

Post-Trial Delay: The Möbius Strip Path¹

Major Andrew D. Flor*

I. Introduction

Post-trial delay, or delay between the trial and appellate review, is not a new problem. In fact, post-trial delay has been the subject of frequent appellate opinions almost since the inception of the Uniform Code of Military Justice (UCMJ) in 1950.² However, a historical review of post-trial delay appellate decisions reveals an interesting phenomenon. Over the last fifty years, courts have twice departed from the original standard of review based upon prejudice, only to later return to that prejudice-based standard. This circuitous path that the courts have followed has only caused confusion and uncertainty with regards to post-trial delay. This article argues that the appellate courts should stop wandering this Möbius strip path, as depicted in Appendix A, and instead continue to apply the prejudice test to post-trial delay.

The courts should adhere to this standard for three primary reasons. First, post-trial delay does not normally affect the findings or the sentence in each case. Generally speaking, the accused stands convicted and sentenced for the crimes he or she committed regardless of the post-trial delay in the case.³ Second, and because the post-trial delay does not affect the findings or the sentence, those cases without prejudice should not receive relief for what amounts to an administrative delay.⁴ This position is consistent with

Article 59, UCMJ,⁵ and the standard of prejudice articulated by the Court of Appeals for the Armed Forces (CAAF) in *United States v. Wheelus*.⁶ Finally, the standard of prejudice may occasionally lead to arbitrary results,⁷ but this simple prejudice test would be no more arbitrary than the artificial timelines that the courts have attempted to impose on post-trial delay over the years.⁸

In order to show that post-trial delay review has only briefly deviated from the standard of simple prejudice in the past, and that it never should, this primer will trace the Möbius strip path followed by the military appellate courts over the years. First, this primer will examine the history and origins of post-trial delay from the earliest published opinions up until *Dunlap v. Convening Authority, Combined Arms Center* in 1974. The *Dunlap* decision signaled the first major shift for post-trial delay review away from prejudice, but that shift lasted only five years. This article will next cover that short period from the *Dunlap* decision until it was abandoned in 1979 in *United States v. Banks*.⁹ Third, this article will cover the period of case-by-case post-trial delay review following the *Banks* decision in 1979 until 2002, when the CAAF decided *United States v. Tardif*.¹⁰ Next, this article will examine the current state of post-trial delay review from the *Tardif* decision to the present. Finally, this

* Judge Advocate, U.S. Army. Presently assigned as Professor, Criminal Law Department, The Judge Advocate General's Legal Center and School, U.S. Army, Charlottesville, Virginia.

¹ A Möbius Strip is a piece of paper that has been twisted 180 degrees and the ends taped together. It creates a continuous, one-sided surface from start to finish. For example, if a pencil line is drawn along the length of the strip from the starting point, it will traverse the entire piece of paper on "both" sides and end up at the exact same starting point. The Moebius Strip, http://mathforum.org/sum95/math_and/moebius/moebius.html (last visited Jan. 28, 2011).

² See 64 Stat. 108 (1950) (enacting the UCMJ). The Court of Military Appeals (CMA) issued the earliest recorded post-trial delay opinion in 1958. See *United States v. Tucker*, 26 C.M.R. 367, 369 (C.M.A. 1958).

³ However, one major problem with post-trial delay is that the convening authority must approve the results of the court-martial before the conviction and sentence become final, or before the case can be reviewed on appeal. See UCMJ arts. 60, 66 (2008). Delays in the post-trial process can impede this important role the convening authority plays, and can impede the possibility of clemency for the accused. "It is at the level of the convening authority that an accused has his best opportunity for relief." *United States v. Boatner*, 43 C.M.R. 216, 217 (C.M.A. 1971).

⁴ "[W]e conclude that any meaningful relief available would be an undeserved windfall for the appellant and disproportionate to any possible harm the appellant suffered as a result of the post-trial delay." *United States v. Magincalda*, No. 200900686 (N-M. Ct. Crim. App. Aug. 26, 2010) (refusing to grant relief for a post-trial delay of 857 days from trial until action).

⁵ "A finding or sentence of court-martial may not be held incorrect on the ground of an error of law unless the error *materially prejudices the substantial rights of the accused*." UCMJ art. 59(a) (2008) (emphasis added).

⁶ The court in *Wheelus* held:

[T]he following [is the] process for resolving claims of error connected with a convening authority's post-trial review. First, an appellant must allege the error at the Court of Criminal Appeals. Second, an appellant must allege prejudice as a result of the error. Third, an appellant must show what he would do to resolve the error if given such an opportunity.

49 M.J. 283, 288 (C.A.A.F. 1998).

⁷ Compare *United States v. Tucker*, 26 C.M.R. 367, 369 (C.M.A. 1958) (granting dismissal with prejudice for a two year delay), with *United States v. Bush*, 68 M.J. 96, 104 (C.A.A.F. 2009) (granting no relief for a seven year delay).

⁸ See, e.g., *Dunlap v. Convening Authority, Combined Arms Center*, 48 C.M.R. 751, 754 (C.M.A. 1974) (imposing an arbitrary ninety-day limit from trial to convening authority action), and *United States v. Moreno*, 63 M.J. 129, 142 (C.A.A.F. 2006) (imposing three arbitrary timelines: 120 days from trial to convening authority action, thirty days from convening authority action to docketing at the service court, and eighteen months from docketing to appellate court decision).

⁹ *United States v. Banks*, 7 M.J. 92, 93-94 (C.M.A. 1979).

¹⁰ *United States v. Tardif*, 57 M.J. 219, 223-25 (C.A.A.F. 2002).

primer will use the 2009–2010 term of court as a case study to establish the true Möbius strip nature of post-trial delay review. The 2009–2010 term of court will also show that despite any opinions to the contrary, the courts ultimately, and correctly, test post-trial delay cases for prejudice.

A. The Origins of Post-Trial Delay Review (1958–1974)

1. The Earliest Post-Trial Delay Opinions (1958–1960)

As early as 1958, post-trial delay was addressed in a published opinion: *United States v. Tucker*.¹¹ The post-trial delay at issue in *Tucker* was not the normal type of post-trial delay we see today. Most delays today are caused by slow processing before the appellate court decision.¹² In *Tucker*, the delay occurred after the initial appeal when the Government took more than one year to serve the Navy Board of Review (NBR)¹³ opinion on the appellant after it was decided.¹⁴ In addition to that delay, the appellant's petition for review was not forwarded to The Judge Advocate General of the Navy for more than one year after the opinion was finally served.¹⁵ The Court of Military Appeals (CMA) dismissed the charge and its specifications, stating that “[u]nexplained delays of the kind presented here should not be tolerated by the services, and they will not be countenanced by this Court.”¹⁶

Two years later, in *United States v. Richmond*, the court faced a question of “speedy trial” rights that the court decided as an issue of “timely review” instead.¹⁷ The court distinguished the two types of delay by stating that “[a]n accused is guaranteed the right to a speedy trial, but that

privilege must be distinguished from his rights on appeal.”¹⁸ The former right evolved from the Magna Carta and is found in the Sixth Amendment to the Constitution and must be “jealously guarded,” while the latter normally results in relief only if the accused is prejudiced by the delay. The court cited to *Tucker* as the only example in the court's history where post-trial delay was severe enough to require dismissal of the charges.¹⁹ The only delay in *Richmond* that garnered any attention by the court was the ten month delay from trial to convening authority action, which the court called “unusual.” However, in the “absence of any assertion that the accused's defense on rehearing was impaired or hampered, or that he was otherwise prejudiced,” the court would not dismiss the conviction.²⁰

As shown by *Richmond*, as early as 1960 the court started to address post-trial delay under a standard of prejudice. And, even while the post-trial delay review in *Tucker* was not directly decided on grounds of prejudice, the court was clearly concerned with the prejudicial impact of other errors in the case that might have influenced their decision to dismiss the case.²¹

2. The Early 1970s

After *Tucker* and *Richmond*, post-trial delay did not receive attention from the court for another ten years. However, from 1970 through 1974, the court would publish no fewer than eleven post-trial delay opinions. Almost all of these eleven opinions would base their decisions, at least in part, on whether the accused suffered prejudice from the delay. All eleven opinions are discussed below.

In September 1970, the court decided *United States v. Ervin*, in which the record of trial was lost for almost three years, so that the appellant was not promptly served his copy of the Navy Board of Review decision. The court found that the case was due to be reversed because of erroneous sentencing instructions, and noted that the accused would have a case for dismissal on rehearing based on the three-year delay. The court cited to *Richmond* for the proposition that “consideration still must be given to whether the accused was prejudiced by the delay.” The court concluded that rehearing would serve no useful purpose, as the appellant had long since served his sentence and been

¹¹ *Tucker*, 26 C.M.R. at 369. Ironically, showing the true Möbius nature of post-trial delay review, the Court of Appeals for the Armed Forces (CAAF) cited *Tucker* in the *Tardif* decision. See *Tardif*, 57 M.J. at 222. There do not appear to be any published post-trial delay opinions prior to 1958 (research on file with author).

¹² See, e.g., *Moreno*, 63 M.J. at 133.

¹³ The precursor to the Navy-Marine Corps Court of Criminal Appeals.

