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ARTICLE, ESSAY & NOTE: CONVENING AUTHORITY CLEMENCY: IS IT REALLY AN ACCUSED'S BEST CHANCE OF RELIEF?

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BIO:

* The positions and opinions stated in this article are those of the author and do not represent the views of the United States Government, the Department of Defense, or the United States Navy. LT Michael J. Marinello is presently assigned as a command services attorney and Assistant Staff Judge Advocate to Commander, Navy Region Mid-Atlantic under Region Legal Service Office Mid-Atlantic, Norfolk, Virginia. J.D., *cum laude,* 2006, University of Maryland School of Law, Baltimore, Maryland; B.S. 1999, United States Naval Academy, Annapolis, Maryland. Previous assignments include Navigator, Administrative Officer and Legal Officer, USS GERMANTOWN (LSD 42), San Diego, California, 2002-2003; First Division Officer and Machinery Division Officer, USS HARPERS FERRY (LSD 49), San Diego, California, 2000-2002. Member of the bar of Maryland. This article was submitted in partial completion of the Juris Doctor requirement of the University of Maryland School of Law, Baltimore, Maryland.

LEXISNEXIS SUMMARY:
... Prior to taking action, however, the convening authority must consider any and all matters submitted in writing by the servicemember, such as allegations of legal error in the proceedings, letters from family and friends, or clemency recommendations. ... In order to fully understand the convening authority's unique power to exercise clemency, it is essential to understand this unique facet of military justice known as command control. ... Ultimately, in the American military justice system, the convening authority's power to exercise clemency dates back to the earliest laws governing courts-martial. ... The fact that the convening authority's power to exercise clemency has persevered in the American military justice system for 230 years through times of substantial change, including changes made directly to the convening authority's post-trial duties, seemingly speaks volumes towards its validity. ... The substantial modifications that have occurred within the military justice system present an interesting question regarding the convening authority's role in the court-martial process, particularly in reference to the convening authority's power to exercise clemency. ... Of particular importance, the British military justice system no longer requires the findings and sentence of a court-martial to be approved by a commander. ... Despite the fact that the convening authority's power to exercise clemency has survived myriad changes to the American military justice system, the practical effects of the power have been altered dramatically. ...

TEXT:
[*169] **I. INTRODUCTION**

Currently, following a conviction at court-martial in the military system, a sentence is imposed by either a military judge or the court-martial members. If the sentence is imposed by members, then the military judge overseeing the court-martial has no authority to modify the sentence. Once sentencing is complete, the authority who convened the court martial is required to take action. Prior to taking action, however, the convening authority must consider any and all matters submitted in writing by the servicemember, such as allegations of legal error in the proceedings, letters from

family and friends, or clemency recommendations. In taking action, the convening authority may disapprove a finding of guilty, approve a finding of guilty only for a lesser included offense, and disapprove, suspend, mitigate, or remit any part or the entire sentence. This ability to alter the findings and sentence of a court-martial is commonly referred to as the convening authority's clemency power.

The Court of Appeals for the Armed Forces has repeatedly noted that an accused's best chance of relief rests with the convening authority's power to grant clemency. n1 Yet, anyone who has been involved in appellate advocacy for the military or who has had the occasion to read military appellate decisions may have noticed that convening authorities rarely seem to exercise this unique [*170] power. Time and again, the military appellate decisions summarily state: "the convening authority approved the sentence as adjudged." Rarely does one see a statement that the convening authority exercised clemency in reducing or suspending a sentence.

This article is intended to examine the contradictory positions stated above. It starts by examining the roots of the clemency provision in an effort to provide perspective on why it was created. Next, this article examines how, if at all, the clemency provision has been modified, as well as how certain changes in the military justice system have significantly impacted the importance of the clemency provision. Finally, this article analyzes how convening authorities have been using their clemency power in recent years and whether, in practice, the convening authority's power to exercise clemency truly represents an accused's best hope of relief.

II. HISTORY OF THE CLEMENCY PROVISION

The power of the convening authority to exercise clemency is currently codified at Article 60, Uniform Code of Military Justice (hereinafter "UCMJ"). n2 Additionally, in the Manual for Courts-Martial (hereinafter "MCM"), the President has established rules specifically governing clemency matters submitted by a convicted servicemember n3 and the convening authority's duty to consider such matters. n4 Currently, the clemency provision as set forth in the MCM is substantially similar to that codified at Article 60, UCMJ. Therefore, the analysis of the history of the clemency provision in this article will focus primarily on the statutory basis for the provision, although occasional references will be made to the MCM.

Throughout our nation's history until the latter half of the 20<th> century, typically little attention was paid to courts-martial legislation during times of peace. n5 This is due in large part to the fact that courts-martial affected far fewer men and women during peacetime than during times of war and therefore drew far less public attention. Whereas during wartime, involuntary conscription greatly increased the size of the armed forces and the number of courts-martial. n6 Consequently, the most notable and significant changes to legislation governing courts-martial came in the years following World War I and World War II. Since that time, significant changes have been enacted on several more [*171] occasions. Yet, the more recent changes have not been based on the effects of large world wars and conscription, but rather through a desire to continually improve a system that now more closely tracks its civilian counterpart. Indeed, as it currently stands, our nation's military justice system, "in more ways than not, closely resembles trial in federal district court." n7 Arguably, the practical effects of the convening authority's clemency power have also changed in the face of such substantial modification to the military justice system.

This section will briefly analyze the history of legislation governing courts-martial. Particular attention will be paid to the provisions of law governing the convening authority's power to exercise clemency, as well as pertinent developments in the courts-martial process overall that have had a significant impact on the clemency power.

A. Background on Military Justice in General

1. The Purpose behind a Separate System for Military Justice

Military justice exists to help ensure the nation's security through a well-disciplined military. n8 More specifically, "[t]he purpose of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States." n9 As stated by Judge Robinson O. Everett, former Chief Judge of the Court of Military Appeals:

> In many situations some one individual must be in a position to make choices for a group and have his decision enforced. For this reason, the armed services have a system of rank and command which is designed clearly to place one person in charge when a group action must be decided upon. Of course, for American civilians . . . it is difficult to acquire habits of instantaneous obedience to another person's de-

cisions. Military justice provides a stimulus to cultivate such habits by posing the threat that disobedience of commands will be penalized." n10

[*172] Thus, a separate and distinct system for the military grew out of the need for discipline. The Constitution, Congress, and the United States Supreme Court have all recognized this need for a separate system of military justice. n11

Furthermore, "the reasons for a separate system [of military justice] are primarily grounded on the rationale that world-wide deployment of large numbers of military personnel with unique disciplinary requirements mandates a flexible, separate jurisprudence capable of operating in times of peace or conflict." n12 That is, the military justice system goes wherever the nation's military goes in order to ensure disciplined forces no matter where the location or what the circumstances. n13

2. The Role of the Commander

The authority of commanders to control discipline within their units is central to the military justice system n14 Indeed, "[c]ommanders are the foundation of the American military -- people who make tough decisions and ensure success. Discipline begins and ends with commander involvement." n15 In order to be effective, military commanders must be assured that their personnel will be disciplined enough to obey orders even in the face of grave danger. n16 As stated by the Navy-Marine Corps Court of Military Review, "[a] major objective of the military justice system is to obtain obedience by subordinates of orders of their superiors. Trial by court-martial is the enforcement mechanism which Congress has provided to assure that obedience is obtained." n17

Accordingly, since the inception of courts-martial, military commanders have been granted unique control over the process. This facet of military justice is often referred to as "command control." In that regard, command control encompasses the ability of commanders to order an investigation into alleged misconduct, evaluate the results of such investigations, refer charges to courts-martial, convene courts-martial, appoint members to courts-martial, and take action on the findings and sentence of courts-martial. Command control aims to provide military commanders with the flexibility [*173] necessary to mete out discipline whenever and wherever the need should arise in order to maintain combat-ready units. n18

The convening authority's power to exercise clemency is essentially a component of the convening authority's more comprehensive duty to take action on the findings and sentence of all courts-martial. n19 It is during this approval process that the convening authority has the ability to exercise clemency towards a convicted servicemember. Of course, the duty of the convening authority to take action on the findings and sentence is a component of command control as described above. Thus, the historical analysis of the clemency provision below will pay particular attention to the role of commanders in the courts-martial process. In order to fully understand the convening authority's unique power to exercise clemency, it is essential to understand this unique facet of military justice known as command control.

B. Origins: A System of Discipline

The American military justice system essentially finds its roots in the laws of Julius Caesar and the Roman Empire. n20 However, a detailed analysis of Roman military law is unnecessary for the purpose of this article. Suffice to say, it was from the military laws of the Roman Empire that the British system of military justice was eventually developed. n21 In turn, the early laws governing military justice in the United States were adopted directly from the existing British Articles of War when the Continental Congress promulgated the Articles of War of 1775. n22 In fact--and quite ironically considering that America was fighting so vigorously for independence from the British royal crown--the American Articles of War of 1775 were so nearly exact to the existing British Articles of War that several of the Founding Fathers were shocked to see them enacted so easily in Congress. n23 Similar to the British Articles, the American Articles of War of 1775 contained provisions enabling commanders to exercise clemency by pardoning or mitigating punishments ordered by courts-martial. Specifically, the Articles of War of 1775 provided that the general (for a general court-martial) or regimental commander (for a regimental court-martial) "shall [*174] have full power of pardoning, or mitigating any of the punishments ordered to be inflicted...." n24

At the same time, the rules governing the Navy initially were not so clear regarding clemency powers. Again, the first set of rules for the American Navy was promulgated in 1775 and was based almost entirely on existing British law. n25 Specifically, the Continental Congress enacted the "Rules for the Regulation of the Navy of the United Colonies of North America. n26 Interestingly, however, as originally promulgated, Article 43 of the Rules provided that "[t]he sentence of a court-martial for *any capital offence* shall not be put into execution, until it be confirmed by the com-

mander in chief of the fleet." n27 Furthermore, Article 44 provided that "[t]he Commander in Chief of the fleet for the time being, shall have power to pardon and remit *any sentence of death* that shall be given in consequence of any of the aforementioned articles." n28 The Rules contained no similar provisions for non-capital offenses. Article 7 of the Rules, however, required that the captain of a vessel "cause the *articles of war* to be hung up in some public place of the ship, and read to the ship's company once a month." n29 As such, Article 7 was inconsistent with Articles 43 and 44. While the Rules did not specifically provide for clemency by a commander in non-capital cases, they also required ships' captains to inform their crews of the articles of war which, of course, specifically provided for such clemency by a convening authority.

