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Articles

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Note from the Field

Book Review

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

Major John A. Hamner[*]

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

I. Introduction[2]

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

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

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

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

[2] The author wishes to thank Major John Rothwell, Professor, Criminal Law Dep't, TJAGLCS, for his various insights, suggestions, and assistance with this article.

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

[4] *See id.* at 132.

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

[6] *See Moreno*, 63 M.J. at 133.

[7] *See id.* at 132.

[8] *See id.* at 141.

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

[10] *Moreno*, 63 M.J. at 142.

[11] *See id.* at 140.

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

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

II. Post-Trial Development and Diminishment

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

A. Legislative Development

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

1. The UCMJ

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

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

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

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

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

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

[16] *See generally id.*

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

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

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

[20] *See* Larkin, *supra* note 14.

[21] UCMJ art. 60(b)(1) (2005).

[22] *Id.* art. 60(c)(1).

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

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

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

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

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

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[24] *Id.*

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

[26] *Id.*

[27] *Id.*

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

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

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

[31] *Id.* at 19.

[32] *See* Larkin, *supra* note 14.

[33] Morgan, *supra* note 30, at 20.

[34] *Id.*

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

[36] Larkin, *supra* note 14, at 7–8.

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

[38] *See generally id.*

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

[40] *See id.* at 319.

a. Getting the Lawyers Involved

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

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

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

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

Congress adopted Article 27 almost exactly as proposed, providing that "[f]or each general and special court-martial the authority convening the court shall appoint a trial counsel and a defense counsel."[46] Like the counsel involved, the military judge, referred to as the "Army law officer," did not have to be a lawyer.[47] The Elston Act[48] remedied this shortcoming and Article 26[49] maintained it. Named after its proponent, House Armed Services Committee Chairman Charles Elston, the Elston Act modified the Articles of War, "the precursor to the [UCMJ]."[50] It began much of the work that the UCMJ finished. Like the trial and defense counsel, however, the law officer was also still subject to the commander's authority. [51] It was essential that the UCMJ curtail the extent of the convening authority's power.

b. Curtailment of Convening Authority Power

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

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[41] *See* U.S. CONST. amend. VI.

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

[43] *Id.*

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

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

[46] 10 U.S.C. § 827 (1950).

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

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

[49] *See generally* 10 U.S.C. § 826.

[50] Library of Congress, *supra* note 48.

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

[52] Library of Congress, *supra* note 48.

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

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

c. Appellate Review

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

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

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

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

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

[54] *See id.*; 10 U.S.C. § 837.

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

[56] *See id.*

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

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

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

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

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

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

[63] *See generally id.*

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

This fear led Congress to approve a review process in which the convening authority was only the first stop.[65] For those cases in which the convening authority approved a sentence that included dismissal, discharge, or confinement in excess of one year, a board of review would next evaluate the case.[66] From there, either the Judge Advocate General, or the accused upon successful petition, could cause a judicial council to hear the case.[67] Though the development of the post-trial process tempered the convening authority's power, developments since the UCMJ's enactment have eroded the need for the convening authority's involvement in the review process. One such development is the expansion of the powers under Article 15.[68]

2. Expansion of Article 15

Though commanders during the Revolutionary War used nonjudicial punishment, it was not officially authorized until 1916.[69] It was later included as part of the enactment of the UCMJ.[70] Its development, however, did not stop there. On 7 September 1962, Congress expanded the powers of commanders under Article 15.[71] One purpose for this expansion was to "red[uce] the number of courts-martial,[72] and to 'affect the matter of discharges under other than honorable conditions, which many times are based on the number of courts-martial received.'"[73] The expansion gave commanders the ability to impose more rigorous punishments which they previously would have had to resort to courts-martial to achieve.[74] Greater Article 15 power reduces the need for convening authorities to retain post-trial review of cases. A convening authority determines whether to court-martial an accused.[75] This authority, combined with the ability to administer punishments for minor offenses, essentially moots the argument that post-trial review by the convening authority is necessary for commanders to be able to retain individuals who are essential to the war effort. In the event of an essential person, commanders can choose not to refer the case and instead administer an Article 15.[76] A Soldier could derail a convening authority's attempt to utilize Article 15 if he opted for a court-martial.[77] The convening authority would then have to determine the Soldier's value to the war effort in deciding whether to court-martial. Nevertheless, the Article 15 was essential in giving commanders a tool to

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

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

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

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

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

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

[70] UCMJ art. 15 (1951).

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

[72] *Id.*

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

[74] *See id.*

[75] *See* UCMJ art. 22 (2005).

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

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

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

3. The Judiciary

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

4. Military Justice Act of 1983

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

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

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

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

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

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

[81] *See generally id.*

[82] UCMJ art. 26 (2005).

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

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

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

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

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

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

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

B. Executive Activism—Establishment of the Trial Defense Service

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

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

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

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

[91] *See* UCMJ art. 66(c).

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

[93] *Id.*

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

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

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

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

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

C. Judicial Activism

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

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

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

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

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

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

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

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

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

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

[106] *Id.*

[107] *See id.* at 217–18.

[108] *See id.* at 218.

[109] *See id.* at 219.

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

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

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

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

In overruling *Dunlap*, the court reasoned that,

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

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

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

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

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

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

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

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

[117] *See Dunlap*, 48 C.M.R. at 754.

[118] *See id.*

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

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

[121] *See Banks*, 7 M.J. at 92.

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

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

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

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

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

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

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

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[123] *Id*.

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

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

[126] *See id.* at 340.

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

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

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

[130] *Bell*, 46 M.J. at 354.

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

[132] *Id*. at 323.

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

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

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

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

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

> [a]ppellate courts . . . do not have clemency powers, per se, that being an Executive function reposed . . . in the convening authority.[146] Still, the Courts of Criminal Appeals have broad power to moot claims of prejudice by "affirming only such findings of guilty and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved."[147]

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

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

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

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

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

[137] *See id.*

[138] *See id.*

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

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

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

[142] *See id.* at 287–88.

[143] *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

[151] *Id.* at 230.

[152] *Id.* at 229–30.

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

Id.

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

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

[155] *Id.* at 725 n.6.

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

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

Id. at 432.

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

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

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

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

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

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

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

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

[160] *See Jones*, 61 M.J. 80.

[161] *Id.* at 81.

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

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

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

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

[166] *Id.*

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

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

[169] *Id.*

[170] *Id.*

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

[172] *Id.* at 84.

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

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

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

III. Clemency

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

A. Statistics[183]

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

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

[174] *Id.* at 86.

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

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

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

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

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

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

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

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

[183] *See generally infra* App. A.

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

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

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

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

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

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

[186] *Id.*

[187] *Id.*

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

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

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

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

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

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

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

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

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

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

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

> Four general courts-martial resulted from the incident. A panel of officers convicted Private Michael A. Schwarz of premeditated murder and sentenced him to confinement for life. A panel of officer and enlisted members convicted Private First Class Samuel G. Green, Jr., of unpremeditated murder and sentenced him to five years in confinement. Another officer panel acquitted Lance Corporal Randy Herrod [(the patrol leader and arguably the most culpable)], and a military judge acquitted Private First Class Thomas R. Boyd. The government granted Private First Class Michael S. Krichten immunity in exchange for his testimony . . . .[198]

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

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

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

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

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

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

[198] *Id.*

[199] *Id.* at 240.

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

> [t]he board of review, now, has very extensive powers. It may review law, facts, and practically, sentences; because the provisions stipulate that the board of review shall affirm only so much of the sentence as it finds to be justified by the whole record. It gives the board of review . . . the power to review facts, law and sentence . . . .[201]

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

IV. Suggested Changes

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[207] *Wheelus*, 49 M.J. at 286–87.

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

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

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

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

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

V. Conclusion

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

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[212] *Moreno*, 63 M.J. at 133.

[213] *Id.*

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

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

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

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

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

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

[220] *Id.*

Appendix A

Not Guilty Clemency Totals*

2000

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

2001

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

2002

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

2003

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

2004

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

2005

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

2006

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

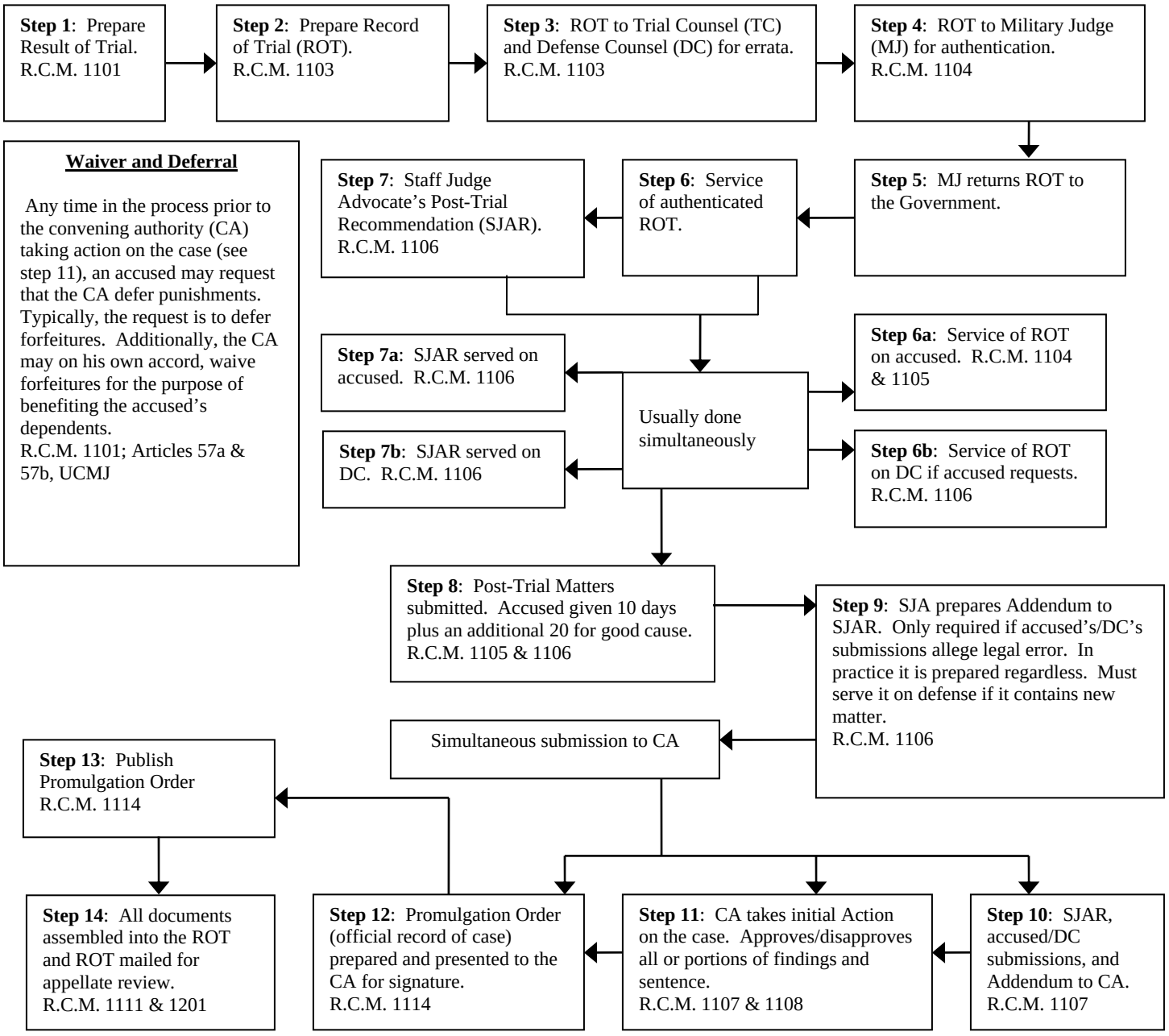
Jurisdiction	# Cases Granted Clemency	Disapproved		Forfeitures		Confinement		Discharge	
		Case	Spec	Reduced (T to P)	Disapproved	Adjudged	Amount Reduced	Reduced (DD to BCD)	Disapproved
HQ, Alaska	1	0	0	0	1	0	0	0	0
ARCENT	1	0	0	0	0	5y	2y	0	0
Ft. Benning	1	0	0	0	0	11m	3m	0	0
Ft. Bliss	1	0	0	0	0	15y	1m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

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

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

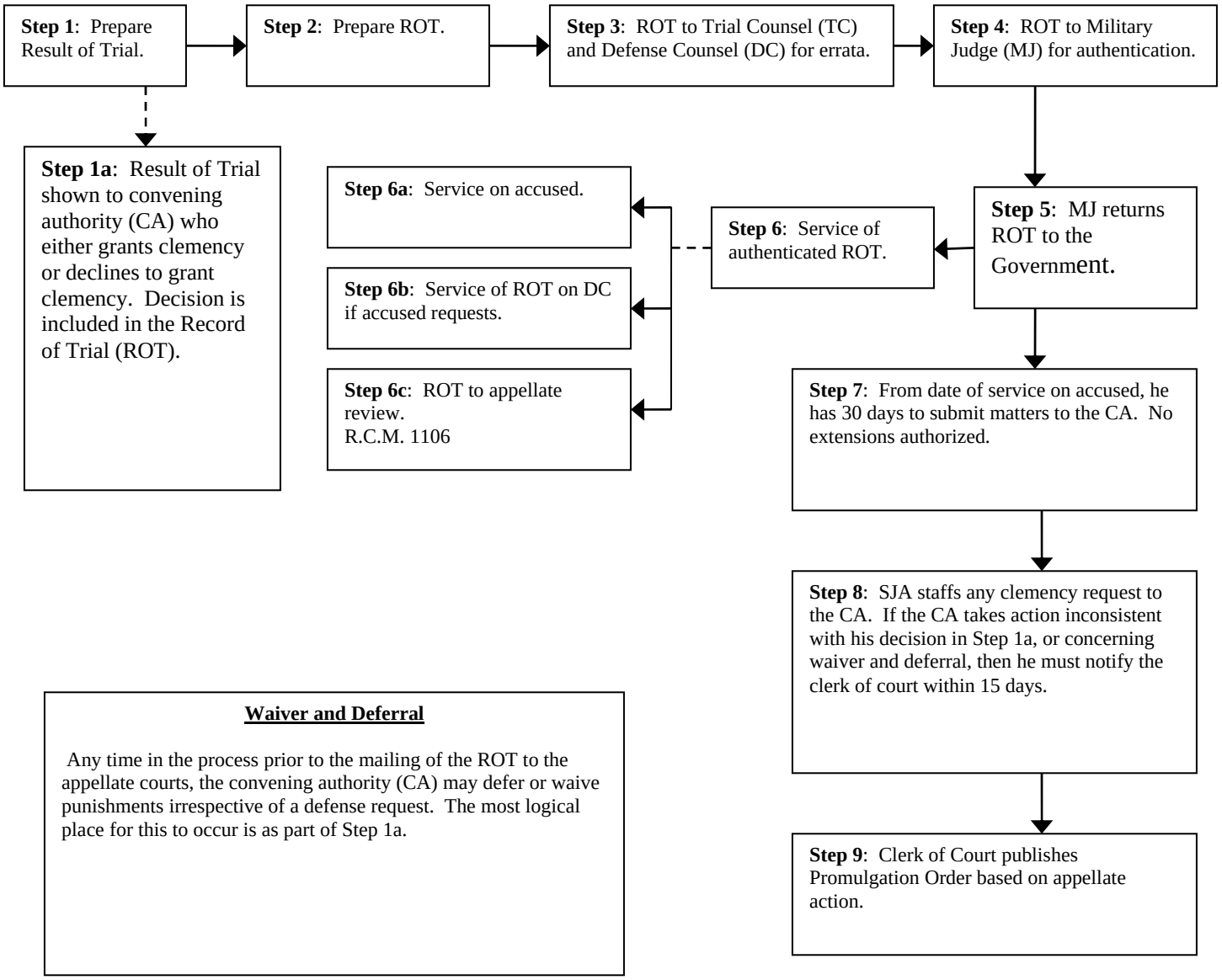
Appendix B

Post-Trial Process in its Current Form



Appendix C

Post-Trial Process as Proposed



Military Justice in the National Guard: A Survey of the Laws and Procedures of the States, Territories, and the District of Columbia

Major Robert L. Martin[*]

Nothing can be more hurtful to the service, than the neglect of discipline; for that discipline, more than numbers, gives one army the superiority over another.[1]

I. Introduction[2]

Members of the U.S. Armed Forces are subject to the Uniform Code of Military Justice (UCMJ) at all times while serving on active-duty in the military.[3] Similarly, servicemembers in the organized reserves of the Army, Navy, Marine Corps, Air Force, and Coast Guard[4] are also subject to the UCMJ, while serving in an active military status.[5]

An exception to this jurisdictional principle regarding the UCMJ is the applicability to Soldiers and Airmen serving in the Army and Air National Guards[6] of the individual states.[7] Unless serving in a federal active-duty status under Title 10 of the United States Code, members of the National Guard are not subject to the UCMJ and military justice action or disciplinary measures must be taken by the individual states.[8]

Those military justice actions taken by the states are often markedly different than courts-martial or nonjudicial punishment under the UCMJ. This article provides an overview of the National Guard military justice systems among the states, territories, and the District of Columbia.[9] Specifically, the overview addresses nonjudicial punishment, all levels of courts-martial including pre-trial matters, courts-martial personnel, trials, post-trial procedures, and appellate matters. The following discussions examine the similarities and differences with the UCMJ and state military justice systems as well as the procedural and substantive differences in the two systems of criminal justice. Additionally, a recently proposed Model State Code of Military Justice will be examined in contrast to existing state laws.[10]

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[1] 8 THE WRITINGS OF GEORGE WASHINGTON 359 (John C. Fitzpatrick ed., 1933) (quoting General George Washington, General Orders, July 6, 1777).

[2] The author would like to acknowledge the invaluable guidance of Major (MAJ) Nick Lancaster, Crim. Law Dep't, TJAGLCS for his contributions to the finalization of this research article.

[3] UCMJ art. 2(a)(1) (2005) (codified at 10 U.S.C. §§ 801–946 (2000)); MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 202(a) discussion (5) and R.C.M. 204 (2005) [hereinafter MCM].

[4] Members of the U.S. Coast Guard are also subject to the UCMJ, however, they serve under Title 14 U.S.C. as opposed to Title 10. *See* 10 U.S.C. § 801 (2000). *See generally* 14 U.S.C. § 2 (2000).

[5] UCMJ art. 2(a)(1); MCM, *supra* note 3, R.C.M. 202(a) discussion (5) and R.C.M. 204.

[6] While each state has components of both Army National Guard and Air National Guard, this article focuses primarily on the Army National Guard. Unless otherwise indicated, the term "National Guard" as used in this article refers only to the Army National Guard.

[7] UCMJ art. 2(a)(2)(B).

[8] *See* 32 U.S.C.S. §§ 326–327 (LexisNexis 2008).

[9] Each state, territory, and the District of Columbia has a National Guard. 32 U.S.C. § 101(4) (2000). The term "state" used throughout this work shall be inclusive of the territories and the District of Columbia unless otherwise noted.

[10] NATIONAL GUARD BUREAU, MODEL STATE CODE OF MILITARY JUSTICE (2007) [hereinafter MODEL STATE CODE OF MJ], *available at* http://www.ngb.army.mil/jointstaff/ps/ja/conference/2007/MODEL_STATE_CODE_OF_MILITARY_JUSTICE.doc.

A. The Army National Guard

The Army National Guard of the United States is part of the organized militia which is "a land force" that is "trained, and has its officers appointed, under the sixteenth clause of section 8, article I, of the Constitution," which "is organized, armed, and equipped wholly or partly at Federal expense," and is also "federally recognized."[11] The Army National Guard is made up of more than 340,000 Soldiers.[12] Of those 340,000 plus Soldiers, there are more than 600 Judge Advocates serving in the Army National Guard.[13]

While the National Guard is a component of the U.S. Armed Forces, it is also the militia of the individual state when not serving in a federal status.[14] More simply put, unless called into federal service under Title 10, the National Guard remains primarily under the control of the states and their governors. Accordingly, discipline of National Guard Soldiers and military justice actions are under the exclusive jurisdiction of the state when not in federal service.[15]

In July of 2003, the structure of each state's National Guard Headquarters was changed from their previous make-up. The Chief of the National Guard Bureau directed that states transition from separate Army and Air National Guard commands into a joint headquarters.[16] Consequently, as joint commands, most states administer military justice in the same manner for both the Army and Air National Guard components.[17]

B. Historical Overview

The militia system in the United States can trace its roots back to the earliest settlers on this continent. As early as the 1500s, militias were formed by Spanish settlers.[18] In 1565, Saint Augustine, Florida, was established as the first Spanish military *presidio* (headquarters) in what would become the United States.[19] More than four hundred years later, Saint Augustine retains its historic ties to the militia system as the location of the Florida National Guard Headquarters.[20]

While the term "National Guard" was first used in 1824,[21] the framework for the modern National Guard was established by federal legislation in 1903.[22] The Militia Act of 1903 (also known as the Dick Act[23]) secured the federal nexus between state militias and the United States military by providing funding and equipment and requiring the militias to standardize their training and structure.[24] It was then that the National Guard first became subject to call-up for federal service other than

[11] 32 U.S.C. § 101(4).

[12] Lieutenant General Clyde A. Vaughn, *The Army National Guard's Accomplishments and Initiatives*, ARMY, Oct. 2006, at 121.

[13] Major Patrick Barnett, U.S. Army, Video Lecture for the 2007 Judge Advocate Officer Advanced Course at TJAGLCS: National Guard Trial Defense Service (Oct. 17, 2006) [hereinafter Barnett Lecture].

[14] *See* 32 U.S.C. § 102; *see also id.* § 104.

[15] *See* 32 U.S.C.S. §§ 326–327 (LexisNexis 2008).

[16] Memorandum, Chief, National Guard Bureau, to The Adjutants General of All States et al., subject: National Guard Bureau Transformation (1 July 2003) [hereinafter NGB Memo].

[17] *See* Captain Robert L. Martin, Results of Military Justice Survey (Jan. 25, 2007) (unpublished summary of data collected from National Guard Military Justice Survey conducted in Nov. 2006) (on file with author) [hereinafter MJ Survey].

[18] MICHAEL D. DOUBLER & JOHN W. LISTMAN, JR., THE NATIONAL GUARD: AN ILLUSTRATED HISTORY OF AMERICA'S CITIZEN SOLDIERS 1 (2003).

[19] *Id.* at 2.

[20] CAPTAIN ROBERT L. MARTIN, HISTORY OF THE FLORIDA NATIONAL GUARD JUDGE ADVOCATE GENERAL'S CORPS 1870–2005, at 79 (2006).

[21] NATIONAL GUARD ASSOCIATION OF THE UNITED STATES: THE NATION'S NATIONAL GUARD 10 (1954) [hereinafter THE NATION'S NATIONAL GUARD]. The designation "National Guard" was adopted by the 7th Regiment, New York Militia in 1824 to honor the Marquis de Lafayette, and his military unit, the "Garde National" of France. DOUBLER ET AL., *supra* note 18, at 25.

[22] DOUBLER ET AL., *supra* note 18, at 53.

[23] So named for the sponsor, U.S. Sen. Charles Dick, who was also a Major General in the Ohio National Guard. THE NATION'S NATIONAL GUARD, *supra* note 21, at 27.

[24] Militia Act of 1903, ch. 196, 32 Stat. 775; *see also* DOUBLER ET AL., *supra* note 18, at 53.

on a volunteer basis.[25] When not in federal service, responsibility for military justice action and discipline of militia troops remained with the states.[26]

Following World War II, Congress enacted the UCMJ.[27] During the floor debates about the UCMJ, the issue of its applicability to the National Guard was specifically addressed for the record:

> Mr. HOLLAND. I should like to ask the Senator from Tennessee if it is correct to say for the record that there is nothing in this bill which is applicable to the National Guard of the several States?
> Mr. KEFAUVER. There is not, unless members of the National Guard are on Federal service.
> Mr. HOLLAND. Does the Senator mean by his answer to state that the National Guard and no components of personnel therefrom would be affected by or subject to any of the provisions of this bill until and unless they have been actually federalized?
> Mr. KEFAUVER. Until they have been actually called or ordered to duty or training by the Federal Government.[28]

It was the intent of Congress in 1949 that the newly enacted UCMJ not apply to the National Guard unless serving in a federal status.[29] Additionally, the 1950 version of the UCMJ required any orders placing reserve component personnel on federal active-duty to specifically state they were then subject to the UCMJ.[30] The inapplicability of the UCMJ to non-federalized National Guard personnel remains the case today.[31]

C. Role of the National Guard

The National Guard is the only reserve component of the United States' military to also have a non-federal mission. Serving as the state militia, the National Guard's unique dual military role has been explained as follows:

> Perhaps the most unique aspect of the National Guard is that it exists as both a federal and state force. As a federal force, the Guard provides ready, trained units as an integral part of America's field forces. In its state role, the National Guard protects life and property and preserves peace, order, and public safety under the direction of state and federal authorities. No other reserve military force in the world has such an arrangement, and the National Guard's dual allegiance to state and nation has often been the subject of much controversy and misunderstanding . . . . National Guard troops serve at the direction of the state governors until the president [sic] of the United States orders them to active duty for either domestic emergencies or overseas service.[32]

Since the National Guard falls under Title 32 of the United States Code, rather than Title 10, when serving in its state militia status, the UCMJ is not applicable to National Guard members unless called into federal military service.[33] Therefore, as previously noted, the authority to discipline Soldiers in a Title 32 status remains with the individual states and territories.[34]

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[25] DOUBLER ET AL., *supra* note 18, at 53.

[26] *See* 32 U.S.C.S. §§ 326–327 (LexisNexis 2008).

[27] UCMJ, ch. 169, 64 Stat. 107 (1950) (codified as amended at 10 U.S.C. §§ 801–946 (2000)).

[28] DEPARTMENT OF THE NAVY, JUDGE ADVOCATE GENERAL, CONGRESSIONAL FLOOR DEBATE ON THE UNIFORM CODE OF MILITARY JUSTICE 226 (1950).

[29] *Id.*

[30] *See* UCMJ art. 2(3) (1950); *see also* FREDERICK BERNAYS WIENER, THE UNIFORM CODE OF MILITARY JUSTICE: EXPLANATION, COMPARATIVE TEXT, AND COMMENTARY 37 (1950).

[31] UCMJ art. 2(a)(3) (2005); MCM, *supra* note 3, R.C.M. 202(a) discussion (5).

[32] DOUBLER ET AL., *supra* note 18, at xi.

[33] UCMJ art. 2(a)(3); MCM, *supra* note 3, R.C.M. 202(a) discussion (5); *see also* 32 U.S.C.S. §§ 326–327 (LexisNexis 2008).

[34] *See* 32 U.S.C.S. §§ 326–327.

D. National Guard Duty Status

Active component and reserve component personnel (other than the National Guard) serve only in a military duty status under Title 10. National Guard personnel may serve in several different military statuses, all of which impact military justice jurisdiction.[35] To better understand state (and federal) military justice jurisdiction and its limitations, one must also understand the military statuses in which National Guard personnel serve.

Members of the National Guard generally serve in one of four military categories: (1) federal active-duty under Title 10; (2) full-time active-duty under Title 32; (3) inactive training duty under Title 32; and (4) state active duty under the laws of the individual states. Each of these categories is discussed below.