¹⁴ Article 67 requires that any appeal to the CAAF be filed within sixty days from the date the accused is served with the decision of the Court of Criminal Appeals (CCA) or the date of mailing of the decision of the CCA. See UCMJ art. 67(b) (2008). While this does not impose a requirement on how expeditiously the service CCA decisions must be served, it does set a guideline. This requirement did not exist when *Tucker* was written, but the courts were concerned about expeditious post-trial processing. See Military Justice Amendment of 1981, Pub. L. No. 97-81, 95 Stat. 1087 (adding the sixty-day provision to the statute). See also U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE para. 13-9 (16 Nov. 2005) (requiring service of the Army CCA decision on the accused in a manner as “expeditiously as possible”).

¹⁵ See UCMJ art. 67(b) (2008).

¹⁶ *Tucker*, 26 C.M.R. at 369.

¹⁷ *United States v. Richmond*, 28 C.M.R. 366, 368 (C.M.A. 1960).

¹⁸ *Id.* at 369.

¹⁹ *Id.*

²⁰ *Id.* at 371.

²¹ Specifically, the court was concerned with the “prejudicial effect” of prior convictions that were improperly revealed to the panel. In fact, in its decretal paragraph, the court stated, “The decision of the Board of Review is reversed. In view of all the circumstances [including, presumably, the delay] the charge, with all its specifications, is dismissed.” *Tucker*, 26 C.M.R. at 368.

separated from the service, and dismissed the charges.²² In a concurring opinion citing to *Tucker*, Judge Ferguson wrote that he would have dismissed the charges “regardless of the existence of any other error” because the lengthy delay constituted “a due process violation.”²³

Five post-trial delay opinions were issued by the CMA in early 1971. In *United States v. Fortune*, the Navy Board of Review decision was not served on the appellant for twenty months. The court cited *Ervin* and dismissed the charges and specifications in a terse three-paragraph opinion. The court does not mention prejudice, but the court noted that the Government conceded that the sentencing instructions were erroneous, and that the appellant was currently separated from the service, so there was “no useful purpose in continuing the proceedings.”²⁴

In *United States v. Prater*, the court made several interesting observations surrounding post-trial delay. First, the court stated that “the due process clause of the Fifth Amendment [does not apply] *ex proprio vigore* to appellate review of military trials.”²⁵ Instead, the concept of “military due process” covered the issue of post-trial delay. Second, the court cited to *Richmond* for the principle that post-trial delay is not covered by the same law as a speedy trial claim.²⁶ Finally, the court held that a nine-month delay from trial to convening authority action was “not a sufficient” basis for reversal in the absence of prejudicial error (citing *Tucker* and *Ervin*).²⁷ Unfortunately, the *Prater* opinion seemed to be of dubious precedential value. The lead opinion was only from one judge, Judge Darden.²⁸ The concurrence in the result by Chief Judge Quinn disagreed on the concept of due process.²⁹ The dissent by Judge Ferguson, like his opinion in *Ervin*, stated that he would have granted relief, finding “prejudice in the fact of delay alone.”³⁰ Judge Ferguson would have also found other errors in the case.³¹

²² *United States v. Ervin*, 42 C.M.R. 289, 290 (C.M.A. 1970).

²³ *Id.* at 291 (Ferguson, J., concurring).

²⁴ *United States v. Fortune*, 43 C.M.R. 133, 133 (C.M.A. 1971).

²⁵ *United States v. Prater*, 43 C.M.R. 179, 182 (C.M.A. 1971). *Ex proprio vigore* means “[b]y their or its own inherent force.” BLACK’S LAW DICTIONARY 602 (7th ed. 1999).

²⁶ *Prater*, 43 C.M.R. at 182.

²⁷ *Id.* at 183.

²⁸ *Id.* at 180.

²⁹ *Id.* at 183 (Quinn, C.J., concurring in the result).

³⁰ *Id.* (Ferguson, J., dissenting).

³¹ *Id.* at 186 (Ferguson, J., dissenting). Judge Ferguson would also have found errors in the detailing of defense counsel to represent the accused, as well as error in the accused being treated as a sentenced prisoner prior to review by the convening authority. *Id.*

In April 1971, after *Fortune* and *Prater*, the court decided *United States v. Davis*. The delay consisted of six separate periods of delay, one as short as five days between authentication and convening authority action, and the longest being seventy-eight days to prepare a thirty-nine-page record of trial. The court cited to both *Richmond* and *Prater* for the proposition that “[i]nordinate delays do not ‘*ipso facto*’ demonstrate prejudice.” In the absence of any identified prejudice, the court did not grant any relief.³² As in *Prater*, the majority opinion consisted of Judge Darden, while Chief Judge Quinn concurred in the result, and Judge Ferguson dissented and would have dismissed the charges based on the delays (again citing *Tucker*).³³

The next post-trial delay opinion was a month later, in *United States v. Adame*. This time, Judge Ferguson joined the majority in voting to dismiss, while Judge Darden (the author of *Fortune* and *Davis*) dissented. The court dismissed the charges based upon an erroneous ruling on admissible evidence combined with a delay of sixteen months in serving the Navy Board of Review opinion on the appellant, and cited to *Ervin* and *Fortune* for the proposition that “no useful purpose” would be served by a remand because the appellant’s sentence to confinement had long since been served, and the suspension period for his bad conduct discharge had also expired.³⁴ The dissent cited to *Davis* and *Prater*, and stated that a rehearing could still be appropriate, as the appellant was still on active duty.³⁵

Seven days later, in a per curiam opinion, the court cited *Fortune* and *Adame* and dismissed the charges in *United States v. Sanders* for a failure to serve the Navy Board of Review decision on the appellant within nineteen months. Again, the case showed errors independent of the delay (in this case, all irregularities in the record of trial), but because of the delay “the period of confinement and the probationary period for remission of the bad-conduct discharge” had expired, so that the case “[could] properly be concluded” with a dismissal.³⁶

These five opinions in 1971 show that the court was still requiring prejudice or at least independent error before it would grant relief for post-trial delays. The opinions that granted relief (*Fortune*, *Adame*, and *Sanders*) did so based on errors that would have warranted reversal without the delays, but found that the delays had rendered rehearing pointless. The two opinions that did not grant relief (*Prater* and *Davis*) specifically cited the absence of prejudice. One judge (Judge Ferguson) held the opinion that delay alone

³² *United States v. Davis*, 43 C.M.R. 381, 382 (C.M.A. 1971).

³³ *Id.* at 383 (Ferguson, J., dissenting).

³⁴ *United States v. Adame*, 44 C.M.R. 3, 3 (C.M.A. 1971).

³⁵ *Id.* at 3–4 (Darden, J., dissenting).

³⁶ *United States v. Sanders*, 44 C.M.R. 10, 11 (C.M.A. 1971).

could justify dismissal in the absence of other error or more specific prejudice, but his views did not prevail at that time.

After those five opinions in early 1971, the court did not decide another post-trial delay opinion for almost ten months. In 1972, the court decided *United States v. Whitmire*, which dealt with a long delay in appellate review of the record of trial. *Whitmire* showed that the court had started to solidify the law regarding post-trial delay.³⁷ While the length of the delay was not mentioned in the opinion, the court assumed that the explanation for the delay was inadequate. The court nonetheless held that for relief to be granted, “[i]t must further appear that the delay presents a fair risk of prejudice to the accused,” which was lacking in this case. The court cited *Prater* as authority and granted no relief based on post-trial delay.³⁸

Later in 1972, the court addressed an interesting issue in *United States v. Wheeler*. The appellant faced both pretrial and post-trial delays. As a result, he attempted to argue that the combination of the two violated his rights. The court did not agree. Each delay was, and should be, addressed separately according to the court. With respect to post-trial delay, the court cited *Prater* for the proposition that “unexplained appellate delays may demand a dismissal if prejudicial errors have occurred.” Finding no such error, the court did not grant relief for post-trial delay.³⁹

In 1973, the court decided *United States v. Timmons*. The court held that a six-month delay in the convening authority review of the case to be unreasonable because it was without valid explanation.⁴⁰ However, the other errors in the case had been remedied by the Army Court of Military Review, and the court was “loathe [sic] to declare that valid trial proceedings are invalid solely because of delays in the criminal process after trial.”⁴¹ The court affirmed the findings of guilty and remanded the case for reassessment of the sentence based on an error in the Staff Judge Advocate’s Recommendation.⁴² The dissent agreed that the SJAR was prejudicially inadequate, but stated that “the interest of justice would be better served by dismissal,” citing *Tucker* without further explanation.⁴³

Later in 1973, the court decided *United States v. Gray*. This case dealt with a delay of 212 days from trial until

convening authority action. Relying heavily on *Timmons*, the court found that despite the “deplorable and unreasonable” delay in this case, the lack of prejudice did not require relief for post-trial delay.⁴⁴ However, the tone had clearly shifted over the previous few years. The stronger language used by the court (“deplorable”) signaled that their patience was running out, and that a seismic shift was coming.

The last opinion before that seismic shift was *United States v. Jefferson*. The post-trial delay in this case was 244 days from trial until convening authority action. The court again called the delay “deplorable and unreasonable,” and stated that the “respectability” of any jurisdiction collapses if it does not serve the ends of justice by providing “an expeditious and impartial review.” However, the court could find no prejudice to the appellant. As a result, the court granted no relief. In a parting shot before the landmark *Dunlap* opinion, the court held, “[o]ur affirmance on this case should not be read to mean that the Government may delay the post-trial review of a case with impunity. The Uniform Code provides one means of insuring against unnecessary delay in the disposition of a case, Article 98, UCMJ, 10 USC § 898.”⁴⁵ The fact that the court highlighted the possibility of criminal prosecution against parties responsible for post-trial delay signaled that the court had run out of patience with post-trial delay.

