IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES	)	
Appellee	)	**BRIEF ON BEHALF OF**
v.	)	**APPELLANT**
	)	
Sergeant (E-5)	)	USCA Dkt. No. 17-0559/AR
ERIC F. KELLY	)	Crim. App. Dkt. No. 20150725
United States Army,	)	
Appellant	)	

TO THE HONORABLE, THE JUDGES OF THE
UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

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ISSUE PRESENTED

WHETHER A COURT OF CRIMINAL APPEALS HAS THE AUTHORITY TO DISAPPROVE A MANDATORY MINIMUM PUNITIVE DISCHARGE.

STATEMENT OF STATUTORY JURISDICTION

The Army Court of Criminal Appeals reviewed this case pursuant to Article 66, UCMJ. *United States v. Kelly*, 76 M.J. 793 (A. Ct. Crim. App. Jul. 5, 2017) (*en banc*). Appellant filed a timely petition for review with this Court, and this Court granted review. Accordingly, this Court has jurisdiction under Article 67(a)(3), UCMJ.

STATEMENT OF THE CASE

On November 6, 2015, Appellant was convicted contrary to his pleas, by a general court-martial composed of members with enlisted representation, of abusive sexual contact upon a sleeping person in violation of Article 120(d), UCMJ, and of sexual assault by causing bodily harm in violation of Article 120(b)(1)(B), UCMJ. The members sentenced Appellant to confinement for one year, reduction to E-1, total forfeitures, and a dishonorable discharge.

The convening authority approved the sentence as adjudged on March 13, 2016, however he suspended the adjudged forfeitures and waived automatic forfeitures for the benefit of Appellant's dependent spouse and children.

Appellant's case was docketed with the Army Court of Criminal Appeals on March 18, 2016. The court heard oral argument on April 12, 2017.

On July 5, 2017, the Army court issued its decision in Appellant's case, affirming the findings and sentence.

Appellant petitioned this Court for review on August 23, 2017, and this Court granted review on October 12, 2017.

STATEMENT OF FACTS

Congress amended Article 56, UCMJ, effective on June 24, 2014, to include a new paragraph (b) that states:

> (b)(1) While 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 as provided for in section 860 of this title (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).

§ 1705, National Defense Authorization Act for Fiscal Year 2014, 127 Stat. 672, 959 (2013) (hereinafter the 2014 amendment).

Appellant's convictions relate to an encounter on December 13, 2014. (JA at 24). The military judge properly instructed the members that they were required to adjudge a dishonorable discharge as part of the sentence. (JA at 27).

The members adjudged a dishonorable discharge. (JA at 38).

On brief to the Army Court of Criminal Appeals, Appellant asserted that the dishonorable discharge is inappropriately severe considering the circumstances of his case, and Appellant asked that it not be approved. (JA at 43-44).

The Army Government Appellate Division's brief to the Army court conceded that the court "can conduct a sentence appropriateness review even in cases where a mandatory minimum has been established by Congress." (JA at 47).

A three-judge panel of the Army court heard oral argument on April 12, 2017, on four issues, none involving the court's sentence appropriateness power. (JA at 50). The court *sua sponte* considered the case *en banc* after oral argument.

The Army court decided Appellant's case on July 5, 2017, by *en banc*, published decision. Writing for the six-judge majority, Judge Wolfe concluded that the Army court "lack[s] the authority to give [A]ppellant his requested relief." *Kelly*, 76 M.J. at ___ (JA at 20). Judge Wolfe reasoned that when Congress amended Article 56 to require a court-martial adjudge a dishonorable discharge in

Appellant's case, "no exception provided for a sentence reduction as part of our Article 66(c), UCMJ, authority." *Kelly*, 76 M.J. at ___ (JA at 21). Judge Wolfe also found that "when a sentence is mandatory as a matter of law, there is no 'legal standard' that would allow us to set the sentence aside." *Kelly*, 76 M.J. at ___ (JA at 21). Accordingly:

> as we see ourselves as lacking the authority to provide relief, we do not reach the question of whether appellant's sentence "should be approved" in the absence of an applicable mandatory minimum.

Kelly, 76 M.J. at ___ (JA at 21).

