by Mark R. Strickland, Lt. Colonel, USAF (Ret.)

Rush to Justice: Amending Article 60 of the Uniform Code of Military Justice

There is a saying among American lawyers: Bad cases make bad law. Congress's rush to amend Article 60 (10 U.S.C. 860) of the Uniform Code of Military Justice (UCMJ) falls within this category.

Article 60 grants broad authority to an officer who convenes a court-martial (the court-martial convening authority) to approve, modify or set aside the findings and sentence of any court-martial that he or she convenes. Convening authorities essentially create the court-martial by appointing the members of the court-martial panel (the military jury) and referring the charges the court is to adjudicate. The convening authority's staff judge advocate (legal advisor) appoints the trial government counsel (prosecutor) while separate independent authorities appoint the military judge and the defense counsel. (The accused may also hire private civilian counsel at his or her own expense.) The authority to review and modify findings and sentences extends to commanders who assume command of a unit in which a court-martial is in progress, and which the new commander would have had the authority to convene. After reviewing the results of the trial, the convening authority has the authority to grant clemency to a convicted service member. The convening authority may make things better for the accused, but may not make things worse.

According to reports in the newspaper *Stars and Stripes* published between August 2012 and July 2013, a general court-martial convicted Lieutenant Colonel James H. Wilkerson III, the Inspector General of the 31st Fighter Wing at Aviano Air Base, Italy, of violating UCMJ Articles 120 (aggravated sexual assault and abusive sexual contact) and Article 133 (conduct unbecoming an officer and gentleman). The court-martial, consisting of four colonels and one lieutenant colonel, sentenced Colonel Wilkerson to confinement for one year and dismissal from the Air Force. On Feb. 25, 2013, after reviewing the results of the court-martial, the convening authority, Lt. General Craig A. Franklin, commander of Third Air Force, used his authority under Article 60 to set aside the findings of guilty (and, consequently, the sentence).[1]

In a memorandum to the secretary of the Air Force, Gen. Franklin stated that he reasonably doubted Col. Wilkerson's guilt.[2] The memorandum sets forth the general's reasons for harboring such doubt. The details of the underlying case notwithstanding, General Franklin's decision brought military law squarely into the national spotlight.

Since Gen. George Washington appointed the first judge advocate general, convening authorities have had practically unfettered authority to review the results of courts-martial and to grant clemency as they see fit. Military law does not provide any procedure for review of clemency decisions. At least as early as 1806, Article 65 of the Articles of War for the government of the Armies of the United States (approved by Congress) dictated: "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."

As our nation evolved, so did military law. In 1950, Congress established the Uniform Code of Military Justice, bringing all of the military services under one legal regime. The 1951 Manual for Courts-Martial (MCM) replaced Article of War 65 with Article 60 of the UCMJ. 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." Article 60 remained unchanged in the 1969 MCM, which set forth significant changes to military law to safeguard the constitutional rights of American servicemembers.

In 1983, Congress considered further changes to the UCMJ. The approved changes were included in the 1984 MCM (the manual issued to the author when he reported to the Air Force Judge Advocate General's School in 1991). Congress amended Article 60 to provide more detail regarding the procedures for requesting and granting clemency. Article 60(b) provided that "the accused may submit to the convening authority matters for consideration by the

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convening authority with respect to the findings and the sentence," and set forth time limits for doing so. Article 60(d) required the convening authority to seek advice from his or her staff judge advocate, and Article 60(e) granted the convening authority power to order a rehearing.

Article 60(c) required the convening authority to consider matters submitted by the convicted service member before acting on the findings and sentence, but it also reiterated what had been true throughout the military legal history of the United States: "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." This clemency power or set aside findings of guilty.

The sponsors of these bills are understandably concerned about sexual misconduct in the military and potential abuse of convening authority clemency power. As justifiable as these concerns are, both of these proposed bills appear to be reactions to one questionable posttrial decision, rather than fully considered modifications to military law. Ironically, most individuals who criticize military justice are concerned that the accused lacks adequate protection from errant commanders; in this case, critics fear too much protection. It does not necessarily follow, however, that destroying clemency for service members will automatically make victims safer.

Many disagree with the general's clemency decision and want

(and its accompanying procedures) remains the same despite subsequent changes to the MCM over the years, including the most recent 2012 manual.

There are (at least) two bills pending before Congress that would significantly change Article 60, one in the House of Representatives and the other in the Senate. H.R. 1079[3] eliminates the convening authority's clemency power, completely rescinding his or her authority to change the findings or the sentence. Ironically, it retains provisions allowing the convicted service member to submit written matters to the convening authority for inclusion in the record of trial, the original purpose of which was to support a plea for clemency. While the House bill represents the nuclear option, Senate bill S. 538[4] takes a more nuanced approach. It allows the convening authority to set aside the sentence of a court-martial, and requires the convening authority to provide written justification for doing so (said justification becomes part of the record of trial). It eliminates, however, the convening authority's authority to modify to prevent senior military leaders from protecting their own from charges of sexual assault. Some believe such changes are necessary to modernize military justice and to protect victims of military sex offenders. Even assuming General Franklin's decision is totally without justification or merit, such changes are unnecessary in the first instance and ineffective in the second.

