

The Rise and Fall of Post-Trial—Is It Time for the Legislature to Give Us All Some Clemency?

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*It is at the level of the convening authority that an accused has his best opportunity for relief. . . .*¹

I. Introduction²

The recent decision of the U.S. Court of Appeals for the Armed Forces (CAAF) in *United States v. Moreno* raises the question of the viability and efficacy of the military post-trial process.³ In *Moreno*, the accused was convicted of rape and was sentenced to, among other punishments, confinement for six years.⁴ Despite a relatively short record of trial, it took the convening authority 490 days to take action on the case.⁵ From there, the case continued to have its processing woes, with the majority of the time (eighteen months) attributed to Moreno's appellate defense counsel requesting additional time to file a defense brief.⁶ In total, 1688 days elapsed from the end of Moreno's trial until the U.S. Navy-Marine Corps Court of Criminal Appeals (NMCCA) made its decision on his appeal.⁷

In determining that the lengthy post-trial processing time violated Moreno's due process right to speedy review and appeal,⁸ the CAAF applied the four factors set forth in *Barker v. Wingo*.⁹ Responding to the lengthy time from trial to action, the CAAF adopted a 120-day "presumption of unreasonable delay [standard] that will serve to trigger the Barker four-factor analysis where the action of the convening authority is not taken within 120 days of the completion of trial."¹⁰ An appellant will still have to prove prejudice for processing that exceeds 120 days.¹¹ In practice, *Moreno* will result in more copious tracking of delay, and staff judge advocates (SJAs) may not be as hesitant to forward cases to the convening authority for action when the defense has failed to timely submit matters for the convening authority's consideration. *Moreno's* impact, however, is more than just a commitment to more detailed tracking. It brings to the forefront the tension between the post-trial clemency and appellate review processes.

The excessive delay in *Moreno* highlights the competing interests between the convening authority's action and judicial review, both of which are steps in the appellate process.¹² This conflict, at least in part, may be an attribute of a system in

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¹ *United States v. Boatner*, 43 C.M.R. 216, 217 (C.M.A. 1971).

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³ See *United States v. Moreno*, 63 M.J. 129 (2006).

⁴ See *id.* at 132.

⁵ See *id.* at 133 (detailing the length of time involved in the various stages of the post-trial process and that the record of trial was 746 pages). See generally UCMJ art. 60 (2005) (describing action by the convening authority).

⁶ See *Moreno*, 63 M.J. at 133.

⁷ See *id.* at 132.

⁸ See *id.* at 141.

⁹ See *Barker v. Wingo*, 407 U.S. 514, 530 (1972) (detailing the four factors as: (1) length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right to timely review and appeal; and (4) prejudice).

¹⁰ *Moreno*, 63 M.J. at 142.

¹¹ See *id.* at 140.

¹² See generally U.S. Court of Appeals for the Armed Forces, <http://www.armfor.uscourts.gov/> (last visited Jan. 25, 2008) (providing a brief history and purpose of the court); U.S. Army Court of Criminal Appeals, <http://www.jagcnet.army.mil/ACCA> (last visited Jan. 25, 2008); Appellate Review of Courts-Martial, <http://www.armfor.uscourts.gov/AppellateRev.htm> (last visited Jan. 25, 2008) (providing a brief overview of the military appellate process and the

which the convening authority's intricate involvement in the process has outlived its usefulness. A review of the development of the post-trial process, key developments in the military justice system, judicial activism in the post-trial arena, and an examination of the rate of clemency reveal that the post-trial system is ripe for legislative change rather than continued judicial change.

II. Post-Trial Development and Diminishment

The development of the post-trial process is a function of legislative, judicial, and executive power.¹³ The public's perception of fairness was a driving force throughout its development.¹⁴ The public was extremely wary of the vast amount of power that the commanding officer wielded in the military justice system.¹⁵ In developing the Uniform Code of Military Justice (UCMJ), the drafters addressed these underlying concerns.¹⁶ One vestige that remained, however, was the ability of the convening authority to return to duty Soldiers essential to the war effort.¹⁷ Though this was a reason for the convening authority's continued involvement, the effect was to bestow more rights on accused in an appellate process whose procedural safeguards exceeded that of the federal system.¹⁸ It appeared to be a trade-off. In exchange for the system's failure to conform in every respect to the federal system, the convening authority would retain the vast power over the outcome of the case, but only under the guise of clemency.¹⁹ Developments since the UCMJ's implementation have succeeded in increasing the public's confidence in the military justice system. These changes have resulted in a diminishing need for such an extensive post-trial review process.

A. Legislative Development

Any foray into the efficacy and viability of the post-trial process necessitates a look at its inception. Since the process was born amidst the Herculean effort of establishing a UCMJ,²⁰ it is also necessary to delve into some of the other essential decisions concerning accused's rights.

1. *The UCMJ*

Article 60 of the UCMJ is an accused's first bite at the appellate apple. It provides an accused the opportunity to "submit to the convening authority matters for consideration by the convening authority with respect to the findings and the sentence."²¹ This stage of the process gives the convening authority the power to modify the findings and sentence of a court-martial as "a matter of command prerogative involving the sole discretion of the convening authority."²²

Command prerogative is unique to the military and creates an internal conflict within the military appellate process. Command prerogative pits the convening authority's ability to grant clemency against judicial review.²³ The more time that

purpose and organization of the court). For those unfamiliar with the system and terminology this overview is useful for it also discusses the changes in names that the courts have experienced through the years.

¹³ See generally *Uniform Code of Military Justice: Hearing on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed Services*, 81st Cong. 565–1307 (1949) [hereinafter *H.R. 2498*].

¹⁴ See *id.*; Felix E. Larkin, *Professor Edmund M. Morgan and the Drafting of the Uniform Code*, 28 MIL. L. REV. 7 (1965).

¹⁵ See generally *H.R. 2498*, *supra* note 13.

¹⁶ See generally *id.*

¹⁷ See *id.* at 1184 (statement of Felix E. Larkin, member of the committee appointed to draft a UCMJ).

¹⁸ *Id.* See generally 18 U.S.C. §§ 3731–3742 (2000) (describing the federal appellate process) (in the federal system the President of the United States may exercise clemency, but there is no immediate authority capable of granting clemency prior to appellate review of the case); *Dunlap v. Convening Authority*, 48 C.M.R. 751, 753 (C.M.A. 1974) (describing that "[i]n the federal civilian criminal justice system, finality of verdict and sentence is established in the trial court."); *Structure of the Federal Courts—Understanding the Federal Courts*, http://www.uscourts.gov/understand03/content_3_0.html (last visited Jan. 23, 2008) (providing an overview of the structure of the federal courts and the appellate process).

¹⁹ See generally *H.R. 2498*, *supra* note 13.

²⁰ See Larkin, *supra* note 14.

²¹ UCMJ art. 60(b)(1) (2005).

²² *Id.* art. 60(c)(1).

²³ See generally *United States v. Moreno*, 63 M.J. 129 (2006).

elapses until the convening authority takes action, the more difficult it becomes to ensure that the accused will receive meaningful relief on appeal.²⁴ For example, in a fictional case in which an accused was given one year confinement and a bad-conduct discharge, had the convening authority taken the time that the convening authority did in *Moreno* to take action, the accused would have been released from confinement before the case was even sent to the service appellate court.²⁵ If the accused was successful on appeal, he would not receive meaningful credit because he would have already served his term of confinement.²⁶ He may receive monetary compensation for the time erroneously spent in confinement, but this is little consolation to an accused pondering the fate of his case while in confinement.²⁷ In the federal system, there is no intermediate stop for appellate review.²⁸ The reason the military has such a stop is found in the UCMJ's legislative history.²⁹

The involvement of the convening authority in the post-trial process predates the UCMJ. Prior to the UCMJ's enactment, the Army imposed discipline under the Articles of War.³⁰ The authority it bestowed on the commanding officer was virtually absolute. In the 1916 revision to the Articles of War, "[n]o sentence or finding of a court-martial could be put into effect until approved by the authority which appointed the court. The power to approve included the power to disapprove and to send back to the court a finding of not guilty or a sentence deemed too lenient."³¹

Professor Edmund M. Morgan, the man largely responsible for drafting the UCMJ,³² provides an example of the extreme power commanders wielded prior to the UCMJ's enactment. "Tapalina, a military policeman charged with burglary, was found not guilty by a general court-martial. The appointing authority sent the case back for revision with a communication which amounted to an argument that the evidence warranted a finding of guilty. The court on revision found the accused guilty."³³ The lack of confidence in a military justice system in which the appointing authority yielded such vast power climaxed as a result of the perceived abuses occurring during World War II.³⁴

The legislative history of the UCMJ is replete with congressional concerns with this power. For example, the legislative history reveals that the governor of Vermont had served as a member of a court-martial and that the commanding officer who had convened the court subsequently reprimanded him for his poor performance while serving as a panel member.³⁵ In response to abuses such as these that undermined the validity of military justice, in 1948 Secretary of Defense James Forrestal appointed a special committee to draft the UCMJ.³⁶ The UCMJ sought to unify the services in their application of justice in a manner that instilled public confidence and maintained the command's ability to impose discipline in the unique setting of military service.³⁷ Accomplishing this required the committee to address the differences between the courts-martial process and the procedures and rights that the average citizen would expect in a fair trial.³⁸ The right to counsel was one of the major differences the committee addressed.³⁹ Prior to the UCMJ's enactment, the accused was not necessarily represented by an attorney.⁴⁰

²⁴ *Id.*

²⁵ *Id.* at 139 (concluding that Moreno would have been released from confinement prior to the court's acting on his case).

²⁶ *Id.*

²⁷ *Id.*

²⁸ See 18 U.S.C. §§ 3731–3742 (2000) (describing the federal appellate process).

²⁹ See generally *H.R. 2498*, *supra* note 13.

³⁰ See Edmund M. Morgan, *The Background of the Uniform Code of Military Justice*, 28 MIL. L. REV. 17 (1965).

³¹ *Id.* at 19.

³² See Larkin, *supra* note 14.

³³ Morgan, *supra* note 30, at 20.

³⁴ *Id.*

³⁵ *H.R. 2498*, *supra* note 13, at 608 (statement of Prof. Edmund M. Morgan, Jr., Harvard University Law School).

³⁶ Larkin, *supra* note 14, at 7–8.

³⁷ See Morgan, *supra* note 30, at 609.

³⁸ See generally *id.*

³⁹ See *Uniform Code of Military Justice: Hearing on S. 857 and H.R. 4080 Before a Subcomm. of the H. Comm. on Armed Services*, 81st Cong. 40 (1949) [hereinafter *S. 857*] (statement of Prof. Edmund M. Morgan, Jr., Harvard University Law School); *id.* at 63 (statement consisting of an article read into the record: Arthur E. Farmer and Richard H. Weis, *Command Control—or Military Justice?*, N.Y.U. L. REV. Q., Apr. 1949; *id.* at 300 (statement of Frederick P. Bryan, Chairman, Special Committee on Military Justice of the Bar Ass'n of the city of N.Y.); *id.* at 319.

⁴⁰ See *id.* at 319.

a. Getting the Lawyers Involved

The right to counsel is guaranteed by the Sixth Amendment.⁴¹ In military justice, however, counsel were not necessarily trained in the law.

Now one of the major criticisms that appeared in almost every report on military justice and in fact voiced by almost every officer and enlisted man who had intimate contact with it is the frequency with which the accused was represented by defense counsel who did not have the capacity, no matter how good their intentions, to adequately protect the rights of the accused. The selection of defense counsel was often done haphazardly and I am frank to say to you gentlemen from my own experience in many cases you went over the list of officers and you suddenly found a fellow over here who was not doing much of anything useful and you said; “We can spare him and we can throw him in as defense counsel, he hasn’t much to do.”⁴²

The UCMJ sought to correct the practice of assigning available officers to represent military accused as an extra duty, instead providing a defense counsel who was “a qualified legal specialist—a trained lawyer in effect”⁴³ Providing qualified counsel to represent military accused was an essential step in improving the public’s perception of the fairness of military justice. Skeptics, however, argued that convening authorities still wielded too much power because the convening authorities appointed the defense counsel, who were members of their command and subject to their influence.⁴⁴

It is greatly feared that the matter which has caused the greatest amount of discussion since the close of the last war; namely, control by command over the functions of the courts, has not been remedied by the proposed sections. This aspect is emphasized by article 27, wherein it is provided that for each general and special court martial the convening authority shall appoint trial and defense counsel, etc.⁴⁵

Congress adopted Article 27 almost exactly as proposed, providing that “[f]or each general and special court-martial the authority convening the court shall appoint a trial counsel and a defense counsel.”⁴⁶ Like the counsel involved, the military judge, referred to as the “Army law officer,” did not have to be a lawyer.⁴⁷ The Elston Act⁴⁸ remedied this shortcoming and Article 26⁴⁹ maintained it. Named after its proponent, House Armed Services Committee Chairman Charles Elston, the Elston Act modified the Articles of War, “the precursor to the [UCMJ].”⁵⁰ It began much of the work that the UCMJ finished. Like the trial and defense counsel, however, the law officer was also still subject to the commander’s authority.⁵¹ It was essential that the UCMJ curtail the extent of the convening authority’s power.

b. Curtailment of Convening Authority Power

The Elston Act, the immediate precursor to the UCMJ, laid some groundwork for its successor.⁵² One important measure it took was to limit the commander’s influence by prohibiting his reprimanding of court-martial members.⁵³ The

⁴¹ See U.S. CONST. amend. VI.

