Cornell Journal of Law and Public Policy

Volume 25
Issue 2 *Issue 2 - Winter 2015*

Article 2

Taming the Military's Post-Trial Leviathan: Reforms That Could Save the Military up to $170 Million Each Year

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TAMING THE MILITARY'S POST-TRIAL LEVIATHAN: REFORMS THAT COULD SAVE THE MILITARY UP TO $170 MILLION EACH YEAR

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Sexual assault in the military has unleashed a firestorm of national media attention and a sense of urgency among lawmakers who are considering major changes to the military justice system. No area of military justice is more ripe for reform than the military's unique post-trial system—and not merely because of the role it played in fueling the ongoing controversy.

This Article proposes reforms to the military's post-trial process to more closely align it with civilian procedural standards and bring the resource burden to a more fair and sustainable level. Methodically comparing the military's post-trial system with civilian post-trial systems demonstrates that a civilian death sentence and a military misdemeanor guilty plea trigger roughly equivalent levels of post-trial procedure. Reform is necessary in part because the military's unusually resource-intensive post-trial system has grown so expansive that the United States must forgo valuable warfighting capabilities in order to pay for it. Reform is also necessary because the historical circumstances that once justified the military's unique system no longer apply.

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One of these things is not like the others,
One of these things just doesn't belong,
Can you tell which thing is not like the others
By the time I finish my song?[1]

INTRODUCTION

A guilty plea for marijuana use in the military justice system unleashes a post-trial process that rivals (and in many ways exceeds) the protections afforded to a civilian condemned to die.[2] A convicted ser-

[1] *Sesame Street* (PBS television broadcast).

[2] *See infra* Appendix A (comparing the post-trial process that follows a civilian's death penalty conviction in California state court against the post-trial process that follows a Soldier's guilty plea for marijuana use). In seven of ten categories, the Soldier's misdemeanor-

vicemember whose sentence does not include confinement[3] may nonetheless enjoy elaborate procedural safeguards that include automatic review by an appellate court,[4] up to four opportunities for clemency,[5] and a defense appellate attorney appointed at the government's expense (regardless of the convicted's financial status).[6] A run-of-the-mill guilty plea[7] regularly triggers a military post-trial process that requires at least four judges,[8] six attorneys,[9] a general officer,[10] and an average of five hundred-seventy days to complete.[11] No other U.S. jurisdiction provides

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level guilty plea triggers a post-trial process that exceeds the protections afforded to a civilian condemned to die. *See infra* Appendix A. The post-trial process is roughly equivalent in the remaining three categories. *See infra* Appendix A.

3 Assume the court-martial sentenced the servicemember to a punitive discharge from military service.

4 MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1201 (2012) [hereinafter MCM].

5 *See* U.S. CONST. art II, § 2 (providing pardon authority to the President); MCM, *supra* note 4, R.C.M. 1107, 1201 (providing clemency authority to the convening authority and the service Judge Advocate General); U.S. DEP'T OF ARMY, REG. 15-130, ARMY CLEMENCY & PAROLE BD., ¶¶ 1-1, 2-2 (1998) [hereinafter AR 15-130] (providing for clemency through the Army Clemency and Parole Board and the Secretary of the Army). However, Congress recently imposed additional limitations on the convening authority's clemency powers for sexual assault convictions, adjudged sentences that exceed six months confinement or include a punitive discharge, or convictions for offenses that include a maximum punishment exceeding two years of confinement. National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1702, 127 Stat. 672, 954–958 (2013) [hereinafter National Defense Authorization Act for Fiscal Year 2014]. These new limitations apply to offenses that occurred on or after June 2014. *Id.* § 1702(d). Although the military justice system rarely grants clemency, clemency may be even rarer in civilian death penalty cases. *Compare* Michael J. Marinello, *Convening Authority Clemency: Is It Really an Accused's Best Chance of Relief?*, 54 NAVAL L. REV. 169, 196 (2007) (finding that convening authorities granted clemency in only two percent of cases between 2003 and 2004), *with* Mary-Beth Moylan & Linda E. Carter, *Clemency in California Capital Cases*, 14 BERKELEY J. CRIM. L. 37, 66 (2009) (finding that California denied all fourteen clemency requests from 1976 to 2009).

6 *See* MCM, *supra* note 4, R.C.M. 1202.

7 Again, assume the court-martial sentenced the servicemember to a punitive discharge from military service.

8 *See* Uniform Code of Military Justice art. 66, 10 U.S.C. § 866 (2012) [hereinafter UCMJ] (requiring three judge panels to hear cases at the service courts of criminal appeals); MCM, *supra* note 4, R.C.M. 1201 (providing for automatic appellate review of sentences including a punitive discharge). The fourth judge in this example is the trial judge. MCM, *supra* note 4, R.C.M. 501.

9 The six attorneys are the trial counsel, defense counsel, chief of military justice (preparing post-trial documents), the staff judge advocate (preparing post-trial documents), defense appellate counsel, and government appellate counsel. *See* MCM, *supra* note 4, R.C.M. 501, 1106, 1202.

10 *See* MCM, *supra* note 4, R.C.M. 1107.

11 *See* E-mail from Homan Barzmehri, Management and Program Analyst, Army Court of Criminal Appeals, to author (Jan. 22, 2015) [hereinafter Barzmehri E-mail, Jan. 22, 2015] (on file with author) (explaining that the average time from sentence until a case was received at the Army Court of Criminal Appeals was 231 days in 2014); E-mail from Homan Barzmehri, Management and Program Analyst, Army Court of Criminal Appeals, to author (Jan. 27, 2015) [hereinafter Barzmehri E-mail, Jan. 27, 2015] (on file with author) (explaining

its felons with post-trial protections that match the protections the military post-trial system provides to a servicemember whose only punishment is a punitive discharge.[12] This disparity between military and civilian post-trial protections raises questions in light of the formal equality principle that like things should be treated alike.[13]

More practically, maintaining a post-trial leviathan that overconsumes scarce resources represents a very real decision to cut other capabilities of our military. Today's military simultaneously faces fiscal austerity, a major drawdown in forces, and increasing mission requirements.[14] Yet the military's unique post-trial process costs taxpayers approximately $170 million annually.[15] To put it in perspective, this number roughly equals the annual cost of three infantry battalions (most of the combat power in an infantry brigade combat team).[16] At a time when budget cuts are forcing the Army to eliminate ten brigade combat teams (one-quarter of the Army's overall number), $170 million represents a noticeable reduction in U.S. combat power.[17] As another example, the United States devotes annually thirty-four times more resources to military post-trial than it devotes to countering Islamic State in Iraq and the Levant's (ISIL) slick social media recruiting campaign, which is currently a national security strategic priority.[18] To further put the re-

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that the average processing time for an appeal at the Army Court of Criminal Appeals is 339 days).