The Rules for the Regulation of the Navy remained unrefined until 1799, at which time Congress officially enacted the Articles for the Government of the Navy(AGN). n30 Yet the Articles for the Government of the Navy were still poorly arranged and substantially mirrored the Rules of 1775. n31 One year later, the AGN were revised by a more complete set of articles, including clarification regarding the clemency power. n32 First, the Articles for the Government of the Navy of 1800 were amended to read that the commanding officer of a ship shall cause the *rules for government of the navy* to be hung up in some public place, thereby distinguishing the Articles for the Government of the Navy as separate and distinct from the Articles of War. n33 Second, the [*175] revised Articles for the Government of the Navy expanded the clemency power to include any offense, rather than limiting the power to only capital offenses. n34 Finally, the revised Articles extended the power to exercise clemency to all convening authorities. n35 However, the power of convening authorities to exercise clemency was limited to circumstances when the courts-martial were conducted outside of the United States. Otherwise, if the courts-martial took place within the United States, the power to exercise clemency was vested in the President of the United States. n36 Eventually, this limitation was also removed when the Articles for the Government of the Navy were modified in 1918. n37

Ultimately, in the American military justice system, the convening authority's power to exercise clemency dates back to the earliest laws governing courts-martial. However, once again, it is important to note that these early versions of the laws governing military justice were based on recognition by the Founding Fathers and early representatives in Congress that governance of the military was based on needs far different than those of the civilian society. n38 According to John Adams, who played a vital part in the enactment of the Articles of War of 1775, "[t]here can be no liberty in a commonwealth where the laws are not revered and most sacredly observed, nor can there be happiness or safety in an army for a single hour when discipline is not observed." n39 Adams, a passionate believer in self-government, frequently admitted that the articles were severe. Yet, without strict discipline in the military, he feared "the ruin of our cause and country ...." n40

Furthermore, these early laws incorporated the need for a flexible, separate jurisprudence capable of operating regardless of geographic location in either times of peace or conflict, a characteristic described above. n41 This principle is clearly evident in the distinction that existed in the Articles for the Government of the Navy enacted in 1800 regarding who had the authority to exercise clemency when the naval force was deployed or stateside. The idea of granting the clemency power to lower echelon commanders only while their [*176] forces were outside the United States demonstrates the need for commanders to maintain combat ready units. Granting clemency power to the lower level convening authorities while their forces were deployed enabled these convening authorities to return a sailor convicted at court-martial back to service in order to maintain full fighting capabilities, rather than having to rely on a higher commander with whom a deployed squadron may have been unable to communicate. Otherwise, waiting to obtain clemency by the Commander in Chief of the Fleet would severely limit the commander's ability to maintain a unit "ready to fight wars should the occasion arise." n42

As a result of incorporating the need for a separate and flexible system of jurisprudence, these early laws governing courts-martial demonstrated command control in its purest form. Congress vested near total control of courts-martial in a single commander. In fact, under the Articles of War of 1775, the military commander controlled the entire courts-martial process all the way through execution in cases where death was prescribed by the court. Consequently, a servicemember could be investigated, prosecuted, found guilty, and executed all under the control of a single military commander. Essentially, courts-martial were not a vehicle for justice, but rather a system of discipline. Therefore, the convening authority's clemency power fit within the overall command control aspect of early court-martial legislation.

The Articles of War and the Articles for the Government of the Navy essentially remained intact until the early 1900s. The few modifications made during the 19<th> century were generally unremarkable. As time progressed, however, the need for change arose. With the massive influx of men and women into military service during World War I, the stage was set. As we shall see, the subsequent changes to the Articles of War and Articles for the Government of the Navy would be marked by one key development in particular: limiting the ability of commanders to control the entire

court-martial process. While Congress continually sought to strike a balance between the unique demands of military discipline and military justice, the overall trend was to limit the command control aspect of military justice. This overall trend has arguably had tremendous practical consequences for the convening authority's exercise of the clemency power.

C. World War I Era: A Call for Change

Once enacted, the Articles of War remained relatively unchanged until 1920. Following World War I, however, there was nationwide clamor regarding the military justice system. In a letter to Major General Enoch H. Crowder, the [*177] Judge Advocate General of the Army, in 1919, Secretary of War Newton Baker acknowledged being "deeply concerned...over the harsh criticisms uttered upon our system of military justice." n43 According to the House Committee on Military Affairs, "[s]ince the close of the war attention has been frequently called to the fact that our present code is archaic and out of date; that we have not kept pace with other nations in such matters; and that we are going too far back into the past for our plan of administering military justice." n44 More specifically, critics complained that commanders exercised arbitrary discretion, that sentences were excessively severe, that reviewing authorities possessed the ability to send acquittals back to the court, and that the actions taken by the Office of the Judge Advocate General of the Army were ineffectual. n45 Furthermore, it was generally known that Britain had recently modified its system of military justice, the very system from which the American system was born. n46

Interestingly, the movement to change the military justice system was fueled primarily by a dispute within the military service itself. Specifically, Brigadier General Samuel T. Ansell, the Acting Judge Advocate of the Army, sparked a major controversy when he questioned the legality of two courts-martial that arose in late 1917, commonly referred to as the Houston riot and Fort Bliss mutiny cases. n47 For the purposes of this article, the details of those cases need not be described here. What is important is that General Ansell interpreted Section 1199 of the Revised Statutes of 1878 as granting the power of appellate review over courts-martial to the Judge Advocate General. General Ansell's superiors, Major General Enoch H. Crowder and Secretary of War Newton Baker, both disagreed. n48 Ultimately, at the heart of the Ansell-Crowder dispute was the concept of command control and, in particular, the issue of appellate review in the military system.

[*178] Eventually, in 1919, the Ansell-Crowder dispute turned public after General Ansell was called to testify before the Senate Military Affairs Committee. In a statement before the Senate Military Affairs Committee, he criticized the Army's court-martial proceedings:

> Terrible injustices have been inflicted upon small offenders. The whole system is wrong. I realize that I am maiming an institution to which I belong. But I am doing it so that ample justice may be done the men in ranks. We need more humanity in our judgment of their offenses. We have not shown it. For the sake of our men and their families we must put an end to this cruel system, and we must do it at once. n49

Shortly thereafter, the *New York World* published a scathing article titled "The Thing That Is Called Military Justice!" outlining numerous instances of military injustice. n50 Meanwhile, the politics of the issue had gained full speed. Aligned with General Ansell was Senator George Chamberlain who, on December 30, 1918 in a Senate speech, stated that "the records of the courts-martial in this [first world] war show that we have no military law or system of administering justice which is worthy of the name of law or justice." n51

Accordingly, on January 13, 1919, Senator Chamberlain introduced Senate Bill 5320 to establish a revisory power in the Office of the Judge Advocate General and to reduce the discretion of commanders over courts-martial. n52 Ultimately, this bill failed because the Sixty-fifth Congress ended on March 3, 1919. However, in April 1919, Senator Chamberlain submitted Senate Bill 64, a draft revision of the Articles of War. n53 The second Chamberlain Bill (which was actually written by General Ansell) proposed considerable changes in procedure for courts-martial, including: (1) an independent military judge who would select the court members; (2) the right of the accused to have a portion of the panel chosen from his own rank; (3) definite limits on sentences; (4) mandatory and binding pretrial investigations; and (5) the right to legal [*179] counsel. n54 Most notably, S.64 proposed: (1) that the reviewing authority be stripped of the ability to order reconsideration of a finding of not guilty; and (2) that a court of military appeals be established and comprised of three lawyers appointed by the President for life with the authority to automatically review all cases involving death, dismissal, dishonorable discharge, or confinement in excess of six months unless the accused waived the review. Indeed, the overall intent of the Chamberlain Bill was to eliminate the convening authority from the post-trial review process altogether as a means of eliminating command control. n55

The Chamberlain Bill stalled in Congress primarily because of the voluminous text of testimony, statistics and documents that resulted from the subcommittee hearings. n56 In fact, Senator Chamberlain and his subcommittee counterparts were so confused by the extensive evidence that they turned to the Judge Advocate General, General Crowder, for assistance. n57 As a result, General Crowder submitted another revision of the Articles of War in December 1919, which of course proffered far less drastic changes than S. 64. Shortly thereafter the chairman of the subcommittee, Senator Warren, reported the Chamberlain Bill favorably to the Congress with one amendment. That amendment was essentially the Crowder revision of December 1919. n58 Initially, not even this bill could pass the Senate. However, in May 1920, a bill similar to the amended Chamberlain Bill, known as the Army Reorganization Act of 1920, passed.