⁴² H.R. 2498, *supra* note 13, at 623 (statement of Frederick P. Bryan, Chairman, Special Committee on Military Justice of the Bar Ass’n of the city of N.Y.).

⁴³ *Id.*

⁴⁴ See, e.g., MilitaryCorruption.com, Fighting for the Truth . . . Exposing the Corrupt, <http://www.Militarycorruption.com> [hereinafter MilitaryCorruption.com] (last visited Jan. 23, 2008) (providing an example that skepticism over the military justice system remains prevalent).

⁴⁵ H.R. 2498, *supra* note 13, at 684 (statement of John J. Finn on Behalf of the American Legion).

⁴⁶ 10 U.S.C. § 827 (1950).

⁴⁷ See H.R. 2498, *supra* note 13, at 607–08 (statement of Prof. Edmund M. Morgan, Jr., Harvard University Law School).

⁴⁸ See Library of Congress Online Catalog, The Elston Act: Military Legal Resources (Federal Research Division), http://www.loc.gov/rr/Military_Law/Elston_act.html [hereinafter Library of Congress] (last visited Jan. 24, 2008) (citing the Elston Act, Pub. L. No. 80-759, 62 Stat. 604, § 6 (1948)).

⁴⁹ See generally 10 U.S.C. § 826.

⁵⁰ Library of Congress, *supra* note 48.

⁵¹ See H.R. 2498, *supra* note 13, at 608.

⁵² Library of Congress, *supra* note 48.

⁵³ See H.R. 2498, *supra* note 13, at 608 (statement of Prof. Edmund M. Morgan, Jr., Harvard University Law School).

new UCMJ took this one step further and made unlawful command influence a punishable offense.⁵⁴ Despite the insertion of lawyers in the process and the imposition of controls on command influence, the convening authority still retained vast power, leading to much debate before Congress over the extent of post-trial review.⁵⁵ The debate climaxed during the legislative hearings before a subcommittee on Armed Services, which was intent on revising the UCMJ.⁵⁶ The convening authority was essential for purposes of exercising command prerogative, but it inserted him in the appellate process. The extent of his involvement in the appellate review process was also subject to much debate.

c. Appellate Review

An argument against the convening authority's power to reassess a sentence is that panel members would mete out severe sentences, knowing full well that the convening authority could later reduce them in accordance with his own wishes.⁵⁷ Others argue, however, that the convening authority should "retain the right to review the case only for the purposes of exercising clemency"⁵⁸ In other words, any review on questions of law should be reserved for the appellate courts.⁵⁹ This did not occur. This argument, however, highlights the competing interests of the post-trial process and appellate review. If the convening authority catches legal error, he can reassess the sentence.⁶⁰

Reassessment does not necessarily equal relief. A convening authority could reassess the sentence and determine that no change in the sentence is warranted. This could impede an accused's opportunity for meaningful relief on appeal, because appellate courts are unlikely to find prejudice when a convening authority recognized an issue and addressed it for sentence appropriateness. Notwithstanding the criticisms that the military justice system will never achieve validity so long as the convening authority retains the power "to make the charges against the accused, to appoint the court that is to try the accused, and to review the sentence passed by his own appointed court,"⁶¹ the unique role of the military demanded the convening authority's involvement in the post-trial process. The unique role refers to the military being charged with winning our nation's wars. It is conceivable that the imposition of justice would have to take a backseat to the war effort. The convening authority is the best person to gauge a military member's value to the war effort. As the following excerpt from the hearings before a House Armed Services subcommittee reflects, the drafters of the UCMJ considered the convening authority's involvement in the post-trial process essential to the war effort.

The classic case that I think General Eisenhower stated in his testimony before your subcommittee last year was that even though you might have a case where a man is convicted and it is a legal conviction and it is sustainable, that man may have such a unique value and may be of such importance in a certain circumstance in a war area that the commanding officer may say "Well he did it all right and they proved it all right, but I need him and I want him and I am just going to bust this case because I want to send him on this special mission."⁶²

The UCMJ's creation in the wake of World War II convinced Congress of the need to have the convening authority as part of the post-trial process. Congress was very concerned and devoted much time, however, to the review process after the case left the convening authority.⁶³

If you could be in the position of some Members of Congress who have had complaints from men who got bad-conduct discharges about their inability to obtain jobs in civil life because of their record, you would

⁵⁴ *See id.*; 10 U.S.C. § 837.

⁵⁵ *See generally* H.R. 2498, *supra* note 13.

⁵⁶ *See id.*

⁵⁷ *See* S. 857, *supra* note 39, at 251 (statement of Prof. Arthur John Keeffe, Cornell Law School); H.R. 2498, *supra* note 13, at 840 (statement of Prof. Arthur John Keeffe, Cornell Law School).

⁵⁸ H.R. 2498, *supra* note 13, at 639 (report of the Committee on Military Justice of the N.Y. County Lawyers' Ass'n).

⁵⁹ *See id.* at 840 (statement of Prof. John Arthur Keeffe, Cornell Law School).

⁶⁰ *See* United States v. Sales, 22 M.J. 305 (C.M.A. 1986).

⁶¹ H.R. 2498, *supra* note 13, at 840 (statement of Prof. John Arthur Keeffe, Cornell Law School).

⁶² *Id.* at 1184 (statement of Felix E. Larkin, member of the committee appointed to draft a UCMJ).

⁶³ *See generally id.*

understand why we feel, a great many of us, that there should be a complete review so that no possible injustice can be done.⁶⁴

This fear led Congress to approve a review process in which the convening authority was only the first stop.⁶⁵ For those cases in which the convening authority approved a sentence that included dismissal, discharge, or confinement in excess of one year, a board of review would next evaluate the case.⁶⁶ From there, either the Judge Advocate General, or the accused upon successful petition, could cause a judicial council to hear the case.⁶⁷ Though the development of the post-trial process tempered the convening authority's power, developments since the UCMJ's enactment have eroded the need for the convening authority's involvement in the review process. One such development is the expansion of the powers under Article 15.⁶⁸

2. Expansion of Article 15

Though commanders during the Revolutionary War used nonjudicial punishment, it was not officially authorized until 1916.⁶⁹ It was later included as part of the enactment of the UCMJ.⁷⁰ Its development, however, did not stop there. On 7 September 1962, Congress expanded the powers of commanders under Article 15.⁷¹ One purpose for this expansion was to "red[uce] the number of courts-martial,"⁷² and to "affect the matter of discharges under other than honorable conditions, which many times are based on the number of courts-martial received."⁷³ The expansion gave commanders the ability to impose more rigorous punishments which they previously would have had to resort to courts-martial to achieve.⁷⁴ Greater Article 15 power reduces the need for convening authorities to retain post-trial review of cases. A convening authority determines whether to court-martial an accused.⁷⁵ This authority, combined with the ability to administer punishments for minor offenses, essentially moots the argument that post-trial review by the convening authority is necessary for commanders to be able to retain individuals who are essential to the war effort. In the event of an essential person, commanders can choose not to refer the case and instead administer an Article 15.⁷⁶ A Soldier could derail a convening authority's attempt to utilize Article 15 if he opted for a court-martial.⁷⁷ The convening authority would then have to determine the Soldier's value to the war effort in deciding whether to court-martial. Nevertheless, the Article 15 was essential in giving commanders a tool to

⁶⁴ *Id.* at 797 (statement of Colonel (COL) Frederick B. Wiener).

⁶⁵ See 10 U.S.C. § 859 (1950) (permitting a reviewing authority to sustain a finding of guilty even though error has been committed when it can be determined that the error does not materially prejudice the substantial rights of the accused); *id.* § 862 (permitting the convening authority to return a court-martial record to the court for reconsideration of a dismissal which does not amount to a finding of not guilty or to correct any apparent error or omission provided the corrections can be accomplished without material prejudice to the substantial rights of the accused); *id.* § 863 (giving the convening authority the authority to order a rehearing in cases in which he disapproves the findings and sentence, except in those cases in which there is a lack of sufficient evidence in the record to support the findings); *id.* § 864 (authorizing the convening authority to approve only such findings of guilty, and the sentence or such part or amount of the sentence, as he finds correct in law and fact).

⁶⁶ See *id.* § 866 (providing for review by the Board of Review).

⁶⁷ *Id.* § 867 (providing for review by the Court of Military Appeals (COMA)).

⁶⁸ See generally UCMJ art. 15 (2005) (providing the authority for Article 15, a tool for commanders to dispose of minor offenses. It gives commanders the ability to exact the discipline essential to military service without having to resort to measures such as a court-martial. A conviction at a court-martial may cause a loss of a trained member to the unit because of a punitive discharge as well as scar the person's permanent record in the military and civilian life with a federal conviction. Though Article 15 is the authority from which commanders derive the ability to impose punishment, the services have their own vernacular when referring to it. The Army and Air Force call it nonjudicial punishment (NJP) and the Navy and Marine Corps refer to it as mast).

⁶⁹ See Captain Harold L. Miller, *A Long Look at Article 15*, 28 MIL. L. REV. 37 n.4 (1965).

⁷⁰ UCMJ art. 15 (1951).

⁷¹ See Miller, *supra* note 69, at 38.

⁷² *Id.*

⁷³ *Id.* (quoting *Hearings on H.R. 11257 Before a Subcomm. of the Senate Comm. on Armed Services*, 87th Cong., at 6 (1962)).

⁷⁴ See *id.*

⁷⁵ See UCMJ art. 22 (2005).

⁷⁶ See U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE ch. 3 (16 Nov. 2005) (providing that a servicemember could decide to not accept an Article 15 in which case the commander would have to decide whether to send the case to a court-martial or dispose of the offenses in some other manner. This right to demand trial is taken from Article 15(a) and paragraph 132 of the *Manual for Courts-Martial (MCM)*. UCMJ art. 15(a); MANUAL FOR COURTS-MARTIAL, UNITED STATES ¶ 132 (1969) (Rev.)). In any case it is always an option to do nothing such as in the event that someone is so crucial to the war effort.

⁷⁷ See UCMJ art. 15 (2005) (detailing the punishments commanders may impose, subject to regulations that the President may prescribe).

dispose of minor offenses. It was the establishment of the judiciary, however, that gave courts-martial more of a semblance of fairness.

3. *The Judiciary*

The Military Justice Act of 1968 established the military's trial judiciary.⁷⁸ The judiciary's establishment effectively removed the potential for the convening authority to influence the law officer.⁷⁹ It cannot be overstated that a primary concern of the UCMJ's drafters was the extent of control the convening authority exercised over the entire courts-martial process.⁸⁰ It appeared that in exchange for the convening authority's having apparent unfettered authority over the process and retaining the right to exercise vast post-trial powers, Congress approved an extensive appellate process.⁸¹ The establishment of the judiciary diminished the need for multiple levels of review. The Military Justice Act of 1968 effectively negated any authority the convening authority may have been able to exert when he was responsible for appointing the law officer. As a result, Article 26, UCMJ, ensures that the convening authority is not in the rating chain of the military judge and that the military judge's duties are controlled by the Judge Advocate General.⁸² After the Military Justice Act of 1968, it was not until the Military Justice Act of 1983 that the code again experienced legislative changes.