Of the eleven post-trial delay cases from 1970 through 1974, six explicitly denied relief based on lack of prejudice to the appellant. Four others (*Ervin*, *Fortune*, *Adame*, and *Sanders*) had reversible errors independent of post-trial delay, and were dismissed rather than remanded because, in the court’s view, the delays had rendered other remedies pointless.⁴⁶ In one case (*Timmons*), the court remanded the case for a different error, and expressed its unwillingness to dismiss for delay alone. Thus, the court was deciding cases on a prejudice standard: unreasonable post-trial delays could convert a reversal into a dismissal, but the court would not reverse for delay alone in the absence of prejudice. However, the standard was about to change.

B. The *Dunlap* Era (1974–1979)

In 1974, the seismic shift finally came. In the landmark opinion of *Dunlap v. Convening Authority, Combined Arms*

³⁷ *United States v. Whitmire*, 45 C.M.R. 42, 43 (C.M.A. 1972).

³⁸ *Id.* at 43.

³⁹ *United States v. Wheeler*, 45 C.M.R. 242, 248–49 (C.M.A. 1972).

⁴⁰ *United States v. Timmons*, 46 C.M.R. 226, 227 (C.M.A. 1973).

⁴¹ *Id.* at 228.

⁴² *Id.* at 229.

⁴³ *Id.* (Quinn, J., dissenting).

⁴⁴ *United States v. Gray*, 47 C.M.R. 484, 486 (C.M.A. 1973).

⁴⁵ *United States v. Jefferson*, 48 C.M.R. 39, 40–41 (C.M.A. 1971) (citing *Timmons*, 46 C.M.R. at 227–28 (Article 98, UCMJ, Noncompliance with Procedural Rules, is a punitive article that could be used for prosecuting individuals responsible for “unnecessary delay in the disposition of any case.” See UCMJ art. 98 (2008)).

⁴⁶ This is consistent with the court’s ruling in *Tucker*, where various other errors warranted reversal, but “in view of all the circumstances” (including the delay) the court instead decided to dismiss.

Center, the court prospectively required convening authorities to take action on cases where the accused was in confinement or continuous restraint after trial within ninety days after the end of trial, or else a presumption of prejudice would arise. If that happened, the court would dismiss unless the Government could meet a “heavy burden” to show its own diligence.⁴⁷

In *Dunlap*, the accused pleaded guilty in Germany and was sent to confinement in Fort Leavenworth. The Staff Judge Advocate recommended a sentence rehearing because the court-martial did not have enough enlisted members. The convening authority agreed, but sent the record and request for a rehearing to Fort Leavenworth instead of ordering it himself. The Leavenworth convening authority concluded that the court-martial had lacked jurisdiction and that retrial was necessary. He returned the record of trial to the Soldier’s command in Germany, which ordered retrial and asked Leavenworth to assume jurisdiction. Eleven months after the original trial, Leavenworth re-referred the charges. Three months after that, the appellant filed a petition for extraordinary relief with the CMA, asking them to dismiss the charges based upon unreasonable post-trial delay. Throughout these proceedings, he remained in confinement.⁴⁸ The CMA dismissed the charges against *Dunlap*,⁴⁹ but also created a prospective rule to discourage further unreasonable delays.

The court noted that unreasonable post-trial delays had been a serious problem for several years, citing the joint annual reports issued by the court and the services’ Judge Advocates General. It quoted the 1972 report as calling for “positive action” to assure speedy justice, and cited various other authorities on the need for expeditious processing of criminal justice actions, before and after trial. The court made clear that even though there was no statute comparable to Article 10, UCMJ, for post-trial delay, Congress had still commanded that the post-trial process be timely, for example by requiring the court to act on petitions for review within thirty days.⁵⁰ Finally, the court reached back to *Tucker*, and reiterated that “[u]nexplained delays of the kind presented here should not be tolerated by the services, and they will not be countenanced by this [c]ourt.”⁵¹ In setting

the ninety-day limit, the court stated that “[y]ears of experience have demonstrated the need for a guideline” when the accused is confined after trial, and took the ninety-day period from its then-existing Article 10 case law.⁵²

One judge dissented. Judge Duncan, while he agreed that the “evil or apparent evil” that results from post-trial delay is unacceptable, disagreed with the arbitrary nature of the ninety-day limit. Under the circumstances, he would have held to the simple post-trial prejudice test from *Gray* and *Timmons*.⁵³

It took several more decisions to elucidate the true extent of the *Dunlap* decision. For example, in *United States v. Brewer*, the court confirmed that a general court-martial convening authority’s post-action review, when required, had to occur within the ninety-day window.⁵⁴ In *United States v. Manalo*, the court confirmed that the first day of confinement did not count toward the ninety-day window, but the date of the action did count.⁵⁵

Dunlap had serious consequences in the field. Cases were dismissed even if the delay was ninety-one days, a mere one day over the limit.⁵⁶ In *United States v. Montgomery* the convening authority acted ninety-one days after trial. One day of that delay was attributable to a snowstorm which closed the entire post. The Army Court of Military Review was not sympathetic, and dismissed the charges with prejudice.⁵⁷ In *United States v. Brantley*, the convening authority took action on the ninety-first day. After much discussion of the “onerous and disruptive” *Dunlap* rule, the Navy Court of Military Review dismissed the charge with prejudice.⁵⁸

⁴⁷ *Dunlap v. Convening Authority, Combined Arms Center*, 48 C.M.R. 751, 754 (C.M.A. 1974). In requiring the “heavy burden,” *Dunlap* cited *United States v. Marshall*, 47 C.M.R. 409, 410–13 (C.M.A. 1973), applying a “heavy burden” standard to an Article 10 case.

⁴⁸ *Dunlap*, 48 C.M.R. at 752.

⁴⁹ *Id.* at 756. While the court did not explicitly address the issue of prejudice, it noted that no competent authority had explicitly determined why *Dunlap* should remain confined once the original court-martial was declared invalid, and that he had repeatedly requested release. *Id.* at 755. Thus, the court implicitly found prejudice before dismissing (as was to be expected, since the new rule abandoning that requirement did not go into effect until thirty days after *Dunlap* was issued). *Id.* at 754.

⁵⁰ *Dunlap*, 48 C.M.R. at 753–54 (citing UCMJ art. 67(c) (1968)).

⁵¹ *Id.* at 754 (quoting *United States v. Tucker*, 26 C.M.R. 367 (C.M.A. 1958)).

⁵² *Id.* at 756–57 (Duncan, J., dissenting).

⁵³ *Id.*

⁵⁴ *United States v. Brewer*, 1 M.J. 233, 234 (C.M.A. 1975). *Brewer*’s bad conduct discharge special court-martial was convened and his sentence approved by the special court-martial convening authority, but because his sentence included a BCD, it had to be reviewed by the general court-martial convening authority. The court held that both the action and the review had to occur within the ninety-day window.

⁵⁵ *United States v. Manalo*, 1 M.J. 452, 453 (C.M.A. 1976).

⁵⁶ *See United States v. Banks*, 7 M.J. 92 (C.M.A. 1979).

⁵⁷ *United States v. Montgomery*, 50 C.M.R. 860, 861–62 (A.C.M.R. 1975). In part by relying on the CMA’s Article 10 case law, the court stated that its inquiry was into the “overall” diligence of the Government, and did not find such diligence.

⁵⁸ *United States v. Brantley*, 2 M.J. 594, 595–97 (N.C.M.R. 1976). The court expressed “the greatest reluctance” in dismissing the case, as the evidence established the accused’s guilt in stabbing a fellow Marine in the throat. *Id.* at 594.