Ultimately, what began as a movement to overhaul the military justice system ended as a mere revision. n59 Nevertheless, the Army Reorganization Act of 1920 still resulted in significant changes to the Articles of War. Many of them represented substantial limitations on command control over courts-martial. Specifically, the new articles required an impartial investigation prior to referring charges to trial, n60 provided for a law member to serve on courts-martial, n61 guaranteed counsel for the accused, n62 established the appointment of a judge advocate to serve as a prosecuting attorney, n63 permitted one peremptory challenge of anyone except the law member by both the prosecution and [*180] defense, n64 and required acquittals to be announced in open court immediately after the court had made its findings. n65 Each of these provisions worked to insulate military accused from the detrimental effects of command control. Furthermore, the Army Reorganization Act of 1920 offered a positive development in the way of appellate review. While the Act fell short of establishing a military court of appeals, it did establish of a Board of Review located in the Office of the Judge Advocate General under Article 50 1/2. n66

Perhaps the most important modification to the Articles of War under the Army Reorganization Act of 1920 was the removal of the provision which previously allowed a reviewing authority to return a record of trial for reconsideration of an acquittal, a finding of not guilty, or of a sentence with a view towards increasing its severity. n67 This change has been described as the single most important amendment to the Articles of War in 1920. n68 According to Edmund M. Morgan, an Army colonel at the time who would later become a law professor at Harvard and would later chair the committee appointed to create a uniform code of military justice in the 1940s, before the reviewing authority was stripped of such authority, he "had practically absolute command not only over the personnel of the court, but over the findings and sentence of the court." n69 By limiting the convening authority's ability to return a court-martial case for reconsideration, the amended Articles of War now definitively required the convening authority to either accept the court's findings and sentence (with limited exceptions), or exercise clemency regarding the sentence. n70 Indeed, this change represented one of the most significant steps in the direction of limiting command control.

Interestingly, the commotion and public treatment of the Army military justice system during the World War I era escaped the Navy. n71 This is most likely because the Secretary of the Navy possessed fairly extensive review powers, unlike any authority in the Army higher than the convening authority. n72 [*181] This issue of appellate review vested in higher military authority was, of course, at the heart of the Ansell-Crowder dispute. n73 This disparate treatment did not escape General Crowder who wondered "[w]hy...has not the storm broken out against the Navy? The answer is, I imagine, because the Judge Advocate General of the Navy was more alert in instructions and admonitions given courts than ourselves." n74 That is, in General Crowder's opinion, the Army and the Navy had "'practically the same [military justice] system,'" yet the Navy was applauded and the Army was "submerged with vindictive criticism." General Crowder viewed the Navy's ability to escape criticism as a result of the Navy Judge Advocate General taking time to instruct, admonish and caution his courts against injustice, something General Crowder believed the Army had "'made less use of [its] opportunities than [the Navy]'" to do.

D. World War II Era: Creation of a Unified System

Again, the Articles of War and the Articles for the Government of the Navy remained relatively unchanged until the late 1940s, and they governed the military justice systems of the Army and Navy respectively through World War II. Yet, once again, during and following the war there was nationwide clamor regarding the military justice system. n75 Veterans of the second World War, particularly those conscribed against their will, resented being subject to a system of justice so different that the civilian system and so dependent on command control. n76 Once again, Congress recognized that the vulnerability of the Americans drafted into service meant it was "imperative, morally speaking, for Congress and the War Department to seek the greatest possible assurance that what is officially called military justice be justice indeed, and that it be adjusted, if adjustments prove necessary, to conform as closely as possible to the standards of individual rights which are established as part of our civil heritage in a democratic state." n77 This time the call for

change would result in a uniform code governing all services. Significantly, and not surprisingly, at the heart of the movement was the issue of command control.

The Navy was unable to escape "the storm" this time around. In a period of four years, from 1943 to 1947, the Navy received no less than seven reports assessing the quality of military justice in the Navy. n78 Of course, among [*182] these assessments, the role of the convening authority was an issue of frequent concern. For example, in 1943, the Navy received its first report from a board headed by Arthur A. Ballantine, former Undersecretary of the Treasury, commenting on the exercise of clemency by convening authorities following courts-martial. n79 Specifically, the report focused on the fact that Navy courts-martial frequently issued severe sentences with the understanding that the convening authorities would subsequently recommend clemency. n80 This allegation mirrored criticism by General Ansell in 1919 that such a practice "throws a responsibility upon others which properly belongs with the court." n81 Furthermore, the report commented on the tension between a system of justice and the purpose behind command control. n82

In 1947, the Navy received an even more extensive and thoughtful analysis in the Report of the General Court-Martial Sentence Review Board, chaired by Professor Arthur J. Keeffe and administered by Felix Larkin. n83 Once again, the Keeffe report latched on to the role of the convening authority. Regarding the fact that the reviewing authority was typically the same officer who convened the court-martial, the Keeffe report noted that "it is 'humanly impossible for a person, no matter how high his purpose, to dissociate himself from his prior actions and opinions...[,] and to view it later as though he were seeing it for the first time.'" n84 The board noted that the practical result was that the convening authority, rather than the court, actually fixed the sentences. While the convening authority could exercise clemency, all too often such action consisted of 'merely reducing the sentence to something that approached what it should have been in the first place.'" n85 The Keeffe board, much like the Chamberlain Bill in 1920, ultimately recommended that the only way to correct [*183] such deficiencies was to separate the reviewing authority from the convening authority, or even to abolish the review altogether and to leave appellate review to higher authority. For those who opposed such a step on the grounds that it "might be destructive of discipline," the Keeffe board acknowledged as much by noting that once a case has been referred to court-martial, "it ceases to be a mere disciplinary matter, and from that time on the process of law should be paramount, and command control should cease." n86

Meanwhile, the Army convened its own advisory committee under Dean Arthur T. Vanderbilt, Dean of New York University and soon to become Chief Justice of the New Jersey Supreme Court. n87 While the investigative efforts of the Vanderbilt committee initially appeared extremely impressive, the ultimate report was hardly innovative in that its recommendations were substantially similar to the changes first recommended by General Ansell and Senator Chamberlain more than 25 years earlier. n88 Of course, the Vanderbilt report echoed the oft repeated criticisms regarding command control when it stated that "the command frequently dominated the courts in the rendition of their judgment." n89 Accordingly, the Vanderbilt report suggested that the convening authority be specifically forbidden from reprimanding courts and their members and that reviewing authority be vested in the Judge Advocate General of the Army. n90

In the end, the above discussion represents a mere portion of the overall analysis of military justice that occurred between 1943 and 1947. Ultimately, two bills were introduced to Congress, one by the Army and one by the Navy, each of which recommended substantial changes to the Articles of War and Articles for the Government of the Navy respectively. Yet, each bill still differed in substantial ways. For example, the proposed amendments to the Articles for the Government of the Navy were radical in that they proposed vesting the power to review the legality of courts-martial proceedings, the findings, and the sentence in an authority higher than the convening authority, while the Army bill left such powers with the convening authority. Interestingly, the Navy specifically directed that the convening authority shall "retain full clemency power and there shall be no restoration of originally imposed punishment once such clemency has been exercised." n91 The fact that the Navy desired to retain full clemency power at the convening authority level, despite simultaneously proposing fairly radical changes to the post-trial review [*184] process, demonstrates the historical importance attached to the convening authority's clemency power. The House of Representatives passed the Army bill (known as the Elston Act); however, the bill stalled in the Senate. Neither house took action on the Navy bill.

Before any further action could be taken on either bill, the National Security Act of 1947 unified all military services under the Department of Defense. n92 Soon thereafter, in 1948, Secretary of Defense James Forrestal ordered the creation of a committee to draft a uniform code that would govern all military services, and he appointed Edmund Morgan as the committee chair (hereinafter "the Morgan Committee"). Interestingly, Secretary Forrestal was well aware of Morgan's support for General Ansell and opposition to General Crowder during 1918-1919. Indeed, Forrestal con-

sidered Morgan's role in the earlier movement for reform to be "an asset rather than a liability" in the renewed movement for change. n93 In a way, Forrestal preemptively legitimized the reforms that the committee would soon recommend by affirmatively selecting someone so prone to recommend substantial changes.

The Morgan Committee conducted a seven-month study in which it considered the Articles of War, the Articles for the Government of the Navy, the Federal Code, the penal codes of various states, and voluminous reports on military and naval justice. n94 The end result was House Resolution 4080, a bill to establish the Uniform Code of Military Justice. On May 6, 1950, President Truman signed the Uniform Code of Military Justice into law. The bill had passed without even a roll call in either the House or Senate. In the end, Congress enacted the bill almost exactly as the Morgan Committee had drafted it.

Of course, the UCMJ had not been passed without criticism. And not surprisingly, the public and political reaction centered on the issue over command control. Secretary Forrestal seemingly tried to preempt the criticism when he forwarded the bill to Congress by highlighting the provisions that were "designed to prevent undue control or interference with the administration of military justice." n95 Additionally, when Professor Morgan introduced the bill for hearings before the House Armed Services Committee, he explained:

> Because of the military nature of courts-martial, we have left the convening of the courts, the reference of the charges, [*185] and the appointment of members to the commander. For the same reason, we have preserved the initial review of the findings and the sentence by the commander.
>
> Having done this, we examined ways and means of restricting the commander to his legitimate functions. We have tried to prevent courts-martial from being an instrumentality and agency to express the will of the commander.
>
> To make the action of courts-martial and the procedure for review free from his influence we have set up an impartial judge for the court-martial, made it mandatory that lawyers represent the parties in the general court-martial cases, required the commander to consult before and after with his staff judge advocate or law specialist, and prohibited him from either censuring or reprimanding the court.
>
> We have set up a system which resembles the independent civilian court, but we have placed it within the framework of military operations. At the trial and in the review of facts the men who function as counsel, trial judge, and intermediate appellate judges will be skilled in law and in military matters. They will be independent of command and subject to a supreme civilian tribunal on questions of law.