12 *See infra* Part II and Appendix B.

13 *See* ARISTOTLE, NICOMACHEAN ETHICS bk. V, at 3 (W.D. Ross trans., 1999) (c. 384 B.C.E.). Servicemembers should receive more rigorous post-trial protections because of the nature of service in an all-volunteer military and the military's two-thirds voting requirement to convict. *See* MCM, *supra* note 4, R.C.M. 921. However, the military's two-thirds panel voting requirement is only relevant towards justifying the post-trial process that follows contested panel cases (not guilty pleas or judge alone courts-martial). *See* MCM, *supra* note 4, R.C.M. 921, 1103–1204 (providing the same post-trial process without regard to plea or forum). Additionally, the persuasiveness of all justifications for heightened protections for servicemembers wane for cases in which the punishments approach the low end of the spectrum. *See* MCM, *supra* note 4, R.C.M. 1103–1204 (requiring the same post-trial process regardless of whether the punishment is a punitive discharge or ten years of confinement).

14 Tyrone C. Marshall Jr., *McHugh: America's Army Facing Sequestration 'Enemy' at Home,* U.S. DEP'T OF DEF. (Mar. 11, 2015), http://www.defense.gov/News-Article-View/Article/604258.

15 *See infra* Part III.A.4.

16 *See infra* note 136 and accompanying text.

17 *Report: Army Accelerating Cuts, Reorganization*, STARS & STRIPES (Oct. 21, 2013), http://www.stripes.com/report-army-accelerating-cuts-reorganization-1.248253 (reporting that budget cuts are forcing the Army to cut 80,000 Soldiers); Claudette Roulo, *Army to Cut 12 Brigade Combat Teams by 2017, Odierno Says*, U.S. DEP'T OF DEF. (June 25, 2013), http://archive.defense.gov/news/newsarticle.aspx?id=120361 (explaining that budget cuts are forcing the Army to reduce the number of brigade combat teams from forty-five to thirty-three by 2017).

18 *See Fareed Zakaria GPS* (CNN television broadcast Feb. 22, 2015) (discussing the inter-agency effort with a $5 million budget that is charged with countering ISIL's information operations and recruiting on social media).

source burden in perspective, military post-trial is sixty-four times more expensive (per capita) than the entire annual budget of the U.S. circuit courts of appeals.[19]

It is time to reform the military's post-trial process to more closely align it with civilian procedural standards and bring the resource burden to a more fair and sustainable level. Servicemembers, military commanders, and America as a whole would all benefit from post-trial reforms that reduce costs and remove systemic delay from the process, but continue to provide convicted servicemembers with significant post-trial protections beyond those available to civilians. With these goals in mind, this Article proposes a series of reforms to military post-trial. The proposed reforms stand on an appreciation of modern microeconomic theory, a data-driven cost-benefit analysis of each reform, and a comparative analysis of military and civilian post-trial procedure.

First, this Article will frame the issues by comparing the post-trial processes triggered by a death sentence in California and a military guilty plea. Second, this Article will discuss three modern developments that justify reforming post-trial. This section of the Article includes the first-ever study to calculate the actual costs of the military's post-trial system. It also includes the first-ever study to methodically compare the military's post-trial process against civilian post-trial practices in all fifty states and the federal courts. Finally, this Article will detail a series of proposed reforms to the post-trial process.

I. BACKGROUND

To frame the problem, compare the post-trial process that follows a civilian's death penalty conviction in California's state courts with the post-trial process that follows a servicemember's guilty plea for marijuana use in the military.[20] For readers who are unfamiliar with the military justice system, this comparison also serves as general overview of the military post-trial system.[21] The military post-trial process described in this section applies to servicemembers who receive a sentence that includes confinement for one year or a punitive discharge from military service.[22]

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19 *See infra* Part III.B.1.

20 Assume the convicted servicemember is sentenced to reduction in grade, total forfeiture of pay, one month confinement, and a Bad-Conduct Discharge at a General Court-Martial.

21 This information is also displayed in a table for ease of comparison. *See infra* Appendix A.

22 *See* MCM, *supra* note 4, R.C.M. 1101–1204. The military post-trial process required for a particular court-martial is dictated primarily by the sentence the servicemember receives. *See id.* Plea and forum generally do not impact the military post-trial system. *See id.*

In both cases, appellate courts must automatically review the convictions, sentences, and trial process.[23] While the death penalty case will take longer to move through its post-trial process, the convicted in either case should expect years to elapse between their sentencing and the conclusion of the post-trial process.[24]

However, the servicemember enjoys stronger post-trial protections than the condemned civilian in a variety of areas. In capital cases, California provides appellate defense attorneys at taxpayer expense only to indigent defendants;[25] on the other hand, in all appellate cases the military provides appellate defense attorneys at no cost to the convicted regardless of the convicted's ability to pay.[26] Both cases generate a verbatim transcript of the trial process, but only the servicemember's transcript is reviewed word-for-word by the court reporter, the prosecutor, the defense attorney, and the judge before it is authenticated.[27] Conversely, the attorneys and judge in the death penalty case are not required to directly review the transcript; rather, they review the docket sheets and minute orders to make sure the record is complete.[28] Further, both systems provide options for clemency, but the servicemember who pleads guilty to marijuana use enjoys more protections in this area than the California civilian sentenced to death. First, up to four separate authorities are authorized to grant clemency to the servicemember (the court-martial

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23 CAL. R. CT. 8.600(a); MCM, *supra* note 4, R.C.M. 1201.

24 OFFICE OF THE ATT'Y GEN., STATE OF CAL., A VICTIM'S GUIDE TO THE CAPITAL CASE PROCESS 2, http://oag.ca.gov/sites/all/files/agweb/pdfs/publications/deathpen.pdf. *See* Barzmehri E-mail, Jan. 27, 2015, *supra* note 11; *see also* United States v. Grimes, Army 20100720, 2014 CCA LEXIS 63 (A. Ct. Crim. App. Jan. 31, 2014) [hereinafter Grimes] (unpublished), *rev. denied*, No. 14-0493, 2014 CAAF LEXIS 829 (C.A.A.F. Aug. 11, 2014) (unpublished). Post-trial processing exceeded four years, but neither the convening authority nor the appellate courts recognized post-trial delay as an issue. *See id.*

25 S*ee* CAL. R. CT. 8.605. *See also Death Penalty Cases*, CAL. COURTS, http://www.courts.ca.gov/5641.htm (last visited Oct. 25, 2015).