After five short years, the CMA reversed course and abrogated the *Dunlap* rule in *United States v. Banks*. *Banks* answered a certified question from the Army Judge Advocate General: whether dismissal was required “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.” The court answered in the affirmative, but prospectively eliminated the *Dunlap* rule.⁵⁹ In doing so, the court noted that post-trial prisoners had several protections that had not existed at the time of *Dunlap*, including continuous post-trial representation by counsel and availability of deferred sentencing.⁶⁰ Citing *Gray*, the court declared that future applications for relief based on post-trial delay would be tested for prejudice.⁶¹

C. The Case-by-Case Era of Post-Trial Delay Review (1980–2001)

For the next several decades, each case was dealt with separately on the standard of prejudice.⁶² Until deciding *United States v. Tardif*⁶³ in 2002, the court did not establish any more post-trial timelines. On rare occasions, the court would find prejudice and grant relief. For example, in *United States v. Shely*, the convening authority took 439 days to take final action on a thirty-eight page record of trial. After being released from confinement, the appellant was assigned to the disciplinary barracks (instead of the transient barracks) for over a year while waiting for the convening authority to act. He provided the court a detailed affidavit describing the onerous conditions there. The court cited “indefensible delay at the convening authority and supervisory authority level,” held that the case represented “another of a disturbing number of cases involving intolerable delay in the post-trial processing of courts-martial which have arisen since” *Banks* overturned *Dunlap*, and also found that Shely had “amply” demonstrated prejudice. The court dismissed the charges.⁶⁴

Shely, however, was a rare example. Most post-trial delay cases between *Banks* and *Tardif* did not receive relief. For example, in *United States v. Dunbar*, the court did not find any prejudice in a 1,097-day delay between convening

authority action and docketing at the court of military review. The entire verbatim record of trial was twenty-four pages, and the Government took thirty seven-months total to move the case from trial until docketing at the court of military review. Despite finding “bungling and indifference” and “egregious delay,” the court found no prejudice and granted no relief.⁶⁵ Likewise, in *United States v. Jenkins*, the record of trial was lost for over four years. The total delay in the case was six-and-a-half years from trial until the first appellate decision. After stating that the court had “repeatedly denounced unexplained delays in the post-trial processing of courts-martial,” the court held that the appellant had not shown any prejudice, and did not grant any relief.⁶⁶

During the case-by-case era, questions of post-trial delay revolved around whether or not the accused was prejudiced by what amounts to an administrative delay.⁶⁷ In none of these cases did the post-trial delay directly impact the findings or the sentence that the accused received at trial. However, major changes in post-trial delay review would be forthcoming in two seminal cases, *United States v. Tardif* and *United States v. Moreno*.⁶⁸ Despite these opinions, the court did not return to a period of *Dunlap*-style relief for post-trial delay cases.

D. Post-Trial Delay: The Current State of the Law (2002 through Present)

The current state of the law originated in 2002. During that year, the CAAF issued the landmark decision of *United States v. Tardif*. The delay in that case consisted of more than twelve months from trial until referral of the record to the Coast Guard court. The Coast Guard court had held that the “appellant must show that the delay, no matter how extensive or unreasonable, prejudiced his substantial rights.”⁶⁹ However, the CAAF reversed the Coast Guard court, and held that “a CCA has the authority under Article 66(c), UCMJ . . . to grant appropriate relief for unreasonable and unexplained post-trial delays.” This relief could be granted even in the absence of prejudice.⁷⁰ This authority to grant relief under Article 66(c), UCMJ, exists independently of the ability of the court to find error in law under Article

⁵⁹ *Banks*, 7 M.J. at 92–93.

⁶⁰ *Id.* at 93 (citing *United States v. Palenius*, 2 M.J. 86 (C.M.A. 1977), *United States v. Brown*, 6 M.J. 338 (C.M.A. 1979)).

⁶¹ *Banks*, 7 M.J. at 94 (citing *United States v. Gray*, 47 C.M.R. 484 (C.M.A. 1973)).

⁶² *See, e.g.*, *United States v. Bell*, 46 M.J. 351 (C.A.A.F. 1997).

⁶³ 57 M.J. 219 (C.A.A.F. 2002). *See infra* Part I.D.

⁶⁴ *United States v. Shely*, 16 M.J. 431, 431–33 (C.M.A. 1983).

⁶⁵ *United States v. Dunbar*, 31 M.J. 70 (C.M.A. 1990).

⁶⁶ *United States v. Jenkins*, 38 M.J. 287, 288 (C.M.A. 1993).

⁶⁷ Post-trial delay, however egregious, does not usually affect the validity of the findings or sentence, and is therefore administrative rather than substantive in nature.

⁶⁸ *See infra* Part I.D.

⁶⁹ *United States v. Tardif*, 55 M.J. 666, 668 (C.G. Ct. Crim. App. 2001) (citing *United States v. Banks*, 7 M.J. 92 (C.M.A. 1979); *United States v. Jenkins*, 38 M.J. 287 (C.M.A. 1993); and *United States v. Hudson*, 46 M.J. 226 (C.A.A.F. 1997)).

⁷⁰ *United States v. Tardif*, 57 M.J. 219, 220–21 (C.A.A.F. 2002).

59(a), UCMJ, such as a due process violation for post-trial delay.⁷¹ On remand, the appellant was granted five months of relief from his sentence to confinement.⁷²

Tardif has its limitations. Article 66(c), UCMJ, by its very wording, applies only to Courts of Criminal Appeal.⁷³ Once a case is before the Court of Appeals for the Armed Forces, this review authority no longer applies.⁷⁴ *Tardif* also does not mandate or prescribe consistent results. Each of the Courts of Criminal Appeal applies and grants relief under *Tardif* in its own way.⁷⁵

In 2005, the CAAF decided *Diaz v. Judge Advocate General of the Navy*, holding that Fifth Amendment Due Process rights included a right to “timely” post-trial review.⁷⁶ This laid the groundwork for the landmark case of *United States v. Moreno* one year later. In *Moreno*, the court took *Diaz* one step further and applied the four-factor *Barker v. Wingo*⁷⁷ due process violation test to post-trial delays. The four factors are: (1) length of the delay; (2) reasons for the delay; (3) assertion of the right to a speedy review; and (4) prejudice. Each factor is weighed against the others, and no single factor is required to make a finding of a due process violation.⁷⁸ The court also further subdivided the prejudice factor into three sub-parts: (1) oppressive incarceration pending appeal; (2) anxiety and concern; and, (3) impairment of the ability to present a defense at a rehearing.⁷⁹

⁷¹ *Id.* at 223–25.

⁷² *United States v. Tardif*, 58 M.J. 714 (C.G. Ct. Crim. App. 2003), *aff’d*, 59 M.J. 394 (C.A.A.F. 2004) (summary disposition).

⁷³ “[T]he Court of Criminal Appeals may . . . affirm only such findings of guilty and the sentence or such part or amount of the sentence, as it finds correct in law and fact . . . should be approved.” UCMJ art. 66(c) (2008).

⁷⁴ The CAAF review authority is limited to “the findings and sentence as approved by the convening authority and as affirmed or set aside as incorrect in law by the Court of Criminal Appeals.” *Id.* art. 67(c) (2008). This means that the CAAF cannot reduce the sentence like a CCA. *See id.* art. 66(c).

⁷⁵ *See infra* Part I.E. *See also* *United States v. Collazo*, 53 M.J. 721, 726–27 (A. Ct. Crim. App. 2000) (granting four months sentence credit for unreasonable ten-month sentence delays under UCMJ art. 66(c) in the absence of prejudice). *Collazo* was written before and cited in *Tardif*.

⁷⁶ *Diaz v. Judge Advocate General of the Navy*, 59 M.J. 34, 37–38 (C.A.A.F. 2003).

⁷⁷ 407 U.S. 514 (1972). This opinion was a pre-trial delay due process violation decision, but had also been applied to post-trial delay due process violations by other courts. *See United States v. Moreno*, 63 M.J. 129, 135 n.6 (C.A.A.F. 2006).

⁷⁸ *Moreno*, 63 M.J. at 135–36 (citing *Barker v. Wingo*, 407 U.S. 514, 530 (1972)). *Barker* was a Sixth Amendment case dealing with pre-trial delays, but as noted in *Moreno*, civilian courts had been applying its test to post-trial delays analyzed as due process violations. *Id.* at 135 & n.6).

⁷⁹ *Id.* at 138–41.

Finally, the court set several post-trial review timeline standards where, if violated, there would be a presumption of unreasonable delay, and the *Barker v. Wingo* four-factor test would automatically be triggered. First, the convening authority action must take place within 120 days of trial. Second, the record of trial must be docketed with the service court of criminal appeals within thirty days. Third, the service courts must decide the case within eighteen months of docketing.⁸⁰ The Government can rebut the presumption of unreasonable delay on a case-by-case basis. In *Moreno*, the court found a due process violation based upon multiple delays totaling 1688 days from trial until completion of appellate review, including 490 days from trial to action, seventy-six days from action to docketing, and 925 days from docketing to appellate decision.⁸¹ The court reversed the case and allowed a rehearing, but capped the sentence upon rehearing to a punitive discharge.⁸²

Following the *Moreno* decision, there were fears that the court was signaling a return to the harsh *Dunlap* review standard that the court implemented from 1974 through 1979. Despite these fears, the CAAF has consistently shown since then that *Moreno* was not *Dunlap* revisited.⁸³ Immediately following the *Moreno* decision, the CAAF declined to grant dismissal of cases in the event of a due process violation for post-trial delay.⁸⁴

Three months after *Moreno*, in *United States v. Toohey*, the court placed a further limitation on its *Moreno* framework, expressly elevating the importance of prejudice in the following language:

[This] case presents us with the question of how to strike this due process balance in the absence of any finding of prejudice under the fourth *Barker* factor. We believe that such circumstances warrant a different balancing of the four factors.

⁸⁰ *Id.* at 142.

⁸¹ *Id.* at 136–37.

⁸² *Id.* at 144. On rehearing, *Moreno* was convicted again, and sentenced to a dishonorable discharge (DD). *See United States v. Moreno*, No. 200100715, 2009 WL 1808459, at *1 (N-M. Ct. Crim. App. June 23, 2009). His DD was later affirmed by the CAAF. *See United States v. Moreno*, 69 M.J. 36 (C.A.A.F. 2010) (summary disposition).

⁸³ For additional analysis of how the court has not returned to the harsh *Dunlap* rule, see Lieutenant Colonel James L. Varley, *The Lion Who Squeaked: How the Moreno Decision Hasn't Changed the World and Other Post-Trial News*, ARMY LAW., June 2008, at 80, 81–87; and Major Andrew D. Flor, “I’ve Got to Admit It’s Getting Better”: *New Developments in Post-Trial*, ARMY LAW., Feb. 2010, at 10, 10–17.

