

# Congress Offends Eisenhower and Cicero by Annihilating Article 60, UCMJ

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## I. Introduction

*But when it comes to the mitigating of that sentence I say it has got to be in the chain of authority, to be done by someone that has some responsibility for winning the war, and not just sitting on the outside and exercising his authority independently of the Secretary of War.*

—General Dwight D. Eisenhower<sup>1</sup>

*Let us not listen to those who think we ought to be angry with our enemies, and who believe this to be great and manly. Nothing is so praiseworthy, nothing so clearly shows a great and noble soul, as clemency and readiness to forgive.*

—Marcus Tullius Cicero<sup>2</sup>

General Dwight D. Eisenhower and Marcus Tullius Cicero believed strongly in the importance of clemency, the former through the spectrum of a military commander and the latter as a key component of an enlightened society. On 24 June 2014, clemency under Article 60 of the Uniform Code of Military Justice (UCMJ) changed radically. The convening authority's power to take post-trial action has long been nearly omnipotent.<sup>3</sup> He could reverse convictions, reduce charges to lesser included offenses, and grant clemency of nearly any kind without explanation. This power has been greatly curtailed following the outcry in the wake of the Lieutenant Colonel James Wilkerson case<sup>4</sup> and

*The Invisible War*.<sup>5</sup> Due to congressional action amending Article 60, UCMJ, the days of unfettered discretion by convening authorities and limited or no involvement by victims are gone. The UCMJ now requires involvement of victims in the post-trial process; prohibits convening authorities from dismissing findings, changing convictions to lesser included offenses, or granting sentence clemency in the majority of cases; and, in most cases, requires convening authorities to give written explanations of decisions to grant clemency.<sup>6</sup>

Post-trial practices must now reflect these changes, and convening authorities must be made aware of the new limitations. Chiefs of military justice and staff judge advocates need to understand the changes, be able to explain the changes, and amend their post-trial practices accordingly. This article explains the amendments to Article 60 and offers practical advice on how to amend post-trial mechanics to avoid potential snags. Part II outlines the post-trial power historically vested in the convening authority and explains why Article 60 was amended. Part III summarizes the changes and gives examples of how the changes will work in practice. Finally, Part IV identifies potential consequences and dangers that may lie ahead as a result of the new law.

## II. History

### A. Old Law

As far back as the early 1800s, senior commanding officers of the U.S. Armed Forces were entrusted with the

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from the service. But a commander overturned the verdict and dismissed the charges, saying he found Wilkerson and his wife more believable than the alleged victim.

*Id.*

<sup>5</sup> THE INVISIBLE WAR (Chain Camera Pictures 2012). In 2012, the Sundance Film Festival summarized the film as “[a]n investigative and powerfully emotional examination of the epidemic of rape of soldiers within the U.S. military, the institutions that cover up its existence and the profound personal and social consequences that arise from it.” 2012 Sundance Film Festival Announces Awards, SUNDANCE INST., <http://www.sundance.org/press-center/release/2012-sundance-film-festival-awards/> (last visited June 5, 2014). The film was awarded the U.S. Documentary Audience Award at the Festival. *Id.* Also, the 85th Academy Awards honored the film's work by nominating it for Best Documentary Feature. ACADEMY AWARDS, <http://www.oscars.org/awards/academy-awards/legacy/ceremony/85th-winners.html> (last visited July 9, 2014). The film has become required viewing across all branches of the military, including the 62d U.S. Army Judge Advocates General's Corps Graduate Course.

<sup>6</sup> S. 538, 113th Cong. (2013).

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<sup>1</sup> *Sundry Legislation Affecting the Naval and Military Establishments of 1947: Hearing on H.R. 2964, 3417, 3735, 1544, 2993 and H.R. 2575 Before the H. Comm. on Armed Services*, 80th Cong. 4425 (1947) (statement of General Dwight D. Eisenhower, Chief of Staff, U.S. Army).

<sup>2</sup> Marcus Tullius Cicero—Quote, [http://thinkexist.com/quotation/let\\_us\\_not\\_listen\\_to\\_those\\_who\\_think\\_we\\_ought\\_to/344620.html](http://thinkexist.com/quotation/let_us_not_listen_to_those_who_think_we_ought_to/344620.html) (last visited July 4, 2014). “Marcus Tullius Cicero was a Roman Philosopher and Political Theorist (Jan. 3, 106 BC–Dec. 7, 43 BC),” and “[h]is political thought and activism is [sic] said to have inspired the figures of both the American Revolution and the French revolution.” Marcus Tullius Cicero – Biography, THE EUROPEAN GRADUATE SCH., <http://www.egs.edu/library/cicero/biography/> (last visited July 9, 2014).

<sup>3</sup> *United States v. Davis*, 58 M.J. 100, 102 (C.A.A.F. 2003) (citing UCMJ art. 60(c)(1)–(2) (2002)).

<sup>4</sup> Jacques Billeaud, *Kimberly Hanks Stunned By Reversal of Lt. Col. James Wilkerson's Conviction*, HUFFINGTON POST (Apr. 4, 2012), [http://www.huffingtonpost.com/2013/04/25/kimberly-hanks-james-wilkerson\\_n\\_3156868.html](http://www.huffingtonpost.com/2013/04/25/kimberly-hanks-james-wilkerson_n_3156868.html).

A military jury in November convicted Wilkerson, a former inspector general at Aviano Air Base in Italy, of aggravated sexual assault and other charges. He was sentenced to one year in prison and dismissal

authority to convene courts-martial and were vested with the responsibility to ensure justice was served. Article 65 of the Articles of War provided:

Any general officer commanding an army, or Colonel commanding a separate department, may appoint general courts-martial whenever necessary. But no sentence of a courts-martial shall be carried into execution until after the whole proceedings shall have been laid before the same officer ordering the same.<sup>7</sup>

The role of final arbiter over a court-martial was clearly a task allocated to the convening authority by the Founding Fathers of this nation. This tradition continued in subsequent revisions to the Articles of War.<sup>8</sup> Commanders continued to be solely responsible for convening courts-martial and ensuring equity and justice were served at trial.