26 MCM, *supra* note 4, R.C.M. 1202.

27 MCM, *supra* note 4, R.C.M. 1103, 1104(a); CAL. R. CT. 8.320, 8.336–.344, 8.619. For all California felony convictions, the court reporter prepares and certifies the written transcript. CAL. R. CT. 8.320, 8.336–.344, 8.619. The clerk of the trial court prepares and certifies the portion of the record that includes the papers, documents, and exhibits used at trial. *Id.* After the clerk delivers the certified transcripts, each counsel reviews the docket sheets and minute orders to determine whether the reporter's transcript is complete and reviews the court file to determine whether the clerk's transcript is complete. *Id.* The rules do not require counsel for either party to read the entire reporter's transcript. *Id.* If any counsel files a request for additions or corrections, then the judge must also certify the record as complete. CAL. R. CT. 8.619. Regarding military practice, the requirement for trial defense counsel to review transcripts prior to authentication is based in local and regional Trial Defense Service policy. This assertion is based on the author's professional experiences across eight years of military justice practice as a trial counsel, defense counsel, senior trial counsel, command judge advocate, and chief of military justice from 2007 to 2014 [hereinafter Professional Experiences].

28 *See supra* note 27.

convening authority, the Judge Advocate General, the Clemency and Parole Board, and the President of the United States),[29] while only one authority can grant clemency to the condemned civilian (the Governor).[30] Second, the servicemember's first clemency review is automatic and mandatory,[31] while the civilian must affirmatively petition the Governor for clemency.[32] Third, the California Governor must obtain approval from the California Supreme Court in order to grant clemency in certain circumstances,[33] while the authorities who would act on the servicemember's clemency enjoy largely unfettered power.[34] Fourth, the servicemember enjoys a higher probability of obtaining clemency than the civilian condemned to die.[35]

Additionally, the convicted Soldier enjoys a variety of post-trial procedural entitlements that are wholly absent from the civilian death penalty process. For example, the staff judge advocate (a senior military

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29 *See* National Defense Authorization Act for Fiscal Year 2014, *supra* note 5, § 1702. U.S. CONST. art. II, § 2 (providing pardon authority to the President); MCM, *supra* note 4, R.C.M. 1107, 1201 (providing clemency authority to the convening authority and the service Judge Advocate General); AR 15-130, *supra* note 5, ¶ 2-2 (providing for clemency through the Army Clemency and Parole Board and the Secretary of the Army). However, Congress recently imposed additional limitations on the convening authority's clemency powers for sexual assault convictions, adjudged sentences that exceed six months confinement or including a punitive discharge, or convictions for offenses that include a maximum punishment exceeding two years confinement. These new limitations apply to offenses that occurred on or after June 2014. *See* National Defense Authorization Act for Fiscal Year 2014, *supra* note 5, § 1702.

30 *See* CAL. CONST. art. V, § 8. The President's civilian pardon authority is limited to federal offenses. *See* U.S. CONST. art. II, § 2.

31 MCM, *supra* note 4, R.C.M. 1107, 1201. Clemency by the convening authority or the service Judge Advocate General can occur without any action from the convicted. *Id.* However, the President of the United States rarely uses his pardon authority unless requested by the convicted. *See Standards for Consideration of Clemency Petitioners*, U.S. DEP'T OF JUSTICE, http://www.justice.gov/pardon/about-office-0 (last visited Mar. 7, 2015).

32 OFFICE OF GOVERNOR, STATE OF CAL., HOW TO APPLY FOR A PARDON (2013), https://www.gov.ca.gov/docs/How_To_Apply_for_a_Pardon.pdf.

33 CAL. CONST. art. V, § 8. For example, the California Supreme Court must recommend granting a pardon before the Governor can pardon an applicant who has been convicted of more than one felony. *Id.* Also, the Governor may only consider certain factors when acting on murder case with a sentence to an indeterminate term of confinement. *Id.*; *see also* OFFICE OF GOVERNOR, *supra* note 32.

34 The President's clemency power is restricted only as to impeachment. *See* U.S. CONST. art. II, § 2. The Judge Advocate General's clemency power is unqualified. MCM, *supra* note 4, R.C.M. 1201(b)(3). Clemency is "within the sole discretion of the convening authority" and "is a matter of command prerogative." MCM, *supra* note 4, R.C.M. 1107(b)(1). However, Congress recently imposed additional limitations on the convening authority's clemency powers for sexual assault convictions, adjudged sentences that exceed six months confinement or including a punitive discharge, or convictions for offenses that include a maximum punishment exceeding two years confinement. These new limitations apply to offenses that occurred on or after June 2014. National Defense Authorization Act for Fiscal Year 2014 *supra* note 5, § 1702.

35 *Compare* Marinello, *supra* note 5, at 196 (finding that convening authorities grant clemency in only two percent of cases), *with* Moylan & Carter, *supra* note 5, at 66 (finding that California denied all fourteen clemency requests from 1976 to 2009).

attorney) must review the servicemember's conviction and provide written recommendations to the court-martial convening authority (a senior military commander) before the convening authority takes initial action (i.e., clemency) and forwards the case to the appellate level.[36] Also, the convening authority will often direct that the servicemember continue to receive his military pay while in confinement (known as deferment or waiver of forfeitures).[37]

The above comparison of California's death penalty conviction and a military guilty plea indicates that a servicemember who pleads guilty to a misdemeanor has greater procedural rights than a civilian Californian who has been sentenced to death. In seven of ten categories, the Soldier's misdemeanor-level guilty plea triggers a post-trial process that exceeds the protections afforded to a civilian condemned to die.[38] The post-trial process is roughly equivalent in the remaining three categories. Given the vastly more serious punishment facing the condemned civilian, it is surprising that the servicemember's guilty plea should trigger superior procedural protections.

