matter for a convening

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50. Id. R.C.M. 1106(f)(7); id. R.C.M. 1107(b)(3)(B)(iii).

51. See Manual for Courts-Martial, United States, R.C.M. 1106(d)(5) (2012) [hereinafter MCM (2012)]; see also id. R.C.M. 1107(b)(3)(B)(iii).

52. See, e.g., United States v. Heirs, 29 M.J. 68, 69 (C.M.A. 1989) (setting aside finding of guilt where staff judge advocate improperly considered inadmissible withdrawn guilty plea).

53. See United States v. Beatty, 64 M.J. 456, 458 n.4 (C.A.A.F. 2007) ("What constitutes the 'entire record' for review of *sentence appropriateness* has been understood to include not only evidence admitted at trial, but also the matters considered by the convening authority in his action on the sentence."); see also supra note 30 (noting instances where convening authorities consulted outside opinions for reviewing sentencing).

54. National Defense Authorization Act for Fiscal Year 2014 § 1706(a)(1).

55. Id. § 1706(a)(5).

56. Id. § 1706(a)(2)–(4).

authority's consideration.[57] Additionally, the procedural measures in paragraphs (2) through (4) are remarkable only in that they establish fixed time limits for a victim's submission where there were previously no such limits.

The remaining substance of the new Article 60(d) is merely a partial codification of a convening authority's existing ability to consider matters beyond the record of trial.[58] It is not a new victims' right because military law explicitly endorsed victim submissions to a convening authority under the preexisting rules. For example, in *United States v. Pfister*, the appellant, who had been convicted of sexually abusing his daughter, sought an order from the Army Court of Criminal Appeals to prevent the convening authority from considering a post-trial letter from the child's mother.[59] The Army court denied the appellant's petition and the Court of Appeals for the Armed Forces later found no error in the convening authority's consideration of the letter.[60] Similarly, in *United States v. Bartlett*, the appellant, who had been convicted of murdering his wife, asserted that the convening authority should not have considered three letters from his wife's relatives that were forwarded by the staff judge advocate.[61] The Army court affirmed the staff judge advocate's action forwarding the letters and "encourage[d] [other staff judge advocates] to follow the example in the instant case and act as conduits for victim submissions to the convening authority."[62] The Army court's decision was based in part on the existence of the Department of Defense (DoD) Victim and Witness Assistance Procedures, including a pamphlet provided to victims that advised them of their "right to submit a statement to the convening authority on how [they] feel about the inmate receiving clemency."[63] Under current DoD regulations, a victim still receives this pamphlet.[64]

Moreover, the new Article 60(d) fails to address the role, if any, of a staff judge advocate or legal officer in the processing of a victim's submission. As a general rule, the recommendation prepared by a staff

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57. See supra note 30 (noting instances where convening authorities were allowed to consult outside opinions for sentencing).

58. See supra Part I.B (discussing procedural changes allowing matters not on record to be considered).

59. 53 M.J. 158, 159–60 (C.A.A.F. 2000). The letter rebutted claims that the appellant made in his own clemency submission. Id. at 159.

60. Id. at 160.

61. 64 M.J. 641, 648–49 (A. Ct. Crim. App. 2007), aff'd, 66 M.J. 426 (C.A.A.F. 2008).

62. Id. at 649.

63. Id. at 648 (alteration in original) (internal quotation marks omitted); see also United States v. Bright, 44 M.J. 749, 751 (C.G. Ct. Crim. App. 1996) (calling consideration of letter from accused's wife forwarded to convening authority by staff judge advocate "in the spirit of the DOD Victim and Witness Assistance Program implementing the Victims Rights and Restitution Act of 1990" (internal quotation marks omitted)).

64. U.S. Dep't of Def., Instruction 1030.2, Victim and Witness Assistance Procedures ¶ 6.4 (2004).

judge advocate or legal officer may not present unreliable or misleading information to a convening authority.[65] But whether a victim's submission must be scrutinized for accuracy and reliability, and what to do in the event of a discrepancy between a victim's submission and evidence in the record of trial, are open questions.