1. Federal Active-Duty Under Title 10

National Guard personnel may serve pursuant to federal law under Title 10 or Title 32. Soldiers of the National Guard normally serve under Title 10 only when they have been federally mobilized for deployment due to a national emergency, or a contingency operation in the United States or overseas.[36] For example, National Guard units mobilized and deployed to Iraq serve under Title 10. Soldiers on active-duty and assigned to the National Guard Bureau may also fall under Title 10.[37] National Guard Soldiers serving in this status are subject to the UCMJ.[38]

2. Full-Time Active-Duty Under Title 32

Soldiers serving in a duty status under Title 32 normally remain under the command and control of their state's governor, even when performing some federal missions such as those related to homeland defense.[39] While most National Guard Soldiers are traditional drilling reservists, there are also personnel who perform their duties on a full-time basis.[40]

National Guard units function very much like their active-duty counterparts on a day-to-day basis, but the staffing of these units is somewhat different. Full-time staffing of National Guard units is often by active-duty Soldiers, known as Active Guard Reserve (AGR) personnel.[41] At the state level, AGR Soldiers have a full-time duty status under Title 32.[42] In addition to AGR Soldiers, personnel who are on active-duty for extended periods for advanced training schools, active-duty for special work such a recruiting or counter-drug missions, or other special full-time permanent or temporary assignments, are serving under Title 32.[43] Regardless of whether National Guard Soldiers serve full-time or part-time, if the duty status is under Title 32, those personnel are subject only to the state military codes, and not the UCMJ.[44]

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[35] Duty status in the National Guard is also relevant to issues other than military justice. The status of a member of the National Guard is significant for retirement, benefits, and legal protections, not just the applicability of the UCMJ or state military code. *See infra* App. C, National Guard Duty Status Chart.

[36] *See, e.g.*, 10 U.S.C. § 12301 (2000).

[37] *See, e.g., id.*

[38] UCMJ art. 2(a)(1); MCM, *supra* note 3, R.C.M. 202(a) discussion (5), R.C.M. 204.

[39] *See, e.g.*, 32 U.S.C.S. § 904.

[40] Full-time staffing of the National Guard includes AGR Soldiers, and military technicians, as well as military personnel employed by the individual states, such as The Adjutant General (TAG).

[41] Administrative and staff positions are filled by both AGR Soldiers and military technicians. Military technicians are similar to AGR Soldiers in that they are members of the National Guard, but serve in a full-time capacity as federal employee (rather than an as an active-duty Soldier) for pay and benefits purposes. Military technicians serve under Title 5 of the United States Code. *See* 5 U.S.C. § 2105 (2000).

[42] *See, e.g,.* 32 U.S.C. § 502 (2000). A National Guard AGR Soldier may sometimes serve under Title 10. For example, a Soldier assigned to the National Guard Bureau or detailed as an instructor at TJAGLCS serves under Title 10, not under Title 32, as his or her duties would be primarily federal in nature and do not fall under the command and control of an individual state.

[43] *See id.*

[44] UCMJ art. 2(a)(3) (2005); MCM, *supra* note 3, R.C.M. 202(a) discussion (5).

3. Inactive Training Duty Under Title 32

Most National Guard personnel serve in the traditional, part-time military status normally associated with the reserve components. Soldiers serving in an inactive duty training status, such as weekend drill status or during their annual training period, normally fall within the provisions of Title 32.[45] An exception to this rule is when training missions are conducted outside the continental United States, which must be done in a federal active-duty status.[46] National Guard Soldiers attending some advanced individual training, officer basic and advanced courses, and similar training do so under Title 32. Unless National Guard Soldiers are performing inactive duty training under Title 10, they are not subject to the UCMJ in that status.[47]

4. State Active Duty Under the Laws of the Individual States

Unlike members of the other reserve components, National Guard personnel may serve on active-duty solely under state law in their capacity as the state militia.[48] The governor of a state, as Commander-in-Chief of their National Guard, has the authority to order Soldiers to active-duty for state missions. State active duty missions may include fighting forest fires, homeland security missions, relief efforts during natural disasters such as floods, hurricanes, blizzards, or responding to civil unrest or violence, such as rioting.[49]

When serving in a state active duty status, National Guard personnel receive their pay and allowances from the state government.[50] Accordingly, these Soldiers do not earn federal military retirement credit for service in their state-only capacity.[51] Another major distinction from a federal mission is that Soldiers performing state active duty are not covered by federal medical or disability benefits. Soldiers performing state missions are only protected under state worker's compensation laws.[52] Because their service is solely under state law, Soldiers performing state missions would never be subject to the UCMJ.[53]

II. Military Justice in the National Guard

The UCMJ only applies to National Guard personnel serving in a federal military status under Title 10. Conduct that would constitute an offense under the UCMJ, but committed while serving in a National Guard status (under Title 32 or while on state active duty) can only be addressed under state law.[54]

Unlike active-duty military personnel who are always subject to UCMJ action, state law dictates when and how military justice jurisdiction is applicable to members of the National Guard.[55] The inapplicability of the UCMJ, the part-time military status of most National Guard Soldiers, and the diversity of laws in the individual states results in unique military justice issues not encountered in the active-duty armed forces.

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[45] *See* 32 U.S.C. § 502.

[46] Army National Guard Soldiers who deploy outside the United States must be in an active duty status under Title 10. U.S. DEP'T OF ARMY, REG. 350-9, OVERSEAS DEPLOYMENT TRAINING para. 4-2 (8 Nov. 2004). A Title 10 duty status may protect National Guard personnel under any existing Status of Forces agreements with the host nation. *See* NAT'L GUARD BUREAU, AIR NATIONAL GUARD INSTR. 16-101, INTERNATIONAL ACTIVITIES para. 2-1 (1 Dec. 2006).

[47] UCMJ art. 2(a)(3); MCM, *supra* note 3, R.C.M. 202(a) discussion (5).

[48] *See, e.g.*, FLA. STAT. § 250.06 (2006).

[49] *See, e.g.*, 32 U.S.C. § 328; *see also* Colonel John C. Renaud, National Guard Fact Sheet Army National Guard (FY 2005) (May 3, 2006); KEITH E. BONN, ARMY OFFICER'S GUIDE 61 (50th ed. 2005).

[50] *See, e.g.*, FLA. STAT. § 250.23.

[51] *See* U.S. DEP'T OF ARMY, REG. 135-180, ARMY NAT'L GUARD AND ARMY RESERVE QUALIFYING SERVICE FOR RETIRED PAY NONREGULAR SERVICE para. 2-8 (1 July 1987).

[52] *See, e.g.*, FLA. STAT. § 250.34.

[53] UCMJ art. 2(a)(3) (2005); MCM, *supra* note 3, R.C.M. 202(a) discussion (5).

[54] *See* 32 U.S.C.S. §§ 326–327 (LexisNexis 2008).

[55] *See* MJ Survey, *supra* note 17.

Like members of all United States military reserve components, a National Guard Soldier is considered to be in a duty status only when performing military duties.[56] As with any reserve component servicemember, criminal acts committed by National Guard Soldiers not in a duty status will likely be handled by civilian authorities. Such conduct may, however, result in military administrative action depending on the offense and final disposition of the case.[57]

When a National Guard member commits a purely military offense, but is not in a duty status, what then is the recourse for that conduct? Is a state military justice code applicable when a Guardsman, in a duty status, commits a military offense outside his or her state? There is no one answer to these questions as each is dependant on the laws of the individual states. To address these and other disciplinary issues, most states have enacted a military justice code, as authorized under federal law.[58]

Title 32 provides for court-martial jurisdiction among the states for National Guard personnel.[59] Specifically, under federal law it is provided that when the

> National Guard [is] not in Federal service, there are general, special, and summary courts-martial constituted like similar courts of the Army and the Air Force. They have the jurisdiction and powers, except as to punishments, and shall follow the forms and procedures, provided for those courts. Punishments shall be as provided by the laws of the respective States, the Commonwealth of Puerto Rico, the District of Columbia, Guam, and the Virgin Islands.[60]

The research for this article demonstrates that most states have taken steps to exercise that authority by adopting some type of state military justice code.[61]

A. Military Justice Survey[62]

In November of 2006, the author sent a National Guard-specific military justice survey (MJ Survey)[63] to the state staff judge advocate (SJA) for the National Guard[64] of each state, territory, and the District of Columbia.[65] The questionnaire covered several topics including the form of the state military justice code, courts-martial, punishments, convening authorities, nonjudicial punishment, court-martial personnel, and post-trial and appellate procedures.[66] Fifty percent of the states responded to the MJ Survey.[67]

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[56] *See, e.g.*, 32 U.S.C. § 502 (2000).

[57] *See, e.g.*, U.S. DEP'T OF ARMY, REG. 135-178, ARMY NAT'L GUARD AND ARMY RESERVE ENLISTED ADMIN. SEPARATIONS para. 12-1 (10 July 2006) (discussing separation for misconduct).

[58] *See* MJ Survey, *supra* note 17.

[59] *See* 32 U.S.C.S. §§ 326–327.

[60] *Id.* § 326.

[61] *See* MJ Survey, *supra* note 17.

[62] The author would like to acknowledge the assistance of Colonel (COL) Elizabeth C. Masters & Ms. Cathy Tringali, Office of the Staff Judge Advocate, Fla. National Guard, for their assistance in coordinating the dissemination of the MJ Survey. The author would also like to acknowledge the assistance of MAJ Nick Lancaster of TJAGLCS for his guidance in finalizing the MJ Survey document.

[63] A copy of the MJ Survey is included at App. A, *infra*.

[64] The following National Guard Judge Advocates participated in the MJ Survey process: COL Richard Palmatier, Jr. – Arizona, Captain (CPT) Jake Jones – Arkansas, COL Roland L. Candee – California, Lieutenant Colonel (LTC) Victor A. Tall – District of Columbia, COL Kenneth Waldrep – Georgia, COL David B. Riano – Guam, LTC David Dahle – Idaho, LTC Wayne S. Carlson – Illinois, LTC Michael A. Kuehn – Iowa, COL Kenneth G. Gale – Kansas, COL Jules D. Edwards, III – Louisiana, MAJ Anthony Sciaraffa – Massachusetts, MAJ John Wojcik – Michigan, MAJ Mark Majors – Mississippi, COL Douglas Wilken – Nebraska, Lt Col Francine Swan – New Hampshire, COL Daniel Giaquinto and CPT Robert Stevens – New Jersey, COL James C. McKay – New Mexico, COL George A. Yanthis – New York, LTC Duncan Aukland – Ohio, MAJ Mark Ronning – Oregon, LTC Phillip M. Reilly – Puerto Rico, COL Barry J. Bernstein – South Carolina, MAJ Matthew Cooper – Washington, CPT Gerald Fox – Wisconsin, and MAJ Francisco Romero – Wyoming.

[65] While American Samoa has a National Guard, no statutory reference to a military justice system could be located, nor was there a listing for a staff judge advocate. Therefore, no MJ Survey was sent to American Samoa and that territory is not included in the statistical analysis of this article.

[66] *See infra* App. A, MJ Survey.

[67] As of 1 March 2007, Arkansas, California, District of Columbia, Florida, Georgia, Guam, Idaho, Illinois, Iowa, Kansas, Louisiana, Massachusetts, Michigan, Mississippi, Nebraska, New Hampshire, New Jersey, New Mexico, New York, Ohio, Oregon, Puerto Rico, South Carolina, Washington, Wisconsin, and Wyoming responded to the MJ Survey.

The results of the MJ Survey responses are supplemented by the author's review of the various state and territorial codes.[68] A summary of the MJ Survey results and the author's review of the state codes are contained in Appendix B and discussed in greater detail below.

B. State Military Justice Systems

1. State Military Justice Codes

Federal law authorizes each state National Guard to administer a military justice program similar to that of the UCMJ, with punishments determined by the states.[69] In response to a congressional mandate,[70] the Model State Code of Military Justice (Model Code) has been drafted by personnel of the National Guard Bureau.[71] The promulgation of the Model Code is an effort to bring consistency to state courts-martial actions, but it has not yet been adopted by any of the states.[72]

Fifty-two of the fifty-four states and territories have some form of a military justice code in their published laws.[73] The State of Tennessee[74] and the Territory of American Samoa[75] do not have codified state military justice codes. Based on the results of the author's MJ Survey and a review of existing state military justice codes, it appears that more than 70% of the states have, by law, a military justice system similar to that provided for under the UCMJ.[76]

Specifically, nearly 30% of the state military justice codes appear to be adapted from (or at least based upon) the UCMJ.[77] Most of the remaining states have enacted legislation adopting some version of the actual UCMJ for use by their National Guard.[78] In line with the 2003 directive from the Chief of the National Guard Bureau that state headquarters transition into joint commands, more than 90% of the state military justice systems are applicable to both Army and Air National Guard personnel.[79]

Several states indicate that while there is a military justice code on the books, either their state does not have an active military justice program,[80] or that the system in use differs from the UCMJ.[81] Some states, rather than use courts-martial, employ military administrative remedies for misconduct and also refer criminal matters to civilian authorities for

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[68] *See infra* App. D, State Military Justice Codes; MJ Survey, *supra* note 17.

[69] *See* 32 U.S.C.S. §§ 326–327 (LexisNexis 2008).

[70] *See* Bob Stump National Defense Authorization Act for 2003, Pub. L. No. 107-314, 116 Stat. 2537 [hereinafter NDAA 2003].

[71] The *Model State Code of Military Justice* is discussed in more detail at Part VI, *infra*. MODEL STATE CODE OF MILITARY JUSTICE 2007, *supra* note 10; *see also* Colonel Jeffrey Lawson, PowerPoint Presentation at the National Guard Bureau All Hands Conference in Orlando Fla.: Model Code & Manual (Jan. 17, 2007) [hereinafter Lawson Presentation] (on file with author).

[72] A new state military code that closely tracks the Model Code is under consideration by the Wisconsin legislature as of December 2006. *See* National Guard Military Justice Survey (Nov. 9, 2006) (unpublished MJ Survey of Wisconsin National Guard, completed by CPT Gerald Fox) (on file with author) [hereinafter Wis. MJ Survey].

[73] *See* MJ Survey, *supra* note 17.

[74] Under Tennessee state law, there are no provisions for courts-martial. However, the Tennessee Code does have penal provisions that are directly applicable to National Guard personnel. *See* TENN. CODE. ANN. §§ 58-1-611 to 58-1-634 (2006). It is presumed that these offenses would be prosecuted by Tennessee state courts as would any other crime. The Tennessee National Guard did not respond to the author's MJ Survey request.

[75] American Samoa has no reference to military justice or courts-martial contained in its statutes.

[76] *See* MJ Survey, *supra* note 17.

[77] *Id.*

[78] Not all states have adopted the UCMJ. The states of California, Florida, Indiana, Montana, North Carolina, North Dakota, South Dakota, and Wyoming have adopted some version of the UCMJ by statute. *See id.*; *see also* 32 U.S.C.S. §§ 326–327 (LexisNexis 2008).

[79] Tennessee does not have a state military justice code; the District of Columbia, Illinois and New Jersey do not have an active military justice system. *See* MJ Survey, *supra* note 17; *see also* NGB Memo, *supra* note 16.

[80] The District of Columbia, Illinois, Massachusetts, Nebraska, New Hampshire, New Jersey, New York, Oregon, and Wyoming indicate that their state's military justice system is either inactive or is rarely used. *See* MJ Survey, *supra* note 17.

[81] The laws pertaining to courts-martial in Alabama, Alaska, Delaware, District of Columbia, Illinois, Indiana, Maine, Maryland, Mississippi, Nebraska, New Jersey, South Carolina, Utah, and Vermont differ from the provisions of the UCMJ. *See* MJ Survey, *supra* note 17.

prosecution.[82] A number of states utilize civilian authorities in addition to (or instead of) military justice action in all criminal matters.[83]

2. State Military Justice Regulations

In addition to the Manual for Courts-Martial (*MCM*), the active-duty Army exercises regulatory control of the military justice process through Army Regulation 27-10 (AR 27-10). To supplement their state military justice codes, some states have promulgated their own military justice regulation.[84] Many states that have a military justice regulation adapted it from AR 27-10.[85]

While there are a number of states that have regulatory materials to supplement the state military justice code, not all are based on AR 27-10. Some state regulations are a hybrid of AR 27-10 and the *MCM*, while others are more akin to the *MCM* alone.[86] The California National Guard is unique in that it has a "courts-martial manual," although the publication is specific to their state law and not similar to AR 27-10 or the active-duty *MCM*.[87] While a few states have some form of military justice regulation with a limited scope of applicability,[88] the remaining states have no regulatory materials supplementing their state military justice code.[89]

The congressional requirement that the Model Code be developed for adoption by the states includes a directive to create a model state manual for courts-martial.[90] A model state manual for courts-martial was drafted in 2003.[91] The model state manual does not "duplicate" the *MCM*, but "[a]llows states to supplement" when necessary.[92]

III. Courts-Martial Actions in the National Guard

National Guard Soldiers (serving under Title 32 or on state active duty) violating the law, state military justice code, or applicable regulations, may be subject to military justice action under state law. While this may include courts-martial as provided for by the applicable state code, such actions may differ greatly from those conducted under the UCMJ. This section will discuss pretrial matters such as jurisdictional issues, investigation of charges, as well as custodial arrests. Other matters addressed are courts-martial personnel, the different types of courts-martial in the National Guard, and confinement of offenders.

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[82] These states include the District of Columbia, Illinois, Nebraska, New Hampshire, and New Jersey. The Illinois and New Hampshire National Guards also use nonjudicial punishment as a corrective measure. *See id.*

[83] These states include Nebraska, New Hampshire, New Jersey, Tennessee, and Vermont. *See id.*

[84] *See id.*

[85] The regulations for Arkansas, Georgia, Kansas, Michigan, Montana, New York, Ohio, Oregon, South Carolina, and Washington are based upon the U.S. Army's Military Justice regulation. *See id.*; *see also* U.S. DEP'T OF ARMY, REG. 27-10, MIL. JUST. para. 3-2 (16 Nov. 2005) [hereinafter AR 27-10].

[86] New Jersey has a military justice regulation similar to AR 27-10, but they do not have an active military justice system at this time. National Guard Military Justice Survey (Nov. 9, 2006) (unpublished MJ Survey of New Jersey National Guard, completed by COL Daniel Giaquinto and CPT Robert Stevens) (on file with author) [hereinafter N.J. MJ Survey]. The Florida and Guam regulations are taken from both AR 27-10 and the *MCM*. National Guard Military Justice Survey (Nov. 9, 2006) (unpublished MJ Survey of Florida National Guard, completed by CPT Robert L. Martin) (on file with author); National Guard Military Justice Survey (Nov. 9, 2006) (unpublished MJ Survey of Guam National Guard, completed by COL David B. Riano) (on file with author). The Louisiana and Wisconsin regulations are more similar to the *MCM* only. National Guard Military Justice Survey (Nov. 9, 2006) (unpublished MJ Survey of Louisiana National Guard, completed by COL Jules Edwards) (on file with author); Wisconsin MJ Survey, *supra* note 72.

[87] CALIFORNIA NATIONAL GUARD, MANUAL FOR COURTS-MARTIAL CALIFORNIA (2007); *see also* National Guard Military Justice Survey (Nov. 9, 2006) (unpublished MJ Survey of California National Guard, completed by COL Roland L. Candee) (on file with author) [hereinafter Cal. MJ Survey].

[88] The New Hampshire National Guard military justice regulation covers only arrests and nonjudicial punishment and the Illinois regulation is applicable only to nonjudicial punishment. *See* National Guard Military Justice Survey (Nov. 9, 2006) (unpublished MJ Survey of Illinois National Guard, completed by LTC Wayne S. Carlson) (on file with author) [hereinafter Illinois MJ Survey]; National Guard Military Justice Survey (Nov. 9, 2006) (unpublished MJ Survey of New Hampshire National Guard, completed by LTC Francine Swan) (on file with author) [hereinafter N.H. MJ Survey].

[89] These states include Arizona, Iowa, Massachusetts, Mississippi, Nebraska, New Hampshire, New Mexico, Oregon, and Wyoming. *See* MJ Survey, *supra* note 17.

[90] *See* NDAA 2003, *supra* note 70.

[91] Lawson Presentation, *supra* note 71.

[92] *Id.*

1. Jurisdiction by Military Status

Active-duty and reserve component personnel are subject to courts-martial jurisdiction under the UCMJ by virtue of their Title 10 military status at the time an offense is committed,[93] and also at the time of court-martial.[94] As with the UCMJ, jurisdiction is also a significant issue under state law for National Guard personnel.

In most states, the military status of the National Guard Soldier (serving in a Title 32 or state active duty status) is the key component of jurisdiction for military justice action.[95] Not all states, however, are uniform in their application of the status element. Nearly half of the states require the Soldier be in a duty status (or under orders to be in a duty status) at the time of the offense to establish jurisdiction over an accused for courts-martial or nonjudicial punishment.[96] The other states indicated their jurisdictional criteria for courts-martial and nonjudicial punishment is more like the requirements set forth in the UCMJ.

Under the laws of these states, all Soldiers (and members of the Air National Guard), by being a member of the National Guard, are subject to the state's military justice code at all times.[97] In these states, misconduct by a National Guard member at anytime could result in military justice action as courts-martial jurisdiction exists over a Soldier regardless of his duty status at the time of the offense.[98]

2. Jurisdiction by the Offense Committed

For active-duty military personnel, there is no "subject matter" requirement for courts-martial jurisdiction. The UCMJ does not require an offense to have a military nexus, or be service connected, to establish jurisdiction over misconduct committed by an active-duty servicemember.[99] The "service connection" jurisdictional requirement under the UCMJ was abolished by the U.S. Supreme Court in 1987.[100] The military nature (or non-military nature) of an offense is not a jurisdictional issue under the UCMJ. This is not always the case under some state military codes.

Unlike the UCMJ, some states maintain an *alternative* method of establishing jurisdiction over a National Guard Soldier if the offense committed has a "military nexus."[101] In these states, the "service connection" is an additional method of obtaining jurisdiction over a National Guard Soldier, if the Soldier was *not* in a duty status when the offense was committed.

The proposed Model Code requires both status as a National Guard member and nexus between the offense and "the state military force."[102] Like the Model Code, Kansas is unique in that it is the only state currently requiring both a military status (under Title 32 or state active duty) as well as a "military connection" to the offense to establish jurisdiction.[103]

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[93] UCMJ art. 2(a)(3) (2005); *see also* United States v. Chodara, 29 M.J. 943 (A.C.M.R. 1990) (military status required for offenses committed by reservists).

[94] UCMJ art. 3.

[95] *See* MJ Survey, *supra* note 17.

[96] The states requiring duty status include Alabama, Alaska, Delaware, Guam, Hawaii, Idaho, Illinois, Indiana, Iowa, Louisiana (except drug offenses), Maryland, Michigan, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, Ohio, Oklahoma, Oregon, Puerto Rico, Utah, Washington, Wisconsin, and Wyoming. *See id.*

[97] These states are Arkansas, Arizona, California, Colorado, Florida, Georgia, Kansas, Louisiana (for Article 112a drug offenses only), Maine, Massachusetts, New Mexico, New York, North Carolina, Pennsylvania, Rhode Island, South Carolina, South Dakota, Texas, Virgin Islands, and West Virginia. *See id.*

[98] *See id.*

[99] MCM, *supra* note 3, R.C.M. 203.

[100] *See* Solorio v. United States, 483 U.S. 435 (1987).

[101] These states include Illinois, Oregon, Puerto Rico, and Wisconsin. *See* MJ Survey, *supra* note 17.

[102] MODEL STATE CODE OF MJ, *supra* note 10, art. 2.

[103] *See* National Guard Military Justice Survey (Nov. 9, 2006) (unpublished MJ Survey of Kansas National Guard, completed by COL Kenneth G. Gale) (on file with author).

3. Extraterritorial Jurisdiction

The UCMJ does not limit jurisdiction to offenses committed by an accused Soldier at certain locations, such as on a military installation, or even within the United States.[104] For Title 10 active-duty personnel, status of the accused at the time of the offense (and at the time of trial) is the key to jurisdiction.[105] For active-duty personnel, the UCMJ jurisdiction applies at all times and in all places.[106] Unlike the unlimited territorial applicability of the UCMJ, geographic boundaries can be a jurisdictional issue in National Guard military justice.

National Guard personnel often cross state lines for official duties under both Title 32 and when serving on state active duty.[107] Most state military codes are similar to the UCMJ in that jurisdiction for courts-martial action is not limited to the boundaries of the state.[108] Only ten National Guards limit military justice jurisdiction to offenses committed within the state.[109] In most states, an offense committed by National Guard personnel serving outside of the state still confers jurisdiction over the offense and the accused.[110] Like the UCMJ, the key to jurisdiction under the laws of these states is the duty status of Soldier, not the location of the offense.[111] The Model Code provides for extraterritorial jurisdiction when Soldiers commit offenses while serving beyond the limits of their state.[112]

4. Investigation of Charges

The UCMJ requires allegations of criminal or regulatory misconduct be investigated.[113] Such inquiries may be conducted by the commander, Military Police, the U.S. Army Criminal Investigative Division, or pursuant to Army Regulation 15-6 (AR 15-6). In the National Guard, all states generally follow the active-duty procedures for investigating allegations of wrongdoing; however, such inquiries are handled in a variety of differing ways.[114]

Most states responding to the MJ Survey indicated that investigations were primarily a command responsibility.[115] California, for example, handles investigations in the same manner as the active component.[116] In addition to National Guard commanders (or a designee) handling investigations, a number of states also allow others, such as investigating officers

[104] UCMJ art. 5 (2005).

[105] *Id.* art. 2.

[106] *Id.*

[107] For example, in October 2005, the author deployed from Florida to Louisiana in a Title 32 status during Hurricane Katrina operations.

[108] *See* MJ Survey, *supra* note 17.

[109] The laws of Alabama, Alaska, Delaware, Guam, Illinois, Indiana, Kansas, Maryland, New Hampshire, and New York do not provide for extraterritorial jurisdiction. *See* MJ Survey, *supra* note 17.

[110] *See id.*

[111] *See id.*

[112] MODEL STATE CODE OF MJ *supra* note 10, art. 2.

[113] MCM, *supra* note 3, R.C.M. 303.

[114] *See* MJ Survey, *supra* note 17.

[115] *See id.*

[116] *See* Cal. MJ Survey, *supra* note 87.

appointed under AR 15-6, military police,[117] and/or civilian law enforcement officers to also investigate alleged offenses.[118] At least two states have laws requiring military courts of inquiry to be appointed to conduct investigations.[119]

5. Arrests and Pre-Trial Confinement

In the active component, any person subject to the UCMJ may be apprehended (arrested) based upon probable cause that they committed an offense that may subject them to trial by courts-martial.[120] Rule for Courts-Martial (RCM) 304 provides for imposing pretrial restraint on Soldiers with a pending UCMJ action and is defined as "moral or physical restraint on a person's liberty . . . imposed before and during disposition of offenses."[121] Pretrial *restraint* may be in the form of "conditions on liberty, restriction in lieu of arrest, arrest, or confinement."[122] Due to the part-time nature of their military service, pretrial restraint is rarely used in National Guard court-martial actions.[123]

Active-duty servicemembers facing trial by courts-martial under the UCMJ may also be placed in more restrictive pretrial *confinement* (actual custodial confinement) under RCM 305.[124] When National Guard Soldiers are facing charges, a custodial arrest, pretrial restriction, or confinement is not always available under the state military justice systems.[125]

While it is unknown why pretrial confinement authorization is not available in some states, it is likely that the more common military offenses are not serious enough to justify such restrictions on a part-time Soldier's liberty.[126] By the very nature of their part-time military service, pretrial restraint is difficult to impose on traditional drilling National Guard personnel; however, more than half of the state military justice codes do allow pretrial confinement for Soldiers facing courts-martial.[127]

Although arrests are not commonplace in the National Guard, only five states prohibit custodial arrest for violations of the state military justice code.[128] The most common offenses in the National Guard are not of a nature to warrant pretrial confinement as most states use the civilian criminal justice system for serious crimes.[129] In states that allow National Guard Soldiers to be incarcerated, most use civilian jails when restraint is necessary.[130]

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[117] Military police are authorized to conduct criminal investigations in Arkansas, Arizona, Florida, Georgia, Guam, Idaho, Kansas, Michigan, Louisiana, Massachusetts, Michigan, Mississippi, Nebraska, South Carolina, and Wisconsin. *See* MJ Survey, *supra* note 17. Ohio and Wyoming do not have military police available for this purpose. *See* National Guard Military Justice Survey (Nov. 9, 2006) (unpublished MJ Survey of Ohio National Guard, completed by LTC Duncan Aukland) (on file with author); National Guard Military Justice Survey (Nov. 9, 2006) (unpublished MJ Survey of Wyoming National Guard, completed by MAJ Francisco Romero) (on file with author) [hereinafter Wyo. MJ Survey]. Military police may be used to conduct an investigation in Washington only where they have been appointed under AR 15-6. *See* MJ Survey, *supra* note 17.

