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## Restoring the Power of the Convening Authority to Adjust Sentences

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## NOTE

### RESTORING THE POWER OF THE CONVENING AUTHORITY TO ADJUST SENTENCES

Jacob R. Weaver\*

*In 2013, Congress abrogated the power of certain military officers to reduce court-martial sentences, thereby eliminating a military defendant's best hope for efficient and effective relief from common legal errors in the military justice system. While the overhaul of the Uniform Code of Military Justice (UCMJ) in 2016 promised significant reform, it ultimately failed to substantially reduce common legal errors. This Note analyzes how the 2013 and 2016 reforms have combined to prevent military defendants from receiving timely and adequate relief. In light of this analysis, this Note suggests an amendment to the UCMJ that would restore to certain officers a limited authority to reduce sentences based on legal errors. Such a reform ultimately addresses the core concerns that led to the 2013 revision while simultaneously providing an efficient and effective remedy for common legal errors, furthering the UCMJ's aim of promoting justice and maintaining good order and discipline.*

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I dedicate this work to my late grandfather George R. White, who inspired my passion for military service.

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## INTRODUCTION

In 2013, *United States v. Wilkerson*, a case involving military sexual assault, ignited national debate regarding the adequacy of the military justice system.<sup>1</sup> The debate led to revisions in how the military handled posttrial

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1. David Classen, *Military Justice Under Fire: Commanders' "Convening Authority" Power*, BENCH & BAR MINN., Nov. 2013 (discussing *United States v. Wilkerson*); see, e.g., Evan Puschak, 'All for Nothing': *The Military, Sexual Assault, and the Search for Justice*, MSNBC

processing.<sup>2</sup> Among other changes, the 2013 reforms removed the convening authority's power to reduce certain court-martial sentences.<sup>3</sup> In the civilian world, these changes were hailed as a victory for victims, especially survivors of sexual assault.<sup>4</sup>

However, the 2013 reforms warrant reevaluation in the wake of the Uniform Code of Military Justice (UCMJ) overhaul in 2016, which took effect on January 1, 2019.<sup>5</sup> The 2013 reforms limited the convening authority's power to reduce sentences, which had been an effective remedy for common problems that plagued the military justice system, including pretrial punishment, posttrial confinement conditions, and trial counsel misconduct at sentencing.<sup>6</sup> The 2016 reforms failed to address these common issues.<sup>7</sup> Consequently, the 2013 and 2016 UCMJ amendments combined to limit servicemembers' ability to obtain remedies for legal errors that occur before, during, and after their prosecutions.

In order to reduce this substantial burden on servicemembers, Congress should add a provision to the UCMJ that restores the power of convening authorities in all cases to reduce sentences of confinement based on legal errors, subject to two restrictions: (1) a convening authority's staff judge advocate must provide a written review and recommendation before the convening authority acts, and (2) any reduction in confinement over fifty-six days is subject to review by the Office of the Judge Advocate General of the branch concerned.

Part I of this Note provides historical background for the 2013 and 2016 UCMJ reforms. Part II analyzes continuing problems in the military justice system and servicemembers' current options to remedy legal errors. Part III offers a revision to the UCMJ, discussing the benefits of the modification and addressing several critiques that the proposal might face.

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(Mar. 12, 2013, 10:27 PM), <http://www.msnbc.com/the-last-word/all-nothing-the-military-sexual-assau> [<https://perma.cc/H2RJ-4GEJ>]; *House Panel Moves to Curb Military Sexual Assaults*, CBS NEWS (May 22, 2013, 5:12 PM), <https://www.cbsnews.com/news/house-panel-moves-to-curb-military-sexual-assaults/> [<https://perma.cc/BSG8-JJRJ>]; Juana Summers, *Kimberly Hanks Takes on Air Force*, POLITICO (Sept. 9, 2013 11:54 PM), <https://www.politico.com/story/2013/09/accuser-kimberly-hanks-takes-on-air-force-096510> [<https://perma.cc/29PY-4R4M>].

2. See National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, secs. 1701-09, 127 Stat. 672, 952-65 (2013) (codified as amended in scattered sections of 10 U.S.C.).

3. *Id.* sec. 1702(b), § 832(b), 127 Stat. at 955.

4. See, e.g., *Policy Achievements*, PROTECT OUR DEFS., <https://www.protectourdefenders.com/policy-achievements/> [<https://perma.cc/3FMM-2UFL>].

5. Military Justice Act of 2016, Pub. L. No. 114-328, sec. 5542, § 801, 130 Stat. 2894, 2967 (2016) (codified as amended in scattered sections of 10 U.S.C.).

6. For an overview of the 2013 reforms and other proposed reforms, see generally David A. Schlueter, *American Military Justice: Responding to the Siren Songs for Reform*, 73 A.F.L. REV. 193 (2015).

7. For a detailed overview of the 2016 reforms, see David A. Schlueter, *Reforming Military Justice: An Analysis of the Military Justice Act of 2016*, 49 ST. MARY'S L.J. 1 (2017).

## I. REFORMING THE MILITARY JUSTICE SYSTEM

The 2013 and 2016 amendments to the UCMJ drastically altered the structure of the military justice system. This Part provides a brief overview of the military justice system and convening authority power, discusses what prompted the 2013 and 2016 reforms, and concludes with an assessment of the reforms as they relate to convening authority power.

A. *The Pre-Reform Military Justice System*

Much like prosecutors in the civilian criminal justice system, officers are the epicenter of the military justice system.<sup>8</sup> However, officers have wider discretion than civilian prosecutors.<sup>9</sup> For instance, the UCMJ allows for non-judicial punishments—minor punishments that may be imposed without the intervention of a court-martial, the military equivalent of a civilian trial court.<sup>10</sup> Superior officers might also choose, in lieu of a court-martial, to simply discharge the individual from the service through administrative proceedings.<sup>11</sup>

Finally, certain officers called “convening authorities”<sup>12</sup> maintain the power to convene one of three types of courts-martial: a summary court-martial, a special court-martial, and a general court-martial.<sup>13</sup> The type of court-martial dictates the type of punishment that may be imposed if the member panel, the factfinder in courts-martial, finds the accused guilty.<sup>14</sup> The general court-martial, which will be the focus of this Note, is the equivalent of a civilian felony trial.<sup>15</sup> Today, such a court-martial consists of eight panel members and a military judge, though the accused may opt for a bench trial.<sup>16</sup>

In addition to selecting the type of court-martial, convening authorities have broad control over court-martial proceedings. In fact, before the 2013 and 2016 revisions, the convening authority oversaw nearly every portion of a general court-martial—from initiating an investigation to selecting a member panel to approving the court-martial results.<sup>17</sup> This broad control included the ability to alter a court-martial’s findings and the imposed sen-

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8. Classen, *supra* note 1, at 23–24.

9. Schlueter, *supra* note 6, at 207–09; *see infra* Section I.A.

10. JOINT SERV. COMM. ON MIL. JUST., MANUAL FOR COURTS-MARTIAL UNITED STATES, at II-28 (2019) [hereinafter MCM 2019] (Rule 306); Schlueter, *supra* note 6, at 199, 207.

11. Schlueter, *supra* note 6, at 201.

12. MCM 2019, *supra* note 10, at II-56 (Rule 504(a)).

13. *Id.* at II-13 (Rule 201(f)).

14. *Id.*

15. Schlueter, *supra* note 6, at 45.

16. 10 U.S.C. § 816(b)(1), (3) (2018).

17. Schlueter, *supra* note 6, at 199–204.

tence.<sup>18</sup> Specifically, Article 60 of the UCMJ provided the convening authority with substantial discretion to set aside findings of guilt or reduce the degree of the charge.<sup>19</sup> It stipulated that convening authorities maintained complete authority to “approve, disapprove, commute, or suspend the sentence in whole or in part.”<sup>20</sup>

Scholars and servicemembers alike argued that these powers were fundamental to the military justice system. Officers, they reasoned, are directly responsible for ensuring the good order and discipline of the armed forces and are in the best position to understand the specific needs and disciplinary issues of those they command.<sup>21</sup> Moreover, convening authorities are not without legal assistance during the court-martial process. Staff judge advocates, lawyers trained in military law who are the principal legal advisors of a command,<sup>22</sup> advise convening authorities throughout the proceedings.<sup>23</sup> For instance, prior to the 2013 reforms, the UCMJ demanded that the convening authority’s staff judge advocate assess the record of trial and any material submitted to the convening authority by the defendant.<sup>24</sup> After the staff judge advocate completed this assessment, she provided a written report to the convening authority that detailed the results of the trial, including the findings, the sentence, and any sentencing-authority clemency recommendation.<sup>25</sup> The report also included the staff judge advocate’s recommendation regarding clemency and sentence reduction.<sup>26</sup> Still, the convening authority

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18. Uniform Code of Military Justice, 10 U.S.C. § 860 (2012) (amended 2016); JOINT SERV. COMM. ON MIL. JUST., MANUAL FOR COURTS-MARTIAL UNITED STATES, at II-152 (2012) [hereinafter MCM 2012] (Rule 1107(b)(1)). Modification of findings and sentences was “a matter of command prerogative involving the sole discretion of the convening authority.” 10 U.S.C. § 860(c)(1) (2012) (amended 2016).

19. *Id.* § 860; MCM 2012, *supra* note 18, at II-152 (Rule 1107(b)). It should be noted that convening authorities very rarely offered such sweeping clemency. In fact, one study of convening-authority power within the Air Force found that convening authorities overturned court-martial convictions in only forty of 3,713 cases and that over half of these cases involved minor offenses such as underage drinking. Matthew Burris, *Thinking Slow About Sexual Assault in the Military*, 23 BUFF. J. GENDER L. & SOC. POL’Y 21, 34 (2015).

20. 10 U.S.C. § 860(c)(2) (2012) (amended 2016).

21. See, e.g., Schlueter, *supra* note 6, at 207–08; Erin Delmore, *Military Chiefs Fight for Commander Control of Sexual Assault Cases*, MSNBC (June 4, 2013, 1:59 PM), <http://www.msnbc.com/andrea-mitchell/military-chiefs-fight-commander-control-o> [<https://perma.cc/TPE7-5CG6>].

22. Staff judge advocates might be compared to in-house counsels. See MCM 2019, *supra* note 10, at II-2 (Rule 103(18)); see also Schlueter, *supra* note 6, at 208.

23. As the Manual for Courts-Martial states, “Convening authorities shall at all times communicate directly with their staff judge advocates in matters relating to the administration of military justice.” MCM 2019, *supra* note 10, at II-7 (Rule 105(a)).

24. 10 U.S.C. § 860(d) (2012) (amended 2016). The material that the defense could submit was not limited by the rules of evidence. MCM 2012, *supra* note 18, at II-148 (Rule 1105(b)(2)).

25. MCM 2012, *supra* note 18, at II-150 (Rule 1106(d)).

26. *Id.* The defendant then had a chance to respond to the staff judge advocate’s recommendation. *Id.* at II-151 (Rule 1106(f)(4)).

maintained absolute and final authority irrespective of her staff judge advocate's advice.<sup>27</sup>

B. *United States v. Wilkerson, the 2012 SAPR Report, and Calls for Reform*

The convening authority's broad discretion came under public scrutiny in 2013. In particular, *Wilkerson* and the Pentagon's 2012 Workplace and Gender Relations Survey led to calls for reform both inside and outside Congress.

1. *United States v. Wilkerson*

In April 2012, Kimberly Hanks, a civilian contractor, accused Air Force Lieutenant Colonel James Wilkerson of sexual assault.<sup>28</sup> Wilkerson was charged with two violations of UCMJ Article 120 (Rape and Sexual Assault Generally) and three violations of UCMJ Article 133 (Conduct Unbecoming an Officer and a Gentleman).<sup>29</sup> Although the convening authority, Lieutenant General Craig Franklin, believed there was little evidence to corroborate Hanks' claims, he sent the case to a general court-martial.<sup>30</sup> Wilkerson pled not guilty to all charges, but, in November 2012, a five-member panel convicted Wilkerson on all counts.<sup>31</sup> The member panel sentenced him to dismissal from the Air Force and confinement for one year.<sup>32</sup>

Wilkerson then requested clemency from the convening authority, submitting more than ninety letters from colleagues, friends, and family as support.<sup>33</sup> The staff judge advocate reviewed these submissions as well as the trial record, but he recommended that the convening authority uphold the verdict.<sup>34</sup> On his own review, however, Franklin decided that the evidence did not prove Wilkerson's guilt beyond a reasonable doubt.<sup>35</sup> With this con-

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27. See 10 U.S.C. § 860(c)(2) (2012) (amended 2016).

28. *Memo Gives Insight into Sex-Assault Clemency*, MIL. TIMES (Apr. 13, 2013) [hereinafter *Memo Gives Insight*], <https://www.militarytimes.com/2013/04/13/memo-gives-insight-into-sex-assault-clemency/> [<https://perma.cc/KE5P-LWMF>].

29. 10 U.S.C. §§ 920, 933 (2012) (amended 2016); *United States v. Wilkerson*, General Court-Martial Order No. 10 (Headquarters, Third Air Force, Ramstein AB, Germany, Feb. 26, 2013) [hereinafter GCMO 10].

30. *Memo Gives Insight*, *supra* note 28.

31. *Id.*; GCMO 10, *supra* note 29.