Yet, the critics still assailed the UCMJ for its failure to eliminate command control by entirely removing commanders from the court-martial process. Richard Wels, Chairman of the Special Committee on Military Justice of the New York County Lawyers' Association, stated that "[t]here is no question that this bill retains command control in all of its ugly aspects." n96 While he recognized that "the commanding officer must and should be able to place a man on trial and control and direct the prosecution," he urged that "the judicial machinery itself must be in the hands of an independent judicial system...." n97 The American Bar Association "urgently recommend[ed] the passage by Congress...of legislation separating military justice from command...." n98 Finally, even representatives of the military supported such a [*186] position. General R.C. Harmon, Judge Advocate General of the Air Force, testified before the Senate Subcommittee on Armed Services that "there should be all of the elimination of command influence that can be brought about in the bill." n99 He elaborated that "the administration of military justice generally should be completely taken away from command...so that the commanding officer has decided that [a man] is to be investigated for [an offense] and various steps going up to court-martial after that. I do not believe that command should exert any influence then in trial and completion of the case from that point."' n100

Ultimately, Congress certainly recognized and echoed the specific concern over command control. Indeed, the House of Representatives Committee on Armed Services considered command control as "[p]erhaps the most troublesome question which [it] considered." n101 In this regard, the Committee explained:

> [W]e have included numerous restrictions on command. The bill provides that the convening authority may not refer charges for trial until they are examined for legal sufficiency by the staff judge advocate or legal officer; authorizes the staff judge advocate or legal officer to communicate directly with the Judge Advocate General; requires all counsel at a general court-martial trial to be lawyers or law graduates and,

> in addition, to be certified as qualified by the Judge Advocate General; provides a law officer who must be a lawyer whose ruling on interlocutory questions of law will be final and binding on the court and who must instruct the court on the presumption of innocence, burden of proof, and elements of the offense charged; provides that the staff judge advocate of the convening authority must examine the record of trial for sufficiency before the convening authority can act on a finding or sentence; provides legally qualified appellate counsel for an accused before a board of review and the Court of Military Appeals; establishes a civilian court of military appeals, completely removed from all military influence or persuasion; and makes it a court-martial offense subject to this code to unlawfully influence the action of a court-martial. n102

[*187] In response to those who urged Congress to separate military justice from command, the House Committee explained:

> We fully agreed that such a provision might be desirable if practicable, but we are of the opinion that it is not practicable. We cannot escape the fact that the law which we are now writing will be as applicable and must be as workable in time of war as in time of peace, and, regardless of any desires which may stem from an idealistic conception of justice, we must avoid the enactment of provisions which will unduly restrict the conduct of our military operations.

Clearly, while Congress retained certain provisions of command control, it certainly intended to establish (or retain) some checks on military authority in the courts-martial process. Not surprisingly, the power of the convening authority to exercise clemency in the post-trial approval phase survived as a part of the UCMJ.

As enacted under the UCMJ, the clemency provision was based on multiple articles. First, Article 60 provided:

> After every trial by court-martial the record shall be forwarded to the convening authority, and action thereon may be taken by the officer who convened the court, an officer commanding for the time being, a successor in command, or by any officer exercising general court-martial jurisdiction. n103

Second, Article 64 provided:

> In acting on the findings and sentence of a court-martial, the convening authority shall 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 and as he in his discretion determines should be approved. Unless he indicates otherwise, approval of the sentence shall constitute approval of the findings and sentence. n104

Collectively, Articles 60 and 64 represented the convening authority's responsibility to approve the findings and sentence of a court-martial, including the power to exercise clemency by approving only so much of the findings and [*188] sentence "as he in his discretion determines should be approved." Important to note is the degree to which Congress desired to ensure that the convening authority's ability to act was a discretionary power. The Congressional Hearings on this matter demonstrate the importance placed on ensuring that convening authorities understood that the approval of the findings and sentence was, in fact, in their discretion. As initially proposed by the Morgan Committee, Article 64 did not include the phrase "as he in his discretion" immediately preceding the word "determines." n105 Following a discussion on the clarity of the original version, Senators Elston and Brooks wanted to ensure that the language of Article 64 was "very clear." n106 Accordingly, the "discretion" phrase was added to make clear that clemency was "a discretionary matter with the convening authority as to what he shall do with any sentence which comes before him for review." n107

The clemency provision undoubtedly remained alive because it is an element of command control that benefits the accused. According to Robert Smart, an attorney serving on the House Armed Services Committee, the clemency provision was intended to enable commanders to suspend the sentences of those convicted in order to prepare for combat. n108 If the men "made good" then the commander would remit their sentences. n109 According to Smart, "[t]hat is the intent of it and it works for the benefit of the accused." n110

In another crucially important provision in the UCMJ, Article 67 established appellate review by a civilian Court of Military Appeals. This court was unique in that it was established outside the Department of Defense and it was staffed with "highly qualified civilians." n111 Congress specifically sought to set the compensation for the judges high

enough to attract well-qualified attorneys. n112 While one may initially ask how the establishment of this court pertains to the convening authority's post-trial responsibilities, the answer is more readily apparent in the amendments to the UCMJ in the years following 1950, particularly in 1983. n113 In passing the 1983 amendments, Congress specifically recognized the careful watch over military justice being conducted by the Court of Military Appeals. Because of the Court's diligence, Congress felt compelled to limit the convening authority's role in the post-trial process. [*189] The creation of the Court of Military Appeals was truly a remarkable step in the history of our military justice system.

E. 1951 to Present: The Continued Civilianization of Courts-Martial

Following the initial enactment of the UCMJ, there have been several significant amendments to the Code. Specifically, the Military Justice Act of 1968 and the Military Justice Act of 1983 enacted the most substantial revisions. These amendments continued the trend toward limiting the scope of command control.

The Military Justice Act of 1968 introduced a key feature to the modern-day court-martial and a substantial step in the "civilianization" of the courts-martial process: the military judge. n114 The military judge was a significant evolution of the "law officer" in general courts-martial and an entirely new protection in special courts-martial. n115 Prior to 1968, general courts were presided over by the "law member," and special courts were presided over by the president of the court (senior member), who was usually not a lawyer and was usually unassisted by any lawyer. n116 Indeed, for those who practiced military law prior to 1968, many had become accustomed to the thought of a servicemember being sentenced to six months in prison at a special court-martial with no lawyer present in the courtroom. n117

According to the Senate Armed Services Committee, the Military Justice Act of 1968 was:

> an attempt to improve some of the procedures and increase the substantive safeguards in courts-martial. In brief, the bill...amends the Uniform Code of Military Justice to streamline court-martial procedures in line with procedures in U.S. district courts, to redesignate the law officer of a court-martial as a 'military judge' and give him functions and powers more closely allied to those of Federal district judges, to increase the availability of legally qualified counsel to represent the accused in courts-martial, to redesignate appellate boards of review as 'courts of military review' and change somewhat their structure, to increase the independence of military judges and members and other [*190] officials of courts-martial from unlawful influence by convening authorities and other commanding officers, and to increase the post-conviction safeguards and remedies available to the accused. n118

Cleary, the Military Justice Act of 1968 was an extension of Congress' continuing desire to ensure courts-martial were conducted in a manner that appropriately protects the rights of accused servicemembers while continuing to support the needs of military discipline. And clearly, continuing to reduce the specter surrounding command control was an issue at the heart of changes.

In 1983, Congress substantially revised the UCMJ once again. This time the Military Justice Act of 1983 made significant changes to the post-trial responsibilities of the convening authority, including the clemency process. n119 In fact, the Military Justice Act of 1983 represents the culmination of years of criticisms surrounding command control and the convening authority's ability to affect the findings and sentence of courts-martial.

Under the Military Justice Act of 1983, Articles 60 and 64 of the older UCMJ were merged, and Article 60 under the 1983 amendment became the sole statutory provision governing the submission of clemency matters and the convening authority's role in taking action on courts-martial. n120 Under the prior law, the convening authority was required to make a determination as to the legal sufficiency of the proceedings. n121 Thus, the convening authority was required to approve both the findings and the sentence. In order to assist the convening authority, the Staff Judge Advocate or legal officer was required to prepare a detailed legal review of the court-martial. The Military Justice Act of 1983 eliminated the requirement for the convening authority to insure the legal sufficiency of the proceeding. In doing so, the Senate Armed Services Committee noted:

> When laymen presided over all courts-martial and lay officers served as counsel, there was a clear basis for requiring legal review in the field and requiring action on the law by the convening authority. This is less the case today when virtually all special and general courts-martial are tried before military judges and qualified attorneys and all cases are subject to review by qualified attorneys. Moreover, as a result of court decisions, the staff judge advocate's review has become a [*191] cumbersome document which produces a substantial strain on legal resources, often is too lengthy to be of use to the convening author-

ity, and can constitute an independent source of appellate litigation even when the underlying case is otherwise free of error. n122

Congress intended to eliminate these problems by leaving the legal review of courts-martial to the appellate courts. n123 As a result of the Military Justice Act of 1983, the convening authority was no longer required to approve the findings of courts-martial, although he retained the ability to dismiss charges, modify findings (from guilty to not guilty or from guilty of a specification to guilty of a lesser included offense, but not vice versa), and order rehearings as a matter of discretion. Further, while the convening authority was still required to act on the sentence of every court-martial, "a review of the legality of the sentence is not required...because action on the sentence '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.'" n124

The message delivered by Congress through the Military Justice Act of 1983 regarding the post-trial responsibilities of the convening authority was clear. The convening authority had finally been reduced to a limited role post-trial. In a letter from Secretary of Defense Caspar Weinberger to the Senator Melvin Price, Chairman of the House Committee on Armed Services, Secretary Wienberger stated: "The bill emphasizes that the convening authority's post-trial role primarily involves clemency matters rather than a formal appellate review." n125 In enacting these changes to the UCMJ, the Committee on Armed Services reflected on the origins of the UCMJ. In discussing the enactment of the UCMJ, the committee noted that "[p]erhaps the most troublesome matter before the Congress in examining the Uniform Code of Military Justice legislation proposals in 1949 was the issue of command control -- and rightly so." n126 The committee continued by noting that "[t]he decisions of the Court of Military Appeals over the past 30 years show careful monitoring of these issues." n127 Thus, in modifying the convening authority's role post-trial and essentially reducing it to a role of clemency, Congress recognized the extent to which command control had effectively been reduced by the numerous [*192] modifications to the courts-martial process throughout the years, such as the creation of an independent, civilian appellate review process.