There is nothing wrong with modernization. Over the last 237 years, military law itself has certainly changed, but certain aspects of military service have not. Military men and women still fight, kill and die for their country. Military commanders still lead them in this effort. Military life and service are still different enough to justify a separate legal system. The flag draped coffin means the same thing it meant over two hundred years ago. Given this reality, if the Founding Fathers thought it was a good idea for convening authorities to have unfettered clemency powers, why is it a bad idea now? Other than technological changes, modern warfare and military service have not changed that much.

The reason the debate over the Wilkerson case looms large in the media isn't merely because a convening authority made a decision with which others disagree. It's ultimately because of the nature of the crime. Presumably, those who advocate changes to (or elimination of) a convening authority's clemency power want to protect victims of sexual offenses, and ensure offenders are punished. This is a worthwhile goal, but doing away with Article 60 clemency authority won't achieve it. Achieving this goal may require fundamental changes in military culture and mindset, and perhaps further improvements in victim protection and assistance. Eliminating clemency, however, will not prevent a single sexual assault, and will not guarantee that a guilty party will get what he deserves. Eliminating clemency will merely do away with a major procedural safeguard that has been an integral part of American military law since its inception.

If Congress feels the need to protect victims of crimes, let them take the necessary steps to do so. If there must be change to clemency, a slight change to the Senate bill may be in order. In short, convening authorities should keep their present clemency authority, but Congress may require them to provide written justification for the record.

Furthermore, doing away with clemency affects not only male officers charged with sexual assault; it also adversely affects young, male and female enlisted personnel as well. Suppose Gen. Franklin convened a court-martial to try an airman accused of barracks theft. Suppose, after conviction, the general decided that the evidence did not support the findings of guilt, and he wiped the airman's slate clean. It is unlikely that decision would get much attention. In fact, some critics of military justice might even grudgingly admit that the system worked to protect and innocent airman.

Suppose a female airman goes to war, finds herself in combat fighting for her life and the lives of her comrades. In battle, she and commits acts that, on their face, violate the laws of war; a court-martial convicts her based upon the evidence. Maybe she's a war criminal who got what she deserved, or maybe she's guilty of a technical violation and had the misfortune of facing an unsympathetic court. Either way, does the United States want to send other people's daughters in harms way, into the utter nightmare of combat, with no hope of redemption? Clemency, under such circumstances, whether partial or complete, may not be merely feasible; it may be the only route to actual justice.

Most clemency decisions do not wipe the slate clean. Usually, convening authorities make minor or moderate changes to the sentence (rarely to the findings). They may reduce a period of confinement or allow the convicted service member to keep a few more stripes. Often, convening authorities reduce monetary punishments to mitigate the adverse financial impact upon the families of those convicted at trial. Fundamentally, clemency is not merely a vehicle to set sex-offending officers free; it is a way to effect actual justice.

Court-martial convening authorities have no counterparts in civilian law. No one but a military commander (or the President or secretary of defense) may create a federal criminal court, review it's result, and dissolve the court when it has finished its business. This is the system which the Founding Fathers ratified, that Congress codified, and that the Supreme Court certified over the course of our history.

If Congress feels the need to protect victims of crimes, let them take the necessary steps to do so. If there must be change to clemency, a slight change to the Senate bill may be in order. In short, convening authorities should keep their present clemency authority, but Congress may require them to provide written justification for the record. This provides accountability for all such decisions and allows those with purview over military law to monitor such decisions, detect trends, and make informed changes to military law in the future, if necessary.

In any event, our congressional leaders need to be more considerate of the judicial protections afforded to those who defend the United States. They must trust those whom the President appoints (and the Senate confirms) to administer and enforce the law. Granted, it is rarely a good idea to continue a practice or procedure merely because "we've always done it that way." We must consider, however, the historical reasons and rationales for longstanding legal protections before eliminating them. Article 60 of the UCMJ codifies a fundamental concept of military law: That the officer who convenes the court-martial may review its results and grant clemency as he or she sees fit. This is good law, and bad cases should not turn good law into bad law. ⊙

Endnotes

[1]*See*, generally, Nancy Montgomery, *Hagel Orders Review of UCMJ After Wilkerson Sex Assault Case* (visited Aprilo 12, 2013) www.stripes.com/news/hagel-orders-review-of-ucmj-after-wilkerson-sex-assault-case-1.211333.

[2]Memorandum of Lt. Gen. Craig A. Franklin to Hon. Michael B. Donley, March 12, 2013 www.scribd.com/doc/135203535/Air-Force-General-explains-why-he-overturned-the-decision-in-sexual-assault-case.

[3]H. R. 1079, 113th Cong. (2013).

[4]S. 538, 113th Cong. (2013).