In 1950, Congress enacted the UCMJ in an effort to modernize criminal prosecutions in the military and institute uniformity across the Department of Defense.<sup>9</sup> In addition, the UCMJ was created to prevent injustices that occurred during World War II.<sup>10</sup> A key component of the UCMJ was the convening authority's power to review and take action on courts-martial after trial. This authority was primarily memorialized in Articles 60 and 64 of the UCMJ, which required that "after every trial by court-martial the record shall be forwarded to the convening authority"<sup>11</sup> for action, and that "the convening authority shall approve only such findings of guilty, and the sentence or such part or amount of the sentence, as he finds correct in law and fact and as he in

his discretion determines should be approved."<sup>12</sup> During the House of Representatives, Committee on Armed Services hearing on the UCMJ in 1949, the convening authority's post-trial powers were discussed at length.<sup>13</sup> Felix Larkin, Assistant General Counsel for the Office of the Secretary of Defense, outlined General Eisenhower's position on what that power encompassed:

[Y]ou might have a case where a man is convicted and it is a legal conviction and it is sustainable, that man may have such unique value and may be of such importance in a certain circumstance in a war area that the commanding officer may say, "Well he did it all right and they proved it all right, but I need him and I want him and I am just going to bust this case because I want to send him on this special mission."<sup>14</sup>

Mr. Larkin and others who testified before the committee agreed with Eisenhower that post-trial decisions by commanders were judgment calls based on command prerogative, so long as they accrued to the benefit of the accused.<sup>15</sup> In 1969, the UCMJ was revised again, but the power of the convening authority to take action on findings and sentences following trial was unchanged.<sup>16</sup> Congress amended Article 60 in 1983, adding clarifying language: "The authority under this section to modify the findings and sentence of a court-martial is a matter of command prerogative involving the sole discretion of the convening authority."<sup>17</sup> In addition, Congress established with particularity a right for an accused to submit matters to the convening authority to consider in the clemency determination, mandated a timeline for submission, and required convening authorities to consider the accused's submissions.<sup>18</sup> The changes to Article 60 combined the previous post-trial powers of the convening authority, found in Articles 60 through 64, into one Article of the UCMJ outlining all post-trial procedures.<sup>19</sup>

The 1983 version of Article 60 memorialized the long-standing power of convening authorities and clearly

<sup>7</sup> Articles of War, An Act for the Establishing Rules and Articles for the Government of the Armies of the United States, 2 Stat. 359 (1806).

<sup>8</sup> EUGENE WAMBAUGH, GUIDE TO THE ARTICLES OF WAR 18–19 (1917); *id.* art. 46 (Approval and Execution of Sentence); *id.* art. 47 (Powers Incident to Power to Approve); LEE S. TILLOTSON, THE ARTICLES OF WAR ANNOTATED 155–65 (1949). Article 47 combined the previous Article 46 and 47, but the substance of the duty and power of the convening authority was unchanged.

<sup>9</sup> S. REP. NO. 486, at 3 (1949).

<sup>10</sup> *Id.* Examples of injustices were a sentence of ten years' confinement for a Soldier who had been in the Army for only three weeks and refused to give a lieutenant a cigarette; a sentence of five years' confinement at hard labor and a dismissal for a one-day AWOL; life imprisonment for an AWOL. The conviction rate for general courts-martial from 1942 to 1945 for the 63,876 held in the United States (no data is available for the 25,000 to 30,000 courts-martial held overseas) was 94% compared to 79.8% during World War I. Lastly, 141 death sentences were executed during World War II, including 51 for rape and one for desertion. H. COMM. ON MILITARY AFFAIRS, 79TH CONG., INVESTIGATIONS OF THE NATIONAL WAR EFFORT 3, 40–43 (Comm. Print 1946)

<sup>11</sup> UCMJ art. 60 (1950). The 1950 version of Article 60 stated, "After every trial by court-martial the record shall be forwarded to the convening authority, and action thereon may be taken by the officer who convened the court, an officer commanding for the time being, a successor in command, or by any officer exercising general court-martial jurisdiction." *Id.*

<sup>12</sup> *Id.* art. 64.

<sup>13</sup> *Uniform Code of Military Justice: Hearing on H.R. 2498, Before the H. S. Comm. of the Comm. on Armed Service*, 81st Cong. 1184 (1949).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 1182–85.

<sup>16</sup> UCMJ arts. 60 & 64 (1969).

<sup>17</sup> UCMJ art. 60(c)(1) (1983).

<sup>18</sup> *Id.* art. 60(b)(1)–(2) and (c)(2).

<sup>19</sup> *Id.*

established total control over the outcome of courts-martial by allowing convening authorities to overturn convictions completely and to grant clemency by reducing punishments as they saw fit.<sup>20</sup> The Court of Appeals for the Armed Forces (CAAF) synthesized the law in *United States v. Davis*, stating that “[a]s a matter of ‘command prerogative’ a convening authority ‘in his sole discretion, may approve, disapprove, commute, or suspend the sentence in whole or in part.’”<sup>21</sup> When the convening authority “is performing his post-trial duties, his role is similar to that of a judicial officer.”<sup>22</sup> In his post-trial role, the convening authority acts as an impartial arbiter. Specifically, with regard to a sentence, “the convening authority shall approve that sentence which is warranted by the circumstances of the offense and appropriate for the accused.”<sup>23</sup> Given that convening authorities’ post-trial powers vest in the form of “command prerogative,” “sole discretion,” and appropriateness of sentence, those powers have been nearly unlimited, so long as they accrued to the benefit of the accused.<sup>24</sup> This unlimited power has changed drastically in the wake of recent amendments to the UCMJ.<sup>25</sup>

## B. The New Law

As a result of the public concerns that surfaced following the Lieutenant Colonel James H. Wilkerson III case<sup>26</sup> and the release of the widely-acclaimed documentary film *The Invisible War*,<sup>27</sup> Congress amended the UCMJ in many ways, including limiting the power of convening authorities to take action post-trial. A grand debate over how to address the sexual assault problem in the military recently transpired on Capitol Hill.<sup>28</sup> One side argued that commanders should be removed completely from the prosecution of non-military-specific criminal cases. Senator Kirsten Gillibrand of New York proposed legislation that would “[s]trip military commanders of any involvement in determining

how rape and sexual assault cases are handled.”<sup>29</sup> Senator Gillibrand’s bill, the Military Justice Improvement Act, proposed having senior judge advocates with significant trial experience decide whether a case will go forward and to what type of court-martial.<sup>30</sup> Military commanders would retain authority over military specific offenses and offenses with maximum punishments under one year.<sup>31</sup> Under this proposal, military justice would function similarly to a federal prosecutor’s office—a senior attorney making prosecutorial decisions with no command input or influence in the process.

Senator Claire McCaskill of Missouri championed an alternative approach. This approach modified the post-trial powers of convening authorities, specifically, prohibiting dismissal of and changing findings to lesser included offenses and requiring written explanations by convening authorities for modifications to sentences.<sup>32</sup> Senator McCaskill argued in her editorial piece in *USA Today* that taking all power from the commander was not the best way forward:

An alternative plan under consideration would strip military commanders of their responsibility to decide which sexual assault cases go to criminal trials, and instead create a separate prosecutor’s office outside the chain of command to handle such matters. We view this as a risky approach for victims—one that would increase the risk of retaliation, weaken our ability to hold commanders

<sup>20</sup> *Id.*

<sup>21</sup> 58 M.J. 100, 102 (C.A.A.F. 2003) (citing UCMJ art. 60(c)(1)–(2)(2002)).

