Article 140a, UCMJ—An Unfulfilled Promise

On July 12, 2020, while undergoing a major overhaul in San Diego, California, the amphibious assault ship USS Bonhomme Richard was destroyed by fire. Seaman Ryan Mays was charged with aggravated arson and hazarding a vessel.

Before and during the court-martial, reporters for ProPublica, "an independent, nonprofit newsroom," https://www.propublica.org/about/, sought contemporaneous access to court filings. According to ProPublica, the Navy Office of the Judge Advocate General "repeatedly" denied access "relying on shifting reasons": (1) that the information was exempt from disclosure under the Freedom of Information Act Exemption 7(A), as "records or information compiled for law enforcement purposes"; and (2) due to the Privacy Act, 5 U.S.C § 552a, the Navy interpreted Article 140a, UCMJ,

> to only permit release of court records *if* the accused is convicted and then only after the record has been 'certified' following trial. OJAG personnel stated that even in cases ending in conviction, the record released to the public would only include certain limited portions and exclude any attachments to motions.

ProPublica, Inc. v. Commander Derek Butler, JAGC, USN, et al, Complaint at 9–10, https://s3.documentcloud.org/documents/23071225/1_complaint_propublica_v_butler.pdf. The Navy continued to refuse ProPublica access even after Seaman Mays and his counsel waived any rights he could assert under the Privacy Act to the release of court filings. *Id.* at 10–11. The Navy had previously released the charge sheet and an affidavit accompanying a warrant for the search of Seaman Mays' electronic devices. *Id.* at 11 n.4.

ProPublica submitted a letter to the military judge requesting access to the court records and contemporaneous access to future court filings or for Seaman Mays to be able to disclose the filings himself under the First and Sixth Amendments. Seaman Mays moved the court to release the documents under his Sixth Amendment right to a fair trial. *Id.* at 11–12. In his ruling, the military judge conceded that the Supreme Court had recognized a qualified right of the press to access judicial records but insisted that the proper avenue for the press to pursue such access was through an appeal of a Freedom of Information Act request or "potentially in an Article III court." Ruling at 2, https://www.documentcloud.org/documents/22276016-20220830_order_denying_access_mays?responsive=1&title=1.

On September 13, 2022, the Reporters Committee for Freedom of the Press, ProPublica, and 38 media organizations wrote to the DoD General

Counsel expressing their concern that the military trial judge and the Office of the Judge Advocate General had denied the press access to routine court filings in the Mays case that were not classified, privileged, or under seal, based on a misreading of Article 140a. Six days later NIMJ wrote to the General Counsel endorsing the media's view that the Navy had misconstrued Article Article 140a "as a mandate for secrecy rather than public access to courts-martial." The General Counsel did not respond to either letter.

On September 27, 2022, attorneys from Gibson, Dunn, and Crutcher LLP filed a complaint in the United States District Court for the District of Southern California, on behalf of ProPublica, seeking access to the court-martial filings in *United States v. Mays*. The complaint noted that documents the Navy was withholding from public access included

> the Navy's own preliminary hearing officer's report recommending that the case not proceed to trial due to a lack of evidence, multiple motions by the defense, including one claiming the Navy's refusal to disclose these records violates his Sixth Amendment right to a public trial, a motion by the government to exclude from evidence the Navy's own report documenting widespread safety failures leading up to the fire, and the military judge's written orders on such motions.

Complaint at 3, https://www.documentcloud.org/documents/23071225-1_complaint_propublica_v_butler.

ProPublica asserted this was "a clear violation of freedom of the press and the public's First Amendment and common law rights of access to court proceedings and records." Complaint at 4. Although nominally concerning the Mays case, the relief requested included declaratory judgment and injunctions concerning contemporaneous access to non-sealed filings in all courts-martial cases.

Seaman Mays was acquitted on September 30. On October 6, "the parties jointly moved to stay the [civil] case while the government begins reviewing and producing records of the court-martial." https://www.rcfp.org/us-v-mays-media-coalition-letter/.

Compared to the transparency of the federal courts, with its PACER system (Public Access to Court Electronic Records), the military justice system is opaque. For the most part, and in most cases, the Freedom of Information Act has been the sole means for the public to gain access to the type of case information and court filings routinely available in civilian criminal courts. Such records are only available after the record of trial has been certified.

In its report of December 22, 2015, the Military Justice Review Group (MJRG) recommended enactment of a new statute, Article 140a (Case management; data collection and accessibility), which would "provide victims, counsel, and members of the public access to all unsealed court-martial documents." Report of the Military Justice Review Group, Part I: UCMJ Recommendations 28 (2015).

The proposed Article 140a was to do so by requiring

> the Secretary of Defense to develop uniform case management standards and criteria that also would allow public access to court-martial dockets, pleadings, and records *in a manner similar to that available in the federal civilian courts*. This proposal envisions implementation across the services to ensure ease of access and management of data.

Id. at 36 (emphasis added).

Despite the sweeping language of the MJRG's Report in describing the purpose of the new statute, the language of the proposed legislation was more circumscribed and ambiguous. It directed the Secretary of Defense to "prescribe uniform standards and criteria," "using, insofar as practicable, the best practices of Federal and State courts" to, *inter alia*, facilitate "access to docket information, filings, and records," "at all stages of the military justice system," "*taking into consideration restrictions appropriate to judicial proceedings and military records*." Article 140a, UCMJ, 10 U.S.C. 940a, Pub. L. No. 114-328, div. E, title LXI, § 5504(a), 130 Stat. 2961 (2016) (emphasis added). The law set deadlines for the Secretary to issue the standards (two years after enactment) and for the standards to take effect (four years after enactment). Article 140a(b), UCMJ.