4. *Military Justice Act of 1983*

The Military Justice Act of 1983, presumably in response to a growing number of appellate issues, simplified the convening authority's role.⁸³ "Prior to [its] enactment . . . the convening authority's post-trial responsibility was quite broad."⁸⁴ The 1956 version of Article 64, UCMJ, required the convening authority to approve only those findings of guilty that he finds correct in both law and fact.⁸⁵ This required the convening authority as well as his staff judge advocate to act in a quasi-judicial role.⁸⁶

During consideration of the 1983 amendments to the Code, however, Congress was mindful of the cumbersome aspects of the legal review that then-Article 64 required of the convening authority and was mindful, particularly, of the fertile field for appellate litigation in connection with the post-trial review of the SJA under then-Article 61, UCMJ The House of Representatives' report on the legislation "emphasized that . . . [the convening authority's post-trial] role primarily involves a determination as to whether the sentence should be reduced as a matter of command prerogative (e.g., as a matter of clemency) rather than a formal appellate review."⁸⁷

Consequently, the Military Justice Act of 1983 reduced the breadth of advice that the SJA must give to the convening authority because it removed the affirmative obligation to examine the record for legal errors.⁸⁸ "The [subsequent] 1984 changes [to the Manual for Courts-Martial] were designed to make the post-trial review a shorter document" for the purpose

⁷⁸ See Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335; Library of Congress, The Military Justice Act of 1968: Military Legal Resources (Federal Research Division), http://www.loc.gov/rr/frd/Military_Law/MJ_act-1968.html (last visited Jan. 23, 2008) (citing the Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335). See generally Morgan, *supra* note 30, at 27 (editorial note) (detailing the development of the trial judiciary).

⁷⁹ MANUAL FOR COURTS-MARTIAL, UNITED STATES ch. 2, ¶ 4e (1951) [hereinafter MCM 1951] (describing the appointment of a law officer to a general court-martial).

⁸⁰ See *H.R. 2498*, *supra* note 13, at 797.

⁸¹ See generally *id.*

⁸² UCMJ art. 26 (2005).

⁸³ See Military Justice Act of 1983, Pub. L. No. 98-209, 97 Stat. 1393 (1983); see also *United States v. Wheelus*, 49 M.J. 283, 287 (1998) (discussing the Military Justice Act of 1983). See generally MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE § 17-8(B)(1) (Matthew Bender & Co. 2005); Library of Congress, The Military Justice Act of 1983: Military Legal Resources (Federal Research Division), http://www.loc.gov/rr/frd/Military_Law/MJ_act-1983.html (last visited Jan. 23, 2008) (citing the Military Justice Act of 1983, Pub. L. No. 98-209, 27 Stat. 1393).

⁸⁴ *United States v. Diaz*, 40 M.J. 335, 340 (C.M.A. 1994).

⁸⁵ See 10 U.S.C. § 864 (1956); MCM 1951, *supra* note 79, ¶ 86.

⁸⁶ See § 864. See generally *H.R. 2498*, *supra* note 13.

⁸⁷ *Diaz*, 40 M.J. at 340 (quoting H. REP. NO. 549, at 15 (1983)).

⁸⁸ See UCMJ art. 60 (2005); MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1106(d)(1) (2005) [hereinafter MCM]. Though there is not an affirmative obligation to examine the record for legal error, prudence dictates a review.

of reducing the number of errors in the post-trial process and shifting the focus to the review of substantive issues on appeal.⁸⁹ In turn, the convening authority's obligation under Article 60(c)(1) is to modify the findings and sentence as a matter of command prerogative.⁹⁰ Under Article 66(c), however, the Court of Military Review (CMR) is responsible for reviewing only those findings and the sentence that the convening authority approves.⁹¹ The distinction between Article 60 and Article 66 further supports the notion that the UCMJ's drafters did not intend to have the convening authority act as a judicial stop in the appellate process, but rather to have the convening authority involved to exercise discretion in determining whether a particular accused was so important to the defense of our country that he was deserving of clemency. Legislative changes such as the Military Justice Act of 1983 represent the most drastic changes in the military justice system, but it is the responsibility of the President to promulgate the rules that the legislature enacts.⁹² In doing so, the President has wide latitude in shaping the military justice system.

B. Executive Activism—Establishment of the Trial Defense Service

*The passage of the Uniform Code of Military Justice by Congress and its approval by the President on May 5, 1950, did not complete the work of creating a uniform military justice system for the armed forces. Article 36 of the code required the President to lay down procedural rules*⁹³

Though most procedural rules shortly followed in the 1951 *Manual for Courts-Martial (MCM)*, a later executive change established the Trial Defense Service (TDS).⁹⁴ Like the establishment of the trial judiciary, the official establishment of the TDS added to the professionalism and perceived fairness of the process, and most importantly removed the defense counsel from the command of the convening authority.⁹⁵ Prior to its creation, an accused enjoyed the benefit of having assigned defense counsel represent them. Opponents of the military justice system, however, were quick to point out that those defense counsel were subject to the control of the convening authority. The obvious implication was that defense counsel would be unable to zealously represent an accused either because of the actual assertion of authority or a subconscious lack of effort on the part of counsel who did not want to displease their boss.⁹⁶ The creation of the TDS removed defense counsel from the convening authority's organization, making defense counsel completely independent.⁹⁷ Even with the creation of the TDS, there are still those who believe that military defense counsel will not be able to represent an accused adequately because of a military culture in which it is natural for junior officers to succumb to the wishes of superiors, regardless of whether they are in the chain of command.⁹⁸ Like the establishment of the judiciary, the creation of the TDS reduced the convening authority's perceived ability to influence a case. Since the UCMJ's inception, various legislative and executive developments have changed the perceived power that the convening authority exercised over the courts-martial process. The legislative and executive developments have whittled away the need for an extensive appellate process to act as a watchdog over the convening authority. Despite the development of procedural guarantees, judicial activism has diminished the need to have the convening authority take such an active role in the post-trial process.

⁸⁹ Lieutenant Colonel Lawrence J. Morris, *'Just One More Thing . . .'* and Other Thoughts on Recent Developments in Post-Trial Processing, ARMY LAW., Apr. 1997, 129, 129 n.6 (relying on *United States v. Diaz*, 40 M.J. 335, 340–42 (C.M.A. 1994)).

⁹⁰ See UCMJ art. 60(c)(1); *Diaz*, 40 M.J. at 340. See generally *H.R. 2498*, *supra* note 13.

⁹¹ See UCMJ art. 66(c).

⁹² Gilbert G. Ackroyd, *Professor Morgan and the Drafting of the Manual for Courts-Martial*, 28 MIL. L. REV. 14, 14 (1965) (describing that Article 36 of the UCMJ "required the President to lay down procedural rules and modes of proof for the unified court-martial system . . .").

⁹³ *Id.*

⁹⁴ See Exec. Order No. 10,214 (Feb. 8, 1951) (prescribing the 1951 *MCM*); U.S. Army Trial Defense Service—History, <https://www.jagcnet.army.mil/JAGCNETIntranet/Databases/TDS> [hereinafter TDS] (last visited Jan. 28, 2008) (detailing that TDS was an experiment from 1978–1980 after which the Army Chief of Staff permanently approved it as an organization).

⁹⁵ TDS, *supra* note 94 (detailing that the TDS had "a separate chain of command within the Judge Advocate General's Corps . . .").

⁹⁶ Interview with COL (Ret.) William G. Eckhardt, U.S. Army, in Kansas City, Mo. (Dec. 19, 2006) (providing that counsel succumbing to outside pressures is a possibility, though it certainly would be an aberration). Not all judge advocates, however, agreed with the decision to create a separate trial defense service. It is apparent that if COL Eckhardt's career is anything similar to a typical judge advocate's, that the concern people held about judge advocates being able to perform without influence, is unfounded. During Vietnam, the ability to zealously represent accused without fear of reprisal was put to the test, for counsel would often find themselves prosecuting one day and defending the next. If nothing else, the creation of TDS did much for the public's confidence in the military justice system.

⁹⁷ TDS, *supra* note 94 (detailing that the TDS had "a separate chain of command within the Judge Advocate General's Corps . . .").

⁹⁸ See *MilitaryCorruption.com*, *supra* note 44.

C. Judicial Activism

Judicial developments affecting the convening authority's action are concentrated in two areas.⁹⁹ First, the courts address errors in advising commanders. These errors run the gamut from including items in the addendum without giving the defense an opportunity to respond, to failing to inform the convening authority of a medal that the accused earned.¹⁰⁰ The second area focuses on the time that it takes for the convening authority to take action. It is the courts' attempts to deal with these post-trial irregularities that reveal judicial activism resulting in the usurping of the convening authority's power. This usurpation did not occur overnight. Rather, it was a case-by-case development stemming from the courts' attempts to address post-trial errors and post-trial processing delay. The following cases are presented chronologically and demonstrate the appellate courts' frustration with post-trial delay and faulty post-trial submissions. The frustration slowly leads to judicial activism and the judiciary's assumption of quasi-clemency powers.

In *United States v. Boatner*, the United States Court of Military Appeals (COMA) addressed an issue it had previously faced in *United States v. Rivera*.¹⁰¹ In each case, when making a recommendation as to the disposition of charges, the respective accused's immediate commander recommended that the accused not be eliminated from service.¹⁰² Both accused were convicted and sentenced to a punitive discharge.¹⁰³ The subsequent SJAs' post-trial recommendations, however, did not inform the convening authority of the recommendations to retain the accused.¹⁰⁴ The court found that "[w]hen a convening authority acts upon a case, either before or after trial, he does so only after obtaining the advice of his staff judge advocate. . . . If the advice is erroneous, inadequate, or misleading, the substantial rights of the accused may be prejudiced."¹⁰⁵ If we consider that the legislative purpose behind having the convening authority involved in the post-trial process is to exercise his command prerogative for furthering the war effort, then the court's recognition that the post-trial advice is a "substantial right of the accused" effectively turned the purpose on its head.¹⁰⁶

It would be an aberration for a convening authority to retain a private who enlisted in March, went absent without leave in July, and remained in an AWOL status almost exclusively until his court martial the following February.¹⁰⁷ The majority would have you believe that the company commander's recommendation would carry such weight.¹⁰⁸ The dissent, however, is more compelling because it inserts a dose of reality. The majority ignored the fact that the same company commander recommended a general court-martial for the accused and that the recommendation for retention was germane to whether the accused should be administratively separated.¹⁰⁹ Since those two recommendations were on the same document, one may read it to mean that this accused should not be administratively separated; he should be court-martialed and subject to the

⁹⁹ See generally UCMJ art. 60 (2005) (describing action by the convening authority). In the typical post-trial process, once the trial is complete the record of trial is first transcribed. The counsel involved in the case review the transcript for accuracy and then the case is forwarded to the military judge for authentication. Once authenticated, the staff judge advocate prepares a post-trial recommendation and serves it on the defense. The defense then has ten days (can be extended an additional twenty days for cause) within which to submit matters that he desires the convening authority to consider when making a decision on his case. The defense matters may request clemency, assert legal error in the process, or address other issues the defense feels are pertinent to the convening authority making a decision when exercising his command authority. Once the defense submits matters, the staff judge advocate may compose an addendum and it, along with the original recommendation and the defense matters, will then go to the convening authority for action. See *infra* App. B (depicting the post-trial process). Major John Rothwell provided the idea for the appendix. The format and information contained therein is based on a similar document for which the author is unknown.

¹⁰⁰ See *United States v. Demerse*, 37 M.J. 488 (C.M.A. 1993) (finding plain error for the staff judge advocate's failure to include the appellant's awards and decorations for Vietnam service in the post-trial recommendation to the convening authority); *United States v. Catalani*, 46 M.J. 325 (1997) (finding error where the staff judge advocate included new matter in the addendum to his post-trial recommendation and did not serve it on the defense; the new matter, *inter alia*, consisted of an assertion that the military judge had already considered the claims the defense made in their clemency request in reaching an appropriate sentence.).

¹⁰¹ See *United States v. Boatner*, 43 C.M.R. 216 (C.M.A. 1971); *United States v. Rivera*, 42 C.M.R. 198 (C.M.A. 1970).

¹⁰² See *Boatner*, 43 C.M.R. 216; *Rivera*, 42 C.M.R. 198.

¹⁰³ See *Boatner*, 43 C.M.R. 216; *Rivera*, 42 C.M.R. 198.

¹⁰⁴ See *Boatner*, 43 C.M.R. 216; *Rivera*, 42 C.M.R. 198.

¹⁰⁵ *Boatner*, 43 C.M.R. at 217 (citing generally *United States v. Greenwalt*, 20 C.M.R. 285 (C.M.A. 1955); *United States v. Grice*, 23 C.M.R. 390 (C.M.A. 1965); *United States v. Johnson*, 23 C.M.R. 397 (C.M.A. 1957); *United States v. Fields*, 25 C.M.R. 332 (C.M.A. 1958); *United States v. Bennie*, 27 C.M.R. 233 (C.M.A. 1959); *United States v. Foti*, 30 C.M.R. 303 (C.M.A. 1961); *Collier v. United States*, 42 C.M.R. 113 (C.M.A. 1970)).