[118] Investigations are not addressed under the laws of Illinois. *See* Ill. MJ Survey, *supra* note 88. Civilian law enforcement may be utilized in Arizona, Florida, Georgia, Guam, Idaho, Kansas, Louisiana, Massachusetts, Michigan, Mississippi, Ohio, Puerto Rico, South Carolina, Washington, Wisconsin, and Wyoming. *See* MJ Survey, *supra* note 17. The New Jersey National Guard refers all criminal matters to civilian law enforcement officials. *See* N.J. MJ Survey, *supra* note 86.

[119] Those states include New Hampshire and Oregon. *See* N.H. MJ Survey, *supra* note 88; National Guard Military Justice Survey (Nov. 9, 2006) (unpublished MJ Survey of Oregon National Guard, completed by MAJ Mark Ronning) (on file with author).

[120] MCM, *supra* note 3, R.C.M. 302.

[121] *Id.* R.C.M. 304.

[122] *Id.*

[123] *See* MJ Survey, *supra* note 17.

[124] MCM, *supra* note 3, R.C.M. 305.

[125] *See* MJ Survey, *supra* note 17.

[126] In Florida, for example, pretrial restraint is only authorized when an accused has been given notice of court-martial and fails to appear for the proceedings. FLORIDA DEP'T OF MILITARY AFFAIRS REG. 27-10, MILITARY JUSTICE para. 4-6 (1 June 2006) [hereinafter FLA. NG REG. 27-10]. Such custody is limited to a forty-eight-hour period or the duration of the court-martial. *Id.* It should be noted that serious criminal charges, unless of a purely military nature, are referred to the civilian courts in Florida. *Id.* para. 1-5.

[127] *See* MJ Survey, *supra* note 17.

[128] Arrests for military offenses are generally not permitted in Alabama, Illinois, Nebraska, New Jersey, and Puerto Rico. *See id.*

[129] *See id.*

[130] *See id.* Some states did indicate the use of a military "guardhouse" in addition to civilian facilities. *Id.*

The Model Code provides for both warrantless arrests of offenders and pretrial restraint or confinement, when circumstances require it.[131] It remains to be seen whether states adopting the Model Code will accept these provisions of the act. This may be a point of consideration in those states that now prohibit arrests by the National Guard.[132]

B. Court-Martial Personnel

Article 27 of the UCMJ establishes minimum qualifications for counsel involved in litigating courts-martial. Specifically, it requires that both trial counsel (prosecutor) and defense counsel be law school graduates, admitted as a member of a federal or state bar, and be "certified as competent to perform such duties by the Judge Advocate General . . . ."[133] The minimum qualifications for Judge Advocates serving as trial and defense counsel at courts-martial within the National Guard vary from state to state.

1. Trial Counsel

Nearly 80% of the states require military offenses to be prosecuted by a Judge Advocate.[134] Most states do not require Article 27(b), UCMJ, certification for Judge Advocates participating in courts-martial, but some states have alternative requirements such as approval by the state SJA.[135] Some states allow prosecution by civilian prosecutors in addition to Judge Advocates, however, in the District of Columbia, offenses committed by National Guard Soldiers are prosecuted only in the civilian courts.[136]

2. Defense Counsel

An accused facing a general or special court-martial under the UCMJ has the right to representation by an assigned military defense counsel.[137] Additionally, the UCMJ affords an accused the right to his or her choice of military defense counsel, if available, and civilian counsel at the expense of the accused.[138] In most states, statutes or regulations provide that Soldiers who are accused of committing a military offense are entitled to representation by a detailed Judge Advocate.[139]

More than half of the states require their defense counsel to either be Article 27 (b), UCMJ, certified, or be approved by the state SJA.[140] In a number of states, civilian defense attorneys are authorized in addition to (or in lieu of) military counsel.[141] Some states, however, do not require any type of certification of defense counsel, military or civilian.[142]

Assignment as a defense counsel in the National Guard is normally an additional duty; however, a few states have one or more Judge Advocates dedicated as defense counsel.[143] The Florida National Guard, for example, previously manned a

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[131] *See* MODEL STATE CODE OF MJ, *supra* note 10, arts. 7, 9, and 10.

[132] Those states include Alabama, Illinois, Nebraska, New Jersey, and Puerto Rico. *See* MJ Survey, *supra* note 17.

[133] UCMJ art. 27(b) (2005).

[134] There are no specific trial counsel requirements in Massachusetts, New Hampshire, or New Jersey. *See* MJ Survey, *supra* note 17.

[135] *See id.*

[136] Those states which allow civilian prosecutions include Illinois and Wyoming. *See* Illinois MJ Survey, *supra* note 88; Wyoming. MJ Survey, *supra* note 117; *see also* National Guard Military Justice Survey (Nov. 9, 2006) (unpublished MJ Survey of District of Columbia National Guard, completed by LTC Victor A. Tall) (on file with author).

[137] UCMJ art. 38.

[138] *Id.*

[139] About 77% of the state codes provide for representation by military defense counsel. *See* MJ Survey, *supra* note 17.

[140] *See id.*

[141] These states include New York, New Mexico, Oregon, Puerto Rico, and Wisconsin. *See id.*

[142] These states include Arkansas, Connecticut, Georgia, Guam, Illinois, Iowa, Mississippi, Nebraska, Oregon, South Carolina, Washington, and Wisconsin. *See id.*

[143] These states include Alabama, California, Illinois, Louisiana, Nebraska, New York, Washington, and Wyoming. *See id.*

dedicated trial defense counsel position and their current state military justice regulation provides for a dedicated trial defense counsel, however, defense counsel are detailed only as needed.[144]

3. National Guard Trial Defense Service Positions[145]

The United States Army Trial Defense Service (TDS) began in 1978 to ensure the independence of military defense attorneys, who previously worked under the same convening authority as the courts-martial to which they were detailed.[146] The mission of the TDS is "to provide a full-range of defense legal services to over 490,000 soldiers serving in numerous commands worldwide."[147] The Army's TDS has traditionally been comprised of active-duty Army and Army Reserve personnel. In 2005 planning was implemented to include the National Guard in the U.S. Army TDS.[148]

As the Army force structure changes to modular units, National Guard TDS elements will begin to form and the changes should be complete by 2011.[149] The National Guard positions will fall under Army TDS, with a National Guard Deputy Chief reporting to the Chief of TDS.[150] However, the National Guard Judge Advocates assigned to TDS will remain members of their state's National Guard.[151]

The training requirements and opportunities for National Guard TDS personnel will be the same as those for active-duty officers.[152] National Guard Judge Advocates who serve as TDS counsel may be utilized by the active component, as well as represent Soldiers in National Guard military justice cases and adverse administrative matters.[153] Trial Defense Service activities that cross state lines will be funded centrally through the National Guard Bureau.[154] Intra-state defense matters remain a state mission, which would be paid for locally.[155]

The new TDS positions will bolster the strength level for Judge Advocates in the National Guard. It is anticipated that the TDS function will add approximately 132 new Judge Advocate positions to the National Guard.[156] These positions will be organized both as elements of combat theatre sustainment units as well as stand-alone TDS elements.[157] Allocation of the TDS slots to the states will be based upon "troop density, geography, state code, licensure, and workload history."[158] It is anticipated that each state will have at least one TDS attorney, with some states having multiple positions.[159] Additional enlisted personnel will be authorized to support the National Guard TDS mission.[160]

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[144] FLA. NG REG. 27-10, *supra* note 126, para. 1-4.

[145] The author acknowledges the contribution of MAJ Christopher Brown, TJAGLCS for his assistance in obtaining the background materials and information on the National Guard Trial Defense Service program.

[146] U.S. Trial Defense Service - History, https://www.jagcnet.army.mil/JAGCNETIntranet/Databases/TDS/TDS_Hq.nsf/ (last visited Jan. 18, 2007).

[147] TDS Mission, https://www.jagcnet.army.mil/JAGCNETIntranet/Databases/TDS/TDS_Hq.nsf/ (last visited Jan. 18, 2007).

[148] Barnett Lecture, *supra* note 13.

[149] *Id.*

[150] *Id.*; *see also* Major Patrick Barnett, National Guard Trial Defense Service (Oct. 17, 2006) (unpublished PowerPoint Presentation) (on file with author) [hereinafter Barnett PowerPoint].

[151] Barnett Lecture, *supra* note 13.

[152] *Id.*

[153] *Id.*

[154] *Id.*

[155] *Id.*

[156] *Id.*

[157] *Id.; see also* Barnett PowerPoint, *supra* note 150.

[158] Barnett Lecture, *supra* note 13; *see also* Barnett PowerPoint, *supra* note 150.

[159] Barnett Lecture, *supra* note 13.

[160] *Id.*; *see also* Barnett PowerPoint, *supra* note 150.

4. Military Judges

Under the UCMJ, most general courts-martial are presided over by a military judge.[161] While each service may have individual requirements, the UCMJ requires only that a military judge be:

> [A] commissioned officer of the armed forces who is a member of the bar of a Federal court or a member of the bar of the highest court of a State and who is certified to be qualified for duty as a military judge by the Judge Advocate General of the armed force of which such military judge is a member.[162]

Under the military justice codes of the states, qualifications for military judges usually have similar criteria; however, some states do not provide for a military judiciary at all.[163]

State military justice codes provide for judges in more than 70% of states, although not all of those states currently have a qualified military judge.[164] Most states do not require their National Guard judges to complete the Military Judge Course at The Judge Advocate General's Legal Center and School, as in the Regular Army and Army Reserve.[165]

In those states whose laws do not provide for military judges, or where there is not a qualified National Guard military judge available, that role is filled in other ways. Wyoming allows non-military state court judges to be utilized by the National Guard.[166] Army Reserve Military Judges are authorized for National Guard courts-martial in a few states that do not have their own military judges.[167] In other states, Presidents of Courts-Martial, who may not necessarily be a Judge Advocate or attorney, are used in lieu of military judges.[168] The term "Law Officer" from the original UCMJ,[169] who served in the role of a military judge, is still used in a few state codes.[170]

5. State Bar Membership

Accession into the Army Judge Advocate General's Corps, whether as an active-duty or reserve component Judge Advocate, requires applicants to "be admitted to practice and have membership in good standing of the bar of the highest court of a state of the United States, the District of Columbia, Commonwealth of Puerto Rico, or a Federal court."[171] It is further required that such bar membership be maintained for continued service as a Judge Advocate.[172] There is no U.S. Army policy requiring a Judge Advocate appointed in the National Guard be admitted to a *specific* state bar.[173]

State military justice actions are purely state law matters and do not constitute federal practice.[174] Unlike UCMJ actions, state military justice proceedings often require bar membership in that particular jurisdiction.[175] Even though not required by

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[161] *See* UCMJ art. 26(b) (2005). A military judge may be detailed to a special court-martial. MCM, *supra* note 3, R.C.M. 501(a)(2)(B).

[162] UCMJ art. 26(b).

[163] There are no provisions for military judges under the state codes of Alabama, Illinois, Indiana, Massachusetts, New Hampshire, North Dakota, and Puerto Rico. *See* MJ Survey, *supra* note 17.

[164] *See id.*

[165] Only Arizona, California, Florida, Idaho, Louisiana, New York, Ohio, and Wyoming indicated that the Military Judge Course was a requirement for their states. *See id.*

[166] Wyo. MJ Survey, *supra* note 117.

[167] These states are Arizona, Nebraska, and Wyoming. *See* National Guard Military Justice Survey (Nov. 9, 2006) (unpublished MJ Survey of Arizona National Guard, completed by COL Richard Palmatier, Jr.) (on file with author); National Guard Military Justice Survey (Nov. 9, 2006) (unpublished MJ Survey of Nebraska National Guard, completed by COL Douglas Wilken) (on file with author); Wyo. MJ Survey, *supra* note 136.

[168] Those states are Alabama, Indiana, Massachusetts, and North Dakota. *See* MJ Survey, *supra* note 17.

[169] *See* UCMJ art. 26 (1950). The current UCMJ uses the term "military judge." *See* UCMJ art. 26 (2005).

[170] The term "law officer" is found in the state codes of Hawaii, Puerto Rico, and Rhode Island. *See* MJ Survey, *supra* note 17.

[171] U.S. DEP'T OF ARMY, REG. 27-1, JUDGE ADVOCATE LEGAL SERVICES para. 13-2(h)(1) (30 Sept. 1996).

[172] *Id.* para. 13-2(h)(2).

[173] Thus, under Army policy, an attorney appointed as a Judge Advocate in the New York National Guard need not be licensed to practice law in New York, as long as he or she is admitted to the bar of some state. As noted below, some individual states have their own policies or practices that would preclude appointment of a National Guard Judge Advocate not admitted to the bar of their state.

[174] Barnett Lecture, *supra* note 13.

Army regulations or policies, many states require that National Guard Judge Advocates be licensed by the bar of their particular state, whether by state law or by policy.[176]

While many states require licensure as an attorney in that state for appointment as a National Guard Judge Advocate, bar membership in that state is not necessarily a requirement to serve as a trial or defense counsel in state courts-martial.[177] A number of states do not require admission to their particular state bar to participate in military justice proceedings and allow Judge Advocates admitted to a federal bar to appear, if approved by the state SJA.[178] The Model Code requires that court-martial counsel be admitted to the "bar of the highest court of the State where the court-martial is held."[179] The Model Code also provides for pro hoc vice admission by the military judge for counsel who are military officers that are members in good standing of a state bar, and "certified as a judge advocate in the Judge Advocate General's Corps of the Army, Air Force, Navy, or the Marine Corps."[180]

State bar membership is an issue being addressed in the creation of National Guard TDS positions.[181] It is anticipated that National Guard TDS attorneys will not be detailed to represent clients in a state wherein they are not admitted to the bar, unless they can be admitted pro hoc vice, when necessary.[182]

In most states, military judges in the National Guard are required to be members of their state's bar.[183] Possessing a state law license is not a statutory requirement for military judges in some states, while others require only admission to a federal bar.[184] The provisions of the Model Code pertaining to military judges specifically allow for judges to be detailed from other states.[185]

C. Courts-Martial Proceedings in the National Guard

Soldiers accused of committing criminal acts under the UCMJ may be tried by general, special, or summary court-martial.[186] The most serious offenses, including those which are subject to the death penalty, are tried by general or special court-martial under the Federal UCMJ.[187] Less serious crimes are generally handled by summary courts-martial.[188]

National Guard Soldiers who violate their state's military code may be tried and punished for such offenses. Since these are state law actions, the types of courts-martial and potential punishments differ from those under the UCMJ.[189] Normally, state courts-martial are limited to minor crimes or purely military offenses, such as a minor assault or unauthorized absence

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[175] *See* MJ Survey, *supra* note 17.

[176] Arkansas, Arizona, Colorado, Connecticut, Georgia, Hawaii, Iowa, Kansas, Louisiana, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Jersey, New Mexico, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, Texas, and Washington require admission to highest of court of that state to be appointed as a National Guard Judge Advocate. *See id.*

[177] While not specifically addressed in the MJ Survey results, some states indicated that this practice is allowed to utilize Army Reserve Judge Advocates as military judges for state courts-martial. It is presumed that this may also be the reason that trial and defense counsel qualifications differ from National Guard appointment criteria in those states. *See id.*

[178] These states include Hawaii, Minnesota, Missouri, Nevada, Oregon, Rhode Island, and West Virginia. *See id.*

[179] MODEL STATE CODE OF MJ, *supra* note 10, art. 27.

[180] *Id.*

[181] Barnett Lecture, *supra* note 13.

[182] *Id.*

[183] *See* MJ Survey, *supra* note 17.

[184] State bar licensure is not statutorily required for military judges in California, Florida, Idaho, Nevada, North Carolina, Rhode Island, or Wisconsin. *See* MJ Survey, *supra* note 17. National Guard Judge Advocates who are admitted to a federal bar are eligible to serve as military judges in Idaho, Iowa, and Rhode Island. *See id.*

[185] MODEL STATE CODE OF MJ, *supra* note 10, art. 26 annot.

[186] UCMJ art. 16 (2005).

[187] *Id.* art. 18.

[188] *Id.* arts. 19, 20.

[189] *See* MJ Survey, *supra* note 17.

from drill.[190] Most state military code punishments are relatively minor and some do not provide for confinement.[191] Unless empowered to do so by statute, most civilian state courts would not even have jurisdiction over military offenses.[192] Similarly, most state military courts would not be involved with non-military offenses or serious acts of criminal conduct, even if committed by a National Guard Soldier.[193]

If a National Guard Soldier commits a serious criminal offense, such as rape, murder, or other felonious act, that misconduct is also a violation of state penal laws and could be tried in the civilian courts. In such circumstances, state court jurisdiction for National Guard personnel would be no different than for a Soldier subject to the UCMJ in that military status does not necessarily preclude jurisdiction by civilian authorities.[194] Additionally, courts-martial punishments under state law rarely exceed the sanctions normally imposed for misdemeanor offenses.[195] Therefore, serious criminal misconduct committed by National Guard personnel is generally disposed of by civilian state courts rather than courts-martial.[196]

1. General Courts-Martial

A general court-martial under the UCMJ is distinguishable from other proceedings by its potential punishments. Only a general court-martial is empowered to impose the death penalty or the dismissal of an officer.[197] Thus, a general court-martial is normally used only for the most serious offenses.

Trial by general courts-martial, usually convened by the governor or state adjutant general, is authorized under most state military justice codes.[198] Under most state military justice codes, punishments by general courts-martial provide for punitive discharge, however confinements are normally limited to less than one year as very few states have military offenses that are classified as felony offenses.[199]

The Model Code provides for general courts-martial that are closely aligned with the UCMJ, but limits the potential confinement punishments to a maximum of ten years.[200] While many offenses under the Model Code would constitute a felony, it is not known why the punishment maximum cap was placed at ten years. Perhaps it was contemplated that the National Guard would continue to refer serious misconduct, not purely military in nature, to the civilian courts for disposition.

While most states[201] provide for various levels of courts-martial, in Maine, the laws provide only for "courts-martial," presided over by a military judge, with or without a panel.[202] Similarly, the Utah National Guard is authorized a "military court," composed of a judge and a panel of three members.[203]

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[190] *See id.*

[191] *See id*.

[192] *See id.*

[193] *See id.*

[194] *See* MCM, *supra* note 3, R.C.M. 201(d)(2) ("An act or omission which violates both the code and local criminal law, foreign or domestic, may be tried by a court-martial, or by a proper civilian tribunal . . . .").

[195] *See* MJ Survey, *supra* note 17.

[196] *See id.*

[197] MCM, *supra* note 3, R.C.M. 1003, 1004.

[198] Approximately 88% of the state codes provide for general courts-martial. *See* MJ Survey, *supra* note 17.

[199] *See id.*

[200] MODEL STATE CODE OF MJ, *supra* note 10, arts. 16, 56.

[201] The State of New Jersey does not use courts-martial and all criminal matters are referred to civilian authorities. *See* N.J. MJ Survey, *supra* note 86. The State of Tennessee has no courts-martial provisions in their state code. *See* MJ Survey, *supra* note 17.

[202] *See* MJ Survey, *supra* note 17; *cf.* 32 U.S.C.S. § 326 (LexisNexis 2008) ("In the National Guard not in Federal service, there are general, special, and summary courts-martial constituted like similar courts of the Army and the Air Force.").

[203] *See* MJ Survey, *supra* note 17.

2. Special Courts-Martial

A special court-martial is similar to a general court-martial under the UCMJ; however it differs significantly in the potential punishments it may impose. Special courts-martial may not impose any separation greater than a bad-conduct discharge, nor impose any confinement in excess of one year.[204]

Special courts-martial authority can be found in the military justice codes of forty-six states.[205] Convening authorities for National Guard special courts-martial are often at the brigade and battalion commander levels, although some states limit the authority to the state's Adjutant General.[206] Punishments are normally similar to those of the state's general courts-martial, but provide for less confinement and may also limit the authority to impose a punitive discharge.[207]

3. Summary Courts-Martial

The UCMJ also provides for proceedings known as summary courts-martial, whose purpose is "to promptly adjudicate minor offenses under a simple procedure."[208] Summary courts-martial are conducted by a commissioned officer, who is not a Judge Advocate, and have the authority to try any Soldier subject to the UCMJ, "except commissioned officers, warrant officers, cadets, aviation cadets, and midshipmen, for any noncapital offense . . . ."[209]

Summary courts-martial are less formal proceedings than general or special courts-martial and are more restricted in the punishments that may be imposed. In the Army, the authority to convene a summary court-martial is granted to anyone with the authority to convene a general or special court-martial, or "[t]he commander of a detached company or other detachment . . . ."[210] The punishments authorized for a summary court-martial are "confinement for 30 days, forfeiture of two-thirds pay per month for one month, and reduction to the lowest pay grade."[211] No punitive discharge may be imposed by summary courts-martial.[212]

In most states allowing special court-martials, summary court-martials are available as well.[213] Often, the authority to convene and try National Guard Soldiers by summary courts-martial is at the company commander level.[214] The maximum sentence permitted under the state codes are less severe than those authorized for special courts-martial.[215]

D. Sentences of Confinement

Sentences of confinement are a potential punishment under most state military justice codes.[216] The conditions and length of potential confinement sentences varies from state to state.[217] Most serious offenses committed by Soldiers should

[204] MCM, *supra* note 3, R.C.M. 201(f)(2)(B).

[205] There are no statutory provisions for special courts-martial under the laws of Maine, New Jersey, Utah, or Tennessee. *See* MJ Survey, *supra* note 17; *cf.* 32 U.S.C.S. § 326 (LexisNexis 2008) ("In the National Guard not in Federal service, there are general, special, and summary courts-martial constituted like similar courts of the Army and the Air Force.").

[206] *See* MJ Survey, *supra* note 17.

[207] *See id.*

[208] MCM, *supra* note 3, R.C.M. 1301(b).

[209] *Id.*

[210] *Id.* R.C.M. 1302(a)(2). In practice, summary courts-martial authority is usually with battalion-level commanders.

[211] *Id.* R.C.M. 1301(d)(1) discussion.

[212] *Id.* R.C.M. 1301(d)(1).

[213] Summary courts-martial are not available in Idaho. *See* MJ Survey, *supra* note 17; *see also* National Guard Military Justice Survey (Nov. 9, 2006) (unpublished MJ Survey of Idaho National Guard, completed by LTC David Dahle) (on file with author); *cf.* 32 U.S.C.S. § 326 (LexisNexis 2008) ("In the National Guard not in Federal service, there are general, special, and summary courts-martial constituted like similar courts of the Army and the Air Force.").

[214] *See* MJ Survey, *supra* note 17.

[215] *See id.*

[216] No statutory provisions for a sentence of incarceration by a court-martial exist in Alabama, Massachusetts, New Jersey, or Vermont. *See id.*

[217] *See id.*

also be violations of state penal laws handled by civilian authorities. Very few states, therefore, have potential sentences of more than one year, and in many states confinement sentences are only given in lieu of fines.[218] As previously noted, the Model Code contains the same maximum punishments for military offenses as the UCMJ, except that the death penalty and sentences of confinement in excess of ten years are not authorized.[219]

IV. Post-Trial and Appellate Matters

Articles 59 through 69 of the UCMJ provide for post-trial and appellate review of military convictions. An accused convicted at court-martial is entitled to first seek clemency or other relief from the convening authority.[220] A Soldier receiving an approved sentence of confinement in excess of one year, and/or a dishonorable or bad-conduct discharge or dismissal, is also entitled to appellate review by the Army Court of Criminal Appeals.[221]

All military justice proceedings against National Guard Soldiers who are not serving on active-duty under Title 10 are state law proceedings. Accordingly, post-trial and appellate procedures, as well as the classification of such convictions, are governed by the laws of the state and often differ greatly from the UCMJ.[222]

The Model Code, recognizing the differences in post-trial procedures among the states, includes no provision that parallels Article 66 of the UCMJ. Under the Model Code it is required that the "senior force judge advocate" review all general and special courts-martial convictions.[223] This is similar to the UCMJ Article 64 requiring review by a "judge advocate."[224]

A. Classification of Convictions

While all convictions under the UCMJ are considered federal criminal convictions, not all state military justice adjudications fall into that classification. While many states do classify military offenses as criminal convictions,[225] a number of jurisdictions classify them as non-criminal matters.[226] Most states, however, do not classify any military offenses as felony crimes.[227] Violations of state military justice codes are classified as misdemeanor offenses in most states.[228] A few jurisdictions classify at least some of their military court convictions as either a civil infraction or a non-criminal offense.[229] As previously discussed, the proposed Model Code authorizes sentences that would classify convictions as felony offenses.[230]

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[218] Only Colorado, Michigan, Montana, North Carolina, Virgin Islands, and Wyoming have potential sentences of confinement that exceed one-year. *See id.*

[219] MODEL STATE CODE OF MJ, *supra* note 10, arts. 16, 56.

[220] UCMJ art. 60 (2005).

[221] *See id.* art. 66.

[222] *See* MJ Survey, *supra* note 17.

[223] MODEL STATE CODE OF MJ, *supra* note 10, art. 64.

[224] UCMJ art. 64.

[225] State courts-martial adjudications are considered criminal convictions in Arkansas, Arizona, California, Colorado, Florida, Guam, Idaho, Kansas, Louisiana, Maryland, Massachusetts, Michigan, Mississippi, Montana, New York, North Carolina, Ohio, Oregon, Texas, Virginia, Virgin Islands, Washington, Wisconsin, and Wyoming. *See* MJ Survey, *supra* note 17.

[226] Violations of the state military justice codes in Georgia, Iowa, Illinois, Nebraska, New Hampshire, New Jersey, New Mexico, Puerto Rico, South Carolina, and Vermont are not criminal adjudications. *See id.*

[227] Currently, only Colorado, Michigan, Montana, North Carolina, Virgin Islands, and Wyoming have military offenses that may be punished by more than one year of confinement. *See id.* If Wisconsin adopts the Model Code this year, they too will have offenses punishable as a felony. *See* Wis. MJ Survey, *supra* note 72.

[228] *See* MJ Survey, *supra* note 17.

[229] These states include Guam, Idaho, Mississippi, New Mexico, and New York. *See id.*

[230] MODEL STATE CODE OF MJ, *supra* note 10, art. 56.

B. Post-Trial Review

As is required by the UCMJ, most state courts-martial undergo a mandatory post-trial review.[231] Most states allow the convening authority of a court-martial to modify sentences and grant clemency to an accused.[232] Additionally, many states require a legal review of convictions by the state SJA and some states also require a post-trial review by The Adjutant General (TAG) before a sentence can be approved.[233] Some states do not have any statutory provision requiring a post-trial review, although it may be required by regulation or practice.[234]

C. Role of TAG and Governor

The Adjutant General, as commander of the state's military force, is often a key figure in National Guard military justice proceedings, with their roles ranging from convening authority to appellate review. In many states TAG is the general courts-martial convening authority, which defines his or her role in the post-trial process as is the case under the UCMJ with regard to clemency and sentence approval.[235] State adjutants general are involved in the appellate or post-trial proceedings in more than 40% of the states,[236] and several states permit appeals and clemency requests to be submitted to TAG, even if they were not the convening authority.[237] Several states do not involve TAG in post-trial or appellate matters at all.[238]

Each state's governor serves as the commander-in-chief of that state's military forces.[239] According to the results of the MJ Survey, the governor of a state is even more likely to participate in post-trial military justice proceedings than TAG.[240] While it varies from state-to-state, governors are often vested with general courts-martial convening authority and a number of states permit appeals and clemency requests to be submitted to the governor.[241]

In more than 60% of the states, governors have an active role in the military post-trial process.[242] Some states limit the governor's involvement to approval of sentences involving a punitive discharge.[243] In states where the governor is the convening authority, he or she participates in the post-trial process in a manner similar to an active-duty convening authority.[244]

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[231] *See* MJ Survey, *supra* note 17.