II. MILITARY POST-TRIAL PROCEDURES ARE OUT OF STEP WITH CIVILIAN PRACTICES AND STANDARDS

The first rationale for reforming military post-trial is that it is out of step with civilian practice. Congress passed legislation stating its intent that military post-trial should broadly mirror federal civilian practice.[39] However, the Rules for Courts-Martial and service regulations governing post-trial have created a military system that is entirely unique.[40] No

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[36] MCM, *supra* note 4, R.C.M. 1106, 1107. *See generally* CAL. R. CT. 4.1–.700, 8.1–.1125 (after review of the cited authorities, the author has determined that this state has no procedures that are similar to staff judge advocate review or convening authority initial action).

[37] *See* MCM, *supra* note 4, R.C.M. 1101. *See generally* CAL. R. CT. 4.1–.700, 8.1–.1125. After review of the cited authorities, the author has determined that this state has no procedures that are similar to deferment or waiver of forfeitures. The convicted's punishment often includes forfeiture of pay or reduction in grade (i.e., military rank). *See* MCM, *supra* note 4, R.C.M. 1101. Deferment is the convening authority's power to postpone pay forfeitures or rank reduction until the convening authority takes post-trial action. *Id.* Waiver is the convening authority's power to continue paying salary to the family of the accused for six months after he takes post-trial action. *Id.* Waiver only applies to pay forfeitures that occur as a matter of law, not pay forfeitures adjudged by the court-martial. *Id.* Deferments and waivers of pay forfeitures is a significant government program that costs taxpayers more than approximately $20.3 million annually. *See infra* Part III.A.3.

[38] *See infra* Appendix A.

[39] *See* UCMJ, *supra* note 8, art. 36 ("[P]ost-trial procedures . . . for cases . . . triable in courts-martial . . . may be prescribed by the President by regulations 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 . . . .").

[40] *See supra* Part I; *infra* Appendix B. Some of the military's unique post-trial requirements are imposed by statute. *See* UCMJ, *supra* note 8, art. 64, 66 (requiring appellate review

other jurisdiction in the United States requires mandatory post-trial review of every criminal conviction.[41] No other jurisdiction in the United States requires that a written transcript be prepared for every criminal conviction.[42] No other jurisdiction in the United States requires that multiple attorneys review each transcript prior to authentication of the record upon a criminal conviction.[43]

The fact that the military and civilian post-trial systems differ substantially does not by itself mean that military post-trial should be reformed. Yet it raises two questions: (1) are the costs of the military's unique post-trial process worth the benefits, and (2) why is the military system so different? The following two sections address these issues.

III. POST-TRIAL HAS GROWN INTO A LEVIATHAN THAT DEVOURS MORE RESOURCES THAN IS JUSTIFIABLE IN THE MODERN, RESOURCE-CONSTRAINED MILITARY

A second rationale for reforming the military's post-trial system is the system's high budgetary costs. The courts have focused on the costs that post-trial delay imposes upon convicted servicemembers.[44] Other commentators have highlighted the indirect costs the current post-trial system imposes upon commanders and good order and discipline.[45] For example, Navy Captain David Grogan notes that the number of courts-martial has plummeted in the last ten years as procedural protections have continued to increase well beyond what is constitutionally required.[46] This reduction in courts-martial reflects commanders' increased use of adverse administrative actions for cases that would have previously been tried at court-martial, rather than a decrease in crime.[47] Further, "to the extent [c]ommanders are resorting to these options because courts-martial have become too complex, good order and discipline suffers."[48] Captain Grogan concludes that "[w]ithout . . . reforms that simplify the military justice system and inject flexibility for the

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for all guilty findings). However, the military imposes many unique post-trial requirements upon itself. For example, the requirement that multiple attorneys review every record trial before authentication is not based in statute. MCM, *supra* note 4, R.C.M. 1103(i). Further, the requirement to transcribe courts-martial that resulted in full acquittals or were withdrawn before trial is contained only in service regulation. U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE, ¶ 5-41e (2011) [hereinafter AR 27-10].

41 *See infra* Appendix B.

42 *See infra* Appendix B.

43 *See infra* Appendix B.

44 *See* United States v. Moreno, 63 M.J. 129 (C.A.A.F. 2006).

45 *See* Captain David E. Grogan, *Stop the Madness! It's Time to Simplify Court-Martial Post-Trial Processing*, 62 NAVAL L. REV. 1, 28 (2013).

46 *See id.*

47 *See id.*

48 *See id.*

warfighter without compromising fundamental due process rights of the accused, Commanders will continue to turn to alternative dispositions in increasing numbers and the practice of military justice will wither on the vine."[49]

However, other commentators have not yet explored the monetary costs the military's post-trial system imposes on the taxpayer and the warfighter. First, this section quantifies those monetary costs. Second, this section attempts to put those costs in context. By choosing to maintain the military post-trial system in its current (resource intensive) form, policymakers are simultaneously choosing to divert scarce resources away from other areas where the warfighter needs them.[50]

A. Quantifying the Monetary Costs of the Military's Post-Trial Process

The monetary costs of military post-trial fall into several broad categories: (1) the pay and benefits paid to personnel who devote all or a substantial part of their time to post-trial, (2) contracts related to post-trial, and (3) the pay and non-pay benefits the convicted receives while his case slowly navigates the post-trial process.

1. Pay and Benefits of Post-Trial Personnel

The pay and benefits of post-trial personnel account for the largest part of the cost of military post-trial. However, calculating this number is not straightforward. First, no one in the Army knows exactly how many personnel are engaged in the post-trial process.[51] Second, many post-trial personnel devote only a portion of their time to post-trial.[52] In some cases, this is due to personnel shortages that lead to one servicemember covering multiple full-time positions.[53] In other cases, smaller jurisdictions may have light-enough caseloads that post-trial is not a full-time position. Post-trial personnel for each Army jurisdiction may include the chief of military justice, the post-trial paralegal, the court reporter, the attorneys and judges who try each court-martial, the attorneys at Defense Appellate Division and the Office of the Judge Ad-

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49 *See id.* at 29.

50 *See infra* Part III.B.2 (explaining the economic theory of opportunity costs).

51 *See infra* notes 60–66. *See generally* FORCE MGMT. SYS., https://fmsweb.army.mil (last visited Jan. 22, 2015). Force management planners use FMSweb to track whether billets for judge advocates and paralegals are filled, but the system does not track the numbers of junior enlisted servicemembers performing post-trial positions, does not reflect personnel who perform post-trial duties as an additional duty, and does not account for the ability of staff judge advocates to deviate from their unit's Table of Organization and Equipment or Table of Distribution and Allowances when assigning personnel at the local level.

