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SEVEN YEARS LATER: THE STRUGGLE WITH *MORENO* CONTINUES

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Not only is untimely post-trial processing unfair to the soldier concerned, but it also damages the confidence of both soldiers and the public in the fairness of military justice, thereby directly undermining the very purpose of military law.[1]

I. Introduction

In 1999, a military panel convicted Marine Corps Gunnery Sergeant (GySgt) Brian Foster of rape, aggravated assault and wrongfully communicating a threat. Sergeant Foster was sentenced to seventeen years of confinement, forfeiture of all pay and allowances, reduction to the grade of E-1, and a dishonorable discharge. In February 2009, the Navy-Marine Corps Court of Criminal Appeals (NMCCA) found the evidence of rape "legally and factually insufficient." As a result, the

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[1] United States v. Bauerbach, 55 M.J. 501, 506 (A. Ct. Crim. App. 2001) (citing United States v. Williams, 42 M.J. 791, 794 (N-M Ct. Crim. App. May 22, 1995).

court dismissed the charge of rape and set aside the remaining findings and sentence.[2]

United States v. Foster represents a perfect example of the importance of speedy post-trial processing. In *Foster*, over nine years had elapsed between the completion of trial and his appeal to the NMCCA. As a result, Sergeant Foster served almost ten years in confinement for an offense that the court ultimately dismissed.[3] Now that he has secured his release from confinement, he "must salvage his personal life and relationship with his sons, and fight to save his career, regain his NCO rank and recoup thousands in back pay and benefits he believes are owed to him."[4]

In October 2009, in response to the "travesty of justice"[5] in *United States v. Foster*, Congress established an independent panel to "review the judge advocate requirements of the Department of the Navy for the military justice mission"[6] and ordered the Department of Defense Inspector General "to review the systems, policies, and procedures currently in use to ensure timely and legally sufficient post-trial reviews of courts-martial within the Department of the Navy."[7] The Department of Defense Inspector General put together a team of experts who examined the post-trial process in the Navy and Marine Corps and concluded "that Navy JAGs have not fully accomplished their post-trial military justice mission as required in statute and regulation."[8]

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[2] United States v. Foster, No. 200101955, 2009 WL 382002 (N-M. Ct. Crim. App. Feb. 17, 2009).

[3] Sergeant Foster's sentence was adjudged on December 3, 1999, and the Navy-Marine Corps Court of Criminal Appeals opinion was issued on February 17, 2009. *Id.*

[4] Gidget Fuentes, *Innocent Marine Freed After 9 years in Prison*, MARINE CORPS TIMES, (Apr. 20, 2009), http://www.marinecorpstimes.com/news/2009/04/marine_foster_042009w/.

[5] *Hearing to Receive Testimony on Providing Legal Services by Members of the Judge Advocate General's Corps Before the S. Subcomm. on Personnel, Comm. On Armed Services*, 112th Cong. 2 (2011) [hereinafter *Hearing*].

[6] National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, § 506, 123 Stat. 2190, 2278–79 (2009).

[7] *Hearing*, *supra* note 5, at 3.

[8] U.S. DEP'T OF DEF. INSPECTOR GEN., EVALUATION OF POST-TRIAL REVIEWS OF COURTS-MARTIAL WITHIN THE DEPARTMENT OF THE NAVY, REP. NO. IPO2010E003 (10 Dec. 2010) [hereinafter DODIG REPORT].

The case of *United States v. Foster* resulted in scrutiny of post-trial processing within the Department of the Navy,[9] but the case also served to prompt all military services to examine their post-trial processes and reduce unnecessary delays in order to ensure post-trial due process for servicemembers. According to the Court of Appeals for the Armed Forces (CAAF), "[d]ue process entitles convicted servicemembers to a timely review and appeal of court-martial convictions."[10] While the nearly ten years of post-trial delay in *Foster* clearly represents a violation of Sergeant Foster's post-trial due process rights, what constitutes "timely" post-trial processing? Pursuant to *United States v. Moreno*, a presumption of unreasonable delay exists when the convening authority does not take action within 120 days of the completion of trial.[11] This presumption of unreasonable delay triggers a four-part *Barker* analysis, balancing: "(1) the 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."[12] To rebut the presumption of unreasonable delay, the government must show "justifiable, case-specific delays supported by the circumstances of [the] case and not delays based upon administrative matters, manpower constraints or the press of other cases."[13]

The CAAF has made it clear they believe delay in post-trial processing poses a problem.[14] Although not as extreme as the post-trial delay in *United States v. Foster*, as depicted in Figure 1, post-trial processing in the Army has gradually increased over the years, and the average processing time from completion of trial to convening authority action has exceeded 120 days since 2000.[15]

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[9] *Id.*; *Hearing*, *supra* note 5, at 2–3; Memorandum from The Judge Advocate General, U.S. Navy, to Distribution, subject: Report on the Status of Military Justice in the Navy (4 Aug. 2009).

[10] United States v. Moreno, 63 M.J. 129, 132 (C.A.A.F. 2006) (citing Toohey v. United States, 60 M.J. 100, 101 (C.A.A.F. 2004)).

[11] *Id.* at 142.

[12] *Id.* at 135 (citing Barker v. Wingo, 407 U.S. 514, 530 (1972)).

[13] *Id.* at 143.

[14] *Id.* at 142 (noting that "Moreno's case is not an isolated case that involves excessive post-trial delay issues").

[15] E-mail from Homan Barzmehri, Mgmt. & Program Analyst, Office of the Clerk of Court, Army Court of Criminal Appeals, to author (Dec. 1, 2011, 3:49 P.M. EST) [hereinafter Barzmehri e-mail] (on file with author).

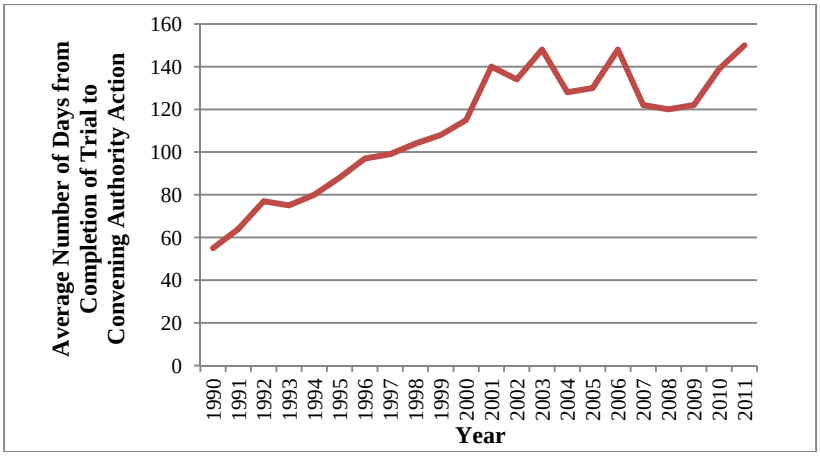

Figure 1. Army Average Number of Days from Completion of Trial to Convening Authority Action Per Year[16]

In 2011, the average number of days between completion of trial and convening authority action in the Army was 150 days,[17] with 60% of Army courts-martial not meeting the requirement of convening authority action within 120 days.[18] Of the 63 general court-martial convening authority (GCMCA) jurisdictions in the Army in 2011, 41 had processing time averages of over 120 days from completion of trial to convening authority action.[19]

While other services may suffer from lack of "institutional vigilance" and "leadership failures,"[20] in general, Army criminal law offices diligently process post-trial actions, yet continue to struggle with timely post-trial processing.[21] Although administrative constraints hinder timely post-trial processing in the Army, the failure of appellate courts to consider case circumstances and exclude periods of delay beyond the control of the government results in an inaccurate evaluation of post-trial delay. In order to compel the appellate courts to accurately evaluate

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[16] *Id.* Data was formatted by the author to create this chart.
[17] *Id.*
[18] *Id.* Data was re-formatted by the author to calculate percentage of trials with convening authority action within 120 days.
[19] E-mail from Homan Barzmehri, Mgmt. & Program Analyst, Office of the Clerk of Court, Army Court of Criminal Appeals, to author (Jan. 4, 2012, 3:49 P.M.) [hereinafter Barzmehri e-mail 2] (on file with author).
[20] DoDIG REPORT, *supra* note 8.
[21] United States v. Moreno, 63 M.J. 129 (C.A.A.F. 2006).

post-trial delay, the Rules for Courts-Martial should be amended to define timely post-trial processing and excludable periods of delay. A more accurate evaluation of post-trial delay by the appellate courts, combined with a reduction in administrative constraints to post-trial processing, would best serve the interests of justice and contribute to timely post-trial processing in the Army.

II. History of Convening Authority Post-Trial Delay

While the appellate courts have expressed frustration for several decades over post-trial delay, they courts have struggled to develop an effective deterrent to post-trial delay.

A. Early History

Although the issue of post-trial delay has been discussed in appellate cases as early as 1958,[22] the early post-trial delay cases addressed delay in the appellate process rather than delay between completion of trial and convening authority action.[23] In 1971, after a ten-month delay without convening authority action, the Court of Military Appeals (CMA) started the trend of appellate review of delay in convening authority action by issuing a writ of mandamus directing the convening authority to take action in the case of *Montavon v. United States*.[24] Following *Montavon*,

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[22] United States v. Tucker, 26 C.M.R. 367 (C.M.A. 1958) (Delay of more than one year in forwarding the petition for review to The Judge Advocate General of the Navy: "There may be good reason for the delay in the appellate processes, but it does not appear in the record before us. Unexplained delays of the kind presented here should not be tolerated by the services, and they will not be countenanced by this Court.").

[23] *See, e.g.*, *id.* (over one-year delay in forwarding the petition for review to The Judge Advocate General of the Navy); United States v. Richmond, 28 C.M.R. 366 (C.M.A. 1960) (two-year delay to reach Court of Military Appeals (CMA) after two rehearings); United States v. Ervin, 42 C.M.R. 289 (C.M.A. 1970) (delay in service of the decision of the board of review); United States v. Fortune, 43 C.M.R. 133 (C.M.A. 1971) (twenty-month delay in service of the decision of the board of review); United States v. Adame, 44 C.M.R. 3 (C.M.A. 1971) (over one-year delay in service of the decision of the board of review); United States v. Sanders, 44 C.M.R. 10 (C.M.A. 1971) (nineteen-month delay in service of the decision of the board of review). For a review of post-trial delay cases, to include appellate delay, see Major Andrew D. Flor, *Post-Trial Delay: The Möbius Strip Path*, ARMY LAW., June 2011, at 4.

[24] ANNUAL REPORT OF THE UNITED STATES COURT OF MILITARY APPEALS AND THE JUDGE ADVOCATES GENERAL OF THE ARMED FORCES AND THE GENERAL COUNSEL OF THE DEPARTMENT OF TRANSPORTATION PURSUANT TO THE UNIFORM CODE OF MILITARY

appellate courts expressed even stronger concern with delay in convening authority action and addressed the issue more frequently.[25] However, they rarely granted relief because the court found that "post-trial delay, standing alone without prejudicial error in the trial proceedings, will not require relief on otherwise proper findings and sentences."[26]

By 1972, post-trial delay from trial to convening authority action caught the attention of not only the courts but the service Judge Advocates as well. In their Annual Report, the service Judge Advocates noted that "instances in which the transcription of a record of trial and action by the convening authority were prolonged over several months occur often enough that this part of the appellate process needs further attention and action to assure that the accused is afforded the speediest possible justice consistent with due process."[27]

Although the service Judge Advocates recognized the problem of post-trial delay, a change to Army regulation in 1973 exacerbated the problem. Before 1973, Army regulation did not allow for the transfer of an accused to the disciplinary barracks until promulgation of the convening authority's action.[28] However, in January 1973, the Army

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JUSTICE FOR THE PERIOD JAN. 1, 1971 TO DEC. 31, 1971 (1971) (citing Montavon v. United States, Miscellaneous Docket No. 70-3).

[25] *See, e.g.*, United States v. Prater, 43 C.M.R. 179 (C.M.A. 1971) (nine-month delay between trial and convening authority action was excessive but not prejudicial); United States v. Davis, 43 C.M.R. 381 (C.M.A. 1971) (187-day delay between trial and supervisory authority action was excessive but no error); United States v. Wheeler, 45 C.M.R. 242 (C.M.A. 1972) (holding that the 231-day delay from trial to action "did not evidence a desirable standard of expeditiousness" but finding no prejudice); United States v. Timmons, 46 C.M.R. 226 (C.M.A. 1973) (180-day delay between trial and convening authority action was unreasonable but granted no relief); Rhoades v. Haynes, Commanding Gen., 46 C.M.R. 189 (C.M.A. 1973) (finding 116-day delay from completion of trial unreasonable and ordering the convening authority to complete his review of the record of trial); United States v. Gray, 47 C.M.R. 484 (C.M.A. 1973) (212-day delay between trial and convening authority action was "deplorable and unreasonable," but granted no relief because there was no prejudice); United States v. Jefferson, 48 C.M.R. 39 (C.M.A. 1973) (244-day delay between trial and convening authority action was unreasonable, but no relief because there was no prejudice).

[26] *Timmons*, 46 C.M.R. at 227.