[232] *See id.*

[233] *See id.*

[234] There is no *statutory* requirement for post-trial review of courts-martial records in Alabama, Alaska, Arkansas, Delaware, Maryland, Massachusetts, Minnesota, Montana, Nebraska, New Hampshire, or North Dakota. *See id.* Several of these states do provide for appellate review of courts-martial convictions. *Id.*

[235] In Arizona, Florida, Idaho, Iowa, Kansas, Michigan, Mississippi, Puerto Rico, and Washington, TAG is involved in post-trial matters only when serving as the convening authority of the court-martial. In California, TAG is involved only if he or she supervises the convening authority. *See id.*; *see also* UCMJ art. 60 (2005).

[236] In addition to those states where TAG is involved only as the convening authority, he or she serves a post-trial role in Alabama, Arkansas, Delaware, Guam, Louisiana, Montana, New Hampshire, New Mexico, New York, Ohio, Oregon, Virginia, and Vermont. *See* MJ Survey, *supra* note 17.

[237] *See id.*

[238] TAG is not routinely involved in the post-trial or appellate process in Maine, Massachusetts, Nebraska, or Wyoming. *See id.*

[239] *See* 32 U.S.C. § 104(c) (2000). The President of the United States is also the Commander-in-Chief of the District of Columbia National Guard. D.C. CODE § 49-409 (2007).

[240] The author's research indicates post-trial involvement for Adjutants General, including those serving as the convening authority at approximately 40%. *See* MJ Survey, *supra* note 17. Statistically, governor's are involved in over 60% of the states. *Id.*

[241] *See id.*

[242] *See id.*

[243] These states include Florida, Idaho, Minnesota, and Virginia. *See id.*

[244] In Iowa, Kansas, Mississippi, South Carolina, and Washington, the governor participates in the post-trial process only as the convening authority. *See id.*

D. Appellate Review

As purely state law actions, there is no jurisdiction for the federal military courts of criminal appeal to hear appeals from National Guard court-martial convictions.[245] However, appeals from National Guard courts-martial to state-level military and civilian courts are allowed in several jurisdictions.[246]

1. State Military Appellate Courts

Under the UCMJ, courts-martial convictions that result in a punitive discharge or confinement for more than one year are required to be reviewed by the appellate court for the accused's branch of service.[247] Similarly, about fifteen states have established appellate bodies to review military convictions from the National Guard.[248]

Several other states conduct some form of appellate review without a formal standing military court.[249] These states review court-martial convictions by appointing boards of review, when necessary.[250] These boards of review are usually appointed by the state SJA or the state's Adjutant General.[251]

2. Civilian Appellate Courts

Since National Guard court-martial convictions are state law actions and are not subject to review by the Army (or Air Force) Court of Criminal Appeals, several jurisdictions permit Soldiers to appeal convictions to the civilian state appellate courts. Sixteen states, including some with military appellate forums, provide for appeals in the state court system.[252] States allowing state court appeals of court-martial convictions are in the minority as twenty-four states do *not* permit civilian state court appeals of military cases.[253] In those states where courts-martial appeals are not permitted in state court, eight of those states have a military appellate forum.[254] Four other of those states indicate that their military justice system is inactive or rarely used.[255]

V. Nonjudicial Punishment in the National Guard

Article 15 of the UCMJ prescribes the types of nonjudicial punishments commanders may impose on Soldiers who commit minor offenses that do not warrant a court-martial.[256] Each armed service is permitted to develop its own regulation pertaining to the imposition of nonjudicial punishment.[257] The Army's applicable regulation is AR 27-10, which specifically provides that nonjudicial punishment may be used to:

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[245] *See* UCMJ art. 66 (2005).

[246] *See* MJ Survey, *supra* note 17.

[247] UCMJ art. 66.

[248] Military appellate courts have been established by statute for the states of Arizona, Delaware, Indiana, Kansas, Michigan, Mississippi, Nebraska, Oregon, Puerto Rico, and Texas. *See* MJ Survey, *supra* note 17.

[249] Court-martial convictions are reviewed by an appointed military "board of review" rather than an appellate court in Missouri, New York, Pennsylvania, and West Virginia. *See id.*

[250] *See id.*

[251] *See id.*

[252] State court appeals are allowed in Alabama, Arizona, Arkansas, California, Colorado, Florida, Guam, Hawaii, Idaho, Kansas, Louisiana, Maine, Nebraska, New Mexico, New York, South Carolina, and Wyoming. *See id.*

[253] No state court appeals are provided for by statute in military cases in Alaska, Connecticut, Delaware, Georgia, Illinois, Indiana, Louisiana, Massachusetts, Michigan, Missouri, Mississippi, Montana, Nevada, New Hampshire, Pennsylvania, Ohio, Oregon, Puerto Rico, Rhode Island, Utah, Virginia, Vermont, Washington, and West Virginia. *See id.*

[254] *See id.*

[255] *See id.*

[256] UCMJ art. 15 (2005).

[257] *Id.*

a. Correct, educate, and reform offenders who the imposing commander determines cannot benefit from less stringent measures.

b. Preserve a Soldier's record of service from unnecessary stigma by record of court-martial conviction.

c. Further military efficiency by disposing of minor offenses in a manner requiring less time and personnel than trial by court-martial.[258]

In the United States Army, such punishments may include correctional custody, restriction, arrest in quarters, extra duties, reduction in grade, and forfeiture of pay.[259] Nonjudicial punishment is generally administered informally by commanders and Soldiers do not have to accept the nonjudicial punishment process.[260] A Soldier has the right to demand court-martial in lieu of nonjudicial punishment proceedings.[261]

Under AR 27-10, nonjudicial punishment may be imposed under "summarized proceedings" for offenses wherein the commander will not sentence a Soldier to extra duty or restriction in excess of fourteen days, or not issue more than an oral reprimand or admonition.[262] Summarized proceedings provide for reduced punishments, but also provide for diminished due process rights such as no right to counsel and a shorter decision period for acceptance of nonjudicial punishment.[263]

Most states have adopted some form of nonjudicial punishment under their state code of military justice. Punishments are generally similar to those imposed under Article 15 of the UCMJ by the active Army.[264] In the National Guard, more than 80% of the state military justice codes contain a provision for nonjudicial punishment.[265] Summarized nonjudicial punishment, however, a procedure created by regulation, is available in very few states.[266]

The proposed Model Code contains a section that closely parallels Article 15 of the UCMJ, but allows each state to promulgate its own regulation to administer nonjudicial punishment.[267] While the Model Code does not expressly provide for summarized proceedings, it is likely that any state adopting the Model Code could utilize such procedures by developing a state regulation allowing it.[268] The nonjudicial punishment provisions in the Model Code are a "hybrid" of Army and Air Force procedures in recognition of the joint-command concept in the National Guard.[269]

VI. Model State Code of Military Justice

As discussed in the preceding sections, military justice in the National Guard is driven by the varying state code provisions that have been enacted over the years. While some states have adopted some version of the UCMJ,[270] or modeled the state code on the UCMJ,[271] the administration of military justice differs greatly from state to state. At least two attempts have been made to bring uniformity to the state codes since the UCMJ was enacted.

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[258] AR 27-10, *supra* note 85, para. 3-2.

[259] *Id.* para. 3-19.

[260] UCMJ art. 15.

[261] *Id.*

[262] AR 27-10, *supra* note 85, para. 3-16.

[263] *Id.*

[264] *See* MJ Survey, *supra* note 17.

[265] Only Alabama, Alaska, District of Columbia, Maine, New Jersey, and Virginia do not have statutory authority to impose nonjudicial punishment. *See* MJ Survey, *supra* note 17.

[266] Summarized nonjudicial punishment is allowed in Florida, Guam, Louisiana, Michigan, Mississippi, Puerto Rico, South Carolina, and Wyoming. *See* MJ Survey, *supra* note 17.

[267] MODEL STATE CODE OF MJ, *supra* note 10, art. 15 annot.

[268] *Id.*

[269] *See* Lawson Presentation, *supra* note 71.

[270] Some version of the UCMJ has been adopted by statute in California, Florida, Indiana, Montana, North Carolina, North Dakota, South Dakota, Virgin Islands, and Wyoming. *See* MJ Survey, *supra* note 17.

[271] *See id.*

In 1961, the Uniform Commission of Model State Laws drafted a model military justice code,[272] based upon the UCMJ, which was subsequently enacted in twenty-three states.[273] In 1998, a military justice panel made recommendations pertaining to a new model code for the states, but no model code resulted.[274] An effort to standardize and update the state codes was made again in 2002 with the passage of 2003 National Defense Authorization Act (NDAA 2003).[275]

Section 512 of the 2003 NDAA amended Title 32 and required the Secretary of Defense to prepare a model state code and a model *MCM*, consistent with the 1998 panel recommendations, for use by the National Guard in Title 32 status.[276] The National Guard Bureau played a key role in the drafting and development of the Model Code.[277]

In July of 2003, the first draft of the Model Code was completed, with a draft model *MCM* produced in September of 2003.[278] Both draft documents were sent to Congress, as required in the NDAA, in December 2003.[279] From January through June of 2004, the documents were reviewed by the Departments of Defense, Air Force, and Army, and their comments were ultimately incorporated into the draft Model Code.[280] The final draft of the Model Code was approved by the Department of Defense in 2005.[281] As of the Fall of 2006, the Model Code has been approved for presentation to the states by the National Guard Bureau.[282]

As with previous efforts, it is obvious that the goal of the latest Model Code is to establish consistency in administering military justice among the states, as well as to align their systems with the UCMJ. Uniformity in laws and procedures would also be a great advantage to the new National Guard TDS organizations. In that it is based upon the UCMJ, the Model Code has many positive attributes such as a uniform jurisdiction standard over National Guard Soldiers and extraterritorial provisions that are lacking in some states.[283]

One of the needs for the Model Code has been expressed in the context of "increased operational tempo" resulting in more National Guard "disciplinary and criminal matters."[284] But will the adoption of a Model Code result in more courts-martial? Most states now have a high operational tempo, even those that indicate that the military justice system is inactive or rarely used.[285] For example, since September of 2001 the Florida National Guard has mobilized and deployed, at various times, nearly 40,000 Army and Air National Guard personnel in support of global, domestic, and state operations.[286] During that same period, the Florida National Guard, which adopts the UCMJ by statute,[287] has gone forward with only two general courts-martial.[288] Florida, like many other states, uses summary courts-martial, nonjudicial punishments, and administrative

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[272] HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE ANNUAL CONFERENCE MEETING IN ITS SEVENTEENTH YEAR 234–76 (1961).

[273] COLONEL ESTHER RADA, AIR NATIONAL GUARD COMMANDER'S LEGAL DESKBOOK, sec. 8-15, at 2 (2004) [hereinafter ANG LEGAL DESKBOOK].

[274] *See* Lawson Presentation, *supra* note 71.

[275] NDAA 2003, *supra* note 70.

[276] *Id.*; *see also* Lawson Presentation, *supra* note 71.

[277] *See* Lawson Presentation, *supra* note 71.

[278] *See id.*

[279] ANG LEGAL DESKBOOK, *supra* note 273, at 2; *see also* Lawson Presentation, *supra* note 71.

[280] Lawson Presentation, *supra* note 71.

[281] *Id.*

[282] *Id.*

[283] There is no extraterritorial jurisdiction under the laws of Alabama, Alaska, Delaware, Guam, Illinois, Indiana, Kansas, Maryland, New Hampshire, and New York. *See* MJ Survey, *supra* note 17.

[284] Lawson Presentation, *supra* note 71.

[285] The District of Columbia, Illinois and New Jersey do not have active military justice systems. *See* MJ Survey, *supra* note 17.

[286] The Florida National Guard has deployed 9745 Army and Air National Guard personnel in support of federal missions since September 2001. *See* e-mail from MAJ Lynn Pate, Office of the Deputy Chief of Staff Operations, Florida National Guard Headquarters, St. Augustine, Fla., to CPT Robert L. Martin, Student, 55th Judge Advocate Graduate Course, Charlottesville, Va. (Jan. 26, 2007, 08:00 EST) (on file with author). In support of various state and domestic operations such as hurricanes, wildfires, seaport and airport security, more than 29,000 Florida National Guard Soldiers and Airmen have been called to active-duty at different times since September 2001. *See* Unpublished State Active Duty Missions Summary, Florida National Guard (Sept. 15, 2006) (on file with author).

[287] *See* FLA. STAT. § 250.35(1) (2006) (adopting the *MCM (2002)* as the Florida Code of MJ).

[288] The assertion is based upon the author's experience as a Florida Army National Guard Judge Advocate from 18 May 2000 to 31 July 2006.

actions to handle nearly all minor military offenses.[289] Serious criminal activity by Florida National Guard personnel is referred to state and federal civilian law enforcement authorities when appropriate.[290]

A review of the Model Code demonstrates its close association with the UCMJ.[291] For states that adopt the Model Code, Judge Advocates mobilized into federal service will easily make the transition from their state's military justice code to the UCMJ. A major issue with the Model Code, however, will be whether or not states adopt it. While the author's research has clearly shown the marked differences between the various state codes, the clamor for uniformity has not come from the states. Many states have addressed the inconsistencies between National Guard military justice and the active component by simply adopting the UCMJ as state law by legislation.[292] Similarly, a number of states have enacted a military justice code similar to the UCMJ.[293]

While the Model Code's final version has just recently been approved, only Wisconsin indicates that adoption of a *similar* version is under consideration by their legislature.[294] While is unlikely that every state and territory will adopt the Model Code, some no doubt will do so. It will be interesting to see if other states adopting the Model Code will follow the same tact as Wisconsin and adopt a "similar" version of the code. In the end, the adopted Model Codes may be as different from one another as the current codes are today.

VII. Conclusion

When military justice action is taken in the active and reserve components of our armed forces, there is one body of law applicable to the proceedings. In the National Guard, when not in federal service and functioning as the militia of the individual states, the laws and procedures for administering military justice are as varied and unique as the states themselves. State military justice codes, much like the civilian penal laws of the individual states, provide for differing procedures, penalties, and proscriptions.

While laws may differ from state to state, should the focus in state military justice be a matter of consistency, or rather one of justice? Assuming that current state military codes adequately ensure constitutional protections to those accused of military offenses, do the state systems otherwise need uniformity? As previously noted, the Model Code was not created at the request of the states.

The Model Code currently proposed would provide consistency, uniformity, and bridge any gaps left by state law, but will this ever come to pass? Under existing laws, every state administers military justice differently (or in some cases, takes no military justice action at all). That being the case, is it not a fair prediction that any state adopting the Model Code will change it to meet its own needs? And each change made thwarts the goal of uniformity.

In the end, assuming the unlikely possibility that *all* states adopt a version of the Model Code, we would likely still end up with fifty-two different state military justice codes. Absent any evidence of injustice to our Soldiers caused by the present systems, why ask the states to change what appears to be working for them? While there are obvious advantages to having a uniform system of military justice among the states, perhaps the Model Code is just "an ingenious solution to a nonexistent problem."[295]

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[289] *Id.*

[290] *See* FLA. NG REG. 27-10, *supra* note 126, para. 1-5.

[291] *See* MODEL STATE CODE OF MJ, *supra* note 10.

[292] Current or previous versions of the UCMJ have been adopted in California, Florida, Indiana, Montana, North Carolina, North Dakota, South Dakota, Virgin Islands, and Wyoming. *See* MJ Survey, *supra* note 17.

[293] *See id.*

[294] *See* Wis. MJ Survey, *supra* note 72.

[295] *See* Massad Ayoob, *A Great Man*, AM. HANDGUNNER, Mar./Apr. 2007, at 87 (attributing the phase to the late Lieutenant Colonel Jeff Cooper, U.S. Marine Corps).

Appendix A

Military Justice Survey

NATIONAL GUARD MILITARY JUSTICE SURVEY
CPT Robert L. Martin, JA, FLARNG
Student - 55th Graduate Course
The Judge Advocate General's Legal Center & School - United States Army

The information gathered in this survey will be used as the basis for my Graduate Course research project, which is a survey of how military justice is administered within the National Guard's of the states, territories and the District of Columbia (the use of the term "state" is used generically in this survey and is intended to encompass the territories and D.C.).

Please provide the information requested, or state that it is not available or inapplicable.

If you have questions about this survey, you may contact me via email:
***robert.martin5@us.army.mil** – or by telephone – (904) 814-4220.*

INFORMATION ABOUT THE PERSON COMPLETING THIS SURVEY:

***STATE / TERRITORY / D.C.:*_____**

***RESPONDENT'S NAME/RANK:*_____**

***RESPONDENT'S TITLE:*_____**

1. DOES YOUR STATE'S NATIONAL GUARD HAVE A "MILITARY JUSTICE" SYSTEM? YES/NO

a. If **NO**, how are disciplinary or criminal matters handled?
[i.e. Administrative action, prosecution by civilian authority, etc.]

b. If **YES**, please provide the applicable state statute or code provision(s):
[i.e. Chapter 250, Florida Statutes, etc.]:

c. Is your state military justice code similar to, or adapted from, the Uniform Code of Military Justice (or the model state code of military justice)?

d. Does your military justice code apply to both the Army and Air National Guard of your state?

2. JURISDICTION:

a. How is jurisdiction over the accused obtained under your state code (i.e. status as a NG Soldier, nexis with military duties, etc.)?

b. Does your state code have a provision to extend jurisdiction beyond the state for military offenses committed beyond its boundries?

3. COURTS-MARTIAL:

a. Does your state law provide for **General Courts-Martial**? **YES/NO**

(i) If **YES**, who is the convening authority?

(ii) What are the maximum punishments?

b. Does your state law provide for **Special Courts-Martial**? **YES/NO**

(i) If **YES**, who is the convening authority?

(ii) What are the maximum punishments?

c. Does your state law provide for **Summary Courts-Martial**? **YES/NO**

(i) If **YES**, who is the convening authority?

(ii) What are the maximum punishments?

4. NON-JUDICIAL PUNISHMENT:

a. Does your state law provide for Article 15-type **Non-Judicial Punishment** (NJP)? **YES/NO**

(i) If **YES**, who may impose NJP?

(ii) What are the maximum punishments?

b. Does your state law provide for Summarized NJP? **YES/NO**

(i) If **YES**, who may impose Summarized NJP?

(ii) What are the maximum punishments?

5. MILITARY JUSTICE REGULATION(S):

a. Does your state's National Guard have regulation similar to Army Regulation 27-10 (Military Justice) to assist in administering military justice under the state's military code? **YES/NO**

b. If **YES**, is the regulation similar to, or adapted from, AR 27-10?

c. If **YES**, is this a joint publication (as opposed to the ANG and ARNG having separate regulations)?

d. If **YES**, is a copy of this publication available for use in this research project (in hard-copy or electronically)?

6. INVESTIGATIONS / ARRESTS:

a. Who may investigate allegations of military code violations?

(i) Commanders (or designee)?

(ii) AR 15-6 investigating officers?

(iii) Military Police?

(iv) Civilian law enforcement?

(v) Other – please specify:

b. Does the state's military code require Article 31, UCMJ Rights (or a state code equivalent) for questioning suspects who may have committed a violation of a <u>military</u> offense? **YES/NO**

c. Is custodial arrest authorized for offenders?

(i) If YES, are warrants issued?

(ii) Who issues the warrant?

7. COURT MARTIAL PERSONNEL:

a. Are violations of your state's military code prosecuted by a Judge Advocate (as opposed to a civilian prosecutor)?

b. Is a defendant/accused represented by a Judge Advocate (as opposed to court-appointed civilian defense counsel or public defenders)?

c. Does your state require military defense counsel to be Art. 27(b), UCMJ, certified?

d. Does your state have a Trial Defense Service (or similar entity) with Judge Advocates dedicated to serve as assigned defense counsel? (Please provide details such as how many Jas serve in the role, etc.)

e. Does your state have **Military Judges** to preside at courts-martial? **YES/NO**

(i) Does your state require completion of the Army Military Judge course?

(ii) Does your state have other requirements for appointment as a Military Judge? (If YES, please specify)

f. If your state does not have military judge(s), who presides in that role?

(i) State court judges (non-military)

(ii) State court judges (National Guard member)

(iii) Reserve component Military Judge (not National Guard)

(iv) Other – please specify:

g. **BAR MEMBERSHIP** – Does your state require bar membership (in your state) for:

(i) All Judge Advocates?

(ii) Trial counsel/prosecutor?

(iii) Defense counsel (military and/or civilian)?

(iv) Military Judges?

8. INCARCERATION:

a. Does your state's military justice system provide for incarceration as a punishment for those convicted at courts-martial? **YES/NO**

b. If **YES**, who is the final approval authority to commit the defendant to incarceration (i.e. convening authority, TAG, etc.)?

c. May a defendant be placed in **post-trial confinement** while <u>awaiting</u> approval of the sentence?

(i) Who may authorize post-trial confinement (i.e. Military Judge, Convening Authority, TAG, etc.)?

(ii) Under what circumstances/criteria may a defendant be placed in post-trial confinement before the sentence is approved?

d. May a defendant be placed in **pre-trial confinement**?

(i) Who may authorize pre-trial confinement (i.e. Military Judge, Convening Authority, TAG, etc.)?

(ii) Under what circumstances/criteria may a defendant be held in pre-trial confinement?

e. Where are defendants incarcerated for pre-trial and/or post-trial confinement (i.e. county or municipal jail, state prison, etc.)?

9. CONVICTIONS, POST-TRIAL PROCEDURES, AND APPEALS:

a. Are state court martial convictions considered a criminal conviction under your state's laws?

(i) Are any court martial offenses considered a felony (punishable by more than one year in prison)?

(ii) Misdemeanor?

(iii) Civil infraction or offense?

b. When a Soldier has been convicted at a state Court Martial, what is the appellate process?

(i) May the convening authority modify or set-aside convictions or sentences?

(ii) Is the Adjutant General involved in the post-trial or appellate process? (If YES, please explain the TAG role)

(iii) Is the Governor (as Commander-in-Chief) involved in the post-trial or appellate process? (If YES, please explain the Governor's role)

c. May convictions be appealed in the civilian appellate courts of your state? (If YES, please explain the process and name the court(s) involved)

d. Does your state have a military appellate court or similar body?

10. OTHER – Please provide any additional information or facts about your state's military justice system or procedures not covered in the preceding questions:

Appendix B

Results of Military Justice Survey

STATES/TERRITORIES SURVEYED: *All states, territories and D.C.*

STATES/TERRITORIES WHO RESPONDED: Arizona (AZ), Arkansas (AR), California (CA), District of Columbia (DC), Florida (FL), Georgia GA), Guam (GU), Idaho (ID), Iowa (IA), Illinois (IL), Kansas (KS), Louisiana (LA), Massachusetts (MA), Michigan (MI), Mississippi (MS), Nebraska (NE), New Hampshire (NH), New Jersey (NJ), New Mexico (NM), New York (NY), Ohio (OH), Oregon (OR), Puerto Rico (PR), South Carolina (SC), Washington (WA), Wisconsin (WI), and Wyoming (WY).

STATES/TERRITORIES WHO DID NOT RESPOND (*answers provided are from the author's review of the applicable state statutes or codes*): *Alabama (AL), Alaska (AK), Colorado (CO), Connecticut (CT), Delaware (DE), Hawaii (HI), Indiana (IN), Maine (ME), Maryland (MD), Minnesota (MN), Missouri (MO), Montana (MT), Nevada (NV), North Carolina (NC), North Dakota (ND), Oklahoma (OK), Pennsylvania (PA), Rhode Island (RI), South Dakota (SD), Tennessee (TN), Texas (TX), Utah (UT), Vermont (VT), Virginia (VA), Virgin Islands (VI), and West Virginia.*

THE SUMMARY BELOW REFLECTS THE ANSWERS TO THE SURVEY PROVIDED BY THE STATE INDICATED, AND INFORMATION GATHERED BY THE AUTHOR THROUGH STATUTE REVIEW. THE INFORMATION GATHERED BY STATUTE IS INDICATED BY THE STATE'S ABBREVIATION IN *ITALICS* FOR QUESTIONS THAT WERE NOT ANSWERS BY THE STATE SURVEYED AND/OR NOT AVAILABLE BY STATUTE REVIEW, NO RESPONSE IS INDICATED BELOW.

1. DOES YOUR STATE'S NATIONAL GUARD HAVE A "MILITARY JUSTICE" SYSTEM? YES/NO

YES	NO	OTHER
AL, AK, **AR, AZ, CA, *CO, CT, DE,* FL, GA, GU, *HI,* ID, IA, *IN,* KS, LA, *ME, MD,* MI, *MN,* MS, *MO, MT, NV,* NM, NY, *NC, ND,* OH, *OK,* OR, *PA,* PR, *RI,* SC, *SD, TX, UT, VA, VI, VT,* WA, *WV,* WI, WY**	**DC, *TN***	**IL, MA, NE, NH, NJ, NY, OR, WY – *not active/rarely used***

a. If **NO**, how are disciplinary or criminal matters handled?
[i.e. Administrative action, prosecution by civilian authority, etc.]

CIVILIAN AUTHORITIES	ADMINISTRATIVE ACTION	NJP
DC, NE, NJ, NH, *TN, VT*	**DC, NE, NJ, NH**	**IL, NH**

b. If **YES**, please provide the applicable state statute or code provision(s):
[i.e. Chapter 250, Florida Statutes, etc.]:

ALL STATES EXCEPT TENNESSEE (MILITARY PENAL LAWS ONLY, NO MILITARY JUSTICE PROVISIONS) AND AMERICAN SAMOA, HAVE MILITARY JUSTICE STATUTES. THIS INCLUDES THOSE STATES WHO RARELY USE MILITARY JUSTICE, OR THE SYSTEM IS CONSIDERED "INACTIVE."

c. Is your state military justice code similar to, or adapted from, the Uniform Code of Military Justice (or the model state code of military justice)?

YES	NO
AR, AZ, CA, *CO, CT, DE,* FL, GA, GU, *HI,* ID, IA, KS, LA, MA, MI, *MN, MO, MT, NV, NC, ND,* NH, NM, NY, OH, *OK,* OR, *PA,* PR, *RI, SD,*	***AL, AK, DE, DC,* IL, *IN, ME, MD,* MS, NE, NJ, SC, *UT, VT***

***TX, VA, VI,* WA, *WV,* WI, WY**	

d. Does your military justice code apply to both the Army and Air National Guard of your state?

YES
***AL, AK,* AR, AZ, CA, *CO, CT, DE,* FL, GA, GU, *HI,* ID, IL, *IN,* IA, KS, LA, *ME,* MA, MI, *MN,* MS, *MO, MT,* NE, *NV,* NH, NM, NY, *NC, ND,* OH, *OK,* OR, *PA,* PR, *RI,* SC, *SD, TX, UT, VA, VI, VT,* WA, *WV,* WI, WY**

2. JURISDICTION:

a. How is jurisdiction over the accused obtained under your state code (i.e. status as a NG Soldier, nexus with military duties, etc.)?

NG MEMBERSHIP	DUTY STATUS	OTHER
AR, AZ, CA, *CO, CT,* FL, GA, KS, LA (Art. 112a only), *ME,* MA, NM, NY, *NC, PA, RI,* SC, *SD, TX, VI, WV*	***AL, AK, DE,* GU, *HI,* ID, IL, *IN,* IA, LA, *MD,* MI, *MN,* MS, *MO,* NE, *NV,* NH, OH, *OK,* OR, PR, *UT,* WA, WI, WY**	**IL, OR, PR, WI – also by military nexus**

b. Does your state code have a provision to extend jurisdiction beyond the state for military offenses committed beyond its boundaries?

YES	NO
AR, AZ, CA, *CO, CT,* FL, GA, *HI,* ID, IA, LA, *ME,* MA, MI, *MN,* MS, *MO, MT,* NE, *NV,* NM, *NC,* OH, *OK,* OR, *PA,* PR, *RI,* SC, *TX, UT,* WA, *WV,* WI, WY	***AL, AK, DE,* GU, IL, *IN,* KS, *MD,* NH, NY,**

3. COURTS-MARTIAL:

a. Does your state law provide for **General Courts-Martial**? **YES/NO**

YES	NO
***AL, AK,* AR, AZ, CA, *CO, CT, DE, DC,* FL, GA, GU, *HI,* ID, IA, *IN,* KS, LA, *ME, MD,* MI, *MN,* MS, *MO, MT, NV,* NM, NY, *NC, ND,* OH, *OK,* OR, *PA,* PR, *RI,* SC, *SD, TX, UT, VA, VI, VT,* WA, *WV,* WI, WY**	**NJ**

(i) If **YES**, who is the convening authority?