⁸⁴ *See, e.g., United States v. Dearing*, 63 M.J. 478, 488–89 (C.A.A.F. 2006); *United States v. Harvey*, 64 M.J. 13, 25 (C.A.A.F. 2006); *United States v. Simon*, 64 M.J. 205, 208 (C.A.A.F. 2006) (*Dearing* and *Harvey* explicitly rejected dismissal “under the circumstances,” and all three cases were remanded to the service courts for determination of further relief).

Hence, where there is no finding of *Barker* prejudice, we will find a due process violation only when, in balancing the other three factors, the delay is so egregious that tolerating it would adversely affect the public's perception of the fairness and integrity of the military system.⁸⁵

The court found such "egregious" delay and remanded the case because over six years passed between the day of trial and the decision of the CCA. Following *Toohey*, at least one service court granted minor sentence relief in the absence of prejudice, but only with a finding of "egregiousness" after delays of nine years.⁸⁶

A more recent case shows that the court had made yet another loop on the Möbius strip of post-trial delay review: *United States v. Bush*.⁸⁷

In *Bush*, the record of trial was lost in the mail for over six years. The CAAF agreed with the lower court in finding this to be facially unreasonable, particularly in light of the fact that the trial was a guilty plea and the record of trial was only 143 pages. Despite this, the court held that the appellant's unsupported affidavit alleging prejudice due to a failure to find employment based upon a lack of a DD Form 214 was insufficient to establish prejudice under *Barker v. Wingo*.⁸⁸ The court then applied a secondary prejudice test in determining whether or not the due process violation was harmless beyond a reasonable doubt. The Government had met their burden to prove that the violation was harmless because the appellant's unsupported affidavit was insufficient to establish prejudice.⁸⁹ To hold otherwise, the

court held, would "adopt a presumption of prejudice . . . in the absence of *Barker* prejudice."⁹⁰

Despite language in *Moreno* to the contrary, *Bush* reflects the current state of the law: prejudice is the standard of review for post-trial delay.⁹¹ Ironically, the court keeps returning to this standard throughout the history of post-trial delay review.⁹² As the next section will show, the 2009–2010 term of court serves as an excellent case study to show that the post-trial delay standard of review has completed a full circuit on the Möbius strip and has essentially returned to a simple prejudice test.⁹³

E. Analysis of All Post-Trial Delay Opinions in the 2009–2010 Term of Court

Over the 2009–2010 term of court, there were twenty-five opinions from the military appellate courts that addressed post-trial delay.⁹⁴ Only one of these opinions was issued by the CAAF.⁹⁵ The remaining twenty-four opinions were from the service courts of criminal appeal. Only three of those opinions granted any relief for post-trial delay: *United States v. Benson*,⁹⁶ *United States v. Beaber*,⁹⁷ and *United States v. Sapp*.⁹⁸ None of these three opinions granted relief for a due process violation under *Moreno*. All granted relief under the service courts' authority to assess sentence appropriateness under Article 66(c), UCMJ.⁹⁹

Each of the service courts issued opinions dealing with post-trial delay, but the number of opinions varied depending on the service. The Air Force and the Navy-Marine Corps courts had the most opinions dealing with post-trial delay with ten and nine cases, respectively. Meanwhile, the Army and the Coast Guard courts each had three opinions dealing with post-trial delay. Appendix B

⁸⁵ *United States v. Toohey*, 63 M.J. 353, 361–62 (C.A.A.F. 2006).

⁸⁶ *United States v. Walden*, 2008 WL 5252700, at *4–5 (N-M. Ct. Crim. App. Dec. 18, 2008). The case took over nine years after trial to reach the CCA. The relief granted was disapproval of \$1800 in forfeitures and the 45-day sentence to confinement, which had long since been served. Even with this delay, in the absence of prejudice, the court declined to disapprove a bad-conduct discharge, expressing concern that this would present a "windfall" to the appellant. *But see* *United States v. Myers*, 2008 WL 5191293, at *4 (A.F. Ct. Crim. App. Dec. 12, 2008) (case took about 2½ years to reach CCA after a previous remand, court found an "egregious" delay amounting to a "total breakdown" of the appellate process, but nonetheless found the delay harmless beyond reasonable doubt).

⁸⁷ 68 M.J. 96 (C.A.A.F. 2009).

⁸⁸ *Id.* at 99–100. The court placed emphasis on the fact that the affidavit was unsupported. The appellant provided no documentation from the Costco store in Alabama where he applied stating that they would have hired him, despite his bad conduct discharge, had he provided a DD Form 214. *Id.* at 99. Whenever the appellant provides a supported affidavit, the court finds prejudice far more easily. *See* *United States v. Jones*, 61 M.J. 80, 84–85 (C.A.A.F. 2005) (finding prejudice where the appellant provided three sworn affidavits from a potential employer stating that they would have hired the appellant if he had a DD Form 214).

⁸⁹ *Bush*, 68 M.J. at 103.

⁹⁰ *Id.* at 104.

⁹¹ *Id.* at 96.

⁹² *See supra* Parts I.A–C.

⁹³ *See infra* Part I.E.

⁹⁴ *See infra* Appendix F.

⁹⁵ *United States v. Mullins*, 69 M.J. 113 (C.A.A.F. 2010).

⁹⁶ No. 20071217 (A. Ct. Crim. App. Jan. 29, 2010)

⁹⁷ No. 24416 (C.G. Ct. Crim. App. Apr. 15, 2010).

⁹⁸ No. 24411 (C.G. Ct. Crim. App. July 14, 2010).

⁹⁹ *Benson* was granted relief under the Army court's more specific *United States v. Collazo*, 53 M.J. 721 (A. Ct. Crim. App. 2000), opinion. *See supra* note 75 (providing further discussion of *Collazo*). *Beaber* and *Sapp* were granted relief under the CAAF's general decision in *United States v. Tardif*, 57 M.J. 219 (C.A.A.F. 2002).

provides a graphical representation of the number of post-trial delay cases from each service.

Just as the number of cases varied by service, the reasons for the delay varied from case to case as well. Appendix C provides a graphical representation of the post-trial delay reasons broken down by the three *Moreno* timelines.¹⁰⁰ The most common reason for post-trial delay was delay between the trial and the convening authority action. Sixteen of the twenty-five cases had delays that exceeded the 120-day presumptively unreasonable delay standard from *Moreno*. The second most common reason for post-trial delay was delay from convening authority action to docketing at the service court. Eleven of the twenty-five cases had a delay that exceeded the thirty-day presumptively unreasonable delay standard from *Moreno*. Finally, five of the cases had a delay that exceeded the eighteen month appellate decision presumptively unreasonable delay standard from *Moreno*.¹⁰¹

Curiously, the Air Force Court of Criminal Appeals addressed post-trial delay in three cases that did not violate *Moreno* at all.¹⁰² While *Moreno* did not set a minimum review standard for all post-trial delay cases, most appellate decisions since *Moreno* have required at least a *Moreno* timeline standard to be exceeded before addressing the issue on appeal.¹⁰³

Even though the rationale for the post-trial delay varied from case to case, the average delay, regardless of the reasons, still varied widely between the services.¹⁰⁴ Appendix D shows the normalized average post-trial delay per case, by service.¹⁰⁵

The average delay for the Navy and Marine Corps is much higher than the other services. However, this higher average delay is due to more than just one extreme case of delay. As shown in Appendix G, only one of the Navy and Marine Corps cases was even close to the *Moreno* delay timelines—*United States v. Burgess* with a normalized delay of only four days¹⁰⁶—while the remainder of the Navy and Marine Corps cases were at least 240 days over the *Moreno* presumptively unreasonable delay standards.¹⁰⁷

Of the twenty-five opinions this term, the post-trial delay in seventeen was held to be harmless beyond a reasonable doubt. The post-trial delays in five others were held to be simply non-prejudicial, and the remaining three cases were granted relief under Article 66(c). Most of the cases decided were found to be harmless beyond a reasonable doubt, even when post-trial delay violated the appellants' due process rights. As discussed previously, the reason for this failure to grant relief for a due process violation is that the CAAF has, in keeping with its decision in *Toohey*, elevated the fourth prong of the *Barker v. Wingo* four-factor test, prejudice, to a "super-prong."¹⁰⁸ In the absence of prejudice, the appellant normally will not prevail on post-trial delay. In essence, the court has returned to the prejudice test from the pre-*Dunlap* days, as exemplified by *United States v. Gray*,¹⁰⁹ despite all the timelines and tests that are now applied to post-trial delay. For example, in *United States v. Mullins*, the CAAF assumed a due process violation and proceeded immediately to the issue of prejudice.¹¹⁰ Since there was no prejudice, the court found the delay harmless beyond a reasonable doubt.¹¹¹ Of course, the courts of criminal appeal still have the ability to discipline the post-trial process through Article 66(c) review, as confirmed by *United States v. Tardif*.¹¹²

Of the three opinions that granted relief this term for post-trial delay, the amount of relief granted varied. In *Benson*, the court granted one month of confinement

¹⁰⁰ Note that the total number of delays (32) exceeds the number of cases (25) because some cases had delay in several categories. See *infra* Appendix F.