52 *See* U.S. DEP'T OF ARMY, FIELD MANUAL 1-04, LEGAL SUPPORT TO THE OPERATIONAL ARMY ¶ 5-2, 5-12 (2013) [hereinafter FM 1-04].

53 *See* FORCE MGMT. SYS., *supra* note 51.

vocate General who must review each record of trial, and the appellate judges at the Army Court of Criminal Appeals who must review each record of trial.[54] The exact roster of post-trial personnel varies across jurisdictions.[55]

First, the chief of military justice is a jurisdiction's chief prosecutor in the Army. The chief of military justice's jurisdiction generally (but not always) matches a general court-martial convening authority's jurisdiction.[56] The chief of military justice supervises the jurisdiction's prosecuting attorneys (called "trial counsel"), supervises the preparation of all military justice actions that may require decisions by the general court-martial convening authority, and supervises the jurisdiction's post-trial operations.[57] In the Army, there are approximately forty-six chiefs of military justice (thirty-six majors and ten captains).[58] Assuming that chiefs of military justice spend roughly one-third of their time working on post-trial issues, the Army spends approximately $3,244,356 each year on the post-trial efforts of chiefs of military justice.[59]

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54 The staff judge advocate, deputy staff judge advocate, and convening authority also devote time to post-trial processing. *See* FM 1-04, *supra* note 52, ¶ 5-12. However, this Article omits them from the calculations because their time commitment is generally minimal. Additionally, this Article distinguishes between the costs associated with actual appellate litigation versus the costs of mandatory review of every court-martial by the service courts of criminal appeals or the Office of the Judge Advocate General. This Article only discusses costs associated with mandatory review.

55 *See* PERSONNEL, PLANS, & TRAINING OFFICE, OFFICE OF THE JUDGE ADVOCATE GEN., U.S. DEP'T OF ARMY, 2014–2015 JAGC PERSONNEL DIRECTORY (2014) [hereinafter JAGC DIRECTORY] (listing judge advocate assignments throughout the Army); *see also* Telephone Interview with Major Robert Leone, Chief of Operations, Criminal Law Div., Office of the Judge Advocate Gen., U.S. Dep't of Army (Jan. 21, 2015) [hereinafter MAJ Leone Interview].

56 *See* JAGC DIRECTORY, *supra* note 55; MAJ Leone Interview, *supra* note 55; FM 1-04, *supra* note 52, ¶ 5-9.

57 *See* FM 1-04, *supra* note 52, at para. 5-9.

58 E-mail from Lieutenant Colonel Laura Calese, Field Grade Assignments Officer, Personnel, Plans, & Training Office, Office of the Judge Advocate Gen., U.S. Dep't of Army, to author (Jan. 15, 2015) [hereinafter LTC Calese E-mail] (on file with author). Additionally, there are several chief of justice positions held by lieutenant colonels. This Article omits those positions from its calculations because they are few and their post-trial caseloads are limited. *See* JAGC DIRECTORY, *supra* note 55.

59 The monthly salary for a major with twelve years of service is $6,990.60, and the monthly salary for a captain with eight years of service is $5,744.10. DEF. FIN. & ACCOUNTING SERV., 2015 MILITARY PAY CHARTS—1949 TO 2015 (2015) [hereinafter MILITARY PAY CHART 2015], http://www.dfas.mil/militarymembers/payentitlements/military-pay-charts.html (follow "Jan. 1, 2015" hyperlink). The basic allowance for subsistence for officers is $253.38 per month. *Id.* The average monthly basic allowance for housing with dependents in the continental United States is $2,093 for a major and $1,759 for a captain. *Regular Military Compensation (RMC) Calculator*, U.S. DEP'T OF DEF., http://militarypay.defense.gov/Calculators/RMCCalculator.aspx (last visited Jan. 22, 2015) (select O-3 or O-4 for pay grade and leave duty location blank, but note that this underreports the current rate because it is a prior year number). Further, non-cash benefits account for forty-nine percent of the average servicemember's total compensation. OFFICE OF THE UNDER SECRETARY OF DEF. FOR PERSONNEL & READINESS, U.S. DEP'T OF DEF., THE ELEVENTH QUADRENNIAL REVIEW OF MILITARY COM-

Second, calculating how much the Army spends on post-trial paralegals is more complicated because of the uncertainty surrounding how many paralegals fill post-trial positions at any given moment.[60] First, Army planners use FMSweb to track the number of personnel required and authorized under each unit's Table of Organization and Equipment (TOA) or Table of Distribution and Allowances (TDA).[61] However, entries for paralegal positions in FMSweb do not specify the pinpoint assignment.[62] For example, the TOA for the 82d Airborne Division's military justice office lists two authorizations for "paralegal NCO."[63] One of these authorizations is actually for the post-trial paralegal.[64] Second, FMSweb only lists an authorization as "paralegal" if it is for a non-commissioned officer, while a post-trial paralegal position may be filled by an E-4 specialist.[65] Third, the local offices of the staff judge advocate control the pinpoint assignments of paralegals and regularly deviate from the TOA/TDA.[66] To circumvent the uncertainties regarding the number of post-trial paralegals, this Article assumes that each general court-martial convening authority that actively prosecutes courts-martial has one post-trial paralegal. Given that there are approximately fifty-eight active general courts-martial convening authorities,[67] the Army spends approxi-

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PENSATION 17 (2012) [hereinafter ELEVENTH QUADRENNIAL]. Applying these numbers, the approximate yearly pay for a chief of justice with the rank of major is $112,044. Divide by fifty-one percent to account for the cost of non-cash benefits received by each servicemember ($219,694). Multiplied by thirty-six majors, the sum is $7,908,984. Assuming that chiefs of justice spend roughly one-third of their time on post-trial, reduce this sum to one-third to arrive at the estimated sum the Army spends on the post-trial activities of major chiefs of justice ($2,636,064). Next, applying the above numbers, the approximate yearly pay for a captain chief of justice is $93,078. Divide by fifty-one percent to account for the cost of non-cash benefits received by each servicemember ($182,506). Multiplied by ten captains, the sum is $1,825,060. Assuming that chiefs of justice spend roughly one-third of their time on post-trial, reduce this sum to one-third to arrive at the estimated sum the Army spends on the post-trial activities of captain chiefs of justice ($608,292). The Army's total annual total post-trial costs from chief of justice labor is approximately $2,636,064 + $608,292 = $3,244,356.