Furthermore, the Military Justice Act of 1983 essentially codified the right of a convicted servicemember to request clemency from the convening authority. n128 Throughout history until this point, the convening authority undoubtedly possessed the authority to approve whatever portion of the sentence he deemed appropriate. Yet never, until the Military Justice Act of 1983, did servicemembers possess *a statutory right* to submit clemency matters to the convening authority. n129 In theory, this amendment was yet another step in the overall transformation of the clemency provision from a commander's tool to a more pure source of relief for a convicted servicemember. Indeed, the clemency provision as modified in 1983 seemed to enhance the opinion expressed by the Court of Military Appeals that clemency was accused's best chance at post-trial relief. In theory, the clemency provision was looking more and more like a true process for clemency, rather than a tool of commanders in the field. However, as we shall see, theory and practice do not always mesh.

F. Summary: The Modern Court-Martial

The laws governing courts-martial have been modified dramatically since their initial enactment. According to some, the military justice system has undergone considerable "civilianization," and as a result, the modern court-martial closely resembles a trial in federal district court. n130 In fact, this has arguably been the goal throughout the process. Article 36, UCMJ, specifically provides that the President may prescribe rules for pre-trial, trial, and post-trial procedures "which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter *[10 U.S.C. §§ 801* et seq.]." n131 According to the drafters of the Manual for Courts-Martial, the 1984 revision of the MCM "was to conform to federal practice to the extent possible," except where specifically required otherwise by the UCMJ. n132

While the system is still designed for a commander to convene a court-martial and for that commander to subsequently review and take action on the [*193] court-martial, so many protections have been incorporated into the system that the duties of a convening authority are now more transparent than ever. Significant changes to military justice include the establishment of a military judge with substantial responsibilities, the requirement for qualified counsel for both the accused and the government, restrictions on pre-trial investigations, the creation of peremptory challenges of members, the Military Rules of Evidence, limitations on the convening authority's post-trial duties, and the creation of multiple levels of appellate review independent of the convening authority, including a strong civilian court. Each of these changes represents a separate and distinct check on command control which means the court-martial process is undoubtedly running more fairly today than when it was first created or even when the UCMJ was first passed.

The limiting of command control has not been motivated out of a desire to merely strip convening authorities of their unique powers, but rather by the desire to guarantee due process rights under the Constitution and avoid the specter of unlawful command influence, "the mortal enemy of military justice." n133 Yet, even throughout the civilianization of military justice, the power of the convening authority to exercise clemency has survived.

III. ANALYSIS OF THE PRACTICAL EFFECTS OF THE MODERN CLEMENCY PROVISION

The fact that the convening authority's power to exercise clemency has persevered in the American military justice system for 230 years through times of substantial change, including changes made directly to the convening authority's post-trial duties, seemingly speaks volumes towards its validity. At the same time, however, modem day commanders are undoubtedly aware of the civilianization of military justice that has occurred over the years. To many commanders, the actual conduct of courts-martial may appear nearly identical to civilian courts, despite the fact that they convene them. Furthermore, modem day commanders are well aware of the independent appellate review process. The substantial modifications that have occurred within the military justice system present an interesting question regarding the convening authority's role in the court-martial process, particularly in reference to the convening authority's power to exercise clemency. Specifically, given the fact that modem day commanders are undoubtedly aware of the civilianization of military justice, to what extent do they exercise their clemency power? How often do convening authorities actually exercise clemency while approving courts-martial?

[*194] A. Statistical Analysis of Clemency as Exercised by Convening Authorities

Among the chief complaints during the World War I era was that the sentences prescribed by courts-martial were too severe, resulting in reductions by review boards in at least 75 percent of the cases examined. n134 This was due, in large part, because of the massive mobilizations required to man the military services in support of the war, in particular an influx of inexperienced officers.

> These new officers, not sitting easily in the saddle, and feeling unsure of themselves (1) are prone as commanding officers to resort too readily to courts-martial, and (2) as court martial judges they display ignorance of military law and traditions, uncertainty of themselves, undue fear of showing leniency lest they be thought weak or unmilitary, and a tendency to avoid responsibility by giving severe...sentences, accompanied with recommendations to clemency, attempting thereby to shoulder onto higher authority the responsibility for determining the proper quantum of punishment; a responsibility which our system contemplates shall be assigned and discharged by the court-martial judges themselves. n135

While the boards of review referenced above clearly differ from convening authorities, the point to be taken from the statistics cited is that there was clearly a need for someone in the review process to exercise clemency. Congress recognized such need as a result of the tendency for courts-martial to hand down excessive sentences.

Similar criticism of the military justice system surfaced during the World War II era call for change. First, many critics (and even proponents) of the UCMJ recalled the horror stories of the World War I era. Second, there were those who even argued that convening authorities directed certain sentences to be handed down so that they might exercise clemency for purposes of appearance in front of their units. For example, Arthur E. Farmer, Chairman of the Committee on Military Law, War Veterans Bar Association, stated the following:

> I have also heard an officer say, and this is not a unique experience, "Gentlemen, when you pass sentence on the [*195] accused, you will give him the maximum sentence. Clemency is my function, and I want the men in the command to look to me for clemency, so that when I cut down the sentence they may have more confidence in me." n136

While such descriptions of the manner in which convening authorities exercised clemency do not seem to apply to today's military justice system, the question remains: how is clemency used today?

In order to assess the manner in which modern day convening authorities have been exercising their clemency power, I conducted a review of more than 800 courts-martial. This research was specifically limited to Navy and Marine Corps courts-martial. The cases were examined at the Navy-Marine Corps Appellate Defense Division (Code 45), as well as at the Navy-Marine Corps Court of Criminal Appeals. Therefore, the sample examined really only represents courts-martial eligible for appellate review (that is, those cases in which the servicemember was sentenced to one year or more in confinement and/or a Bad Conduct Discharge). However, this limitation does not adversely affect the pool of

cases represented by the tested sample because the number of cases eligible for appellate review does not differ tremendously from the total courts-martial conducted, ignoring summary courts. The 807 courts-martial examined all took place between 1999 and 2004. n137 During this period there were 15,040 general and special courts-martial conducted which included 527 acquittals, for a total of 14,513 convictions at general and special courts martial. During this period there were 10,675 records of courts-martial docketed with the Navy-Marine Corps Court of Criminal Appeals which is 3838 courts-martial less than the total number conducted. Thus, the 807 courts-martial reviewed are representative of a pool that comprises 74% of all courts-martial conducted. n138

In the end, the entire sample examined represents 7.6 percent of the pertinent pool. Thus, the following results are based on a decent-sized representative sample. Of the total 807 special and general courts-martial examined, the convening authority exercised clemency only 35 times. That is, clemency was exercised in only 4 percent of the courts-martial reviewed. [*196] Meanwhile, appellants submitted clemency matters to the convening authority in approximately 33% of the cases reviewed.

Of the 807 case files examined, 500 of them were courts-martial docketed in either 2003 or 2004. This represents 15.5% of the total courts-martial docketed for appellate review during 2003 and 2004. As such, this particular sample is a fairly large representative sample. Of the 500 cases reviewed, the convening authority exercised clemency only 10 times. Thus, clemency was exercised in a mere 2 percent of the courts-martial reviewed for 2003 and 2004.

Clearly, the modern day convening authority rarely exercises clemency. Military commanders today are undoubtedly keenly aware of the civilianization of the courts-martial process. In that regard, commanders recognize that the process is now governed by extensive legislation, in addition to substantial case law from the appellate courts. Of course, commanders know that courts-martial are subject to a process of direct appellate review, and so it seems as though convening authorities are highly unlikely to exercise clemency in the absence of compelling reasons. Meanwhile, several other significant considerations deserve our attention at this point.

B. Significant Factors to Consider When Analyzing the Modern Clemency Provision

1. Court-Martial by Members vs. Court-Martial by Military Judge Alone

Again, among the chief complaints during the World War I era was that the sentences prescribed by courts-martial were too severe, resulting in reductions by review boards in at least 75 percent of the cases examined. n139 Court-martial panels of young, inexperienced officers displayed "a tendency to avoid responsibility by giving severe...sentences, accompanied with recommendations to clemency, attempting thereby to shoulder onto higher authority the responsibility for determining the proper quantum of punishment..." n140

The modern court-martial, however, has become accustomed to the presence of a military judge. Not only has the modern court-martial become accustomed to the military judge's presence, but trial by military judge alone has become the norm. Of course, trial by military judge alone was unavailable to a [*197] military accused prior to 1968. The significance of this development in military justice cannot be overlooked when analyzing the convening authority's power to exercise clemency.

An analysis of the number of courts-martial by members versus the number of courts-martial by military judge alone for the period from 1997 until 2004 reveals that the tides have changed considerably since the creation of the military judge. Specifically, from 1997 to 2004, the Navy and Marine Corps conducted 21,085 general and special courts-martial. 19,160 of those courts-martial were trials by military judge alone. That is, 91 percent of all courts-martial during those eight years were conducted by military judges rather than members.

The significance of this fact is quite simply that the accused servicemember was sentenced by a military judge in 91 percent of all courts-martial between 1997 and 2004. Today's military judges are highly qualified attorneys with tremendous experience and training in military justice. Clearly, their qualifications to determine sentences, not to mention their independence from the convening authority, place them in a far greater position than the inexperienced officers serving as members during World War I. The logical result is that convening authorities have far less reason to exercise clemency knowing that experienced and highly qualified military judges are rendering the sentences.