Four judges disagreed with this reasoning, with Senior Judge Campanella writing that the majority:

> disregards three things. First, the majority disregards the language of the statute mandating a dishonorable discharge; second, they ignore the purpose behind the change in the statute; and finally they discount the precedents regarding the Article 66, UCMJ, authority of a service court of criminal appeal.

Kelly, 76 M.J. at ___ (JA at 22). Quoting this Court's reasoning that a Court of Criminal Appeals has "an awesome, plenary, *de novo* power of review," and that "a clearer *carte blanche* to do justice would be difficult to express," Senior Judge Campanella found that:

> The majority opinion, likely for the first time ever, finds there is now one area where our "carte blanche" is no longer accepted.

Kelly, 76 M.J. at ___ (JA at 22) (quoting *United States v. Cole*, 31 M.J. 270, 272 (C.A.A.F. 1990); *United States v. Claxton*, 32 M.J. 159, 162 (C.M.A. 1991)) (emphasis omitted). Senior Judge Campanella concluded:

> Congress, however, neither explicitly nor implicitly, restricted our authority under Article 66, UCMJ, to review a mandated sentence of dishonorable discharge for sentence appropriateness and determine whether it "should be approved."

Kelly, 76 M.J. at ___ (JA at 23).

SUMMARY OF ARGUMENT

Article 66(c) imposes both a power and a duty on a Court of Criminal Appeals to determine the appropriateness of the sentence. This power and duty exists in every case, even cases with statutory mandatory minimum punishments.

The plain language of Article 56 is not ambiguous and does not affect the independent power and duty of a Court of Criminal Appeals to determine the appropriateness of the sentence. The Army court's contrary interpretation of Article 56 is erroneous, exaggerates the significance of a technical amendment, and leads to absurd results.

A proper Article 66(c) review is a substantial right. The Army court abstained from conducting that review in Appellant's case. Accordingly, remand is required.

STANDARD OF REVIEW

The scope and meaning of Article 56 and Article 66(c) are matters of statutory interpretation, which is a question of law reviewed *de novo*. *United States v. Schloff*, 74 M.J. 312, 313 (C.A.A.F. 2015), *cert. denied*, 136 S. Ct. 915 (2016).

ARGUMENT

COURTS OF CRIMINAL APPEALS MUST ALWAYS DETERMINE THE APPROPRIATENESS OF THE SENTENCE.

Article 66(c) states:

> In a case referred to it, the Court of Criminal Appeals may act only with respect to the findings and sentence as approved by the convening authority. It may affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record, it may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses.

(emphasis added). The second sentence is substantially identical to the wording first enacted on May 5, 1950, 64 Stat. 107, 128.[1] It will remain substantially identical when the Military Justice Act of 2016, 130 Stat. 2894, 2933, takes effect.

[1] It originally began: "It shall affirm only such findings . . ." *Shall* was changed to *may* when Title 10 was codified by the Act of August 10, 1965, 70A Stat. 1, 59.

This provision "requires that the CCAs conduct a plenary review and that they affirm only such findings of guilty and the sentence or such part or amount of the sentence, as they find correct in law and fact and determine, on the basis of the entire record, should be approved." *United States v. Chin*, 75 M.J. 220, 222 (C.A.A.F. 2016) (marks and citations omitted) (emphasis added).

Congress did not give the Courts of Criminal Appeals unlimited authority to grant sentence appropriateness relief. *See United States v. Gay*, 75 M.J. 264, 269 (C.A.A.F. 2016) (not recognizing unlimited authority). But Congress did give them a "highly discretionary power to determine whether a sentence should be approved." *United States v. Lacy*, 50 M.J. 286, 287 (C.A.A.F. 1999) (emphasis added). This power "has no direct parallel in the federal civilian sector," but rather:

> further[s] the goal of uniformity in sentencing in a system that values individualized punishment by relying on the judges of the Courts of Criminal Appeals to:
>
> "utilize the experience distilled from years of practice in military law to determine whether, in light of the facts surrounding [the] accused's delict, his sentence was appropriate. In short, it was hoped to attain relative uniformity rather than an arithmetically averaged sentence."