32. GCMO 10, *supra* note 29, at 2.

33. Classen, *supra* note 1, at 23.

34. See *id.* at 24.

35. *Memo Gives Insight*, *supra* note 28. The law did not impose any obligation on Franklin to explain his reasons for overturning the conviction. *Id.* Due to public outcry, however, he submitted a six-page memo to the Air Force Secretary on March 12, 2013 that detailed his logic. *Id.* Franklin listed eighteen facts that he believed militated against Wilkerson's conviction. *Id.*

clusion, Franklin exercised his Article 60 power as the convening authority to overturn Wilkerson's conviction in February 2013.<sup>36</sup>

## 2. 2012 Workplace and Gender Relations Survey

The Pentagon's Sexual Assault Prevention and Response Office released its 2012 Workplace and Gender Relations Survey in 2013 at nearly the same time that *Wilkerson* reached the public eye.<sup>37</sup> Among servicemembers who responded to the survey, 23% of women and 4% of men stated that they had experienced some form of unwanted sexual contact during their time in the military.<sup>38</sup> In 2012 alone, a reported 6.1% of women and 1.2% of men—an estimated 26,000 servicemembers in total—faced some form of unwanted sexual contact.<sup>39</sup> Of the women who faced unwanted sexual contact, 67% did not report the contact to a military authority.<sup>40</sup> The three most common reasons for not filing a report included not wanting anyone to know (70%), feeling uncomfortable making a report (66%), and not believing the military would keep the report confidential (51%).<sup>41</sup> The pervasiveness of sexual assault and the lack of reporting ignited a political firestorm.<sup>42</sup>

## 3. Calls for Reform

The combination of *Wilkerson* and the 2012 Workplace and Gender Relations Survey led to intense political debate. Reformers quickly set their sights on Article 60, the provision that allowed Franklin to overturn Wilkerson's conviction. They argued that because convening authorities could overturn or commute verdicts and reduce sentences, there was no guarantee that justice would be served.<sup>43</sup> Consequently, servicemembers were skeptical

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36. *Id.*; see also Uniform Code of Military Justice, 10 U.S.C. § 860 (2012) (amended 2016).

37. DEF. MANPOWER DATA CTR., DEP'T OF DEF., 2012 WORKPLACE AND GENDER RELATIONS SURVEY OF ACTIVE DUTY MEMBERS (2013), [http://www.ncdsv.org/images/DOD\\_2012-Workplace-and-Gender-Relations-Survey-of-Active-Duty-Members\\_3-15-2013.pdf](http://www.ncdsv.org/images/DOD_2012-Workplace-and-Gender-Relations-Survey-of-Active-Duty-Members_3-15-2013.pdf) [<https://perma.cc/CY3W-J8N7>].

38. *Id.* at 1–4 (the survey yielded a 24 percent weighted response rate).

39. *Id.* at 1–2; Michal Buchhandler-Raphael, *Breaking the Chain of Command Culture: A Call for an Independent and Impartial Investigative Body to Curb Sexual Assaults in the Military*, 29 WIS. J.L. GENDER & SOC'Y 341, 342 (2014).

40. DEF. MANPOWER DATA CTR., *supra* note 37, at 3.

41. *Id.*

42. Schlueter, *supra* note 7, at 13; Jennifer Steinhauer, *Reports of Military Sexual Assault Rise Sharply*, N.Y. TIMES (Nov. 7, 2013), <https://www.nytimes.com/2013/11/07/us/reports-of-military-sexual-assault-rise-sharply.html> [<https://perma.cc/926H-L8Q2>].

43. See Suzanne Simms, Comment, *Revision of Article 60 and the Military Convening Authority's Clemency Power: An Alternative to the Enacted Legislation*, 2 NAT'L SEC. L.J. 301, 315–18 (2014). In her December 11, 2014 speech on the Senate floor, Senator Gillibrand suggested that servicemembers did not believe that justice would be served. 160 CONG. REC. S6587 (daily ed. Dec. 11, 2014) (statement of Sen. Gillibrand).



of the military justice system.<sup>44</sup> On this view, the military justice system stifled reports and facilitated a culture of sexual assault.<sup>45</sup> These concerns were paired with arguments about the oddity of allowing an individual who took no part in a court-martial to overturn the decision of a member panel.<sup>46</sup> Commentators also questioned why an individual untrained in the law held the final authority to assess court-martial verdicts for legal error and determine whether a trial counsel, the rough equivalent of a civilian prosecutor, met her burden of proof.<sup>47</sup>

Based on these arguments, reformers called for the complete elimination of convening authority posttrial powers.<sup>48</sup> Even the Department of Defense agreed that Congress should eliminate convening authorities' ability to overturn verdicts, though it hoped Congress would allow convening authorities to retain the ability to reduce sentences.<sup>49</sup>

### C. *The 2013 and 2016 UCMJ Reforms*

In May 2013, Senator Kirsten Gillibrand introduced the Military Justice Improvement Act.<sup>50</sup> While Congress did not pass the proposed Act, it incor-

44. Simms, *supra* note 43, at 311, 315.

45. For instance, Senator Claire McCaskill, one of the first congresspeople to broach the subject, suggested that allowing the convening authority to reduce sentences and overturn convictions prevents justice for survivors and leads to a culture that condones sexual assault. *Memo Gives Insight*, *supra* note 28; see also Jane C. Timm, *McCaskill Challenges Military Justice System Over Sexual Assault Case*, MSNBC (Mar. 12, 2013, 9:51 AM), <http://www.msnbc.com/morning-joe/mccaskill-challenges-military-justice-system> [<https://perma.cc/HQE4-X7R9>]. Representative Jackie Speier echoed this sentiment. Referencing *Wilkerson*, she stated,

I think it's clear that the chain of command chose the future of one soldier over the integrity of the entire Air Force. Against any measure of better judgment, they thumbed their noses at the victim, her family, and justice in general. This closed system of power is truly amazing in its arrogance.

Summers, *supra* note 1. For a critique of the view that convening authority power led to a culture of sexual assault, see generally Burris, *supra* note 19.

46. As Senator McCaskill argued, "A commander who has not listened to the testimony should not be able to unilaterally overturn a jury verdict or change an offender's sentence without explanation." Chris Carroll, *Hagel: Change UCMJ to Deny Commanders Ability to Overturn Verdicts*, STARS & STRIPES (Apr. 8, 2013), <https://www.stripes.com/hagel-change-ucmj-to-deny-commanders-ability-to-overturn-verdicts-1.215629> [<https://perma.cc/WZ38-CUZD>].

47. Simms, *supra* note 43, 315–16.

48. See, e.g., *Statement: Protect Our Defenders Calls UCMJ Proposed Article 60 Reform Insufficient*, PROTECT OUR DEF. (Apr. 9, 2013), <https://www.protectourdefenders.com/statement-protect-our-defenders-calls-ucmj-proposed-article-60-reform-insufficient/> [<https://perma.cc/SBV7-45XV>].

49. The ability to reduce sentences, the department argued, allowed convening authorities to effectively negotiate plea bargains and reduce harsh sentences. Carroll, *supra* note 46.

50. S. 967, 113th Cong. (2013). The bill's core object was the removal of commanders' prosecutorial discretion and authority. Greg Rustico, Note, *Overcoming Overcorrection: To-*

porated major elements of Gillibrand's legislation into the National Defense Authorization Act for Fiscal Year 2014 (2014 NDAA).<sup>51</sup> Consistent with the Military Justice Improvement Act, the 2014 NDAA nearly eliminated convening authorities' ability to act on the findings and sentence of a court-martial.<sup>52</sup>

The 2014 NDAA categorized crimes into "qualifying" and "nonqualifying" offenses. Under the NDAA, a qualifying offense was any offense for which (1) the maximum punishment did not include a sentence greater than two years' confinement, and (2) the actual sentence imposed did not include a dismissal, a punitive discharge, or more than six months' confinement.<sup>53</sup> The definition of "qualifying offense" explicitly excluded all sexual offenses outlined in UCMJ Articles 120, 120b, and 125.<sup>54</sup> Nonqualifying offenses, on the other hand, included any offense that did not meet the criteria of a qualifying offense.<sup>55</sup> The law additionally allowed the Secretary of Defense to designate otherwise qualifying offenses as nonqualifying offenses.<sup>56</sup> Roughly, the category of qualifying offenses encompassed minor military crimes, which often result in a sentence of no more than six months' confinement and no punitive discharge or dismissal, whereas the category of nonqualifying offenses contained civilian crimes, which usually carry a sentence of greater than six months' confinement, a punitive discharge or dismissal, or both.<sup>57</sup>

Under the Act, a convening authority could only modify the findings of a member panel in cases involving *qualifying* offenses.<sup>58</sup> For any *nonqualifying* offense, convening authorities could no longer set aside findings of guilt, dismiss charges, or reduce charges to lesser included offenses.<sup>59</sup> Moreover, if

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*wards Holistic Military Sexual Assault Reform*, 102 VA. L. REV. 2027, 2060–61 (2016). Though the bill retained commanders' ability to issue nonjudicial punishment, it placed the power to prosecute into the hands of senior judge advocates. *Id.* In addition to removing commanders' pretrial prosecutorial authority, the bill also eliminated the entirety of commanders' posttrial authority under Article 60. *See* S. 967 § 6.

51. *See generally* National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, secs. 1701-53, 127 Stat. 672, 950-1005 (2013) (codified as amended in scattered sections of 10 U.S.C.).

52. *See id.* sec. 1702(b), § 832(b), 127 Stat. at 954.

53. *Id.*

54. *Id.*

55. *See id.*

56. *Id.*

57. Minor military crimes include offenses such as "[c]ontempt or disrespect to other noncommissioned or petty officer" and "[d]ereliction in the performance of duties... [t]hrough neglect or culpable inefficiency," which carry a maximum sentence of three months' confinement. MCM 2019, *supra* note 10, at IV-26, IV-28. Civilian crimes include drunken operation of a vehicle, which carries a maximum punishment of a dishonorable discharge and eighteen months' confinement, and involuntary manslaughter, which carries a maximum punishment of a dishonorable discharge and ten years' confinement. *Id.* at IV-70 to -71, IV-79 to -80.

58. National Defense Authorization Act sec. 1702(b), § 832(b), 127 Stat. at 955-58.

59. *See id.*

the convening authority chose to act on the verdict of a qualifying offense, the law demanded that the convening authority provide a written explanation for her actions.<sup>60</sup>

The 2014 NDAA also cabined the convening authority's power to act on sentences. The law forbade the convening authority from disapproving, commuting, or suspending any part of an adjudged sentence if that sentence included confinement for more than six months or a punitive discharge or dismissal.<sup>61</sup> Congress provided two narrow exceptions to this rule: a convening authority could reduce such a sentence if (1) the trial counsel recommended such action based on the defendant's substantial assistance in the investigation or prosecution of another servicemember, or (2) reducing the sentence was necessary to enforce a pretrial agreement.<sup>62</sup>

In 2016, Congress passed a second round of reforms.<sup>63</sup> The 2016 amendments were the most extensive changes to the UCMJ since their initial adoption in 1950.<sup>64</sup> Congress added sixty-seven new articles and amended ninety-six existing articles.<sup>65</sup> Due to these sweeping changes, the revised UCMJ did not take effect until January 1, 2019.<sup>66</sup>

The 2016 reforms included further revision of posttrial procedures. In an effort to clarify and simplify the military justice system's complex posttrial process, Congress divided Article 60 into four sections: Article 60, Article 60a, Article 60b, and Article 60c.<sup>67</sup> Article 60 now requires military judges to send a "Statement of Trial Results" to the convening authority immediately after trial, and it explicitly permits military judges to hear posttrial motions.<sup>68</sup>

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60. *Id.*

61. *Id.* Dismissals are reserved for officers, as they cannot be punitively discharged. For enlisted servicemembers, punitive discharges include dishonorable and bad conduct discharges. UMAR MOULTA-ALI & SIDATH VIRANGA PANANGALA, CONG. RSCH. SERV., R43928, VETERANS' BENEFITS: THE IMPACT OF MILITARY DISCHARGES ON BASIC ELIGIBILITY app. at 18 (2015).

62. National Defense Authorization Act sec. 1702(b), § 832(b), 127 Stat. at 955–58.

63. Military Justice Act of 2016, Pub. L. No. 114-328, 130 Stat. 2894 (codified as amended in scattered sections of 10 U.S.C.).

64. Schlueter, *supra* note 7, at 8–9.

65. *Id.* at 9.

66. Military Justice Act sec. 5542, § 801, 127 Stat. at 2967–68 (mandating that the president implement the regulations by January 1, 2019); Schlueter, *supra* note 7, at 115.

67. This revision sought to "mirror procedures for federal criminal proceedings and to simplify and expedite processing of court-martial convictions." 10 U.S.C. §§ 860–860c (2018); Schlueter, *supra* note 7, at 75.

68. Military Justice Act sec. 5321, § 860(a), 130 Stat. at 2924; Schlueter, *supra* note 7, at 75. Before these amendments, no UCMJ provision authorized military judges to conduct posttrial hearings, though the Manual for Courts Martial (MCM) allowed judges to exercise such power. *Compare* 10 U.S.C. § 860 (2012) (amended 2016) (containing no statutory provision authorizing posttrial hearings), *with id.* § 860(b) (2018) (adding new statutory authority to allow for posttrial motions); *see also* JOINT SERV. COMM. ON MIL. JUST., MANUAL FOR COURTS-

Articles 60a and 60b generally retained the 2013 reforms' scheme regarding the alteration of findings and sentences.<sup>69</sup> Article 60a forbids convening authorities from altering court-martial *findings* in which (1) the maximum sentence of confinement for any offense of which the accused is found guilty is more than two years; (2) the maximum sentence of confinement imposed, running consecutively, is more than six months; (3) the sentence imposed includes a dismissal, dishonorable discharge, or bad conduct discharge; or (4) the accused was found guilty of a rape or sexual assault.<sup>70</sup> As for *sentences*, Article 60a prohibits convening authorities from reducing, commuting, or suspending any sentence that contains a period of confinement for all offenses involved, running consecutively, that is greater than six months.<sup>71</sup> A convening authority also cannot alter a sentence that includes a dismissal, dishonorable discharge, bad conduct discharge, or sentence of death.<sup>72</sup> The new provisions also limited exceptions to the sentence-reduction scheme to cases in which (1) the military judge, in the Statement of Trial Results, recommends that the convening authority suspend the sentence, or (2) the trial counsel recommends a reduction based on the defendant's substantial assistance in investigating or prosecuting another individual.<sup>73</sup> Any changes to sentences or court-martial findings must be accompanied by a written statement outlining the convening authority's reasoning.<sup>74</sup> Overall, these changes continued the 2013 reforms' trend of circumscribing the convening authority's discretion to modify court-martial findings and sentences.