[RESPONSES OMITTED - See text]

(ii) What are the maximum punishments?

[RESPONSES OMITTED - See text]

b. Does your state law provide for **Special Courts-Martial**? **YES/NO**

YES	NO
AL, AK,* AR, AZ, CA, *CO, CT, DE,* FL, GA, GU, *HI,* ID, IA, *IN,* KS, LA, *MD,* MI, *MN,	***ME,* NJ, *UT***

MS, *MO, MT, NV,* NM, NY, *NC, ND,* OH, *OK,* OR, *PA,* PR, *RI,* SC, *SD, TX, UT, VA, VI, VT,* WA, *WV,* WI, WY	

(i) If **YES**, who is the convening authority?

[RESPONSES OMITTED - See text]

(ii) What are the maximum punishments?

[RESPONSES OMITTED - See text]

c. Does your state law provide for **Summary Courts-Martial**? **YES/NO**

YES	NO
***AL, AK,* AR, AZ, CA, *CO, CT, DE,* FL, GA, GU, *HI,* IA, *IN,* KS, LA, *MD,* MI, *MN,* MS, *MO, MT, NV,* NM, NY, *NC, ND,* OH, *OK,* OR, *PA,* PR, *RI,* SC, *SD, TX, UT, VA, VI, VT,* WA, *WV,* WI, WY**	**ID, *ME,* NJ, *UT***

(i) If **YES**, who is the convening authority?

[RESPONSES OMITTED - See text]

(ii) What are the maximum punishments?

[RESPONSES OMITTED - See text]

4. NON-JUDICIAL PUNISHMENT:

a. Does your state law provide for Article 15-type **Non-Judicial Punishment** (NJP)? **YES/NO**

YES	NO
AR, AZ, CA, *CO, CT, DE,* FL, GA, GU, *HI,* ID, IA, *IN,* KS, LA, *MD,* MI, *MN,* MS, *MO, MT, NV,* NM, NY, *NC, ND,* OH, *OK,* OR, *PA,* PR, *RI,* SC, *SD, TX, UT, VI, VT,* WA, *WV,* WI, WY	***AL, AK,* DC, *ME,* NJ, *VA***

(i) If **YES**, who may impose NJP?

[RESPONSES OMITTED - See text]

(ii) What are the maximum punishments?

[RESPONSES OMITTED - See text]

b. Does your state law provide for Summarized NJP? **YES/NO**

YES
FL, GU, LA, MI, MS, PR, SC, WY

(i) If **YES**, who may impose Summarized NJP?

[RESPONSES OMITTED - See text]

(ii) What are the maximum punishments?

[RESPONSES OMITTED - See text]

5. MILITARY JUSTICE REGULATION(S):

a. Does your state's National Guard have regulation similar to Army Regulation 27-10 (Military Justice) to assist in administering military justice under the state's military code? **YES/NO**

YES	NO	OTHER
AR, FL, GA, GU, KS, MI, *MT*, NY, OH, OR, PR, SC	**AZ, IA, ID, MA, MS, NE, NH, NJ, NM, OR, WY**	**CA, LA, WI – State MCM; IL – NJP only**

b. If **YES**, is the regulation similar to, or adapted from, AR 27-10?

YES	NO	OTHER
AR, FL, GA, GU, IL, KS, MI, *MT*, NY, SC, WA	**CA, LA, NH, NM, OR, PR, WY**	**FL, GU – adapted from AR 27-10 and MCM; IL – NJP only; LA, WI – adapted from MCM; PR – from 10 U.S.C. § 827**

c. If **YES**, is this a joint publication (as opposed to the ANG and ARNG having separate regulations)?

YES	NO	N/A
FL, GA, GU, IL, KS, LA, MI, PR, SC, WI	**AR**	**CA, IA, NH, NM, OR, WY**

d. If **YES**, is a copy of this publication available for use in this research project (in hard-copy or electronically)?

[RESPONSES OMITTED]

6. INVESTIGATIONS / ARRESTS:

a. Who may investigate allegations of military code violations?

(i) Commanders (or designee)?

YES	NO	OTHER
AR, AZ, CA, *CO*, FL, GA, GU, IA, ID, KS, LA, MA, MI, MS, NE, NM, NY, OH, OR, PR, WA, WI, WY	**NH**	**IL, NJ – n/a**

(ii) AR 15-6 investigating officers?

YES	NO	OTHER
AR, AZ, CA, FL, GA, GU, IA, ID, KS, LA, MA, MI, MS, NE, NM, NY, OH, OR, PR, SC, WA, WI, WY	**NH**	**IL, NJ – n/a**

(iii) Military Police?

YES	NO	OTHER
AR, AZ, CA, FL, GA, GU, ID, KS, LA, MA, MI, MS, NE, SC, WI	**LA, NH, NM, NY, OH, OR, WY**	**IL, NJ, PR – n/a; WA – if appointed under AR 15-6**

(iv) Civilian law enforcement?

YES	NO	OTHER
AZ, FL, GA, GU, ID, KS, LA, MA, MI, MS, PR, SC, WA, WI, WY	**AR, CA, GA, IA, LA, NE, NH, NM, NY, OH, OR**	**IL, NJ – n/a**

(v) Other – please specify:

MA – Provost Marshal; *AL*, NH, OR, and WI – Court of Inquiry

b. Does the state's military code require Article 31, UCMJ Rights (or a state code equivalent) for questioning suspects who may have committed a violation of a military offense? **YES/NO**

YES	NO	OTHER
AR, AZ, CA, *CO, CT,* FL, GA, GU, *HI,* ID, IA, KS, LA, MA, MI, *MN,* MS, *MO, MT, NV,* NE, NM, *NC, ND,* PR, OH, *OK,* OR, *PA, RI, SD, TX, VA, VI* WA, *WV,* WI, WY	***AL, AK,* NY**	**IL, NH, NJ – n/a; NE – (not required/done in practice)**

c. Is custodial arrest authorized for offenders?

YES	NO
AZ, CA, *CO, CT,* FL, GA, GU, *HI,* ID, *IN,* IA, KS, LA, *ME,* MA, MI, *MN,* MS, *MO, MT, NV,* NH, NM, NY, *NC, ND,* OH, *OK,* OR, *PA, RI,* SC, *SD, TX, UT, VA, VI,* WA, *WV,* WI, WY	***AL,* IL, NE, NJ, PR**

(i) If YES, are warrants issued?

[RESPONSES OMITTED]

(ii) Who issues the warrant?

[RESPONSES OMITTED]

7. COURT MARTIAL PERSONNEL:

a. Are violations of your state's military code prosecuted by a Judge Advocate (as opposed to a civilian prosecutor)?

YES	NO	OTHER
AR, AZ, CA, *CO, CT,* FL, GA, GU, *HI,* ID, IL, IA, KS, LA, MI, *MN,* MS, *MO, MT, NV,* NE, NM, NY, *NC, ND,* OH, *OK,* OR, *PA,* PR, *RI,* SC, *SD, TX, VA, VI, VT,* WA, *WV,* WI, WY	**DC, MA, NH, NJ**	**IL, WY – civilian authorized**

b. Is a defendant/accused represented by a Judge Advocate (as opposed to court-appointed civilian defense counsel or public defenders)?

YES	NO	OTHER
AR, AZ, CA, *CO, CT,* FL, GA, GU, *HI,* ID, IL, IA, KS, LA, MI, *MN,* MS, *MO, MT, NV,* NE, NM, NY, *NC, ND,* OH, *OK,* OR, *PA,* PR, *RI,* SC, *SD, TX, VA, VI, VT,* WA, *WV,* WI, WY	**DC**	**MA, NH, NJ – n/a; NY, NM, OR, PR, WI – civilian authorized**

c. Does your state require military defense counsel to be Art. 27(b), UCMJ, certified?

YES	NO	OTHER
FL, KS, LA, MI, *MT*, NM, NY, *NC, ND,* OH, PR, *VA, VI*, WY	**AR, *CT*, DC, GA, GU, IL, IA, MS, NE, OR, SC, WA, WI**	***AZ*, CA, *CO, HI,* ID, *ME, MN, MO, NV, PA, RI* - State SJA approval; MA, NH – n/a**

d. Does your state have a Trial Defense Service (or similar entity) with Judge Advocates dedicated to serve as assigned defense counsel? (Please provide details such as how many Jas serve in the role, etc.)

YES	NO
***AL*, CA, IL, LA, NE, NY, WA, WY**	**AR, AZ, DC, FL, GA, GU, IA, ID, KS, MA, MI, MS, NH, NM, OH, OR, PR, SC**

e. Does your state have **Military Judges** to preside at courts-martial? **YES/NO**

YES	NO
AR, AZ, CA, *CO, CT, DE*, FL, GA, *HI,* ID, IA, KS, LA, *ME*, MI, *MN*, MS, *MO, MT*, NE, *NV*, NM, NY, *NC,* OH, *OK,* OR, *PA, RI,* SC, *SD,TX, UT, VA, VI,* WA, *WV,* WI, WY	***AL*, GU, IL, *IN*, MA, NH, *ND,* PR**

(i) Does your state require completion of the Army Military Judge course?

YES	NO
AZ, CA, FL, ID, LA, NY, OH, WY	**AR, *CO, CT, DE,* GA, IA, *ME,* MI, MS, NE, NM, OR, SC, WA, WI**

(ii) Does your state have other requirements for appointment as a Military Judge? (If YES, please specify)

[RESPONSES OMITTED]

f. If your state does not have military judge(s), who presides in that role?

(i) State court judges (non-military)

YES
WY

(ii) State court judges (National Guard member)

YES
WY

(iii) Reserve component Military Judge (not National Guard)

YES
AZ, NE, WY

(iv) Other – please specify:

OTHER	PRESIDENT OF C.M.
***HI*, NE, WY (*see text*)**	***AL, IN, MA, ND***

g. **BAR MEMBERSHIP** – Does your state require bar membership (in your state) for:

(i) All Judge Advocates?

YES	NO
AR, AZ, *CO, CT,* GA, *HI,* IA, KS, LA, MA, MI, *MN,* MS, *MO,* NE, NJ, NM, OH, *OK,* OR, *PA,* SC, *TX,* WA	**CA, DC, FL, GU, ID, NH, NY, PR, WY**

(ii) Trial counsel/prosecutor?

YES	NO	OTHER
AR, *CO,* GA, IA, ID, KS, LA, MA, MI, MS, NE, NJ, NM, NY, OH, *OK,* OR, *PA,* SC, *TX,* WA	**CA, *CT,* FL, GU, *HI, ME, MN, MO,* NH, PR, *RI, WV,* WY**	***HI, MN, MO, NV,* OR, *RI, WV* – may be certified by State SJA (if admitted to a federal court)**

(iii) Defense counsel (military and/or civilian)?

YES	NO	OTHER
AR, *CO,* GA, IA, ID, KS, LA, MA, MI, MS, NE, NJ, NM, NY, OH, *OK,* OR, *PA,* SC, *TX,* WA	**CA, *CT,* FL, GU, *HI, ME, MN, MO,* NH, PR, *RI, WV,* WY**	***HI, MN, MO, NV,* OH, *RI, WV* – may be certified by State SJA (if admitted to a federal court); OR – may be certified by State SJA**

(iv) Military Judges?

YES	NO	OTHER
AR, AZ, GA, *HI,* IA, KS, LA, *ME,* MI, *MN,* MS, *MO,* NE, NM, NY, OH, *OK,* OR, *PA,* SC, *SD, TX, UT, VA,* WA, *WV,* WY	**CA, FL, ID, *NV, NC, RI,* WI**	**GU, NJ, NH, PR, – n/a; *ID,* IA, *RI* - federal bar membership only permitted**

8. INCARCERATION:

a. Does your state's military justice system provide for incarceration as a punishment for those convicted at courts-martial? **YES/NO**

YES	NO
AR, *AK,* AZ, CA, *CO, CT, DE,* FL, GA, GU, *HI,* ID, IL, *IN,* IA, KS, LA, *ME,* MA, *MD,* MI, *MN,* MS, *MO, MT,* NE, *NV,* NH, NM, NY, *NC, ND,* OH, OR, *PA,* PR, *RI,* SC, *TX, UT, VA, VI,* WA, *WV,* WI, WY	***AL,* MA, NJ, *VT***

b. If **YES**, who is the final approval authority to commit the defendant to incarceration (i.e. convening authority, TAG, etc.)?

[RESPONSES OMITTED - See text]

c. May a defendant be placed in **post-trial confinement** while <u>awaiting</u> approval of the sentence?

YES	NO
AZ, CA, GU, IA, KS, MI, MS, *MT,* NM, NY, *NC, ND,* OH, PR, *SD, VA, VI,* WY	***AL,* AR, FL, GA, ID, IL, LA, MA, NE, NH, NJ, OR, SC, *VT,* WA**

(i) Who may authorize post-trial confinement (i.e. Military Judge, Convening Authority, TAG, etc.)?

[RESPONSES OMITTED - See text]

(ii) Under what circumstances/criteria may a defendant be placed in post-trial confinement before the sentence is approved?
[RESPONSES OMITTED - See text]

d. May a defendant be placed in **pre-trial confinement**?

YES	NO
AR, AZ, CA, *CO*, *CT*, FL, GA, GU, *HI*, IA, KS, LA, MI, *MN*, MS, *MT*, NE, NY, *NC*, *ND*, OH, OR, *SD*, *VA*, *VI*, WA, WY	***AL*, ID, IL, MA, NH, NJ, NM, PR, SC, *VT*, WI**

(i) Who may authorize pre-trial confinement (i.e. Military Judge, Convening Authority, TAG, etc.)?

[RESPONSES OMITTED - See text]

(ii) Under what circumstances/criteria may a defendant be held in pre-trial confinement?
[RESPONSES OMITTED - See text]

e. Where are defendants incarcerated for pre-trial and/or post-trial confinement (i.e. county or municipal jail, state prison, etc.)?

[RESPONSES OMITTED - See text]

9. CONVICTIONS, POST-TRIAL PROCEDURES, AND APPEALS:

a. Are state court martial convictions considered a criminal conviction under your state's laws?

YES	NO
AR, AZ, CA, *CO*, FL, GU, ID, KS, LA, *MD*, MA, MI, MS, *MT*, NY, *NC*, *ND*, OH, OR, *TX*, *VA*, *VI*, WA, WI, WY	**GA, IA, IL, NE, NH, NJ, NM, PR, SC, *VT***

(i) Are any court martial offenses considered a felony (punishable by more than one year in prison)?

YES
***CO*, MI, *MT*, *NC*, *VI*, WI, WY**

(ii) Misdemeanor?

YES	NO
AR, AZ, CA, *CO*, FL, IA, ID, KS, LA, *MD*, MA, MI, MS, *MT*, NM, NY, *NC*, *ND*, OH, OR, *TX*, *VA*, *VI*, WA, WI, WY	***AL*, GA, GU, NE, NJ, PR, SC, *VT***

(iii) Civil infraction or offense?

YES	NO
GU, ID (some offenses), MS (some offenses), NM, NY	**AR, AZ, CA, FL, GA, IA, KS, LA, *MD*, MA, MI, *MT*, NE, NJ, *NC*, OH, OR, PR, SC, *VI*, WA, WI, WY**

b. When a Soldier has been convicted at a state Court Martial, what is the appellate process?

(i) May the convening authority modify or set-aside convictions or sentences?

YES	NO	OTHER
AZ, AR, CA, *CO, CT,* FL, GA, GU, *HI,* ID, IA, KS, LA, *ME,* MI, MS, *MO, MT,* NE, *NV,* NH, NM, NY, *NC, ND,* OH, *OK, PA,* PR, *RI, SD, TX, UT, VA, VI, VT,* WA, *WV,* WI, WY	**OR**	**IL, MA, NH – n/a**

(ii) Is the Adjutant General involved in the post-trial or appellate process? (If YES, please explain the TAG role)

YES	NO	OTHER
AL, AK,* AR, AZ, *DE,* GU, ID, LA, *MT,* NH, NM, NY, OH, OR, *VA, VT	**IL, *ME,* MA, NE, NJ, WY**	**AZ, FL, IA, ID, KS, MI, MS, PR, WA – if convening authority (C/A); CA – if supervising the C/A**

(iii) Is the Governor (as Commander-in-Chief) involved in the post-trial or appellate process? (If YES, please explain the Governor's role)

YES	NO	OTHER
***AL, AK,* AZ, *CO, CT, DE,* GU, *IN,* LA, *ME,* NE, *NV,* NH, NM, NY, *NC,* OH, *OK,* OR, PR, *RI,* WY**	**AR, GA, IL, MA, MI, *MT,* NJ**	**FL, ID, *MN, VA* – punitive discharge only; IA, KS, MS, SC, WA – if C/A;**

c. May convictions be appealed in the <u>civilian</u> appellate courts of your state? (If YES, please explain the process and name the court(s) involved)

YES	NO
***AL,* AR, AZ, CA, *CO,* FL, GU, *HI,* ID, KS, LA, *ME,* NE, NM, NY, SC, WY**	***AK, CT, DE,* GA, IL, *IN,* IA, MA, MI, *MO,* MS, *MT, NV,* NH, *PA,* OH, OR, PR, *RI, UT, VA, VT,* WA, *WV***

d. Does your state have a <u>military</u> appellate court or similar body?

YES
AZ, CA, *DE, IN,* KS, MI, MS, *MO,* NE, NY, OR, *PA,* PR, *TX, WV*

10. OTHER – Please provide any additional information or facts about your state's military justice system or procedures not covered in the preceding questions:

[RESPONSES OMITTED]

Appendix C

National Guard Duty Status Chart

The following chart compares the various benefits and obligations of National Guard personnel in state and federal status:[1]

	State Active Duty	Title 32 – AGR -IDT - AT- ADSW[2]	Title 10 – Federal Active Duty
Command & Control	Governor	Governor	President
Who Performs Duty	National Guard	National Guard	Active, Reserve & National Guard
Where Duty is Performed	Determined by State Statute	CONUS – EMAC[3]	Worldwide
Pay & Benefits	State Pay & Allowances	Federal Pay & Allowances	Federal Pay & Allowances
Tort Immunity	Under State Law	Federal Tort Claims Act	Federal Tort Claims Act
Posse Comitatus	Not applicable	Not applicable	Yes
Reemployment Rights	State Statute only	USERRA	USERRA
SCRA Protections	No	Yes – Limited	Yes
Missions	Determined by State Law	IDT, AT, AGR & other Federally Authorized	Federal only
Discipline	State Law	State Law	UCMJ
Federal Retirement	No	Yes	Yes
Medical Coverage	State Benefits only	Federal Benefits	Federal Benefits
Disability	State Workers Compensation	Federal Benefits	Federal Benefits
Involuntary Order to Duty	Determined by State Law	Yes	Yes
Voluntary Order to Duty	Determined by State Law	Yes	Yes

[1] Adapted from a similar chart created by Colonel Bryan Morgan, Staff Judge Advocate, Alabama National Guard, January 2006 (on file with author).

[2] AGR – Active Guard-Reserve; IDT – Inactive Duty for Training; AT – Annual Training; ASDW – Active Duty for Special Work.

[3] EMAC is the Emergency Management Assistance Compact, a model code adopted by most states to provide for mutual aid across state lines during an emergency. Emergency Management Assistance Compact, http://www.emacweb.org (last visited Dec. 10, 2006).

Appendix D

State Military Justice Codes

Included in this Appendix is a listing of the Military Justices Codes and other related laws for the individual states. The State of Tennessee does not have a military code which provides for courts-martial, however, they do have penal laws applicable to National Guard personnel. The Territory of American Samoa does not have any statutory provisions related to military justice.

CODE OF ALABAMA	Title 31, Military Affairs and Civil Defense, Chapter 2, Military Code
ALASKA STATUTES	Title 26, Military Affairs, Veterans, & Disasters, Chapter 05, Military Code of Alaska
ARIZONA REVISED STATUTES	Title 26, Military Affairs and Emergency Management
ARKANSAS CODE OF 1987	Title 12, Law Enforcement, Emergency Management, & Military Affairs, Subtitle 4 - Military Affairs, Chapter 64, Military Justice
DEERING'S CALIFORNIA CODES ANNOTATED	Military & Veterans Code, Division 2 - Military Forces of the State Part 1 - The State Militia, Chapter 1, Laws & Regulations of the United States
COLORADO REVISED STATUTES	Title 28 - Military & Veterans, Article 3.1, Colorado Code of Military Justice
CONNECTICUT STATUTES	Title 27, Armed Forces & Veterans, Chapter 507, Connecticut Code of Military Justice
DELAWARE CODE	Title 20 - Military & Civil Defense, Part I - Military, Chapter 1 - Delaware National Guard, Subchapter IV, Courts-Martial & Sentences
DISTRICT OF COLUMBIA CODE	Title 49 - Military, Chapter 5, Courts-Martial
FLORIDA STATUTES	Chapter 250 - Military Affairs, Part I, Military Code
OFFICIAL CODE OF GEORGIA ANNOTATED	Title 38, Military, Emergency Management, & Veterans Affairs Chapter 2 - Military Affairs, Article 5, Code of Military Justice
GUAM CODE ANNOTATED	Title 10 - Health & Safety, Division 3 - Public Safety, Chapter 63 Guam National Guard, Article 7, Guam Code of Military Justice
HAWAII REVISED STATUTES	Division 1 - Government, Title 10, Public Safety & Internal Security, Chapter 124A, Hawaii Code of Military Justice
IDAHO CODE STATUTES ANNOTATED	Title 46 - Militia and Military Affairs, Chapter 11, Code of Military Justice
ILLINOIS COMPILED STATUTES ANNOTATED	Chapter 20 - Executive Branch, Department of Military Affairs, Military Code of Illinois, Article XIV, Military Offenses
BURNS INDIANA STATUTES ANNOTATED	Title 10 - State Police, Civil Defense, & Military Affairs Article 16 - Indiana Military Code, Chapter 9, Court-martial Procedures

IOWA ANNOTATED STATUTES	Title I, State Sovereignty & Management, Subtitle 11 - Defense Chapter 29b, Military Justice
KANSAS ANNOTATED STATUTES	Chapter 48, Militia, Defense & Public Safety
KENTUCKY REVISED STATUTES ANNOTATED	Title V, Military Affairs, Chapter 35, Military Justice
LOUISIANA REVISED STATUTES	Title 29, Military, Naval, & Veteran's Affairs, Chapter 1 - Military Forces of the State, Part 2, Louisiana Code of Military Justice
MAINE REVISED STATUTES	Title 25, Internal Security & Public Safety, Part 3 - Military Law Chapter 137, Courts-Martial
ANNOTATED CODE OF MARYLAND	Title 13 - Militia, Subtitle 8, Courts-Martial
LAWS OF MASSACHUSETTS	Part I, Administration of the Government, Chapter 33 - Militia VI. Military Justice
MICHIGAN COMPILED LAWS SERVICE	Chapter 32, Military Establishment, Michigan Code of Military Justice of 1980
MINNESOTA STATUTES	Military Affairs, Chapter 192a, Uniform Code of Military Justice
MISSISSIPPI CODE of 1972	Title 33 - Military Affairs, Chapter 13, Mississippi Code of Military Justice
MISSOURI STATUTES	Title 5 - Military Affairs & Police, Chapter 40, Military Justice
MONTANA CODE	Title 10, Military Affairs & Disaster, & Emergency Services Chapter 1 - Militia
NEBRASKA REVISED STATUTES	Chapter 55 - Militia, Article 4, Nebraska Code of Military Justice
NEVADA REVISED STATUTES ANNOTATED	Title 36, Military Affairs & Civil Emergencies, Chapter 412, Nevada Code of Military Justice
NEW HAMPSHIRE REVISED STATUTES	Title VIII, Public Defense & Veterans' Affairs, Chapter 110-B The Militia
NEW JERSEY ANNOTATED STATUTES	Title 38a - Military & Veterans Law, Subtitle 1 - Armed Forces Chapter 10, Military Courts
STATUTES OF NEW MEXICO	Chapter 20 - Military Affairs, Article 12, Code of Military Justice
NEW YORK CODES, RULES AND REGULATIONS	Title 9 -Executive Department, Subtitle L, Division of Military & Naval Affairs, Chapter IV, Military Justice
GENERAL STATUTES OF NORTH CAROLINA	Chapter 127A - Militia, Article 3, National Guard
NORTH DAKOTA CENTURY CODE	Title 37 - Military, Chapter 37-09, Military Courts
PAGE'S OHIO REVISED CODE ANNOTATED	Title 59, Veterans - Military Affairs, Chapter 5924 Code of Military Justice
OKLAHOMA STATUTES	Title 44 - Militia, Chapter 7, Code of Military Justice

OREGON REVISED STATUTES	Title 32, Military Affairs; Emergency Services, Chapter 398 Military Justice
PENNSYLVANIA CONSOLIDATED STATUTES	Title 51 - Military Affairs, Part IV, Military Justice
LAWS OF PUERTO RICO ANNOTATED	Title 25 - Internal Security, Subtitle 2 - Military Matters, Part I - Military Code of Puerto Rico, Chapter 207, Military Justice
GENERAL LAWS OF RHODE ISLAND	Title 30 - Military Affairs & Defense, Chapter 13, Rhode Island Code of Military Justice
SOUTH CAROLINA CODE OF LAWS	Title 25, Military, Civil Defense & Veterans Affairs, Chapter 1 - Military Code, Article 19, Code of Military Justice for the National Guard
SOUTH DAKOTA STATUTES	Title 33 - Military Affairs, Chapter 33-10, National Guard Discipline & Courts-Martial
TENNESSEE CODE	Title 58, Military Affairs, Emergencies, & Civil Defense, Chapter 1 - Military Forces, Part 6, Armed Forces-Penal Provisions
TEXAS STATUTES AND CODES	Government Code, Title 4 - Executive Branch, Subtitle C, State Military Forces and Veterans, Chapter 432, Texas Code of Military Justice
UTAH CODE ANNOTATED	Title 39 - Militia and Armories, Chapter 6, Utah Code of Military Justice
VERMONT STATUTES	Title Twenty, Internal Security & Public Safety, Part 2 - National Guard, Chapter 39, Courts-Martial
CODE OF VIRGINIA	Title 44, Military & Emergency Laws, Chapter 1 - Military Laws of Virginia, Article 4, National Guard Courts-Martial
VIRGIN ISLANDS CODE ANNOTATED	Title Twenty-Three, Internal Security & Public Order, Chapter 19 National Guard, Subchapter II, Rights & Liabilities of Members & Officers
REVISED CODE OF WASHINGTON	Title 38 - Militia and Military Affairs, Chapter 38.38, Washington Code of Military Justice
WEST VIRGINIA CODE	Chapter 15 - Public Safety, Article 1E, Code of Military Justice
WISCONSIN STATUTES	General Organization of the State, Except the Judiciary, Chapter 21, Department of Military Affairs
WYOMING STATUTES ANNOTATED	Title 19 - Defense Forces & Affairs, Chapter 12 - Military Courts & Justice, Article 1, State Military Code

TJAGLCS Practice Note

Tax Law Note

Update for 2007 Federal Income Tax Returns

There are a few changes that legal assistance attorneys should be aware of when completing and filing tax returns for military taxpayers this tax season. Most of these changes relate to recent tax legislation for the Alternative Minimum Tax (AMT),[1] mortgage debt relief,[2] deductions for charitable cash contributions,[3] and a number of credits including the Hope and Lifetime Learning Credit,[4] Adoption Credit,[5] and Earned Income Credit.[6] In addition, to aid legal assistance clients with tax planning for future years, legal assistance attorneys should be aware of a change in the taxation of unearned income of minors[7] which will take effect in 2008.