<sup>22</sup> *United States v. Fernandez*, 24 M.J. 77, 78 (C.M.A. 1987) (citing *United States v. Boatner*, 43 C.M.R. 216 (C.M.A. 1971)).

<sup>23</sup> MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1107(d)(2) (2012).

<sup>24</sup> *Id.* R.C.M. 1107 (b)(1), (d)(2).

<sup>25</sup> Spencer Ackerman, *Senate Approves U.S. Defence Budget Plan with Sexual Assault Reforms*, THE GUARDIAN, Dec. 20, 2013, <http://www.theguardian.com/world/2013/dec/20/congress-passes-ndaa-defense-budget-sexual-assault-reform>.

<sup>26</sup> Billeaud, *supra* note 4.

<sup>27</sup> THE INVISIBLE WAR, *supra* note 5.

<sup>28</sup> Helene Cooper, *Senate Rejects Blocking Military Commanders from Sexual Assault Case*, N.Y. TIMES, Mar. 6, 2014, [http://www.nytimes.com/2014/03/07/us/politics/military-sexual-assault-legislation.html?\\_r=0](http://www.nytimes.com/2014/03/07/us/politics/military-sexual-assault-legislation.html?_r=0).

<sup>29</sup> Ed O’Keefe, *Work on Sexual Assault in Military Signals Sen. Kirsten Gillibrand’s Evolution*, WASH. POST, Nov. 20, 2013, [http://www.washingtonpost.com/politics/work-on-sexual-assault-in-military-signals-gillibrands-evolution/2013/11/20/ee999a9c-509c-11e3-9e2c-e1d01116fd98\\_story.html](http://www.washingtonpost.com/politics/work-on-sexual-assault-in-military-signals-gillibrands-evolution/2013/11/20/ee999a9c-509c-11e3-9e2c-e1d01116fd98_story.html).

<sup>30</sup> S. 1752, 113th Cong. (2013). The bill provided,

[t]he determination whether to try such charges by court-martial shall be made by a commissioned officer of the Armed Forces designated in accordance with regulations prescribed for purposes of this subsection from among commissioned officers of the Armed Forces in grade O-6 or higher who (i) are available for detail as trial counsel under section 827 of title 10, United States Code (article 27 of the Uniform Code of Military Justice); (ii) have significant experience in trials by general or special court-martial; and (iii) are outside the chain of command of the member subject to such charges.

*Id.*

<sup>31</sup> *Id.*

<sup>32</sup> S. 538, 113th Cong. (2013).

accountable, and lead to fewer prosecutions.<sup>33</sup>

Senator McCaskill argued that keeping commanders involved in the prosecution of sexual assaults would ensure command emphasis and command responsibility are the causes behind a reduction in sexual assaults.<sup>34</sup> She also pointed out that several U.S. allies have stripped commanders of power in the prosecutorial process and have seen no increase in prosecutions as a result.<sup>35</sup> Ultimately, Senator McCaskill's UCMJ reformation approach won the day over the nuclear option of removing a commander from the process entirely. The UCMJ was saved, but major reforms were enacted. One such reform was to the post-trial abilities of the convening authority, mainly Article 60 of the UCMJ.

The changes to Article 60, UCMJ, are divided into three categories: limitations on the power of the convening authority, required explanations for granting clemency by the convening authority, and involvement of victims in the post-trial process. This article addresses each category separately below and offers useful tips for implementation in post-trial practice in a military justice shop.

### III. Changes

#### A. Limitations on the Power of the Convening Authority

The 2014 National Defense Authorization Act curtailed the convening authority's powers significantly with regard to action on findings and sentences.<sup>36</sup> These changes limiting a convening authority's power to grant clemency went into effect on 24 June 2014, and apply to offenses committed on or after that date.<sup>37</sup> Therefore, the changes outlined below should begin to affect post-trial advice and actions by

<sup>33</sup> Senator Claire McCaskill & Congresswomen Loretta Sanchez, *Commanders Must Fight Sexual Assault in Military*, USA TODAY, Aug. 29, 2013, <http://www.usatoday.com/story/opinion/2013/08/29/women-sexual-assault-column/2725081/>.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* Senator McCaskill pointed out that other nations who removed commanders from the military justice system did so to protect the rights of the accused, and that none saw increased prosecutions. Also, she cited ninety-three cases within the last two years where civilian prosecutors declined to prosecute cases that the U.S. military brought to court. *Id.*

<sup>36</sup> National Defense Authorization Act (NDAA), Pub. L. No. 113-66, 127 Stat. 672 (2013) [hereinafter 2014 NDAA]. The full text of NDAA § 1702(b) can be found in Appendix B (National Defense Authorization Act for Fiscal Year 2014).

<sup>37</sup> *Id.* § 1702(d)(2) (providing that amendments to Article 60, UCMJ, "shall take effect 180 days after the date of the enactment of this Act and shall apply with respect to offenses committed under chapter 47 of title 10, United States Code (the Uniform Code of Military Justice), on or after that effective date"). The NDAA was enacted on 26 December 2013. 24 June 2014 is 180 days after that date.

convening authorities starting in the fall of 2014 in most jurisdictions.

#### 1. Findings

After a court-martial has adjudged a finding of guilty, the convening authority no longer has the authority to take the following actions:

[D]ismiss any charge or specification by setting aside a finding of guilty thereto; or change a finding of guilty to a charge or specification to a finding of guilty to an offense that is a lesser included offense of the offense stated in the charge or specification.<sup>38</sup>

Under the new Article 60, the convening authority may not dismiss by setting aside findings of guilty or change findings of guilty to lesser included offenses, except for qualifying offenses, in which case he must provide "a written explanation of the reasons for such action."<sup>39</sup> Qualifying offenses are offenses in which "the maximum sentence of confinement that may be adjudged does not exceed two years," and the sentence adjudged did not include a dismissal, a bad-conduct or dishonorable discharge, or confinement for more than six months.<sup>40</sup> In addition, the following Articles are expressly excluded from being a "qualifying offense": Articles 120(a) and (b), 120b,

<sup>38</sup> UCMJ art. 60(c)(3) (2012).