Though it will be some time before statistics that relate to the 2016 reforms are available, ample Department of Defense statistics on sexual assault collected after the 2013 reforms exist. In 2015, the first year in which all 2013 reforms were implemented,<sup>75</sup> sexual assault reports in the military decreased by 1%.<sup>76</sup> This is a drastic shift, considering that fiscal years 2013 and 2014 saw a 53% and 11% increase in sexual assault reports, respectively.<sup>77</sup> The rate

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MARTIAL UNITED STATES, at II-146 (2016) [hereinafter MCM 2016] (Rule 1102) (allowing military judges to convene posttrial hearings despite no statutory authorization).

69. 10 U.S.C. §§ 860a–860b (2018).

70. Congress enacted this provision in direct response to *Wilkerson*. *Id.* § 860a; see *supra* Section I.B.

71. 10 U.S.C. § 860a.

72. *Id.*

73. Military Justice Act sec. 5322, § 860(a), 130 Stat at 2924; Schlueter, *supra* note 7, at 75–78.

74. Schlueter, *supra* note 7, at 78.

75. See DEP'T OF DEF., SEXUAL ASSAULT PREVENTION & RESPONSE OFF., DEPARTMENT OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY: FISCAL YEAR 2014, at 18, app. H (2015) [hereinafter DOD ANNUAL REPORT FY 2014].

76. DEP'T OF DEF., SEXUAL ASSAULT PREVENTION & RESPONSE OFF., DEPARTMENT OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY: FISCAL YEAR 2015, at 7 (2016) [hereinafter DOD ANNUAL REPORT FY 2015].

77. DOD ANNUAL REPORT FY 2014, *supra* note 75, at 6.

of conversion from confidential reports to public reports<sup>78</sup> also increased from 14% in 2013 to 21% in 2015,<sup>79</sup> suggesting that survivors had increased confidence that the military would properly handle their case and that they would not face retaliation by those in their command. By 2016, the Department of Defense found that rates of sexual assault decreased to 4.3% among active-duty women and 0.6% among active-duty men, corresponding to roughly 14,900 servicemembers.<sup>80</sup> The data also suggested that approximately one in three servicemembers chose to report, up from one in four in 2014 and one in ten in 2012.<sup>81</sup> Unfortunately, 2018 data (the most recent Department of Defense study) suggests that sexual assaults increased to an estimated total of 20,500 instances, while reporting rates remained steady.<sup>82</sup> However, conversions from restricted to unrestricted reports increased to 23%.<sup>83</sup>

It should be noted that these reports do not analyze how the 2013 reforms to convening authority power affected sexual assault in the military apart from the many other Department of Defense reforms.<sup>84</sup> As the 2016 reforms take effect, researchers should attempt to isolate and analyze how specific reforms affect sexual assault and reporting rates, a project that would provide Congress invaluable information as it considers future reforms. Regardless, it appears that the 2013 reforms in combination with other efforts by the Department of Defense, though not perfect, have made a positive impact on reducing sexual assault in the military.

What these reforms failed to achieve, however, is as important as what they achieved. Specifically, they failed to address many of the continuing problems in the military justice system that lead to systemic legal errors while all but eliminating the most efficient and effective remedy<sup>85</sup> available

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78. The survivor can choose to make their report “restricted” or “unrestricted.” *Reporting Options*, U.S. DEP’T DEF. SEXUAL ASSAULT PREVENTION & RESPONSE, <https://www.sapr.mil/reporting-options> [<https://perma.cc/D89D-3PHL>]. Restricted reports remain confidential, are not investigated by the military, and limit a survivor’s access to support services. *Restricted Reporting*, U.S. DEP’T DEF. SEXUAL ASSAULT PREVENTION & RESPONSE, <https://www.sapr.mil/restricted-reporting> [<https://perma.cc/993N-C4RW>]. In contrast, unrestricted reports are public, are investigated by the military, and provide broad access to support services. *Unrestricted Reporting*, U.S. DEP’T DEF. SEXUAL ASSAULT PREVENTION & RESPONSE, <https://www.sapr.mil/unrestricted-reporting> [<https://perma.cc/7ND2-58TK>].

79. DOD ANNUAL REPORT FY 2015, *supra* note 76, at 11.

80. DEP’T OF DEF., SEXUAL ASSAULT PREVENTION & RESPONSE OFF., DEPARTMENT OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY: FISCAL YEAR 2016, at 9 (2017) [hereinafter DOD ANNUAL REPORT FY 2016].

81. *Id.* at 19; DOD ANNUAL REPORT FY 2014, *supra* note 75, at 8.

82. DEP’T OF DEF., SEXUAL ASSAULT PREVENTION & RESPONSE OFF., DEPARTMENT OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY: FISCAL YEAR 2018, at 3 (2019) [hereinafter DOD ANNUAL REPORT FY 2018].

83. *Id.* at 5–6.

84. See DOD ANNUAL REPORT FY 2014, *supra* note 75, app. H for a list of reforms.

85. As the Manual for Courts-Martial states, “The purpose of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote effi-

for such errors—convening authority posttrial sentence-reduction power. This has left courts-martial and the military courts of criminal appeals (CCAs) to fill the void.

## II. INADEQUATE REMEDIES FOR CONTINUING PROBLEMS IN THE MILITARY JUSTICE SYSTEM

Though the 2016 reforms sought to increase due process procedures for defendants, legal errors, including violations of defendants' statutory and constitutional rights, still occur.<sup>86</sup> By taking away the convening authority's power to revise sentences, the 2013 reforms removed the most efficient and effective way to resolve many common legal errors that the 2016 reforms failed to alleviate. As a result, servicemembers are forced to seek remedies exclusively in the courts-martial and CCAs.

This Part assesses several continuing problems within the military justice system and analyzes the convening authority's role in resolving those problems before the 2013 reforms. It then outlines a servicemember's current options for relief and explains why these options are inadequate.

### A. *Continuing Problems in the Military Justice System*

The unique nature of the military justice system results in many problems that neither the 2013 nor the 2016 UCMJ revisions effectively resolved. This Section examines three errors that often occur in the military justice system: pretrial punishment, posttrial confinement conditions, and trial counsel misconduct at sentencing.

#### 1. Pretrial Punishment

The UCMJ allows certain officers to impose pretrial restraints, ranging from restricted liberty to physical confinement, on an individual charged with an offense as long as probable cause exists.<sup>87</sup> However, Article 13 and the Manual for Courts Martial (MCM)—regulations promulgated by the president that implement the UCMJ—strictly prohibit the imposition of pretrial punishment.<sup>88</sup> The Court of Appeals for the Armed Forces (CAAF)<sup>89</sup>

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*ciency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States.” MCM 2019, supra note 10, at I-1 (emphasis added) (3. Nature and Purpose of Military Law).*

86. Schlueter, *supra* note 7, at 53.

87. 10 U.S.C. § 810; MCM 2019, *supra* note 10, at II-21 (Rule 304(a)). Any officer may impose pretrial restraint on enlisted personnel if there is probable cause to believe that “(1) [a]n offense triable by court-martial has been committed; (2) [t]he person to be restrained committed it; and (3) [t]he restraint ordered is required by the circumstances.” MCM 2019, *supra* note 10, at II-21 (Rule 304(b)–(c)). Similar rules apply to the imposition of pretrial restraint on civilians and officers, though only a commanding officer under whose authority the accused acts may order pretrial restraint.

88. 10 U.S.C. § 813; MCM 2019, *supra* note 10, at II-21 to -23 (Rule 304).

has held that such punishment denies an accused due process.<sup>90</sup> The MCM defines “pretrial punishment” fairly broadly, including forcing the accused to engage in punitive duty hours, training, or labor.<sup>91</sup> The CAAF has also suggested that, though not a per se violation, confining the accused with post-trial prisoners may result in an Article 13 violation,<sup>92</sup> leading the service branches to enact various regulatory prohibitions on such confinement.<sup>93</sup> Still, pretrial restraint often devolves into punishment, sometimes intentionally and sometimes accidentally.<sup>94</sup> For instance, in *United States v. Cruz*, the commander sought to publicly humiliate and degrade the individuals involved by arresting and searching them in front of a formation of 1,200 soldiers.<sup>95</sup> In other cases, pretrial confinement in civilian facilities has inadvertently devolved into pretrial punishment.<sup>96</sup>

## 2. Posttrial Confinement Conditions

Posttrial confinement is a second area of military justice rife with errors. It should first be noted that the 2016 reforms dealt with one significant cause of legal errors that occurred during posttrial confinement: Article 12. Before

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89. The Court of Appeals for the Armed Forces (CAAF) is established by Congress under Article I and is administered by the executive branch, receiving appeals from the CCAs. James E. Baker, *Is Military Justice Sentencing on the March? Should It Be? And If So, Where Should It Head? Court-Martial Sentencing Process, Practice, and Issues*, 27 FED. SENT’G REP. 72, 73–74 (2014). Its members are appointed by the president and serve fifteen-year terms. *Id.* All members are civilians. *Id.* Like Article III courts of appeals, litigants may appeal CAAF rulings to the Supreme Court of the United States. *Id.*

90. *United States v. Heard*, 3 M.J. 14, 20 (C.M.A. 1977). The Court of Military Appeals (renamed the U.S. Court of Military Appeals in 1968) was established by the original Uniform Code of Military Justice enacted in 1950 and served as the highest military appellate body until 1994, when Congress redesignated it as the Court of Appeals for the Armed Forces. *About the Court*, U.S. CT. APPEALS FOR ARMED FORCES, <https://www.armfor.uscourts.gov/newcaaf/about.htm> [<https://perma.cc/E37G-EGUP>]. For the remainder of this Note, the Court of Military Appeals, the U.S. Court of Military Appeals, and the Court of Appeals for the Armed Forces will be treated under the single title “Court of Appeals for the Armed Forces” or “CAAF.”

91. MCM 2019, *supra* note 10, at II-23 (Rule 304(f)).

92. Timothy Riley, Note, *Protecting Servicemembers from Illegal Pretrial Punishment: A Survey of Article 13, Uniform Code of Military Justice, Caselaw*, ARMY LAW., Dec. 2006, at 36, 43.

93. See, e.g., DEP’T OF THE ARMY, THE ARMY CORRECTIONS SYSTEM, ARMY REGULATION (AR) 190-47, at 69 (2006) (“Pretrial prisoners will not reside, work, or be permitted to mingle with prisoners who have been sentenced to confinement.”).

94. For a broad overview of pretrial punishment issues, see generally Riley, *supra* note 92.

95. *United States v. Cruz*, 25 M.J. 326, 328 (C.M.A. 1987).

96. See, e.g., *United States v. Zarbatany*, 70 M.J. 169 (C.A.A.F. 2011) (allowing confinement credit based on conditions in the civilian confinement facility). For an overview of pretrial confinement legal errors associated with civilian confinement facilities, see Marc Wm. Zelnick, *Managing an Installation’s Utilization of a Civilian Confinement Facility: A Primer*, ARMY LAW., Dec. 2014, at 6.

the 2016 reforms, Article 12 prevented the military from confining military members with *any* foreign national.<sup>97</sup> This especially created problems in civilian confinement facilities that often held both foreign nationals and military members.<sup>98</sup> However, the 2016 UCMJ revision amended the Article to prohibit only the confinement of U.S. military members with enemy prisoners and other foreign nationals *detained under the laws of war*.<sup>99</sup> While this provision may still result in legal errors, especially at overseas confinement facilities and during times of war, the new provision will reduce the number of errors as most Article 12 violations that occurred before the 2016 revision involved confinement with foreign nationals.<sup>100</sup>

But, as Article 12 claims dwindle, claims regarding unlawful confinement in civilian facilities are on the rise. Depending on the length of the sentence, military members typically serve their sentences in one of three locations: a local confinement facility, a level II or medium-security facility, or the maximum-security facility at Fort Leavenworth.<sup>101</sup> Military prisons are typically more desirable than Federal Bureau of Prisons institutions, as they tend to be safer, cleaner, and less crowded.<sup>102</sup> But, due to budgetary restrictions, the military has begun to close and consolidate military correctional facilities.<sup>103</sup> As a result, the military has developed an increasing need to house prisoners in civilian institutions.<sup>104</sup>

While servicemembers placed in civilian facilities are subject to the same regulations and restrictions as the civilians in that institution,<sup>105</sup> the use of these facilities, particularly their use for temporary confinement, creates unique challenges for the military.<sup>106</sup> One of these challenges is civilian confinement facilities' use of administrative segregation,<sup>107</sup> a form of solitary

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97. 10 U.S.C. § 812 (2012) (amended 2016).

98. Zelnick, *supra* note 96, at 12.

99. 10 U.S.C. § 812 (2018).

100. Schlueter, *supra* note 7, at 27. The most obvious problem is the potential for temporary imprisonment with enemy prisoners. *See, e.g., United States v. Wise*, 64 M.J. 468 (C.A.A.F. 2007); *Robinson v. Sloop*, No. 16-cv-01361, 2017 WL 679963 (S.D. Ill. Feb. 21, 2017). The second problem is that the military might commit a legal error while attempting to *avoid* running afoul of Article 12's prohibitions. *See United States v. Gusev*, No. ACM S32392, 2018 WL 4443182, at \*2 (A.F. Ct. Crim. App. Aug. 21, 2018) (finding that a civilian confinement facility kept defendant in administrative segregation in order to avoid violating Article 12).

101. Baker, *supra* note 89, at 83.

102. *Id.*

103. *See id.*

104. *Id.*

105. 10 U.S.C. § 858.