[27] ANNUAL REPORT OF THE UNITED STATES COURT OF MILITARY APPEALS AND THE JUDGE ADVOCATES GENERAL OF THE ARMED FORCES AND THE GENERAL COUNSEL OF THE DEPARTMENT OF TRANSPORTATION PURSUANT TO THE UNIFORM CODE OF MILITARY JUSTICE FOR THE PERIOD JAN. 1, 1972 TO DEC. 31, 1972 (1972).

[28] U.S. DEP'T OF ARMY, REG. 190-4, UNIFORM TREATMENT OF MILITARY PRISONERS para. 1-3(b)(2)(b) (25 June 1971) ("A detained prisoner or officer prisoner whose sentence has

eliminated this restriction and began allowing the transfer of convicted servicemembers to confinement before the convening authority took action.[29] While the change "relieve[d] the convening authority from the pressures of dealing effectively with a convicted accused,"[30] the change also reduced the pressure for convening authorities to take action quickly, thus adding to the post-trial delay problem.

B. *Dunlap v. Convening Authority, Combined Arms Center*[31]

By 1974, timeliness of convening authority action had deteriorated so much that the CMA finally addressed the issue. In *Dunlap v. Convening Authority, Combined Arms Center*, the court cautioned that post-trial delay "should not be tolerated" and held that "the failure of the Uniform Code or the Manual for Courts-Martial to condemn directly unreasonable delay by the convening authority in acting on the record of trial does not mean that relief against such delay is unobtainable."[32]

The *Dunlap* court compared post-trial delay to the presumption of unreasonable pre-trial delay in violation of Article 10 of the Uniform Code of Military Justice (UCMJ) when the accused was in pre-trial confinement.[33] Applying the pre-trial delay standard to post-trial delay, the court found that there is a presumption of unreasonable post-trial delay 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."[34]

The *Dunlap* presumption served as an immediate deterrent to post-trial delay because it required dismissal of charges when the presumption was met and the government failed to show diligence.[35] Between 1974

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not been approved by the convening authority will not be confined in a disciplinary barracks.").

[29] Dunlap v. Convening Auth., Combined Arms Ctr. and Commandant, 48 C.M.R. 751, 754 (C.M.A. 1974).

[30] *Id.*

[31] *Id*. at 751.

[32] *Id.* at 754.

[33] *Id.* ("We deem it appropriate that this guideline be the same as that applicable when the accused is in arrest or confinement before trial." Since the court established 90 days as the presumption for an Article 10 violation in *United States v. Burton*, the court applied the same 90-day standard to post-trial delay.).

[34] *Id.*

[35] *Id.*

and 1979, courts strictly applied the rule, dismissing charges when convening authority action took longer than ninety days,[36] regardless of the seriousness of the offense,[37] length or complexity of the case,[38] or lack of other prejudicial error. Although effective at deterring post-trial delay, the *Dunlap* presumption received harsh criticism due to the inflexibility of the rule and its rigid application by appellate courts.[39]

In 1979, the CMA abandoned the *Dunlap* presumption of unreasonable delay in the case of *United States v. Banks*.[40] Following *Banks*, the court reverted to a standard of prejudice when determining whether to grant relief for post-trial delay in convening authority action.[41] For the next two decades, courts examined each case individually to determine if the delay was unreasonable, and, if so, whether the unreasonable delay prejudiced the appellant. Using this

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[36] *See, e.g.*, United States v. Larsen, 1 M.J. 300 (C.M.A. 1975) (137-day delay, 1000+ page record of trial); United States v. Montgomery, 50 C.M.R. 860 (A.C.M.R. 1975) (91-day delay); United States v. Philpott, 2 M.J. 494 (C.M.A. 1976) (195-day delay); United States v. Young, 2 M.J. 524 (C.M.A. 1976) (100-day delay); United States v. Puckett, 2 M.J. 1228 (N.M.C.M.R. 1976) (91-day delay); Bouler v. United States, 1 M.J. 299 (C.M.A. 1976) (98-day delay); United States v. Brantley, 2 M.J. 594 (N.M.C.M.R. 1976) (91-day delay); United States v. Garrett, 2 M.J. 1283 (C.G.C.M.R. 1976) (98-day delay); United States v. Miller, 1 M.J. 1081 (N.M.C.M.R. 1977) (99-day delay); United States v. Campbell, 6. M.J. 809 (N.M.C.M.R. 1979) (97-day delay); United States v. Mitchell, 6 M.J. 851 (N.M.C.M.R. 1979) (92-day delay); United States v. Spiesman, 7 M.J. 819 (N.M.C.M.R. 1979) (95-day delay).

[37] *See, e.g.*, *Brantley*, 2 M.J. at 595. Lance Corporal Brantley was convicted of stabbing a fellow Marine in the throat. Despite the seriousness of the offense, in accordance with *Dunlap*, the Navy Court of Military Review dismissed the charges because the convening authority did not take action until 91 days after imposition of post-trial confinement. *Id.*

[38] For example, in *United States v. Larsen*, the CMA dismissed the charges pursuant to the *Dunlap* rule due to 137 days of post-trial confinement prior to convening authority action even though the record of trial exceeded 1,000 pages. *Larsen*, 1 M.J. 300.

[39] *See, e.g.*, *Dunlap*, 48 C.M.R. at 756–57 (Duncan,J., dissenting) (pointing out the "dissimilarity between pretrial delay and delay in a convening authority's action and the harm that may result from each" and explaining that he was "reluctant, under these circumstances, to decide that 3 months is a more appropriate time than 2 months, 4 months, or some other period"); *Brantley*, 2 M.J. 595 (N.M.C.M.R. 1976) (expressing frustration with *Dunlap* because of the inability to "balance the rightful expectation of society to be protected by its judicial system against the actual harm suffered by a convicted felon because of delays in the review of his conviction").

[40] United States v. Banks, 7 M.J. 92 (C.M.A. 1979). In accordance with *Dunlap v. Convening Authority, Combined Arms Center*, the Army Court of Military Review (ACMR) dismissed charges of larceny, assault and battery due to 91 days of post-trial confinement before the convening authority took action. The CMA affirmed the decision of the ACMR but abandoned the *Dunlap* presumption for future cases. *Id.*

[41] *Id.* at 94 (citing United States v. Gray, 47 C.M.R. 484 (C.M.A. 1973)).

standard, courts rarely granted relief even for extremely long periods of delay.[42] Although the courts infrequently granted relief, the Army seemed to be on track with post-trial processing and, until 1996, the average number of days from completion of trial to convening authority action in the Army remained under 90 days.[43]

C. The Years Leading up to *United States v. Moreno*

From 1996 to 2000, post-trial processing time in the Army crept upward,[44] and courts struggled to find an effective remedy for post-trial delay. During this time period, the courts interpreted Articles 59(a) and 66(c), UCMJ, narrowly and felt constrained to grant relief only when "the error materially prejudice[d] the substantial rights of the accused."[45]

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[42] *See, e.g.*, United States v. Gauvin, 12 M.J. 610 (N.M.C.M.R. 1981) (227-day delay); United States v. Williams, 14 M.J 994 (N.M.C.M.R. 1982) (302-day delay); United States v. Milan, 16 M.J. 730 (A.F.C.M.R. 1983) (237-day delay); United States v. Dillon, 17 M.J. 501 (A.F.C.M.R. 1983) (269-day delay); United States v. Bolden, 17 M.J. 1046 (N.M.C.M.R. 1984) (628-day delay); United States v. Mansfield, 33 M.J. 972 (A.F.C.M.R. 1991) (423-day delay); United States v. Jenkins, 38 M.J. 287 (C.M.A. 1993) (six-and-a-half-year delay); United States v. Henry, 40 M.J. 722 (N-M. Ct. Crim. App. 1994) (eight-year delay); United States v. Lizama, No. 30703, 1995 WL 61111 (A.F. Ct. Crim. App. Feb. 10, 1995) (231-day delay); United States v. Lang, No. 9301561, 1995 WL 934977 (N-M. Ct. Crim. App. May 5, 1995) (five-and-a-half-year delay); United States v. Agosto, 43 M.J. 853 (N-M. Ct. Crim. App. 1996) (eight-month delay); United States v. Hudson, No. 9401691, 1996 WL 927616 (N-M. Ct. Crim. App. Feb. 26, 1996) (twenty-seven-month delay); United States v. Hughes, No. 9500870, 1996 WL 927765 (N-M. Ct. Crim. App. Apr. 17, 1996) (twenty-nine-month delay); United States v. Humphrey, No. 9501245, 1996 WL 927736 (N-M. Ct. Crim. App. Aug. 14, 1996) (14-month delay); United States v. Deville, No. 32433, 1997 WL 184781 (A.F. Ct. Crim. App. Apr. 8, 1997) (eight-month delay); United States v. Bell, 46 M.J. 351 (C.A.A.F. 997) (two-year delay); United States v. Burkett, No. 9700203, 1998 WL 764074 (N-M. Ct. Crim. App. Aug. 31, 1998) (eight-month delay); United States v. Moser, No. 9500310, 1999 WL 179610 (N-M. Ct. Crim. App. Mar. 16, 1999) (eight-year delay).

[43] The average number of days from completion of trial to convening authority action per year from 1990 to 1995 was 55 days in 1990, 64 days in 1991, 77 days in 1992, 75 days in 1993, 80 days in 1994, and 88 days in 1995. Barzmehri e-mail, *supra* note 15.

[44] Average post-trial processing time for the Army from completion of trial to convening authority action was: 97 days in 1996, 99 days in 1997, 104 days in 1998, 108 days in 1999, and 115 days in 2000. *Id.*

[45] United States v. Tardif, 57 M.J. 219, 220 (C.A.A.F. 2002) (quoting UCMJ art. 59(a) (2000)). Article 59(a) provides: "A finding or sentence of a 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). Article 66(c) states,

> the Court of Criminal Appeals may act only with respect to the findings and sentence as approved by the convening authority. It

In those cases where excessive post-trial delay prejudiced the accused, the courts believed that dismissal was the only authorized remedy pursuant to Article 59(a).[46]

By 2000, the average number of days between completion of trial and convening authority action in the Army had increased to 115 days.[47] Concerned that "the dilatory habits that led to the adoption of *Dunlap* [were] once again creeping into post-trial processing,"[48] appellate courts searched for other methods to remedy the problem without reverting back to the "inflexibility of the *Dunlap* rule."[49] In *United States v. Collazo*, the Army court abandoned the interpretation that dismissal was the only authorized remedy and granted relief by affirming only part of the accused's sentence to confinement pursuant to Article 66(c).[50] Although the Army court found no actual prejudice, they reduced the sentence based on their "broad power to moot claims of prejudice"[51] because they found that "fundamental fairness dictates that the government proceed with due diligence to execute a soldier's regulatory and statutory post-trial processing rights and to secure the convening authority's action as expeditiously as possible."[52]

Two years later, in *United States v. Tardif*, the CAAF ratified the Army court's interpretation of available remedies.[53] Concluding that

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> may affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved.

Id. art. 66(c).

[46] *See* United States v. Tardif, 55 M.J. 666, 668–69 (C.G. Ct. Crim. App. 2001); *Tardif*, 57 M.J. at 220 ("Because the court below considered itself constrained from granting relief by Article 59(a) and did not consider the impact of the post-trial delays in its review under Article 66(c), we remand the case for further consideration.").

[47] Barzmehri e-mail, *supra* note 15.

[48] United States v. Collazo, 53 M.J. 721, 725 (A. Ct. Crim. App. 2000).

[49] *Id.*

[50] *Id.* at 727.

[51] *Id.* (quoting United States v. Wheelus, 49 M.J. 283, 288 (C.A.A.F. 1998)).

[52] *Id.*

[53] *See generally* United States v. Tardif, 57 M.J. 219 (C.A.A.F. 2002). In *United States v. Tardif*, the Coast Guard Court of Criminal Appeals (CGCCA) found that the twelve-month delay was unreasonable, but "prejudice directly attributable to the delay in this case [had] not been established, and thus no relief [was] warranted." United States v. Tardif, 55 M.J. 666, 669 (C.G. Ct. Crim. App. 2001). The CAAF set aside the decision of the CGCCA and held that "the court's authority to grant relief under Article 66(c) does not require a predicate holding under Article 59(a) that 'the error materially prejudices the substantial rights of the accused.'" *Tardif*, 57 M.J. at 220.

"appellate courts are not limited to either tolerating the intolerable or giving an appellant a windfall," the CAAF empowered the service courts to devise remedies that provide appropriate relief to the accused for excessive post-trial delay without dismissing charges.[54]

Despite the court's application of the additional remedies authorized under *Collazo* and *Tardif*,[55] post-trial processing in the Army continued to deteriorate. In 2001, one year after *Collazo*, the Army average post-trial processing time from completion of trial to convening authority action increased from 115 days in 2000 to 140 days in 2001.[56] By 2003, the average had increased to 148 days,[57] indicating that the new remedies had not effectively decreased post-trial delay.

In 2003, in the case of *Diaz v. Judge Advocate General of the Navy*, the CAAF held that an accused not only has a right to a full, fair and timely review of his findings and sentence under Article 66,[58] but also that he "has a constitutional right to a timely review guaranteed him under the Due Process Clause."[59]

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[54] *Tardif*, 57 M.J. at 225.