¹⁰⁶ *Id.*

¹⁰⁷ See *id.* at 217-18.

¹⁰⁸ See *id.* at 218.

¹⁰⁹ See *id.* at 219.

punishments that may accompany such a disposition.¹¹⁰ The court reconciles this disconnect as an inconsistency that “should be resolved in favor of the accused.”¹¹¹ The court also ignores, however, the process through which a case travels to end at a general court-martial. Had the majority considered that the convening authority had the opportunity to consider the recommendations of the commander prior to referring the case to a general court-martial, perhaps it would have reached the same conclusion as the dissent.¹¹² Though the court in *Boatner* recognized that “[t]he convening authority has absolute power to disapprove the findings and sentence, or any part thereof, for any or no reason, legal or otherwise[.]”¹¹³ it showed its willingness to ensure that this right is the accused’s, not the convening authority’s. The court justifies returning the case to the convening authority for a new post-trial review and action under the guise of ensuring that the convening authority is properly informed when carrying out his clemency powers.¹¹⁴ The courts’ willingness to return cases for further action demonstrates judicial activism, but this was only the first step. The returning of cases at least allowed the convening authority to ultimately make the decision regarding clemency. Soon thereafter, the courts went one step further and began to dismiss cases in response to unreasonable post-trial processing time.

In *Dunlap v. Convening Authority*, the CMR determined that “a presumption of a denial of speedy disposition of the case will arise when the accused is continuously under restraint after trial and the convening authority does not promulgate his formal and final action within 90 days of the date of such restraint after completion of trial.”¹¹⁵ The court in *Dunlap* reasoned that a post-trial prisoner should be treated according to a rule similar to the one established for pre-trial prisoners.¹¹⁶ The presumption required the Government to show diligence,¹¹⁷ and the absence of diligence required dismissal.¹¹⁸ “*Dunlap* came in response to a problem which frequently manifested itself where the convening authority delayed his final action.”¹¹⁹ *Dunlap* created the potential to give accused a windfall dismissal for a technical violation of a judicially-created timeline. It was not until five years after *Dunlap* that “The Judge Advocate General of the Army certified for review the correctness of the decision of the CMR dismissing the charges of larceny as well as assault and battery, and vacating the findings of guilty and the sentence thereon” that the COMA took a look at the ninety-day rule adopted in *Dunlap*.¹²⁰ *United States v. Banks* was the poster-child case for everything that was wrong with inelastic application of the post-trial processing timeline promulgated in *Dunlap*.¹²¹

In *United States v. Banks*, the court was

asked to decide whether the rule established in *Dunlap* . . . required automatic dismissal of charges . . . ‘where the accused received a fair trial free from error, was found guilty beyond a reasonable doubt and where the delay of 91 days in the review of the conviction by the convening authority caused him to suffer absolutely no prejudice.’¹²²

In overruling *Dunlap*, the court reasoned that,

[C]onvicted service persons now enjoy protections which had not been developed when *Dunlap* was decided. For example, in *United States v. Palenius*, 2 M.J. 86 (C.M.A. 1977), [the court] announced duties on the part of the trial defense attorney which are designed to insure a continuous uninterrupted representation of the convicted accused service person. Performance of those functions may well remove the causes which concerned the *Dunlap* court. And in *United States v. Brownd*, 6 M.J. 338 (C.M.A. 1979)

¹¹⁰ See *id.* at 219 (Darden, J., dissenting).

¹¹¹ *Id.* at 218 (citing *United States v. Johnson*, 23 C.M.R. 397 (C.M.A. 1957)).

¹¹² See *id.* at 219 (Darden, J., dissenting).

¹¹³ *Id.* at 218 (citing *United States v. Massey*, 18 C.M.R. 138 (C.M.A. 1955); *United States v. Smith*, 36 C.M.R. 430 (C.M.A. 1966)).

¹¹⁴ See *id.* (citing *United States v. Fields*, 25 C.M.R. 332 (C.M.A. 1958); *United States v. Foti*, 30 C.M.R. 303 (C.M.A. 1961)).

¹¹⁵ *Dunlap v. Convening Authority*, 48 C.M.R. 751, 754 (C.M.A. 1974).

¹¹⁶ See *United States v. Burton*, 44 C.M.R. 166 (C.M.A. 1971).

¹¹⁷ See *Dunlap*, 48 C.M.R. at 754.

¹¹⁸ See *id.*

¹¹⁹ *United States v. Banks*, 7 M.J. 92, 93 (C.M.A. 1979) (listing cases in which the convening authority delayed his final action).

¹²⁰ *Id.*; see UCMJ art. 67(b)(2) (2005) (providing the authority for the Judge Advocate General to order a case be sent to the court of appeals).

¹²¹ See *Banks*, 7 M.J. at 92.

¹²² *Id.* at 92–93 (quoting the issue that The Judge Advocate General certified for the COMAs’ review).

[the court] announced standards by which applications for deferment of sentence are to be judged in appropriate cases. Thus, the serviceman awaiting final action by the convening authority may avail himself of remedies during the pendency of review which were not clear when *Dunlap* was decided.¹²³

Though Banks received the benefit of the *Dunlap* decision, “in cases tried subsequent to [*Banks*], applications for relief because of delay of final action by the convening authority will be tested for prejudice.”¹²⁴ With Banks’ overruling the ninety-day strict liability processing timeline in *Dunlap*, the focus for the appellate courts seemed to shift once again from post-trial processing timelines to procedural abnormalities in the clemency process. In 1983, as previously discussed, Congress attempted to simplify the post-trial process with the Military Justice Act of 1983. The COMA recognized this in *United States v. Diaz*.¹²⁵

United States v. Diaz exhibits the COMA’s recognition that the convening authority’s purpose is to exercise command prerogative, while the court’s purpose is to review only the findings and sentence that the convening authority approved.¹²⁶ Though the Military Justice Act of 1983 clearly defined these roles, in usurping clemency authority, the courts blurred the dividing line. The Military Justice Act of 1983 tried to simplify the process, but that is not to say that it was without problems. Since *Banks*, the courts have continued to struggle with post-trial processing times.

In a line of cases after *Banks*, the court of military appeals followed its ruling in *United States v. Gray* that an accused has to suffer prejudice as a result of delay of final action by the convening authority.¹²⁷ Though the courts in those cases did not grant an accused relief, they continued to voice their displeasure with unreasonable post-trial processing times. As the list of cases addressing processing times grew, so did the rancor of the CAAF, and its decisions portended what was to come. For example, in *United States v. Hudson*, the court wrote: “We are mindful that continued examples of inordinate and unreasonable delay may require a return to a ‘Draconian Rule,’ similar to *Dunlap*. However, we conclude that appellant has not shown substantial prejudice in this case.”¹²⁸ In *United States v. Bell*, the court expressed their frustration that “[s]uch extensive and unexplained delay not only is unreasonable but also seriously undermines the high standards of justice established for service-members. . . . At one time, significant post-trial delay alone was sufficient to presume prejudice, and this presumption, unrebutted, warranted post-trial relief.”¹²⁹ The court concluded in *Bell*: “We continue to be troubled by cases such as appellant’s, where unexplained delays have occurred between the court-martial and the action of the convening authority.”¹³⁰ *Hudson* and *Bell* showed a judiciary increasingly troubled by post-trial processing times, and these cases served as a warning that changes would come one way or another. Interestingly, it was a case decided the same day as *Bell* that demonstrated the courts’ willingness to fashion change, but it was in response to procedural irregularities rather than lengthy post-trial processing times.

In *United States v. Chatman*, the CAAF returned to the problems associated with the SJA’s inclusion of new matter in the addendum to the post-trial advice without giving the defense an opportunity to comment.¹³¹ In the past, the court would return the case to the convening authority. *Chatman* signifies a shift in that line of thinking. The court wrote:

The court below [(Air Force Court of Criminal Appeals)] has noted that post-trial errors have accounted for 44% of the cases where they have granted relief We are no longer confident that returning cases for a new recommendation and action is a productive judicial exercise in the absence of some indication that the information presented to the convening authority on remand will be significantly different.¹³²

¹²³ *Id.*

¹²⁴ *Id.* at 93–94 (citing *United States v. Gray*, 47 C.M.R. 484 (C.M.A. 1973)).

¹²⁵ See generally *United States v. Diaz*, 40 M.J. 335 (C.M.A. 1994).

¹²⁶ See *id.* at 340.

¹²⁷ The prejudice standard used in *United States v. Gray*, 47 C.M.R. 484 (C.M.A. 1973), was revived in *United States v. Banks*, 7 M.J. 92 (C.M.A. 1979). Since *Banks*, the standard was used in *United States v. Jenkins*, 38 M.J. 287 (C.M.A. 1993), *United States v. Sowers*, 24 M.J. 429, 430 (C.M.A. 1987) (summary disposition), and *United States v. Shely*, 16 M.J. 431 (C.M.A. 1983).

¹²⁸ *United States v. Hudson*, 46 M.J. 226, 228 (1997) (839 days from trial to action).

¹²⁹ *United States v. Bell*, 46 M.J. 351, 353 (1997) (737 days from trial until action); see *infra* App. B (depicting the post-trial process).

¹³⁰ *Bell*, 46 M.J. at 354.

¹³¹ See *United States v. Chatman*, 46 M.J. 321 (1997).

¹³² *Id.* at 323.

Whereas in the past the court was loath to enter into the convening authority's realm,¹³³ *Chatman* "requir[ed] [an] appellant to demonstrate prejudice by stating what, if anything, would have been submitted to 'deny, counter, or explain' the new matter."¹³⁴ Though this common sense approach is likeable, as the dissent points out, it is "judicial rulemaking."¹³⁵ The court continued this approach in *United States v. Cook*.¹³⁶

In *United States v. Cook*, the CAAF affirmed the Air Force Court of Criminal Appeals's disapproval of Airman Jason W. Cook's bad-conduct discharge for wrongful use and distribution of marijuana, because the convening authority had not considered Cook's post-trial submission.¹³⁷ The court in *Cook* did not return the case to the convening authority to determine if Cook was the sort of Airman the convening authority desired for continued service.¹³⁸ The CAAF's reasoning became clear in *United States v. Wheelus*, in which the court provides a great discussion and categorization of the litany of post trial errors that have occurred since the Military Justice Act of 1983 tried to simplify the process.¹³⁹ *Wheelus* also demonstrates the CAAF's willingness to continue its judicial activism.¹⁴⁰

In *United States v. Mosely*, the court suggested "that ordinarily errors in post-trial processing should be returned to the convening authority for correction as soon as detected."¹⁴¹ In *Wheelus*, the court showed a preference for any case that must be returned to go to the same convening authority who initially acted on the case.¹⁴² Reasoning that may not occur, the court determined that a different convening authority may "not necessarily be an accused's best chance for clemency."¹⁴³ Consequently, the CAAF relied on Rule for Courts-Martial (RCM) 1106(d)(6) which provides: "In case of error in the recommendation . . . , appropriate corrective action shall be taken by appellate authorities without returning the case for further action by a convening authority."¹⁴⁴ The CAAF further relied on Congress, which provided:

If the accused has any objections to the staff judge advocate's recommendations those objections must be raised in the response; failure to do so constitutes a waiver of the objection to the staff judge advocate's recommendation and the effect of the recommendation on the convening authority's action. If there is an objection to an error that is deemed prejudicial under Article 59 during appellate review, it is the Committee's intent that appropriate corrective action be taken by appellate authorities without returning the case for further action by a convening authority.¹⁴⁵

In *Wheelus*, the CAAF discussed the clemency powers of appellate courts, recognizing that

[a]ppellate courts . . . do not have clemency powers, per se, that being an Executive function reposed . . . in the convening authority.¹⁴⁶ Still, the Courts of Criminal Appeals have broad power to moot claims of prejudice by "affirming 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."¹⁴⁷

Relying on this language, the CAAF offered that *Cook*

¹³³ See *United States v. Leal*, 44 M.J. 235, 237 (1996).

¹³⁴ *Chatman*, 46 M.J. at 323 (citing UCMJ art. 59(a) (1994)).

¹³⁵ *Id.* at 324 (Sullivan, J., dissenting).

¹³⁶ See *United States v. Cook*, 46 M.J. 37 (1997).

¹³⁷ See *id.*

¹³⁸ See *id.*

¹³⁹ See *United States v. Wheelus*, 49 M.J. 283 (1998).