106. *See generally* Zelnick, *supra* note 96. For example, *United States v. Gay*, an important CAAF case on confinement of military prisoners in civilian facilities, has been cited 145 times in just four years. 75 M.J. 264 (C.A.A.F. 2016).

107. *See, e.g., Gay*, 75 M.J. at 265 (noting that the civilian correctional facility confined Gay in administrative segregation for nine days for reasons unrelated to discipline); *United States v. Stortz*, 2017 WL 1735167, at \*2 (A.F. Ct. Crim. App. Apr. 17, 2017) (noting that a ci-



confinement that separates a servicemember from all other prisoners and confines him for up to twenty-three hours per day.<sup>108</sup> In *United States v. Gay*, the Air Force CCA noted that while administrative segregation violated neither the defendant's Eighth Amendment constitutional right nor his Article 55 statutory right against cruel and unusual punishment, the conditions rendered the sentence inappropriately severe; thus, the court awarded sentence credit.<sup>109</sup> The CAAF upheld this ruling, suggesting that the facts of the case demonstrated a *legal deficiency* in the posttrial process.<sup>110</sup> In addition to administrative segregation, a plethora of other branch-specific regulations may result in legal error during a defendant's stay in a civilian confinement facility, especially if that stay is temporary.<sup>111</sup>

### 3. Trial Counsel Misconduct at Sentencing

Improper argument by the trial counsel is one of the most commonly alleged legal errors.<sup>112</sup> While improper arguments may occur at several stages of trial proceedings, this Note focuses on trial counsel misconduct during sentencing, as this error was appropriately resolved through convening authority action before the 2013 reforms<sup>113</sup> and currently may be resolved through sentence credit.<sup>114</sup> Moreover, as of 2014, accusations of trial counsel misconduct during sentencing comprised the largest category of military appeals.<sup>115</sup>

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vilian confinement facility held a military prisoner in administrative segregation for twenty-eight days due to lack of available space in the general population area).

108. *What is Administrative Segregation?*, NAT'L INST. JUST. (Mar. 25, 2012), <https://nij.ojp.gov/topics/articles/what-administrative-segregation> [<https://perma.cc/M8LM-8YL4>].

109. *United States v. Gay*, 74 M.J. 736, 742–43 (A.F. Ct. Crim. App. 2015), *aff'd*, 75 M.J. 264.

110. *Gay*, 75 M.J. at 269.

111. See *generally* SEC'Y OF THE NAVY, SECNAV M-1640.1, DEP'T OF THE NAVY CORRECTIONS MANUAL (2019).

112. William J. Kilgallin, *Prosecutorial Power, Abuse, and Misconduct*, ARMY LAW., Apr. 1987, at 19, 23. Other types of prosecutorial misconduct may occur throughout court-martial proceedings. As the CAAF stated, "Prosecutorial misconduct occurs when trial counsel 'overstep[s] the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense.'" *United States v. Hornback*, 73 M.J. 155, 159 (C.A.A.F. 2014) (quoting *United States v. Fletcher*, 62 M.J. 175, 178 (C.A.A.F. 2005)). Examples of prosecutorial misconduct include discriminatory and arbitrary enforcement of the law, ex parte communications, failure to disclose evidence favorable to the defendant, and the known use of false evidence. See *generally* Kilgallin, *supra*.

113. See *United States v. Adams*, 1 M.J. 877, 879 (A.F.C.M.R. 1976) (suggesting that convening authority assessment of a sentence that excludes the alleged trial counsel misconduct was the proper procedure).

114. See *United States v. Shows*, 5 M.J. 892, 893 (A.F.C.M.R. 1978) (holding that reassessment of the sentence was an appropriate remedy for prejudice resulting from trial counsel's improper argument at sentencing); see also *United States v. Ignatko*, 33 M.J. 571, 574 (N.M.C.M.R. 1991); *United States v. Barnack*, 10 M.J. 799, 800 (A.F.C.M.R. 1981).

115. Baker, *supra* note 89, at 74.

Trial counsel face numerous restrictions during sentencing arguments, some universal to both the civilian and military criminal justice systems and some unique to the military justice system. As in the civilian system, a trial counsel may not argue that the sentencing authority should impose a sentence based on a sentence adjudged in a different case.<sup>116</sup> Trial counsel must also take care when arguing for a sentence based on general deterrence.<sup>117</sup> Moreover, while it is permissible for both civilian prosecutors and trial counsel to draw the sentencing authority's attention to the defendant's lack of remorse, it is unconstitutional to argue for a stiffer sentence based on the defendant's failure to plead guilty or failure to testify.<sup>118</sup> Finally, as in the civilian system, trial counsel cannot seek to inflame the sentencing authority's passions or mischaracterize findings of evidence.<sup>119</sup>

In addition to restrictions common to both the civilian and military justice systems, trial counsel also face restrictions that are unique to the military justice system. Unlike the civilian system, the Military Rules of Evidence apply to the sentencing phase.<sup>120</sup> Trial counsel also may not suggest they speak for the convening authority or a higher authority, reference such an authority's views or policies regarding punishment, or mention any type or amount of punishment greater than the court-martial may adjudge.<sup>121</sup> Additionally, trial counsel may not characterize punitive discharges and dismissals as simply decisions regarding the military's retention of the defendant, and they may not suggest that the sentencing authority draw adverse inferences from the fact that the defendant chose to make an unsworn statement at the sentencing hearing.<sup>122</sup>

Thus, trial counsel not only contend with the restrictions imposed upon civilian attorneys, but they also must comply with additional military-specific restrictions. Because trial counsel face more pitfalls than their civilian counterparts, there are naturally more opportunities for legal error during military sentencing than during civilian sentencing.

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116. For an overview of improper sentencing arguments that can occur in the military justice system, see Adam Oler, *Fine Lines and Sharp Points — The Nuances of Proper Sentencing Argument*, REPORTER, June 2005, at 6. For an overview of improper sentencing arguments that can occur in the civilian system, see *Williams v. New York*, 337 U.S. 241 (1949).

117. Oler, *supra* note 116, at 8.

118. *Id.* at 8–9.

119. *Id.* at 9–10; see also Kilgallin, *supra* note 112, at 23.

120. FED. R. EVID. 1101; Schlueter, *supra* note 7, at 68; MCM 2019, *supra* note 10, at II-140 (Rule 1001). In some instances, the Military Rules of Evidence may be relaxed during sentencing. MCM 2019, *supra* note 10, at II-140 (Rule 1001).

121. MCM 2019, *supra* note 10, at II-144 (Rule 1001(h)).

122. Oler, *supra* note 116, at 7, 11.

### B. Convening Authority Remedies Before 2013

Military law seeks “to promote efficiency and effectiveness in the military establishment.”<sup>123</sup> To attain this goal, the military justice system before the 2013 reforms allowed convening authorities to remedy the aforementioned legal errors by reducing defendants’ sentences.<sup>124</sup> Such a sentence reduction was essentially a grant of sentence credit—the same remedy a court-martial or CCA would provide. However, convening authority discretion and timeliness provided a more efficient and effective remedy than courts-martial and CCAs.<sup>125</sup>

Prior to the 2013 reforms, an appeal to the convening authority was “an accused’s best hope for sentence relief,”<sup>126</sup> as convening authorities were not bound by the strict legal rules and precedents that bind military judges.<sup>127</sup> Convening authorities thus had more discretion to issue sentence credit for legal errors than either the courts-martial or the CCAs.<sup>128</sup> Consequently, an accused had a significantly better chance at receiving sentence credit for legal errors from the convening authority than from the military courts.<sup>129</sup>

In addition to greater discretion, convening authorities could provide sentence credit significantly faster than the CCAs. For example, in 2017, a soldier in the Army could have received sentence credit from the convening

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123. MCM 2012, *supra* note 18, at I-1 (3. Nature and Purpose of Military Law).

124. See Baker, *supra* note 89, at 77. There are very few studies ascertaining the frequency with which convening authorities used their Article 60 sentencing power, but Baker concludes that the power was usually used to reduce sentences in response to legal errors. See *id.*

125. Schlueter, *supra* note 6, at 227–28.

126. United States v. Davis, 58 M.J. 100, 102 (C.A.A.F. 2003). But see generally Michael J. Marinello, *Convening Authority Clemency: Is It Really an Accused’s Best Chance of Relief?*, 54 NAVAL L. REV. 169 (2007) (suggesting that the modern convening authority rarely exercises her clemency powers).

127. See, e.g., United States v. Boatner, 20 C.M.A. 376, 377–78 (1971) (noting that convening authorities have much broader discretion than CCAs). The ability to grant sentence relief without considering legal rules and precedent provides convening authorities a significant amount of discretion that they can potentially abuse. This argument is addressed *infra* in Sections III.A.2 and III.B.1.

128. In *United States v. Gusev*, for example, the convening authority granted the defendant sentence credit for both Article 12 and Article 13 violations even though the Air Force CCA suggested it would not have provided such credit. See generally No. ACM S32392, 2018 WL 4443182, at \*2, \*7 (A.F. Ct. Crim. App. Aug. 21, 2018). The court noted that the appellant did not exhaust his administrative remedies and that there were substantial differences between the appellant’s case and *United States v. Gay*. *Gusev*, 2018 WL 4443182, at \*8 (comparing the facts of this case with those of *United States v. Gay*, 75 M.J. 264 (C.A.A.F. 2016)). See also *United States v. Rodriguez*, 60 M.J. 87, 88 (C.A.A.F. 2004) (noting that the “the convening authority significantly reduced” the appellant’s sentence despite the Navy-Marine CCA finding no plain error in the trial counsel’s sentencing argument).

129. See *Boatner*, 20 C.M.A. at 377 (“It is at the level of the convening authority that an accused has his best opportunity for relief because of the former’s broad powers which are not enjoyed by Courts of [Criminal Appeals] or even by [the CAAF].”).

authority in an average of 158 days.<sup>130</sup> If she instead sought sentence credit on appeal, the same soldier would expect to wait an average of 474 days.<sup>131</sup>

### C. *Post-2016 UCMJ Reforms: Courts-Martial and CCAs as a Remedy*

By curtailing the convening authority's ability to revise sentences, the 2013 revision removed the most efficient and effective remedy for the procedural problems in the military justice system. The burden to resolve these problems now falls on the courts-martial and the CCAs. Unfortunately, courts-martial and CCAs are ill-equipped to resolve these problems for two reasons. First, military courts have far less discretion to deal with common legal errors such as pretrial punishment, posttrial confinement conditions, and prosecutorial misconduct at sentencing, resulting in fewer remedies for defendants.<sup>132</sup> Second, the length of posttrial legal action, measured by the time from sentencing to a CCA's verdict, prohibits many servicemembers from seeking sentence credit on appeal.<sup>133</sup>

#### 1. Pretrial Punishment

The court-martial is the first line of defense against pretrial punishment. For pretrial confinement violations, the MCM allows the military judge to provide "credit for each day of pretrial confinement that involves an abuse of discretion or unusually harsh circumstances."<sup>134</sup>

However, the CAAF has noted that pretrial punishment "does not create a *per se* right to sentencing credit."<sup>135</sup> To warrant a remedy, the punishment

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130. CHARLES N. PEDE, REPORT OF THE JUDGE ADVOCATE GENERAL OF THE ARMY: OCTOBER 1, 2016 TO SEPTEMBER 30, 2017, at 40 (2017), <https://www.armfor.uscourts.gov/annual/FY17AnnualReport.pdf> [<https://perma.cc/99HA-3TTN>].

131. In 2017, the average processing time from receipt of the trial record by the Army CCA to the court's decision was 316 days. *Id.* Taking into account the average convening authority processing time and not including the relatively minimal time it takes for the CCA to receive the trial record, the average soldier did not receive a ruling until 474 days after her trial. *See id.*

132. *See, e.g.,* United States v. Nerad, 69 M.J. 138, 145 (C.A.A.F. 2010) ("Congress's statutory grant of authority to the CCAs with respect to findings and sentence is more limited than the authority granted a convening authority."); United States v. Bischoff, 74 M.J. 664, 669 (A.F. Ct. Crim. App. 2015).

133. *See also* Jan E. Aldykiewicz, *Recent Developments in Sentencing: A Sentencing Potpourri from Pretrial Agreement Terms Affecting Sentencing to Sentence Rehearings*, ARMY LAW., July 2004, at 100, 127–31. *See generally* Michael G. Seidel, *Giving Service Members the Credit They Deserve: A Review of Sentencing Credit and Its Application*, ARMY LAW., Aug. 1999, at 1 (discussing the many situations in which an individual might receive sentence credit).

134. MCM 2019, *supra* note 10, at II-27 (Rule 305(k)).

135. United States v. Adcock, 65 M.J. 18, 23 (C.A.A.F. 2007) (suggesting that "confinement in violation of service regulations does not create a *per se* right to sentencing credit" because "not all violations of law result in individually enforceable remedies" (emphasis added)).

must have materially prejudiced a substantial right of the servicemember.<sup>136</sup> When assessing whether an Article 13 violation substantially prejudiced a defendant, military appellate courts look to factors such as the nature of the violation, the harm the defendant suffered, and what relief the defendant is seeking on appeal.<sup>137</sup> Courts-martial and CCAs also rely heavily on whether confinement officials *intended* to punish and whether the defendant failed to complain of confinement conditions.<sup>138</sup>

Due to the fact-specific nature of these inquiries, a remedy for pretrial punishment—typically sentence credit—rests squarely within a court-martial’s discretion.<sup>139</sup> The aforementioned barriers, however, bar many claims.<sup>140</sup> Consequently, courts-martial often do not award a remedy, forcing defendants to seek a remedy on appeal.<sup>141</sup>

The CAAF has stated that, on appeal, the CCAs should review findings of fact for clear error while reviewing the court-martial’s findings of law *de novo*.<sup>142</sup> Because the facts of a case drive a court’s pretrial-punishment analysis, the standard crafted by the CAAF hamstrings defendants’ ability to receive sentence credit for pretrial punishment in the CCAs.<sup>143</sup> For instance, in *United States v. Mosby*, the CAAF noted that the intent to punish is one of

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136. 10 U.S.C. § 859, art. 59(a); *United States v. Villamil-Perez*, 32 M.J. 341, 342 (C.M.A. 1991) (holding that the defendant was not entitled to relief because the Article 13 violation did not materially prejudice him).