<sup>39</sup> 2014 NDAA, *supra* note 36, § 1702(b) (Elimination of Unlimited Command Prerogative and Discretion). There is an alternative reading of § 1702(b) that interprets the statute as not prohibiting convening authorities from dismissing charges, but merely requiring a written explanation if non-qualifying offenses are dismissed. The author disagrees with this view based on macro and micro level statutory analysis. On the macro level, the title of § 1702(b) is "Elimination of Unlimited Command Prerogative and Discretion." *Id.* Also, the bulk of the congressional debate regarding the changes to Article 60, UCMJ, revolved around removing command discretion during clemency. *See supra* Part II. To read § 1702(b)(3)(B)(i) and (C) as requiring only a written explanation for non-qualifying offenses conflicts with both the title of the section and the substance of the congressional debate. Thus, at the macro level, the alternative reading is deeply flawed. At the micro level, § 1702(b)(3)(B)(i) states that the convening authority "may not dismiss any charge or specification" other than for qualifying offenses. *Id.* This is clearly a prohibition on dismissal, except for qualifying offenses. The NDAA § 1702(b)(3)(C) provides that if a convening authority dismisses a charge (other than a qualifying offense), the convening authority shall provide a written explanation. This author believes that the "other than a qualifying offense" language must be read out of the statute. If not, § 1702(b)(3)(C) would authorize convening authorities to dismiss non-qualifying offenses so long as a written explanation is provided. *Id.* This reading directly contradicts the clear prohibition outlined in § 1702(b)(3)(B)(i). Thus, on the micro level, the alternative reading creates an irrational inconsistency. Based on both macro and micro statutory analysis the alternative reading of § 1702(b) is flawed. Therefore, the author adopted the view outlined in this article.

<sup>40</sup> *Id.* § 1702 (b)(3)(D).

125<sup>41</sup> and “such other offenses as the Secretary of Defense may specify by regulation.”<sup>42</sup> In general, qualifying offenses are military-specific crimes and crimes typically considered misdemeanors. Below are some examples to help explain this concept and demonstrate the absolute importance of making the correct charging decision.<sup>43</sup>

#### Example 1

Sergeant Smith is an excellent Soldier with numerous awards for valor, but missed her unit’s deployment flight to Afghanistan because of car trouble. Sergeant Smith was charged with missing movement by design, a violation of Article 87, UCMJ, with a maximum allowable period of confinement of two years.<sup>44</sup> She is found guilty by a general court-martial and sentenced to confinement for 180 days and no discharge. In this case, the convening authority may set aside the finding of guilty or change the finding of guilty to a lesser-included offense because the charge is a qualifying offense.

The charge of missing movement by design carries a maximum allowable confinement period of two years and the adjudged sentence did not include a discharge or confinement for a period of more than six months. Thus, the convening authority can dismiss the charge by setting aside the finding of guilty or change the finding of guilty to a finding of guilty of a lesser included offense, such as missing movement by neglect or absence without leave, but the convening authority must state in writing the reason for the decision. If Sergeant Smith had received a discharge or confinement of 181 days (or more) as part of her adjudged sentence, the convening authority would be foreclosed from taking any action on the findings beyond simply approving them.

#### Example 2

Same facts as Example 1, but this time Sergeant Smith called her company commander when she knew she would be late. Her company commander ordered her to arrive at the flight location at a specific time, yet Sergeant Smith still missed the flight due to car trouble. Sergeant Smith was charged with failing to obey a lawful order from her company commander to board the deployment aircraft, in

violation of Article 90, UCMJ, which carries a maximum allowable period of confinement for five years.<sup>45</sup> She was found guilty by a general court-martial and sentenced to no punishment. Under these facts, the convening authority could not dismiss the charge as an act of clemency because the maximum sentence of confinement that could be adjudged exceeded two years. Conversely, if the convening authority had referred the case to a special court-martial, the maximum sentence of confinement that could have been adjudged would not have exceeded two years, so the convening authority would be free to dismiss the charge post-trial.

These Sergeant Smith scenarios demonstrate the importance of the charging and referral decisions under the new Article 60 and the extreme limitations on the power of convening authorities in granting clemency by setting aside or reducing findings to lesser included offenses. Additional limitations exist on clemency powers of convening authorities regarding sentence.

#### 2. Sentence

Although granting clemency in the form of modifying findings is generally a rare occurrence by convening authorities,<sup>46</sup> the same cannot be said for post-trial action on a sentence. Convening authorities have traditionally granted clemency to an accused in the form of a sentence reduction. Under the new Article 60, UCMJ, the convening authority “may not disapprove, commute, or suspend in whole or in part an adjudged sentence of confinement for more than six months or a sentence of dismissal, dishonorable discharge, or bad conduct discharge,”<sup>47</sup> with two exceptions. First,

[u]pon the recommendation of the trial counsel, in recognition of the substantial assistance by the accused in the investigation or prosecution of another person who has committed an offense, the convening authority . . . shall have the authority to disapprove, commute, or suspend the adjudged sentence in whole or in part, even with respect to an offense for

<sup>41</sup> UCMJ arts. 120(a) (Rape), 120(b) (Sexual Assault), 120b (Rape and Sexual Assault of a Child), 125 (Sodomy) (2012).

<sup>42</sup> *Id.*

<sup>43</sup> MAJOR MEGAN WAKEFIELD, CRIMINAL LAW DEP’T, THE JUDGE ADVOCATE GEN.’S LEGAL CTR. & SCH., U.S. ARMY art. 60 chart (9 Jan. 2014) (outlining the changes to Article 60, UCMJ, in a simplified form) (Appendix A).

<sup>44</sup> UCMJ art. 87(e) (2012).

<sup>45</sup> *Id.* art. 90 (e).

<sup>46</sup> *Sexual Assault in the Military: Hearing Before S. Armed Serv. Subcomm. on Personnel*, 113th Cong. (2013) (statement of Sen. Lindsey Graham, ranking member of subcomm.), available at <http://www.c-span.org/video/?311468-2/sexual-assault-military-part-2>. The Judge Advocate Generals of each Armed Service gave the percentage of disapproval and dismissal of all findings by convening authorities after courts-martial as follows: Marines 0.4% (0 Sexual Assault (SA) cases), Air Force 1.4% (5 SA cases), Army 1.4% (0 SA cases). The Navy did not have an adequate tracking system to determine the percentage at that time, but had zero SA cases. *Id.*

<sup>47</sup> 2014 NDAA, *supra* note 36, § 1702(4)(A).

which a mandatory minimum sentence exists.<sup>48</sup>

The mandatory minimum sentence referenced in the section refers to new mandatory dishonorable discharge or dismissal for an accused found guilty of violations of rape, sexual assault, rape or sexual assault of a child, forcible sodomy, or attempts to commit said offenses.<sup>49</sup> While the statute uses the term “mandatory minimum sentences,” in actuality, the provision creates a mandatory discharge requirement, not a traditional mandatory minimum sentence as in other criminal statutes.<sup>50</sup>