60 *See* FORCE MGMT. SYS., *supra* note 51.

61 *See* LTC Calese E-mail, *supra* note 58.

62 *See* FORCE MANAGEMENT SYSTEM, *supra* note 51.

63 *See id.*

64 Interview with Sergeant First Class Daniel Duncan, Noncommissioned Officer in Charge, Military Justice Office, 82d Airborne Div., U.S. Dep't of Army, at Fort Bragg, N.C. (April 1, 2013).

65 *See* FORCE MGMT. SYS., *supra* note 51 (listing "paralegal NCO" for an authorization that was filled by a junior enlisted E-3).

66 Interview with Master Sergeant Billie Suttles, Force Structure, Combat Developments Directorate, The Judge Advocate Gen.'s Legal Ctr. & Sch., U.S. Dep't of Army (Jan. 15, 2015) [hereinafter MSG Suttles Interview].

67 MAJ Leone Interview, *supra* note 55 (explaining that the number of general court-martial convening authorities in the Army changes frequently).

mately $4,929,137 each year on pay and benefits for post-trial paralegals.[68]

Third, court reporters in the military justice system are primarily post-trial personnel.[69] For every hour on the record in court, court reporters in the military expect to spend between three and six hours preparing the ROT.[70] Under current rules, court reporters must laboriously transcribe every portion of every court-martial (including arraignments, all motions hearings, all UCMJ Article 39 pre-trial conferences, etc.).[71] Transcripts commonly exceed 1,000 pages for a contested trial and sometimes exceed 10,000 pages.[72] While some courts-martial require summarized transcripts rather than verbatim transcripts, this does not significantly alter the burden on court reporters for two reasons. First, summarized and verbatim transcripts require similar preparation times.[73] For

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68 The monthly salary for a staff sergeant with eight years of service is $3,261 and the monthly salary for a sergeant with six years of service is $2,761.80. MILITARY PAY CHART 2015, *supra* note 59. The basic allowance for subsistence for enlisted servicemembers is $367.92 per month. *Id.* The average basic allowance for housing with dependents rate in the continental United States is $1,526 for a staff sergeant and $1,347 for a sergeant. *Regular Military Compensation Calculator*, UNDERSECRETARY OF DEF., PERSONNEL & READINESS, http://militarypay.defense.gov/Calculators/RMCCalculator.aspx (last visited Jan. 22, 2015) (select E-5 and E-6 for pay grade and leave duty location blank) (this underreports the current rate because it is a prior year number). Further, non-cash benefits account for forty-nine percent of the average servicemember's total compensation. *See* ELEVENTH QUADRENNIAL, *supra* note 59, at 17. This Article assumes that half of post-trial paralegals are staff sergeants and half are sergeants. *See* FORCE MGMT. SYS., *supra* note 51. Applying these numbers, the yearly pay for staff sergeant is $61,859. Divide by fifty-one percent to account for the cost of non-cash benefits received by each servicemember ($121,292). Multiply by twenty-nine staff sergeants who hold post-trial paralegal positions to reach the Army's approximate annual cost of $3,517,468. Next, repeat the same process for sergeants. Applying the above numbers, the yearly pay for sergeant is $53,721. Divide by fifty-one percent to account for the cost of non-cash benefits received by each servicemember ($105,335). Multiply by twenty-nine sergeants who hold post-trial paralegal positions to reach the Army's approximate annual cost of $3,054,715. Combine the Army's annual costs for both staff sergeants and sergeants to estimate the Army's total approximate annual cost for post-trial paralegals. $3,517,468 + $3,054,715 = $6,572,183. To account for post-trial paralegals who work in jurisdictions where it is not a full-time position, reduce the total amount by one-fourth to estimate the Army's approximate total annual cost for post-trial paralegals ($4,929,137).

69 *See* Interview with Sergeant First Class Margarita Abbott, Senior Court Reporter, 82d Airborne Div., U.S. Dep't of Army, at Fort Bragg, N.C. (Oct. 22, 2013) [hereinafter SFC Abbott Interview] (discussing post-trial transcription processing times).

70 *See* SFC Abbott Interview, *supra* note 69 (explaining that a court reporter normally spends three to four hours transcribing each hour of court-martial proceedings); Interview with Staff Sergeant Joshua Glober, Court Reporter Instructor, The Judge Advocate Gen.'s Legal Ctr. & Sch., U.S. Army, at Charlottesville, VA (Mar. 13, 2015) [hereinafter SSG Glober Interview] (explaining that a court reporter normally spends four to six hours transcribing each hour of court-martial proceedings).

71 MCM, *supra* note 4.

72 *See* United States v. Bozicevich (3d Infantry Div., Fort Stewart Aug. 10, 2011) (14,200 page record of trial); United States v. Lorance (82d Airborne Div., Fort Bragg Aug. 1, 2013) (1,000 page record of trial for two-and-a-half day trial).

73 SFC Abbott Interview, *supra* note 69; SSG Glober Interview, *supra* note 70.

summarized transcripts, the court reporter must rely less on assistance from speech recognition software and rely more on listening to the recordings, taking notes, and then exercising independent thought to summarize witness testimony.[74] Second, summarized transcripts are relatively rare after court-martial convictions.[75] To illustrate the amount of time that goes into transcribing a court-martial, consider the example of a contested sexual assault court-martial. Sexual assault prosecutions commonly require one or two full days of pretrial motions, one or two pre-trial UCMJ Article 39 sessions for arraignment and administrative matters, and three-to-five days of trial.[76] If the court reporter transcribed full-time, this common sexual assault trial would require the court reporter to spend approximately one month creating the transcript.[77] However, the average transcription time for verbatim transcripts is approximately six months[78] in part because military court reporters never transcribe full-time.[79]

Eighty-three uniformed court reporters serve in the Army (twenty E-7s, twenty-three E-6s, thirty-seven E-5s, and three E-4s) at an approximate annual cost of $9,760,219.[80] Additionally, the Army employs

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74 SFC Abbott Interview, *supra* note 69; SSG Glober Interview, *supra* note 70.

75 *See* MCM, *supra* note 4, R.C.M. 1103 (providing for summarized transcripts when the sentence includes less than six months confinement, no forfeiture of pay that exceeds two-thirds of pay per month of six months duration, and no punitive discharge); Grogan, *supra* note 45, at 28 (discussing increased use of adverse administrative actions for cases that would previously have gone to court-martial).