¹⁴⁰ See Major Michael J. Hargis, *The CAAF Drives On: New Developments in Post-Trial Processing*, ARMY LAW., May 1999, at 63.

¹⁴¹ *Wheelus*, 49 M.J. at 288 n.3 (citing *United States v. Mosely*, 35 M.J. 481 (C.M.A. 1992)).

¹⁴² See *id.* at 287-88.

¹⁴³ *Id.*

¹⁴⁴ *Id.* (citing MCM, *supra* note 88, R.C.M. 1106(d)(6)).

¹⁴⁵ *Id.* (quoting S. REP. NO. 53, at 21 (1983)).

¹⁴⁶ *Id.* (citing *United States v. Healy*, 26 M.J. 394 (C.M.A. 1988)).

¹⁴⁷ *Id.* (quoting UCMJ art. 66(c) (2005)).

was an example of that process. There, . . . [the CAAF] sustained the decision of the Court of Criminal Appeals to order sentence reduction, rather than returning the record of trial to a convening authority for a new recommendation and action. [The CAAF] concluded that the court “properly exercised its discretion to fashion an appropriate remedy by affirming only that portion of the sentence that it found correct under the guidelines of Article 66(c).”¹⁴⁸

Relying on this language, the CAAF claims that its decision in *Cook* is consistent with Congress’s intent.¹⁴⁹ What it really signifies is the extent to which the court will go to garner clemency-like powers. The court’s argument, in the context of new matter as in *Cook*, is inconsistent with the congressional language upon which the CAAF relies.

The language of UCMJ Article 66(c) does give the courts authority to take corrective action, but this authority is premised on the convening authority’s having considered everything the defense wished to submit. When an SJA includes new matter and fails to serve the defense, then it cannot be said that the convening authority considered everything the defense desired to submit. The issue is not ripe for the appellate courts because if the defense counsel did not have knowledge of the new matter, he could not have waived submitting a response. Shortly after its decision in *Wheelus*, the CAAF appeared to reduce its level of activism and return to written beratements.

In *United States v. Johnston*, the CAAF seemed to retreat from its position that the appellate courts could fashion an appropriate remedy.¹⁵⁰ Rather, it found that “[a]ll this Court can do to ensure that the law is being followed and that military members are not being prejudiced is to send these cases back for someone TO GET THEM RIGHT.”¹⁵¹ The court also advocated holding accountable those responsible for appellate issues “resulting from sloppy staff work and inattention to detail.”¹⁵² The frustration with processing times also continued. Following the CAAF’s lead in *Hudson and Bell*, the U.S. Army Court of Criminal Appeals (ACCA), in *United States v. Sherman*, expressed its frustration over lengthy post-trial processing times.¹⁵³ In *United States v. Collazo*, ACCA acted on its frustration.

In *United States v. Collazo*, ACCA used the authority CAAF identified in *Wheelus* and applied it in a post-trial processing delay case.¹⁵⁴ The record of trial in *Collazo* was 519 pages, yet it took ten months to prepare.¹⁵⁵ Despite the appellant’s lack of complaint to the convening authority regarding the post-trial processing of his case, and ACCA’s finding no prejudice as required by *Banks*, the court relied on the CAAF’s language from *United States v. Shely* to fashion a new remedy.¹⁵⁶ The court found that,

¹⁴⁸ *Id.* at 289 (citing *United States v. Cook*, 46 M.J. 37, 40 (1997)).

¹⁴⁹ *See id.* (citing *Cook*, 46 M.J. 37).

¹⁵⁰ *See United States v. Johnston*, 51 M.J. 227 (1999).

¹⁵¹ *Id.* at 230.

¹⁵² *Id.* at 229–30.

Our concern is ensuring that the law is adhered to, established procedures are followed, and staff judge advocates do their jobs. Obviously the supervisory responsibility for military justice advice to convening authorities lies with the Judge Advocates General of the Armed Forces and the General Counsel of the Department of Transportation. See *United States v. Johnson-Saunders*, 48 M.J. 74, 76 (1998) (Crawford, J., dissenting). Hopefully, these statutory officers are being kept abreast of the numerous cases in which this Court must act on issues resulting from sloppy staff work and inattention to detail. It is also hoped that they are responding by holding those responsible accountable for their actions or lack thereof.

Id.

¹⁵³ *See United States v. Sherman*, 52 M.J. 856, 860–61 (Army Ct. Crim. App. 2000) (“we do not condone the lengthy post-trial processing, which extended for just over one full year from adjournment to action. Prior to 1984, staff judge advocates routinely completed records and laborious post-trial reviews under the previous, stringent ninety-day rules.”).

¹⁵⁴ *See United States v. Collazo*, 53 M.J. 721 (Army Ct. Crim. App. 2000).

¹⁵⁵ *Id.* at 725 n.6.

¹⁵⁶ *Id.* at 725; *United States v. Shely*, 16 M.J. 431 (C.M.A. 1983).

The very difficulty in demonstrating that prejudice to an accused has resulted from delays in completing the action provides a temptation for a convening authority to lapse into dilatory habits in completing his action. Thus, the demise of the *Dunlap* presumption may produce a return to the intolerable delays that persuaded the Court to adopt the presumption in the first place. Indeed, to help prevent such an occurrence, the Court should be vigilant in finding prejudice wherever lengthy post-trial delay in review by a convening authority is involved.

Id. at 432.

[A]ppellant has not demonstrated actual prejudice under *Banks*. However, fundamental fairness dictates that the government proceed with due diligence to execute a [S]oldier's regulatory and statutory post-trial processing rights and to secure the convening authority's action as expeditiously as possible, given the totality of the circumstances in that [S]oldier's case. Considering the record as a whole, that did not happen in the appellant's case. . . . Congress granted this court "broad power to moot claims of prejudice by 'affirming 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 our judgment, this is an appropriate case to exercise that authority. We will grant relief . . . in the form of a reduction to the sentence to confinement by four months.¹⁵⁷

Collazo exhibited the courts' willingness to create a judicial remedy despite no showing of actual prejudice. The CAAF recognized the inconsistency with *Banks*, which remains good law,¹⁵⁸ yet in *United States v. Tardif*, the CAAF followed the same reasoning as *Collazo* in determining that the courts of criminal appeal had the authority under Article 66(c) to "grant appropriate relief for unreasonable and unexplainable post-trial delays."¹⁵⁹ The battle over unreasonable post-trial delays continued in *United States v. Jones*, which provides an excellent synopsis of the courts' authority to grant relief for excessive post-trial processing and failure to adhere to post-trial procedures.¹⁶⁰

In *United States v. Jones*, the CAAF reviewed the NMCCA's decision that despite the post-trial processing of appellant's case being unreasonable, he did not suffer prejudice.¹⁶¹ The CAAF used its power under Article 59(a), UCMJ to conduct a de novo review to assess prejudice, and made it clear that its authority under Article 59(a) is "entirely distinct from the Court of Criminal Appeals' Article 66(c) sentence appropriateness powers" that we saw in *Wheelus*.¹⁶² This distinction is important because it explains the apparent disconnect in the service appellate courts granting relief for excessive post-trial delay despite the lack of prejudice that *Banks* required. In *United States v. Toohey*, the CAAF confirmed that,

"[A]n accused has the right to a timely review of his or her findings and sentence."¹⁶³ This includes the right to a reasonably timely convening authority's action,¹⁶⁴ the reasonably prompt forwarding of the record of trial to the service's appellate authorities,¹⁶⁵ and reasonably timely consideration by the military appellate courts.¹⁶⁶

The CAAF's recognition of these stages of post-trial review means that the Due Process Clause constitutionally guarantees the right to a timely review.¹⁶⁷ In applying the *Barker v. Wingo* factors, the CAAF first had to determine whether an appellant suffered prejudice.¹⁶⁸ The first factor is the prerequisite to the application of the remaining factors.¹⁶⁹ The remaining factors are: the reasons for the delay; whether the appellant asserted his right to a timely appeal; and whether the appellant suffered any prejudice.¹⁷⁰ In *Jones*, the CAAF determined that the length of delay was facially unreasonable.¹⁷¹ The CAAF further determined that the appellant had in fact suffered prejudice and granted relief under Article 59(a), UCMJ.¹⁷² In granting relief to Jones under Article 59(a), the CAAF made it clear that relief for lack of due process for a

¹⁵⁷ *Collazo*, 53 M.J. at 728 (quoting *United States v. Wheelus*, 49 M.J. 283 (1998)).

¹⁵⁸ See *United States v. Jones*, 61 M.J. 80 (2005).

¹⁵⁹ *United States v. Tardif*, 57 M.J. 219 (2002).

¹⁶⁰ See *Jones*, 61 M.J. 80.

¹⁶¹ *Id.* at 81.

¹⁶² *Id.* at 86; see *United States v. Wheelus*, 49 M.J. 283 (1998).

¹⁶³ *United States v. Toohey*, 60 M.J. 100, 101 (2004) (citing *Diaz v. Judge Advocate General of the Navy*, 59 M.J. 34, 37 (2003)).

¹⁶⁴ *Id.* (citing *United States v. Williams*, 55 M.J. 302, 305 (2001) ("Appellant has a right to a speedy post-trial review of his case.")).

¹⁶⁵ *Id.* (citing *United States v. Dunbar*, 31 M.J. 70, 73 (C.M.A. 1990)).

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 102 (citing *Diaz*, 59 M.J. at 38).

¹⁶⁸ See *Barker v. Wingo*, 407 U.S. 514, 530-32 (1972).

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *United States v. Jones*, 61 M.J. 80, 83-84 (2005) (applying factors from *Barker*, 407 U.S. at 530-32).

¹⁷² *Id.* at 84.

post-trial review requires a showing of prejudice, whereas relief under Article 66(c)'s sentence appropriateness does not.¹⁷³ Thus, because there was "a finding of legal error accompanied by Article 59(a) prejudice, . . . [the CAAF] could order a remedy . . . rather than remanding the case for that purpose."¹⁷⁴ If there had not been prejudice, then the court of criminal appeals would have had to grant relief under Article 66(c).¹⁷⁵ Finding that the delay was facially unreasonable was the CAAF's threshold step in determining that Jones suffered prejudice. The court made that step easier in *United States v. Moreno*,¹⁷⁶ which brings us full circle.

Moreno's establishment of presumptive unreasonableness for post-trial processing exceeding 120 days combines elements of CAAF's decision in *Dunlap*¹⁷⁷ establishing a time limit, with the requirement from *Banks*¹⁷⁸ that an appellant must show prejudice. *Moreno* represents another judicial shift in the post-trial process by which the courts hope to cure, if their chastising language is any reflection, a post-trial epidemic. It is still too early to determine what *Moreno* will accomplish in fixing post-trial delay, but it does highlight the conflict inherent in the military justice system that pits an accused's right to effective clemency against his right to a meaningful appeal. The line of post-trial cases explored in this article demonstrates not only willingness on the part of the courts to fashion remedies, but that as a result, the convening authority may no longer be an accused's best chance for relief.

In their interpretations of the rules governing post-trial matters submitted pursuant to Rules for Courts-Martial 1105 and 1106,¹⁷⁹ the courts have essentially made the post-trial process one in which the "imperfections in the post-trial review, as distinguished from the underlying trial, required reversal of countless cases."¹⁸⁰ "Though outright reversal is relatively rare for post-trial error, remand for new reviews and actions are extremely common for post-trial errors that do not go to the core of the matter at issue in trial."¹⁸¹ The extent of clemency that convening authorities grant when cases are remanded is unknown, but the overall clemency rates are worth exploring. With courts granting relief, and clemency actually saving cases, it appears that clemency may no longer be an accused's best chance for relief.¹⁸²

III. Clemency

Considering the courts' activism in the post-trial arena, is the convening authority still an accused's best chance for relief? Statistics will tell whether convening authorities grant relief, but the bigger question may be whether the convening authority should remain a part of the post-trial process.

A. Statistics¹⁸³

Determining whether an accused received clemency depends on how we define the term. For instance, one could argue that deferral or waiver of forfeitures is not clemency, because the manner in which that is accomplished typically ensures that an accused does not receive any of the money.¹⁸⁴ Others would quickly point out that the accused's family obtains monetary

¹⁷³ *Id.* at 83 (discussing the court's decision in *United States v. Tardif*, 57 M.J. 219 (2002), in which the CAAF confirmed that Courts of Criminal Appeals "have authority to address unreasonable and unexplained post-trial delay under their Article 66 authority to ensure an 'appropriate sentence.'").

¹⁷⁴ *Id.* at 86.

¹⁷⁵ See *United States v. Wheelus*, 49 M.J. 283 (1998).