[55] After *Collazo* and *Tardif*, courts frequently reassessed sentences as a result of post-trial delay. *See, e.g.*, United States v. Bauerbach, 55 M.J. 501 (A. Ct. Crim. App. 2001) (288-day delay); United States v. Pursley, No. 200101280, 2002 WL 31656105 (N-M. Ct. Crim. App. Nov. 14, 2002) (four-year delay); United States v. Spratley, No. 20010191, 2003 WL 25945988 (A. Ct. Crim. App. Jan. 22, 2003) (twelve-month delay); United States v. Chisholm, 58 M.J. 733 (A. Ct. Crim. App. 2003) (sixteen-month delay); United States v. Hairston, No. 9900811, 2003 WL 25945626 (A. Ct. Crim. App. Feb. 24, 2003) (twelve-month delay); United States v. Nicholson, No. 20010638, 2003 WL 25945841 (A. Ct. Crim. App. Apr. 15, 2003) (twelve-month delay); United States v. Warner, No. 20010190, 2004 WL 5866344 (A. Ct. Crim. App. Jan. 29, 2004) (over one-year delay); United States v. Bell, 60 M.J. 682 (N-M. Ct. Crim. App. 2004) (seventeen-month delay); United States v. Michael, No. 200300102, 2004 WL 2608262 (N-M. Ct. Crim. App. Nov. 18, 2004) (five-year delay); United States v. Easter, No. 20030693, 2005 WL 6520242 (A. Ct. Crim. App. Feb. 15, 2005) (over ten-month delay); United States v. Frames, No. 20010796, 2005 WL 6519751 (A. Ct. Crim. App. Apr. 26, 2005) (545-day delay); United States v. Bodkins, No. 20010107, 2005 WL 6520751 (A. Ct. Crim. App. May 10, 2005) (412-day delay); United States v. Chebaro, No. 20030838, 2005 WL 6520463 (A. Ct. Crim. App. Sept. 21, 2005) (twelve-month delay); United States v. Bishop, No. 200500613, 2005 WL 2704971 (N-M. Ct. Crim. App. Oct. 17, 2005) (two-year delay); United States v. Geter, No. 9901433, 2005 WL 3115333 (N-M. Ct. Crim. App. Nov. 8, 2005) (sixteen-month delay); United States v. Sanchezcruz, No. 200500313, 2006 WL 235325 (N-M. Ct. Crim. App. Jan. 24, 2006) (500-day delay); United States v. Kelly, No. 20040214, 2006 WL 6624100 (A. Ct. Crim. App. Mar. 31, 2006) (209-day delay).

[56] Barzmehri e-mail, *supra* note 15.

[57] *Id.*

[58] Diaz v. Judge Advocate Gen. of the Navy, 59 M.J. 34, 37 (C.A.A.F. 2003).

[59] *Id.* at 38 (citing Harris et al. v. Champion et al., 15 F.3d 1538 (10th Cir. 1994)).

A year later, the court took the due process analysis one step further in the case of *Toohey v. United States*.[60] In determining whether Toohey's due process rights had been violated by the delay, the court found that "[f]ederal courts generally consider four factors to determine whether appellate delay violates an appellant's due process rights: (1) length of the delay; (2) reasons for the delay; (3) the appellant's assertion of his right to a timely appeal; and (4) prejudice to the appellant."[61] The court explained that the first factor, length of delay, serves as a "triggering mechanism" for the other factors if the delay "appears, on its face, to be unreasonable under the circumstances."[62] While the court in *Toohey* did not set a standard for triggering the four-part analysis, the concept of using the first factor as a triggering mechanism would eventually lead to the presumption of unreasonable delay created by *United States v. Moreno*.

D. *United States v. Moreno*[63]

Although the Army Court of Criminal Appeals warned staff judge advocates in *Collazo* to fix post-trial processing,[64] it did not improve. By 2006, only 41% of the Army's 1,149 records of trial reached convening authority action within 120 days,[65] and the average time between completion of trial and convening authority action was 148 days—nearly triple the average from 1990.[66] However, the Army was not alone with the post-trial delay problems and the CAAF was growing concerned with the timeliness of post-trial processing.

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[60] Toohey v. United States, 60 M.J. 100 (C.A.A.F. 2004). In *Toohey*, the petitioner filed a request for extraordinary relief because the convening authority did not take action on the case until 644 days after the court-martial adjourned, and yet, six years after the trial, the first appeal had not been completed.

[61] *Id.* at 102 (referring to six federal cases and stating that "[t]hese factors are derived from the Supreme Court's speedy trial analysis in *Barker v. Wingo.*").

[62] *Id.* (citing United States v. Smith, 94 F.3d. 204, 208–09 (6th Cir. 1996)).

[63] United States v. Moreno, 63 M.J. 129 (C.A.A.F. 2006).

[64] United States v. Collazo, 53 M.J. 721, 725 (A. Ct. Crim. App. 2000) (The court reminded staff judge advocates of the "draconian" *Dunlap* rule and warned that they "can forestall a new judicial remedy by fixing untimely post-trial processing now.").

[65] Barzmehri e-mail, *supra* note 15. Data was re-formatted by the author to calculate percentage of trials with convening authority action within 120 days.

[66] The Army average post-trial processing time from completion of trial to convening authority action was 55 days in 1990. *Id.*

The facts in *United States v. Moreno* clearly explain the court's frustration. On September 29, 1999, a military panel convicted Corporal Moreno of rape and sentenced him to confinement for six years, forfeiture of all pay and allowances, reduction to the lowest enlisted grade, and a dishonorable discharge.[67] The government did not complete authentication of the 746-page record of trial until 278 days after the completion of trial. Upon authentication, it took the convening authority an additional 212 days (for a total of 490 days after completion of the trial) to approve the sentence. After action by the convening authority, 76 additional days elapsed before the NMCCA docketed the case. The service court granted the appellate defense attorney eighteen motions for enlargement of time, and he finally filed the defense brief 702 days after docketing. The government took 223 days to file an answer brief, and the NMCCA affirmed the findings and sentence 197 days later. The CAAF noted that "[f]our years, seven months and fourteen days (1,688 days) elapsed between the completion of trial and the completion of Moreno's appeal of right under Article 66, UCMJ."[68]

Due to the extremely long delay in *United States v. Moreno*, the CAAF believed that post-trial processing had declined so much that "some action [was] necessary to deter excessive delay in the appellate process and remedy those instances in which there [was] unreasonable delay and due process violations."[69] For this reason, the court created a presumption of unreasonable delay again. However, the court explained that this presumption was "less draconian" than the presumption created in *Dunlap*.[70] Rather than triggering dismissal of charges for denial of speedy disposition as required by *Dunlap*, the presumption of unreasonable delay in *Moreno* only triggered further analysis using the four-part test of *Barker v. Wingo*.[71]

The *Moreno* court broke down the post-trial process into three different stages and created a presumption of unreasonable delay for each stage of the post-trial process: (1) convening authority action, (2) docketing by the service Court of Criminal Appeals, and (3) appellate review. For convening authority action, the court created "a presumption of unreasonable delay that will serve to trigger the *Barker* four-factor

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[67] *Moreno*, 63 M.J. at 132.
[68] *Id.* at 133.
[69] *Id.* at 142.
[70] *Id.*
[71] *Id.* (referring to Barker v. Wingo, 407 U.S. 514 (1972)).

analysis where the action of the convening authority is not taken within 120 days of the completion of trial."[72]

Unlike *Dunlap*, in *United States v. Moreno*, the CAAF gave no explanation for setting 120 days as the standard for the presumption of unreasonable delay from completion of trial to convening authority action.[73] While some members of the CAAF have expressed disagreement with the arbitrary nature of the 120-day standard set in *Moreno*,[74] the number appears to derive from the *Dunlap* presumption. Consideration of clemency matters by the convening authority presents one possible explanation for the increase from the ninety-day presumption created in 1974 by *Dunlap*[75] to the 120-day presumption created in 2006 by *Moreno*.[76]

Although the *Moreno* presumption of unreasonable delay serves as precedent that the service courts must follow, their inconsistency in granting relief in the years following *Moreno* may indicate that the criticisms of the *Moreno* presumption have become more persuasive in the appellate judiciary.

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[72] *Id.*

[73] *See generally Moreno*, 63 M.J. 129.

[74] *See id.* at 151 (Crawford, J., dissenting); United States v. Arriaga, 70 M.J. 51, 61 (C.A.A.F. 2011) (Stucky, J., dissenting).

[75] Dunlap v. Convening Auth., Combined Arms Ctr., 48 C.M.R. 751 (C.M.A. 1974).

[76] *Moreno*, 63 M.J. at 142. Before 1983, the Rules for Court-Martial did not specifically authorize the accused to submit clemency matters to the convening authority for consideration. *See generally* MANUAL FOR COURTS-MARTIAL, UNITED STATES, ch. XVI–XVII (1969); Lieutenant Michael J. Marinello, *Convening Authority Clemency: Is It Really an Accused's Best Chance of Relief*, 54 NAVAL L. REV. 169, 192 (2007). The Military Justice Act of 1983 allowed the accused to submit "matters for consideration by the convening authority with respect to the findings and sentence" within thirty days of announcement of the sentence or seven days after receiving a copy of the record of trial. Military Justice Act of 1983, Pub. L. No. 98-209, § 860, 97 Stat. 1393 (codified as amended at 10 U.S.C. § 860); MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1105(c) (1984). In 1987, Congress changed the time period for clemency matters, allowing the accused to submit clemency matters ten days after receipt of a copy of the authenticated record of trial or the post-trial recommendation of the staff judge advocate. National Defense Authorization Act for Fiscal Year 1987, Pub. L. No. 99-661, § 806, 100 Stat. 3816 (1986). The change also authorized the convening authority or staff judge advocate to extend the time period by twenty days for good cause. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1105(c) (2008) [hereinafter 2008 MCM]. By 2006, defense counsel routinely requested an extension for clemency matters in every case, thereby adding thirty days to the post-trial process. *See infra* Part V.B.

E. After *United States v. Moreno*

Three months after the decision in *United States v. Moreno*, the court expanded on their analysis of prejudice, the fourth *Barker* factor, in the case of *United States v. Toohey*.[77] Despite the NMCCA finding of no prejudice, the CAAF found that a due process violation has occurred when "the delay is so egregious that tolerating it would adversely affect the public's perception of the fairness and integrity of the military justice system."[78]

Following the 2006 decisions in *Moreno* and *Toohey*, "there was great concern that appellate courts would apply the 120-day rule strictly and bludgeon the government into timeline compliance by granting widespread and significant relief to otherwise undeserving appellants."[79] Immediately following the *Moreno* decision, the concern of practitioners seemed justified as the court found due process violations and granted relief in several cases.[80]

A few months later, however, the courts shifted away from granting relief, even in the most egregious cases, unless prejudice was clearly established.[81] In one case, the CAAF held that an accused "was not denied his due process right to timely post-trial review and speedy appeal" despite a delay of 1,263 days between sentencing and the first appeal (including 783 days between sentencing and convening authority action).[82] In subsequent cases between 2006 and 2010, the CAAF continued to find due process violations, but generally granted no relief after finding that the violations were harmless beyond a reasonable doubt.[83] The service courts have followed the lead of the CAAF, rarely granting relief for post-trial delay in recent years.[84]

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[77] United States v. Toohey, 63 M.J. 353 (C.A.A.F. 2006).

[78] *Id.* at 362.

[79] 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.

[80] *See generally id.*; United States v. Dearing, 63 M.J. 478 (C.A.A.F. 2006); United States v. Harvey, 64 M.J. 13 (C.A.A.F. 2006).

[81] *See generally* Varley, *supra* note 79; Major Andrew D. Flor, *"I've Got to Admit It's Getting Better": New Developments in Post-Trial*, ARMY LAW., Feb. 2009, at 10.

[82] United States v. Canchola, 64 M.J. 245 (C.A.A.F. 2007).

[83] *See, e.g.*, United States v. Allison, 63 M.J. 365 (C.A.A.F. 2006) (over five-year delay between trial and completion of service court appeal); United States v. Rodriguez-Rivera, 63 M.J. 372 (C.A.A.F. 2006) (over six-year delay between trial and completion of service court appeal); United States v. Young, 64 M.J. 404 (C.A.A.F. 2007) (1637-day delay

Despite the criticism and dissenting opinions, post-trial processing in the Army improved for several years after *Moreno*. From 2007 to 2009, the average number of days between completion of trial and convening authority action was between 120 days and 122 days.[85] However, even when the average processing time was 120 days, convening authorities failed to take action within 120 days in 44 to 46 % of trials within the Army.[86]

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between trial and completion of service court appeal); United States v. Roberson, 65 M.J. 43 (C.A.A.F. 2007) (1524-day delay between trial and completion of service court appeal); United States v. Allende, 66 M.J. 142 (C.A.A.F. 2008) (2484-day delay between trial and completion of service court appeal); United States v. Bush, 68 M.J. 96 (C.A.A.F. 2009) (seven-year delay between trial and docketing with service court); United States v. Ashby, 68 M.J. 108 (C.A.A.F. 2009) (2970-day delay between trial and completion of service court appeal); United States v. Schweitzer, 68 M.J. 133 (C.A.A.F. 2009) (eight-year delay between trial and completion of service court appeal); United States v. Mullins, 69 M.J. 113 (C.A.A.F. 2010) (over 360-day delay between trial and convening authority action); United States v. Luke, 69 M.J. 309 (C.A.A.F. 2011) (over eleven-year delay between trial and completion of service court appeal). *But see* United States v. Arriaga, 70 M.J. 51 (C.A.A.F. 2011) (remanded the case for appropriate relief because the 243-day delay from trial to convening authority action deprived the accused of his due process rights).