Furthermore, even where the remaining nine percent of courts-martial in those eight years were conducted before members, the concerns from the World War I and World War II eras have been abated by certain developments in military justice, such as peremptory challenges and challenges for cause of panel members. Indeed, members may be dismissed based solely on their sentencing philosophy. n141 Thus, modern day defense counsel surely attempt to root out prospective members who may potentially demonstrate "an actual bias by [their] inelastic attitude toward sentencing."

n142 Consequently, because of developments like peremptory challenges, convening authorities today have far less need to second guess the validity of sentences rendered by members in the modern military justice system.

2. Pre-trial Agreements

Also of particular importance to the analysis of the convening authority's power to exercise clemency is the development of pre-trial agreements in military justice. The pre-trial agreement has been in use since [*198] 1953, although it was not included in the Manual for Courts-Martial until 1984. Specifically, R.C.M. 705 authorizes and governs the use of pre-trial agreements. Meanwhile, there is no provision in the UCMJ governing their existence or use.

Generally speaking pre-trial agreements enable an accused to enter into an agreement with the convening authority. As part of an agreement with the convening authority, an accused may agree to plead guilty and/or to fulfill other terms and conditions, n143 in return for a promise by the convening authority to refer the charges to a certain level of court-martial, to withdraw charges or specifications, and/or most importantly to take specified action on the adjudged sentence, *e.g.*, approve no sentence in excess of a specified maximum, to suspend all or part of a sentence, or to mitigate certain forms of punishment into less severe forms. n144 Typically, accused servicemembers do plead guilty, and typically, convening authorities agree to sentences that are considerably less than those authorized by law. n145

In a way, pre-trial agreements between an accused and the convening authority essentially represent a mutual agreement on clemency prior to the trial. They represent "pre-fabricated" clemency. Common sense begs the question: why would a convening authority ever exercise clemency in the form of disapproving, suspending, or mitigating the findings and/or sentence after agreeing to what he or she purportedly felt was an appropriate result? To be sure, the convening authority is bound by the terms of a pre-trial agreement once he or she approves it. The United States Court of Appeals for the Armed Forces has recognized that the creation of pre-trial agreements has possibly affected "the quantum of post-trial clemency." n146 In *United States v. Wheelus*, the court noted that while it believes post-trial clemency still plays a vital role in the military justice system, to what extent the practice of modern pre-trial agreements has altered "the quantum of post-trial clemency" is unknown. n147

Of the 807 cases reviewed for clemency n148 535 of them contained pre-trial agreements that included provisions pertaining to the findings and/or sentence. That is, in 66 percent of the representative sample, the accused servicemember and the convening authority came to a mutual agreement regarding what the final result should be in terms of the findings and/or the sentence. The point here is clear: the evolution of pre-trial agreements has substantially altered the face of military courts martial. "[I]n fact, most new trial [*199] and defense counsel begin their trial experience with guilty plea cases involving pre-trial agreements before moving on to contested cases." n149 Guilty-plea courts-martial governed by detailed pre-trial agreements have become the norm. Consequently, convening authorities clearly have less need to exercise clemency.

3. Appellate Litigation and the Clemency Provision

Yet another important factor to consider when analyzing the modern clemency provision is the development of appellate litigation in the area of post-trial error and post-trial delay. Post-trial delay, in particular, has become increasingly more frequent in the recent years. In 1998, the Court of Appeals for the Armed Forces stated that "[p]ost-trial processing errors abound." n150

One recent case at the Navy-Marine Corps Court of Criminal Appeals highlights the potential problems that can result from the requirement for convening authorities to review courts-martial and from the right of an accused to submit clemency matters. In *United States v. Wilson*, the military judge convicted the appellant of wrongful use of marijuana and breaking restriction, in violation of Articles 112a and 134, UCMJ. n151 On appeal the NMCCA set aside the original convening authority's action and ordered a new action and a new legal officer's review, returning the record of trial to the Judge Advocate General for remand to an appropriate convening authority for a new post-trial review process n152 According to the court, it took "that course of action because the plethora of errors in those two important post-trial documents negated any presumption of regularity we might normally apply in post-trial circumstances." n153 In remanding the case, the court highlighted the specific problems existing in the original convening authority's action and legal officer's review. n154

Following the second post-trial review, the NMCCA was once again displeased with the convening authority's action and legal officer's review. Indeed, the court made no attempt to hide the fact that it was "far from pleased with the post-trial processing of this case." n155 Among the problems in the new documents was the convening authority's failure to note that he considered both [*200] clemency packages that the legal officer indicated the appellant had submitted. n156 The court contemplated remanding the case for a *third* post-trial review by the convening authority

but declined to do so "in the interest of judicial economy." n157 According to the court, "[o]f primary concern in this case is the inordinate amount of time that has elapsed since the appellant's court-martial without the completion of the review process, when the delay is due in large part, plain and simply, to administrative carelessness." n158

Interestingly, the *Wilson* court concluded that the appellant had received a fair and complete review of his clemency request, during both the original submission and the second post-trial review. n159 This conclusion highlights the conflict between the convening authority's clemency power and the recent development in post-trial processing errors as an appellate assignment of error. In *Wilson*, the appellant received a fair and complete review of his clemency request according to the NMCCA. Yet, on appeal, the appellant alleged error in the review of his clemency submissions, and the total post-trial review process took more than four years to complete. This amounts to an incredible waste of judicial resources. The requirements in place as a result of the clemency provision can result in appellate litigation even when the accused has received a fair and complete review of his or her clemency submissions.

In May 2005, the Navy-Marine Corps Appellate Government Division (Code 46) had 148 cases awaiting a reply brief due in the next 60 days to NMCCA. n160 Of the 148 cases, 38 of them included an assignment of error by the appellant alleging unreasonable post-trial delay. n161 In fact, in 15 cases, unreasonable post-trial delay was the *only* assignment of error. n162 That is, 25 percent of the cases included an assignment of error alleging unreasonable post-trial delay, and 10 percent of them included unreasonable post-trial delay as the only assignment of error. Of course, not every assignment of error alleging unreasonable post-trial delay is attributable to the convening authority's clemency power. Yet, as demonstrated by *United States v. Wilson*, the clemency step certainly represents a point in the process where errors can be made. As revealed above, n163 convening authorities today exercise clemency extremely infrequently. Judicial waste resulting from post-trial processing errors and post-trial [*201] delay has seemingly begun to far outweigh the benefit of the convening authority's clemency provision.

4. Modern View of the Convening Authority in Britain and Canada

Finally, another consideration in analyzing the role of the convening authority, albeit a far less direct consideration, is the fact that several nations have recently sough to modernize their systems of military justice. n164 According to the Cox Commission, a commission established by the National Institute of Military Justice to review and provide comments on the military justice system in light of the 50<th> anniversary of the UCMJ, "[t]his modernization has focused on both increasing the impartiality of court-martial procedures and respecting the human rights of servicemembers." n165 Indeed, certain countries have gone so far as removing the convening authority from the appellate review process altogether. While this fact plays little direct role in the American military justice system, it certainly indicates the attitudes of our foreign neighbors regarding the role of the convening authority in modern military justice.

Reform efforts have affected military justice in Australia, India, Ireland, Israel, Mexico, and South Africa as well as in the United Kingdom and Canada. n166 Most importantly, in Britain, the role of the convening authority was abolished almost ten years ago in the Armed Forces Act following a landmark decision in *Findlay v. United Kingdom.* n167 The functions of the convening authority in the British military justice system have been distributed between three separate entities: the prosecuting authority, the court-martial administration officer, and the reviewing authority. Of particular importance, the British military justice system no longer requires the findings and sentence of a court-martial to be approved by a commander. Instead, the sentence stands as adjudged subject only to a system of automatic review. It is instructive that the predecessor to our own system of military justice has developed in such a manner.

[*202] **IV. CONCLUSION**

In theory, the power of the convening authority to exercise clemency does, indeed, represent an accused's best chance of sentence relief. This is because the convening authority cannot change a finding of not guilty to guilty, nor remand a not guilty finding for further consideration, nor increase the sentence. The convening authority can only disapprove or disapprove in part, or approve the sentence. Theoretically, he or she can only help the accused. In that sense, the accused gets a "second bite of the apple." n168

Practically speaking, however, the power of the convening authority does not necessarily represent the accused's best hope of sentence relief. Despite the fact that the convening authority's power to exercise clemency has survived myriad changes to the American military justice system, the practical effects of the power have been altered dramatically. The dramatic changes to the courts-martial process have substantially limited the necessity of a clemency provision with the convening authority. Time and again Congress has sought to limit command control. Presently, command control has effectively been reduced to its most limited form in our history. This has been accomplished through either the elimination of certain powers formerly available to convening authorities or the establishment of inherent protec-

tions, such as the creation of a law member who was later granted additional powers elevating him to a status very similar to a civilian district court judge. In yet another example of substantial change to the military justice system, the military appellate courts have truly redefined the nature of military justice.

Arguably, the very basis for creating the clemency power in convening authorities has all but vanished. Yet, perhaps even more important is the fact that convening authorities simply are not exercising their clemency powers to any noticeable extent. Two pertinent factors in this regard are the fact that the overwhelming majority of courts-martial today are conducted before a military judge alone and the fact that pre-trial agreements have also become commonplace. Each of these considerations is highly relevant in attempting to determine why convening authorities are exercising clemency in less than 5% of the cases they convene. Practically speaking, the hope of receiving clemency from the convening authority is extremely slim.

