Hon. Howard P. McKeon
Chairman, Armed Services Committee
U.S. House of Representatives
2120 Rayburn House Office Bldg.
Washington, DC 20515

May 15, 2013

Dear Chairman McKeon:

I write to express my concern over the apparent rush to eliminate or limit the power of the Convening Authority to disapprove the findings or sentence of a court-martial that he convened. In the media uproar over LTG Franklin's disapproval of the findings in the courts-martial of LTC Wilkerson in Aviano, Italy, I fear we are about to jettison a component of the military justice system that serves both the need to insure good order and discipline within the command and provide the accused with a prompt and meaningful right of appellate review.

I served 22 years on active duty in the U.S. Army. Commissioned in the Infantry from ROTC, I was later selected to attend law school under the Funded Legal Education Program. Upon completion of law school I was appointed to the Judge Advocate General's Corps and served the rest of my career as an Army Judge Advocate. Thus, I have seen and worked in the military justice system as both a line officer and a lawyer.

The Uniform Code of Military Justice is both a mechanism to punish criminal behavior and, importantly, a mechanism to promote and preserve good order and discipline within the command. The role of the Convening Authority is pivotal to both functions. As the senior commander, the Convening Authority is responsible for everything the unit does or fails to do. The commander is responsible for the battle plans to defeat the enemy. The commander is responsible for the care and feeding of the troops. The commander is responsible for training. The commander is responsible for the morale and discipline of the force. From medical care to ammunition to meals at forward operating bases, the commander's responsibility is pervasive. While medical doctors deliver medical services and lawyers deliver legal services, they do so to assist the commander in fulfilling the awesome responsibility of equipping, training, and employing the subordinate units to protect our national security and, when necessary, find, fix, and destroy the enemy. Recognizing the scope, uniqueness, and seriousness of the commander's responsibilities, the UCMJ vests the Convening Authority with the power not only to call a court-martial into being, but to review its results.

Courts-martials are not standing courts like those we find in our state and federal systems. They are convened on a case-by-case basis by the Convening Authority. While military lawyers prosecute those charged with criminal offenses, and all persons subject to the UCMJ have the ability to prefer charges, it is the chain-of-command, from the immediate commander to the convening authority, who ultimately decides the disposition of those charges. In civilian society, this "prosecutorial discretion" is a function performed by executive branch officials such as United States Attorneys; in the military it is a prerogative of command. The military prosecutor does not have the discretion to dismiss a case or

approve a plea bargain like a civilian district attorney because the commander, not the lawyer, is responsible for good order and discipline within the command. While a military judge presides over a court-martial, the military judge does not possess the power of civilian judges to set aside a finding of guilty that is not supported by the law or facts. Nor does the military judge have the power to suspend a sentence to confinement pending appellate review. Under the UCMJ, these powers are reserved to the Convening Authority, for it is the Convening Authority, not the military judge, who is responsible for maintaining good order and discipline within the command. This is a command function carried out by commanders, not a purely legal function delegated to lawyers.

The important role of the Convening Authority in both the administration of justice and the maintenance of good order and discipline has been a part of our military law since before adoption of the Constitution. The unique and specialized nature of the Armed Forces requires a different and specialized system of military justice. Articles 60-64 of the UCMJ define the role and responsibility in post-trial reviews that Convening Authorities since George Washington have exercised in order to do justice and maintain good order and discipline in their units. We must not diminish or eliminate those roles and responsibilities without good cause, serious consideration, and careful deliberation.

For those without an informed understanding of the military justice system, the decision of LTG Franklin to disapprove the findings of LTC Wilkerson's court-martial seems bizarre and unusual. To the uninitiated, it is unheard of for one who is not a "judge" to "overrule" the findings of a "court." Of course, the fact that the underlying charge was a sexual assault contributes to the emotional and political interest. But this was not the typical court in a civilian justice system. It was a court-martial convened and conducted under the unique and specialized rules that are necessary to govern a unique and specialized society. In reviewing the findings of LTC Wilkerson's courts-martial, LTG Franklin discharged the same duties and responsibilities his predecessors have done since the Continental Army was first formed. If his superior in the chain of command is not satisfied with his ability to discharge the grave responsibilities of a Convening Authority the remedy is to remove his authority to convene a court-martial, not reshape the military justice system. LTG Franklin's superior has that authority today and needs no additional legislative power to take that action.