Lacy, 50 M.J. at 288 (quoting *United States v. Olinger*, 12 M.J. 458, 461 (C.M.A. 1982) (quoting *United States v. Judd*, 28 C.M.R. 388, 394 (C.M.A. 1960) (Ferguson, J., concurring in the result))) (emphasis omitted) (marks in original).

It is not an uncontroversial power. When Congress passed the UCMJ, "military officials opposed giving the review boards power to alter sentences. The [Congressional] Subcommittee nevertheless decided the boards should have that power." *Jackson v. Taylor*, 353 U.S. 569, 577 (1957) (citing *Hearings before a Subcommittee of the Senate Committee on Armed Services on S. 857 and H. R. 4080*, 81st Cong., 1st Sess., at 262, 285, and 311 (1949) (reprinted in *Index and Legislative History, Uniform Code of Military Justice* (1950))).

Since then the power has been described as "plenary authority to determine anew the appropriateness of the sentence," *United States v. Higbie*, 30 C.M.R. 298, 300 (C.M.A. 1961), as "the judicial function of assuring that justice is done and that the accused gets the punishment he deserves," *United States v. Healy*, 26 M.J. 394, 395 (C.A.A.F. 1988), as a "*carte blanche* to do justice" *United States v. Claxton*, 32 M.J. 159, 162 (C.A.A.F. 1991), and as a "power and duty . . . separate and distinct from [the] power and duty to review a sentence for legality under Article 59(a)," *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002). As for the wielder of the power, the Courts of Criminal Appeals are "something like the proverbial 800-pound gorilla when it comes to their ability to protect an accused." *United States v. Parker*, 36 M.J. 269, 271 (C.A.A.F. 1993).

The proverbial gorilla, however, is made to work. "Considered together, Articles 59(a) and 66(c) bracket the authority of a Court of Criminal Appeals . . .

Article 66(c) is a broader, three-pronged constraint on the court's authority to affirm." *Tardif*, 57 M.J. at 224. A Court of Criminal Appeals may not affirm a sentence unless it finds – after reviewing the entire record – that the sentence is "(1) correct in law, and (2) correct in fact . . . [and (3)] should be approved." *Id*. Furthermore, Article 66(c) is both "power and duty." *Id*. It imposes an affirmative "duty on members of [Courts of Criminal Appeals] to act within their own sphere and they should not approve a sentence they consider excessive and then appeal to others to reduce [it]." *United States v. Cavallaro*, 14 C.M.R. 71, 74 (C.M.A. 1954). Moreover, it is a duty that continues even if a sentence is otherwise reduced below the jurisdictional threshold. *See Boudreaux v. United States Navy-Marine Corps Court of Military Review*, 28 M.J. 181, 182 (C.A.A.F. 1989). And it applies to all cases reviewed by a Court of Criminal Appeals under Article 66.

EVEN WHEN THE SENTENCE IS MANDATORY.

"[T]he criterion for the exercise of the [Court of Criminal Appeals'] power over the sentence is not legality alone, but legality limited by appropriateness." *United States v. Atkins*, 23 C.M.R. 301, 303 (C.M.A. 1957). A Court of Criminal Appeals "may affirm a legal sentence only, and may not affirm one which is illegal." *United States v. Brasher*, 6 C.M.R. 50, 52 (C.M.A. 1952). But it "must also consider whether the sentence is a 'fair and just punishment for every

accused.'" *Atkins*, 23 C.M.R. at 303 (quoting *United States v. Lanford*, 20 C.M.R. 87, 94 (C.M.A. 1955)).

Mandatory minimum sentences are lawful sentences, but not necessarily appropriate sentences. Accordingly, a Court of Criminal Appeals has both the power and the duty to review the appropriateness of the mandatory minimum.

The existence of a statutory minimum sentence does not undermine this independent power and duty. Rather, this Court has long recognized that:

> the desire of Congress to have the [Court of Criminal Appeals] determine the appropriateness of a sentence is so strongly stated we concluded that a [Court of Criminal Appeals] can even ameliorate a sentence which the Uniform Code makes mandatory for the court-martial.

Atkins, 23 C.M.R. at 303. (citing *United States v. Jefferson*, 21 C.M.R. 319, 320 (C.M.A. 1956)).