137. See *United States v. Zarbatany*, 70 M.J. 169, 176–77 (C.A.A.F. 2011).

138. *Adcock*, 65 M.J. at 25 (“When a violation of Article 13, UCMJ, is alleged, we scrutinize the government’s ‘purpose or intent to punish, determined by examining the intent of detention officials or by examining the purposes served by the restriction or condition, and whether such purposes are ‘reasonably related to a legitimate governmental objective.’” (quoting *United States v. King*, 61 M.J. 225, 227 (2005))); *United States v. McLean*, 70 M.J. 573, 577 (A.F. Ct. Crim. App. 2011); *United States v. Mosby*, 56 M.J. 309, 310 (C.A.A.F. 2002). See Riley, *supra* note 92, at 38 for a list of decisional factors that courts use to assess whether pretrial punishment in the context of confinement has occurred.

139. See Riley, *supra* note 92, at 39, 47 (“Court decisions in this area are highly dependent upon the specific facts that define the case; specifically, whether an authority intentionally acted in a way calculated to serve as punishment or whether the authority’s conduct was consistent with an otherwise legitimate governmental purpose.”).

140. See, e.g., *United States v. Hutchins*, No. 200800393, 2018 WL 580178, at \*49 (N-M. Ct. Crim. App. Jan. 29, 2018) (affirming a court-martial’s ruling that sentence credit should not be provided because there existed no evidence that the military official intended to punish the defendant). This is especially true in the case where an accused did not complain about pretrial punishment. Seidel, *supra* note 133, at 13.

141. See Seidel, *supra* note 133, at 13.

142. *Mosby*, 56 M.J. at 310.

143. Riley, *supra* note 92, at 38–39; see Jeremy Stone Weber, *The Abuse of Discretion Standard of Review in Military Justice Appeals*, 223 MIL. L. REV. 41, 48 (2015) (noting that under the clear error standard of review, “the appellate court will uphold any reasonable finding of fact, ‘even though it is convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently’” (quoting *Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985))).

the most significant factors in pretrial-punishment cases.<sup>144</sup> In the same breath, the CAAF stated that intent to punish is a finding of fact and thus subject to review for clear error.<sup>145</sup> Unsurprisingly, the defendant could not demonstrate clear error, and the court found that no pretrial punishment occurred, basing its ruling on the lack of intent to punish.<sup>146</sup>

## 2. Posttrial Confinement Conditions

Courts-martial likely lack the ability to address legal errors involving posttrial confinement conditions. Article 39(a) governs the posttrial hearings that the 2016 version of Article 60 explicitly authorizes.<sup>147</sup> Though the 2016 reforms did not substantially revise Article 39(a),<sup>148</sup> President Trump significantly revised Rule for Court-Martial 1104,<sup>149</sup> which provides substantial procedural direction to military judges.<sup>150</sup> The Rule outlines the scope and purpose of posttrial hearings and provides a nonexclusive list of posttrial motions that a party may bring.<sup>151</sup>

While the CAAF has yet to interpret the revised rule, Article 39(a) posttrial sessions likely do not extend to allegations of unlawful posttrial confinement. The stated purpose of such hearings is to resolve any posttrial matter that “substantially affects the legal sufficiency of any findings of guilty or the sentence.”<sup>152</sup> An analysis of case law<sup>153</sup> reveals that the CAAF has typically interpreted this language to include only errors that directly relate to a court-martial’s proceedings, such as allegations of jury misconduct, misleading instructions, insufficient evidence, and newly discovered evidence.<sup>154</sup>

Though allegations of unlawful posttrial confinement conditions likely would not fall within this limited category of errors, such allegations are even less likely to fall within Rule 1104’s new “scope” section.<sup>155</sup> This section restricts court-martial action to the reconsideration of “any *trial ruling* that

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144. *Mosby*, 56 M.J. at 310.

145. *Id.*

146. *Id.* at 310–11.

147. 10 U.S.C. § 839(a) (2018); *id.* § 860 (2012 & Supp. III 2016).

148. *See* 10 U.S.C. § 839(a) (2012 & Supp. III 2016).

149. MCM 2019, *supra* note 10, at II-164 to -165 (Rule 1104).

150. *Compare* MCM 2016, *supra* note 68, at II-146 to -147 (Rule 1102), *with* MCM 2019, *supra* note 10, at II-164 to -165 (Rule 1104).

151. MCM 2019, *supra* note 10, at II-164 to -165 (Rule 1104).

152. *Id.* at II-165 (Rule 1104(a)(2)). This is the same language the CAAF addressed in its previous Article 39(a) cases. *See, e.g.*, *United States v. Scaff*, 29 M.J. 60, 65 (C.M.A. 1989).

153. *See generally* Randy L. Woolf, *The Post-Trial Authority of the Military Judge*, ARMY LAW., Jan. 1991, at 27.

154. *E.g.*, *United States v. Griffith*, 27 M.J. 42, 47 (C.M.A. 1988); *Scaff*, 29 M.J. at 66. The CAAF, however, has historically interpreted court-martial powers under Article 39 broadly. Tate & Holland, *An Ongoing Trend: Expanding the Status and Power of the Military Judge*, ARMY LAW., Oct. 1992, at 23, 26.

155. MCM 2019, *supra* note 10, at II-165 (Rule 1104(a)(3)).

substantially affects the legal sufficiency of any findings of guilty or the sentence.”<sup>156</sup> Because posttrial confinement conditions do not involve a “trial ruling,” servicemembers are unlikely to obtain remedies in courts-martial.<sup>157</sup>

By eliminating the convening authority’s ability to provide relief for posttrial confinement issues and by failing to grant courts-martial the ability to hear such arguments, the 2013 and 2016 amendments left potential remedies to the CCAs. Such appeals, however, are largely inadequate for two reasons. First, in order to obtain appellate relief for posttrial confinement conditions, an appellant must convince the court to exercise its Article 66 power to revise sentences.<sup>158</sup> While the Article 66 power is discretionary,<sup>159</sup> the CAAF has admonished the CCAs not to use this power to “grant sentence appropriateness relief for any conditions of post-trial confinement of which they disapprove.”<sup>160</sup> Instead, the posttrial confinement conditions must constitute a legal error.<sup>161</sup> As a result, CCAs have been hesitant to exercise their Article 66 power to resolve posttrial confinement issues.<sup>162</sup> For instance, in *United States v. Burrell*, the Air Force CCA—the court that issued *United States v. Gay*<sup>163</sup>—declined to extend its precedent in *Gay* to a remarkably similar fact pattern.<sup>164</sup> A similar trend is present in other CCAs.<sup>165</sup>

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156. *Id.* (emphasis added).

157. *See id.*

158. UCMJ Article 66(d) allows military appellate courts to “affirm only . . . the sentence or such part or amount of the sentence, as the Court finds correct in law and fact and determines, on the basis of the entire record, should be approved.” 10 U.S.C. § 866(d).

159. *United States v. Gay*, 75 M.J. 264, 268 (C.A.A.F. 2016).

160. *Id.* at 269; *see also* *United States v. Ferrando*, 77 M.J. 506, 517 (A.F. Ct. Crim. App. 2017) (“[W]e are not a clearing house for post-trial confinement complaints or grievances.”).

161. *Gay*, 75 M.J. at 268.

162. *Baker*, *supra* note 89, at 73.

163. *United States v. Gay*, 74 M.J. 736, 742–43 (A.F. Ct. Crim. App. 2015), *aff’d*, 75 M.J. 264; *see supra* Section II.A.2.

164. *United States v. Burrell*, No. ACM S32523, 2019 WL 4412256, at \*5–6 (A.F. Ct. Crim. App. Sept. 12, 2019).

165. Precedent has primarily stemmed from the Air Force CCA. A brief survey of case law reveals that the Air Force CCA has attempted to limit *Gay*. *See, e.g., id.* (refusing to extend *Gay* to a similar fact pattern); *United States v. Buford*, 77 M.J. 562, 564 (A.F. Ct. Crim. App. 2017) (refusing to extend *Gay* to lack of payment for accrued leave); *United States v. Anderson*, No. ACM 39141, 2018 WL 1176456, at \*5–6 (A.F. Ct. Crim. App. Feb. 28, 2018) (affirming *Buford* and refusing to extend *Gay* to issues with posttrial delay). The Army CCA has only considered *Gay*’s holding on the Article 66 power in four instances, refusing to exercise the Article 66 power in each case. *See* *United States v. Cannon*, ARMY 20180034, 2020 WL 1146669 (A. Ct. Crim. App. Mar. 6, 2020); *United States v. Czaiczynski*, ARMY 20170309, 2019 WL 993094 (A. Ct. Crim. App. Feb. 26, 2019); *United States v. Bowhall*, ARMY 20170357, 2019 WL 718971 (A. Ct. Crim. App. Feb. 13, 2019); *United States v. Jessie*, ARMY 20160187, 2018 WL 6892945 (A. Ct. Crim. App. Dec. 28, 2018). The Navy-Marine CCA has only considered *Gay* once, also refusing to exercise its Article 66 power. *United States v. Wagers*, No. 201600180, 2017 WL 712784 (N-M. Ct. Crim. App. Feb. 23, 2017). The Coast Guard CCA has yet to consider *Gay*.

Second, the CAAF and the CCAs have raised additional hurdles that an appellant must clear before a court will exercise its powers in response to posttrial confinement issues. For instance, courts have demanded that an appellant first seek administrative remedies and demonstrate that the conditions of confinement rendered the sentence inappropriately severe.<sup>166</sup> Consequently, defendants are often unable to obtain a remedy via appellate review of posttrial confinement conditions.<sup>167</sup>

### 3. Trial Counsel Misconduct at Sentencing

A military judge may provide a remedy for trial counsel misconduct during sentencing—typically a member panel instruction—upon timely objection by defense counsel or *sua sponte*.<sup>168</sup> Moreover, if a military judge believes that misconduct influenced the sentence delivered by a member panel, she can, *sua sponte* or at the request of the defense counsel, recommend that the convening authority suspend a portion of the sentence.<sup>169</sup> But this remedy is ineffective if the military judge delivers the sentence. Because a judge should not take improper sentencing arguments into consideration,<sup>170</sup> she is unlikely to alter a sentence she handed down on the grounds that she was influenced by an improper sentencing argument. As the 2016 reforms favor sentencing by a military judge as opposed to a member panel, a servicemember is less likely to receive a court-martial remedy for such misconduct than he was before the 2016 reforms.<sup>171</sup>

If a court-martial does not provide a remedy for trial counsel misconduct during sentencing, the burden falls on the CCA. Unlike a convening authority, a CCA will not act unless the trial counsel's offense meets the legal definition of trial counsel misconduct and prejudiced the appellant's substantial rights.<sup>172</sup> Moreover, except in extreme circumstances, the defense must have preserved the appeal in the court-martial via an objection.<sup>173</sup> The

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166. See, e.g., *Jessie*, 2018 WL 6892945, at \*2 (noting that, though the issue was not briefed, the court would assume, for sake of argument, that the defendant had exhausted all administrative remedies available); *Wagers*, 2017 WL 712784, at \*6 (noting that a “prisoner must seek administrative relief prior to invoking judicial intervention”). But see *United States v. Henry*, 76 M.J. 595, 610 (A.F. Ct. Crim. App. 2017) (declining to require that the defendant exhaust all administrative remedies but noting that the court will give “significant weight” to a defendant’s failure to exhaust such remedies).

167. *Baker*, *supra* note 89, at 83–84.

168. See *Oler*, *supra* note 116, at 10–12.

169. See *United States v. Shows*, 5 M.J. 892, 893 (A.F.C.M.R. 1978). This recommendation must include “(A) the portion(s) of the sentence to which the recommendation applies; (B) the minimum duration of the suspension; and (C) the facts supporting the suspension recommendation.” MCM 2019, *supra* note 10, at II-160 (Rule 1101(a)(5)).

170. See *United States v. Montgomery*, 20 C.M.A. 35, 39 (1970).

171. See *Schlueter*, *supra* note 7, at 141.

172. See *United States v. Rodriguez*, 60 M.J. 87, 88–89 (C.A.A.F. 2004).

173. Failure to object to improper arguments during sentencing “shall constitute forfeiture of the objection.” MCM 2019, *supra* note 10, at II-144 (Rule 1001(h)); see also *United*



increased use of military judges in sentencing will also complicate appeals. Unlike member panels, judges are presumed to have ignored improper arguments.<sup>174</sup> This presumption will make it substantially more difficult for servicemembers who faced trial counsel misconduct during sentencing to receive relief on appeal.

#### 4. Length of Posttrial Legal Action

The length of posttrial legal action also prohibits servicemembers from seeking sentence credit on appeal. In 2018, the average time of posttrial legal action in the Army, not including delays in receipt of trial records by the Army CCA, was 438 days—136 days of processing and 302 days of appellate action.<sup>175</sup> This length of time prohibits a soldier who is serving a sentence less than 438 days from receiving sentence credit because she will have completed her sentence before receiving a ruling.<sup>176</sup> Therefore, many servicemembers are deterred from seeking the remedy at all.

The implementation of the 2016 reforms will likely fail to reduce the average length of posttrial legal action. Though the 2013 reforms' elimination of the convening authority's posttrial sentence-revision powers may have resulted in decreased posttrial processing times, it likely has forced more defendants to seek remedies in the CCAs.<sup>177</sup> In fact, the Navy Judge Advocate General's 2017 report noted that the percentage of cases appealed has increased from 22 percent in 2009 to 36 percent in 2017.<sup>178</sup>

Thus far, the increase in the *percentage* of cases appealed has not translated into increased appellate delays,<sup>179</sup> as it may have been offset by a de-

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States v. Kropf, 39 M.J. 107, 110 (C.M.A. 1994) (“[D]efense counsel should be ever vigilant to object and seek a curative instruction where appropriate. The failure to object constitutes waiver in the absence of plain error.”).