Key Changes for 2007

Expired Provisions

For the last two years taxpayers affected by Hurricanes Katrina, Rita, and Wilma have been granted certain tax benefits under the Katrina Emergency Tax Relief Act of 2005[8] and the Gulf Opportunity Zone Act of 2005.[9] These benefits included waiver of penalties and delayed repayment of loans from Individual Retirement Arrangements (IRAs) and qualified employer plans,[10] increased limits on amounts allowed for the Hope and Lifetime Learning Credits,[11] and authorization of additional exemptions for housing individuals displaced by Hurricane Katrina.[12] Those tax benefits expired in 2006 and will not be authorized for 2007 federal income tax returns.[13]

Alternative Minimum Tax

The Tax Increase Prevention Act of 2007, passed on 26 December 2007, amended the AMT.[14] Many taxpayers were concerned about the AMT because it increases the tax liability of the taxpayer.[15] The AMT does this by eliminating many deductions and credits normally allowed to the taxpayer, ultimately increasing the taxpayer's tax liability.[16] A taxpayer would have to pay the AMT if his or her taxable income was more than the AMT exemption amount based on filing status.[17]

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[1] Tax Increase Prevention Act of 2007, Pub. L. No. 110-166, 121 Stat. 2461.

[2] Mortgage Forgiveness Debt Relief Act of 2007, Pub. L. No. 110-142, 121 Stat. 1809.

[3] I.R.C. § 170(a) (LEXIS 2008).

[4] *Id.* § 25A.

[5] *Id.* § 23.

[6] *Id.* § 32.

[7] *Id.* § 1(g).

[8] Pub. L. No. 109-73, 119 Stat. 2016.

[9] Pub. L. No. 109-135, 119 Stat. 2577.

[10] §§ 101, 103, 119 Stat. 2016.

[11] § 1400O, 119 Stat. 2577.

[12] § 302, 119 Stat. 2016.

[13] § 1400O, 119 Stat. 2577; §§ 101(d)(1), 103(a) and 302(a), 119 Stat. 2016.

[14] Pub. L. No. 110-166, 121 Stat. 2461.

[15] Internal Revenue Service, Topic 556—Alternative Minimum Tax, *available* at www.irs.gov (follow "Alternative Minimum Tax" hyperlink) (last visited Jan. 29, 2008).

[16] *Id.*

[17] *Id.*

The Tax Increase and Prevention Act of 2007, temporarily increases the exemption amount before the taxpayer becomes liable for the AMT. This amount is now $44,350 for single taxpayers and $66,250 for taxpayers married filing jointly.[18] However, due to the late action taken by Congress, filing for certain federal income tax returns will be delayed until 11 February 2007.[19] This will affect federal income tax returns utilizing these forms: (1) Internal Revenue Service (IRS) Form 8863, Education Credits; (2) IRS Form 5695, Residential Energy Credits; (3) Schedule 2, IRS Form 1040A, Child and Dependent Care Expenses for Form 1040A Filers; (4) IRS Form 8396, Mortgage Interest Credit; and (5) IRS Form 8859, District of Columbia First-Time Homebuyer Credit.[20]

Mortgage Interest and Debt Forgiveness

On 20 December 2007, the President signed the Mortgage Forgiveness Debt Relief Act of 2007.[21] This statute amends § 108(a) of the Internal Revenue Code (IRC) allowing taxpayers to exclude from gross income the discharge of indebtedness on their principal residence.[22] At this time, the statute only applies to discharges of indebtedness on or after 1 January 2007 to 1 January 2010.[23]

Even though the taxpayer's discharge of indebtedness is not included in gross income, the amount that is excluded from gross income will reduce the taxpayer's basis in his or her principal residence.[24] Even though the basis in the home is reduced, the Mortgage Forgiveness Debt Relief Act of 2007 prevents the basis in the home from being reduced below zero.[25] This can affect taxpayers at a later date when they sell the home and realize capital gains.

A taxpayer realizes capital gains on the amount earned on the sale of the home above the taxpayer's basis in the home.[26] Currently, taxpayers who sell a home that they have lived in for two of the last five years are allowed to exclude the following amounts of capital gains on the sale: $500,000 if married filing jointly; and $250,000 if filing as a single taxpayer.[27] For example, if a taxpayer has a basis of $750,000 in a town home purchased in Alexandria, Virginia and that taxpayer later goes into arrears on his mortgage and has $350,000 of indebtedness discharged, he can exclude that amount from gross income. However, the taxpayer's basis in his town home is now $400,000. If that taxpayer were to sell the town home for $800,000, he could only exclude $250,000 of that total amount from gross income and would have to include a capital gain of $150,000 in gross income. If the basis had not been reduced to $400,000, the taxpayer could have excluded the entire amount earned on the sale because the taxpayer's basis in the home was $750,000 and only realized capital gains on the sale in the amount of $50,000, well below the $250,000 exclusion amount.

Section 2(h)(2) of the Mortgage Forgiveness Debt Relief Act of 2007 increases the amount allowed for acquisition indebtedness from $1,000,000 to $2,000,000.[28] Acquisition indebtedness is debt incurred for the purchase, construction, or significant renovations of a home.[29] Under § 163(h)(3)(B) of the IRC, taxpayers are limited to a maximum amount of indebtedness on which they receive a deduction for mortgage interest paid.[30] If the taxpayer incurs acquisition indebtedness

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[18] 121 Stat. at 2461.

[19] News Release, I.R.S., Alternative Minimum Tax (AMT)—How It Affects Filing Season 2008 (Dec. 28, 2007), *available* at www.irs.gov/newsroom/article/0,,id=1766055,00.html.

[20] *Id.*

[21] Pub. L. No. 110-142, 121 Stat. 1809.

[22] *Id.*

[23] § 2(a)(1)(E), 121 Stat. 1809.

[24] *Id.* § 2(h)(1).

[25] *Id.*

[26] I.R.C. § 121.

[27] *Id.* § 121(a). However, military taxpayers have a special rule under IRC § 121(d)(9), which allows military members to suspend the five-year time period for up to ten years. *See also* INTERNAL REVENUE SERVICE, PUBLICATION 3, ARMED FORCES TAX GUIDE (2006).

[28] § 2(h)(2), 121 Stat. 1809.

[29] I.R.C. § 163(h)(3)(B).

[30] *Id.*

over this amount, he will not be allowed to take a deduction for the entire amount of mortgage interest paid.[31] The change in the amount of acquisition indebtedness now means that taxpayers who purchase a home over $1,000,000 but less than $2,000,000 can take the entire amount of mortgage interest paid as a deduction.

Finally, the statute also amends IRC § 163(h)(3)(E)(iv) allowing for the treatment of mortgage insurance premiums paid or accrued after 1 January 2007, as mortgage interest until 31 December 2010.[32] As a result of the amendment of IRC § 163 (h)(3)(E)(iv), premiums paid or accrued by a taxpayer for qualified mortgage insurance[33] are deductible on Form 1040, Schedule A as mortgage interest.[34] Nonetheless, the amount a taxpayer can deduct is subject to phase out by 10% per every $1000 the taxpayer's adjusted gross income exceeds $100,000.[35] If the taxpayer is married filing separately, the deduction is reduced by 10% for every $500 the adjusted gross income exceeds $50,000.[36]

Unearned Income for Minors

A "kiddie tax" is incurred by all children who receive unearned income.[37] As of 1 January 2006, children who were under the age of eighteen received their first $850 of unearned income tax free.[38] The second $850 is taxed at the "kiddie tax" rate of 15% and anything over $1700 is taxed at the parent's marginal rate.[39] Starting 1 January 2008, the "kiddie tax" applies to children under the age of nineteen or under the age of twenty-four, if they are a full time student.[40] This means that parents who were contemplating giving their college-age children capital assets, may want to rethink when they give them due to the increased tax consequences of the "kiddie tax."

Deductions

There are two changes in the realm of deductions to discuss. The first is the tuition and fees deduction.[41] Last year the Tax Relief and Health Care Act of 2006 extended this above the line deduction along with a few others through tax year 2007.[42] As was last year, single taxpayers with an adjusted gross income (AGI) of $65,000 or less and married filing jointly taxpayers with an AGI of less than $130,000 will be able to deduct $4000 for higher education tuition and fees.[43] A deduction of $2000 is available to single taxpayers with an AGI of less than $80,000 and married filing jointly taxpayers with an AGI of less than $160,000.[44] However, in order to take the deduction this year, taxpayers will have to fill out IRS Form 8917, Tuition and Fees Deduction.[45]

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[31] *Id.*

[32] § 3(a), 121 Stat. 1809.

[33] "Qualified mortgage insurance is mortgage insurance provided by the Veterans Administration, the Federal Housing Administration, or the Rural Housing Administration, and private mortgage insurance (as defined in § 2 of the Homeowners Protection Act of 1998 as in effect on December 20, 2006)." INTERNAL REVENUE SERVICE, PUBLICATION 936, HOME MORTGAGE INTEREST DEDUCTION (2007).

[34] *Id.*

[35] *Id.*

[36] *Id.*.

[37] I.R.C. § 1(g) (LEXIS 2008).

[38] Pub. L. No. 109-222, 120 Stat. 345 (2006) (codified at I.R.C. § 1(g)(2)(A)).

[39] I.R.C. § 1(g).

[40] Revenue Proc. 2007-66; 2007 I.R.B. 45.

[41] *See* Internal Revenue Service, Form 1040, Line 34 (2007).

[42] Pub. L. No. 109-432, 120 Stat. 2922 (2006).

[43] INTERNAL REVENUE SERVICE, PUBLICATION 970, TAX BENEFITS OF EDUC. (2007).

[44] *Id.*

[45] *Id.*

Second, the rules applying to deductions for charitable cash contributions have been amended for this tax year. In order to deduct cash contributions of any amount the taxpayer must have a written record of the contribution.[46] The type of records required to take the deduction include a cancelled check or bank statement showing the name of the charity, the date the contribution was made and the amount of the contribution.[47] In addition to the bank records, a written communication from the charity will also meet the new requirements.[48] The written communication must include the name of the charitable organization, the date the contribution was made, and the amount of the contribution.[49]

Credits

Several adjusted gross income limits on credits have increased for 2007. Those most common to military taxpayers are the Hope and Lifetime Learning Credit,[50] Adoption Credit,[51] Additional Child Tax Credit,[52] and the Earned Income Credit.[53] As a result of these increases, more taxpayers are eligible to take advantage of these credits.

The Hope Scholarship and Lifetime Learning Credits are two separate educational credits available to taxpayers and their dependents.[54] The Hope Scholarship Credit is authorized for money spent on qualified tuition and related expenses[55] during the first two years of a student's post-secondary education.[56] For 2007, the maximum amount for the Hope Scholarship Credit is $1650.[57] This amount consists of 100% of qualified tuition and related expenses not in excess of $1100 plus 50% of those expenses in excess of $1100, but not more than $2200.[58] Alternatively, the Lifetime Learning Credit applies to the expenses paid for any level of higher education.[59] The taxpayer is allowed to take 20% of costs up to $10,000 of qualified tuition and related expenses for a maximum of $2000.[60] For 2007, both these credits are reduced once the taxpayer's adjusted gross income reaches between $47,000 and $57,000 for all single, head of household, and married filing separate filers.[61] Married filing jointly taxpayers will have these credits reduced when the adjusted gross income is between $94,000 and $114,000.[62] Finally, these credits are eliminated for single taxpayers whose adjusted gross income is $57,000 or more, and for married filing jointly taxpayers whose adjusted gross income is $114,000 or more.[63]

Second, taxpayers adopting an eligible child[64] can receive a credit for qualified adoption expenses which include reasonable and necessary adoption fees, court costs, attorney fees, and other expenses directly related to the adoption of the

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[46] INTERNAL REVENUE SERVICE, PUBLICATION 526, CHARITABLE CONTRIBUTIONS (2007).

[47] *Id.*

[48] *Id.*

[49] *Id.*

[50] I.R.C. § 25A.

[51] *Id.* § 23.

[52] *Id.* § 32(n).

[53] *Id.* § 32.

[54] *Id.* § 25A.

[55] Qualified tuition and related expenses consist of tuition and mandatory fees paid by the taxpayer on behalf of himself, his spouse, or any dependent of the taxpayer for which the taxpayer is allowed the dependency exemption. *Id.* § 25A(f).

[56] *Id.*

[57] I.R.C. § 25A(b)(1); Rev. Proc. 2006-53.

[58] I.R.C. § 25A(b)(1); Rev. Proc. 2006-53.

[59] I.R.C. § 25A(c)(2)(B).

[60] *Id.*

[61] I.R.C. § 25A(b)(1); Rev. Proc. 2006-53.

[62] I.R.C. § 25A(b)(1); Rev. Proc. 2006-53.

[63] I.R.C. § 25A(b)(1); Rev. Proc. 2006-53.

[64] "An eligible child is an individual who has not attained the age of 18 as of the time of the adoption or who is physically or mentally incapable of caring for himself." I.R.C. § 23(d)(2).

eligible child.[65] The taxpayer can take this credit either the year after the expenses are incurred or in the year the adoption is completed.[66] For 2007 the maximum credit allowed for adoption expenses is $11,390.[67] This credit, however, reduces once a taxpayer's adjusted gross income exceeds $170,820 and is completely phased out once a taxpayer's adjusted gross income reaches $210,820 or more.[68]

Finally, the Additional Child Tax Credit and the Earned Income Tax Credit have new minimum and maximum income levels for 2007. First, the minimum amount of earned income used to figure the Additional Child Tax Credit for 2007 is now $11,750.[69] This is an increase from the 2006 amount of $11,300.[70] On the other hand, the maximum amount a taxpayer may earn before they are disqualified from the Earned Income Credit has increased to $37,783 if the taxpayer has more than one qualifying child and is a head of household filer and $39,783 if the taxpayer is married filing jointly.[71] If the taxpayer has one qualifying child the taxpayer must earn less than $33,241 if filing head of household and $35,241 if filing married filing jointly.[72] Finally, if the taxpayer does not have a qualifying child, the taxpayer must earn less then $12,590 if filing single and $14,590 if married filing jointly.[73] Also, the amount of the earned income credit has increased for 2007 to $2853 if the taxpayer has one qualifying child, $4716 if the taxpayer has more than one qualifying child, and $428 if the taxpayer does not have a qualifying child.[74]

[65] *Id.* § 23(d)(1).

[66] *Id.* § 23(a)(2)(A) & (B).

[67] *Id.* § 23(b)(1); Rev. Proc. 2006-53.

[68] I.R.C. § 23(b)(2)(A); Rev. Proc. 2006-53.

[69] Rev. Proc. 2006-53, 2006 I.R.B. 47.

[70] *Id.*

[71] Rev. Proc. 2006-53.

[72] *Id.*

[73] *Id.*

[74] *Id.*

Appendix

There are six different marginal tax brackets for tax year 2007: 10%, 15%, 25%, 28%, 33%, and 35%.[75]

1. Married Individuals Filing Joint Returns and Surviving Spouses:

Taxable Income		Marginal Tax Rate
Over	*But Not Over*	
$1	$15,650	10%
$15,650	$63,700	$1565 + 15% of amount over $15,650
$63,700	$128,500	$8772.50 + 25% of amount over $63,700
$128,500	$195,850	$24,972.50 + 28% of amount over $128,500
$195,850	$349,700	$43,830.50 + 33% of amount over $195,850
$349,700		$94,601 + 35% of amount over $349,700

2. Unmarried Individuals (other than Surviving Spouses and Heads of Households):

Taxable Income		Marginal Tax Rate
Over	*But Not Over*	
$1	$7825	10%
$7825	$31,850	$782.50 + 15% of amount over $7,825
$31,850	$77,100	$4386.25 + 25% of amount over $31,850
$77,100	$160,850	$15,698.75 + 28% of amount over $77,100
$160,850	$349,700	$39,148.75 + 33% of amount over $160,850
$349,700		$101,469.25 + 35% of amount over $349,700

3. Heads of Households:

Taxable Income		Marginal Tax Rate
Over	*But Not Over*	
$1	$11,200	10%
$11,200	$42,650	$1120 + 15% of amount over $11,200
$42,650	$110,100	$5837.50 + 25% of amount over $42,650
$110,100	$178,350	$22,700 + 28% of amount over $110,000
$178,350	$349,700	$41,810 + 33% of amount over $178,350
$349,700		$98,355.50 + 35% of amount over $349,700

4. Married Individuals Filing Separate Returns:

Taxable Income		Marginal Tax Rate
Over	*But Not Over*	
$1	$7825	10%
$7825	$31,850	$782.50 + 15% of amount over $7,825
$31,850	$64,250	$4386.25 + 25% of amount over $31,850
$64,250	$97,925	$12,486.25 + 28% of amount over $64,250
$97,925	$174,850	$21,915.25 + 33% of amount over $97,925
$174,850		$47,300.50 + 35% of amount over $174,850

[75] I.R.C. §1(a)-(d), (i)(2); Rev. Proc. 2006-53, 2006 I.R.B. 48.

5. Estates and Trusts:

Taxable Income		Marginal Tax Rate
Over	*But Not Over*	
$1	$2150	15%
$2150	$5000	$322.50 + 25% of amount over $2,150
$5000	$7650	$1035 + 28% of amount over $5,000
$7650	$10,450	$1777 + 33% of amount over $7,650
$10,450		$2701 + 35% of amount over $10,450

The 2007 Standard Deduction amounts are:

1. Married filing jointly or qualifying widow(er) – $10,700.

2. Single – $5350.

3. Head of household – $7850.

4. Married filing separately – $5350.[76]

Reduction of Itemized Deductions. (IRC § 68) Otherwise allowable itemized deductions are reduced if AGI in 2007 exceeds:

1. Married filing separately - $78,200.
2. All other returns - $156,400.[77]

The amount of the 2007 Personal Exemption is $3400.

2007 Phase Out Amounts for personal exemptions under IRC § 151(d)(3) are:

Taxpayer	Begins After	Fully Phased Out*
Married filing jointly	$234,600	$357,100
Single	$156,400	$278,900
Head of household	$195,500	$318,000
Married filing separately	$117,300	$178,550[78]

* Phase-out occurs at rate of 2% for each $2500 or part of $2500 ($1250 in both cases for married filing separately) by which the taxpayer's adjusted gross income exceeds the "Begins After" amount. The exemption amount for taxpayers which adjusted gross income in excess of the maximum phase out amount is $1133.

[76] *Id.*

[77] *Id.*

[78] *Id.*

Note from the Field

Colonel John Siemietkowski, USAR[1]

E-Discovery Amendments to Federal Rules of Civil Procedure Celebrate First Anniversary

For those Judge Advocates practicing civil litigation in U.S. district courts, or supporting those who do, important amendments to the Federal Rules of Civil Procedure (Rule(s)) celebrated their first anniversary on 1 December 2007.[2] Recognizing the burgeoning role of electronically stored information (ESI)[3] in daily life, the amendments implement significant changes in the area of electronic discovery. The amendments cover Rules 16, 26, 33, 34, 37, and 45.

Early in litigation, attorneys for all parties must address e-discovery issues. A new provision in Rule 16 states that the scheduling order may address "disclosure or discovery" of ESI.[4] An addition to Rule 26 also requires the parties to consider during the initial discovery conference "any issues about disclosure or discovery of [ESI], including the form or forms in which it should be produced."[5] Such early planning is not optional: Rule 26(f) directs the "parties to discuss discovery of [ESI] if such discovery is contemplated in the action."[6]

The amendments also affect the mandatory disclosure provisions of Rule 26. Rule 26(a)(1), which requires litigants to provide, "without awaiting a discovery request,"[7] notice of evidence they intend to use in prosecuting or defending their claims, now requires "a copy—or a description by category and location— of all . . . [ESI] . . . that the disclosing party has in its possession, custody, or control . . . ."[8] Considering ESI's "broad meaning,"[9] and in view of the breadth of electronically-stored documents, communications and data, this new requirement presents a daunting challenge. However, note that Rule 26(a)(1)(A)(ii) does not require production of all identified ESI; it just requires the disclosure of its existence.

The practitioner's true challenge comes in gathering and actually producing the ESI requested by opposing counsel. In this regard, the new Rule 26 provides some relief: "A party need not provide discovery of [ESI] from sources that the party identifies as not reasonably accessible because of undue burden or cost."[10] Because "undue" is in the eye of the beholder, the Committee Note devotes nearly five pages to explaining this concept.[11] Acknowledging many differences in the volume and type of ESI held by parties, the note states that ESI "systems often make it easier to locate and retrieve information. . . . But some sources of electronically stored information can be accessed only with substantial burden and cost."[12] If the parties cannot agree on a reasonable balance between needed discovery and an undue burden, the note suggests seven factors to help a court resolve a discovery dispute:

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[1] Military Judge, 1st Judicial Circuit, U.S. Army Trial Judiciary, Fort Campbell, Ky.

[2] *Amendments to the Federal Rules of Civil Procedure*, *at* http://www.uscourts.gov/rules/EDiscovery_w_Notes.pdf (last visited Jan. 22, 2008) [hereinafter *Amendments*].

[3] ESI refers to data stored in an electronic, as opposed to a paper, format. Such electronic formats may include hard drives, disks, thumb drives, backup tapes, and even off-site electronic archiving facilities. *See generally* Craig Ball, *Hitting the High Points of the New e-Discovery Rules*, LAW PRACTICE TODAY, http://www.abanet.org/lpm/lpt/articles/tch10061.shtml (Oct. 2006). Examples of ESI include word-processing documents, spreadsheets, and e-mails. *See* Tom Mighell, *The New Federal Rules—Are You Ready?*, 69 TEX. B.J., Dec. 2006, at 1042.

[4] FED. R. CIV. P. 16(b)(3)(B)(iii).

[5] *Id.* at 26(f)(3)(C).

[6] *Amendments*, *supra* note 2, at 3 (R. 16(b)) (Comm. note).

[7] FED. R. CIV. P. 26(a)(1)(A).

[8] *Id.* at 26(a)(1)(A)(ii).

[9] *Amendments*, *supra* note 2, at 12 (R. 26(a)) (Comm. note).

[10] FED. R. CIV. P. 26(b)(2)(B).

[11] *Amendments*, *supra* note 2, at 13–17 (R. 26(b)(2)) (Comm. note).

[12] *Id.* at 13.

> (1) the specificity of the discovery request; (2) the quantity of information available from other and more easily accessed sources; (3) the failure to produce relevant information that seems likely to have existed but is no longer available on more easily accessed sources; (4) the likelihood of finding relevant, responsive information that cannot be obtained from other, more easily accessed sources; (5) predictions as to the importance and usefulness of the further information; (6) the importance of the issues at stake in the litigation; and (7) the parties' resources.[13]

In developing a record to argue these factors, the parties may need to take discovery about the discovery. Such discovery may take various forms.[14] Counsel also should remember that the final production rarely will result in an all-or-nothing output: "The conditions [on production] may take the form of limits on the amount, type, or sources of information required to be accessed and produced. The conditions may also include payment by the requesting party of part or all of the reasonable costs . . . ."[15]

When producing large volumes of electronic discovery, practitioners are more at risk of inadvertently disclosing material that is subject to a claim of privilege.

> [A]s the volume of information grows exponentially with the ascendancy of ESI, we are fast losing the ability to review individual items, and it's increasingly common for privileged and non-privileged content to insidiously mix, as occurs when, e.g., a privileged exchange is an embedded thread in an apparently benign e-mail.[16]

Fortunately, the amendments provide attorneys with a process for attempting to "clawback"[17] privileged information inadvertently produced. If a party accidentally produces material that it believes privileged, it may notify the opposing party of its claim.[18] Upon receipt, the opposing party "must promptly return, sequester, or destroy the specified information and any copies it has; [and] must not use or disclose the information until the claim is resolved."[19] Note that the new rule does not require the opposing party to agree to the claim of privilege, nor does the new rule address whether the inadvertent disclosure constitutes a waiver of the claimed privilege.[20]

Along with the general discovery provisions of Rule 26, the amendments also affect specific types of discovery permitted by Rules 33 and 34. Rule 33, Interrogatories to Parties, adds a reference to ESI in the production of business records.[21] Rule 34 addresses requests for production and adds a reference to ESI in its title and in its text as an example of data a party may request and must produce.[22] The new Rule 34 also addresses the form in which a party may request and produce ESI. Regarding the request, Rule 34 states that the request "may specify the form or forms in which [ESI] is to be produced."[23] Regarding production, Rule 34 states that "if a request does not specify the form or forms for producing [ESI], a party must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms."[24] Unlike the relatively straightforward production of paper, for ESI, the Committee Note clarifies that "the responding party must state the form it intends to use for producing [ESI] if the requesting party does not specify a form or if the responding

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[13] *Id.* at 16.

[14] *Id.* at 15.

[15] *Id.* at 17.

[16] Ball, *supra* note 3.

[17] *Id.*; *Amendments*, *supra* note 2, at 25 (R. 26(f)) (Comm. note).

[18] FED. R. CIV. P. 26(b)(5)(B).

[19] *Id.*

[20] *Amendments*, *supra* note 2, at 18 (R. 26(b)(5)(B)) (Comm. note).

[21] FED. R. CIV. P. 33(d).

[22] *Id.* at 34, 34(a).

[23] *Id.* at 34(b)(1)(C).

[24] *Id.* at 34(b)(2)(E)(ii).

party objects to a form that the requesting party specifies."[25] The Note also prohibits the producing party from tampering with the ESI to render it less usable to the requesting party: "If the responding party ordinarily maintains the information it is producing in a way that makes it searchable by electronic means, the information should not be produced in a form that removes or significantly degrades this feature."[26]

Navigating these new rules can be tricky for even the most experienced litigator. Fortunately, the amendments include a "safe harbor" provision to guard practitioners from sanctions imposed by intemperate judges. Rule 37(e) provides: "Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide [ESI] lost as a result of the routine, good-faith operation of an electronic information system."[27] Of course, "exceptional circumstances," "routine," and "good-faith" are in the eye of the beholder. Helpfully, the Committee Note somewhat elucidates routine and good-faith. The Note recognizes that "[m]any steps essential to computer operation may alter or destroy information, for reasons that have nothing to do with how that information might relate to litigation."[28] It notes that "[t]he 'routine operation' of computer systems includes the alteration and overwriting of information, often without the operator's specific direction or awareness . . . ."[29] However, "[g]ood faith in the routine operation of an information system may involve a party's intervention to modify or suspend certain features of that routine operation to prevent the loss of information."[30] This is particularly true "[w]hen a party is under a duty to preserve information because of pending or reasonably anticipated litigation . . . ."[31] Moreover, though this safe harbor protects against sanctions under Rule 37, it does not affect other sources of sanctions.[32]

The last e-discovery amendment to the Federal Rules is Rule 45, affecting subpoenas. It simply provides that a "subpoena may specify the form or forms in which [ESI] is to be produced."[33] It also contains clauses that parallel Rule 26(b)(2) in terms of producing ESI in a form in which "it is ordinarily maintained,"[34] not producing ESI in more than one form,[35] and not producing ESI that is not "reasonably accessible because of undue burden or cost."[36]

Judge Advocates engaged in civil practice in federal court must familiarize themselves with these amendments. Beyond that, though, they must master those information technology topics necessary to successfully advance their clients' interests. This is especially challenging in an area like IT that is constantly changing, yet the amendments require practitioners to recognize that such technology is not static. While "[i]t is not possible to define in a rule the different types of technological features that may affect the burdens and costs of accessing [ESI],"[37] the amendments are "intended to be broad enough to cover all current types of computer-based information, and flexible enough to encompass future changes and developments."[38] Successful representation will require familiarity with such terms as "embedded data"[39] and "metadata."[40]

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[25] *Amendments*, *supra* note 2, at 38 (R. 34(b)) (Comm. note).

[26] *Id.* at 39.

[27] FED. R. CIV. P. 37(e).

[28] *Amendments*, *supra* note 2, at 41 (R. 37(f)) (Comm. note).

[29] *Id.*

[30] *Id.* at 41–42.

[31] *Id.* at 42.

[32] *Id.* at 43.

[33] FED. R. CIV. P. 45(a)(1)(C).

[34] *Id.* at 45(d)(1)(B).

[35] *Id.* at 45(d)(1)(C).

[36] *Id.* at 45(d)(1)(D).