The Air Force court applied this precedent, reassessing and considering the appropriateness of a mandatory minimum sentence, in *United States v. Anderson*, 36 M.J. 963, 987 (A.F.C.M.R. 1993), *aff'd*, 39 M.J. 431 (C.M.A. 1994), *cert. denied*, 513 U.S. 819 (1994).

The Army court also applied this precedent, explicitly acknowledging its power and duty to review the appropriateness of a mandatory minimum sentence, in *United States v. Roukis*, 60 M.J. 925, 931 (A. Ct. Crim. App. 2005) (*per curiam*), *aff'd*, 62 M.J. 212 (C.A.A.F. 2005).

In this case, the Army Government Appellate Division conceded before the Army court that the court "can conduct a sentence appropriateness review even in cases where a mandatory minimum has been established by Congress." (JA at 47).

Nevertheless, a majority of the Army court concluded that Article 66(c) itself "limits [its] authority to give relief in a case with a mandatory punishment." *Kelly*, 76 M.J. at ___ (JA at 21). This conclusion ignores the position of the parties, the intent of Congress, the language of the statute, and the precedent of this Court and the Supreme Court of the United States, and Appellant respectfully asserts that it is wrong.

The majority also concluded that the 2014 amendment of Article 56 established a mandatory minimum punishment that "is unique." *Kelly*, 76 M.J. at ___ n. 21 (JA at 21 n. 21). It based this conclusion on the amendment stating only one exception to the mandatory minimum punishment, and that "there is no exception provided for a sentence reduction [under Article 66(c)]." *Kelly*, 76 M.J. at ___ (JA at 21). This conclusion misreads the amended statute and Appellant respectfully asserts that it is wrong.

A correct reading of the amended Article 56 reveals that it does not affect the wholly-separate grant of authority in Article 66(c), just as it does not affect the various other separate grants of authority to modify a sentence contained within the UCMJ.

THE PLAIN LANGUAGE OF ARTICLE 56 DOES NOT AFFECT THE POWER AND DUTY OF A COURT OF CRIMINAL APPEALS TO DETERMINE THE APPROPRIATENESS OF THE SENTENCE.

"As a first step in statutory construction, we are obligated to engage in a plain language analysis of the relevant statute." *United States v. Tucker*, 76 M.J. 257, 258 (C.A.A.F. 2017) (marks and citations omitted). "Unless the text of a statute is ambiguous, the plain language of a statute will control unless it leads to an absurd result." *United States v. Schell*, 72 M.J. 339, 343 (C.A.A.F. 2013) (marks and citations omitted). For "when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *EV v. United States*, 75 M.J. 331, 333 (C.A.A.F. 2016) (quoting *Hartford Underwriters Ins. Co. v. Union Planters Bank, N. A.*, 530 U.S. 1, 6 (2000)) (marks omitted).

Article 56 – both before the 2014 amendment and now – is not ambiguous as to the power and duty of a Court of Criminal Appeals to determine the appropriateness of a sentence. Rather, it is silent.

"The search for significance in the silence of Congress is too often the pursuit of a mirage. We must be wary against interpolating our notions of policy in the interstices of legislative provisions." *Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4, 11 (1942). Put differently, "a court should not judicially legislate when

Congress, in its wisdom, does not." *United States v. Wiesen*, 56 M.J. 172, 182 (C.A.A.F. 2001) (Sullivan, S.J., dissenting). *Cf. Randolph v. HV*, 76 M.J. 27, 30-31 (C.A.A.F. 2017) (because Article 6b(e) references only Courts of Criminal Appeals, it is limited to Courts of Criminal Appeals). The corollary of the principle that "the legislature says what it means and means what it says," *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1725 (2017) (marks and citation omitted), is that the legislature does not say what it does not mean.

Furthermore, Congressional action must be interpreted in the context of existing law because "it is always appropriate to assume that our elected representatives, like other citizens, know the law." *Cannon v. University of Chicago*, 441 U.S. 677, 696-97 (1979). Put differently, it is well-settled in military law that a Court of Criminal Appeals is not constrained by a statutory mandatory minimum punishment, and "it is reasonable to assume that Congress was aware of the existence of such military law when performing its constitutional task to make laws for the armed forces." *United States v. Kick*, 7 M.J. 82, 85 (C.M.A. 1979).