¹⁷⁶ See *United States v. Moreno*, 63 M.J. 129 (2006).

¹⁷⁷ *Dunlap v. Convening Authority*, 48 C.M.R. 751 (C.M.A. 1974) (establishing a ninety-day post-trial processing rule).

¹⁷⁸ *United States v. Banks*, 7 M.J. 92 (C.M.A. 1979).

¹⁷⁹ Rule for Courts-Martial 1105 governs matters submitted by the accused. Rule for Courts-Martial 1106 covers the recommendation of the staff judge advocate or legal officer.

¹⁸⁰ FRANCIS A. GILLIGAN & FREDERIC I. LEDERER, COURT-MARTIAL PROCEDURE 81 (1991).

¹⁸¹ *Morris*, *supra* note 89, at 129 n.6.

¹⁸² *United States v. Bono*, 26 M.J. 240 (C.M.A. 1988) (the convening authority's grant of clemency saved the case because the defense counsel was found to be ineffective for sentencing).

¹⁸³ See generally *infra* App. A.

¹⁸⁴ Rule for Courts-Martial 1101(d) specifically provides for waiver and payment directly to dependents of forfeitures imposed by the operation of law due to a sentence to confinement. Deferral, authorized by RCM 1101(c), unlike waiver does not give the convening authority the ability to direct payment. In the author's experience, however, the convening authority conditionally approves any deferral of forfeitures on the condition that the amount deferred gets paid directly to the accused's dependents.

support and that this inures to the accused. This conflict raises the issue of whether clemency is just window dressing or whether the statistics show that it is worthwhile.

From 1 January 2000 through 1 December 2006 the Army tried 9081 courts-martial.¹⁸⁵ The number of cases tried in each of those years are: 1073 (2000), 1192 (2001), 1435 (2002), 1325 (2003), 1336 (2004), 1516 (2005), and 1204 (2006).¹⁸⁶ The Army courts, however, do not track clemency. Instead, they track adjudged findings and punishment versus approved findings and punishment. If one defines clemency as any reduction of findings or punishment, from adjudged to approved, then it appears that clemency is freely given. For example, out of the 9081 courts-martial tried from 2001–2006, the convening authority approved something less-than-adjudged in 2533 of them.¹⁸⁷ This would mean that clemency was granted in approximately 28% of cases. This is the absolute high end of the range of clemency. This figure does not contemplate, however, the number of cases in which the convening authority approved a sentence lower than that which was adjudged because he and the accused entered into an agreement by which the accused agreed to plead guilty in exchange for the convening authority agreeing to limit the sentence.¹⁸⁸ Consequently, a better indicator may be those cases in which the accused pled not guilty or pled guilty without the benefit of a deal. In this manner, we can bracket a range of clemency.

Appendix A breaks down clemency from 2000–2006 in cases where the accused pled not guilty to all offenses.¹⁸⁹ From 2001–2006, convening authorities either disapproved or approved less-than-adjudged punishment in 155 cases where the accused pled not guilty. This reveals clemency was given at a rate of 1.7%. This method also has its limitations, for it does not consider the reasons behind the convening authority's action. For example, a perusal of cases reveals one in which, at first blush, the convening authority disapproved the findings and the ten-year sentence, but closer inspection reveals that the convening authority did not approve the case, because the accused committed suicide after trial prior to the convening authority's action.¹⁹⁰ Even in extreme cases of this nature, however, a benefit inures to the accused because his family might then be entitled to benefits.¹⁹¹ Clemency may not inure to the benefit of the accused in those cases where the convening authority gives some clemency to correct a mistake from trial. In cases such as these, an appellate court may have given more clemency, but is unlikely to then second-guess a convening authority who has already addressed the issue. There are also inconsistencies among different convening authorities. The appellate courts have shown a reluctance to return cases to a different convening authority, because a new convening authority would not know the accused. A new convening authority, however, may actually benefit the accused. Some convening authorities are more likely or more predisposed to giving clemency. It is the luck of the draw for an accused on clemency, just like it might have been for sentencing where he drew a trier of fact, be it a military judge or a panel, known for doling out stiff penalties. Clemency also comes in many forms, and the type of clemency affects its value.¹⁹²

Is it clemency to commute a dishonorable discharge to a bad-conduct discharge? A drafter of the UCMJ testified that “clemency has been granted in many cases by both the Army and Navy by changing a dishonorable discharge to a bad-conduct discharge. This is so much double talk because so far as our board could discover, there is very little practical

¹⁸⁵ E-mail from Homan Barzmehri, Management Program Analyst, Office of the Clerk of Court, to MAJ John Hamner (Jan. 12, 2007, 1:33 EST) (on file with author).

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ An accused may negotiate and propose a pretrial agreement. The convening authority may then accept, reject, or make a counteroffer. MCM, *supra* note 88, R.C.M. 705 (d).

¹⁸⁹ *Id.* (the tables were created from data attached to the e-mail).

¹⁹⁰ The author was the trial counsel in *United States v. Rodriguez*, the subject case. See Record of Trial (promulgating order on file with the Army Clerk of Court).

¹⁹¹ When an accused dies prior to completion of an appeal of right the proceedings are subject to abatement ab initio.

[An a]ppellant's motion for abatement rests upon the general concept that the death of an accused after conviction but before completion of an appeal of right abates the entire proceeding from its inception. If granted, abatement ab initio has the effect of 'eliminating or nullifying' the proceeding or conviction 'for a reason unrelated to the merits' of the case. *Black's Law Dictionary* 2 (7th ed. 1999). 'It is as if the defendant had never been indicted and convicted.' *United States v. Logal*, 106 F.3d 1547, 1551-52 (11th Cir. 1997)."

United States v. Rorie, 58 M.J. 399, 400 (2003). If an accused were never convicted his family could receive whatever benefits are payable to the family members of Soldiers who died on active duty.

¹⁹² Value of clemency is ultimately determined by its recipient. See MCM, *supra* note 88, R.C.M. 1107 (providing for action by the convening authority to include action on the sentence).

difference between a bad-conduct and a dishonorable discharge.”¹⁹³ Despite the social stigma attached to a punitive discharge from the military, in this author’s experience, most accused are more concerned with the amount of confinement. The typical accused is young and concerns for the future do not extend beyond tomorrow. When convening authorities decide to reduce the amount of confinement that an accused will serve, regardless of their reasons for doing so, they have shown generosity. From 2000–2006, in the cases where the convening authority granted clemency, the convening authority reduced confinement time by an average of 21%.¹⁹⁴ Thus, although the overall rates of clemency may be low, when given, it is significant. Considering that clemency may be given only to thwart chances for relief on appeal, and the idea that the original idea behind clemency was for the convening authority to exercise command prerogative, does clemency still have a role today?

B. Does the Convening Authority Still Have a Role in the Post-Trial Process?

The legislative history shows that the convening authority’s involvement in the post-trial process was meant more to give the convening authority the opportunity to keep essential personnel than to provide additional rights to accused.¹⁹⁵ With judicial activism, the post-trial rights of accused have continued to grow as the courts attempted to micromanage the convening authority’s review. With the courts’ willingness to use quasi-clemency power, does the convening authority still have a useful role in the post-trial process?

Since the appellate courts have shown a reluctance to return cases to a convening authority unfamiliar with them, they must believe that familiarity is essential to exercising command prerogative. It follows then, that the same convening authority would be absolutely essential in companion cases. The figures show that convening authorities are willing to dole out reductions in confinement. In companion cases, this may be essential to reaching an equitable result. The cases stemming from the Son Thang incident during the Vietnam War provide great examples of a convening authority using this power.¹⁹⁶ In Son Thang, a Marine Corps patrol known as a “killer team” went to a series of huts and in total killed sixteen Vietnamese women and children.¹⁹⁷ The ensuing judicial processing of the cases produced varying results for the five members of the patrol.

Four general courts-martial resulted from the incident. A panel of officers convicted Private Michael A. Schwarz of premeditated murder and sentenced him to confinement for life. A panel of officer and enlisted members convicted Private First Class Samuel G. Green, Jr., of unpremeditated murder and sentenced him to five years in confinement. Another officer panel acquitted Lance Corporal Randy Herrod [(the patrol leader and arguably the most culpable)], and a military judge acquitted Private First Class Thomas R. Boyd. The government granted Private First Class Michael S. Krichten immunity in exchange for his testimony¹⁹⁸

With such vast difference in sentences for individuals who were all involved in the same incident, this seemed an appropriate case for the convening authority to adjust the sentences. The convening authority reduced Green and Schwarz’s sentences to one year.¹⁹⁹ Some would argue that this is an inappropriate use of the convening authority’s post-trial powers because each person was tried before a court that heard all of the evidence, and if it found the person guilty, presumably fashioned a sentence commensurate with his culpability. Anyone who has read the book covering the incident, however, could easily reach the conclusion that the courts got it wrong. This type of clemency is certainly a far cry from the convening authority exercising the authority to keep personnel essential to the war effort. Consequently, Son Thang demonstrates that convening authorities can effectively grant clemency other than for purposes of advancing the war effort. With the courts’ willingness to grant clemency, the convening authority and the courts are potentially at odds. Are the courts perhaps better suited for this type of clemency review?

¹⁹³ *H.R. 2498*, *supra* note 13, at 839 (statement of Arthur J. Keefe offered into the record).

¹⁹⁴ *See infra* App. A (the 21% is from cases in which the accused pled not guilty).

¹⁹⁵ *H.R. 2498*, *supra* note 13, at 325.

¹⁹⁶ *See* GARY SOLIS, *SON THANG: AN AMERICAN WAR CRIME* (1997).

¹⁹⁷ Major David D. Velloney, *Son Thang: An American War Crime*, 166 *MIL. L. REV.* 234 (2000) (book review).

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 240.

The courts, in their exercise of authority under Article 66(c), have demonstrated the aptitude to fashion appropriate sentences. It follows that disparate sentences in companion cases may not necessarily be appropriate, and the respective court could take action under Article 66(c) to make equitable adjustments to the sentences. In *United States v. Tardif*, the CAAF even found support in the UCMJ's legislative history for the courts of criminal appeals to exercise this authority. The legislative history provides: "The Board may set aside, on the basis of the record, any part of a sentence, either because it is illegal or because it is inappropriate."²⁰⁰ Similarly,

[t]he board of review, now, has very extensive powers. It may review law, facts, and practically, sentences; because the provisions stipulate that the board of review shall affirm only so much of the sentence as it finds to be justified by the whole record. It gives the board of review . . . the power to review facts, law and sentence²⁰¹

Though the convening authority has proven adept, the greater role that the judiciary has taken in the post-trial process reveals a decreasing need for the convening authority to be so intricately involved in the post-trial process. Rather than having the courts continue to either gain more control by returning cases to convening authorities, or simply grant clemency on their own accord, the time appears ripe for legislative action. Just like the Military Justice Act of 1983 tried to quell the contention between the convening authority and the courts, the cases leading up to *Moreno* reveal that legislative action may once again be necessary to reestablish the respective roles of the convening authority and appellate courts.

IV. Suggested Changes

It is important to remember that the UCMJ was created in the aftermath of World War II, a period where the war effort dominated the consciousness of the American public. It was a time where perhaps one man, such as those integrally involved in the creation of the atomic bomb, could make a difference in the outcome of the war. In today's Army, it seems very unlikely that one Soldier is so crucial that it demands the commander to exercise his prerogative to keep that Soldier for the war effort. Ever-increasing public scrutiny born from mass media makes it even less likely, because the public would not stand idly by while a convening authority took no action against a serious offender. If the primary purpose for convening authority review is no longer present, should the convening authority remain involved in the post-trial process? Over time, the primary purpose for having the convening authority involved has been lost. The purpose was to benefit the Army in our nation's defense, not to benefit the accused. Safeguards and additional levels of review were emplaced to reduce the public's mistrust of the military justice system and to guard against a convening authority abusing his power. With the continued evolution and professionalization of the military justice system, however, appellate courts no longer need to scrutinize the process. Gone are the days where convening authorities would return the case for another trial. Thus, once again, should the days of convening authority involvement in the post-trial process also disappear?

The idea to bypass the convening authority is not a new one. The drafters of the UCMJ explored a similar idea in the Chamberlain Bill, in which a case would travel directly from trial to a court of military appeals.²⁰² After all, this is the method used in the federal system.²⁰³ In this manner, perhaps the appellate courts could then focus on substantive trial issues rather than focusing so much of their energy on the mechanics of the post-trial process. Removing the convening authority from the post-trial process certainly does not leave the accused utterly without appellate relief. With the courts assuming clemency-like powers, they have shown they are suited to adjusting sentences when necessary.²⁰⁴ This is an attractive idea, but not likely to occur. The commander's involvement in the process is too ingrained in our culture. Simplification, however, is necessary.