[84] *See, e.g.*, United States v. Arindain, 65 M.J. 726 (A.F. Ct. Crim. App. 2007) (404-day delay from trial to action); United States v. Ackley, No. 36703, 2007 WL 2499287 (A.F. Ct. Crim. App. Aug. 16, 2007) (244-day delay from trial to action); United States v. Ogunlana, No. 36848, 2008 WL 818332 (A.F. Ct. Crim. App. Mar. 21, 2008) (150-day delay from trial to action); United States v. Smith, No. 20060139, 2008 WL 2252771 (N-M. Ct. Crim. App. May 27, 2008) (344-day delay from trial to action); United States v. Harris, 66 M.J. 781 (N-M. Ct. Crim. App. 2008) (334-day delay from trial to action); United States v. Sojda, No. 200401746, 2009 WL 347477 (N-M. Ct. Crim. App. Feb. 12, 2009) (237-day delay from trial to action); United States v. Bradley, No. S31559, 2009 WL 690073 (A.F. Ct. Crim. App. Mar. 17, 2009) (168-day delay from trial to action); United States v. Bailon, No. 36912, 2009 WL 1508111 (A.F. Ct. Crim. App. Apr. 29, 2009) (244-day delay from trial to action); United States v. Lobsinger, No. 200700010, 2009 WL 3435922 (N-M. Ct. Crim. App. Oct. 27, 2009) (299-day delay from trial to action); United States v. Yammine, 67 M.J. 717 (N-M. Ct. Crim. App. 2009) (214-day delay from trial to action); United States v. Ney, 68 M.J. 613 (A. Ct. Crim. App. 2010) (174-day delay from trial to action); United States v. Dunn, No. S31584, 2010 WL 3981682 (A.F. Ct. Crim. App. Aug. 31, 2010) (136-day delay from trial to action); United States v. Medina, 69 M.J. 637 (C.G. Ct. Crim. App. 2010) (167-day delay from trial to action); United States v. Bernard, 69 M.J. 694 (C.G. Ct. Crim. App. 2010) (272-day delay from trial to action); United States v. Williams, No. 20091067 (A. Ct. Crim. App. May 9, 2012). *Cf.* United States v. Scott, No. 20091087 (A. Ct. Crim. App. Dec. 23, 2011) (reducing the sentence to confinement by 30 days); United States v. Weaver, No. 20090397 (A. Ct. Crim. App. Mar. 28, 2012) (reducing the sentence to confinement by two months for a 294-day delay from trial to action).

[85] Barzmehri e-mail, *supra* note 15.

[86] *Id.* Data was re-formatted by the author to calculate percentage of trials with convening authority action within 120 days.

Although the average post-trial processing time for the Army decreased during those few years, the scare created by the *Moreno* presumption did not last long. By 2011, the Army's average post-trial processing time from completion of trial to convening authority action had increased to 150 days, more than the pre-*Moreno* average processing time.[87] The continued increase in post-trial delay raises the question, does 120 days represent a reasonable amount of time for post-trial processing from completion of trial to convening authority action?

III. Is 120 Days Reasonable?

Regardless of the reason that the court established 120 days as the presumption of unreasonable delay in *Moreno*, Army jurisdictions do not consistently meet the standard of 120 days from completion of trial to convening authority action.[88] An examination of each step in the post-trial process and the processing of an average case may help determine whether the 120-day *Moreno* presumption represents a reasonable period of time to accomplish post-trial processing from completion of trial to convening authority action.

A. The Post-Trial Process

As illustrated in Figure 2, the post-trial process from completion of trial to convening authority action has many steps that require action from a minimum of six individuals.[89] Since the courts consider the entire period of time from completion of trial to convening authority action as "completely within the control of the Government,"[90] the courts attribute the time required for each step in the post-trial process to the government as post-trial delay.

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[87] In 2005, the average number of days from completion of trial to convening authority action in the Army was 130. In 2006, the year of the *Moreno* decision, the average was 148 days. *Id.*

[88] *Id.*

[89] The post-trial process from completion of trial to convening authority action involves the court reporter, trial counsel, defense counsel, military judge, staff judge advocate, and convening authority.

[90] United States v. Moreno, 63 M.J. 129, 136 (C.A.A.F. 2006).

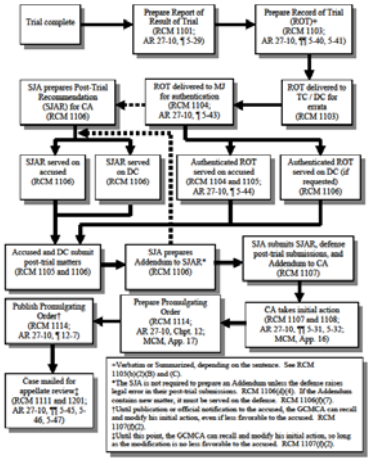

Figure 2. Typical General/Special Court-Martial Post-Trial Processing[91]

The first step in the post-trial process after completion of the trial consists of preparation of the record of trial.[92] Generally considered the most time-consuming part of the post-trial process,[93] preparation of the record of trial requires the court reporter to create a verbatim transcript of the trial[94] and assemble the transcript, exhibits, and other documents into a record of trial.[95]

Court reporters use two methods to produce a transcript of a trial: redictation and manual transcription. During manual transcription, the older model of transcription, the court reporter listens to the audio recordings and then manually types the transcript. During redictation, the court reporter "listens to the audio recordings and repeats it back into

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[91] CRIM. LAW DEP'T, THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., U.S. ARMY, CRIMINAL LAW DESKBOOK, vol. I, at S-69 (Fall 2011).

[92] This analysis omits some steps, such as Appellate Rights, Report of the Result of Trial, and Deferments/Waivers, because these actions are taken at the same time as the production of the record of trial, and therefore do not add time to the process. For a more complete discussion of all actions during the post-trial process, see Lieutenant Colonel Timothy C. MacDonnell, *Tending the Garden: A Post-Trial Primer for Chiefs of Criminal Law*, ARMY LAW., Oct. 2007, at 1 (For a discussion on the necessity of post-trial processing and a proposal to simpligy the post-trial process, see Captain David E. Grogan, *Stop the Madness! It's Time to Simplify Court-Martial Post-Trial Processing*, 62 NAVAL L. REV. 1 (2013).

[93] *Id.* at 13.

[94] 2008 MCM, *supra* note 76, R.C.M. 1103(b)(2)(B).

[95] *Id.* R.C.M. 1103(b)(2)(D).

a speech recognition engine (software)" and the software "converts the reporter's speech into text."[96] The Army still authorizes manual transcription, but redictation has become the preferred method.[97] Using the redictation method, within six months of graduation from court reporter school, a court reporter can produce five verbatim pages of transcript per hour. As court reporters gain experience in redictation, their production rate increases and they can produce at least ten verbatim pages of transcript per hour. Using the manual transcription method, court reporters can produce seven verbatim pages of transcript per hour.[98]

Upon completion of the verbatim transcript of the trial, the court reporter must assemble the transcript with the exhibits and other allied documents to create the record of trial.[99] Although court reporters spend an average of between three and four hours per week on assembly of records of trial,[100] for post-trial processing purposes, a criminal law office should generally factor approximately one full day for assembly of each record of trial.

After assembly, the court reporter sends the record of trial to trial and defense counsel for review (frequently referred to as "errata") in accordance with Rule for Court-Martial (RCM) 1103(i).[101] Although this rule does not prescribe a time requirement for trial defense counsel to review the record of trial, pursuant to the *Rules of Practice before Army Courts-Martial*, "counsel should be able to review at least 150 pages of double-spaced typing per calendar day."[102]

Once the court reporter receives errata from trial and defense counsel, he must make corrections to the transcript before submitting it to the military judge for authentication. Corrections will usually take

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[96] U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE para. 25-4(a) (3 Oct. 2011) [hereinafter AR 27-10].
[97] *See generally id.* ch. 25.
[98] *Id.* para. 25-5.
[99] 2008 MCM, *supra* note 76, R.C.M. 1103(b)(2)(D).
[100] For this paper, the author conducted a survey of Army court reporters. Major Jennifer L. Venghaus, Court Reporter Survey (2011) [hereinafter Court Reporter Survey] (results on file with author).
[101] 2008 MCM, *supra* note 76, R.C.M. 1103(i).
[102] U.S. ARMY TRIAL JUDICIARY, RULES OF PRACTICE BEFORE ARMY COURTS-MARTIAL para. 28.5 (26 Mar. 2012) [hereinafter RULES OF PRACTICE], *available at* http://www.jagcnet.army.mil (follow "Courts" hyperlink; then follow "U.S. Army Trial Judiciary Website" hyperlink; then follow "Rules of Court" hyperlink).

less than one day, but may take several days, depending on the length of the transcript and the number of errors.

Upon correction, the court reporter gives the record of trial to the military judge for review and authentication.[103] A standard for military judge review and authentication does not exist, but military judges "are strongly encouraged to complete authentication within 7 days of receipt of the record of trial" and must inform the Chief Circuit Judge and Chief Trial Judge if they do not complete authentication within twenty-one days of receipt of the record of trial.[104]

After authentication of the record of trial by the military judge, the staff judge advocate must review the record of trial and prepare a post-trial recommendation (frequently referred to as the "staff judge advocate recommendation" or "SJAR").[105] In accordance with RCM 1104 through 1106, the government must serve the post-trial recommendation and authenticated record of trial on the accused and the defense counsel.[106] While the criminal law office may serve the post-trial recommendation and authenticated record of trial on the accused and defense counsel in as quickly as one day, service on the accused in confinement may take up to sixty days due to confinement facility inspection rules.[107]

Upon receipt of the record of trial and staff judge advocate's post-trial recommendation, the accused and defense counsel have ten days to submit clemency matters pursuant to RCM 1105 and comments to the post-trial recommendation pursuant to RCM 1106.[108] As previously mentioned, the rules also provide that the convening authority or staff judge advocate may grant an extension of twenty additional days if the accused and defense counsel demonstrate good cause for needing additional time.[109] Since defense counsel routinely request additional time for clemency matters, criminal law offices should plan for clemency matters to take the full thirty days.[110]

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[103] 2008 MCM, *supra* note 76, R.C.M. 1104.

[104] U.S. ARMY TRIAL JUDICIARY, STANDING OPERATING PROCEDURES ch. 18(6)(b) (17 Aug. 2010) [hereinafter TRIAL JUDICIARY SOP], *available at* http://www.jagcnet.army.mil (follow "Courts" hyperlink, then "U.S. Army Trial Judiciary Website" hyperlink, then "SOPs and Codes" hyperlink, then "Trial Judiciary SOP").

[105] 2008 MCM, *supra* note 76, R.C.M. 1106.

[106] *Id.* R.C.M. 1104–1106.

[107] *See infra* Part VI.B.

[108] 2008 MCM, *supra* note 76, R.C.M. 1105(c), 1106(f).

[109] *Id.* R.C.M. 1105(c)(1), 1106(f)(5).

[110] *See infra* Part V.B.

Upon receipt of clemency matters, the criminal law office prepares the case for convening authority action.[111] In an ideal situation, the convening authority would take action immediately upon receipt of the clemency matters. However, preparation of the action and the schedule of the convening authority frequently delay convening authority action. In practice, it takes an average of twelve days for convening authority action upon receipt of clemency matters.[112]

B. Post-Trial Processing Timeline for an "Average" Case

Pursuant to *United States v. Moreno*, all of the post-trial steps from completion of trial to convening authority action must occur within 120 days in order to avoid a presumption of unreasonable delay. To accomplish this, a criminal law office must adhere to a very strict schedule. Figure 3 shows an example of how to accomplish post-trial processing through convening authority action within 120 days.

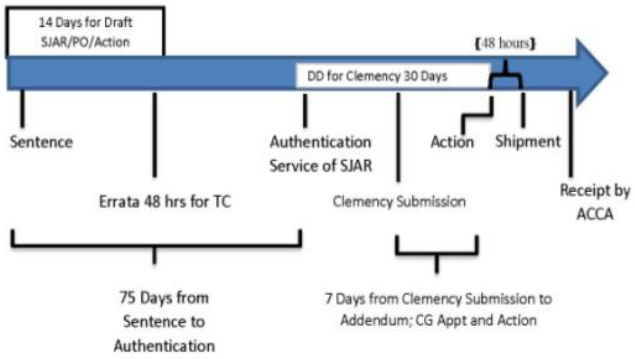

Figure 3. Sample Timeline for Post-Trial Case Processing[113]

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[111] 2008 MCM, *supra* note 76, R.C.M. 1107.

[112] This data was derived from a review of 150 cases in 2010, as annotated on the post-trial reports of three different jurisdictions (82d Airborne Division, Fort Hood, and Fort Stewart) [hereinafter Post-Trial Reports] (on file with author).