¹⁰¹ See *infra* Appendix F.

¹⁰² *Id.*

¹⁰³ Research on file with author.

¹⁰⁴ See *infra* Appendix G.

¹⁰⁵ To normalize the delays, the standard number of days of delay allowed by *Moreno* was deducted from each case. For example, in *United States v. Ney*, 68 M.J. 613 (A. Ct. Crim. App. 2010), the delay was 174 days from sentencing to action. This delay exceeded the *Moreno* standard by fifty-four days. Fifty-four days is the number used to average against the other delays. This was done because delays below the *Moreno* standards are not presumptively unreasonable. See *United States v. Moreno*, 63 M.J. 129, 142–43 (C.A.A.F. 2006). For example, a case that takes 119 days from trial to action does not automatically trigger a *Moreno* review on appeal. Normalizing the delays also allows an accurate comparison between the different delay standards. If the *Moreno* standards were not deducted from each period of the delay, then delays based upon tardy appellate decisions would bias the average in every circumstance merely because the standard is eighteen months. This would not allow a fair comparison against the docketing standard of thirty days.

¹⁰⁶ No. 200900521 (N-M. Ct. Crim. App. Jan. 28, 2010).

¹⁰⁷ See *infra* Appendix G.

¹⁰⁸ The CAAF has never actually called prejudice the "super-prong," but the language in *Toohey* and the result in *Bush* show that its analysis essentially hinges every post-trial delay decision on whether or not prejudice existed.

¹⁰⁹ See *supra* note 44 and accompanying text.

¹¹⁰ 69 M.J. 113, 118–19 (C.A.A.F. 2010). As discussed above in note 88 and accompanying text, this type of prejudice is different from the fourth *Barker v. Wingo* factor. However, the willingness of the CAAF to jump immediately to this prejudice test shows that the court has returned to a simple prejudice test to determine whether or not to grant relief in a post-trial delay case.

¹¹¹ *Id.* at 118–19.

¹¹² 57 M.J. 219, 223 (C.A.A.F. 2002).

credit.¹¹³ In *Beaber*, the court disapproved the bad-conduct discharge.¹¹⁴ In *Sapp*, the court granted seventy days of confinement credit.¹¹⁵ None of the three opinions followed the *Tucker* method of dismissing the charges with prejudice.¹¹⁶ Appendix E shows a graphical representation of the rationales for each of the twenty-five opinions this term.

Conclusion

Ultimately, the CAAF has returned to the original post-trial delay standard of review over its fifty-two year history of deciding post-trial delay cases, just like a line drawn on a Möbius strip.¹¹⁷ Starting with *United States v. Tucker*,¹¹⁸ the court took a hard-line stance of dismissal with prejudice, which two years later was unwound to a simple prejudice test by *United States v. Richmond*.¹¹⁹ After that, the court took another hard-line stance of dismissal with prejudice in *Dunlap v. Convening Authority, Combined Arms Center*¹²⁰ which was unwound five years later to return to the simple prejudice test by *United States v. Banks*.¹²¹ Many years later, the court took their latest hard-line stance of presumptive unreasonableness in *United States v. Moreno*,¹²² which seemingly has been unwound yet again by one of the court's more recent opinions in *United States v. Bush* to a simple prejudice test.¹²³

Regardless of the cyclical trend the CAAF seems to follow with regard to post-trial delay, one trend unifies the majority of the cases. Whether the court is following a hard-

line stance or not, prejudice to the appellant is the one factor that the court will not tolerate. In every case where the appellant suffered some form of verifiable prejudice, the court has either dismissed the charges outright¹²⁴ or granted some form of meaningful relief.¹²⁵ This is the standard that the courts should apply. Not only is the standard of prejudice consistent with Article 59, UCMJ, and *United States v. Wheelus*,¹²⁶ but also applying a review standard based upon verifiable prejudice will grant relief in those cases that need relief, while denying relief for those cases where a post-trial delay had minimal impact on the accused. As stated previously, the crux of post-trial delay review is whether or not the accused was prejudiced by what amounts to an administrative delay.¹²⁷ Almost never does the post-trial delay itself have an impact on the findings or sentence of the case. A standard of prejudice will avoid a potential windfall to an accused who suffered no prejudice from the delay, while holding the Government responsible for the delay in those cases where the accused did suffer some form of prejudice from the delay.¹²⁸

¹¹³ No. 20071217 (A. Ct. Crim. App. Jan. 29, 2010).

¹¹⁴ No. 24416 (C.G. Ct. Crim. App. Apr. 15, 2010).

¹¹⁵ No. 24411 (C.G. Ct. Crim. App. July 14, 2010).

¹¹⁶ See *supra* note 16 and accompanying text.

¹¹⁷ See *infra* Appendix A.

¹¹⁸ 26 C.M.R. 367 (C.M.A. 1958).

¹¹⁹ 28 C.M.R. 366, 368 (C.M.A. 1960).

¹²⁰ 48 C.M.R. 751 (C.M.A. 1974).

¹²¹ 7 M.J. 92, 92–93 (C.M.A. 1979).

¹²² 63 M.J. 129 (C.A.A.F. 2006).

¹²³ 68 M.J. 96 (C.A.A.F. 2010).

¹²⁴ See *United States v. Shely*, 16 M.J. 431, 431–33 (C.M.A. 1983) (charges dismissed with prejudice due to post-trial delay, after a finding that the appellant had “amply” demonstrated prejudice).

¹²⁵ See *Moreno*, 63 M.J. at 129 (court capped the sentence at a rehearing to a punitive discharge due to the post-trial delay, after finding prejudice).

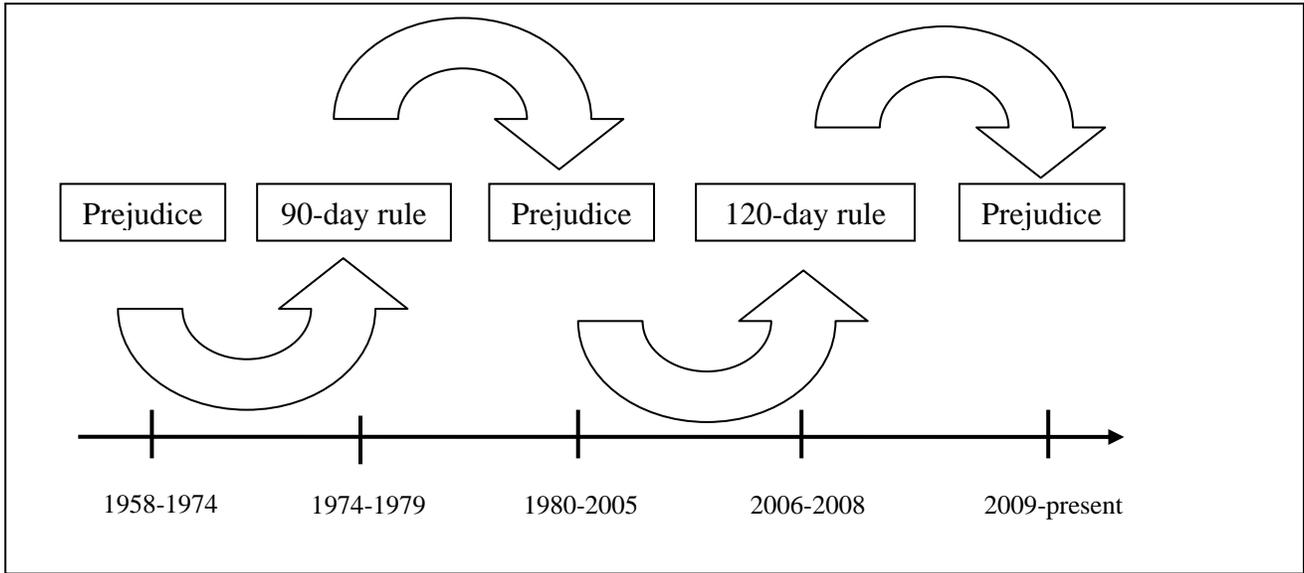
¹²⁶ See UCMJ art. 59 (2008); *United States v. Wheelus*, 49 M.J. 283, 288 (C.A.A.F. 1998).

¹²⁷ See *supra* note 4 and accompanying text.

¹²⁸ See *supra* note 34 and accompanying text.