Of course, the natural inclination is to retain the provision anyway. Flow can it possibly hurt a convicted servicemember? Quite simply the answer is that so long as the clemency provision remains a part of the military justice [*203] system it cannot directly harm a convicted servicemember. The convening authority cannot increase the severity of the sentence or alter a finding from not guilty to guilty. He or she can only work to lessen the blow for the convicted servicemember. Nevertheless, given its infrequent use, determining the continued value of the clemency provision may require an analysis of its other effects, such as the extent to which clemency issues are alleged as error on appeal. Furthermore, a deeper analysis of the entire process of convening authority approval of courts-martial may reveal similar appellate litigation effects. Perhaps the clemency provision is but a part of a larger systemic problem, specifically that the requirement for the convening authority to take action on the findings and sentence of a court-martial is outdated. Unfortunately, these issues are beyond the scope of this article. In the meantime, however, our servicemembers may be interested to know that if the power of the convening authority to exercise clemency represents an accused's best hope of relief, then there is not much hope.

Legal Topics:

For related research and practice materials, see the following legal topics:
Criminal Law & ProcedureSentencingCapital PunishmentStays of ExecutionCriminal Law & ProceduresPostconviction ProceedingsClemencyGovernmentsCourtsJudges

FOOTNOTES:

n1 *See, e.g., United States v. Davis, 58 M.J. 100, 102 (C.A.A.F. 2003); United States v. Wheelus, 49 M.J. 283, 287 (C.A.A.F. 1998); United States v. Wilson, 9 C.M.A. 223, 226 (1958); United States v. Fisher, NMCM 200101235, 2003 CCA LEXIS 75,* at *13-*14 (N-M Ct. Crim. App. March 25, 2003).

n2 Uniform Code of Military Justice, art. 60, *10 U.S.C. § 860* (2005) [hereinafter art. 60, UCMJ]

n3 Manual for Courts-Martial, United States, 2005, Rule for Court-Martial 1105 [hereinafter MCM, 2005, R.C.M.].

n4 MCM, 2005, R.C.M. 1107.

n5 JONATHAN LURIE, ARMING MILITARY JUSTICE 46 (1992).

n6 Staff of the House Comm. on Military Affairs, 79th Cong., Investigations on the National War Effort 1-2 (Comm. Print 1946).

n7 Maj. Christopher W. Behan, *Don't Tug on Superman's Cape: in Defense of Convening Authority Selection and Appointment of Court-Martial Panel Members, 176 MIL. L. REV. 190, 192 (2003).*

n8 *Id.*

n9 MCM, 2005, Part I, at 3.

n10 Lt. Col. James B. Roan & Capt. Cynthia Buxton, *The American Military Justice System in the New Millennium, 52 A.F. L. REV. 185, 189 (2002).*

n11 *See, e.g,* U.S. CONST. amend. V; UCMJ, *10 U.S.C. §§ 801*-950 (2005); *Dynes v. Hoover, 61 U.S. 65 (1857).*

n12 DAVID A. SCHLUETER, MILITARY CRIMINAL JUSTICE PRACTICE AND PROCEDURE § 1-1 (6th ed 2004).

n13 Roan & Buxton, *supra* note 10, at 190.

n14 *Id.* at 192.

n15 *Id.*

n16 Col. James A. Young 111, *Revising the Court Member Selection Process, 163 MIL. L. REV. 91, 97-98 (2000).*

n17 *United States Navy-Marine Corps Court of Military Review v. Carlucci, 26 M.J. 328, 333 (C.M.A. 1988).*

n18 SCHLUETER, *supra* note 12, § 1-1.

n19 *See* art. 60, UCMJ.

n20 WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 17-19 (2d ed. 1920).

n21 *Id.*

n22 *Id.* at 21; *see also Establishment of Military Justice: Hearings on S. 64 Before a Subcomm. of the Comm. on Military Affairs,* 66th Cong. 24-25 (1919) (statement of Maj. J.E. Runcie, United States Army (Ret.)).

n23 *See* S.T. Ansell, *Military Justice,* 5 CORNELL L.Q. (Nov. 1919), reprinted in MIL. L. REV. BICENT. ISSUE 53, 55-56, n.1 (1975) (quoting 3 J. ADAMS, HISTORY OF THE ADOPTION OF THE BRITISH ARTICLES OF 1774 BY THE CONTINENTAL CONGRESS: LIFE AND WORKS OF JOHN ADAMS 68-82).

n24 American Articles of War of 1775, art. LXVII, reprinted in WINTHROP, *supra* note 20, at 953.

n25 *See* EDWARD M. BYRNE, MILITARY LAW (3d ed. 1981).

n26 *See* RULES FOR THE REGULATION OF THE NAVY OF THE UNITED COLONIES OF NORTH-AMERICA (William & Thomas Bradford, 1775, reprinted, Naval Historical Foundation, 1944)

n27 *Id.* art. 43 (emphasis added).

n28 *Id.* art. 44 (emphasis added).

n29 *Id.* art. 7 (emphasis added).

n30 An act for the government of the navy of the United States, ch. 24, *1 Stat. 709 (1799).*

n31 JAMES SNEDEKER, MILITARY JUSTICE UNDER THE UNIFORM CODE (1953).

n32 An act for the better government of the navy of the United States, ch. 33, *2 Stat. 45 (1800).*

n33 *Id.* art. 29 (emphasis added).

n34 *Id.* art. 42.

n35 *Id.*

n36 *Id.*

n37 An act for the government of the Navy of the United States, *40 Stat. 501 (1918).*

n38 *See* Staff of the Sen. Comm. Armed Services, 80th Cong., Courts Martial Legislation: A Study of the Proposed Legislation to Amend the Articles of War (H.R. 2575); and to Amend the Articles to for the Government of the Navy (H.R. 3687; S. 1338) 2 (Sen. Comm. Print 1948) ("At the time these [British and Roman] notions were enacted into law by the American Congress, it was pointed out that the objective of an army is wholly different from the objective of a civilian society; that the objective of military law differs from that of civilian law. ... The function of an army or military organization was then, as it remains today, not only to fight wars but to win them.").

n39 LURIE, *supra* note 5, at 7.

n40 *Id.* at 5.

n41 *See supra* section II(A). SCHLUETER, *supra* note 12, § 1-1.

n42 *United States ex rel. Toth v. Quarks, 350 U.S. 11, 17 (1955).*

n43 Letter from Newton D. Baker, Secretary of War, U.S. War Department, to Maj. Gen. E.H. Crowder, Judge Advocate General of the Army (March 1, 1919), reprinted in U.S. WAR DEPARTMENT, MILITARY JUSTICE DURING THE WAR 3 (1919).

n44 H.R. Rep. No. 66-940, at 2 (1920).

n45 Letter from Maj. Gen. E.H. Crowder, Judge Advocate General of the Army to Newton D. Baker, Secretary of War, U.S. War Department (March 10, 1919), reprinted in U.S. WAR DEPARTMENT, MILITARY JUSTICE DURING THE WAR 12 (1919).

n46 Hearings on S. 64, *supra* note 22, at 25 (statement of Maj. J.E. Runcie, United States Army (Ret.)).

n47 JOHN M. LINDLEY, A SOLDIER IS ALSO A CITIZEN: THE CONTROVERSY OVER MILITARY JUSTICE, 1917-1920, at 7-36 (Harold Hyman & William P. Hobby eds. 1990).

n48 General Crowder served as Judge Advocate General (JAG) of the Army from 1911 until 1923. In 1917, he also assumed the duties as Provost Marshal General and administered the wartime manpower draft (he had been heavily involved in the drafting of the first Service Selection System). Meanwhile, General Ansell assumed control of the day-to-day duties as "acting" JAG. It was during this time that the Ansell-Crowder dispute arose. *See* LINDLEY, *supra* note 47, at 22-23; and LURIE, *supra* note 5, at 48.

n49 *A Bill to Promote the Administration of Military Justice by Amending Existing Laws Regulating Trials by Courts-Martial, and For Other Purposes: Hearings on S. 5320 Before the Sen. Comm. on Military Affairs,* 65th Cong. 40 (1919) (statement of Brigadier General Samuel T. Ansell).

n50 LINDLEY, *supra* note 47, at 136.

n51 57 Cong. Rec. 878 (1918).

n52 *See* A Bill to Promote the Administration of Military Justice by Amending Existing Laws Regulating Trials by Courts-Martial, and For Other Purposes, S. 5320, 65th Cong. (1919). Also, an identical version was introduced to the House on February 14, 1919. *See* 57 Cong. Rec. 3405.

n53 Hearings on S. 64, supra note 22, at 5-23. Also, once again, shortly thereafter an identical bill was introduced in the House. Hearings on S.64, *supra* note 22, at 37, 100-102.

n54 Behan, *supra* note 7, at 218-219 (citing Edward F. Sherman, *The Civilianization of Military Law, 22 ME. L. REV. 3, 6 (1970)).*

n55 *See Uniform Code of Military Justice: Hearings on HR. 2498 Before a Subcomm. of the Comm. on Armed Services,* 81st Cong. 840 (statement of Prof. Arthur J. Keeffe).

n56 LINDLEY, *supra* note 47, at 167.

n57 *Id.*

n58 *Id.* at 167-68.

n59 Behan, *supra* note 7, at 218.

n60 Articles of War of 1920, Art. 70, Pub. L. No. 66-242, ch. 11, *41 Stat. 759, 787-812 (1920).*

n61 *Id.* art. 8.

n62 *Id.* art 17.

n63 *Id.*

n64 *Id.* art. 18.

n65 *Id.* art. 29.

n66 *Id.* art. 50 1/2.

n67 *Id.* art. 40.

n68 *Staff of the House Comm. on Military Affairs, 79th Cong., Investigations on the National War Effort* 5 (Comm. Print 1946).

n69 Hearings on S.64, *supra* note 22, at 1379.

n70 The convening authority was still required to actually approve the findings. That is, the convening authority could only approve findings supported in law and fact. Thus, if the evidence in the case only supported a finding of guilty for a lesser included offense, then the convening authority could only approve a finding of guilty for the lesser included offense. Given the legal nature of this duty, the convening authority was entitled to assistance from the staff judge advocate. *See* Articles of War of 1920, *supra* note 60, arts. 46, 47, and 50 1/2.