174. See United States v. Nellum, 21 M.J. 700, 702 (A.C.M.R. 1985) (“[I]n the absence of some showing that the judge was influenced by an improper argument, he must be presumed to have ignored it.”).

175. CHARLES N. PEDE, U.S. ARMY REPORT ON MILITARY JUSTICE FOR FISCAL YEAR 2018 (2018), <https://jsc.defense.gov/Portals/99/Documents/Article%20146a%20Reports%20-%20FY18%20-%20All%20Services.pdf> [<https://perma.cc/89BN-UK9Z>].

176. See Schlueter, *supra* note 6, at 228. This scenario also does not factor in posttrial confinement-reducing scenarios such as the application of pretrial-confinement time to the sentence. For example, an individual might receive an eighteen-month sentence but receive one hundred days of pretrial sentence credit. This would reduce the individual's posttrial confinement from approximately 450 days to 350 days.

177. Brent A. Goodwin, *Congress Offends Eisenhower and Cicero by Annihilating Article 60*, *UCMJ*, ARMY LAW., July 2014, at 23, 31.

178. ANNUAL REPORT OF THE JUDGE ADVOCATE GENERAL OF THE NAVY: OCTOBER 1, 2016 TO SEPTEMBER 30, 2017, at 57 (2017), <https://www.armfor.uscourts.gov/annual/FY17AnnualReport.pdf> [<https://perma.cc/99HA-3TTN>]

179. See, e.g., U.S. MARINE CORPS ANNUAL MILITARY JUSTICE REPORT FOR FISCAL YEAR 2017, at 98 fig.C (2017), <https://www.armfor.uscourts.gov/annual/FY17AnnualReport.pdf> [<https://perma.cc/99HA-3TTN>]

crease in the *total number* of cases docketed.<sup>180</sup> The decrease stems from the decline in total courts-martial, which is likely due to the military's increasing reliance on administrative remedies to resolve disciplinary issues.<sup>181</sup> As long as this trend holds, appellate delays should remain stagnant; however, if the trend toward administrative remedies reverses, appellants should expect increased delays. Thus, at best, the length of posttrial legal action will remain prohibitively long for many servicemembers.

### III. A NEW EXCEPTION TO UCMJ ARTICLE 60A

The convening authority was the most efficient and effective remedy for legal errors that occurred during the military justice process.<sup>182</sup> Unfortunately, while the 2013 and 2016 reforms improved the handling of sexual assault charges in the military justice system, they exacerbated other issues by limiting the convening authority's remedial powers. This Part proposes that Congress add an additional subsection to Article 60a (UCMJ Section 860a) that allows convening authorities to reduce sentences based on the legal errors that frequently occur during the military justice process. The proposed reform would reinstitute the most efficient and effective remedy for legal errors while serving the goal of the 2013 reforms: restraining convening authority discretion.

The following Sections outline the proposed reform, discussing how it not only remedies legal errors but also restrains convening authority discretion. This Part then addresses several counterarguments, namely that the proposed revision (1) would provide convening authorities too much discre-

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180. See, e.g., DEP'T OF THE NAVY, COMPREHENSIVE REVIEW OF THE DEPARTMENT OF THE NAVY'S UNIFORMED LEGAL COMMUNITIES 87 fig.12 (2019), <https://media.defense.gov/2020/May/18/2002301989/-1/-1/1/COMPREHENSIVE%20REVIEW%20DON%20UNIFORMED%20LEGAL%20COMMUNITIES.PDF> [<https://perma.cc/3G5K-GNB7>].

181. Fredric I. Lederer, *From Rome to the Military Justice Acts of 2016 and Beyond: Continuing Civilianization of the Military Criminal Legal System*, 225 MIL. L. REV. 512, 532 (2017); see also Baker, *supra* note 89, at 81. The amount of cases reviewed by CCAs has decreased as the use of courts-martial has decreased. DEP'T OF THE NAVY, *supra* note 180, at 81, 87. For instance, the Navy-Marine CCA docketed 2,003 cases in 2005, whereas it only docketed 348 in 2015 (roughly an 83 percent decrease). *Id.* at 87. This decrease roughly corresponds to a decrease in general and special courts-martial. In fiscal year 2004, between the Navy and the Marines, 2,185 general courts-martial and bad conduct-discharge special courts-martial went to trial compared to just 692 in fiscal year 2014 (approximately a 68 percent decrease). MICHAEL F. LOHR, ANNUAL REPORT OF THE JUDGE ADVOCATE GENERAL OF THE NAVY: OCTOBER 1, 2003 TO SEPTEMBER 30, 2004 app. (2004), <https://www.armfor.uscourts.gov/annual/FY04AnnualReport.pdf> [<https://perma.cc/GA7F-RY6N>]; U.S. MARINE CORPS ANNUAL MILITARY JUSTICE REPORT FOR FISCAL YEAR 2014 app. at 109 (2014), <https://www.armfor.uscourts.gov/annual/FY14AnnualReport.pdf> [<https://perma.cc/D9B2-U5PE>].

Professor Lederer attributes this decrease to the increasing use of administrative remedies, such as Administrative Separation Boards, to resolve disciplinary issues. Lederer, *supra*, at 532; see also DEP'T OF THE NAVY, *supra* note 180, at 81–82.

182. See *supra* Section II.B.

tion, (2) is unnecessary because alternative paths to relief already exist, and (3) does not provide convening authorities sufficient discretion.

A. *Restoring the Most Efficient and Effective Remedy for Legal Errors*

Article 60a and 60b regulate convening authorities' ability to act on court-martial sentences.<sup>183</sup> Article 60a, the focus of this Note, bars convening authorities from acting on sentences that include (1) a punitive discharge or dismissal, (2) a total period of confinement for all offenses involved, running consecutively, that is greater than six months, or (3) the death penalty.<sup>184</sup> It also provides two exceptions to this rule.<sup>185</sup> First, if the military judge recommends that the convening authority suspend part of a sentence, then the convening authority may act on that recommendation.<sup>186</sup> Second, the convening authority may act on a sentence if the trial counsel recommends that the convening authority reduce, commute, or suspend a sentence based on the accused's substantial assistance in the investigation or prosecution of another individual.<sup>187</sup>

This Note proposes the addition of a third exception that would allow the convening authority to alter sentences of confinement based on legal errors that occurred during the military justice process. The language of the proposed exception would state:

(e) REDUCTION OF SENTENCE FOR LEGAL ERRORS:

(1) Upon the written review and recommendation of a staff judge advocate or legal advisor, if the convening authority finds that a legal error occurred before trial, during trial, or within 60 days of sentencing, the convening authority may reduce a sentence of confinement by up to 56 days.

(2) Upon the written review and recommendation of a staff judge advocate or legal advisor, if the convening authority finds that a legal error occurred before trial, during trial, or within 60 days of sentencing, the convening authority may reduce a sentence of confinement by more than 56 days subject to the review and approval by the Office of the Judge Advocate General of the branch concerned.

(3) The convening authority must act within 90 days of receiving a submission by the accused under subsection (f) that alleges legal error.<sup>188</sup>

Paragraph (1) would allow the convening authority to reduce a sentence of confinement up to fifty-six days if she found that a legal error occurred be-

183. 10 U.S.C. §§ 860a–860b. For a detailed analysis of section 860a, see *supra* Section I.C.

184. 10 U.S.C. § 860a(b)(1).

185. *Id.* § 860a(c)–(d).

186. *Id.* § 860a(c).

187. *Id.* § 860a(d).

188. This proposal was modeled after the two existing statutory exceptions to Article 60a. See *id.* § 860a(c)–(d).

tween the time a crime is reported and sixty days after sentencing. Paragraph (2) provides the convening authority discretion to reduce a sentence beyond fifty-six days, but it subjects such a reduction to review by the Office of the Judge Advocate General of the relevant military branch. Paragraph (3) requires the convening authority to act on the allegation of error within ninety days of receiving the accused's submission.

### 1. An Efficient and Effective Remedy

The revision's breadth of coverage combined with the scope of convening authority discretion and the timeliness of convening authority review creates an efficient and effective remedy for legal errors that occur throughout the military justice process.

The proposed reform provides the convening authority discretion to target all legal errors that may occur from the time a crime is reported to up to sixty days after sentencing. Such breadth supports efficient and effective remedies for two reasons. First, the proposal approximately covers the portion of the military justice system that convening authorities already oversee. The UCMJ demands that convening authorities take an active role in the military justice system, supervising the actions of subordinates involved in the process.<sup>189</sup> The UCMJ also charges convening authorities with the review of allegations of legal error submitted by the accused after trial.<sup>190</sup> Thus, the proposed reform simply restores the role convening authorities and their staff judge advocates have occupied since the UCMJ's inception. Even review by the Offices of the Judge Advocate General in the narrow circumstances outlined in paragraph (2) of the proposed reform keeps the institutions in their traditional roles as the Offices of the Judge Advocate General already review some cases under Article 69.<sup>191</sup> This reform might be contrasted with reforms that add bureaucracy to an already bureaucratic system.<sup>192</sup> Ultimately, the proposed reform permits swift handling of accusations of legal error.<sup>193</sup>

Second, the proposed breadth allows convening authorities to address a wider range of issues than courts-martial. Convening authorities are uniquely situated in the court-martial process. Unlike courts-martial, convening authority review under the proposed reform would take place after the court-martial and sentencing, allowing convening authorities to assess errors made

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189. See *supra* Section I.A.

190. See MCM 2019, *supra* note 10, at II-166 to -167 (Rule 1106). This review, however, is obviously meaningless if the convening authority is forbidden from acting on the sentence under UCMJ section 860a.

191. 10 U.S.C. § 869.

192. See, e.g., Simms, *supra* note 43, at 327-30.

193. See Schlueter, *supra* note 6, at 228.

before, during, and after the court-martial.<sup>194</sup> Furthermore, because convening authorities are not intimately involved in the trial, they can provide an objective assessment of alleged legal errors that occurred during the trial.<sup>195</sup> Thus, the breadth of the proposed reform provides more effective remedies than courts-martial can provide.<sup>196</sup>

While some might object that a convening authority's bias may taint a posttrial review, such a critique is flawed. A convening authority and the defendant are usually separated by several layers of the military hierarchy, so the convening authority will often have little to no relationship with the defendant.<sup>197</sup> Additionally, convening authorities and their staff judge advocates recognize the need to promote evenhanded justice.<sup>198</sup> And, even in the unlikely case that the convening authority was biased in favor of the defendant, the proposed reform provides many checks on her discretion.<sup>199</sup>

In terms of the scope of convening authority power, the proposed reform cautiously restores discretion that the 2013 reforms removed. Such expanded discretion provides efficient and effective remedies for three reasons. First, discretion to act on all sentences allows every defendant, regardless of punishment, to seek redress of legal errors with the convening authority. The current rules bar any defendant whose sentence includes a dismissal, punitive discharge, or more than six months' confinement from obtaining relief from the convening authority.<sup>200</sup> There are few, if any, other contexts in criminal law where a defendant's procedural protections decrease as the severity of his sentence increases.<sup>201</sup> On the contrary, the more severe a sentence, the more likely the civilian criminal justice system is to provide additional procedure.<sup>202</sup> The new provision eliminates the current unreasonable distinction between those who receive greater punishment and those

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194. See *supra* Section I.A. As noted, courts-martial are unlikely to review alleged legal errors that occur after the trial concludes. See *supra* Section II.C.2. The proposed reform, in contrast, expressly allows convening authorities to address posttrial errors.

195. In this position, convening authorities perform a similar function as appellate courts. They serve as a fresh pair of eyes that provide detached evaluation of the trial. See DAVID W. NEUBAUER & STEPHEN S. MEINHOLD, JUDICIAL PROCESS: LAW, COURTS, AND POLITICS IN THE UNITED STATES 375 (7th ed. 2017) (discussing the role of appellate courts).

196. With respect to the above arguments, the CCAs are similar to convening authorities in many ways. The one advantage a convening authority has in this respect is her ability to conduct a more thorough review of a defendant's allegations of legal error. See *infra* Section III.A.1.

197. See Simms, *supra* note 43, at 306.

198. See *infra* Section III.B.3.

199. See *infra* Section III.A.2.

200. 10 U.S.C. § 860a(b)(1)(A)–(C).

201. An exception to this general rule might be the Federal Rules of Evidence's treatment of prior instances of sexual assault or child molestation in criminal sexual assault or child-molestation cases. See FED. R. EVID. 413, 414.

202. See, e.g., *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972) (dividing the right to an attorney under the Sixth Amendment between crimes that ultimately impose imprisonment and those that do not).

who receive lesser punishment, allowing all defendants to seek relief from the convening authority.

Second, increased discretion allows defendants to receive timely relief. Convening authority action is significantly faster than relief provided by the military appellate process, allowing defendants who receive shorter sentences to obtain effective relief.<sup>203</sup> An individual who receives a remedy under paragraph (1) of the proposed reform will, in the most extreme case, receive the remedy within 180 days.<sup>204</sup> Swift relief translates into effective relief, as sentence credit is only an effective remedy if it is provided *before* the accused completes his sentence.<sup>205</sup> With the exception of outlier cases that are unlikely to occur, the proposed reform guarantees that a remedy received will be effective for defendants with posttrial sentences—the total sentence less any pretrial confinement time served—as short as six months.<sup>206</sup>

While one might argue that the increase in appeals to convening authorities may lengthen posttrial processing times, such concerns are likely unfounded. The effect of the 2013 revision, which largely eliminated convening authority review, on posttrial processing times appears to be mixed. For instance, between 2017 and 2018, the Army reduced its posttrial processing times from an average of 158 days to an average of 136 days.<sup>207</sup> However, posttrial processing times in the Marine Corps appear to have remained relatively steady since 2010.<sup>208</sup> The proposed review is also more limited in scope than the review conducted by convening authorities before the 2013 reforms, focusing solely on whether legal error occurred instead of broad questions of clemency.<sup>209</sup> Finally, even if the proposed reform slightly increases posttrial

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203. See *supra* Section II.C.4.