Ultimately, Congress did not give military crime victims any new rights in the revised Article 60(d).

III. CENSORSHIP IN ARTICLE 60(b)(5)

Section 1706(b) of the National Defense Authorization Act for Fiscal Year 2014 added a new paragraph, paragraph (5), to subsection (b) of Article 60, limiting what materials a convening authority may consider when reviewing a court-martial. Under the new paragraph (5),

> The convening authority or other person taking action under this section shall not consider under this section any submitted matters that relate to the character of a victim unless such matters were presented as evidence at trial and not excluded at trial.[66]

Unlike the creation of Article 60(d) in section 1706(a),[67] the newly created Article 60(b)(5) does not reflect preexisting law. Rather, it imposes a new limitation on what a convening authority may consider when acting on the sentence of a court-martial. It also censors submissions from a victim who may wish to comment on his or her own character.

Article 60(b) addresses the right of an accused to submit matters to a convening authority. But unlike the preexisting paragraphs (1) through (4), the new paragraph (5) applies to more than just matters submitted by an accused. It also applies to matters submitted by a victim. The paragraph prohibits consideration of any submitted matters "under this section," an unambiguous reference to the entire Article 60 of the UCMJ.[68] Were the prohibition applicable only to matters submitted by an accused, the reference would be to "this *sub*section." Moreover, the two uses of the phrase "under this section" modify each of the verb phrases "taking action" and "consider," leaving the object "any submitted matters" unchanged from its ordinary and obvious meaning.[69] Thus, the

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65. See United States v. Mann, 22 M.J. 279, 280 n.2 (C.M.A. 1986) ("[T]he staff judge advocate cannot present to the convening authority information which he knows to be unreliable or misleading."); see also supra note 29 and accompanying text (discussing general rule that convening authority can consider practically anything and limitations on rule).

66. National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1706(b), 127 Stat. 672, 961 (2013) (amending 10 U.S.C. § 860).

67. See supra Part II (discussing inconsequentiality of new Article 60(d)).

68. Id.

69. See Park 'N Fly, Inc. v. Dollar Park & Fly, Inc., 469 U.S. 189, 194 (1985) ("Statutory construction must begin with the language employed by Congress and the

effect of paragraph (5) is to censor any new matters related to a victim's character, whether submitted by a victim or by an accused.

Exercising his authority under Article 36[70] to prescribe rules for post-trial procedures, the President of the United States formalized this broad censorship in Executive Order 13,669 with the following prohibition: "The convening authority shall not consider any matters that relate to the character of a victim unless such matters were presented as evidence at trial and not excluded at trial."[71] A separate section of the Executive Order explains that the purpose of this prohibition is to prohibit "consideration of any evidence of a victim's character not admitted into evidence at trial, no matter the source."[72]

This censorship prevents a victim's use of his or her own character as a basis to deny clemency to the same extent that it prevents an accused's post-trial attack on a victim's character in an effort to gain clemency. Post-trial assertions of a victim's peacefulness and virtuosity are just as prohibited as post-trial assertions of a victim's unscrupulousness or sexual promiscuity. A victim who wants a convening authority to consider such matters must now make them part of the record of trial, perhaps by offering them as part of the prosecution's presentation of evidence in aggravation during sentencing.[73] Unfortunately for such a victim, this requirement gives an accused the opportunity for rebuttal in the public forum of a court-martial proceeding, instead of the comparatively private exchange of communications with a convening authority.

IV. PRACTICAL CONSIDERATIONS

Congress did not help victims with the changes made by section 1706 of the National Defense Authorization Act for Fiscal Year 2014. Imposition of time limits and censorship of submissions restricts the previously unlimited ability of a victim to submit matters to a convening authority.[74] The codification of the opportunity for a victim to submit matters formalizes the ways in which such matters may be disregarded, and the censorship potentially conflicts with preexisting rules. An accused also suffers from these changes, as a well-informed convening

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assumption that the ordinary meaning of that language accurately expresses the legislative purpose.").