The second exception to the new restrictive rules prohibiting sentencing clemency is a pretrial agreement. The convening authority can still enter into a pretrial agreement with the accused and promise to limit the sentence that the convening authority will approve.<sup>51</sup> However, unlike the provision rewarding the accused who cooperates with the government by allowing the convening authority unfettered clemency even in mandatory discharge cases, the pretrial agreement exception only allows convening authorities to commute a dishonorable discharge to a bad-conduct discharge.<sup>52</sup> The convening authority cannot “disapprove, otherwise commute, or suspend the mandatory minimum sentence in whole or in part,” in accordance with a pretrial agreement, except commuting a dishonorable discharge to a bad-conduct discharge, unless the accused meets the requirements for cooperating with the government, as outlined above.<sup>53</sup> However, the convening

authority is still free to negotiate a confinement cap as part of an agreement. To illustrate the mechanics of the new Article 60 regarding sentencing clemency, several examples follow.

#### Example 1—Confinement Less Than Six Months and No Discharge

Private Jones was charged with violations of Articles 120a, stalking, and 120b, sexual assault of a child over the age of twelve, and his case was referred to a general court-martial. Private Jones pled not guilty to all charges. The court-martial found Private Jones guilty of stalking, but not guilty of sexual assault based on a successful defense that the accused reasonably believed the child was over sixteen years of age, and sentenced Private Jones to six months’ confinement and no discharge. There was no finding of guilty for an offense requiring a mandatory discharge, and the adjudged sentence did not include a punitive discharge or confinement for greater than six months. Therefore, the convening authority could disapprove all punishment, but must explain in writing the reasons for such action.<sup>54</sup>

#### Example 2—Confinement Greater Than Six Months or Punitive Discharge

Same facts as Example 1, but the court-martial found Private Jones guilty of both stalking and sexual assault of a child. The court-martial sentenced Private Jones to seven months’ confinement, forfeiture of all pay and allowances, and the mandatory dishonorable discharge.<sup>55</sup> On these facts the convening authority cannot modify the adjudged sentence as to confinement or the discharge, but can act on the forfeitures. Since the adjudged sentence included confinement in excess of six months and a punitive discharge, the convening authority is foreclosed from “disapproving, commuting or suspending” any part of the confinement or discharge.<sup>56</sup> However, the new Article 60 does not prohibit the convening authority from disapproving, commuting, or suspending adjudged forfeitures or reductions. Thus, the convening authority is free to disapprove or suspend the forfeitures in this case, but must explain the reason for doing so in writing.

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<sup>48</sup> *Id.* § 1702(4)(B).

<sup>49</sup> *Id.* § 1705(b)(1).

[A] person subject to this chapter who is found guilty of an offense specified in paragraph (2) shall be punished as a general court-martial may direct, such punishment must include, at a minimum, dismissal or dishonorable discharge, except provided for in . . . article 60. (2) Paragraph (1) applies to the following offenses:

(A) An offense in violation of subsection (a) or (b) of section 920 of this title (article 120(a) or (b)).

(B) Rape and sexual assault of a child under subsection (a) or (b) of section 920b of this title (article 120b).

(C) Forcible sodomy under section 925 of this title (article 125).

(D) An attempt to commit an offense specified in subparagraph (A), (B), or (C) that is punishable under section 880 of this title (article 80).

*Id.*

<sup>50</sup> The requirements of mandatory dishonorable discharge or dismissal are not minimum sentences, but rather an imposition of the maximum discharge allowable. There are no higher degrees of discharge from the military.

<sup>51</sup> *Id.* § 1702(4)(c).

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

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<sup>54</sup> *Id.* §1702(b)(2)(C).

<sup>55</sup> There is currently a debate over whether a convening authority could take action to reduce confinement in cases were a punitive discharge was adjudged but confinement did not exceed six months. The plain language of the statute seems to allow for such action.

<sup>56</sup> *Id.* § 1702(b)(4)(A).

### Example 3—Pretrial Agreement

Same facts as Example 1, but this time Private Jones entered into a pretrial agreement in which he promised to plead guilty to both charges in exchange for the convening authority commuting an adjudged dishonorable discharge to a bad-conduct discharge and disapproving confinement in excess of six months. Based on the pretrial agreement, the convening authority can commute the adjudged dishonorable discharge to a bad-conduct discharge and disapprove confinement in excess of six months.<sup>57</sup> As in the previous example, the convening authority can act on the forfeitures without limitation.

### Example 4—Accused Assisting the Government With Other Cases

The same facts as Example 2, but trial counsel recommended clemency to the convening authority based on “substantial assistance by the accused in the investigation”<sup>58</sup> of Private Stealsalot in a barracks larceny case. Since Private Jones substantially assisted the government in another case and because trial counsel recommended clemency, the convening authority can disapprove, commute, or suspend the adjudged sentence in whole or in part, even with respect to an offense for which a mandatory minimum sentence exists. Thus, in this example, the convening authority has the discretion to disapprove the entire sentence, but must still provide a written explanation as to the rationale.

Now that the new limitation imposed by Article 60 on the powers of convening authorities to act on finding and sentence have been addressed, we turn to the requirement of written explanations of the decision to grant clemency.

#### B. Written Explanations by Convening Authorities

As mentioned above, when the convening authority elects to grant clemency, the new Article 60 requires a written explanation be included in the record of trial as to why the decision was made in most cases. Any time a convening authority elects to dismiss a charge or specification by setting aside a finding of guilty or changing a finding of guilty to a lesser included offense, he must explain in writing “the reasons for such action.”<sup>59</sup> Also,

when a convening authority elects to grant clemency in the form of a reduction to the adjudged sentence, a written explanation is required, except with regard to qualifying offenses.<sup>60</sup> Now that convening authorities must explain their decisions to grant clemency, the question remains how best to meet this requirement.

The best practice is to have the military justice shop draft model language for the convening authority. This language should be as simple and straight-forward as possible. For example, “the convening authority has considered the Staff Judge Advocate’s Recommendation (SJAR), the Report of Result of Trial (RROT), the matters submitted by the accused pursuant to Rule for Courts-Martial (RCM) 1105 and 1106, and the submissions of the victims in this case, and grants clemency based on the following reasons.” A menu of options should be outlined for the convening authority to choose from, or more likely, for the chief of military justice to choose from. The menu should include, “extenuation and mitigation,” “substantial assistance by the accused in the investigation or prosecution of another person who has committed an offense,” or “in accordance with a pre-trial agreement.” This standardized approach eliminates multiple trips to the convening authority to memorialize his intent and avoids potential legal error arising from inartful wording by the convening authority.