[113] This sample timeline was created by the Criminal Law Division, Office of the Judge Advocate General, as a recommendation for completing post-trial processing within 120 days. The timeline represents merely a recommendation; the processing times in the timeline are not required by regulation or any other source. Telephone Interview with Captain Jacqueline DeGaine, Operations Branch, Criminal Law Div., Office of the Judge Advocate Gen. (Jan. 19, 2012).

Applying this sample timeline to an average case will assist in determining the possibility of completing post-trial processing through convening authority action within 120 days. Since the time required to complete several steps in the post-trial process depends on the length of the transcript, this analysis will use the 2011 Army average transcript length of 204 pages.[114]

A court reporter can transcribe five to ten pages per hour,[115] so it will take a court reporter twenty to forty hours to produce a transcript of average length. Since court reporters spend an average of twelve to sixteen hours per week on transcription,[116] even an inexperienced court reporter should complete the transcript within four weeks after completion of the trial. Assembly of a 204-page record of trial should take no more than one duty day. Given the Army standard for counsel review of 150 pages per day,[117] the trial and defense counsel should complete their review and errata within two duty days. After allowing the court reporter one duty day to make corrections, the military judge would receive the record of trial for review and authentication. Assuming the military judge reviews and authenticates the record of trial within seven days,[118] completion of the post-trial process through authentication of the record of trial would take fewer than forty days.

Depending on the circumstances, the staff judge advocate should sign the post-trial recommendation within two days, and service of the post-trial recommendation and authenticated record of trial on the accused takes approximately seven days. After allowing thirty days for receipt of clemency matters,[119] the convening authority could take action within twelve days.[120] Given this strict timeline, as depicted in Figure 4, post-trial processing for this case from completion of trial to convening authority action would take approximately 90 days.

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[114] Barzmehri e-mail, *supra* note 15.
[115] AR 27-10, *supra* note 96, para. 25-5.
[116] Court Reporter Survey, *supra* note 100.
[117] RULES OF PRACTICE, *supra* note 102, para. 28.5.
[118] TRIAL JUDICIARY SOP, *supra* note 104, ch. 18(6)(b). *See infra* Part V.A.
[119] *See infra* Part V.B.
[120] *See supra* Part III.A. & note 112.

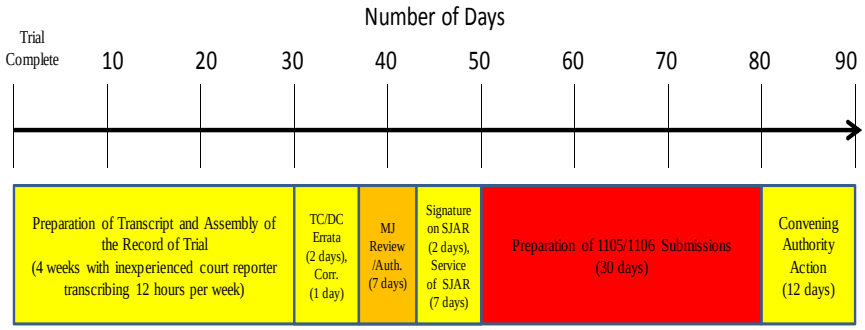

Figure 4. Post-Trial Processing Time for an "Average" Case

Although this analysis demonstrates that 120 days may represent a reasonable time period for post-trial processing of an average 204-page transcript, the analysis fails to consider the reasonableness of post-trial processing for other-than-average cases, such as transcripts of different lengths. For example, a shorter transcript may require fewer than 120 days for reasonable post-trial processing, whereas a longer transcript may require more than 120 days for reasonable post-trial processing.

IV. Reasonable Under the Circumstances

Although appellate courts do not currently consider the circumstances of a case when determining whether the *Moreno* presumption of unreasonable delay has been met, the circumstances of each case have an enormous impact on the time required for post-trial processing. A comparison of post-trial processing statistics with transcript page length—and a look at several case examples—will demonstrate that the circumstances of each case should be considered when determining the reasonableness of post-trial delay.

A. Average Page Count

While difficult to quantify the circumstances of each case for comparison purposes, the length of a transcript generally depicts the circumstances of each case and provides a tool for comparison. For example, a short transcript of fewer than 150 pages generally indicates a relatively simple case, such as a guilty plea, whereas an extremely long transcript would indicate a lengthy, complex, contested court-martial.

Therefore, while the Army average transcript length in 2011 was 204 pages, transcript lengths fluctuate greatly depending on the circumstances of each case.

As demonstrated in Figure 5, over the last few decades, even the average page count per year has fluctuated greatly.

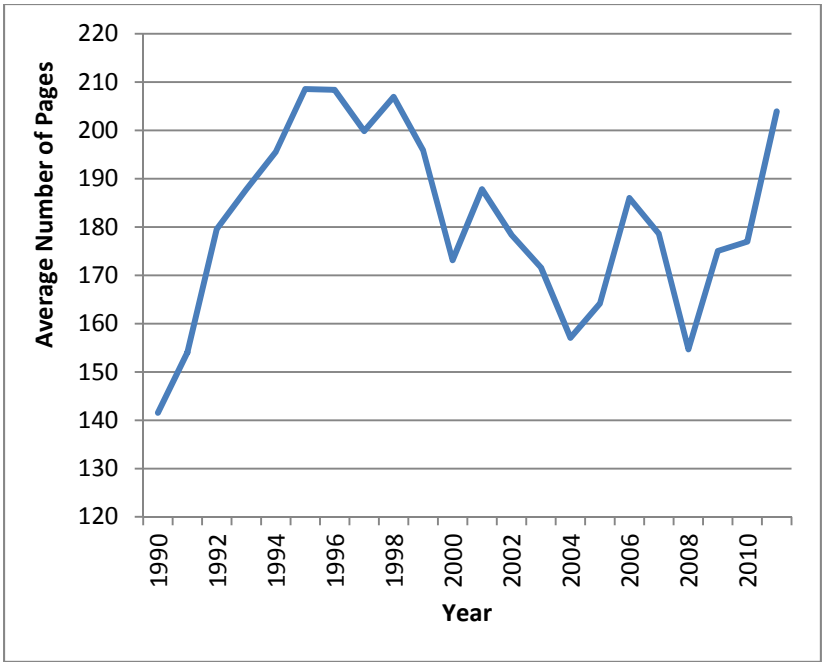

Figure 5. Army Average Page Count Per Year[121]

In 1990, the average page count for an Army transcript was 142 pages. By 1995, the average page count was 209 pages, the highest average between 1990 and 2011. Although the average dipped in 2008 to 155 pages, the average page count for the Army has been steadily increasing since 2008, and by 2011, it had reached 204 pages.[122]

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[121] Barzmehri e-mail, *supra* note 15. Data was formatted by the author to create this chart.

[122] *Id.*

Interestingly, as shown in Figure 6, while the average page count per year varies, since 2000 the variance of page count and post-trial processing times form nearly identical trends, thus demonstrating that post-trial delay correlates to page count.

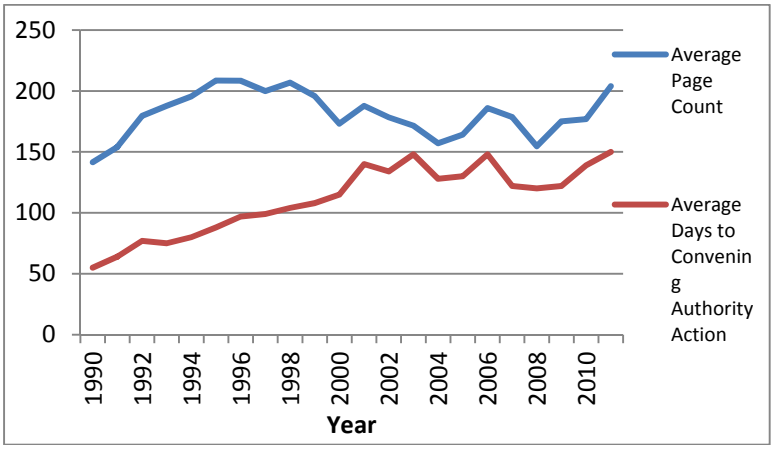

Figure 6. Average Number of Days to Convening Authority Action Compared to Average Page Count Per Year[123]

The 2011 statistics of average page count and average days to convening authority action also show a correlation. As illustrated in Figure 7, while the overall average page count in the Army for 2011 was 204 pages, the average page count for cases in which action was completed within 120 days was only 124 pages.[124] The average page count increases substantially for cases in which action was not completed within 120 days, and the average page count was 419 pages for cases with post-trial processing times of over a year.[125]

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[123] *Id.* Data was formatted by the author to create this chart.
[124] *Id.*
[125] *Id.*

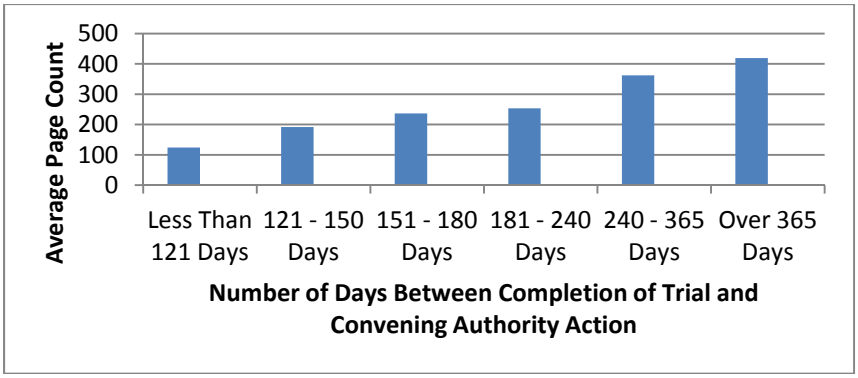

Figure 7. Average Page Count by Post-Trial Processing Time (Army, 2011)[126]

The correlation between page count and number of days of post-trial delay presents a clear indication that the circumstances of a case play a big role in the post-trial processing of a case and therefore should be considered when determining the reasonableness of post-trial delay. The *Moreno* presumption, however, forces appellate courts to ignore the case circumstances and determine the reasonableness of delay based solely on whether the convening authority took action more than 120 days after completion of the trial.[127] While the CAAF carefully notes that "the presumptions serve to trigger the four-part *Barker* analysis—not resolve it," and that "[s]ome cases will present specific circumstances warranting additional time,"[128] post-trial processing in excess of 120 days automatically satisfies the first *Barker* factor without consideration for the circumstances of the case, and it then becomes the burden of the government to demonstrate that the delay was reasonable under the circumstances.[129] Amending the RCM to prescribe time periods for post-trial processing based on the length of the trial would mitigate this problem.

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[126] *Id.* Data was formatted by the author to create this chart.
[127] United States v. Moreno, 63 M.J. 129, 142 (C.A.A.F. 2006).
[128] *Id.*
[129] *See id.*

B. Circumstances of a Case

In his dissent in *United States v. Arriaga*, Judge Stucky articulated the problem with ignoring the circumstances of a case when determining the reasonableness of post-trial delay:

> There is no reason to expect that a fixed period of post-trial delay should trigger heightened review regardless of the length of the trial record or other factors, such as whether the case involves a simple, judge alone plea of guilty to a single specification crime such as wrongful use of cocaine, or for example, a contested case heard by a panel involving premeditated murder, multiple conspiracies and co-accuseds, and the possibility of the death penalty.[130]

For this reason, a look at different case scenarios will demonstrate why ignoring the circumstances of an individual case presents a major flaw in determining the reasoanbleness of post-trial delay.

Case A: A military judge convicted the Accused, pursuant to his plea, of one specification of desertion and sentenced him to eleven months confinement, forfeiture of all pay and allowances, reduction to E-1, and a bad-conduct discharge. The trial took two hours, and the trial transcript was 100 pages.

Case B: A military panel convicted the Accused, contrary to his pleas, of multiple specifications of rape of a child and indecent acts. The panel sentenced him to twenty years confinement, forfeiture of all pay and allowances, reduction to E-1, and a dishonorable discharge. The trial lasted five days, with thirty hours of recorded testimony, and the trial transcript was 1,500 pages.

Case C: A military panel convicted the Accused, contrary to his pleas, of three specifications of premeditated murder and sentenced him to death. The trial took five weeks with over 100 hours of testimony on the record, and the trial transcript was 7,000 pages.

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[130] United States v. Arriaga, 70 M.J. 51, 61 (C.A.A.F. 2011) (Stucky, J., dissenting).

Pursuant to *United States v. Moreno*,[131] the convening authority must take action in all three of the above cases within 120 days in order to avoid a presumption of unreasonable delay. As depicted in Figure 8, more than 120 days of post-trial processing for a case of average length, such as Case A, may include unreasonable delay. However, post-trial processing of longer cases, such as Cases B and C, could very easily take more than 120 days without any unreasonable government delay due to the circumstances of those cases.