70. 10 U.S.C. § 836 (2012).

71. Exec. Order No. 13,669, 79 Fed. Reg. 34,999, 35,012 (June 18, 2014) (creating R.C.M. 1107(b)(3)(C)).

72. Id. at 35,027 (amending analysis of Rules for Courts-Martial contained in Appendix 21 of MCM (2012)).

73. MCM (2012), supra note 51, R.C.M. 1001(b)(4) (discussing "[e]vidence in aggravation").

74. Such matters have even appeared for the first time in appellate submissions. See United States v. Thurston, No. 20080871, 2009 WL 6842639, at *1 (A. Ct. Crim. App. Nov. 25, 2009) (challenging staff judge advocate's post-trial consideration of victim's mother's opposition to clemency).

authority can only decrease the severity of the sentence. And the military justice system will endure further strain under the weight of these changes and the appellate litigation they will cause.

A victim has always been allowed to participate in the post-trial phase of a court-martial.[75] But for a general or special court-martial, Article 60(d)(2) imposes a ten-day time limit for a submission, forcing a victim to make haste.[76] The failure to make a submission during the allowed time is a waiver of the right to make a submission at all.[77] Further, the time limit for an accused's submission is the same, meaning that a victim will likely submit matters either before or contemporaneously with an accused and that a victim is now practically unable to respond to claims made in an accused's post-trial submission.[78]

A victim's character may properly be placed in issue during a trial,[79] or it may be raised during the sentencing phase of a court-martial.[80] But introduction of a victim's character at these stages results in public exposure that a victim may wish to avoid.[81] Before Article 60(b)(5), a victim could avoid this publicity by deliberately choosing to raise sensitive character issues for the first time during the post-trial process. Now, with the enactment of Article 60(b)(5) a convening authority must disregard any matters in the submission that relate to the victim's own character. In effect, Congress deprived a victim of the right to choose how and when character issues are raised.[82]

Notably, the new prohibition on considering character-related submissions in Article 60(b)(5) is potentially incompatible with existing evidentiary rules in cases involving a sexual offense. In the interests of privacy, the Military Rules of Evidence strictly limit the admissibility of evidence of the character of a sexual-assault victim, with limited exceptions to preserve an accused's right to present a defense.[83] If such evi-

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75. See supra Part I (describing convening authority's ability to consider evidence outside record).

76. National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1706(a), 127 Stat. 672, 960–61 (2013) (amending 10 U.S.C. § 860). In a summary court-martial (the third and least severe kind of court-martial), a victim has only seven days to submit matters. The convening authority may, for good cause, extend the time for a victim to submit matters in any case for an additional twenty days.

77. Exec. Order No. 13,669, supra note 71, at 35,009 (creating R.C.M. 1105A(f)).

78. See supra note 59 and accompanying text (discussing *United States v. Pfister*).

79. See Mil. R. Evid. 404(a)(2) (allowing for evidence of pertinent character trait of alleged victims); see also Mil. R. Evid. 412 (providing for limited admissibility of character evidence for victims of sex offenses).

80. See MCM (2012), supra note 51, R.C.M. 1001(e) (providing for broader witness testimony at sentencing).

81. See id. R.C.M. 806 (providing for public trial).

82. See supra Part III (discussing limitations imposed by Article 60(b)(5)).

83. Mil. R. Evid. 412. The privacy-based balancing test in Military Rule of Evidence 412 can produce unconstitutional results under certain circumstances. See United States v. Ellerbrock, 70 M.J. 314, 318 (C.A.A.F. 2011) ("The exception for constitutionally required

dence is offered by the accused at trial and excluded by the military judge, the accused may bring that exclusion to the convening authority's attention as a potential legal error.[84] The recommendation prepared by a staff judge advocate or legal officer must address any such allegation of legal error and provide an opinion on whether corrective action is warranted.[85] However, raising and addressing an allegation of erroneous exclusion of evidence related to a victim's character forces a convening authority to consider the excluded evidence: a character-related submission prohibited by the new Article 60(b)(5). In such a case, the convening authority must either consider the excluded character evidence in violation of the new Article 60(b)(5), or ignore the excluded character evidence and the possibility that the accused was wrongly convicted. How a convening authority can avoid this paradox is another open question.