[37] *Amendments*, *supra* note 2, at 13 (R. 26(b)(2)) (Comm. note).

[38] *Id.* at 34 (R. 34(a)(1) Comm. note).

[39] Embedded data refers to information that is not readily apparent to a reader, but that is electronically hidden in a document. Examples include draft language, edits, and editorial comments. *Id.* at 24 (R. 26(f)) (Comm. note).

Whether propounding or answering a discovery request, attorneys should know such basics as "[b]ack-up tapes are the classic example of material that isn't reasonably accessible, while Word documents should be produced without a fight."[41]

Defensively, lawyers must learn their clients' data preservation systems so that they can better represent those clients in discovery negotiations and disputes. That means learning the clients' "back up and retention practices, customary formats and applications, [and] data location . . . ."[42] It means suggesting that your opponent sample parts of the requested data "to assess its value to the case"[43] before producing all of it, and perhaps insisting on "data filtering and keyword searches . . . to narrow the scope of review and production."[44] It may require the design of creative protocols such as "clawbacks" and "quick peeks."[45]

Offensively, litigators should remember all of the above, and also think creatively about who stores your opponent's ESI that you are seeking. For example, an attorney may want to ask opposing counsel to produce ESI from contractors, accountants, counsel and off-site data storage providers.[46] When making such requests, however, practitioners must remember that "[a] party need not produce the same [ESI] in more than one form,"[47] and that the Rules do not favor "[c]omplete or broad cessation of a party's routine computer operations [that] could paralyze the party's activities."[48]

In navigating the new amendments, Judge Advocates should refer often to the Rules themselves and the text of the Committee Notes. Two additional, very helpful, resources are web sites sponsored by Discovery Resources[49] and a Mr. Ken Withers.[50] The Discovery Resources website is especially informative as it includes not only many articles by practitioners, but also a running list of reported cases addressing e-discovery issues.

The e-discovery amendments to the Federal Rules of Civil Procedure, one-year old on 1 December 2006, require federal court litigators to understand and consider a broader range of data when formulating or answering a discovery request. Judge Advocates engaged in civil litigation would be wise to familiarize themselves with these amendments, as well as the technology that led to their implementation.

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[40] Metadata is data about data. It includes information about the "history, tracking, or management" of data, such as who received an email, who read it, and when they received and read it. *Id.*

[41] Correy E. Stephenson, *E-discovery for Everyone: The New Federal Rules of Civil Procedure*, LAW. WKLY. USA, Nov. 6, 2006, http://www.lawyersusaonline.com/subscriber/archives_FTS.cfm?page=USA/06/B06061.htm&recID=389484&QueryText=e%2Ddiscovery%20and%20everyone.

[42] Ball, *supra* note 3.

[43] *Id.*

[44] *Id.*

[45] *Id.*; *Amendments*, *supra* note 2, at 25 (R. 26(f)) (Comm. Note).

[46] Ball, *supra* note 3.

[47] FED. R. CIV. P. 34(b)(2)(E)(iii).

[48] *Amendments*, *supra* note 2, at 23 (R. 26(f)) (Comm. Note) (citation omitted).

[49] Discovery Resources, http://discoveryresources.org (last visited Jan. 22, 2008).

[50] kenwithers.com, http://www.kenwithers.com/ (last visited Jan 22, 2008) (showing Mr. Withers as a Senior Judicial Education Attorney at the Federal Judicial Center in Washington, D.C., with a professional and personal interest in e-discovery and judicial technology).

Book Review

AMERICAN PATRIOT: THE LIFE AND WARS OF COLONEL BUD DAY[1]

BY MAJOR KIRSTEN M. DOWDY[2]

Robert Coram's *American Patriot, The Life and Wars of Colonel Bud Day*, successfully introduces its readers to a real American war hero. Coram's biography of Colonel (Col) (Retired) George "Bud" Everette Day is empowering. It is equally humbling, as readers are surrounded by Col Day's unwavering strength and endless achievements. Colonel Day is a Marine, an Army officer, an Air Force fighter pilot, a Vietnam Prisoner of War (POW), a Medal of Honor winner, and an accomplished attorney. This biography is not only engrossing to a casual reader, but Col Day's story is highly relevant to military men and women today, as this nation continues to fight the war on terrorism.

Readers serving in the military will be immediately struck by *American Patriot*'s simple and obvious message. Donning a military uniform in this country is like signing a contract. This contract demands those wearing it to "live their lives based on clear values—a code of honor and loyalty, a patriotism, a commitment, and a discipline that place[s] them on a moral high ground."[3] While this message may not sound profound or original, Coram's book about Col Day's life gives this old theory new meaning. It compels military members to critically ask themselves if they truly understand what it means to live this way, even when it seems impossible. More specifically, this book forces those wearing a uniform to take a cold, hard look in the mirror and question their own ability to comply with the Code of Conduct upon capture and "[r]eturn with honor."[4]

Coram's *American Patriot* has three major weaknesses and three major strengths. Its first weakness is that Col Day's life story is abruptly ended with a lengthy description of a documentary against Senator John Kerry, which contributes little to support Coram's ultimate message. Second, Coram glosses over Col Day's heavy involvement in the changes made to the Code of Conduct following Vietnam, even though this fact is extremely relevant to his message. Finally, Coram makes a distracting contradiction throughout his book, when he insinuates that Col Day is straight-lined, yet describes the life of a rebel. Ironically, this last weakness is also this book's first major strength. Coram's depiction of Col Day as someone who does not always walk the straight and narrow, prevents readers from viewing Col Day as extraordinary and makes him a human being to emulate. A second strength is that Coram relied on many different sources to write Col Day's story, even those sources who may ultimately disagree with his message. Finally, as stated above, Coram's biography has relevance and applicability to today's military.

Coram spends eighteen well-organized chapters in *American Patriot* describing how Col Day spent his life swimming upstream to reach the "moral high ground."[5] Colonel Day grew up watching his father emotionally abuse his mother and sister and defending himself against bullies. He disobeyed his father and dropped out of school at seventeen to enlist in the Marines, standing at just five foot two and weighing a mere 116 pounds.[6] Later, as an Air Force officer, Col Day was sent to Vietnam where he commanded an elite flying outfit called Misty[7] and was shot out of the sky by a missile. Colonel Day was captured by the North Vietnamese and spent nearly six grueling years as a POW.[8] After his release, Col Day sued the government he so bravely defended, when he discovered that the military had reneged on their promise of free medical care for life.[9] *American Patriot*'s final chapter is devoted to Col Day's movement against Senator Kerry during the 2004

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[1] ROBERT CORAM, AMERICAN PATRIOT: THE LIFE AND WARS OF BUD DAY (2007).

[2] Judge Advocate, U.S. Army. Student, 56th Judge Advocate Officer Graduate Course, The Judge Advocate General's Legal Ctr. & Sch., U.S. Army, Charlottesville, Va.

[3] CORAM, *supra* note 1, at xii.

[4] *Id*. at 5, 209, 213, 214. *See also* GEORGE E. DAY, RETURN WITH HONOR (1991).

[5] CORAM, *supra* note 1, at xii.

[6] *See id*. at 27.

[7] Colonel Day named this outfit "Misty" after his favorite song, which was recorded by Johnny Mathis in 1959. *See id.* at 98–99, 124. *See also* Robert D. Kaplan, *Rereading Vietnam*, THE ATLANTIC.COM, Aug. 24, 2007, http://www/theatlantic.com/doc/200708u/kaplan-vietnam.

[8] *See* CORAM, *supra* note 1, at 135–254.

[9] *See id.* at 305–44.

Presidential Campaign.[10] More specifically, Coram describes Col Day's involvement in a documentary regarding Senator Kerry's 1971 statement before the Senate Foreign Relations Committee.[11]

It is obvious that Col Day has nothing but complete disdain for Senator Kerry. It is further true that Col Day has devoted time to spreading his opinion that Senator Kerry is a traitor and that electing him as the President in 2004 would have been "[r]idiculous[, u]nthinkable[, u]nbelievable[, and o]utrageous."[12] However, concluding this biography with an entire chapter devoted to Col Day's efforts to thwart Senator Kerry in 2004 seems to deflate the intended message that Col Day is a military man with "clear values" who lives "on a moral high ground."[13] Quite frankly, this chapter makes Col Day seem petty and vengeful and has little relevance or applicability to today's readers.

The fact that Senator Kerry's testimony was used by North Vietnamese captors to substantiate their belief that the American POWs were criminals[14] and referred to when the POWs were "called to quiz,"[15] provides readers with all they need to understand why this war hero hates Senator Kerry. Instead of expanding on Col Day's disdain for this man by describing his efforts to undermine Senator Kerry, Coram should have focused on a topic that lends support to his message and is more relevant and applicable to today's military.

A highly relevant topic that Coram glosses over[16] in this biography is Col Day's direct involvement in the changes that were made to the Code of Conduct by President Jimmy Carter in 1977.[17] When asked about this topic, Coram explains that "while interesting, it was not directly relevant to the thrust of Bud Day's story."[18] Colonel Day's devotion to the Code of Conduct *is* the "thrust of Bud Day's story."[19] Additionally, the changes to the Code of Conduct following Vietnam are extremely relevant to military members today who face the possibility of capture.

In 1977, Col Day was the Air Force representative on the board assigned with the task of reviewing the Code of Conduct and determining if revisions were needed.[20] One of the main revisions examined by this board was whether the word "only" should be eliminated from Article V's sentence, "I am required to give only name, rank, service number and date of birth."[21] Colonel Day states that the senior military leadership, including him, all recognized the need to delete this word from the Code of Conduct because it was unrealistic.[22] However, the first day that this board met, there was some opposition to this

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[10] *See id.* at 345–62.

[11] *Id.* at 356–62. In the beginning of chapter thirteen of *American Patriot*, Coram describes how Senator Kerry's 1971 testimony was shown to the American POWs by their captors. *See id.* at 243. The POWs watched in astonishment. *Id.* Senator Kerry testified that during the Vietnam War, American military men had "raped, cut off ears, cut off heads . . . randomly shot at civilians . . . and generally ravaged the countryside of South Vietnam . . . ." *Legislative Proposals Relating to the War in Southeast Asia: Hearing Before the Subcomm. on Foreign Relations*, 92nd Cong. 180 (1971) (statement of John Kerry, Vietnam Veteran).

[12] CORAM, *supra* note 1, at 353 (quoting e-mail from Col George "Bud" Day (4 Oct. 2004, 06:45:49 PDT) (on file with author).

[13] *Id.* at xii.

[14] *See id.* at 243. North Vietnamese guards classified Americans POWs as criminals claiming that this status afforded them no protections under the Geneva Convention. *See id.* at 239.

[15] *Id.* at 243.

[16] *See id.* at 283.

[17] Exec. Order No. 12,017, 3 C.F.R. 152 (1977), *reprinted as amended in* 10 U.S.C. § 802 (2000).

[18] E-mail from Robert Coram, Author, to Major Kirsten M. Dowdy (29 Aug. 2007, 09:44 EST) (on file with author).

[19] *Id.*

[20] *See* DEFENSE REVIEW COMMITTEE, REPORT OF THE 1976 DEFENSE REVIEW COMMITTEE FOR THE CODE OF CONDUCT (1976), *available at* http://www.dod.mil/pubs/foi/reading_room/13.pdf. This committee consisted of eleven total members and was chaired by Mr. John F. Ahearne, Acting Assistant Secretary of Defense, Manpower and Reserve Affairs. Along with the elimination of the word "only" in Article V, the committee also discussed topics such as UCMJ punishment for violations of the Code of Conduct, Code of Conduct training, and the extent of the power of the senior ranking officer in a POW camp.

[21] Exec. Order No. 10,631, 3 C.F.R. 266 (1954–1958), *reprinted as amended in* 10 U.S.C. § 802 (2000).

[22] E-mail from Col George "Bud" Day, to Major Kirsten M. Dowdy (7 Sept. 2007, 12:09 EST) [hereinafter Day e-mail, 7 Sept. 2007, 12:09 EST] (on file with author).

change. There was "a concern that dropping the word 'only' would somehow or another weaken and gut the Code."[23] Colonel Day explains that this concern "was [the] kind of mealy-mouthed stuff which the [Vietnam] POWs listened to without any enthusiasm . . . ."[24] Colonel Day goes on to explain that "within a day or two it became clear that the voters were going to be voting to drop that word . . . and the civvie leader really did not intend to get crosswise with [the Vietnam] POWs." [25] The word "only" was in fact dropped from the Code of Conduct.[26]

The majority of Coram's biography is focused around Col Day's commitment to the Code of Conduct. His desire to want to change this Code that he lived by for almost six years in captivity is not a topic that should be ignored in Col Day's biography. Coram left an enormous hole in his book by not addressing Col Day's involvement in and opinion of the 1977 changes to the Code of Conduct.

This book's final weakness involves Coram's numerous contradictions about what type of person Col Day is. Throughout his book, Coram makes statements that insinuate Col Day is a man who always walks the straight and narrow and never breaks the rules. For instance, he writes, "[b]lack and white, right or wrong, good or bad—that's the world of Bud Day."[27] Coram adds that Col Day is "a soft-spoken and kind man, with elaborate, almost Victorian manners."[28] Similarly, Coram describes Col Day and his wife as "slightly prudish," explaining that the officer's club parties were "too wild for them."[29]

However, Coram ultimately contradicts each of these statements by portraying Col Day as a hot-tempered man who often acts without thought of natural consequences. While enlisted in the Marines, Col Day attempted to make homemade liquor to sell to other Marines. He also broke restriction and stole a Navy officer's jeep. He faced a summary court martial for the latter two offenses and was sentenced to twenty-eight days confinement and a reduction in rank from a Corporal to a Private First Class.[30] As an Air Force officer, Col Day was insubordinate on more than one occasion.[31] He also destroyed government property during pilot survival training in Germany.[32] Further, Col Day punched a subordinate officer in the face in the officer's club.[33] Finally, as a retiree Col Day organized rallies on the Capitol steps[34] and eventually sued the "government to which he had devoted most of his life."[35] Coram tells the story of a man who is constantly bucking the system, yet at the same time, to lend support to his message, tries to convince his readers that Col Day is a man who sees "only black or white."[36] This inconsistency is obvious and distracting to readers. It is as if Coram is describing two different people. Coram seems to make these contradictory statements throughout his book to convince his readers of his ultimate

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[23] E-mail from Col George "Bud" Day, to Major Kirsten M. Dowdy (7 Sept. 2007, 14:17 EST)) [hereinafter Day e-mail, 7 Sept. 2007, 14:17 EST] (on file with author).

[24] *Id.*

[25] *Id.*

[26] Exec. Order No. 12,017, 3 C.F.R. 152 (1977), *reprinted as amended in* 10 U.S.C. § 802 (2000). In support of this change, the board heard testimony from World War II POWs, Korean War POWs, and Vietnam War POWs, "including a couple of 'finks' who had taken early release." Day e-mail, 7 Sept. 2007, 14:17 EST, *supra* note 23. Colonel Day anxiously volunteered to be the board recorder because he saw it as an opportunity to have some control over the board. *See* Day e-mail, 7 Sept. 2007, 12:09 EST, *supra* note 22. His job was to "summarize and put in writing all of the discussion, witness testimony, docu[ment] examination . . . . [t]his was a very important job [because] if any doubt existed about what was said everyday . . . [he] got to settle the issue on [his] notes and progress reports." *Id.*

[27] CORAM, *supra* note 1, at 296.

[28] *Id.* at 107.

[29] *Id.* at 76.

[30] *See id.* at 37–41.

[31] *See id.* at 69, 79, 129.

[32] *See id.* at 85.

[33] *See id.* at 280.

[34] *See id.* at 325.

[35] *Id.* at 310.

[36] E-mail from Robert Coram, Author, to Major Kirsten M. Dowdy (28 Aug. 2007, 18:16 EST)) (on file with author) (quoting conversation with Senator John McCain).

message, that Col Day is a man who lives his life "based on clear values" and should be placed "on a moral high ground."[37] This is unnecessary. Colonel Day is obviously not a rule follower. He is not a man who sees only good and bad or black and white. He is not a soft-spoken, prudish man. However, these characteristics aren't necessarily what place a person "on a moral high ground."[38] Coram's biography successfully places Col Day on this high ground by merely describing his honorable actions. This same man of honor, however, is cocky, feisty, and rebellious.

Coram should embrace Col Day's fiery personality and eliminate the attempts to convince his readers of this starchy facade. Colonel Day's brash personality complicates, but in no way invalidates Coram's ultimate message that Col Day has "clear values" and should be placed on a "moral high ground."[39]

The above stated weakness is ironically *American Patriot*'s first major strength. In his attempt to portray Col Day as a man who is straight-lined, Coram fortunately achieves the opposite. This biography allows its readers to meet a man who is human. Coram, unintentionally,[40] but brilliantly, pulls the pedestal out from under Col Day.

It is too easy to read a biography of a military war hero such as Col Day and falsely regard the subject as an obscure superhero rather than a role model. By choosing to include Col Day's blemishes, Coram allows his readers to relate to this man of honor. He is a real person who was able to do what it took to "[r]eturn with honor."[41] Coram strengthens his message that *everyone* who wears a uniform signed a contract and is expected to perform honorably in captivity, by constantly reminding readers that Col Day is not a fictional character.

American Patriot's second major strength is that Coram wrote this book after contacting numerous sources first hand.[42] Coram did not only contact those sources who would support his opinion about Col Day, but he also contacted many who he knew would resent his message. Therefore, it seems that Coram wrote this book after hearing all sides of the story.[43]

Coram readily admits that he "went native"[44] when writing this book. There is no doubt that Coram is partial to Col Day.[45] However, this partiality did not stop him from fully investigating his subject. Coram, not only spoke to proponents of Col Day, like Air Force Col (Retired) Larry Guarino, a fellow POW and Doris Day, his wife, but also spoke with Norris Overly,[46] an early release and Senator John McCain, who was portrayed as an arrogant womanizer in this book.[47] Coram's

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[37] CORAM, *supra* note 1, at xii.

[38] *Id.*

[39] *Id.*

[40] It is conceivable that Coram exposed Col Day's court-martial and other UCMJ violations to allow readers to draw similarities between Col Day and himself. Coram's preface indicates that while in the military he himself was court-martialed three different times. *See id.* When probed further, Coram states that two court-martials involved having a female in his barracks. The last court martial involved getting drunk, signing out a government vehicle from the motor pool, and stealing some minor pieces of warehouse furniture. This incident is remarkably similar to Col Day's theft of the Navy officer's jeep. *See* e-mail from Robert Coram, Author, to Major Kirsten M. Dowdy (28 Aug. 2007, 17:51 EST) [hereinafter Coram e-mail, 28 Aug. 2007, 17:51 EST] (on file with author).

[41] *See supra* note 4.

[42] *See id.* at 379–80.

[43] Ironically, Coram's dedication in *American Patriot* reads, "Every story has at least two sides." *Id.* at dedication page. Coram states that his intent was to dedicate this book to his daughter who he has "not seen for 30 years and it regards whatever story her mother might have told her about [their] divorce." Coram e-mail, 28 Aug. 2007, 17:51 EST, *supra* note 40.

[44] CORAM, *supra* note 1, at xii.

[45] Coram spent many years with Col Day researching this book and they still maintain close contact. *See* e-mail from Robert Coram, Author, to Major Kirsten M. Dowdy (29 Aug. 2007, 09:53 EST)) (on file with author). Coram states that in Col Day he sees "personified all that [his] father had tried to teach [him] about the military and all that [he] had rejected." Coram e-mail, 28 Aug. 2007, 17:51 EST, *supra* note 40.

[46] Coram was surprised that Norris Overly agreed to speak with him regarding his early release. *See* e-mail from Robert Coram, Author, to Major Kirsten M. Dowdy (6 Sept. 2007, 14:42 EST) [hereinafter Coram e-mail, 6 Sept. 2007, 14:42 EST] (on file with author).

[47] *See* CORAM, *supra* note 1, at 187. Coram states that the majority of the information supporting this portrayal of Senator McCain was gathered from Norris Overly and Col (Ret.) Larry Guarino. Coram e-mail, 6 Sept. 2007, 14:42 EST, *supra* note 46. Coram further states that he heard similar accounts from other POWs who were in captivity with Senator McCain. *See id.* In Coram's words, "[Senator McCain] was a cocky little party animal trying to come out from under the shadow of his father and grandfather." *Id.* Orson Swindle, who currently works on Senator McCain's campaign, was upset with Coram's portrayal of Senator McCain. He did not tell Coram that it was inaccurate, only that it did not belong in a book about Col Day. *See id.*

professionalism and desire to get it right is clear in the fact that he contacted both favorable and unfavorable sources. Despite his own criticism that he "went native,"[48] this book is more balanced than he may have intended.[49]

American Patriot's third and final strength is its relevance and applicability to today's hostilities. Military members deploying to Iraq and Afghanistan might question why they should comply with the Geneva Convention, when the enemy clearly does not. This book explains that North Vietnamese captors claimed that American POWs could not enjoy the protections of the Geneva Convention because they were criminals.[50] While this certainly does not amount to compliance, these captors were at least watching the actions of American soldiers and felt a need to justify their actions under the Geneva Convention. This demonstrates that if these protections are ignored by this country, they will likewise be ignored by the observant enemy. If American soldiers comply with the Geneva Convention, their enemy may be influenced to do the same.

Similarly, this book is full of lessons about the Code of Conduct. For instance, this book illustrates how the senior member is expected to take charge in captivity in accordance with the Code of Conduct.[51] Further, this book shows that it is extremely important to train military members on the Code of Conduct, so they have rules to cling to if captured.[52] Finally, Coram's biography shows that those who violate the Code of Conduct will face consequences. Many of the early releases described in this book faced trials, most were given negative evaluations by their superiors, and all were snubbed by those who did not cooperate with the enemy.[53] Military members facing the possibility of capture today must understand that compliance with the Code of Conduct is not an option, it is a duty.

In conclusion, *American Patriot* is an exceptional book and will inspire even the most casual reader. Additionally, upon reading Coram's book, military men and women will be reminded that their contract with this country should not be taken lightly. As stated, this book is not without some flaws. However, its strengths certainly outweigh its weaknesses. Most notably, this book is extremely relevant and applicable to military members today as they face the possibility of capture and need to be reminded of what it means to "[r]eturn with honor."[54]

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[48] CORAM, *supra* note 1, at xii.

[49] An example of this balance can be seen with Coram's portrayal of Norris Overly. Overly was a roommate to Col Day and Senator McCain in captivity. Although he was despised for being an early release, Coram describes how Overly nursed both Col Day and Senator McCain back to health while in captivity. Coram may have unintentionally allowed readers to have a certain fondness for this man. *See id.* at 184-190. *See also* Ted Sampley, *John McCain Is No "Hero POW,"* U.S. VETERAN DISPATCH 4 (Nov. 1999), *available at* http://www.usvetdsp.com/mcianhro.htm (describing how Overly nursed Senator McCain back to health).

[50] *See supra* note 14.

[51] *See id.* at 197, 199, 223, 225, 232, 235, 237, 246.

[52] *See id.* at 86; *see also* Major Donna Miles, *Code of Conduct: Guide to Keeping the Faith*, ARMED FORCES PRESS SERV. NEWS ARTICLES (Apr. 27, 1999), *available at* http://www.defenselink.mil/news/newsarticle.aspx?id=42786; Robert K. Ruhl, *The Code of Conduct*, AIRMAN 63, 66 (May 1978), *available at* http://www.au.af.mil/au/awc/awcgate/au-24/ruhl.pdf (explaining that Code of Conduct training is complex because it deals "with what goes on in a guy's mind and whether we can help him stay in control of himself under what . . . are probably the most difficult situations he or any man may ever have to face."). *But see* Ted Sampley, *The Military Code of Conduct; It's Unrealistic and Deadly*, U.S. VETERAN DISPATCH (Aug./Sept. 1996), *available at* http://www.usvetdsp.com/story12.htm (arguing that the Code of Conduct is inadequate to protect POWs).

[53] CORAM, *supra* note 1, at 263–72.

[54] *See supra* note 4.

CLE News

1. Resident Course Quotas

a. Attendance at resident continuing legal education (CLE) courses at The Judge Advocate General's Legal Center and School, U.S. Army (TJAGLCS), is restricted to students who have confirmed reservations. Reservations for TJAGSA CLE courses are managed by the Army Training Requirements and Resources System (ATRRS), the Army-wide automated training system. If you do not have a confirmed reservation in ATRRS, attendance is prohibited.

b. Active duty service members and civilian employees must obtain reservations through their directorates training office. Reservists or ARNG must obtain reservations through their unit training offices or, if they are non-unit reservists, through the U.S. Army Personnel Center (ARPERCOM), ATTN: ARPC-OPB, 1 Reserve Way, St. Louis, MO 63132-5200.

c. Questions regarding courses should be directed first through the local ATRRS Quota Manager or the ATRRS School Manager, Academic Department at 1 (800) 552-3978, extension 3307.

d. The ATTRS Individual Student Record is available on-line. To verify a confirmed reservation, log into your individual AKO account and follow these instructions:

> Go to Self Service, My Education. Scroll to Globe Icon (not the AARTS Transcript Services). Go to ATTRS On-line, Student Menu, Individual Training Record. The training record with reservations and completions will be visible.
>
> If you do not see a particular entry for a course that you are registered for or have completed, see your local ATTRS Quota Manager or Training Coordinator for an update or correction.

e. The Judge Advocate General's School, U.S. Army, is an approved sponsor of CLE courses in all states that require mandatory continuing legal education. These states include: AL, AR, AZ, CA, CO, CT, DE, FL, GA, ID, IN, IA, KS, KY, LA, ME, MN, MS, MO, MT, NV, NH, NM, NY, NC, ND, OH, OK, OR, PA, RI, SC, TN, TX, UT, VT, VA, WA, WV, WI, and WY.