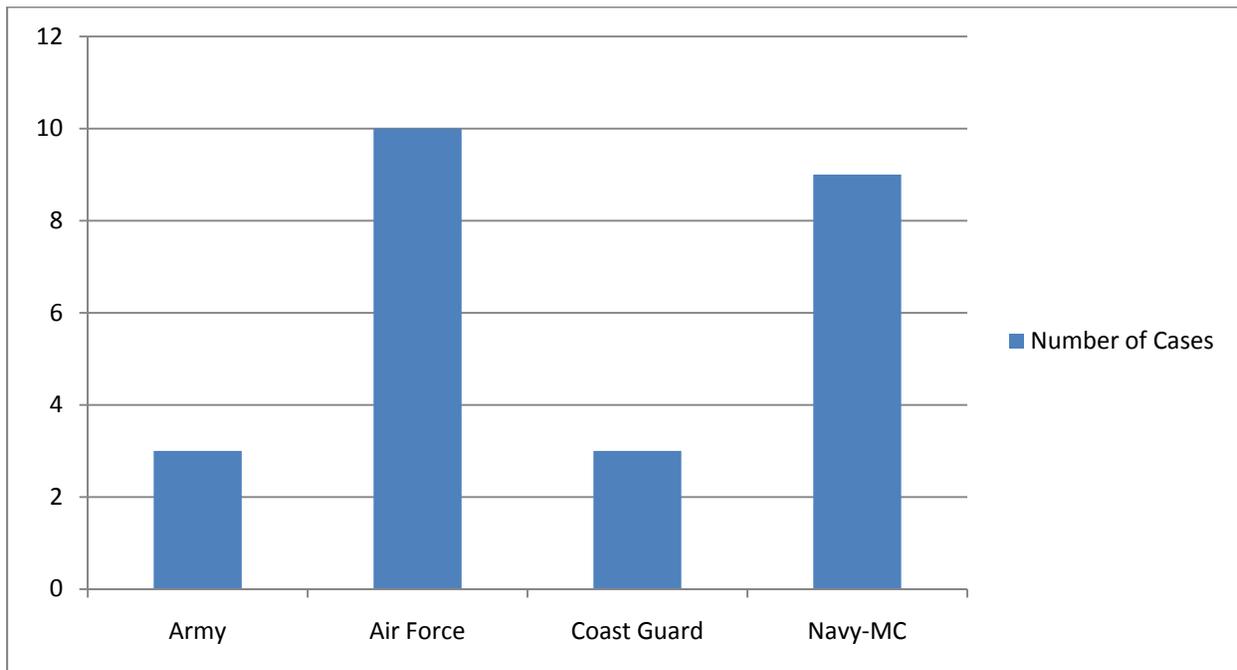
Appendix A

The Post-Trial Möbius Strip



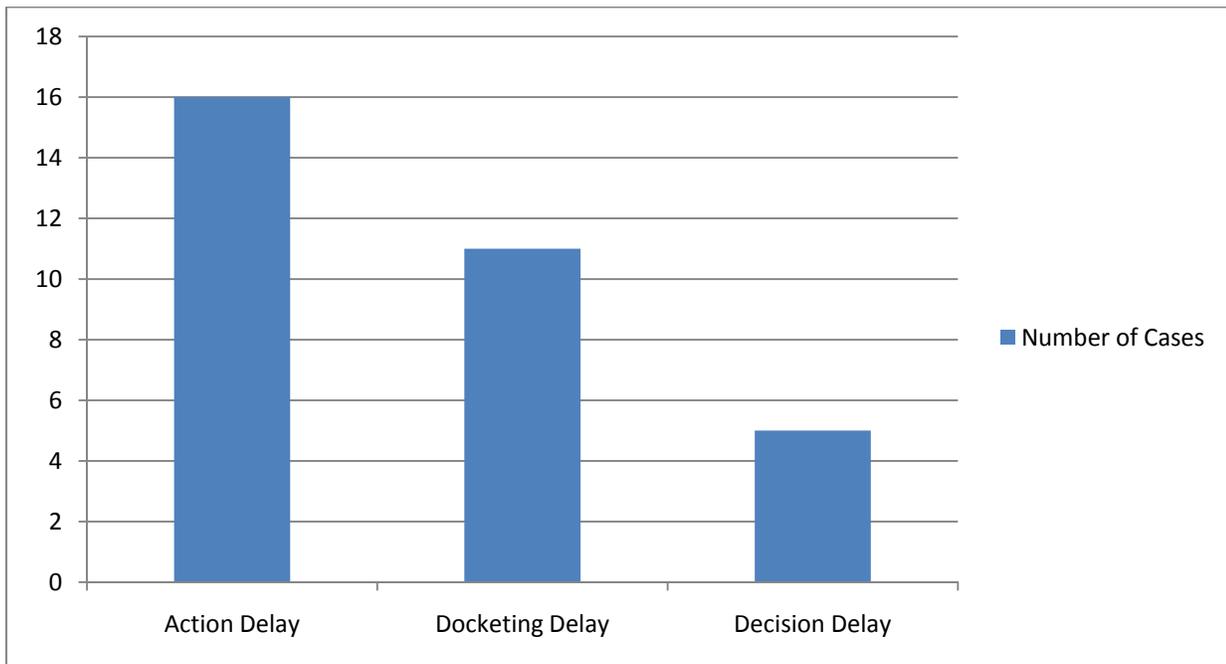
Appendix B

Number of Post-Trial Delay Cases by Service



Appendix C

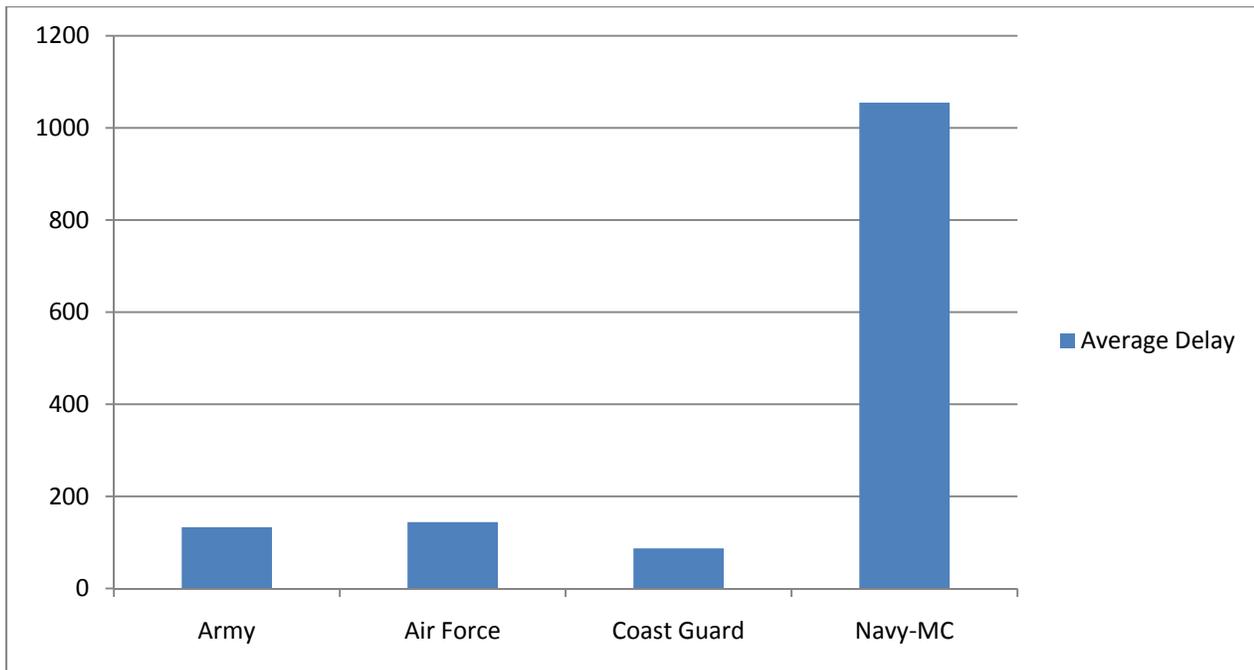
Reasons for Delay



Appendix D

Normalized Average Post-Trial Delay by Service

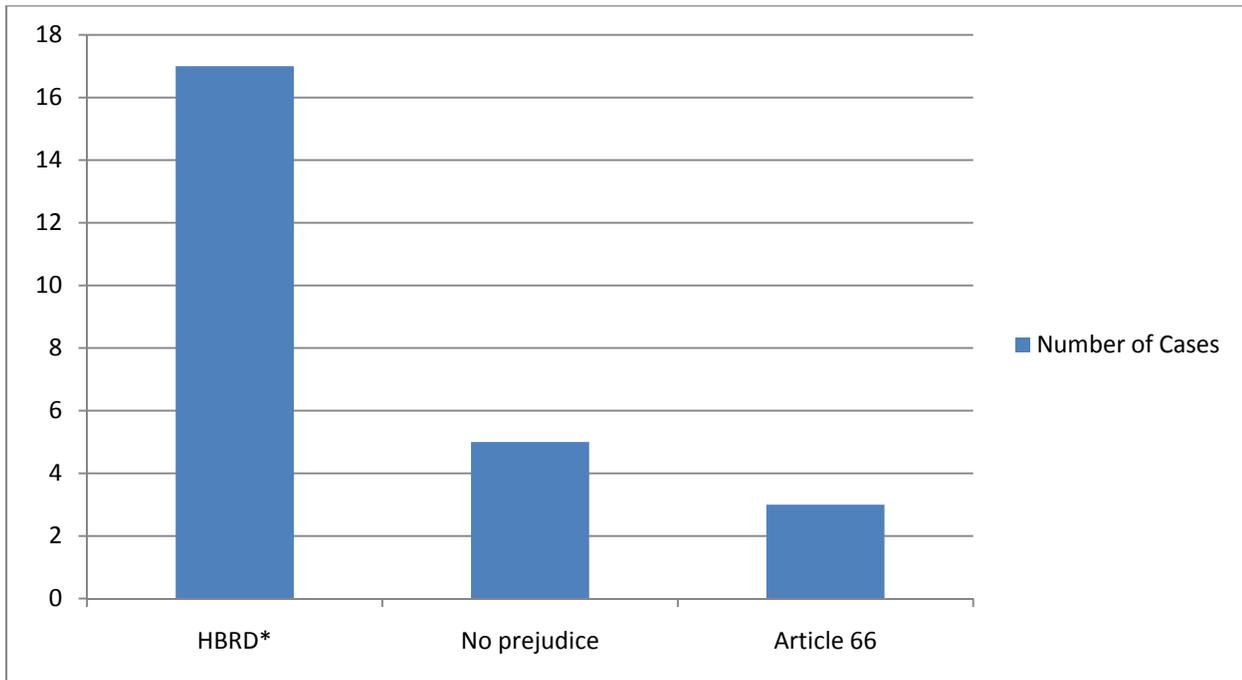
(2009-10 Service-Court Appellate Cases Addressing Post-Trial Delay)	
Service	Average Delay
Army	133 days
Air Force*	144 days
Coast Guard	87 days
Navy-Marine Corps	1055 days



* Three opinions from the Air Force that did not exceed any of the presumptively unreasonable delay *Moreno* standards are included, even though the normalized number of days of delay equaled zero for those cases. *See infra* Appendix G.

