

Analysis of Article 140a, UCMJ, Amended and Updated

As noted in an earlier posting, military judicial proceedings lack the transparency of federal court proceedings, in which most filings, from the trial court through to the Supreme Court, except sealed documents, are available to the public instantaneously through the PACER (Public Access to Court Electronic Records). In its report of December 22, 2015, the Military Justice Review Group (MJRG) recommended enactment of a new statute, Article 140a, UCMJ, (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 MJRG’s proposed legislation was straight-forward and would have required: “the Secretary of Defense to develop uniform case management standards and criteria that 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).

Rather than limiting itself to ordering the implementation of a PACER-like system to provide public access to court-martial and appellate court filings, the Article 140a Congress enacted tasked the Secretary of Defense to

prescribe uniform standards and criteria for conduct of each of the following functions at all stages of the military justice system (including with respect to the Coast Guard), including pretrial, trial, post-trial, and appellate processes, using, insofar as practicable, the best practices of Federal and State courts:

(1) Collection and analysis of data concerning substantive offenses and procedural matters in a manner that facilitates case management and decision making within the military justice system, and that enhances the quality of periodic reviews under section 946 of this title (article 146).

(2) Case processing and management.

(3) Timely, efficient, and accurate production and distribution of records of trial within the military justice system.

(4) Facilitation of public access to docket information, filings, and records, taking into consideration restrictions appropriate to judicial proceedings and military records.

Article 140a, UCMJ, 10 U.S.C. 940a, Pub. L. No. 114-328, § 5504(a), 130 Stat. 2961 (2016).

Acting under secretarial delegation to establish DoD policy on general legal issues, General Counsel Paul C. Ney issued a memorandum prescribing 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. 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, it 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. He specifically noted that neither alternative imposed any restrictions on the Court of Appeals for the Armed Forces.

Each service developed its own system. And as Congress has not excepted these systems from the requirements of the Privacy Act, the services have refused to permit access to court-martial filings until the trial has been completed, the record of trial has been transcribed and assembled, and the court reporter has certified it, which in most cases takes several weeks after adjournment.

Congress amended Article 140a in 2019 to “restrict access to personally identifiable information of minors and victims of crime (including victims of sexual assault and domestic violence), as practicable to the extent such information is restricted in electronic filing systems of Federal and State courts.” Pub. L. No. 116-92, § 534(b), 133 Stat. 1361 (2019).

As part of the National Defense Authorization Act of 2022, Congress ordered 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, to publish, no later December 27, 2022, “*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 1712–14 (2021) (emphasis added). Whereas Article 140a seems to envision resolving its four taskings separately, this new legislation seeks to manage them all within one database.

On 17 January 2023, the current DoD General Counsel Caroline Krass issued new guidelines. “Revised Uniform Standards and Criteria Required by Article 140a, Uniform Code of Military Justice.” In it, she required each service to establish its own system using uniform standards and criteria. § I.A. Although she accepted the possibility of the services acting “in conjunction with each other,” she did not appoint one service as executive agent to establish a joint system. § I.B. Having each of the services set up a separate system is a waste of resources and makes accessing records more difficult for the public.

The General Counsel also delayed access to records by giving the services 45 calendar days after the record of trial is certified before requiring the documents to be publicly accessible. § IV.E.2. Like the Ney Memo, the Krass Memo specifically denies imposing any requirement on the Court of Appeals for the Armed Forces. § IV.D.7. This can hardly be the PACER-like system, with instantaneous public access, the MJRG envisioned Article 140a would create.

If Congress wants to establish a truly worthy system, it needs to revise Article 140a to provide the following:

(1) Separation of the PACER-like public access to electronic court-martial and appellate court filings from the more comprehensive collection and analysis of military justice data.

(2) Require the participation of the Court of Appeals for the Armed Forces (CAAF) in the system. Although the CAAF does have an electronic filing system, the public does not have access to documents submitted to it, and only some of the documents accepted by the Court are ever posted to its website. Without that court’s full participation, the public has access to only half the loaf.

(3) Require the Secretary of Defense to select one of the services as executive agent who, in conjunction with the CAAF and the other services, will develop one PACER-like system to be used by all the services and the CAAF.

(4) Provide an exception from the Privacy Act for court-martial and appellate filings. Otherwise, the goal of Article 140a will never be met. Privacy can adequately be protected, as it is in the PACER system, by adoption and application of the Privacy Policy for Electronic Case Files approved by the Judicial Conference of the U.S. <https://www.uscourts.gov/rules-policies/judiciary-policies/privacy-policy-electronic-case-files>.

(5) Permit the public and press to access court filings and documents instantaneously as does PACER.