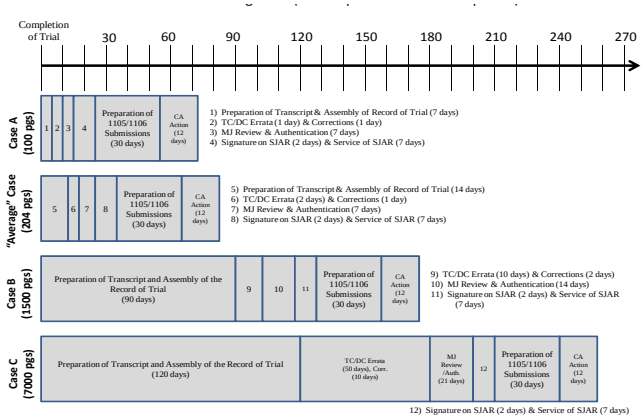

Figure 8. Post-Trial Processing Time for Different Cases (with Experienced Court Reporter)

For Case B, if the court reporter starts transcribing the case immediately upon completion of the trial, it would take an experienced court reporter 150 hours to prepare the transcript.[132] Given that the average court reporter spends twelve to sixteen hours per week on transcription,[133] it would take the court reporter nine to twelve weeks to complete the transcript alone. Adding thirty days for clemency matters would exhaust the 120-day clock, leaving no time for errata, authentication, service of the post-trial recommendation, or action by the convening authority.

For Case C, even with one court reporter who can spend forty hours per week on transcription of only this case, transcription will take over

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131 *Moreno*, 63 M.J. at 129.

132 This number is calculated by dividing 1500 pages by 10 pages per hour, which equals 150 hours. *See* AR 27-10, *supra* note 96, para. 25-5.

133 Court Reporter Survey, *supra* note 100.

seventeen weeks.[134] Therefore, this case would already fall into the category of "unreasonable delay" before completion of the record of trial.

As demonstrated above, "'there is no talismanic number of years or months [of appellate delay] after which due process is automatically violated.' Whether appellate delay satisfies the first criterion [of the *Barker v. Wingo* analysis] is best determined on a case-by-case basis."[135] The court's use of a presumption of unreasonable delay as a trigger for the four-part *Barker* analysis improperly shifts the emphasis to the first *Barker* factor, length of the delay, rather than balancing all the factors.

To alleviate this problem, the President should amend the RCM to define timely post-trial processing. An amendment to RCM 1103 could set time periods for preparation of the record of trial based on the length of the trial. For example, 30 days could be set as the time period for preparation of a record of trial plus 15 additional days for each day the court-martial was in session. An amendment to RCM 1107 could also prescribe the time periods for action by the convening authority.[136] Prescribing time periods in the RCM for post-trial processing based on the length of the trial would not only give staff judge advocates an achievable standard, but it would also require the appellate courts to consider case circumstances when determining whether the period of post-trial delay was reasonable.

V. Calculating the Length of Post-Trial Delay

In addition to not considering case circumstances when determining the reasonableness of post-trial delay, the current methodology of the appellate courts in calculating post-trial delay also leads to an inaccurate evaluation of post-trial delay. Currently, the calculation of post-trial delay includes the entire period from the completion of trial to the day

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[134] This number is calculated by dividing 7000 pages by 10 pages per hour, which equals 700 hours for transcription. *See* AR 27-10, *supra* note 96, para. 25-5. Assuming the court reporter could spend 40 hours per week on transcription, the 700 hours of transcription would take 17.5 weeks.

[135] Toohey v. United States, 60 M.J. 100, 103 (C.A.A.F. 2004) (citing Coe v. Thurman, 922 F.2d 528, 531 (9th Cir. 1990)).

[136] *See* Appendix (proposing language to change RCM 1103 and RCM 1107).

the convening authority takes action.[137] Despite the CAAF assertion that "processing in this segment is completely within the control of the Government,"[138] the government does not have control over all delay within this time period. In order to more effectively measure post-trial delay caused by the government, calculations of post-trial delay should not include any delay caused by the military judge, defense counsel, or the accused. An amendment to RCM 1107 could address this concern by prescribing excludable periods of post-trial delay.[139]

A. Military Judge

The military judge's major role in the post-trial process consists of review and authentication of the record of trial.[140] While the review and authentication may only take only a few days in some cases, the amount of time required for authentication of a record of trial can vary. For example, in *United States v. Arriaga*, "[i]t took the military judge twenty-five days to authenticate the record of trial."[141] Delay in review and authentication of a record of trial can be explained by many factors, such as transcript length, complexity of the case, number of military judges, schedule, and location of the military judge. [142]

When more than one military judge presided over different stages of a case (arraignment, motions, or trial), the record of trial requires review and authentication by multiple military judges,[143] which could add to the time required for authentication. In addition, while large installations usually have an assigned military judge, smaller installations may have traveling military judges,[144] thus requiring the office of the staff judge

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[137] United States v. Arriaga, 70 M.J. 51, 57 (C.A.A.F. 2011) ("To ensure that there are no further misunderstandings, for this period of appellate delay, the clock starts to run the day that the trial is concluded and stops when the convening authority completes his action.").

[138] United States v. Moreno, 63 M.J. 129, 136 (C.A.A.F. 2006).

[139] *See* Appendix (proposing language to amend RCM 1107).

[140] 2008 MCM, *supra* note 76, R.C.M. 1104.

[141] *Arriaga*, 70 M.J. at 56.

[142] *See* MacDonnell, *supra* note 92, at 1, 15–16.

[143] 2008 MCM, *supra* note 76, R.C.M. 1104(a)(1) ("If more than one military judge presided over the proceedings, each military judge shall authenticate the record of the proceedings over which that military judge presided, except as provided in subsection (a)(2)(B) of this rule.").

[144] For example, military judges from Fort Bragg travel to Fort Jackson. *See Fort Bragg Docket*, U.S. ARMY TRIAL JUDICIARY DOCKET (Jan. 5, 2012), http://www.jagcnet.army.

advocate to mail the record of trial to the military judge for authentication.[145]

Regardless of the location of the military judge, the military judge's schedule could impact authentication as well. For example, while conducting a lengthy trial or series of trials, a military judge may not have time to immediately review and authenticate the record of trial. A review of the Fort Bragg docket shows that during a three-week period in January 2012, one military judge had court scheduled every duty day except one, thus limiting his time to review and authenticate records of trial.[146]

For these reasons, the military judge's review and authentication of the record of trial may take several weeks, yet the appellate courts will attribute this time to the government as post-trial delay. However, due to the independence of the military judiciary and their exercise of judicial discretion, any time spent by the military judge to authenticate the record of trial should not count against the government for purposes of post-trial delay.

1. Judicial Independence

Well-rooted in American history,[147] the philosophy of judicial independence also exists in military jurisprudence, and it has been noted that "[a]n independent judiciary is indispensable to our system of justice."[148] Consistent with this philosophy, the military judiciary

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mil [hereinafter *Fort Bragg Docket*] (follow "Courts", then U.S. Army Trial Judiciary website" hyperlink, then "Army Courts-Martial Internet Docket (ACMID)" hyperlink, then "Enter Docket" hyperlink, then "2nd Judicial Circuit" hyperlink, then "Fort Bragg" hyperlink) (copy on file with author).

[145] Although military judges are authorized to authenticate an electronic version of a record of trial, electronic authentication has not yet become the widely accepted practice of trial judges in the Army. For this reason, many staff judge advocate offices are still required to mail records of trial to non-local military judges. *See* RULES OF PRACTICE, *supra* note 102, para. 28.7; TRIAL JUDICIARY SOP, *supra* note 104, ch. 18(5).

[146] *Fort Bragg Docket*, *supra* note 144.

[147] THE FEDERALIST NO. 78 (Alexander Hamilton).

[148] U.S. ARMY JUDICIARY, CODE OF JUDICIAL CONDUCT FOR TRIAL AND APPELLATE JUDGES (16 May 2008) [hereinafter CODE OF JUDICIAL CONDUCT], *available at* http://www.jagcnet.army.mil (follow "Courts" hyperlink, then "U.S. Army Trial Judiciary Website" hyperlink, then "SOPs and Codes" hyperlink, then "Code of Judicial Conduct").

exercises authority completely independent of convening authorities,[149] and the UCMJ prohibits convening authorities from influencing military judges in any manner.[150]

The Army currently has 23 active duty military judges and 24 Army Reserve military judges.[151] Assigned to the U.S. Army Judiciary, an element of the U.S. Army Legal Services Agency,[152] The Judge Advocate General organizes military judges into judicial circuits, and each judicial circuit includes all of the general court-martial jurisdictions within a designated geographic area.[153] A Chief Circuit Judge supervises all of the military judges within a circuit, and the Chief Trial Judge oversees all of the Army judicial circuits.[154] Although technically part of the "government," since the Chief Circuit Judge and the Chief Trial Judge supervise each military judge, the staff judge advocate and convening authority have no role in regulating any delay caused by the military judge in his review and authentication of the record of trial.

2. Judicial Discretion

Although independent of the convening authorities, it is expected that military judges will use judicial discretion in their review and authentication of the record of trial to ensure the accuracy of the record

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[149] *See* UCMJ art. 26(c) (2008) ("A commissioned officer who is certified to be qualified for duty as a military judge of a general court-martial may perform such duties only when he is assigned and directly responsible to the Judge Advocate General, or his designee, of the armed force of which the military judge is a member . . . ."). *See also* Weiss v. United States, 510 U.S. 163 (1994); CODE OF JUDICIAL CONDUCT, *supra* note 148; Major Fansu Ku, *From Law Member to Military Judge: The Continuing Evolution of an Independent Trial Judiciary in the Twenty-First Century*, 199 MIL. L. REV. 49 (2009). *But see* Frederic I. Lederer & Barbara S. Hundley, *Needed: An Independent Military Judiciary—A Proposal to Amend the Uniform Code of Military Justice*, 3 WM. & MARY BILL RTS. J. 629 (1994).

[150] UCMJ art. 37 (2008).

[151] *U.S. Army Trial Judiciary*, JAGCNet, http://www.jagcnet.army.mil (follow "Courts" hyperlink, then "U.S. Army Trial Judiciary Website" hyperlink) (last visited Nov. 27, 2013) [hereinafter *U.S. Army Trial Judiciary*].

[152] AR 27-10, *supra* note 96, para. 7-1.

[153] *Id.* para. 7-3. There are currently five judicial circuits in the Army: 1st Judicial Circuit (Northeastern and Middle Atlantic States), 2d Judicial Circuit (Southeastern States), 3d Judicial Circuit (Southwestern and Midwestern States), 4th Judicial Circuit (Western States (JAGCNet calls this "Far West" and Far East), and 5th Judicial Circuit (Europe and Southwest Asia). *U.S. Army Trial Judiciary*, *supra* note 151.

[154] AR 27-10, *supra* note 96, para. 7-5.

of trial while also affording speedy post-trial processing to the accused in accordance with his rights. Judicial discretion is "[t]he exercise of judgment by a judge or court based on what is fair under the circumstances and guided by the rules and principles of law."[155] Appellate courts generally afford trial judges judicial discretion in trial decisions and only set aside judicial discretion "when the judicial action is arbitrary, fanciful or unreasonable."[156] To some extent, the American system of criminal jurisprudence relies on the judicial discretion of trial judges to ensure the fairness of trials. For example, an accused has a right to a speedy trial, and therefore, pursuant to RCM 707, an accused must "be brought to trial within 120 days" after preferral of charges or imposition of restraint.[157] For purposes of RCM 707, an accused is "brought to trial" at arraignment.[158] Arraignment stops the speedy trial clock because "[a]fter arraignment, the power of the military judge to process the case increases, and the power of the convening authority to affect the case decreases."[159] With respect to pre-trial processing, appellate courts presume that the military judge will use his discretion to ensure that the accused receives a speedy trial in accordance with his rights.

While the concept of judicial discretion prevails in the pre-trial and trial stages of criminal law, the appellate courts give trial judges very little, if any, discretion in their processing of a case post-trial. Although the CAAF has specifically granted appellate judges more flexibility with respect to post-trial delay due to the "exercise of the court of Criminal Appeals' judicial decision-making authority,"[160] the court has failed to extend the same flexibility and judicial decision-making authority to the trial judiciary for purposes of post-trial delay. For this reason, trial judges must limit their review and authentication of a record of trial and have little flexibility to determine when they need more time for additional review.

Despite the disparity created by the CAAF, all judges must perform their duties "impartially, competently, and diligently."[161] Therefore, one would expect that when reviewing and authenticating a record of trial,

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[155] BLACK'S LAW DICTIONARY 479 (7th ed. 1999).
[156] Delno v. Market St. Ry. Co., 124 F.2d 965, 967 (9th Cir. 1942).
[157] 2008 MCM, *supra* note 76, R.C.M. 707(a).
[158] *Id.* R.C.M. 707(b)(1).
[159] United States v. Doty, 51 M.J. 464 (C.A.A.F. 1999).
[160] United States v. Moreno, 63 M.J. 129, 137 (C.A.A.F. 2006).
[161] CODE OF JUDICIAL CONDUCT, *supra* note 148, canon 2.

trial judges will conduct their duties in accordance with the accused's rights, and without unnecessary delay.[162] Since the same professional rules of judicial conduct[163] apply to trial judges as well as appellate judges, trial judges should receive the same degree of flexibility in post-trial processing as judges at the appellate level. Accordingly, military trial judges should have the discretion to balance the accused's right to timely post-trial processing against the need for a thorough review of a record of trial in order to ensure that it fairly and accurately portrays the trial proceeding. If given more discretion, a trial judge may find that some cases require additional review, while they may conduct a quicker review in other cases.