The 2014 amendment of Article 56 does not say that it divests a Court of Criminal Appeals of its longstanding power and duty to determine the appropriateness of a sentence, including a mandatory minimum punishment, because Congress did not mean it to say or do that.

THE PLAIN LANGUAGE OF ARTICLE 56 IS NOT AMBIGUOUS, AND THE ARMY COURT'S DECISION LEADS TO ABSURD RESULTS.

"The plain language will control, unless use of the plain language would lead to an absurd result." *United States v. Lewis*, 65 M.J. 85, 88 (C.A.A.F. 2007). *See also United States v. Schloff*, 74 M.J. 312, 315 (C.A.A.F. 2015) (Stucky, J., dissenting) (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997) ("The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.")). "In any such analysis, this court 'should . . . give meaning to each word' of the statute." *United States v. Sager*, 76 M.J. 158, 161 (C.A.A.F. 2017) (quoting *United States v. Adcock*, 65 M.J. 18, 24 (C.A.A.F. 2007)) (marks in original). This is so because "it is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (marks and citation omitted).

In this case the majority opinion of the Army Court of Criminal Appeals focused on the language of Article 56(b)(1) that:

> While 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 as provided for in section 860 of this title (article 60).

(emphasis added). Perhaps sensing some ambiguity,[2] the majority opinion concluded that:

> The article requires that "such punishment must include" a "dishonorable discharge" in this case. The only exception to the mandatory minimum is a reference to the convening authority's ability to reduce the sentence at initial action, in two very limited circumstances. There is no exception provided for a sentence reduction as part of our Article 66(c), UCMJ, authority.

Kelly, 76 M.J. at ___ (JA at 21).

The Army court's conclusion, however, makes ambiguous what is otherwise clear and would lead to absurd results, for at least four reasons:

First, Article 56(b)(1) refers directly to the punishment the court-martial could direct, providing that the convicted accused "shall be punished as a general court-martial may direct, [and] such punishment must include, at a minimum. . ." This is a limit on the court-martial itself. The Army court, however, suggested that this is a limit on something other than the court-martial. *See Kelly*, 76 M.J. at ___ n. 21 (JA at 21 n.21) ("the other mandatory minimums are a limit on the court-

[2] The majority opinion neither cited nor recited any canon of statutory construction.

martial. . .” (emphasis added)). That interpretation creates unnecessary ambiguity as to what, or who, Article 56(b)(1) limits.

Second, if the 2014 amendment to Article 56 is read to also amend Article 66(c) *sub silentio*, then it is ambiguous as to what other sentence modification powers are similarly curtailed. Article 71(a) gives the President plenary power to “commute, remit, or suspend the sentence, or any part thereof” in a case where the sentence extends to death; Article 71(b) gives the Secretary concerned plenary power to “commute, remit, or suspend the sentence, or any part of the sentence” in a case where the sentence extends to dismissal of a commissioned officer, cadet or midshipman; Article 74(a) gives the Secretary concerned plenary power to remit or suspend any part or amount of the unexecuted part of any sentence not approved by the President (except for certain sentences to confinement for life without the possibility of parole), and also the authority to delegate this power;[3] and Article

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[3] The Secretary of the Army delegates the entire Article 74(a) power to the Assistant Secretary of the Army (Manpower and Reserve Affairs), and also delegates the entire Article 74(a) power (but with limitations) to the Judge Advocate General of the Army. ¶ 5-39, Army Regulation 27-10, *Military Justice* (May 11, 2016) (JA at 51).

The Secretary of the Navy delegates the entire Article 74(a) power as far as “all general court-martial convening authorities over the command to which the accused is attached.” ¶ 0158a, JAG Instruction 5800.7F, *Manual of the Judge Advocate General* (June 26, 2012) (JA at 52).