In the Military Justice Act of 1983, Congress attempted to simplify the post-trial process and remove the obligation of the convening authority to review cases for their correctness in law.²⁰⁵ This was consistent with the drafters' intent, which

²⁰⁰ *United States v. Tardif*, 57 M.J. 219, 223 (2002) (quoting S. REP. NO. 98-486, at 28 (1949)).

²⁰¹ *Id.* at 219 (quoting Professor Morgan, chair of the drafting committee for the UCMJ who testified before Congress discussing the power of the Boards of Review, which preceded the Courts of Criminal Appeals).

²⁰² *H.R. 2498*, *supra* note 13, at 841.

²⁰³ See 18 U.S.C. §§ 3731-3742 (2000) (providing that appeals from the ninety-four federal trial courts known as U.S. District Courts are appealed to their respective U.S. Court of Appeals of which there are twelve. From there, any appeal would have to go to the U.S. Supreme Court).

²⁰⁴ *United States v. Sales*, 22 M.J. 305 (C.M.A. 1988) (finding that the COMA has authority to reassess the sentence).

²⁰⁵ *United States v. Wheelus*, 49 M.J. 283, 286 (1998) (citing the Military Justice Act of 1983, Pub. L. No. 98-209, 97 Stat. 1393).

envisioned the establishment of “a uniform system of review . . . under which the commanding officer shall retain the right to review the case only for the purposes of exercising clemency.”²⁰⁶ The implementation of uniformity in this respect has created procedural difficulties in which form appears to prevail over function.

In *Wheelus*, the CAAF identified three areas of post-trial concern: (1) new matter inserted in the addendum to the SJA’s post-trial recommendation without affording the defense an opportunity to respond; (2) “lawyer problems[,]” primarily stemming from failure to ensure continuous post-trial representation; and (3) errors in the post-trial recommendation.²⁰⁷ The first and third categories are similar in that both concern the SJA’s advice to the convening authority. The line of cases discussed supra, culminating with *United States v. Moreno*, reveal that the third problem area is actually post-trial processing time.²⁰⁸ The impact that these areas have on the post-trial process could be reduced if convening authority action were the exception rather than the norm.

Appendix B is a visual depiction of the post-trial process as it currently exists. It demonstrates the amount of effort devoted to readying a case for the convening authority’s review. Appendix C shows a proposed simplified process, reducing the role of the convening authority. In cases where the convening authority does not exercise his command prerogative within a certain time from authentication, then under the proposed plan, it is presumed that he approves the findings and sentence.²⁰⁹ In keeping with the original purpose for having the commander involved, if a person were vital to the war effort, surely the convening authority would not fail to act to exercise his prerogative prior to the appellate court’s receiving the case. The process could work as described in the following paragraph.

At the end of a trial, the military judge could explain to the accused that he may submit matters to the convening authority in the hope that the convening authority would exercise his power to grant clemency. The military judge would also explain post-trial representation. After authentication of the record of trial, the case would be sent to the accused and to the respective court of criminal appeals. If the convening authority did not exercise his authority within a certain specified time from authentication, say forty-five days, then the court of criminal appeals could presume that the convening authority had approved the findings and sentence as adjudged without affirmative action on his part.²¹⁰ Additionally, once forty-five days from authentication had elapsed, representation would pass from the defense counsel to assigned appellate counsel.²¹¹ Whereas under the current system the SJA must advise the convening authority in painstaking detail, the proposal would only obligate advice to the convening authority when an accused submits matters for consideration. As when an SJA advises a commander on a letter of reprimand rebuttal, there would be no set format for the advice. Furthermore, because the right to exercise clemency belongs to the convening authority, new matter is immaterial. Thus, there is no requirement to serve anything on the accused except for the record of trial. If the accused fails to submit something within the prescribed time, then he has waived any consideration and the case is now within the power of the appellate court. The simplification of the post-trial process would restore the original purpose behind having the convening authority involved and greatly reduce post-trial processing times. It will not, however, cure every case.

²⁰⁶ *H.R. 2498*, supra note 13, at 639.

²⁰⁷ *Wheelus*, 49 M.J. at 286–87.

²⁰⁸ See *United States v. Moreno*, 63 M.J. 129 (2006).

²⁰⁹ The assumption that the convening authority approves the findings and sentence would have to necessarily include that the convening authority approved the findings and sentence as limited by any pre-trial agreement.

²¹⁰ A mechanism by which the convening authority notifies the appellate court must exist for those cases in which the convening authority, with the accused’s express consent, maintains possession of a case longer than the forty-five-day period. This would prove useful in companion cases where it is foreseeable that an accused may want a convening authority to be able to review his case after the conclusion of the companion cases. There would be no affirmative obligation on the convening authority to comply with an accused’s request. In many cases, or as an alternative, the process could be expedited if accused could waive the convening authority’s post-trial review as part of an offer to plead. In this manner, accused could attempt to secure a benefit in terms of limitations on the sentence that he may not otherwise receive during the clemency process.

²¹¹ This automatic passing of representation establishes an easily identifiable event that seeks to remedy the problem of accused and counsel not knowing the extent of the representative relationship. Pursuant to RCM 1105, an accused currently has ten-days to submit matters and may request an additional twenty-days for good cause. The rule gives the staff judge advocate the authority to approve the extension, but only the convening authority may deny such a request. Defense counsel routinely request the extension and it is freely granted. The proposed change would give the defense thirty-days and rid the system of the meaningless exercise in paperwork that accompanied the ten-day deadline. Though the court in *United States v. Moreno*, 63 M.J. 139, 142 (2006), also set a “presumption of unreasonable delay for courts-martial . . . where the record of trial is not docketed by the service Court of Criminal Appeals within thirty-days of the convening authority’s action[,]” under the proposed revision of the post-trial process, an additional fifteen-days was allotted so that a convening authority could notify the appellate court of clemency granted in response to an accused’s submission. If an accused were to turn in his submission on day thirty, some time must be given to the staff judge advocate to advise the convening authority and notify the appellate court of favorable treatment.

In *United States v. Moreno*, the post-trial delays occurred at numerous stages in the process.²¹² It took 288 days to authenticate the record of trial and 490 days for the convening authority to take action.²¹³ Even under the proposed post-trial process, the case would not have been ready for appellate review until 333 days after trial.²¹⁴ No proposal can account for the time to authenticate the record of trial. Responsibility for authentication must remain with the convening authority.²¹⁵ Authentication under the proposed process serves to notify the accused of two important events: (1) that he may submit matters in clemency within thirty days of being served the authenticated record of trial, if he wishes to do so, and (2) that in forty-five days from authentication, his right to representation will pass from the attorney who represented him at trial to his assigned appellate defense counsel.²¹⁶ The countdown to presuming that the convening authority approves the case must begin at authentication rather than sentencing to ensure that there is no gap in representation for the accused. If forty-five days elapsed from sentencing and authentication had not occurred, then appellate counsel would not have a record of trial. This would preclude appellate counsel from providing meaningful advice. In effect, this would leave an accused without effective representation from trial until authentication. In *Moreno*, the proposed process would have reduced the processing time by 32%. Even this significant reduction shows that there is not a cure-all for every case. Simplification of the convening authority's post-trial involvement, however, removes the inherent conflict between the time devoted to the convening authority's exercise of clemency powers and an accused's Fifth Amendment due process right to a speedy trial review.²¹⁷ Radical change such as this can only be accomplished via legislation. This proposed process comports with the original intent behind the convening authority's involvement, while satisfying basic due process rights that the courts have recognized.²¹⁸

V. Conclusion

Though the statistics show that convening authorities grant clemency, the rate may not equal the percentage the appellate courts find are deserving of some relief.²¹⁹ Much of the relief the courts of criminal appeals contemplate, however, is due to post-trial processing concerns.²²⁰ If the status quo continues, the appellate courts may be an accused's best chance for relief. A review of the post-trial process from its inception through its executive, legislative, and judicial development reveals that the process has strayed from what the drafters originally intended. The convening authority's power initially needed guarding, but as the military justice system matured, this need—along with the need for extensive post-trial convening authority involvement—has diminished. The appellate courts have shown that they are capable of dispensing justice by usurping clemency authority. Though there are cases where a convening authority may be better suited to exercise true clemency, these cases are few, and the appellate courts would be just as able. The appellate courts' frustration with the process and attempts to exert influence over the system have signaled the need for another wide-sweeping, legislative overhaul of the post-trial system.

²¹² *Moreno*, 63 M.J. at 133.

²¹³ *Id.*

²¹⁴ This figure is derived by adding the 288 days it took to authenticate *Moreno*'s record of trial to the proposed time of forty-five days that must elapse before any appellate authority can act on the case.

²¹⁵ This puts a premium on the speedy transcription and assembly of records of trial and it will remain an area in which all involved in the appellate process must remain vigilant.

²¹⁶ Pursuant to RCM 1105, an accused currently has ten-days to submit matters and may request an additional twenty days for good cause. The rule gives the staff judge advocate the authority to approve the extension, but only the convening authority may deny such a request. Defense counsel routinely request the extension and it is freely granted. The proposed change would give the defense thirty-days and rid the system of the meaningless exercise in paperwork that accompanied the ten-day deadline. Though the court in *United States v. Moreno*, 63 M.J. 139, 142 (2006), also set a "presumption of unreasonable delay for courts-martial . . . where the record of trial is not docketed by the service Court of Criminal Appeals within thirty-days of the convening authority's action[.]" under the proposed revision of the post-trial process, an additional fifteen-days was allotted so that a convening authority could notify the appellate court of clemency granted in response to an accused's submission. If an accused were to turn in his submission on day thirty, some time must be given to the staff judge advocate to advise the convening authority and notify the appellate court of favorable treatment.

²¹⁷ See U.S. CONST. amend. V; *Moreno*, 63 M.J. at 142; *United States v. Jones*, 61 M.J. 80, 83 (2005).

²¹⁸ See *United States v. Toohey*, 60 M.J. 100, 101 (2004); *Diaz v. Judge Advocate General of the Navy*, 59 M.J. 34, 38 (2003); *United States v. Rodriguez*, 60 M.J. 239, 246 (2004).

²¹⁹ *United States v. Chatman*, 46 M.J. 321, 323 (1997) (the Air Force Court of Criminal Appeals "noted that post-trial errors have accounted for 44% of the cases where they have granted relief").

²²⁰ *Id.*

Appendix A

Not Guilty Clemency Totals*

2000

Jurisdiction	# Cases Granted Clemency	Disapproved		Forfeitures		Confinement		Discharge	
		Case	Spec	Reduced (T to P)	Disapproved	Adjudged	Amount Reduced	Reduced (DD to BCD)	Disapproved
1st Arm. Div.	2	0	0	0	0	8y	1y, 7m	0	0
1st Cav. Div.	1	0	0	0	0	3y	6m	0	0
1st Inf. Div.	4	0	0	2	1	9y, 8m	6m	0	0
III Corps & Ft. Hood	1	0	0	1	0	4m, 14d	4m, 14d	0	0
19th TSC	2	0	0	0	0	3y, 4m	1y, 4m	0	0
25th Inf. Div.	3	2	0	0	0	35y	1y	0	0
HQ, Alaska	1	0	0	0	0	33y	0	1	0
Ft. Bliss	3	1	1	0	1	9m	3m	0	0
Ft. Carson	2	0	0	0	0	13y	4y, 2m, 24d	0	0
Ft. Eustis	2	1	0	0	0	1y, 6m	2m	0	0
Ft. Sam Houston	2	0	1	0	0	1y, 2m, 18d	1m, 25d	1	0
Ft. Lee	1	0	0	1	0	0	0	0	0
Ft. Leonard Wood	1	0	0	0	0	6y	2y	0	0
TOTALS	25	4	2	4	2	114y, 10m, 2d	12y, 1m, 3d	2	0