204. Under paragraphs (1) and (2) of the proposed provision, a defendant may only submit allegations of legal error that occurred within sixty days of sentencing. The MCM would add a provision to Rule 1106 that requires the accused to submit such allegations within ten days of the alleged posttrial error, with the possibility of a twenty-day extension for good cause. See MCM 2019, *supra* note 10, at II-166 (Rule 1106(d)(4)(A)). Section three then requires the convening authority to act on the allegation within ninety days of the accused's submission. This equates to 180 days.

205. While expedited procedures may lead to effective relief in that an accused may receive sentence credit before his sentence expires, such procedures could lead to the provision of undeserved relief absent proper procedural protections. For a discussion on the proposed reform's procedural safeguards, see *infra* Section III.A.2.

206. For instance, if an error occurs before trial, the defendant must submit this allegation to the convening authority within ten days after his sentence is announced. See MCM 2019, *supra* note 10, at II-166 (Rule 1106). The convening authority then has ninety days to investigate the allegation and decide whether to act on the sentence. See *supra* text accompanying note 188. In total, the process takes one hundred days. If the defendant received the maximum credit allowed under paragraph (1), this credit would be effective for any six-month sentence. Compare this to sentence credit provided by the average Army CCA case, which is only effective if the defendant's posttrial sentence is longer than 438 days. *Supra* Section II.C.4.

207. PEDE, *supra* note 130, at 40; PEDE, *supra* note 175, at 1.

208. PEDE, *supra* note 130, at 98 fig.c.

209. See MCM 2012, *supra* note 18, at II-149 to -151 (Rule 1106).

processing times, the resulting decrease in appellate times would be an off-setting benefit.<sup>210</sup>

Lastly, increased discretion allows defendants to receive relief in a broader array of circumstances. Because of her role as a commanding officer, a convening authority may order an investigation into unlawful conduct that occurred before, during, or after trial.<sup>211</sup> She may also review submissions from both the accused and the crime victim, and she is not bound by the Military Rules of Evidence.<sup>212</sup> Armed with discretion and information to which neither the court-martial nor the CCA has access, a convening authority may determine that a defendant with a borderline claim to sentence credit deserves relief.<sup>213</sup> Consequently, the reform restores “an accused’s best hope for sentence relief.”<sup>214</sup>

## 2. Checks on Convening Authority Discretion

The proposed reform also provides several checks on convening authorities’ power to reduce sentences for legal error. These checks include review and written recommendation by a staff judge advocate, Article 60a’s requirement of a written explanation, the sixty-day limitation on posttrial legal errors, and the fifty-six-day sentence-credit limit.

The requirement of review and written recommendation by a staff judge advocate will circumscribe convening authority action. When determining whether to act on a sentence, the UCMJ demands that convening authorities consult with their staff judge advocates.<sup>215</sup> The reform adds to this provision, requiring not only a consultation but a review and written recommendation by the staff judge advocate before a convening authority may reduce a sentence based on legal error.<sup>216</sup> Such a requirement partially restores the pre-2016 revision requirement that a staff judge advocate provide a recommendation before a convening authority acts on the findings or sentence of a

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210. See *supra* Section II.C.4.

211. The MCM has long recognized a convening authority’s ability to effectively and efficiently conduct investigations, entrusting her and her subordinates with the power to conduct criminal investigations at the outset of the military justice process. See MCM 2019, *supra* note 10, at II-21 (Rule 303); see also JOINT SERV. COMM. ON MIL. JUST., MANUAL FOR COURTS-MARTIAL UNITED STATES, at II-20 (1994) (Rule 303) (recognizing convening authority’s power to conduct investigations more than twenty-five years ago).

212. MCM 2019, *supra* note 10, at II-166 to -168 (Rules 1106, 1106A).

213. For instance, unlike a court-martial or CCA, if a convening authority finds a legal error, she does not have to find that the error “materially prejudice[d] the substantial rights of the accused” before providing a remedy. 10 U.S.C. § 859(a). See *infra* Section III.B.1 for a discussion on convening authority power and borderline cases. For an argument as to why this discretion is proper, see *infra* Section III.A.2, discussing the checks the proposed reform places on convening authority action, and Section III.B.1, arguing that it is proper for the convening authority to have more discretion than the courts.

214. United States v. Davis, 58 M.J. 100, 102 (C.A.A.F. 2003).

215. See 10 U.S.C. § 806(b).

216. See *supra* text accompanying note 188.

court-martial.<sup>217</sup> Just as they did before the 2016 reforms, staff judge advocates will review the allegations of legal error, apply any applicable rules and precedent, and then supply their written opinion as to what action, if any, should be taken.<sup>218</sup> Unlike the pre-2016 requirement, however, the proposed revision confines the review to allegations of legal error.<sup>219</sup> Consequently, the imposition of staff judge-advocate review for legal errors will focus convening authorities' attention on the legal issues, thereby confining convening authority actions.<sup>220</sup>

The UCMJ's requirement that convening authorities submit a written explanation when they take action on a sentence—a requirement instituted by the 2013 reforms—also provides a significant check on convening authority power.<sup>221</sup> This requirement forces the convening authority to articulate the reasons for a sentence reduction. Thus, the convening authority's superior officers as well as the public can scrutinize the basis behind her decision.<sup>222</sup> This requirement also incentivizes convening authorities to respect the recommendation of their staff judge advocates. If a convening authority decides to act against a staff judge-advocate recommendation that she take no action, the written-explanation requirement forces the convening authority to provide a reason not only as to why she reduced the sentence but also as to why she opposed her staff judge advocate's recommendation. Consequently, the written requirement will encourage convening authorities to follow their staff judge advocates' advice, which in turn will lead to legally defensible actions.<sup>223</sup>

Additionally, the sixty-day restriction on posttrial errors establishes a bright line as to when a convening authority's jurisdiction over posttrial errors ends and where a CCA's sole jurisdiction begins. While it is desirable

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217. MCM 2012, *supra* note 18, at II-149 to -151 (Rule 1106(a)).

218. *Id.* In *United States v. Bradford*, for example, defense counsel alleged improper sentencing argument. No. ACM S32288, 2016 WL 3681768, at \*1 (A.F. Ct. Crim. App. June 7, 2016). Upon review, the staff judge advocate suggested that no improper argument occurred and suggested that the convening authority approve the sentence. *Id.* at \*3.

219. See *supra* text accompanying note 188.

220. See *United States v. Boatner*, 20 C.M.A. 376, 378 (1971) (“The better the convening authority is informed the more fairly and justly will he exercise his discretion.” (citing *United States v. Foti*, 12 C.M.A. 303, 304 (1961))).

221. 10 U.S.C. § 860a(f)(2). This requirement was established by the 2013 reforms. National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, sec. 1702, § 860(c)(2)(C), 127 Stat. 672, 955-56 (2013) (codified as amended in scattered sections of 10 U.S.C.).

222. Under MCM Rules 1109(g) and 1110(e), the staff judge advocate forwards the written explanation to the court-martial. MCM 2019, *supra* note 10, at II-175 to -176. The UCMJ then demands that the president make the court-martial documents available to the public. 10 U.S.C. § 860c(a).

223. Recall that Lieutenant General Franklin was under no obligation to justify his actions in the *Wilkerson* case. *Memo Gives Insight*, *supra* note 28. He produced a written justification after his actions came under intense public scrutiny. Still, his written explanation allowed his superiors and the public to scrutinize his reasoning. *Id.*



for convening authorities to oversee a defendant's transition into confinement—a time when unlawful posttrial confinement is most likely to occur<sup>224</sup>—it is undesirable for this oversight to extend well beyond that transition.<sup>225</sup> Thus, convening authorities cannot become roving commissions that supervise confinement conditions.

The fifty-six-day sentence-credit limit imposes another restraint on convening authority power. First, the limit allows a convening authority to address most legal errors while restricting her ability to commute a sentence arbitrarily or unjustifiably. Most violations of a defendant's rights necessitate less than fifty-six days of sentence credit.<sup>226</sup> In the rare case that a defendant received a six-month sentence<sup>227</sup> and the convening authority granted the maximum amount of sentence credit, a prisoner still must serve over two-thirds of his confinement time.<sup>228</sup> This proportion only increases with more severe sentences.

Additionally, while the proposed revision provides flexibility, it also provides oversight. In the event of an extreme situation, the convening authority may reduce a sentence beyond the fifty-six-day limit. But the proposed revision necessitates that the Office of the Judge Advocate General of the relevant military branch approve such a reduction. Review by the Office of the Judge Advocate General incentivizes convening authorities to reduce a sentence beyond the fifty-six-day limit only in cases that have strong legal justifications, and the Office of the Judge Advocate General concerned could overturn any reductions it finds arbitrary or unjustified.

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224. The military sometimes holds defendants in temporary confinement while awaiting transition to the military confinement facility where the defendant will serve the remainder of his sentence. *Cf.* Baker, *supra* note 89, at 83. It is in such temporary confinement that arguable legal errors often occur. *See supra* Section II.A.2.

225. Simply put, military justice is just one of a plethora of a commander's concerns. As Major Elizabeth Murphy wrote, "[C]ommanders must focus on the physical, material, mental, and spiritual state of their servicemembers, civilian employees, and their families. . . . This huge undertaking of responsibility is inherent and fundamental to serving as a commander." Elizabeth Murphy, *The Military Justice Divide: Why Only Crimes and Lawyers Belong in the Court-Martial Process*, 220 MIL. L. REV. 129, 137 (2014). The more time a commander must devote to military justice, the less time she has for her primary role. Therefore, the convening authority should be involved no longer than is necessary to ensure the defendant's smooth transition into permanent confinement.

226. *See generally* CRIM. L. DEP'T, THE JUDGE ADVOC. GEN.'S LEGAL CTR. & SCH., U.S. ARMY, CRIMINAL LAW DESKBOOK: PRACTICING MILITARY JUSTICE (2019) (providing an analysis of all types of sentence credit and the case law that governs such credit).

227. Recall that the proposed revision only applies to sentences that include a punitive discharge or dismissal, six months confinement, or both. *See supra* Section III.A. This reform does not address capital cases, as defendants facing the death penalty receive more protections than the average defendant. *See* Schlueter, *supra* note 7, at 38, 64, 80, 90–92.

228. Fifty-six days constitutes about 31 percent of a six-month sentence of confinement.

## B. Responses to Counterarguments

Several critiques might be leveled at this proposed reform, including (1) the reform provides too much discretion to convening authorities, undermining the goals of the 2013 and 2016 reforms; (2) the reform is unnecessary, as there exist alternative avenues to resolve legal errors; and (3) the reform provides too little discretion to convening authorities. The following explains each critique and provides a defense of the proposed reform.

### 1. Too Much Convening Authority Discretion

As discussed in Part I, convening authority discretion spurred the original calls for UCMJ reform.<sup>229</sup> In response, the 2014 NDAA severely curtailed convening authorities' ability to overturn verdicts and reduce sentences.<sup>230</sup> The proposed reform returns a narrow portion of this revoked discretion: the ability to reduce sentences based on legal errors.

One might object that convening authorities should not hold more discretion than courts to reduce sentences.<sup>231</sup> Convening authorities' power to reduce sentences, those who object may argue, gives servicemembers a better chance at a sentence reduction than their civilian counterparts for seemingly no good reason. The discrepancy is especially stark when one considers the gradual injection into court-martial procedures of due process protections that mirror civilian criminal justice procedures, a process known as "civilianization."<sup>232</sup>

The response to such a critique is twofold. First, while there has been significant "civilianization" of the court-martial process, a large gulf between the civilian and military criminal justice systems remains.<sup>233</sup> Simply put, there exist more opportunities for the rights of a military defendant to be violated as compared to a civilian defendant.<sup>234</sup> For instance, while military de-

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229. See *supra* Section I.B.3.

230. See *supra* Section I.C.

231. As noted, convening authorities may award sentence credit where courts-martial and CCAs would refuse to provide such relief. See *supra* Section II.B, III.A.1.

232. See generally Lederer, *supra* note 181 (discussing the gradual civilianization of the court-martial); see also Edward F. Sherman, *The Civilianization of Military Law*, 22 ME. L. REV. 3 (1970).

233. Dan Maurer, *Are Military Courts Really Just Like Civilian Criminal Courts?*, LAWFARE (July 13, 2018, 10:00 AM), <https://www.lawfareblog.com/are-military-courts-really-just-civilian-criminal-courts> [<https://perma.cc/YQ4D-USGM>].