Regardless of the time required, military judges should have the discretion to decide the amount of time required for their review and authentication, and the time used by the military judge for review and authentication should not count as post-trial delay against the government.

B. Defense Counsel

From the date of service of the authenticated record of trial or staff judge advocate's post-trial recommendation on the accused, in accordance with RCM 1105, until receipt of clemency submissions by the staff judge advocate, the timeliness of post-trial processing resides solely within the control of the defense counsel and the accused. Although completely within the control of the defense counsel and the accused, the appellate courts still attribute this time to the government as post-trial delay.

Current rules allow the accused to submit clemency matters "within the later of 10 days after a copy of the authenticated record of trial or, if applicable, the recommendation of the staff judge advocate or legal officer, or an addendum to the recommendation containing new matter is served on the accused."[164] The rules also state that if the accused requests additional time to submit clemency matters, "the convening authority or that authority's staff judge advocate may, for good cause,

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[162] U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGE'S BENCHBOOK para.1-1 (1 Jan. 2010).
[163] CODE OF JUDICIAL CONDUCT, *supra* note 148.
[164] 2008 MCM, *supra* note 76, R.C.M. 1105(c)(1).

extend the 10-day period for not more than 20 additional days; however, only the convening authority may deny a request for such an extension."[165] Due to the restriction on denying an extension request and the fear that denial of an extension request will result in the appellate courts returning the case for new action,[166] most staff judge advocates liberally grant extensions for clemency matter submissions.[167]

Therefore, based on the current rules and the liberal grant of extensions, an accused and his defense counsel generally have little incentive to submit matters in fewer than 30 days. In fact, a review of 150 cases completed in 2010 revealed that defense counsel submitted clemency matters in ten days or less in only 28 of the 150 cases.[168]

Defense counsel also have little incentive to submit matters in accordance with the established time limits due to lack of consequences for late clemency submissions. Despite the 30-day time limit for clemency matters, of 150 cases reviewed from 2010, the average number of days for submission of clemency matters was 35 days.[169] In some cases, the delay in submission of clemency matters totaled as much as 149 days.[170]

Although RCM 1105(d)(1) states that "[f]ailure to submit matters within the time prescribed by this rule shall be deemed a waiver of the right to submit such matters,"[171] appellate courts have shown reluctance to deny the accused his right to submit clemency matters, regardless of timeliness.[172] While the appellate courts recognize the "dilemma" of

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[165] *Id.*

[166] *See* United States v. Beckelic, No. 27973, 1990 WL 8393 (A.F.C.M.R. Jan. 5, 1990); United States v. Hairston, No. 29365, 1993 WL 52408 (A.F.C.M.R. Feb. 3, 1993).

[167] *See* United States v. Lane, No. S29537, 1999 WL 167124 (A.F. Ct. Crim. App. Jan. 14, 1999) ("We are aware that routine practice in the Air Force has been quite liberal in granting extensions . . . .").

[168] Post-Trial Reports, *supra* note 112.

[169] *Id.*

[170] *Id.*

[171] 2008 MCM, *supra* note 76, R.C.M. 1105(d)(1). *See also* United States v. Angelo, 25 M.J. 834 (A.C.M.R. 1988); United States v. Maners, 37 M.J. 966 (A.C.M.R. 1993).

[172] United States v. Smith, No. 9801026, 2000 WL 35801879 (A. Ct. Crim. App. Jan. 27, 2000); United States v. Luquette, No. 20050745, 2007 WL 7264310 (A. Ct. Crim. App. Nov. 30, 2007); United States v. Palmer, No. 20050769, 2007 WL 7263006 (A. Ct. Crim. App. Aug. 7, 2007); United States v. Farfan, No. 20070467, 2008 WL 8086423 (A. Ct. Crim. App. May 21, 2008).

untimely submissions for staff judge advocates ,[173] they routinely set aside convening authority actions and return cases for new action when the convening authority takes action prior to receipt of clemency matters, even when the time limit for submission of clemency matters expired.[174] For this reason, staff judge advocates frequently delay convening authority action until receipt of clemency matters, even if it results in a long period of delay. For example, in a review of 150 cases completed in 2010, 32 of the 150 cases had delays of over 50 days between service of the staff judge advocate's post-trial recommendation and submission of clemency matters, and 6 of those 32 had a delay of over 100 days.[175]

Although the accused and his defense counsel control the timeliness of clemency matters, the appellate courts attribute the time that the government waits for submission of clemency matters to the government for purposes of post-trial delay. In order for calculations of post-trial delay to more accurately reflect the delay caused by the government, the period of delay from service of the staff judge advocate's post-trial recommendation on the accused to submission of clemency matters should not count as post-trial delay attributed to the government.

However, while excluding delay caused by the military judge, accused, and defense counsel results in a more accurate calculation of post-trial delay actually caused by the government, administrative constraints will continue to hinder the government from reducing post-trial processing delay.

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[173] United States v. Pereznieves, No. 20070653, 2008 WL 8086428 (A. Ct. Crim. App. Aug. 14, 2008); United States v. Grier, No. 20070943, 2009 WL 6835713 (A. Ct. Crim. App. Feb. 27, 2009).

[174] *See, e.g.*, United States v. Sosbee, 35 M.J. 892 (A.C.M.R. 1992); United States v. Smith, No. 9801026, 2000 WL 35801879 (A. Ct. Crim. App. Jan. 27, 2000); United States v. Luquette, No. 20050745, 2007 WL 7264310 (A. Ct. Crim. App. Nov. 30, 2007); United States v. Palmer, No. 20050769, 2007 WL 7263006 (A. Ct. Crim. App. Aug. 7, 2007); United States v. Pereznieves, No. 20070653, 2008 WL 8086428 (A. Ct. Crim. App. Aug. 14, 2008); United States v. Farfan, No. 20070467, 2008 WL 8086423 (A. Ct. Crim. App. May 21, 2008); United States v. Grier, No. 20070943, 2009 WL 6835713 (A. Ct. Crim. App. Feb. 27, 2009); United States v. Mercado, No. 20080912, 2009 WL 6827251 (A. Ct. Crim. App. Sept. 30, 2009); United States v. Beckner, No. 20080605, 2010 WL 3952904 (A. Ct. Crim. App. May 7, 2010).

[175] Post-Trial Reports, *supra* note 112.

VI. Administrative Constraints

The CAAF has clearly articulated that "personnel and administrative issues . . . are not legitimate reasons justifying otherwise unreasonable post-trial delay."[176] The court explained further that "[t]o allow caseloads to become a factor in determining whether appellate delay is excessive would allow administrative factors to trump the Article 66 and due process rights of appellants."[177] Despite the fact that administrative issues do not serve as legitimate excuses for post-trial delay, administrative issues, such as court reporter manpower and service of documents on the accused while in confinement, have a large impact on post-trial processing in the Army. Minimizing the effect of these administrative issues would significantly improve post-trial processing time in the Army.[178]

A. Court Reporter Manpower

Court reporters play the largest role in preparation of the record of trial, yet comprise less than three percent of personnel in the U.S. Army Judge Advocate General's Corps.[179] Enlisted soldiers with a military occupational specialty of 27D become Army court reporters and earn the additional skill identifier of C5 by going through additional training at

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[176] United States v. Arriaga, 70 M.J. 51, 57 (C.A.A.F. 2011).

[177] United States v. Moreno, 63 M.J. 129, 137 (C.A.A.F. 2006).

[178] It should be noted that while post-trial processing times have been increasing, statistics show that the overall number of cases tried per year is substantially lower than it was prior to 1994. In 1990, the Army reported 2065 records of trial received by the Army Court of Criminal Appeals. By 1994, the number had decreased to 978. Between 1995 and 2010, the number of records fluctuated between 822 and 1283, and the number hit a record low in 2011 with only 763 records received by the Army Court of Criminal Appeals. Barzmehri e-mail, *supra* note 15. The CAAF has noticed this trend as well: "This increase in processing time stands in contrast to the lower number of cases tried in the military justice system in recent years." *Moreno*, 63 M.J. at 142. However, it is not clear to the author as to why post-trial processing time has been increasing while the number of trials per year has been decreasing.

[179] The active duty component of the U.S. Army Judge Advocate General's Corps consists of approximately 1,900 judge advocates, 100 warrant officers, and 1,600 enlisted personnel. The U.S. Army Judge Advocate General's Corps also includes over 500 civilian attorneys and approximately 600 civilian paraprofessionals. E-mail from Lieutenant Colonel Joseph B. Berger, Plans Officer, Personnel Plans and Training Office, to author (Nov. 25, 2013, 1:34 PM EST). Of those 3,600 personnel, the Army is only authorized 95 military court reporters. E-mail from Thomas Chilton, Combat Devs. Directorate, The Army Judge Advocate Gen.'s Legal Ctr., to author (Nov. 25, 2013, 9:09 AM EST) [hereinafter Chilton e-mail] (on file with author).

The Army Judge Advocate General's Legal Center and School.[180] Although the Army is authorized 95 military court reporters, there are currently only 68 military court reporters on active duty.[181] Additionally, 28 Department of the Army civilian court reporters work in Army commands.[182] Most GCMCAs have between one and three court reporters, although several small jurisdictions rely on another jurisdiction for court reporter support, and a few large jurisdictions have more than three court reporters.[183]

Based on court reporter performance standards,[184] it may seem reasonable for a court reporter to complete transcription and assembly of the record of trial within a few weeks or even days. However, court reporters have many other duties besides transcription. As depicted in Figure 9, on average, a court reporter only spends 30 percent of his time (twelve to sixteen hours per week) on transcription.[185] A court reporter spends the remainder of his time assembling records of trial, managing errata, preparing for court, working with counsel and military judges, working in court, and performing other non-court reporter tasks, such as Soldier training.[186] On average, a court reporter spends between 8 and 10 hours per week in court and spends between 8 and 11 hours per week preparing for court and working with counsel and military judges on cases.[187]

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[180] AR 27-10, *supra* note 96, para. 25-2(d).

[181] E-mail from Master Sergeant Arlene A. Chatman, Office of the Judge Advocate General Liaison to Human Resources Command, to author (Nov. 25, 2013, 1:49 PM EST) (on file with author).

[182] E-mail from Thomas Chilton, Combat Devs. Directorate, The Army Judge Advocate Gen.'s Legal Ctr., to author (Dec. 1, 2011, 4:18 PM EST) (on file with author).

[183] Court Reporter Survey, *supra* note 100; Chilton e-mail, *supra* note 179.

[184] AR 27-10, *supra* note 96, para. 25-5.

[185] Court Reporter Survey, *supra* note 100.

[186] *Id.*

[187] *Id.*

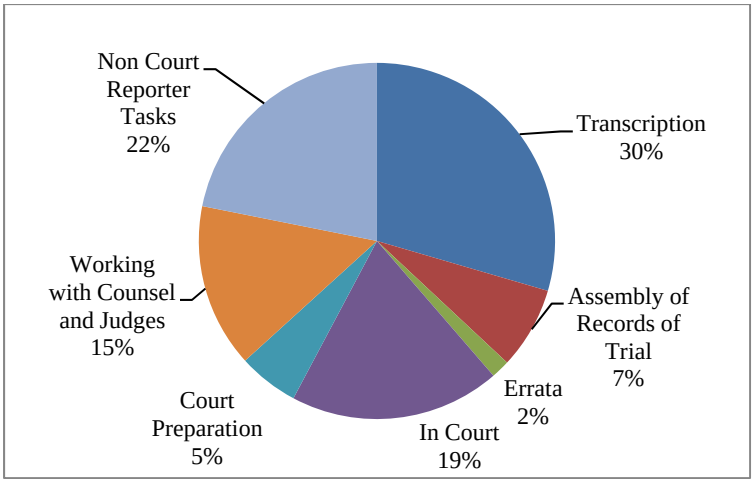

Figure 9. Percentage of Time Court Reporters Spend on Various Tasks[188]

Since all cases within a jurisdiction fall within the responsibility of the court reporter assigned to that jurisdiction, other cases within the jurisdiction may delay the transcription of a particular case. In large jurisdictions, several trials may occur consecutively or simultaneously in different courtrooms, leaving no time for the court reporters to transcribe one case before sitting in court for another case. For example, Fort Hood has four military judges and two courtrooms. On some days, the jurisdiction has three trials scheduled in one day.[189]

Given the other responsibilities of court reporters and the number of cases tried in some large jurisdictions, many jurisdictions have become so back-logged that court reporters can rarely start transcribing a case immediately upon completion of the trial. In a recent survey of court reporters, one court reporter described the difficulty faced by large jurisdictions to keep up with transcription:

> It's hard to keep the backlog clear when you've got court reporters in court at least two days a week, participating

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[188] *Id.*

[189] *Fort Hood Docket*, U.S. ARMY TRIAL JUDICIARY DOCKET (Jan. 9, 2012), http://www.jagcnet.army.mil (follow "U.S. Army Trial Judiciary" hyperlink, then "Army Courts-Martial Internet Docket (ACMID)" hyperlink, then "Enter Docket" hyperlink, then "3rd Judicial Circuit" hyperlink, then "Fort Hood" hyperlink) (copy on file with author).