2001

Jurisdiction	# Cases Granted Clemency	Disapproved		Forfeitures		Confinement		Discharge	
		Case	Spec	Reduced (T to P)	Disapproved	Adjudged	Amount Reduced	Reduced (DD to BCD)	Disapproved
1st Cav. Div.	4	0	0	0	0	23y, 3m, 15d	7y, 3m, 15d	0	0
1st Inf. Div.	2	0	0	0	0	12y, 8m	1y, 1m	0	0
III Corps & Ft. Hood	1	0	0	0	0	5y	1m	0	0
V Corps	1	0	0	0	0	8m	2m	0	0
21st TSC	1	0	0	0	0	1y	25d	0	0
82d Airborne	4	0	0	0	0	10y, 11m, 19d	2y	0	0
Ft. Bliss	1	1	0	0	0	0	0	0	0
Ft. Bragg	1	0	0	0	0	3y	6m	0	0
Ft. Campbell	1	0	1	0	0	1y, 3m	1y, 3m	0	0
Ft. Carson	1	0	0	0	1	6y	6y	0	0
Ft. Drum	1	0	0	0	0	2y, 6m	1y, 6m	0	0
Ft. Leavenworth	1	0	0	0	0	9y	2y	0	0
Military District of Washington	1	0	0	0	1	5y	0	0	0
Ft. Sill	3	0	0	0	1	9y, 1m	4y, 5m	0	0
Ft. Stewart	1	1	0	0	0	0	0	0	0
TOTALS	24	2	0	0	3	89y, 5m, 4d	26y, 4m, 10d	0	0

Jurisdiction	# Cases Granted Clemen cy	Disapproved		Forfeitures		Confinement		Discharge	
		Case	Spec	Reduced (T to P)	Disapprove d	Adjudged	Amount Reduced	Reduced (DD to BCD)	Disapproved
1st Cav. Div.	5	1	1	0	0	91y	39y, 7m	0	1
1st Inf. Div.	3	1	0	0	0	2y, 2m, 14d	11m, 14d	0	0
III Corps & Ft. Hood	2	0	0	0	0	16y	2m	0	0
V Corps	1	0	1	0	0	5m	0	0	0
19th TSC	2	1	0	0	0	3y	1y	0	0
Aberdeen	1	0	0	0	1	5y	0	0	0
Ft. Bliss	2	0	0	0	0	2y, 3m	1y, 2m	0	0
Ft. Campbell	1	0	0	0	1	6m	0	0	0
Ft. Carson	3	0	0	0	1	1y, 6m	3m	0	0
Ft. Eustis	3	0	0	0	0	6y, 6m	8m	0	0
Ft. Gordon	1	1	0	0	0	0	0	0	0
Ft. Lewis	1	0	0	1	0	0	0	0	0
Ft. Meade	1	1	0	0	0	0	0	0	0
Ft. Polk	1	0	0	0	1	0	0	0	0
SOC	1	0	0	0	0	5m	1m	0	0
USMA	2	0	0	0	0	6m	0	0	2
TOTALS	30	5	2	1	4	126, 9m, 14d	43y, 10m, 14d	0	3

2003

Jurisdiction	# Cases Granted Clemency	Disapproved		Forfeitures		Confinement		Discharge	
		Case	Spec	Reduced (T to P)	Disapproved	Adjudged	Amount Reduced	Reduced (DD to BCD)	Disapproved
1st Cav. Div.	3	1	0	0	0	11m	2m	0	1
1st Inf. Div.	3	0	0	0	2	4y, 9m	7m	0	0
III Corps & Ft. Hood	2	0	0	0	0	8y, 3m	2m, 5d	0	0
19th TSC	1	0	0	0	0	7m	1m	0	0
21st TSC	1	0	1	0	0	10y	1m	0	0
82d Airborne	1	0	0	0	0	2y	4m	0	0
HQ, Alaska	1	1	0	0	0	0	0	0	0
ARCENT	1	0	0	0	0	1y	1m	0	0
Ft. Campbell	2	0	0	0	2	0	0	0	0
Ft. Carson	1	0	0	0	0	2y, 3m	5m	0	0
Ft. Eustis	2	1	0	0	0	0	0	1	0
Ft. Huachuca	1	0	0	0	0	6m	1m	0	0
Ft. Irwin	1	0	0	0	0	1y	1m	0	0
Ft. Riley	2	0	1	0	0	7y, 6m	6m	0	0
Spec. Forces Cmd	1	0	0	0	1	1m, 15d	0	0	0
TOTALS	23	3	2	0	5	38y, 10m, 15d	2y, 7m, 5d	1	1

2004

Jurisdiction	# Cases Granted Clemency	Disapproved		Forfeitures		Confinement		Discharge	
		Case	Spec	Reduced (T to P)	Disapproved	Adjudged	Amount Reduced	Reduced (DD to BCD)	Disapproved
1st Cav. Div.	1	0	0	0	0	3y	6m	0	0
2d Inf. Div.	1	0	0	0	0	5y	2m	0	0
V Corps (Rear Prov)	1	0	0	0	0	5y	2m	0	0
7th Army Trng Cmd	1	0	0	0	0	16y	3m	0	0
21st TSC	1	0	0	0	1	1y, 6m	0	0	0
82d Airborne	3	2	0	0	0	20y, 6m	1y	0	0
Ft. Benning	1	0	0	0	1	0	0	0	0
Ft. Bliss	1	0	0	1	0	0	0	0	0
Ft. Campbell	2	0	0	0	0	9y	2m	0	0
Ft. Carson	1	0	0	0	0	1y	1m	0	0
Ft. Dix	1	0	0	0	1	2y, 6m	6m	0	0
Ft. Drum	2	0	0	0	0	2y, 9m	1y, 2m	0	0
Ft. Eustis	1	0	0	0	0	1y	4m, 4d	0	0
Ft. Huachuca	1	0	0	0	0	1y	1m	0	0
Ft. Jackson	1	1	0	0	0	0	0	0	0
Ft. Lewis	1	0	0	0	0	3y	1y	0	0
Ft. Stewart	1	1	0	0	0	0	0	0	0
TOTALS	21	4	0	1	3	71y, 3m	5y, 4m, 4d	0	0

2005

Jurisdiction	# Cases Granted Clemency	Disapproved		Forfeitures		Confinement		Discharge	
		Case	Spec	Reduced (T to P)	Disapproved	Adjudged	Amount Reduced	Reduced (DD to BCD)	Disapproved
V Corps	1	0	0	0	0	1y, 6m	1m	0	0
7th Army Trng Cmd	1	0	0	0	0	6y	3m	0	0
21st TSC	2	1	0	0	0	11y	8y, 6m	0	0
25th Inf. Div.	1	0	0	1		1y, 2m	4m	0	0
HQ, Alaska	2	0	0	0	0	7y, 8m	2y, 3m	0	0
ARCENT	1	1	0	0	0	0	0	0	0
Ft. Benning	1	0	0	0	0	8m	3m	0	
Ft. Bliss	1	0	0	0	0	24y	9y	0	0
Ft. Dix	1	0	0	0	0	5y	2m	0	0
Ft. Drum	3	1	0	0	0	1y, 8m	4m	0	0
Ft. Gordon	1	0	0	0	0	3y, 6m	6m	0	0
Ft. Hood	1	0	0	0	0	6m	5m, 1d	0	0
U.S. Army Japan	1	0	0	0	1	3m	3m	0	0
Ft. Knox	1	1	0	0	0	0	0	0	0
Ft. Sill	1	0	0	0	1	0	0	0	0
Ft. Stewart	2	1	0	0	1	6m	0	0	0
TOTALS	21	5	0	1	3	63y, 5m	22y, 4m, 1d	0	0

2006

(Cases received by the Army Clerk of Court through 12 Jan 2007)

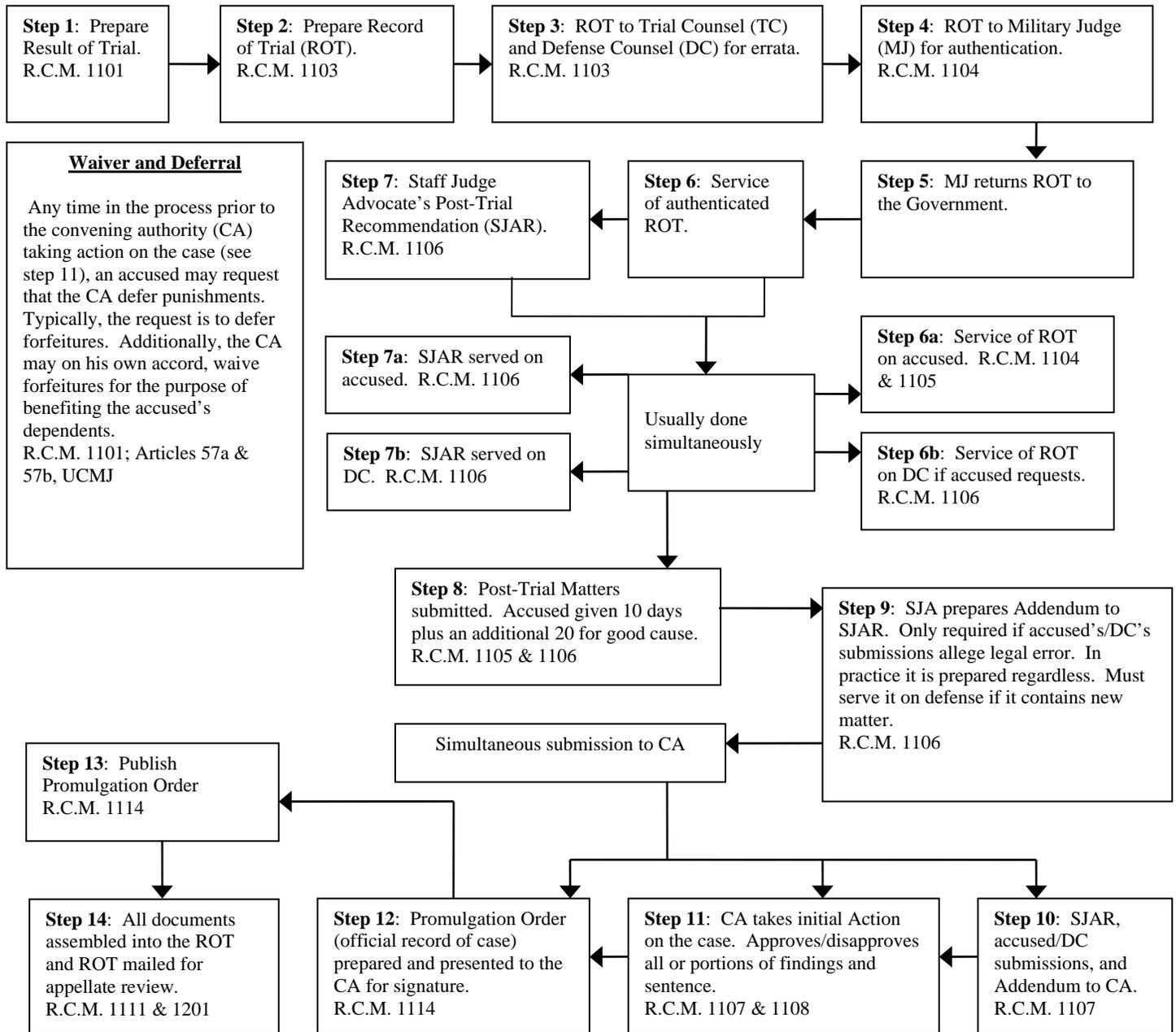
Jurisdiction	# Cases Granted Clemency	Disapproved		Forfeitures		Confinement		Discharge	
		Case	Spec	Reduced (T to P)	Disapproved	Adjudged	Amount Reduced	Reduced (DD to BCD)	Disapproved
HQ, Alaska	1	0	0	0	1	0	0	0	0
ARCENT	1	0	0	0	0	5y	2y	0	0
Ft. Benning	1	0	0	0	0	11m	3m	0	0
Ft. Bliss	1	0	0	0	0	15y	1m	0	0
Ft. Carson	1	0	0	0	0	7y	6m	0	0
Ft. Drum	3	0	0	0	0	19y	2y, 6m	0	1
Ft. Lewis	1	0	0	0	1	6m	6m	0	0
Ft. Stewart	1	1	0	0	0	0	0	0	0
Military Dist. Washington	1		0	1	0	0	0	0	0
TOTALS	11	1	0	1	2	47y, 5m	5y, 10m	0	1

* The database the Army uses to track cases (ACMIS) tracks the adjudged and approved sentences. In the case of an approved sentence being less than the adjudged, it does not explain the discrepancy making it difficult to determine whether a reduced sentence is due to clemency or whether it is the result of an agreement or some other purpose. Consequently, in an effort to reduce the cases affected by an agreement, the tables only track cases in which the accused pled not guilty.

KEY	
Symbol	Meaning
Y	year
M	month
D	day
T	Total
P	Partial
DD	Dishonorable Discharge
BCD	Bad-Conduct Discharge

Appendix B

Post-Trial Process in its Current Form



Appendix C

Post-Trial Process as Proposed