The statute did not define "restrictions appropriate to judicial proceedings and military records." It is likely that by the restrictions appropriate to judicial proceedings, the drafters were referring to the Privacy Policy for Electronic Case Files of the Judicial Conference of the U.S. https://www.uscourts.gov/rules-policies/judiciary-policies/privacy-policy-electronic-case-files. It is most likely, but not clear, that restrictions appropriate to military records referred to the Freedom of Information Act (FOIA) and Privacy Act.

On December 23, 2016, less than 30 days before the end of his term of office, President Obama signed Article 140a into law. Less than a week before the two-year deadline, the Department of Defense General Counsel, Paul C. Ney issued a memorandum in which he personally prescribed ("I prescribe") uniform standards and criteria for implementation of Article 140a and required that the services implement them no later than

December 23, 2020. Uniform Standards and Criteria Required by Article 140a, Uniform Code of Military Justice (UCMJ) Dec. 17, 2018, Navy JAGINST 5813.2, Encl 1, at 1 (Dec. 16, 2020). The Secretary of Defense did not prescribe the standards and criteria, as required by Article 140a, nor did Mr. Ney assert that he was issuing them on behalf of the Secretary. And each service secretary was directed to implement the standards; there was no uniform system mandated.

The Ney Memo acknowledged that filings "should be no less accessible to the public than comparable information and documents from the Federal criminal justice system." *Id.* at 3. Nevertheless, he recognized that the Privacy Act imposed restrictions on the military that did not apply to the civilian courts. *Id.* He then prescribed alternative standards. The first was to apply if "the law is changed to exempt from the Privacy Act the release of military justice docket information, filings, and records." *Id.* The second alternative was to apply absent such change.

The first alternative would require the service secretaries to prescribe standards for their individual trial judiciaries and appellate courts to make the filings accessible on publicly available websites, after redaction of certain sensitive information. The second alternative would provide for public access only after compliance with the Privacy Act. *Id.* at 3–6.

Based on the Ney Memo, each of the services, except the Coast Guard, which is included in the Navy's program, established programs intended to implement Article 140a. None of these programs contemplate the contemporaneous release of court filings that the MJRG envisioned. The Navy program permits access to the entire record of trial online, containing all of the filings, only after it is certified. The Air Force's website permits access to individual filings, but only after the record is certified. Neither service provides access to filings or records in cases of acquittals.

The Army's program is different. Its website is well-designed, intended to be comprehensive, is by far the easiest to navigate, and has the most potential for the future. It includes links to all the motions and appellate filings, although the links to the appellate filings have not yet been implemented. *See, e.g.*, https://www.jagcnet.army.mil/ACMPRS/cases/3647bc53-1144-4b9f-b32c-577d39c89c49. Unlike the Air Force and Navy, it does not omit cases in which there was a total acquittal. *See, e.g.*, https://www.jagcnet.army.mil/ACMPRS/cases/155efbe0-87c3-4c80-a79e-4b3b1db264cb. Nevertheless, access to the filings is not contemporaneous and it is not clear what triggers posting on the website.

In December 2019, Congress excused the Secretary of Defense's dereliction by deleting Article 140a's deadlines. At the same time, it also clarified that the process was to facilitate "public" access to the docket information, filings, and records. Pub. L. No. 116-92, div. A, title V, § 534(a), 133 Stat. 1362 (2019).

Five years after Article 140a's initial enactment, Congress initiated a new process as part of the National Defense Authorization Act of 2022. No later than December 27, 2022, the Secretary of Defense, in consultation with the Secretary of Homeland Security, the Secretaries of the military departments, and the senior judge advocates of each service,

> shall publish a plan pursuant to which the Secretary of Defense shall *establish a single document management system for use by each Armed Force* to collect and present information on matters within the military justice system, including information collected and maintained for purposes of section 940a of title 10, United States Code (article 140a of the Uniform Code of Military Justice).

Pub. L. No. 117-81 § 547(a)(1), 135 Stat 1541 (2021) (emphasis added). Apparently wary of further procrastination, Congress added a requirement that the same individuals report to several congressional committees every 90 days on the status of the development of the plan. *Id.* § 547(d)(1). No such plan has yet to be released, although the deadline is fast approaching.

Whether, and to what extent, the Privacy Act and the Freedom of Information. Act may affect the press's qualified First Amendment right to access courts-martial filings, in general, will be for the courts to decide. Regardless, ProPublica should have been granted access to the filings in *Mays*.

(1) As the Complaint so clearly explains, the release of court filings is not exempt from disclosure under the Freedom of Information Act Exemption 7(A), "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information … could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. § 552(b)(7)(A). ProPublica was seeking court filings, not investigative files.

(2) The Navy's reliance on Article 140a is not persuasive. Article 140a is not self-executing. It cannot become effective until the Secretary of Defense prescribes the required standards and criteria, and no Secretary of Defense has yet done so. Therefore, it cannot be used to excuse the Navy from providing the court filings to ProPublica.

(3) Nor can the Navy prevail by invoking the Privacy Act. As Mr. Ney suggested in his memo, unless Congress creates an exception to the Privacy

Act, it applies to records of courts-martial. Nevertheless, in this case, Seaman Mays requested the release of the court filings by waiving his Privacy Act protections and invoking his right to a public trial under the Sixth Amendment.

ProPublica's relentless efforts to access court-martial filings have established the incompatibility of the MJRG's vision and the current Article 140a with the Privacy Act. Unless Congress acts, the press will continue to be stymied in their attempts to contemporaneously access court-martial filings.

Jim Young