Now that the language is clear, the question remains concerning where to include the clemency explanation in the Record of Trial. The simplest method is to add the language to the action document. This approach eliminates the convening authority signing multiple documents and reduces the risk of missing a signature during a given meeting. Alternatively, a separate document could be drafted with greater detail of the rationale for the grant of clemency or multiple options for the convening authority to choose from. Although this approach may provide greater insight as to why the decision is made by the convening authority, it may expose the convening authority to greater criticism and potentially create grounds for challenge on appeal.<sup>61</sup> Since the new requirement for written explanations of decisions to grant clemency has been explored, the new requirement for victim input in the post-trial process will be addressed.

<sup>57</sup> *Id.* § 1702(b)(4)(C)(i).

<sup>58</sup> *Id.* § 1702(b)(4)(B).

<sup>59</sup> *Id.* § 1702(b)(3)(C). However, based on the plain text of the statute, there is an argument that no written explanation is required. Subsection (b)(3)(B) prohibits the dismissal of charges except for qualifying offenses, while subsection (b)(3)(C) requires a written explanation when dismissing charges, but excludes qualifying offenses from the requirement. This author believes the principles of statutory construction provide that the statute should be read to give meaning to the statute. Thus, striking the

exclusion of qualifying offenses from the written explanation requirement is most logical. Without such action, the written requirement would have no meaning.

<sup>60</sup> *Id.* § 1702(b)(2)(C).

<sup>61</sup> Examples of potential legal error arising from the convening authority’s explanation include: not considering items required by Rule for Courts-Martial 1107; considering items adverse to the accused that have not been served on the accused; and using language indicating an inelastic disposition or undue command influence. MCM, *supra* note 23, R.C.M. 1107(b)(3).

### C. Victim Input in the Post-Trial Process

Under the new NDAA, “the victim shall be provided an opportunity to submit matters for consideration by the convening authority” during the clemency phase of the court-martial process.<sup>62</sup> The timeline for the victim’s post-trial submission is the same as an accused’s timeline for submitting RCM 1105/1106 matters—ten days from service of the authenticated record of trial and the SJAR, with a possible twenty-day extension based on good cause.<sup>63</sup> A victim is defined as “a person who has suffered a direct physical, emotional, or pecuniary loss as a result of a commission of an offense.”<sup>64</sup> Clearly, this definition is extremely broad and does not require that the victim be named in a specification.<sup>65</sup>

A victim can waive the right to make a submission, but must do so in writing.<sup>66</sup> As a matter of practice, waiver could become the norm, since in the majority of cases the convening authority has no significant powers to grant clemency regarding dismissal of charges, reduction of the period of confinement, or disapproval of punitive discharges. As outlined above, unless the sentence does not include a discharge or confinement in excess of six months or involve a pretrial agreement or cooperation with the government in other cases, the convening authority can only grant clemency regarding reduction or forfeitures. If this reality is properly explained to victims, then many victims will likely not care to participate in the clemency process.

Who will explain the process to victims will vary depending on the type of case. In sexual assault cases, the Special Victim Counsel (SVC) will play a vital role in both assisting the victim with submissions and explaining the process, including waiver. However, trial counsel will need to address victims falling outside the scope of the SVC program. Both Special Victim Counsel and trial counsel need to fully understand the post-trial process and be able to flawlessly explain it to their clients for waiver to be used to the greatest extent possible.

Although victims can now play a role in the post-trial clemency process, the convening authority cannot consider “submitted matters that relate to the character of the victim unless such matters were presented as evidence at trial and

not excluded at trial.”<sup>67</sup> Given this new limitation on what can be considered by the convening authority during the clemency phase, staff judge advocates (SJAs) and chiefs of justice must read victim and defense submissions carefully to ensure character evidence regarding the victim not admitted at trial do not go before the convening authority. This can be done by redacting submissions or notifying the defense or a victim that a submission does not comply with the new law, giving defense or a victim an opportunity to bring the submission into compliance. The latter would be the preferred method, since a mistake of over-redaction could create a legal error. Also, if defense discovered evidence related to a victim’s character after the conclusion of the trial, but prior to convening authority action, the defense counsel would need to request a post-trial Article 39, UCMJ, session before the military judge.

The provisions requiring an opportunity for victim participation in the post-trial process and the limitation on submissions related to the victim’s character not admitted at trial became effective 24 June 2014.

### D. Implementation of New Provisions

Now that the changes to Article 60 have been outlined, implementation in practice must be addressed. All other changes previously addressed went into effect on 24 June 2014, and apply to offenses committed on or after that date.<sup>68</sup> Although on its face the application seems straightforward, a few examples listed below explore the nuance of implementation in the field.

#### Example 1—Old Offense

Sergeant Smith commits an offense under the UCMJ on 1 May 2014, is convicted by a general court-martial, and the convening authority is set to take action on 1 September 2014. In this case, the SJAR should be based on the old Article 60 because the offense at issue occurred before the effective date of the new Article 60. Thus, the convening authority has nearly unfettered power to grant clemency.

#### Example 2—New Offense

Sergeant Smith commits an offense under the UCMJ on 1 July 2014, is convicted by a general court-martial, and the convening authority is due to take action on 1 September 2014. The SJAR should be based on the new Article 60 and the convening authority is subject to all the new restrictions as to his clemency powers.

<sup>62</sup> 2014 NDAA, *supra* note 36, § 1706.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> The new NDAA section 1706 requires that the authenticated record of trial be served on victims in accordance with Article 54(e), UCMJ, which requires service on Article 120 victims that testify at trial. The new NDAA has an internal inconsistency. Given the congressional intent to expend victim involvement in the post-trial process, the statute should be read to strike the superfluous reference to Article 54(e).

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* § 1702(d)(2).

### Example 3—An Old and a New Offense

Sergeant Smith commits an offense on 1 May 2014, and a second offense on 1 July 2014, is convicted of both offenses by a general court-martial on 1 August 2014, and the convening authority is due to take action on 1 October 2014. The SJA advice to the convening authority is complicated in this scenario. Regarding the findings related to the offenses, the advice is fairly basic: the findings related to the offense committed on 1 May 2014 can be set aside by the convening authority based on the clemency powers under the old Article 60, UCMJ. However, the findings related to the offense committed on 1 July 2014 may not be dismissed, unless the offense is a qualifying offense based on the new Article 60, UCMJ.