The Secretary of the Air Force delegates the entire Article 74(a) power in many (but not all) cases as far as “a commander exercising GCMCA over the command

74(b) gives the Secretary concerned the power to substitute an administrative discharge for a punitive discharge for good case. The Army court's interpretation of Article 56 turns on the absence of an "exception provided for a sentence reduction as part of our Article 66(c), UCMJ, authority," *Kelly*, 76 M.J. at ___ (JA at 21). But there is no exception for the Article 71(a), 71(b), 74(a), and 74(b) authorities either. By the Army court's reasoning, in Congressional silence, each of these powers is called into doubt.

Third, if Article 56(b)(1) overrides Article 66(c), then a Court of Criminal Appeals lacks the authority to reassess a sentence in a case implicating Article 56(b)(1). The Supreme Court upheld the power of a Court of Criminal Appeals to conduct sentence reassessments in *Jackson v. Taylor* by reference to Article 66(c). *See United States v. Winckelmann*, 73 M.J. 11, 14 (C.A.A.F. 2013). If, however, as the Army court held, the Article 56(b)(1) requirement that "such punishment must include . . . dishonorable discharge," eliminates the Article 66(c) power and duty to determine the appropriateness of the sentence, then it also eliminates the ability to reassess the sentence in a case where a conviction triggering the mandatory

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to which the accused is assigned." ¶ 11.19.2, Air Force Instruction 51-201, *Administration of Military Justice* (June 6, 2013) (JA at 54).

The Secretary of Homeland Security delegates the entire Article 74(a) power to the Commandant of the Coast Guard. ¶ 1.F.6.d.(4), Commandant Instruction M1600.2, *Discipline and Conduct* (September 29, 2011) (JA at 55).

punishment is set aside but another conviction not triggering the mandatory punishment is affirmed. That is an absurd result, made worse by the absence of explicit authorization for a rehearing on sentence alone. *See Winckelmann*, 73 M.J. at 17-18 (concurring opinions of Stucky, J. and Ryan, J.) (UCMJ does not permit rehearing on sentence alone).

Finally, considering the specific context of the language and the broader context of the UCMJ as a whole, the words *such punishment must include* refer only to the punishment to be adjudged by the court-martial. All but eight of the punitive articles of the UCMJ state that a convicted accused *shall be punished* as a court-martial may direct, and five of those remaining eight use equivalent language.[4] Because m*ust* and *shall* are synonymous, the language *such punishment must include* and *shall be punished* have similar meaning; both refer to the punishment to be adjudged by the court-martial. If, however, as the Army court held, the Article 56(b)(1) requirement that "such punishment must include . . . dishonorable discharge," eliminates the Article 66(c) power and duty to determine the appropriateness of the sentence, then so too does the equivalent language in practically every punitive Article, and Article 66(c) is eviscerated. That is an absurd result.

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[4] Articles 112, 104, and 118 state: *"shall suffer. . ."*; Articles 119A and 132 state: "shall, upon conviction, be punished. . ."

Had Congress intended the 2014 amendment to Article 56 to require that the mandatory minimum be adjudged, approved, and executed, it would have said so. It unambiguously did not, and assuming otherwise from its silence invites absurd results.

Nevertheless, if further analysis is required, then the legislative history of the 2014 amendment reveals that the inclusion of the words "except as provided for in section 860 of this title (article 60)" in Article 56(b)(1) was a technical amendment, not a substantive change.

THE CONGRESSIONAL RECORD SHOWS THAT THE "EXCEPT AS PROVIDED FOR" LANGUAGE IN ARTICLE 56(B)(1) IS TECHNICAL, NOT SUBSTANTIVE.

The National Defense Authorization Act for Fiscal Year 2014, 127 Stat. 672, was "the product of an agreement between the Chairman and Ranking Member of the House Committee on Armed Services and the Chairman and Ranking Member of the Senate Committee on Armed Services on the reconciliation of H.R. 1960 . . . [i]n order to ensure the enactment of an annual defense bill by the end of the calendar year." *Note from the Director, Legislative Operations*, *Committee on Armed Services of the House of Representatives*, Jacket No. 86-280 at III (Comm. Print. Dec. 1, 2013) (available at: https://www.gpo.gov/fdsys/pkg/CPRT-113HPRT86280/pdf/CPRT-113HPRT86280.pdf).