> in "Sergeant's Time Training" on Thursdays, and performing normal soldier duties; when you turn in two or maybe three records of trial a week after authentication but have five new cases in the file for transcription, and have received five more packets awaiting docketing. . . . This isn't a marathon. This isn't a sprint. We're not even able to run as fast as we can and stay in one piece, even with help from other jurisdictions. . . .[190]

Every day that a case sits after completion of trial without a court reporter available to start preparing the transcript adds to the time attributed to the government as post-trial delay. Until jurisdictions reduce current backlogs and keep up with transcription of new cases, court reporters will continue to struggle with timely transcription and assembly of records of trial.

1. Court Reporter Manpower Per Jurisdiction

Court reporters serve a unique role in a criminal law office, and no other personnel can perform their duties. Unlike attorneys or paralegals, where the staff judge advocate can move personnel from one section to another to meet the demands of that section, staff judge advocates must manage the demand for court reporting with the number of court reporters authorized for the jurisdiction.

Currently, the type of unit or installation determines the number of court reporters authorized. For example, pursuant to current modified tables of organization and equipment (MTOE), the Army authorizes three military court reporters for each combat division.[191] While this model provides court reporter authorizations based on the proportionate size of the unit, not all units of the same size have the same number of courts-martial per year. Even in units of approximately the same size, the number of courts-martial per year can vary greatly depending on the location of the unit, size of the installation, location of subordinate units, and deployment cycle of the unit. In 2011, for example, the number of

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[190] Court Reporter Survey, *supra* note 100.
[191] Chilton e-mail, *supra* note 179.

courts-martial per year in combat divisions ranged from 19 to 55.[192] For this reason, the Department of the Army must re-assess court reporter manpower to ensure that each jurisdiction has enough court reporters to handle the caseload of the jurisdiction.

2. Assistance from Other Jurisdictions

Even if the Army increases court reporter manpower in the busiest jurisdictions, some jurisdictions will still need more court reporter manpower than authorized at certain times due to the ebb and flow of trial scheduling. Currently, some jurisdictions resolve this problem by seeking assistance from court reporters in other jurisdictions when they experience a higher case-load than usual. In a recent survey of court reporters and chiefs of military justice, half responded that they occasionally seek assistance from court reporters in other jurisdictions.[193] Most jurisdictions only seek assistance once or twice a year, but some jurisdictions seek assistance more than once per month.[194]

Although "[s]taff judge advocates are highly encouraged to . . . [w]here feasible, and to the maximum extent practicable, allow their court reporters to assist other jurisdictions in transcribing backlogged cases,"[195] a system does not exist for requesting assistance from other jurisdictions. While the court reporter training program at The Judge Advocate General's Legal Center and School provides some transcription assistance and assists jurisdictions in finding available court reporters, most jurisdictions resort to seeking assistance from other court reporters they know.[196] In order to more effectively utilize court reporters in slower jurisdictions to assist busier jurisdictions, the Judge

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[192] The 10th Mountain Division and Fort Drum had 19 general courts-martial and 36 special courts-martial (for a total of 55). The 1st Cavalry Division had seventeen general courts-martial and two special courts-martial (for a total of nineteen). Barzmehri e-mail 2, *supra* note 19.

[193] Court Reporter Survey, *supra* note 100; Major Jennifer L. Venghaus, Chiefs of Justice Survey (2011) [hereinafter Chiefs of Justice survey] (results on file with author).

[194] Of 22 Chief of Justice survey respondents, 8 seek court reporter assistance once or twice per year, 2 seek court reporter assistance more than once per month, and 1 seeks court reporter assistance in every trial. *Id.* Of 36 court reporter survey respondents, 13 seek court reporter assistance once or twice per year, 1 seeks court reporter assistance once per month, and 4 seek court reporter assistance more than once per month. Court Reporter Survey, *supra* note 100.

[195] AR 27-10, *supra* note 96, para. 25-7(b)(3).

[196] Court Reporter Survey, *supra* note 100.

Advocate General's Corps should develop a system to centrally manage requests for transcription assistance and identify available court reporters to provide that assistance.

Resolving the dearth of court reporter manpower and creating a system to centrally manage requests for transcription assistance will only alleviate one of the two major administrative constraints on post-trial processing. Service of documents on an accused in post-trial confinement presents another administrative issue that has an effect on post-trial delay.

B. Service on the Accused While in Confinement

Upon authentication of the record of trial, the government must serve a copy of the authenticated record of trial on the accused.[197] In addition, before the convening authority takes action, the staff judge advocate must serve a copy of his post-trial recommendation on the accused and defense counsel.[198] While the staff judge advocate generally signs the post-trial recommendation within a few days after authentication of the record of trial, service of the post-trial recommendation and record of trial frequently takes longer. If the sentence of the accused does not include confinement or if the accused has already completed his sentence, service of the post-trial recommendation and record of trial may take only a few days. However, while in post-trial confinement, the staff judge advocate must mail the documents to the accused, and the time period for the accused to submit clemency matters does not begin until the accused actually receives the documents.[199]

The act of mailing the documents does not add very much time to post-trial processing. However, once the documents arrive at the confinement facility, Army Regulation 190-47 and local confinement rules require confinement facility personnel to review all mail or correspondence addressed to a prisoner before giving it to the inmate.[200] Although the confinement facility may complete its review in as quickly as a few days, most cases have a delay of at least two weeks, and the

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[197] 2008 MCM, *supra* note 76, R.C.M. 1104(b)(1).
[198] *Id.* R.C.M. 1106(f).
[199] *Id.* R.C.M. 1105(c).
[200] *See generally* U.S. DEP'T OF ARMY, REG. 190-47, THE ARMY CORRECTIONS SYSTEM para. 10-10 (15 June 2006) [hereinafter AR 190-47].

review of some cases can take several months depending on the length of the record of trial.[201]

Privileged mail[202] provides the only exception to the inspection rule. Army Regulation 190-47 defines "privileged mail" as "all mail between a prisoner and the President, Vice President, Members of Congress, Attorney General, TJAG (or their representatives), State and Federal Courts, defense counsel, or any military or civilian attorney of record."[203] Privileged mail also includes "correspondence addressed to, or received from, the appropriate appellate agency of TJAG or the department concerned."[204] Privileged mail does not require inspection before delivery to the prisoner unless "there is a reasonable basis for confinement facility personnel to believe that the mail contains contraband or when there is reason to doubt its authenticity."[205]

Although Army Regulation 190-47 creates an exception for "privileged mail,"[206] an exception does not exist for mail from the office of the staff judge advocate to the accused. Therefore, confinement facility personnel must review the mailed copy of the record of trial and staff judge advocate's post-trial recommendation before delivering it to the accused. Simply revising Army Regulation 190-47, paragraph 10-10(b)(10) to broaden the definition of "TJAG" to include the office of the staff judge advocate for purposes of "privileged mail" would resolve this problem and eliminate the period of post-trial delay caused by the confinement facility.

Although the Army currently struggles with administrative constraints on post-trial processing, correcting the problems with court reporter manpower and service of documents on the accused while in confinement would significantly reduce post-trial delay in the Army.

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[201] Post-Trial Reports, *supra* note 112.
[202] Use of the term "privileged" in the paragraphs that follow does not refer to the legal concept of privileged communications, but to "privileged mail" as defined by Army Regulation 190-47.
[203] AR 190-47, *supra* note 200, para. 10-10(b)(10)(a).
[204] *Id.* para. 10-10(b)(10)(b).
[205] *Id.* para. 10-10(b)(10)(a).
[206] *Id.* para. 10-10(b)(10).

VII. Conclusion

"Due process entitles convicted servicemembers to a timely review and appeal of court-martial convictions."[207] Although the UCMJ and the Manual for Courts-Martial do not define "timely" for purposes of post-trial processing, by creating a presumption of unreasonable delay, the appellate courts have defined "timely" as 120 days.

While the presumption of unreasonable delay created by *United States v. Moreno* effectively reduced post-trial delay for several years, it does not serve as an effective long-term deterrent for post-trial delay because it fails to consider that the circumstances of each case have an effect on the reasonableness of post-trial delay. Although it is possible to complete post-trial processing from completion of trial to convening authority action within 120 days in some cases, specific case circumstances may make more than 120 days of post-trial delay reasonable in other more complex or lengthy cases. Therefore, in order to compel the appellate courts to consider the effects of case circumstances on post-trial delay, the President should amend the RCM to prescribe time periods for post-trial processing based on the length of trial. Prescribed time periods for post-trial processing would require the appellate courts to consider case circumstances in determining the reasonableness of post-trial delay before triggering further analysis using the four *Barker v. Wingo* factors.

In addition to prescribing time periods for post-trial processing based on the circumstances of the case, in determining the reasonableness of the period of delay, courts must look carefully at the period of delay and consider only those periods of delay under the government's control. Accordingly, the courts should exclude periods of delay caused by the military judge, defense counsel, and the accused in any analysis of post-trial delay because the convening authority and staff judge advocate have little or no control over that delay.

By considering the circumstances of each case and excluding periods of delay beyond the control of the government, the appellate courts would create a more realistic and accurate approach to post-trial delay. As a result, convening authorities and staff judge advocates could shift

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[207] United States v. Moreno, 63 M.J. 129, 132 (C.A.A.F. 2006) (citing Toohey v. United States, 60 M.J. 100, 101 (C.A.A.F. 2004)).

their focus to improving their post-trial processing systems in order to further reduce any periods of unnecessary post-trial delay.

While changing the evaluation of post-trial delay by the appellate courts would lead to a more accurate analysis of post-trial delay, the Army will continue to struggle with post-trial delay until the effects of administrative constraints are reduced. Specifically, the Army must evaluate court reporter manpower in order to ensure each jurisdiction has enough court reporters to meet the normal demands for transcription and other court reporter responsibilities in that jurisdiction. In order to reduce transcription backlog and assist jurisdictions in times of increased demand for transcription, the Army should develop a system to ensure the equitable distribution of requests for court reporter assistance to court reporters throughout the Army. Lastly, a revision of confinement facility regulations would eliminate unnecessary delay in the service of documents on the accused while in confinement.

United States v. Foster represents an extreme example of post-trial processing delay, but it has resulted in scrutiny of post-trial processing by Congress and the media that will not subside until servicemembers receive timely post-trial processing. While the scrutiny is currently focused on the Department of the Navy, the Army should take this opportunity to make changes to post-trial processing, and the appellate courts should change how they analyze due process challenges based on timeliness of post-trial delay. The suggested changes in this article would not only create a more accurate and realistic analysis of post-trial delay in the appellate courts but would ultimately decrease post-trial processing in the Army and better serve the interests of justice.

Appendix

The following is proposed language to be added to R.C.M. 1103:

(k) ***Time Periods.***

(1) The time period for preparation of the record of trial shall be calculated as follows: 30 days plus 15 additional days for each day the court-martial was in session.

(2) The time period for preparation of the record of trial shall begin on the day following final adjournment of the court-martial and end on the day the record of trial is received by the military judge for authentication in accordance with R.C.M. 1104.

The following is a proposed revision to R.C.M. 1107(b)(2) (new language is bold):

(2) ~~*When action may be taken*~~***Time periods.***

(A) ***When action may be taken.*** The convening authority may take action only after the applicable time periods under R.C.M. 1105(c) have expired or the accused has waived the right to present matters under R.C.M. 1105(d), ~~whichever is earlier,~~ subject to regulations of the Secretary concerned.

(B) ***When action shall be taken.*** **Action shall be taken by the convening authority within 30 days of the date of authentication of the record of trial pursuant to R.C.M. 1104.**

(C) ***Excludable delay.*** **The following time periods shall be excluded when determining whether the period in subsection (B) of this rule has run:**

(i) All periods of time during which appellate courts have issued stays in the proceedings,

(ii) When a post-trial session is ordered pursuant to R.C.M. 1102, the period of time between the day the post-trial session is ordered and the day the post-trial session concludes,

(iii) All periods of time when the accused is absent without authority,

(iv) The entire period of time from the date a copy of the authenticated record of trial or the recommendation of the staff judge advocate or legal officer is served on the accused to the date matters are submitted by the accused pursuant to R.C.M. 1105,

(v) The entire period of time from the date an addendum to the recommendation containing new matter is served

on the accused to the date matters are submitted by the accused pursuant to R.C.M. 1105,

(vi) Any period of time in which the convening authority delays action at the request of the accused.

The following is a proposed revision to Army Regulation 190-47, paragraph 10-10(b)(10)(a) (new language is bold):

(10) Privileged correspondence is defined as follows:
(a) Privileged mail is defined as all mail between a prisoner and the President, Vice President, Members of Congress, Attorney General, TJAG (or their representatives**, to include offices of the staff judge advocate**), State and Federal Courts, defense counsel, or any military or civilian attorney of record. Correspondence with any attorney, for the purpose of establishing an attorney-client relationship, or for any purpose once an attorney-client relationship is formed, and all correspondence with the inspector general or members of the clergy, will be regarded as privileged. Privileged mail may be opened by a certified mail handler when there is a reasonable basis for confinement facility personnel to believe that the mail contains contraband or when there is reason to doubt its authenticity. Privileged mail must be opened in the presence of the prisoner and the correspondence may not be read by anyone other than the prisoner without the prisoner's permission.