76 *See* JUDGE ADVOCATE GENERAL'S CORPS, U.S. ARMY, TRIAL JUDICIARY EDOCKET, https://www.jagcnet.army.mil/Apps/TJeDocket/usatjedocket.nsf (last visited Feb. 21, 2015).

77 *See* SFC Abbott Interview, *supra* note 69 (explaining that a court reporter normally spends three to four hours transcribing each hour of court-martial proceedings); SSG Glober Interview, *supra* note 70 (explaining that a court reporter normally spends four to six hours transcribing each hour of court-martial proceedings). If the court-martial includes seven days on the record (including pre-trial practice and trial), and if transcription takes three to six hours per hour of court-martial proceedings, then a standard sexual assault court-martial would take approximately twenty-one to forty-two days to transcribe. In reality, the transcription process would take longer because court reporters have other duties beyond transcription. *See* FM 1-04, *supra* note 52, ¶ 5-12.

78 *See* Barzmehri E-mail, Jan. 22, 2015, *supra* note 11 (providing data showing that the average transcription time for courts-martial is approximately 200 days). Transcription accounts for the bulk of processing time between sentence and initial action by the convening authority. *See* SFC Abbott Interview, *supra* note 69.

79 *See* FM 1-04, *supra* note 52, ¶ 5-12; SFC Abbott Interview, *supra* note 69. *See generally* OFFICE OF THE JUDGE ADVOCATE GEN., U.S. ARMY, PUBLICATION 1-1, PERSONNEL POLICIES fig.14-1 (2014) (describing paralegal career progression). Military court reporters have many duties beyond transcription, including serving during trial, serving as platoon sergeants, planning and attending weekly sergeant's time training, performing details throughout their unit, etc. *See* FM 1-04, *supra* note 52, ¶ 5-12; SFC Abbott Interview, *supra* note 69.

80 *See* E-mail from MSG Billie Suttles, Force Structure, Combat Developments Directorate, Judge Advocate Gen.'s Legal Ctr. & Sch., U.S. Dep't of the Army, to author (Jan. 15, 2015) [hereinafter MSG Suttles E-mail] (on file with author) (including spreadsheet with Army court reporter staffing numbers). The monthly salary is $3,953.40 for a sergeant first class with twelve years of service, $3,261 for a staff sergeant with eight years of service,

thirty-eight civilian court reporters (one GS-12, one GS-11, nine GS-10s, twenty-six GS-9s, and one GS-4) at an approximate annual cost of $2,418,057.[81] Combining these numbers, the Army's total annual cost

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$2,761.80 for a sergeant with six years of service, and $2,451.60 for a specialist with six years of service. MILITARY PAY CHART 2015, *supra* note 59. The basic allowance for subsistence for enlisted servicemembers is $367.92 per month. *Id.* The average basic allowance for housing with dependents rate in the continental United States is $19,212 for a sergeant first class, $18,312 for a staff sergeant, $16,164 for a sergeant, and $14,808 for a specialist. *Regular Military Compensation (RMC) Calculator*, U.S. DEP'T OF DEF., http://militarypay.defense.gov/Calculators/RMCCalculator.aspx (last visited Jan. 22, 2015) (select E-7, E-6, or E-5 for pay grade and leave duty location blank). Further, non-cash benefits account for forty-nine percent of the average servicemember's total compensation. *See* ELEVENTH QUADRENNIAL, *supra* note 59, at 17, 26. Applying these numbers, the approximate yearly pay for a sergeant first class is $71,068. Divide by fifty-one percent to account for the cost of non-cash benefits received by each servicemember ($139,349). Multiply by twenty sergeants first class who hold court reporter positions to reach the Army's approximate annual cost of $2,786,980. Next, repeat the same process for staff sergeants. Applying the above numbers, the approximate yearly pay for a staff sergeant is $61,859. Divide by fifty-one percent to account for the cost of non-cash benefits received by each servicemember ($121,292). Multiply by twenty-three staff sergeants who hold court reporter positions to reach the Army's approximate annual cost of $2,789,716. Next, repeat the same process for sergeants. Applying the above numbers, the yearly pay for a sergeant is $53,721. Divide by fifty-one percent to account for the cost of non-cash benefits received by each servicemember ($105,335). Multiply by thirty-seven sergeants who hold court reporter positions to reach the Army's approximate annual cost of $3,897,395. Next, repeat the same process for specialists. Applying the above numbers, the approximate yearly pay for a specialist is $48,642. Divide by fifty-one percent to account for the cost of non-cash benefits received by each servicemember ($95,376). Multiply by three specialists who hold court reporter positions to reach the Army's approximate annual cost of $286,128. Combine the Army's annual costs for all four ranks of court reporters to reach the Army's approximate total annual cost of $9,760,219.

[81] *See* MSG Suttles E-mail, *supra* note 80. The Army employs civilian court reporters in the following general schedule (GS) pay grades: one GS-12, one GS-11, nine GS-10s, twenty-six GS-9s, and one GS-4. *Id.* Due to the unavailability of data regarding step levels for individual civilian court reporters, this Article assumes for purposes of calculations that all are at the middle step (step five) of their federal employee GS pay grade. Thus, the annual salary is $79,554 for a GS-12 court reporter, $66,370 for a GS-11, $60,408 for a GS-10, $54,855 for a GS-9, and $32,361 for a GS-4. OFFICE OF PERS. MGMT., SALARY TABLE 2015-RUS (2015) (displaying locality pay table for the rest of the United States). To calculate the Army's cost for civilian court reporters at each pay grade, multiply the salary by the number of court reporters at that grade. GS-12: one court reporter at $79,554. GS-11: one court reporter at $66,370. GS-10: $60,408 salary multiplied by nine court reporters is a total cost of $543,672. GS-9: $54,855 salary multiplied by twenty-six court reporters is a total cost of $1,426,230. GS-4: one court reporter at $32,361. Add the totals for each pay grade to reach the Army's approximate total court reporter salary cost of $2,148,187. Additionally, five of these civilian court reporters receive overseas living quarters allowances (LQA) and cost of living adjustments (COLA) because they are stationed in Germany. At the time of writing, the annual LQA rate for group three in this overseas area was $49,300. *Annual Living Quarters Allowance in U.S. Dollars*, U.S. DEP'T OF STATE, http://aoprals.state.gov/Web920/lqa_all.asp?MenuHide=1 (last visited Feb. 21, 2015) (rates effective Jan. 25, 2015). Multiply the LQA by five personnel to reach the Army's approximate total court reporter LQA cost of $246,500. Next, the COLA rate for all court reporter locations in Germany is fifteen percent. *Post (Cost of Living) Allowance Percentage of Spendable Income*, U.S. DEP'T OF STATE, http://aoprals.state.gov/Web920/cola.asp (last visited Feb. 21, 2015) (rates effective Jan. 25, 2015). The spendable income of a GS-9 in Wiesbaden is $30,600 (four overseas positions are for GS-

for full-time court reporters is approximately $12,178,276. Assuming that court reporters spend roughly one-fifth of their time in court (which is not part of post-trial),[82] the Army spends approximately $9,742,621 on the post-trial activities of court reporters.[83]