This compromise legislation was introduced with a Joint Explanatory Statement inserted into the Congressional Record by Congressmen McKeon and Smith, respectively the Chairman and Ranking Member of the House Committee on Armed Services. 159 Cong. Rec. H7894 (daily ed., Dec. 12, 2013). That Statement included the following discussion of the 2014 amendment of Article 56:

> *Discharge or dismissal for certain sex-related offenses and trial of such offenses by general courts-martial (sec. 1705)*
>
> The House bill contained a provision (sec. 533) that would amend article 56 of the Uniform Code of Military Justice (10 U.S.C. 856) to require that the sentence for a person found guilty of specified sex-related offenses include, at a minimum, a dismissal or dishonorable discharge.
>
> The House bill also contained a provision (sec. 550A) that would amend article 56 of the Uniform Code of Military Justice (10 U.S.C. 856) to require that the sentence for a person found guilty of specified sex-related offenses include, at a minimum, a dismissal or dishonorable discharge and confinement for 2 years.
>
> The Senate committee-reported bill contained a provision (sec. 554) that would amend article 56 of the Uniform Code of Military Justice (10 U.S.C. 856) to require that the sentence for a person found guilty of specified sex-related offenses include, at a minimum, a dismissal or dishonorable discharge, and would limit jurisdiction over these specified sex-related offenses to a general court-martial.
>
> The agreement includes the Senate provision with a technical amendment.

159 Cong. Rec. at H7949 (italics and emphasis added). That technical amendment was the *except as provided for. . .* language now included in Article 56(b)(1).

The House and Senate bills referenced in the Joint Explanatory Statement were "H.R. 1960, as passed by the House of Representatives on June 14, 2013, and S. 1197, as reported out of committee on June 20, 2013." *Note from the Director, Legislative Operations, Committee on Armed Services of the House of Representatives*, *supra* at III.

None of the three sections in those two bills proposing to amend Article 56 included the *except as provided for* language or made any reference to Article 60. (*See* JA at 58, 62, and 64).

The minority view of the Army court is that "the majority reads the recent amendment to Article 56, UCMJ, too broadly." *Kelly*, 76 M.J. at ___ (JA at 22). The minority view is right. The words "except as provided for in section 860 of this title (article 60)" were included in Article 56(b)(1) as nothing more than a technical reference to the newly-limited power under Article 60 to modify the sentence of a court-martial. They are not a substantive limit on the Courts of Criminal Appeals.

REMAND IS REQUIRED.

"Article 66(c) review is a substantial right. It follows that in the absence of such a complete review, Appellant has suffered material prejudice to a substantial right." *United States v. Jenkins*, 60 M.J. 27, 30 (C.A.A.F. 2004).

The majority of the Army court abstained from reviewing the appropriateness of a dishonorable discharge in Appellant's case, concluding that "as we see ourselves as lacking the authority to provide relief, we do not reach the question of whether appellant's sentence 'should be approved' in the absence of an applicable mandatory minimum." *Kelly*, 76 M.J. at ___ (JA at 21). This abstention deprived Appellant of a complete Article 66(c) review, and remand is required for the Army court to fulfill its statutory responsibility.

On remand the Army court will determine whether, "on the basis of the entire record" a dishonorable discharge, a bad-conduct discharge, or no punitive discharge "should be approved." Article 66(c). The court will "determine anew the appropriateness of the sentence," *Higbie*, 30 C.M.R. at 300. It will "assur[e] that justice is done and that [Appellant] gets the punishment he deserves." *Healy*, 26 M.J. at 395. Its judges will "utilize the experience distilled from years of practice in military law to determine whether, in light of the facts surrounding [Appellant's] delict, his sentence was appropriate. *Lacy*, 50 M.J. at 288 (citations omitted). In short, it will "do justice." *Claxton*, 32 M.J. 162.

That is what Congress intended and the UCMJ requires.

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CERTIFICATE OF FILING AND SERVICE

I certify that on November 13, 2017, the foregoing was electronically filed with the Court and delivered to Government Appellate Division.

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CERTIFICATE OF COMPLIANCE

This brief complies with the page limitations of Rule 24(b) because it does not exceed 30 pages.

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