Appendix E

Post-Trial Delay Opinion Rationale



* Harmless Beyond a Reasonable Doubt

Appendix F

2009–2010 Term of Court Post-Trial Delay Opinions (All Service Courts)

#	Case Name	Case Cite	Court and Date	Number of Days	Decision
1	United States v. Mullins	69 M.J. 113	C.A.A.F. 2010	360 days to action; 448 days from docketing to defense appellate counsel first contact with appellant	Harmless Beyond a Reasonable Doubt (HBRD)
2	United States v. Ney	68 M.J. 613	Army. Ct. Crim. App. 2010, <i>review denied</i> , 69 M.J. 86 (C.A.A.F. 2010)	174 days from sentencing to action	No due process violation, no relief
3	United States v. Cox	No. 20080819, 2010 WL 3522561	Army. Ct. Crim. App. Jan. 11, 2010, <i>review denied</i> , 68 M.J. 88 (C.A.A.F. 2010)	248 days from action to docketing	No due process violation, no relief
4	United States v. Benson	No. 20071217	Army Ct. Crim. App. Jan. 29, 2010, <i>review denied</i> , 69 M.J. 157 (2010)	156 days from action to docketing	No prejudice, but one month confinement granted as relief under <i>United States v. Collazo</i> , 53 M.J. 721 (Army Ct. Crim. App. 2000)
5	United States v. Dunn	No. S31584	A.F. Ct. Crim. App. Aug. 31, 2010, <i>review granted on unrelated issue</i> , 69 M.J. 457	136 days from sentencing to action	HBRD
6	United States v. Van Valin	No. 37283	A.F. Ct. Crim. App. July 26, 2010, <i>review denied</i> 69 M.J. 450 (2010).	690 days on appeal at AFCCA (fifteen defense enlargements)	HBRD
7	United States v. Van Vliet	No. 36005	A.F. Ct. Crim. App. Aug. 23, 2010, <i>review denied</i> , 69 M.J. 480 (C.A.A.F. 2011)	951 days to return to the court after the initial decision, plus 93 days until the second convening authority action	HBRD (the court did not hold that the 93 days for the second action was unreasonable, but based on the entire delay, forwarded the record to AF TJAG for consideration)

8	United States v. Hudson	No. 37249	A.F. Ct. Crim. App. Aug. 23, 2010, <i>remanded</i> , 69 M.J. 41 (C.A.A.F. 2011)	74 days to action; 20 days to docketing; AFCCA does not address 750 days on appeal	Neither delay violated <i>Moreno</i> ; assuming error, HBRD
9	United States v. Berry	No. 37310, 2010 WL 2265612	A.F. Ct. Crim. App. May 7, 2010, <i>review denied</i> 69 M.J. 275 (C.A.A.F. 2010)	585 days on appeal at AFCCA (eleven defense enlargements)	HBRD
10	United States v. McDaniel	No. 36649	A.F. Ct. Crim. App. Mar. 16, 2010, <i>aff'd</i> , 69 M.J. 195 (C.A.A.F. 2010) (summary disposition)	560 days to return to AFCCA after remand (382 days to docket after action)	HBRD
11	United States v. Arriaga	No. 37439, 2010 WL 2265581	A.F. Ct. Crim. App. May 7, 2010, <i>rev'd</i> , 70 M.J. 51 (C.A.A.F. 2011)(court reversed finding of HBRD and remanded for further proceedings)	243 days from sentencing to action	HBRD
12	United States v. Astacio-Pena	No. 37401, 2010 WL 2265592	A.F. Ct. Crim. App. Apr. 30, 2010	109 days to action	Delay did not violate <i>Moreno</i> ; assuming error, no prejudice
13	United States v. Long	No. 37044	A.F. Ct. Crim. App. Dec. 18, 2009, <i>review granted on unrelated issues</i> , 69 M.J. 169 (C.A.A.F. 2010), 70 M.J. 141 (C.A.A.F. 2011)	880 days on appeal at AFCCA	HBRD

14	United States v. Strout	No. 37161	A.F. Ct. Crim. App. Dec. 10, 2009, <i>review denied</i> , 69 M.J. 49 (2010),	307 days on appeal at AFCCA	HBRD (despite the fact that the delay did not violate <i>Moreno</i> , the court found a violation)
15	United States v. Beaber	No. 24416	C.G. Ct. Crim. App. Apr. 15, 2010	191 days to action; 77 days to docket	No due process violation; BCD disapproved as relief under <i>United States v. Tardif</i> , 57 M.J. 219 (C.A.A.F. 2002)
16	United States v. Sapp	No. 24411	C.G. Ct. Crim. App. July 14, 2010	183 days to action; 97 days to docket	No due process violation; confinement reduced from 90 to 20 days as relief under <i>United States v. Tardif</i> , 57 M.J. 219 (C.A.A.F. 2002)
17	United States v. Lucas	No. 24399	C.G. Ct. Crim. App. Dec. 22, 2009	132 days to action	No relief; dissent argued for relief under <i>United States v. Tardif</i> , 57 M.J. 219 (C.A.A.F. 2002)
18	United States v. Harper	No. 200800091	N-M. Ct. Crim. App. May 27, 2010	Approximately six years due to remands (including more than four years to initial docketing and nearly two years to controlling convening authority action)	HBRD; convening authority eventually disapproved the entire sentence due to the delay
19	United States v. Magincalda	No. 200900686	N-M. Ct. Crim. App. Aug. 26, 2010	857 days from sentencing to action	HBRD
20	United States v. Bock	No. 200900336	N-M. Ct. Crim. App. Mar. 4, 2010	162 days to action; 1504 days to docketing (faulty waiver of appellate review)	HBRD
21	United States v. Vincent	No. 200900477	N-M. Ct. Crim. App. Feb. 12, 2010	1405 days from trial to docketing	HBRD

22	United States v. Bachiocchi	No. 200700680	N-M. Ct. Crim. App. Apr. 29, 2010	352 days to docketing; 847 days to final docketing (repeated remands for improper post-trial processing)	HBRD
23	United States v. Lobsinger	No. 200700010, 2009 WL 3435922	N-M. Ct. Crim. App. Oct. 27, 2009, <i>review denied</i> , 69 M.J. 44 (2010)	349 days from trial to docketing (299 to action); 1020 days on appeal at NMCCA	No due process violation, no relief
24	United States v. Burgess	No. 200900521	N-M. Ct. Crim. App. Jan. 28, 2010	34 days from action to docketing	HBRD
25	United States v. Turner	No. 200401570, 2009 WL 4917899	N-M. Ct. Crim. App. Dec. 22, 2009	2636 days from trial to action (three prior actions were withdrawn or set aside)	HBRD

Appendix G

Normalized Average Post-Trial Delay Chart

#	Case Name	Service	Normalized Number of Days of Delay – Delay Minus <i>Moreno</i> Presumption of Unreasonable Delay Standard*
1	United States v. Mullins	Navy-MC (CAAF decision)	240 days
2	United States v. Ney	Army	54 days
3	United States v. Cox	Army	218 days
4	United States v. Benson	Army	126 days
5	United States v. Dunn	Air Force	16 days
6	United States v. Van Valin	Air Force	150 days
7	United States v. Van Vliet	Air Force	411 days
8	United States v. Hudson	Air Force	0
9	United States v. Berry	Air Force	45 days
10	United States v. McDaniel	Air Force	352 days
11	United States v. Arriaga	Air Force	123 days
12	United States v. Astacio-Pena	Air Force	0
13	United States v. Long	Air Force	340 days
14	United States v. Strout	Air Force	0
15	United States v. Beaver	Coast Guard	118 days
16	United States v. Sapp	Coast Guard	130 days
17	United States v. Lucas	Coast Guard	12 days
18	United States v. Harper	Navy-MC	1502 days
19	United States v. Magincalda	Navy-MC	737 days
20	United States v. Bock	Navy-MC	1516 days
21	United States v. Vincent	Navy-MC	1255 days
22	United States v. Bachiocchi	Navy-MC	1049 days
23	United States v. Lobsinger	Navy-MC	679 days
24	United States v. Burgess	Navy-MC	4 days
25	United States v. Turner	Navy-MC	2516 days

* Note that some calculations are approximate if the delay description in the opinion was not specific. See note 105 above for why I calculated this normalized delay.