234. For example, compare the opportunities to inflict pretrial punishment in the military justice system, see *supra* Section II.A.1, with the opportunities to inflict such punishment in the civilian system, see *United States v. Salerno*, 481 U.S. 739 (1987); contrast the multiplicity of regulations that civilian confinement facilities must comply with when housing military prisoners (military regulations as well as the facility's regulations) with those they must comply with when housing civilian prisoners (just the facility's regulations), *supra* Section II.A.2; and note the increased burdens on trial counsel during sentencing arguments as juxtaposed with civilian prosecutors, see *supra* Section II.A.3.

defendants face the same types of trial counsel misconduct at sentencing that civilians face, they also face military-specific misconduct during this phase that civilians do not.<sup>235</sup> Moreover, while some military-specific issues might not rise to a constitutional violation or legal deficiency, there are situations in which a remedy is necessary. Consider *United States v. Gusev*, where a civilian facility violated the defendant's Article 12 rights by confining him with foreign nationals.<sup>236</sup> The Air Force CCA noted that the defendant did not exhaust his administrative remedies and opined that he was likely not entitled to sentence credit for the Article 12 violation.<sup>237</sup> In such a situation, it would still be appropriate for a convening authority to provide a limited remedy that at least acknowledges the wrong that the defendant suffered. In fact, in *Gusev*, the convening authority ultimately provided the defendant sentence credit for the Article 12 violation.<sup>238</sup> The provision of this remedy would not be possible under the current law.<sup>239</sup>

Second, the proposed reform focuses convening authorities' attention on the case's legal merits.<sup>240</sup> Before the 2013 reforms, a convening authority could provide a remedy without regard to law or precedent, and she did not have to explain her decision.<sup>241</sup> The proposed revision, however, more directly links convening authority decisions to legal errors and incentivizes convening authorities to adhere closely to the law while allowing them to exercise limited equitable judgement.<sup>242</sup> For example, a staff judge advocate's written recommendation would note if it would be a close call as to whether the alleged conduct constituted a legal error or substantially prejudiced the accused's rights. The convening authority may, based on her investigation and experience in the military, recognize that a remedy should nonetheless be provided.<sup>243</sup> The written requirement then forces her to articulate her reasoning in a document that may be viewed by both her superior officers and the public.<sup>244</sup> If a convening authority's reasoning is inadequate, her superior officers might remove her from command or deny her a promotion.<sup>245</sup> Thus, under the proposed revision, convening authorities and CCAs will likely differ only when the legal questions are close calls.

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235. See *supra* Section II.A.3.

236. *United States v. Gusev*, No. ACM S32392, 2018 WL 4443182, at \*2 (A.F. Ct. Crim. App. Aug. 21, 2018).

237. *Id.* at \*7.

238. *Id.*

239. See 10 U.S.C. § 860a. The defendant in *Gusev* was sentenced to a bad conduct discharge, eleven months' confinement, and reduction to E-1. *Gusev*, 2018 WL 4443182, at \*1.

240. See *supra* Section III.A.2.

241. See *supra* Section I.A.

242. See *supra* Section III.A.

243. See Schlueter, *supra* note 6, at 207–08 (noting the various factors that the convening authority and her staff judge advocate consider when making decisions on criminal matters).

244. See *supra* Section III.A.2.

245. Schlueter, *supra* note 6, at 208.

## 2. Other Avenues for Relief

A second criticism of the proposed reform is that it is unnecessary because UCMJ Articles 66 and 69 provide sufficient avenues for relief. Article 66 concerns review by the CCAs.<sup>246</sup> Weaknesses of Article 66, discussed in Section II.C, include substantial appellate delays as well as the CCAs' inflexibility when providing remedies.<sup>247</sup> The proposed reform, on the other hand, provides both timely and effective review.<sup>248</sup>

Article 69 concerns cases in which the defendant either does not have direct appeal to a CCA or has waived his right to appeal.<sup>249</sup> If a servicemember qualifies for Article 69 review,<sup>250</sup> the Office of the Judge Advocate General will review his case.<sup>251</sup> The use of Article 69 review for cases where both the convening authority cannot review the sentence and the defendant does not receive automatic appeal are rare.<sup>252</sup> The UCMJ provides automatic appeal for sentences that include death, a dismissal or punitive discharge, or more than two years of confinement.<sup>253</sup> But most guilty verdicts resulting in a sentence of confinement for less than two years (which do not receive automatic appeal) but more than six months (which are unreviewable by the convening authority) contain a dismissal or punitive discharge.<sup>254</sup> As a result, most defendants facing a sentence upon which a convening authority currently cannot act will receive an automatic appeal to a CCA because their sentences contain a dismissal or punitive discharge, rendering Article 69 useless.

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246. 10 U.S.C. § 866; *see generally supra* Part II.

247. *See supra* Section II.C.

248. *See supra* Section III.A.1.

249. 10 U.S.C. § 869.

250. These qualifications are outlined in UCMJ Article 65. *Id.* § 865.

251. *Id.* § 869; PEDE, *supra* note 175, at 1.

252. Based on the numbers from the Navy and Marine Corps, only thirty-eight of 517 general courts-martial and bad conduct-discharge special courts-martial convictions were reviewed under Article 69(a) in 2018. JOHN G. HANNINK, NAVY REPORT ON THE STATE OF MILITARY JUSTICE FOR FISCAL YEAR 2018 app. at 19 (2018), <https://jsc.defense.gov/Portals/99/Documents/Article%20146a%20Reports%20-%20FY18%20-%20All%20Services.pdf> [<https://perma.cc/89BN-UK9Z>]; D. J. LECCE, MARINE CORPS REPORT ON THE STATE OF MILITARY JUSTICE FOR FISCAL YEAR 2018 app. at 9 (2018) <https://jsc.defense.gov/Portals/99/Documents/Article%20146a%20Reports%20-%20FY18%20-%20All%20Services.pdf> [<https://perma.cc/89BN-UK9Z>]; 10 U.S.C. § 869(a) (2012) (amended 2016); Tyler J. Sena, *Finding Avenues for Meaningful Clemency*, REPORTER, no. 4, 2016, at 15, 21; JEFFREY A. ROCKWELL, AIR FORCE REPORT ON THE STATE OF MILITARY JUSTICE FOR FISCAL YEAR 2018 app. at 17 (2018), <https://jsc.defense.gov/Portals/99/Documents/Article%20146a%20Reports%20-%20FY18%20-%20All%20Services.pdf> [<https://perma.cc/89BN-UK9Z>].

253. 10 U.S.C. § 866.

254. *See id.*; *Military Discharge in the United States*, VETVERIFY, <https://www.vetverify.org/javax.faces.resource/images/VOSB-Military-Discharge-Overview.pdf.xhtml?ln=default> [<https://perma.cc/P6XM-8UFT>].

Attempts to obtain the benefits of this provision by waiving one's right to appeal are futile. If a servicemember opts into Article 69 by waiving an appeal, the Office of the Judge Advocate General may not review allegations of legal error.<sup>255</sup> Thus, servicemembers who desire review of their case and whose sentences qualify for automatic review by a CCA must enter the appellate system.<sup>256</sup>

The proposed reform, on the other hand, provides convening authority review regardless of whether the UCMJ entitles the defendant to CCA review. In cases that produce the most severe punishments (cases that receive automatic appeal to the CCAs), the proposed reform provides a second layer of review. Moreover, unlike Article 69, the proposed reform allows the convening authority to review for legal error regardless of whether the defendant waived his right to appeal. Therefore, a defendant will receive a review even if he does not want to traverse the arduous military appellate process.

### 3. Too Little Convening Authority Discretion

Some scholars have called for the wholesale restoration of convening authority discretion.<sup>257</sup> As the proposed reform only returns a limited portion of this discretion, they might argue that the reform does not go far enough. This critique has two underlying premises. The first premise is that superior officers who act as convening authorities are essential to justice and discipline in the armed forces.<sup>258</sup> Superior officers are responsible for the good order and discipline of those they command.<sup>259</sup> In order to ensure good order and discipline, a commander must ensure that justice is done within his command; otherwise, he will quickly lose the respect of his subordinates.<sup>260</sup> When officers are removed from the military justice system, it effectively allows commanders to shirk their duty to maintain good order and discipline.<sup>261</sup> Worse yet, if a commander cannot resolve what subordinates

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255. 10 U.S.C. § 865(d)(3)(B).

256. *See id.* §§ 865–866.

257. *See, e.g.,* Schlueter, *supra* note 6, at 227 (discussing why the 2013 limitations on convening authorities' posttrial powers should be abrogated).

258. *Id.* at 227–28 (arguing that convening authorities are necessary to the military justice process, and therefore the 2013 reforms should be abrogated and other proposals to limit or eliminate convening authority power should be rejected).

259. *Id.* at 207 (“In considering any proposed reforms regarding the role of commanders, it is critical that Congress recall that the primary function and purpose of the military justice system is to enforce good order and discipline in the armed forces.”).

260. As Senator Lindsay Graham stated, “When you are in the military and you find out someone has stolen from another member of the unit, and you are all living together on top of each other, side by side, that is a very big deal, and the commander responsible for that unit needs to make sure something happens fairly.” 160 CONG. REC. S6588 (daily ed. Dec. 11, 2014) (statement of Sen. Graham).

261. *Id.*; *see also* Andrew S. Williams, *Safeguarding the Commander's Authority to Review the Findings of a Court-Martial*, 28 *BYU J. PUB. L.* 471, 484 (2014); Schlueter, *supra* note 6, at 207.

perceive as clear injustices, servicemembers lose faith in the military justice system.<sup>262</sup> Such consequences ultimately undermine good order and discipline.<sup>263</sup>

The second premise is that, absent full convening authority discretion, the military justice system lacks adequate safeguards for military defendants.<sup>264</sup> Even after the 2016 reforms, servicemembers receive fewer protections than civilians. For instance, a member panel is comprised of eight members selected by the convening authority, and the panel does not need to return a unanimous verdict.<sup>265</sup> Expansive convening authority review provides a key safeguard against these procedural deviations.<sup>266</sup>

The proposed reform responds to both premises. First, the suggested revision discourages arbitrary action while simultaneously allowing convening authorities to publicly remedy errors.<sup>267</sup> In consequence, the proposed reform not only promotes justice within the military justice system, but it also promotes the *perception* that the military justice system is just. And, as the critics of the 2013 and 2016 reforms noted, both the promotion of justice and the appearance of justice facilitate good order and discipline.<sup>268</sup>

While the proposed reform does not deal with the military justice system's procedural deviations, the proposed reform coupled with CCA review provides a formidable backstop against legal errors. The proposed reform

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262. 160 CONG. REC. S6588 (daily ed. Dec. 11, 2014) (statement of Sen. Graham).

263. Jeremy D. Broussard, *Restoring Balance to the Scales: Higher Panel Quorums and Voting Requirement in Light of Article 60 Restrictions*, ARMY LAW., Feb. 2016, at 5, 14 (quoting Richard C. Harding, *A Revival in Military Justice: An Introduction by the Judge Advocate General*, REPORTER, Summer 2010, at 4) (noting that good order and discipline necessitate trust in the military justice system); see also LAWRENCE J. MORRIS, MILITARY JUSTICE: A GUIDE TO THE ISSUES 5 (2010).

264. See generally Williams, *supra* note 261 (arguing that the lack of procedural safeguards in the military justice system necessitate the convening authority's power of posttrial review).

265. National Defense Authorization Act for Fiscal Year 2017, Pub. L. 114-328, sec. 5161, § 816, 130 Stat. 2000, 2897 (2016); *id.* sec. 5235, § 852, 130 Stat. at 2916. In a case that involves the possibility of death, the law demands a unanimous finding of guilty. *Id.* The 2001 Report on the 50th Anniversary of the Uniform Code of Military Justice stated, "There is no aspect of military criminal procedures that diverges further from civilian practice, or creates a greater impression of improper influence, than the antiquated process of panel selection." WALTER T. COX III, GUY R. ABBATE, JR., MARY M. CHEH, JOHN S. JENKINS & FRANK J. SPINNER, NAT'L INST. OF MIL. JUST., REPORT OF THE COMMISSION ON THE 50TH ANNIVERSARY OF THE UNIFORM CODE OF MILITARY JUSTICE 7 (2001), [https://www.loc.gov/rr/frd/Military\\_Law/pdf/Cox-Commission-Report-2001.pdf](https://www.loc.gov/rr/frd/Military_Law/pdf/Cox-Commission-Report-2001.pdf) [<https://perma.cc/X8FF-4Q2D>].

266. See generally Williams, *supra* note 261 (discussing the necessity of maintaining convening authority posttrial discretion based on the lack of procedural safeguards in the military justice system). Though Colonel Williams's article was written prior to the 2016 reforms, the author's arguments remain relevant.

267. See *supra* Section III.A.

268. See, e.g., Baker, *supra* note 89, at 81 ("[T]he perpetrator of an offense and/or the victim are generally known to the unit, and however large the unit, everyone knows or at least has a perception about when and whether 'justice has been done.'").

maximizes both the convening authorities' and CCAs' expertise. Convening authorities and staff judge advocates oversee the entirety of the court-martial process and are best positioned to understand the practical effects of legal errors on the defendant.<sup>269</sup> Such on-the-scene knowledge allows them to quickly identify legal errors and properly tailor remedies.<sup>270</sup> The CCAs, on the other hand, are further removed from the process; consequently, they are in the best position to make major legal decisions such as overturning a verdict based on lack of evidence.<sup>271</sup>

#### CONCLUSION

Together, the 2013 and 2016 changes to the UCMJ created new barriers to obtaining relief for military servicemembers who were harmed by legal errors in their prosecutions. The proposed revision to the UCMJ facilitates the fundamental goal of the military justice system: to provide efficient and effective procedures while promoting justice and maintaining good order and discipline.<sup>272</sup> Without such a reform, servicemembers will continue to face a system that provides them fewer due process rights than civilian defendants yet prevents them from remedying the inevitable violations that result. Until the military justice system eliminates legal errors (a fanciful proposition) or becomes fully civilianized (a result that may not be desirable), convening authorities must have the power to review courts-martial for legal errors and provide proper remedies.

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269. See *supra* Section III.A.1; see also Williams, *supra* note 261, at 504–05 (suggesting that the convening authority is better suited to review courts-martial findings and sentences than the CCAs).

270. Williams, *supra* note 261, at 509 (“[The commander] brings a unique perspective and competence to the process. Like the accused, the commander also has a great stake in the case . . . . The commander’s sense of responsibility is thus greater and more pronounced than what can be felt by any military appellate judge or court of criminal appeals, which has no ties to the command.”).

271. Murphy, *supra* note 225, at 158–59. *But see* Williams, *supra* note 261, at 506–08 (suggesting that the CCAs struggle when reviewing verdicts for legal sufficiency and are not properly structured to make factual determinations).

272. MCM 2019, *supra* note 10, at I-1 (3. Nature and Purpose of Military Law).