Regarding the action on the sentence, alternative arguments exist as to which version of Article 60 apply. First, since Congress made the mandatory minimum sentence provisions effective 180 days from enactment (24 June 2014) on the date of the trial if an offense was an Article 120a offense, and since it occurred after 24 June 2014, the mandatory minimum sentence would be applicable. It is not logical for Congress to require a mandatory minimum sentence and then allow convening authorities to act to circumvent the requirement by allowing the old Article 60 to control.

Conversely, there is persuasive argument that adopting this view would allow the government to simply add a minor offense that occurred after 24 June 2014 to receive the benefit of the new restrictive Article 60 during the post-trial clemency phase with regard to sentence. This seems inherently unfair. If faced with the situation where offenses occurred before and after 24 June 2014, the SJA advice must make clear the differing clemency constructs that exist for each offense. In circumstances where the convening authority wishes to grant sentencing clemency prohibited by the new Article 60, the action must make clear that the grant of sentencing clemency is related to the offense occurring prior to 24 June 2014. This is a technical and tedious task in twilight Article 60 cases, but it is necessary.

With many changes to post-trial on the horizon, it is important to consider how actions throughout the court-martial process will affect a convening authority's ability to act at the conclusion of the process. Below are a few areas to contemplate during the court-martial process with an eye toward action.

#### IV. Considerations Resulting from Changes

Under the new Article 60, the charging and referral decisions in a given case set the table for what the post-trial clemency process will look like. If non-qualifying offenses are charged, then clemency will be limited; however, if non-qualifying offenses are charged, but referred to a special court-martial, those charges arguably will become qualifying

offenses, depending on the sentence adjudged. Having clemency options is not only important to the defense, but in cases where the convening authority may want to grant clemency, the choice made in charging and referral may frustrate the convening authority's intent.

Second, the practice of giving sentencing relief post-trial to account for minor legal errors in most cases will be eliminated. For example, giving an accused minor sentencing relief in situations of unreasonable delay in post-trial processing cannot happen in cases in which the adjudged sentence includes confinement greater than six months or a punitive discharge. As a result, the service courts will be required to act on more cases at the appellate level that once were remedied in the field. The accused's "best chance for post-trial [*sic*] clemency,"<sup>69</sup> will now rest with the appellate courts.

Given the new requirement allowing victims an opportunity to submit matters during the post-trial process, it is incumbent upon the government to properly explain the new clemency framework to victims and determine whether waiver is an option. Under the new system, the post-trial process will take more time and create more room for claims of unreasonable post-trial delay. Under the new system, matters submitted by victims will likely contain "new matter" requiring service on defense with ten days for defense to comment.<sup>70</sup> These additional ten days, coupled with any delay in receiving victim submissions or any delay caused by addressing impermissible submission by defense or by victims "related to the character of a victim,"<sup>71</sup> will likely increase post-trial processing times. However, understanding and explaining to victims what the convening authority's clemency powers entail in a given case and what cannot be included in a submission will likely generate waiver of submissions by victims. Such a forward-looking approach will unencumber the post-trial process.

Lastly, sentencing arguments and, specifically, requesting sentences that will avoid qualifying offenses are increasingly important under the new Article 60 framework. Trial counsel must understand the importance of requesting and obtaining adjudged sentences that include a punitive discharge or greater than six months confinement.<sup>72</sup> The mere act of requesting a sentence that will create a qualifying offense will generate substantially greater work for the government in the post-trial processing context. Gone are the days when sentencing arguments made by trial counsel at trial are generally meaningless in the post-trial

<sup>69</sup> *United States v. Wheelus*, 49 M.J. 283, 287 (C.A.A.F. 1998); *see United States v. Wilson*, 26 C.M.R. 3, 6 (C.M.A. 1958).

<sup>70</sup> MCM, *supra* note 23, R.C.M. 1106(f)(7).

<sup>71</sup> 2014 NDAA, *supra* note 36, § 1706.

<sup>72</sup> *Id.* § 1702.

processing environment. Trial counsel must be trained on this new reality.