The calls for radical change to a long-standing and fundamental aspect of our military justice system require you and your colleagues to consider several very important questions: Are today's senior officers so lacking in judgment, experience, intelligence, integrity, and common sense that we must strip all of them of authority that has served our nation well since before its inception? Are we promoting officers to positions of senior leadership who do not have the temperament and sound judgment necessary to appropriately exercise discretion in these matters? Have the Judge Advocate Generals failed to provide adequate training to senior officers so they can faithfully and fairly discharge their duties as Convening Authorities? Is justice better served and discipline within the command better preserved by placing the initial appellate review of a conviction in the hands of three lawyers sitting as a Court of Criminal Appeals in Washington, DC, who do not have the benefit of timely input from the trial defense counsel and who are not responsible for good order and discipline within the command? Are we so distrustful of the temperament, judgment and discretion of senior commanders that we are willing to strip them of authority in certain categories of case and turn those cases over to lawyers who have no command

authority or responsibility? If the answer to these questions is "yes," then the problem is far more serious that any alteration of the UCMJ will correct. But if the answer is "no," then we must step back and resist the temptation to throw the baby out with the bath water over the result in one case.

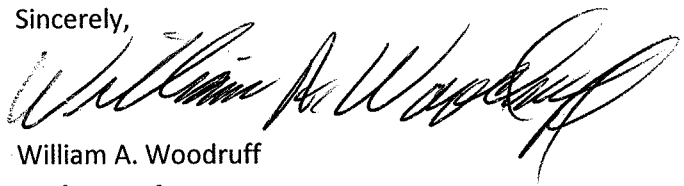
Some may suggest that the existence of the intermediate military appellate courts diminishes the need for the Convening Authority to exercise a significant role in the appellate process. That view overlooks the fact that a sentence of a court-martial takes effect immediately; there is no bail pending appellate review. The Convening Authority is in the best position to correct any errors or injustice in a timely fashion and prevent the accused from enduring the sentence imposed while waiting for the appellate courts to take up the matter in due course.

Others may argue that the power of the Convening Authority to judge the credibility of witnesses without having seen them testify and to determine for himself whether the findings and sentence are appropriate is unheard of. That argument is true as far as civilian criminal justice systems go. But we are not dealing with the civilian criminal justice system. The first tier in the military appellate courts, the Service Courts of Criminal Appeals, has the same power. Unlike civilian appellate courts, the Courts of Criminal Appeals "may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact. . . ." Art.66(c), UCMJ. Thus, the power of the Convening Authority is not strange, unusual, nor unheard of in the military justice system. It is just another check to help insure a fair trial. The fact that Convening Authorities rarely disapprove the findings of court-martials demonstrates that the power is applied intelligently and judiciously with due consideration for the rights of the accused and the need for good order and discipline within the command.

Thank you for taking the time to read and consider my concerns. The political climate being what it is, you and other members of the Committee may think that you have no other choice but to go along with the strident calls for change and "do something." I suggest that the controversial decision of one Convening Authority in one case is hardly justification for eliminating a fundamental aspect of military law that has been employed by countless commanders for well over 200 years. While the issue of sexual assault in the military is an issue that must be addressed, I urge you to explore the cause of that problem and address it at that level. Making fundamental changes to the military justice system because of the result in one or two cases is not the deliberate, thorough, and careful consideration the issue of sexual assault requires. I urge you and your colleagues to resist attempts to limit or eliminate the Convening Authority's critical role in the administration of military justice.

Thank you, again, for considering my thoughts.

Sincerely,



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