2. TJAGLCS CLE Course Schedule (June 2007 - October 2008) (http://www.jagcnet.army.mil/JAGCNETINTERNET/HOMEPAGES/AC/TJAGSAWEB.NSF/Main?OpenFrameset (click on Courses, Course Schedule))

ATTRS. No.	Course Title	Dates
	GENERAL	
5-27-C22	56th Judge Advocate Officer Graduate Course	13 Aug 07 – 22 May 08
5-27-C22	57th Judge Advocate Officer Graduate Course	11 Aug 08 – 22 May 09
5-27-C20 (Ph 2)	175th JAOBC/BOLC III	22 Feb – 7 May 08
5-27-C20 (Ph 2)	176th JAOBC/BOLC III	18 Jul – 1 Oct 08
5F-F1	201st Senior Officers Legal Orientation Course	24 – 28 Mar 08
5F-F1	202d Senior Officers Legal Orientation Course	9 – 13 Jun 08
5F-F1	203d Senior Officers Legal Orientation Course	8 – 12 Sep 08
5F-F52	38th Staff Judge Advocate Course	2 – 6 Jun 08
5F-F52S	11th SJA Team Leadership Course	2 – 4 Jun 08
JARC-181	2008 JA Professional Recruiting Conference	15 – 18 Jul 08

NCO ACADEMY COURSES		
600-BNCOC	3d BNCOC Common Core	10 – 28 Mar 08
600-BNCOC	4th BNCOC Common Core	8 – 29 May 08
600-BNCOC	5th BNCOC Common Core	4 – 22 Aug 08
512-27D30 (Ph 2)	2d Paralegal Specialist BNCOC	29 Jan – 29 Feb 08
512-27D30 (Ph 2)	3d Paralegal Specialist BNCOC	2 Apr – 2 May 08
512-27D30 (Ph 2)	4th Paralegal Specialist BNCOC	3 Jun – 3 Jul 08
512-27D30 (Ph 2)	5th Paralegal Specialist BNCOC	26 Aug – 26 Sep 08
512-27D40 (Ph 2)	2d Paralegal Specialist ANCOC	29 Jan – 29 Feb 08
512-27D40 (Ph 2)	3d Paralegal Specialist ANCOC	2 Apr – 2 May 08
512-27D40 (Ph 2)	4th Paralegal Specialist ANCOC	3 Jun – 3 Jul 08
512-27D40 (Ph 2)	5th Paralegal Specialist ANCOC	26 Aug – 26 Sep 08
WARRANT OFFICER COURSES		
7A-270A2	9th JA Warrant Officer Advanced Course	7 Jul – 1 Aug 08
7A-270A0	15th JA Warrant Officer Basic Course	27 May – 20 Jun 08
7A-270A1	19th Legal Administrators Course	16 – 20 Jun 08
ENLISTED COURSES		
512-27D/20/30	19th Law for Paralegal Course	24 – 28 Mar 08
512-27DC5	25th Court Reporter Course	28 Jan – 28 Mar 08
512-27DC5	26th Court Reporter Course	21 Apr – 20 Jun 08
512-27DC5	27th Court Reporter Course	28 Jul – 26 Sep 08
512-27DC7	9th Redictation Course	31 Mar – 11 Apr 08
512-27D-CLNCO	10th Chief Paralegal BCT NCO Course	21 – 25 Apr 08
512-27DCSP	17th Senior Paralegal Course	16 – 20 Jun 08

ADMINISTRATIVE AND CIVIL LAW		
5F-F23	62d Legal Assistance Course	5 – 9 May 08
5F-F202	6th Ethics Counselors Course	14 – 18 Apr 08
5F-F24	32d Administrative Law for Military Installations Course	17 – 21 Mar 08
5F-F24E	2008 USAREUR Administrative Law CLE	15 – 19 Sep 08
5F-F29	26th Federal Litigation Course	4 – 8 Aug 08
CONTRACT AND FISCAL LAW		
5F-F10	159th Contract Attorneys Course	3 – 11 Mar 08
5F-F10	160th Contract Attorneys Course	21 Jul – 1 Aug 08

5F-F101	2008 Procurement Fraud Course	26 – 30 May 08
5F-F103	2008 Advanced Contract Law Course	7 – 11 Apr 08
5F-F12	78th Fiscal Law Course	28 Apr – 2 May 08
5F-F13	4th Operational Contracting	12 – 14 Mar 08
CRIMINAL LAW		
5F-F33	51st Military Judge Course	21 Apr – 9 May 08
5F-F34	30th Criminal Law Advocacy Course	8 – 19 Sep 08

INTERNATIONAL AND OPERATIONAL LAW		
5F-F41	4th Intelligence Law Course	23 – 27 Jun 08
5F-F42	90th Law of War Course	7 – 11 Jul 08
5F-F43	4th Advanced Intelligence Law Course	25 – 27 Jun 08
5F-F44	3d Legal Issues Across the IO Spectrum	14 – 18 Jul 08
5F-F45	7th Domestic Operations Law Course	26 – 30 Nov 07
5F-F47	49th Operational Law Course	25 Feb – 7 Mar 08
5F-F47	50th Operational Law Course	28 Jul – 8 Aug 08
5F-F47E	2008 USAREUR Operational Law CLE	28 Apr – 2 May 08
5F-F48	1st Rule of Law Course	9 – 13 Jun 08

3. Naval Justice School and FY 2008 Course Schedule

For information on the following courses, please contact Jerry Gallant, Registrar, Naval Justice School, 360 Elliot Street, Newport, RI 02841 at (401) 841-3807, extension 131.

Naval Justice School Newport, RI		
CDP	**Course Title**	**Dates**
BOLT	BOLT (020) BOLT (020) BOLT (030) BOLT (030)	24 – 28 Mar 08 (USMC) 24 – 28 Mar 08 (USN 4 – 8 Aug 08 (USMC) 4 – 8 Aug 08 (USN)
900B	Reserve Lawyer Course (010) Reserve Lawyer Course (020)	10 – 14 Mar 08 22 – 26 Sep 08
850T	SJA/E-Law Course (010) SJA/E-Law Course (020)	12 – 23 May 08 28 Jul – 8 Aug 08
786R	Advanced SJA/Ethics (010) Advanced SJA/Ethics (020)	24 – 28 Mar 08 (San Diego) 14 – 18 Apr (Norfolk)

850V	Law of Military Operations (010)	16 – 27 Jun 08
4044	Joint Operational Law Training (010)	21 – 24 Jul 08
0258	Senior Officer (020) Senior Officer (030) Senior Officer (040) Senior Officer (050) Senior Officer (060) Senior Officer (070)	10 – 14 Mar 08 (Newport) 5 – 9 May 08 (Newport) 9 – 13 Jun 08 (Newport) 21 – 25 Jul 08 (Newport) 18 – 22 Aug 08 (Newport) 22– 26 Sep 08 (Newport)
4048	Estate Planning (010)	21 – 25 Jul 08
748A	Law of Naval Operations (010) Law of Naval Operations (020)	3 – 7 Mar 08 15 – 19 Sep 08
7485	Litigating National Security (010)	29 Apr – 1 May 08 (Andrews AFB)
748K	USMC Trial Advocacy Training (020) USMC Trial Advocacy Training (030) USMC Trial Advocacy Training (040)	12 – 16 May 08 (Okinawa) 19 – 23 May 08 (Pearl Harbor) 15 – 19 Sep 08 (San Diego)
2205	Defense Trial Enhancement (010)	12 – 16 May 08
3938	Computer Crimes (010)	19 – 23 May 08 (Newport)
961J	Defending Complex Cases (010)	18 – 22 Aug 08
525N	Prosecuting Complex Cases (010)	11 – 15 Aug 08
2622	Senior Officer (Fleet) (040) Senior Officer (Fleet) (050) Senior Officer (Fleet) (060) Senior Officer (Fleet) (070) Senior Officer (Fleet) (080) Senior Officer (Fleet) (090) Senior Officer (Fleet) (100) Senior Officer (Fleet) (110)	13 – 7 Mar 08 (Pensacola) 14 – 18 Apr 08 (Pensacola) 28 Apr – 2 May 08 (Naples, Italy) 9 – 13 Jun 08 (Pensacola) 16 – 20 Jun 08 (Quantico) 23 – 27 Jun 08 (Camp Lejeune) 14 – 18 Jul 08 (Pensacola) 11 – 15 Aug 08 (Pensacola)
961A (PACOM)	Continuing Legal Education (010) Continuing Legal Education (020)	4 – 5 Feb 08 (Yokosuka) 1 – 2 May 08 (Naples)
7878	Legal Assistance Paralegal Course (010)	31 Mar – 5 Apr 08

03RF	Legalman Accession Course (020) Legalman Accession Course (030)	22 Jan – 4 Apr 08 9 Jun – 22 Aug 08
846L	Senior Legalman Leadership Course (010) Senior Legalman Leadership Course (010)	18 – 22 Aug 08
049N	Reserve Legalman Course (Phase I) (010)	21 Apr – 2 May 08
056L	Reserve Legalman Course (Phase II) (010)	5 – 16 May 08
846M	Reserve Legalman Course (Phase III) (010)	19 – 30 May 08
5764	LN/Legal Specialist Mid-Career Course (020)	5 – 16 May 08

4040	Paralegal Research & Writing (010) Paralegal Research & Writing (020) Paralegal Research & Writing (030)	21 Apr – 2 May 08 16 – 27 Jun 08 (Norfolk) 14 – 25 Jul 08 (San Diego)
4046	SJA Legalman (010) SJA Legalman (020)	25 Feb – 7 Mar 08 (San Diego) 12 – 23 May 08 (Norfolk)
7487	Family Law/Consumer Law (010)	31 Mar – 4 Apr 08
627S	Senior Enlisted Leadership Course (Fleet) (070) Senior Enlisted Leadership Course (Fleet) (080) Senior Enlisted Leadership Course (Fleet) (090) Senior Enlisted Leadership Course (Fleet) (100) Senior Enlisted Leadership Course (Fleet) (110) Senior Enlisted Leadership Course (Fleet) (120) Senior Enlisted Leadership Course (Fleet) (130) Senior Enlisted Leadership Course (Fleet) (140) Senior Enlisted Leadership Course (Fleet) (150) Senior Enlisted Leadership Course (Fleet) (160) Senior Enlisted Leadership Course (Fleet) (170)	20 – 22 Feb 08 (Norfolk) 18 – 20 Mar 08 (San Diego) 31 Mar – 2 Apr 08 (Norfolk) 14 – 16 Apr 08 (Bremerton) 22 – 24 Apr 08 (San Diego) 28 – 30 Apr 08 (Naples) 19 – 21 May 08 (Norfolk) 8 – 10 Jul 08 (San Diego) 4 – 6 Aug 08 (Millington) 25 – 27 Aug 08 (Pendleton) 2 – 4 Sep 08 (Norfolk)
Naval Justice School Detachment Norfolk, VA		
0376	Legal Officer Course (040) Legal Officer Course (050) Legal Officer Course (060) Legal Officer Course (070) Legal Officer Course (080)	10 – 28 Mar 08 28 Apr – 16 May 08 2 – 20 Jun 08 7 – 25 Jul 08 8 – 26 Sep 08
	Legal Clerk Course (040) Legal Clerk Course (050) Legal Clerk Course (060) Legal Clerk Course (070)	10 – 21 Mar 08 21 Apr – 2 May 08 7 – 18 Jul 08 8 – 19 Sep 08
3760	Senior Officer Course (030) Senior Officer Course (040) Senior Officer Course (050) Senior Officer Course (060) Senior Officer Course (070)	25 – 29 Feb 08 7 – 11 Apr 08 23 – 27 Jun 08 4 – 8 Aug 08 (Millington) 25 – 29 Aug 08
4046	Military Justice Course for SJA/Convening Authority/Shipboard Legalman (020)	16 – 27 Jun 08

Naval Justice School Detachment San Diego, CA		
947H	Legal Officer Course (040) Legal Officer Course (050) Legal Officer Course (060) Legal Officer Course (070) Legal Officer Course (080)	25 Feb – 14 Mar 08 5 – 23 May 08 9 – 27 Jun 08 28 Jul – 15 Aug 08 8 – 26 Sep 08

947J	Legal Clerk Course (040) Legal Clerk Course (050) Legal Clerk Course (060) Legal Clerk Course (070) Legal Clerk Course (080)	31 Mar – 11 Apr 08 5 – 16 May 08 9 – 20 Jun 08 28 Jul – 8 Aug 08 8 – 18 Sep 08

3759	Senior Officer Course (040) Senior Officer Course (050) Senior Officer Course (060) Senior Officer Course (070) Senior Officer Course (080)	31 Mar – 4 Apr 08 (San Diego) 14 – 18 Apr 08 (Bremerton) 28 Apr – 2 May 08 (San Diego) 2 – 6 Jun 08 (San Diego) 25 – 29 Aug 08 (Pendleton)
4046	Military Justice Course for Staff Judge Advocate/ Convening Authority/Shipboard Legalmen (010)	25 Feb – 7 Mar 08

4. Air Force Judge Advocate General School Fiscal Year 2008 Course Schedule

For information about attending the following courses, please contact Jim Whitaker, Air Force Judge Advocate General School, 150 Chennault Circle, Maxwell AFB, AL 36112-5712, commercial telephone (334) 953-2802, DSN 493-2802, fax (334) 953-4445.

Air Force Judge Advocate General School, Maxwell AFB, AL	
Course Title	**Dates**
Paralegal Apprentice Course, Class 08-02	3 Jan – 22 Feb 08
Judge Advocate Staff Officer Course, Class 08-B	19 Feb – 18 Apr 08
Paralegal Apprentice Course, Class 08-03	25 Feb – 11 Apr 08
Paralegal Craftsman Course, Class 08-02	3 Mar – 11 Apr 08
Pacific Trial Advocacy Course, Class 08-A (Off-site, Yokota AB, Japan)	10 – 14 Mar 08
Senior Defense Counsel Course , Class 08-A	14 – 18 Apr 08
CONUS Trial Advocacy Course, Class 08-A	7 – 11 Apr 08
Paralegal Apprentice Course, Class 08-04	15 Apr – 3 Jun 08
Reserve Forces Judge Advocate Course, Class 08-B	19 – 20 Apr 08
Area Defense Counsel Orientation Course, Class 08-B	21 – 25 Apr 08
Environmental Law Course, Class 08-A	28 Apr – 2 May 08
Defense Paralegal Orientation Course, Class 08-B	21 – 25 Apr 08
Advanced Trial Advocacy Course, Class 08-A	29 Apr – 2 May 08
Advanced Labor & Employment Law Course, Class 08-A	5 – 9 May 08
Operations Law Course, Class 08-A	12 – 22 May 08
Negotiation and Appropriate Dispute Resolution Course, Class 08-A	19 – 23 May 08
Environmental Law Update Course (DL), Class 08-A	28 – 30 May 08
Reserve Forces Paralegal Course, Class 08-B	2 – 13 Jun 08
Paralegal Apprentice Course, Class 08-05	4 Jun – 23 Jul 08
Senior Reserve Forces Paralegal Course, Class 08-A	9 – 13 Jun 08
Staff Judge Advocate Course, Class 08-A	16 – 27 Jun 08

Law Office Management Course, Class 08-A	16 – 27 Jun 08
Judge Advocate Staff Officer Course, Class 08-C	14 Jul – 12 Sep 08
Paralegal Apprentice Course, Class 08-06	29 Jul – 16 Sep 08
Paralegal Craftsman Course, Class 08-03	31 Jul – 11 Sep 08
Trial & Defense Advocacy Course, Class 08-B	15 – 26 Sep 08

5. Civilian-Sponsored CLE Courses

For addresses and detailed information, see the September 2007 issue of *The Army Lawyer*.

6. Phase I (Correspondence Phase), Deadline for RC-JAOAC 2008

The suspense for submission of all RC-JAOAC Phase I (Correspondence Phase) materials is ***NLT 2400, 1 November 2008***, for those Judge Advocates who desire to attend Phase II (Resident Phase) at TJAGLCS in January 2009. This requirement includes submission of all JA 151, Fundamentals of Military Writing, exercises.

This requirement is particularly critical for some officers. The 2009 JAOAC will be held in January 2009, and is a prerequisite for most Judge Advocate captains to be promoted to major.

A Judge Advocate who is required to retake any subcourse examinations or "re-do" any writing exercises must submit the examination or writing exercise to the Non-Resident Instruction Branch, TJAGLCS, for grading by the same deadline (1 November 2008). If the student receives notice of the need to re-do any examination or exercise after 1 October 2008, the notice will contain a suspense date for completion of the work.

Judge Advocates who fail to complete Phase I correspondence courses and writing exercises by 1 November 2008 will not be cleared to attend the 2009 JAOAC. If you have not received written notification of completion of Phase I of JAOAC, you are not eligible to attend the resident phase.

If you have any additional questions, contact LTC Jeff Sexton, commercial telephone (434) 971-3357, or e-mail jeffrey.sexton@hqda.army.mil

7. Mandatory Continuing Legal Education Jurisdiction and Reporting Dates

Jurisdiction	**Reporting Month**
Alabama**	31 December annually
Arizona	15 September annually
Arkansas	30 June annually
California*	1 February annually
Colorado	Anytime within a three-year period
Delaware	Period ends 31 December; confirmation required by 1 February if compliance required; if attorney is admitted in an even-numbered year, period ends in even-numbered years, etc.
Florida**	Assigned month every three years
Georgia	31 January annually

Idaho	31 December, every third year, depending on year of admission
Indiana	31 December annually
Iowa	1 March annually
Kansas	Thirty days after program, hours must be completed in compliance period 1 July to June 30
Kentucky	10 August; completion required by 30 June
Louisiana**	31 January annually; credits must be earned by 31 December
Maine**	31 July annually
Minnesota	30 August annually
Mississippi**	15 August annually; 1 August to 31 July reporting period
Missouri	31 July annually; reporting year from 1 July to 30 June
Montana	1 April annually
Nevada	1 March annually
New Hampshire**	1 August annually; 1 July to 30 June reporting year
New Mexico	30 April annually; 1 January to 31 December reporting year
New York*	Every two years within thirty days after the attorney's birthday
North Carolina**	28 February annually
North Dakota	31 July annually for year ending 30 June
Ohio*	31 January biennially
Oklahoma**	15 February annually
Oregon	Period ends 31 December; due 31 January
Pennsylvania**	Group 1: 30 April Group 2: 31 August Group 3: 31 December
Rhode Island	30 June annually
South Carolina**	1 January annually
Tennessee*	1 March annually
Texas	Minimum credits must be completed and reported by last day of birth month each year
Utah	31 January annually
Vermont	2 July annually
Virginia	31 October Completion Deadline; 15 December reporting deadline
Washington	31 January triennially

West Virginia	31 July biennially; reporting period ends 30 June
Wisconsin*	1 February biennially; period ends 31 December
Wyoming	30 January annually

* Military exempt (exemption must be declared with state)
**Must declare exemption

Current Materials of Interest

1. The Judge Advocate General's On-Site Continuing Legal Education Training and Workshop Schedule (2007-2008).

Date	Unit/Location	ATTRS Course Number	Topic	POC
1-2 Mar 2008	75th LSO Burlingame (San Francisco, CA)	005	Lessons Learned International & Operational Law	CPT Steven Wang 916-642-2102 steven.wang1@us.army.mil COL Roger Matzkind Roger.Matzkind@us.army.mil LTC Ronald Rallis
1-2 Mar 2008	151st LSO Fort Belvoir, VA	006	International & Operational Law, Criminal Law	LTC Anthony Ricci, 151st LSO, 508-982-1628, tpricci@hotmail.com MAJ Jen Connelly 571-272-7003 Jennifer.Santiago@us.army.mil
29-30 Mar 2008	WIA&ARNG Fort McCoy, WI	NA	Air Force JAG School	Lt Col Julio R. Barron 608-242-3077 / DSN 724-3077 julio.barron2@us.army.mil
18-20 Apr 2008	1st LSO/90th RRC Oklahoma City, OK	008	International & Operational Law, Contract & Fiscal Law	LTC Randy Fluke, 409-981-7950; randall.fluke@us.army.mil
26-27 Apr 2008	91st LSO/9th LSO 1st Division Museum at Cantigny Wheaton, IL	009	Administrative & Civil Law, Contract & Fiscal Law	1LT Ewa Dabrowski Ewa.dabrowski@us.army.mil 773.593.5978
25-27 Apr 2008	8th LSO/89th RRC Kansas City, MO	010	Administrative & Civil Law, Contract & Fiscal Law	LTC Tracy Diel & SFC Larry Barker tracy.t.diel@us.army.mil SFC Larry Barker Larry.R.Barker@us.army.mil 816-836-0005 ext 2155/2156
26-27 Apr 2008	Indiana ARNG Indianapolis, IN	011	Administrative & Civil Law, International & Operational Law	1LT Kevin Leslie, (317) 247-3491, kevin.leslie@us.army.mil

2. The Judge Advocate General's School, U.S. Army (TJAGLCS) Materials Available Through The Defense Technical Information Center (DTIC).

Each year, TJAGSA publishes deskbooks and materials to support resident course instruction. Much of this material is useful to judge advocates and government civilian attorneys who are unable to attend courses in their practice areas, and TJAGSA receives many requests each year for these materials. Because the distribution of these materials is not in its mission, TJAGSA does not have the resources to provide these publications.

To provide another avenue of availability, some of this material is available through the Defense Technical Information Center (DTIC). An office may obtain this material through the installation library. Most libraries are DTIC users and would be happy to identify and order requested material. If the library is not registered with the DTIC, the requesting person's office/organization may register for the DTIC's services.

If only unclassified information is required, simply call the DTIC Registration Branch and register over the phone at (703) 767-8273, DSN 427-8273. If access to classified information is needed, then a registration form must be obtained, completed, and sent to the Defense Technical Information Center, 8725 John J. Kingman Road, Suite 0944, Fort Belvoir, Virginia 22060-6218; telephone (commercial) (703) 767-8273, (DSN) 427-8273, toll-free 1-800-225-DTIC, menu selection 2, option

1; fax (commercial) (703) 767-8228; fax (DSN) 426-8228; or e-mail to reghelp@dtic.mil.

If there is a recurring need for information on a particular subject, the requesting person may want to subscribe to the Current Awareness Bibliography (CAB) Service. The CAB is a profile-based product, which will alert the requestor, on a biweekly basis, to the documents that have been entered into the Technical Reports Database which meet his profile parameters. This bibliography is available electronically via e-mail at no cost or in hard copy at an annual cost of $25 per profile. Contact DTIC at www.dtic.mil/dtic/current.html.

Prices for the reports fall into one of the following four categories, depending on the number of pages: $7, $12, $42, and $122. The DTIC also supplies reports in electronic formats. Prices may be subject to change at any time. Lawyers, however, who need specific documents for a case may obtain them at no cost.

For the products and services requested, one may pay either by establishing a DTIC deposit account with the National Technical Information Service (NTIS) or by using a VISA, MasterCard, or American Express credit card. Information on establishing an NTIS credit card will be included in the user packet.

There is also a DTIC Home Page at http://www.dtic.mil to browse through the listing of citations to unclassified/unlimited documents that have been entered into the Technical Reports Database within the last twenty-five years to get a better idea of the type of information that is available. The complete collection includes limited and classified documents as well, but those are not available on the web.

Those who wish to receive more information about the DTIC or have any questions should call the Product and Services Branch at (703)767-8267, (DSN) 427-8267, or toll-free 1-800-225-DTIC, menu selection 6, option 1; or send an e-mail to bcorders@dtic.mil.

Contract Law

AD A301096 Government Contract Law Deskbook, vol. 1, JA-501-1-95.

AD A301095 Government Contract Law Desk book, vol. 2, JA-501-2-95.

AD A265777 Fiscal Law Course Deskbook, JA-506-93.

Legal Assistance

A384333 Servicemembers Civil Relief Act Guide, JA-260 (2006).

AD A333321 Real Property Guide—Legal Assistance, JA-261 (1997).

AD A326002 Wills Guide, JA-262 (1997).

AD A346757 Family Law Guide, JA 263 (1998).

AD A384376 Consumer Law Deskbook, JA 265 (2004).

AD A372624 Legal Assistance Worldwide Directory, JA-267 (1999).

AD A360700 Tax Information Series, JA 269 (2002).

AD A350513 Uniformed Services Employment and Reemployment Rights Act (USAERRA), JA 270, Vol. I (2006).

AD A350514 Uniformed Services Employment and Reemployment Rights Act (USAERRA), JA 270, Vol. II (2006).

AD A329216 Legal Assistance Office Administration Guide, JA 271 (1997).

AD A276984 Legal Assistance Deployment Guide, JA-272 (1994).

AD A452505 Uniformed Services Former Spouses' Protection Act, JA 274 (2005).

AD A326316 Model Income Tax Assistance Guide, JA 275 (2001).

AD A282033 Preventive Law, JA-276 (1994).

Administrative and Civil Law

AD A351829 Defensive Federal Litigation, JA-200 (2000).

AD A327379 Military Personnel Law, JA 215 (1997).

AD A255346 Financial Liability Investigations and Line of Duty Determinations, JA-231 (2005).

AD A452516	Environmental Law Deskbook, JA-234 (2006).
AD A377491	Government Information Practices, JA-235 (2000).
AD A377563	Federal Tort Claims Act, JA 241 (2000).
AD A332865	AR 15-6 Investigations, JA-281 (1998).

Labor Law

AD A360707	The Law of Federal Employment, JA-210 (2000).
AD A360707	The Law of Federal Labor-Management Relations, JA-211 (2001).

Criminal Law

AD A302672	Unauthorized Absences Programmed Text, JA-301 (2003).
AD A302674	Crimes and Defenses Deskbook, JA-337 (2005).
AD A274413	United States Attorney Prosecutions, JA-338 (1994).

International and Operational Law

AD A377522	Operational Law Handbook, JA-422 (2005).

* Indicates new publication or revised edition.
** Indicates new publication or revised edition pending inclusion in the DTIC database.

3. The Legal Automation Army-Wide Systems XXI—JAGCNet

a. The Legal Automation Army-Wide Systems XXI (LAAWS XXI) operates a knowledge management and information service called JAGCNet primarily dedicated to servicing the Army legal community, but also provides for Department of Defense (DOD) access in some cases. Whether you have Army access or DOD-wide access, all users will be able to download TJAGSA publications that are available through the JAGCNet.

b. Access to the JAGCNet:

(1) Access to JAGCNet is restricted to registered users who have been approved by the LAAWS XXI Office and senior OTJAG staff:

(a) Active U.S. Army JAG Corps personnel;

(b) Reserve and National Guard U.S. Army JAG Corps personnel;

(c) Civilian employees (U.S. Army) JAG Corps personnel;

(d) FLEP students;

(e) Affiliated (U.S. Navy, U.S. Marine Corps, U.S. Air Force, U.S. Coast Guard) DOD personnel assigned to a branch of the JAG Corps; and, other personnel within the DOD legal community.

(2) Requests for exceptions to the access policy should be e-mailed to:

LAAWSXXI@jagc-smtp.army.mil

c. How to log on to JAGCNet:

(1) Using a Web browser (Internet Explorer 6 or higher recommended) go to the following site: http://jagcnet.army.mil.

(2) Follow the link that reads “Enter JAGCNet.”

(3) If you already have a JAGCNet account, and know your user name and password, select “Enter” from the next menu, then enter your “User Name” and “Password” in the appropriate fields.

(4) If you have a JAGCNet account, *but do not know your user name and/or Internet password*, contact the LAAWS XXI HelpDesk at LAAWSXXI@jagc-smtp.army.mil.

(5) If you do not have a JAGCNet account, select “Register” from the JAGCNet Intranet menu.

(6) Follow the link “Request a New Account” at the bottom of the page, and fill out the registration form completely. Allow seventy-two hours for your request to process. Once your request is processed, you will receive an e-mail telling you that your request has been approved or denied.

(7) Once granted access to JAGCNet, follow step (c), above.

4. TJAGSA Publications Available Through the LAAWS XXI JAGCNet

For detailed information of TJAGLCS Publications available through the LAAWS XXI JAGCNet, see the September 2007, issue of *The Army Lawyer*.

5. TJAGLCS Legal Technology Management Office (LTMO)

The TJAGLCS, U.S. Army, Charlottesville, Virginia continues to improve capabilities for faculty and staff. We have installed new computers throughout TJAGLCS, all of which are compatible with Microsoft Windows XP Professional and Microsoft Office 2003 Professional.

The TJAGLCS faculty and staff are available through the Internet. Addresses for TJAGLCS personnel are available by e-mail at jagsch@hqda.army.mil or by accessing the JAGC directory via JAGCNET. If you have any problems, please contact LTMO at (434) 971-3257. Phone numbers and e-mail addresses for TJAGLCS personnel are available on TJAGLCS Web page at http://www.jagcnet.army.mil/tjagsa. Click on "directory" for the listings.

For students who wish to access their office e-mail while attending TJAGLCS classes, please ensure that your office e-mail is available via the web. Please bring the address with you when attending classes at TJAGLCS. If your office does not have web accessible e-mail, forward your office e-mail to your AKO account. It is mandatory that you have an AKO account. You can sign up for an account at the Army Portal, http://www.jagcnet.army.mil/tjagsa. Click on "directory" for the listings.

Personnel desiring to call TJAGLCS can dial via DSN 521-7115 or, provided the telephone call is for official business only, use the toll free number, (800) 552-3978; the receptionist will connect you with the appropriate department or directorate. For additional information, please contact the LTMO at (434) 971-3264 or DSN 521-3264.

6. The Army Law Library Service

Per *Army Regulation 27-1*, paragraph 12-11, the Army Law Library Service (ALLS) must be notified before any redistribution of ALLS-purchased law library materials. Posting such a notification in the ALLS FORUM of JAGCNet satisfies this regulatory requirement as well as alerting other librarians that excess materials are available.

Point of contact is Mr. Daniel C. Lavering, The Judge Advocate General's Legal Center and School, U.S. Army, ATTN: ALCS-ADD-LB, 600 Massie Road, Charlottesville, Virginia 22903-1781. Telephone DSN: 521-3306, commercial: (434) 971-3306, or e-mail at Daniel.C.Lavering@us.army.mil.

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Mentoring Afghan National Army Judge Advocates: An Operational Law Mission in Afghanistan and Beyond, Lieutenant Colonel Daniel J. Hill & Lieutenant Colonel Kevin Jones, Mar. 2007, at 12.

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