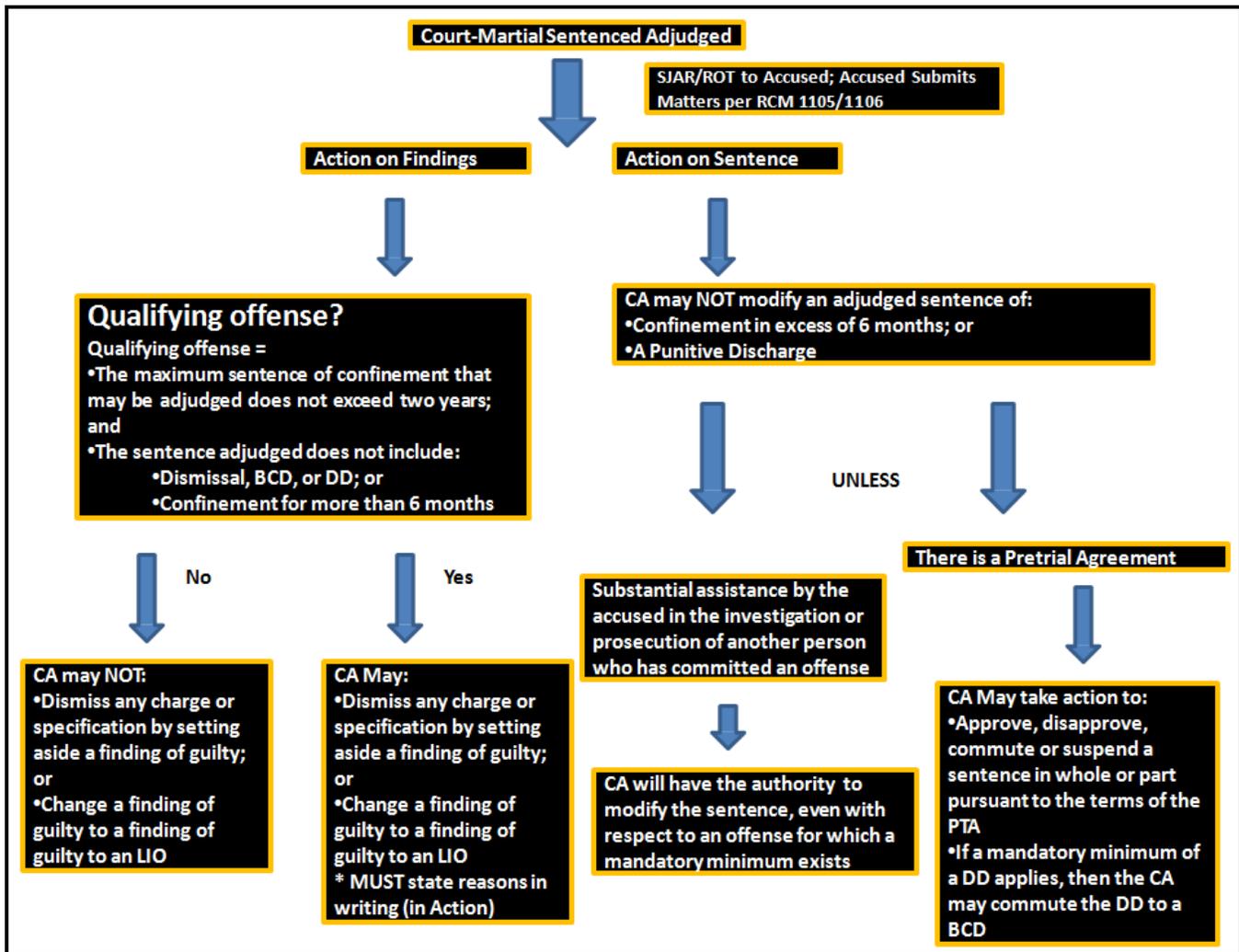
## V. Conclusion

Under the new Article 60, convening authorities will no longer be able to dismiss or reduce findings to lesser included offenses or reduce adjudged sentences, except for qualifying offenses, unless a pre-trial agreement has been entered into or the accused has assisted the government in other cases. Furthermore, convening authorities must explain decisions to grant clemency on findings and sentence in all cases except for qualifying offenses. In addition, convening authorities may not be presented with

post-trial submissions that include information about a victim's character, unless that information was accepted into evidence at trial. Lastly, victims now have a right to submit matters during the post-trial process, unless they waive such right. These changes will fundamentally change post-trial processes and severely curtail the chances for an accused to receive clemency. How these changes are implemented by military justice practitioners in the field will determine the future of the military justice system and level of congressional meddling going forward. Will the UCMJ go the way of the Roman Empire as Cicero might predict? Will a future Supreme Allied Commander be hamstrung from ensuring good order and discipline as General Eisenhower feared? These questions hinge on the implementation of the new Article 60, UCMJ.

Appendix A

New Article 60 Chart<sup>73</sup>



<sup>73</sup> WAKEFIELD, *supra* note 43.

## Appendix B

### National Defense Authorization Act for Fiscal Year 2014

#### SEC. 1702. REVISION OF ARTICLE 32 AND ARTICLE 60, UNIFORM CODE OF MILITARY JUSTICE.

##### (b) ELIMINATION OF UNLIMITED COMMAND PREROGATIVE AND DISCRETION; IMPOSITION OF ADDITIONAL

LIMITATIONS.—Subsection (c) of section 860 of title 10, United States Code (article 60 of the Uniform Code of Military Justice), is amended to read as follows:

(c)(1) Under regulations of the Secretary concerned, a commissioned officer commanding for the time being, a successor in command, or any person exercising general court-martial jurisdiction may act under this section in place of the convening authority.

(2)(A) Action on the sentence of a court-martial shall be taken by the convening authority or by another person authorized to act under this section. Subject to regulations of the Secretary concerned, such action may be taken only after consideration of any matters submitted by the accused under subsection (b) or after the time for submitting such matters expires, whichever is earlier.

(B) Except as provided in paragraph (4), the convening authority or another person authorized to act under this section may approve, disapprove, commute, or suspend the sentence of the court-martial in whole or in part.

(C) If the convening authority or another person authorized to act under this section acts to disapprove, commute, or suspend, in whole or in part, the sentence of the court-martial for an offense (other than a qualifying offense), the convening authority or other person shall provide, at that same time, a written explanation of the reasons for such action. The written explanation shall be made a part of the record of the trial and action thereon.

(3)(A) Action on the findings of a court-martial by the convening authority or by another person authorized to act under this section is not required.

(B) If the convening authority or another person authorized to act under this section acts on the findings of a court-martial, the convening authority or other person—

(i) may not dismiss any charge or specification, other than a charge or specification for a qualifying offense, by setting aside a finding of guilty thereto; or

(ii) may not change a finding of guilty to a charge or specification, other than a charge or specification for a qualifying offense, to a finding of guilty to an offense that is a lesser included offense of the offense stated in the charge or specification.

(C) If the convening authority or another person authorized to act under this section acts on the findings to dismiss or change any charge or specification for an offense (other than a qualifying offense), the convening authority or other person shall provide, at that same time, a written explanation of the reasons for such action. The written explanation shall be made a part of the record of the trial and action thereon.

(D)(i) In this subsection, the term ‘qualifying offense’ means, except in the case of an offense excluded pursuant to clause (ii), an offense under this chapter for which—

(I) the maximum sentence of confinement that may be adjudged does not exceed two years; and

(II) the sentence adjudged does not include dismissal, a dishonorable or bad-conduct discharge, or confinement for more than six months.

(ii) Such term does not include any of the following:

(I) An offense under subsection (a) or (b) of section 920 of this title (article 120).

(II) An offense under section 920b or 925 of this title (articles 120b and 125).

(III) Such other offenses as the Secretary of Defense may specify by regulation.

(4)(A) Except as provided in subparagraph (B) or (C), the convening authority or another person authorized to act under this section may not disapprove, commute, or suspend in whole or in part an adjudged sentence of confinement for more than six months or a sentence of dismissal, dishonorable discharge, or bad conduct discharge.

(B) Upon the recommendation of the trial counsel, in recognition of the substantial assistance by the accused in the investigation or prosecution of another person who has committed an offense, the convening authority or another person authorized to act under this section shall have the authority to disapprove, commute, or suspend the adjudged sentence in whole or in part, even with respect to an offense for which a mandatory minimum sentence exists.

(C) If a pre-trial agreement has been entered into by the convening authority and the accused, as authorized by Rule for Courts-Martial 705, the convening authority or another person authorized to act under this section shall have the authority to approve, disapprove, commute, or suspend a sentence in whole or in part pursuant to the terms of the pre-trial agreement, subject to the following limitations for convictions of offenses that involve a mandatory minimum sentence:

(i) If a mandatory minimum sentence of a dishonorable discharge applies to an offense for which the accused has been convicted, the convening authority or another person authorized to act under this section may commute the dishonorable discharge to a bad conduct discharge pursuant to the terms of the pre-trial agreement.

(ii) Except as provided in clause (i), if a mandatory minimum sentence applies to an offense for which the accused has been convicted, the convening authority or another person authorized to act under this section may not disapprove, otherwise commute, or suspend the mandatory minimum sentence in whole or in part, unless authorized to do so under subparagraph (B).