A convicted accused who continues to attack his or her victim is sure to be viewed as unrepentant and undeserving of clemency, but now a convening authority must remain blind to even such an attack. The prohibition on consideration of character-related submissions in Article 60(b)(5) is so broad that even if an accused pens a spiteful letter to a convening authority, the convening authority may not consider any part of the letter that relates to a victim's character regardless of whether such consideration is ultimately favorable or unfavorable to the accused. Inevitably, such deliberate ignorance deprives an accused of the "careful and individualized review of his sentence" by a convening authority that has long been a fundamental tenet of military law.[86]

These potential practical implications reveal that the changes to section 1706 of the National Defense Authorization Act for Fiscal Year 2014 muddy the legal protections granted to victims of crimes tried by courts-martial. By imposing deadlines, censoring submissions, and intruding on well-founded precedent, Congress made it harder for victims to participate in the post-trial phase of a court-martial.

A better approach would focus congressional attention on oversight of the civilian and military leaders who administer the military justice system, ensuring accountability in the application of existing laws that provide substantial rights to crime victims. The DoD recognizes its duty to provide robust assistance to crime victims under the Victims' Rights and Restitution Act of 1990.[87] It is the unambiguous policy of the DoD that

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evidence in M.R.E. 412(b)(1)(C) includes the accused's Sixth Amendment right to confrontation."); United States v. Gaddis, 70 M.J. 248, 254–56 (C.A.A.F. 2011) ("M.R.E. 412 cannot limit the introduction of evidence required by the Constitution . . . .").

84. MCM (2012), supra note 51, R.C.M. 1105(b)(2)(A).

85. Id. R.C.M. 1106(d)(4).

86. United States v. Wise, 20 C.M.R. 188, 192 (C.M.A. 1955).

87. Pub. L. No. 101-647, § 503, 104 Stat. 4820, 4820–22 (codified as amended at 42 U.S.C. § 10607 (2012)).

> [t]he DoD Components shall do all that is possible within limits of available resources to assist victims and witnesses of crime . . . without infringing on the constitutional rights of an accused. Particular attention should be paid to victims of serious, violent crime, including child abuse, domestic violence, and sexual misconduct.[88]

The DoD also recognizes its duty to apply the federal crime victims' rights statute,[89] though Congress subsequently created a separate military-crime victims' rights statute within the UCMJ.[90] If there is a problem with the way the DoD treats victims, it is not for lack of legislation.

Faithful application of existing law and policy would ensure that victims of crimes tried by courts-martial receive the care and attention they deserve. Failures in this realm reflect poor leadership within the DoD, not structural deficiencies within the UCMJ. By tinkering with the UCMJ, making changes like those to Article 60 that address the participation of victims in the post-trial phase of a court-martial, Congress answered discrete leadership failures with broad structural change.

If Congress is truly set on "making the military the most friendly victims organization in the world,"[91] it must ensure that responsible officials enforce existing law and avoid additional legislative intervention that will further erode the robust protections that the military justice system already provides.

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88. U.S. Dep't of Def., Directive 1030.01, Victim and Witness Assistance ¶ 4.2 (2007).

89. Id. ¶ 1.2 (implementing 42 U.S.C. § 10606 (current version at 18 U.S.C. § 3771 (2012))).

90. National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1701, 127 Stat. 672, 952–54 (2013).

91. 160 Cong. Rec. S1348 (daily ed. Mar. 6, 2014) (statement of Sen. McCaskill, Chairman, S. Subcomm. on Fin. & Contracting Oversight).