n71 LURIE, *supra* note 5, at 129.

n72 *Id.*

n73 *Id.*

n74 *Id.* (quoting Enoch Crowder Papers, reel 5, folder 144 (May 5, 1919)).

n75 *See Bills to Amend the Articles of War: Hearings on Sundry Legislation Affecting the Naval and Military Establishment Before the Subcomm. of the Comm. on Armed Services,* 80th Cong., 2166-2175 (1947); *see also* LURIE, *supra* note 5, at 128.

n76 Index and Legislative History, Uniform Code of Military Justice, at Preface (50th Anniversary ed. 2000).

n77 Investigations on the National War Effort, *supra* note 6, at I.

n78 LURIE, *supra* note 5, at 130.

n79 *Id.* at 131 (citing BALLANTINE REPORT, "ORGANIZATION, METHODS, AND PROCEDURE OF NAVAL COURTS" (1943) in FELIX LARKIN PAPERS 11).

n80 *Id.*

n81 *Id.*

n82 "An even more serious issue for the committee was the extent to which the navy system was able to 'distinguish between the maintenance of discipline and the administration of justice,' providing 'a workable plan under which the two factors are accorded proper relative importance.' Here the committee found much room for improvement.
The navy procedure 'might well provide greater independence to the judicial function.' Because the convening authority not only ordered the accused to trial, but also selects his 'judges,' and because they supposedly would not convene a court-martial 'unless reasonably convinced of his guilt, acquittal may be considered tantamount to an expression of disagreement with a superior officer.' Having pointed to the underlying tension between a justice system and a well established structure, the report emphasized that its statements were 'without any criticism

whatsoever of the integrity and sense of fairness of officer personnel[,] and with the belief that substantial justice is generally afforded.'" *Id.* at 131-32 (quoting BALLANTINE REPORT (1943), at 15, 23, and 24).

n83 *Id.* at 130, n.13 (citing Report of the [Navy] General Courts-Martial Sentence Review Board (1947) in FELIX LARKIN PAPERS 77 [hereinafter RGCMSRB]).

n84 *Id.* at 142-43 (quoting RGCMSB, at 192).

n85 *Id.* at 143 (quoting RGCMSB, at 193).

n86 *Id.* at 143 (quoting RGCMSB. at 193).

n87 *Id.* at 137.

n88 *Id.*

n89 *Id.*

n90 *Id.*

n91 Courts Martial legislation. *supra* note 38. at 21.

n92 National Security Act of 1947, ch. 343, §§ 2-311, *61 Stat. 495 (1947)* (codified as amended at *50 U.S.C. §§ 401*-442 (2005)).

n93 LURIE, supra note 5, at 144.

n94 S. Rep. No. 81-486, at 4 (1949).

n95 H.R. Rep. No. 81-491, at 38 (1949).

n96 *A Bill to Unify, Consolidate, Revise and Codify the Articles of War, the Articles for the Government of the Navy, and the Disciplinary Laws of the Coast Guard, and to Enact and Establish a Uniform Code of Military Justice: Hearings on S. 857 and H.R. 4080 Before Senate Comm. on Armed Services*, 81 Cong. 206 (1949) (statement of Richard H. Wels, Chairman, Special Committee on Military Justice of the New York Lawyers' Association).

n97 *Id.* at 207

n98 *Id.* at 61.

n99 *Hearings on S. 857 and H.R. 4080, supra* note 96, at 290 (statement of Gen. R.C. Harman, Judge Advocate General of the Air Force).

n100 *Id.* at 290-91

n101 H.R. Rep. No. 81-491, at 7 (1949).

n102 *Id.* at 7-8.

n103 Uniform Code of Military Justice, Pub. L. No. 81-506, art. 60 (1951).

n104 *Id.* art. 64.

n105 *Hearings on H.R. 1498, supra* note 55, at 1182-85 and 1266-67.

n106 *Id.* at 1182-85.

n107 *Id.* at 1266.

n108 *Id.* at 1185.

n109 *Id.*

n110 *Id.*

n111 H.R. Rep. No. 81-491, at 32 (1949).

n112 *Id.*

n113 *See infra,* § II(E).

n114 Military Justice Act of 1968, Pub. L. No. 90-632, *80 Stat. 1335 (1968).*

n115 H.F. "Sparky" Gierke, *Five Questions About the Military Justice System, 56 A.F. L. REV. 249, 254-55 (2005).*

n116 *Id.*

n117 *Id. at 250.*

n118 S. Rep. No. 90-1601, at 45034504 (1968).

n119 Military Justice Act of 1983, Pub. L. No. 98-209, *97 Stat. 1393 (1983).*

n120 *Id.* § 5(a)(1), §§ 860, 864.

n121 Uniform Code of Military Justice, arts. 60, 64, *10 U.S.C. §§ 860,* 864 (1982).

n122 S. Rep. No. 98-53, at 7 (1983).

n123 *Id.* at 7, 19; *see also* H.R. Rep. No. 98-549, at 15 (1983).

n124 Andrew S. Effron, *Post-Trial Submissions to the Convening Authority Under the Military Justice Act of 1983,* ARMY LAW., July 1984, at 59, 59-60 (quoting H.R. Rep. No. 98-549, at 15 (1983)).

n125 H.R. Rep. 98-549, *supra* note 123, at 18.

n126 *Id.* at 13.

n127 *Id.*

n128 Military Justice Act of 1983, Pub. L. No. 98-209, sec. 5(a)(1), § 860(b), *97 Stat. 1393 (1983).*

n129 Later, in 1996, the right of an accused to submit clemency matters was modified to require any such submissions to be in writing. *See* Military Justice Amendments of 1996, Pub. L. No. 104-106, sec. 1132, § 860(b), *110 Stat. 186 (1996).*

n130 Behan, *supra* note 7, at 192.

n131 Art. 36, UCMJ.

n132 MCM, 2005, Introduction to Drafters Analysis of the Rules for Court-Martial, app. 21.

n133 *See United States v. Rivers, 49 M.J. 434, 443 (C.A.A.F. 1998);United States v. Gleason, 43 M.J. 69, 73 (C.A.A.F. 1994); United States v. Thomas, 22 M.J. 388, 393 (C.M.A. 1986).*

n134 LURIE, *supra* note 5, at 128.

n135 *Id.* at 46-47 (quoting William C. Rigby, Draft Report on Court Martial Procedures, in Records of the Judge Advocate General, NARC, RG 153, entry 26, box 20. N.p. (1919)).

n136 *Hearings on S. 857 and H.R. 4080, supra* note 96, at 87 (statement of Arthur E. Farmer, Chairman, Committee on Military Law, War Veterans Bar Association).

n137 The special courts-martial were all BCD specials. That is, there were zero non-BCD special courts-martial from 1997 to 2004.

n138 One must also consider the cases where the convening authority exercised clemency to reverse the finding of guilty or to reduce/disapprove the sentence to less than one year confinement and/or no bad conduct discharge. In such cases, appellate review at the NMCCA would not be required. Therefore, these cases were not accounted for in the representative sample; however, in all likelihood, the number of such cases is extremely small.

n139 LURIE, *supra* note 5, at 128.

n140 *Id.* at 46-47 (quoting William C. Rigby, Draft Report on Court Martial Procedures, in Records of the Judge Advocate General, NARC, RG 153, entry 26, box 20. N.p. (1919)).

n141 United States v. Giles, 48 60, 63 (C.A.A.F. 1998).

n142 *Id.* at 63.

n143 MCM, 2005, R.C.M. 705(b)(1).

n144 MCM, 2005, R.C.M. 705(b)(2).

n145 *United States v. Wheelus, 49 M.J. 283, 287 (C.A.A.F. 1998).*

n146 *Id.*

n147 *Id.*

n148 *See supra* section 111(A).

n149 Maj. Mary M. Foreman, *Let's Make a Deal! The Developments of Pretrial Agreements in Military Criminal Justice Practice, 170 MIL. L. REV. 53 (2001).*

n150 *United States v. Wheelus, 49 M.J. 283, 287 (C.A.A.F. 1998).*

n151 *United States v. Wilson, NMCCA 2000014, 2004 CCA LEXIS 33* (N-M Ct. Crim. App. Feb. 10, 2004).

n152 *Id.* at 2.

n153 *Id.*

n154 *Id.*

n155 *Id.* at 9.

n156 *Id.* at 2.

n157 *Id.* at 7.

n158 *Id.* at 7-8.

n159 *Id.* at 9.

n160 E-mail from Rear Admiral Bruce MacDonald, Commander Naval Legal Service Command, to various commanders of Trial Service Offices and Naval Legal Service Offices (May 30, 2005, 10:10 EST) (on file with author).

n161 *Id.*

n162 *Id.*

n163 *See supra* section III(A).

n164 See Report of the Cox Commission on the 50<th> Anniversary of the Uniform Code of Military Justice (May 2001), *available at* http://www.badc.org/html/militarylaw_cox.html.

n165 *Id.*

n166 EUGENE R. FIDELL, A WORLD-WIDE PERSPECTIVE ON CHANGE IN MILITARY JUSTICE, IN EVOLVING MILITARY JUSTICE, 209-217 (Eugene R. Fidell & Dwight H. Sullivan eds. 2002) (analyzing military-legal reform in countries around the world).

n167 Ann Lyon, *After Findlay: A Consideration of Some Aspects of the Military Justice System*, in EVOLVING MILITARY JUSTICE, *supra* note 166, at 218-29; *see* also Findlay v. United Kingdom, 24 EUR. CT. H.R. 221 (1997).

n168 Major Bradley J. Huestis, *You Say You Want a Revolution: New Developments in Pretrial Procedures,* ARMY LAW., April / May 2003, at 17, 20.