Fourth, trial counsels, defense counsels, and judges are post-trial personnel to the extent that they devote a substantial amount of time to reviewing trial transcripts and preparing *errata* during the pre-authentication stage of post-trial.[84] After the court reporter transcribes the proceedings and prepares the record of trial, the trial counsel, the defense counsel, and each judge who presided over the proceedings must review the entire record for errors or omissions.[85] Sometimes, the attorneys and judge must review the transcript multiple times before the judge authenticates the record of trial.[86] Because trial counsels, defense counsels, and judges spend only a fraction of their time working on post-trial, a calculation of their share of post-trial costs cannot merely use their annual wages. Instead, to determine the cost to the Army of the time its judge advocates devote to reviewing and authenticating records of trial, assume that each judge and attorney reviews records of trial at a rate of one page per minute. Next, apply the Laffey Matrix to assign a value to each hour

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9s) and is $33,400 for a GS-10. *Annual Spendable Income by Salary and Family Size*, U.S. DEP'T OF STATE, http://aoprals.state.gov/Content/Documents/SpendableIncome.pdf (last visited Feb. 21, 2015) (rates effective Jan. 26, 2015). Multiply the COLA rate of fifteen percent by the spendable income rates to reach the annual COLA cost per court reporter. The COLA cost is $33,400 times fifteen percent equals $5,010 for the GS-10. The COLA cost for the GS-9s is $30,600 times fifteen percent times four personnel equals $18,360. Add the COLA costs for all five court reporters ($5,010 plus $18,360) to reach the Army's total annual court reporter COLA cost of $23,370. Add the Army's total court reporter salary cost ($2,148,187) plus the Army's total court reporter LQA cost ($246,500) plus the Army's total court reporter COLA cost ($23,370) to reach the Army's approximate total annual court reporter costs ($2,418,057). However, note that this calculation underestimates what the Army spends on pay and benefits for civilian court reporters because it does not include a variety of benefits such as performance bonuses, various in-kind benefits, and future retirement benefits. *See* ELEVENTH QUADRENNIAL, *supra* note 59, at 17, 26 (discussing servicemember compensation, which shares similarities with compensation of civilian employees of the Department of Defense).

82 *See* SFC Abbott Interview, *supra* note 69; SSG Glober Interview, *supra* note 70.

83 If court reporters spend roughly one-fifth of their time in court (which is not part of post-trial), reduce $12,178,276 by one-fifth to estimate the sum the Army spends on the post-trial activities of court reporters ($9,742,621).

84 *See* MCM, *supra* note 4, R.C.M. 1103, 1104(a).

85 *See* MCM, *supra* note 4, R.C.M. 1103, 1104(a); Professional Experiences, *supra* note 27 (observing a requirement for trial defense counsel to review transcripts prior to authentication that is based in local and regional Trial Defense Service policy).

86 *See* MCM, *supra* note 4, R.C.M. 1103, 1104(a).

of judge advocate labor.[87] Thus, the Army's estimated annual cost of requiring three attorneys to review every record of trial is $2,767,905.[88]

Fourth, attorneys at the appellate level have post-trial duties that are separate and distinct from their appellate litigation duties. An attorney at the Office of the Judge Advocate General (OTJAG) must read the entire record of trial for every court-martial with a sentence of less than one year confinement and no punitive discharge.[89] Conversely, at least one attorney at the defense appellate division and three judges on the service court of criminal appeals must read the entire record of trial for all other courts-martial.[90] Actual appellate litigation at the court of criminal appeals starts only if the defense appellate attorney or one of the three appellate judges alleges error.[91] The Army's estimated annual cost of

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87 *See* Laffey v. Northwest Airlines, Inc., 572 F. Supp. 354, 371 (D.D.C. 1983); *Laffey Matrix 2014–2015*, U.S. DEP'T OF JUSTICE, http://www.justice.gov/usao/dc/divisions/Laffey%20Matrix_2014-2015.pdf (last visited Feb. 21, 2015); *History*, LAFFEY MATRIX, http://www.laffeymatrix.com/history.html (last visited Feb. 21, 2015); *Calculating Awards of Attorney Fees*, ECONOMISTS INCORPORATED, http://www.ei.com/vieweconink.php?id=269 (last visited Feb. 21, 2015) (describing the superiority of the Laffey Matrix versus other methods of calculating attorneys fees). The Laffey Matrix is a tool widely used by the courts to award attorney fees. *See Calculating Awards of Attorney Fees*, *supra* note 87. It is calculated annually by the U.S. Department of Justice. *See Laffey Matrix 2014–2015*, *supra* note 87. This Article applies the rate for attorneys with one-to-three years experience ($255) for trial counsels because those positions are usually held by junior and mid-grade captains. *Id.* This Article applies the rate for attorneys with four-to-seven years experience ($300) for defense counsel and appellate counsel because the Army generally assigns more senior captains to those positions. *Id.* Next, this Article applies the rate for attorneys with eleven-to-nineteen years experience ($460) for judges. *Id.*; JAGC DIRECTORY, *supra* note 55; OFFICE OF THE JUDGE ADVOCATE GEN., U.S. ARMY, PUBLICATION 1-1, PERSONNEL POLICIES ¶¶ 8-4–8-5 (2014) (listing qualifications for Army trial and appellate judges).

88 818 courts-martial multiplied by the average length of a record of trial (200 pages) equals 163,600 pages to review in fiscal year 2014. *See* Barzmehri E-mail, Jan. 22, 2015, *supra* note 11. Assuming a review rate of one page-per-minute, divide 163,600 pages by 60 to estimate how many hours trial counsels spent reviewing records of trial in fiscal year 2014. The result is 2,727 hours. The calculation is the same for defense counsel and judges. Next, multiply 2,727 hours by the hourly billable rate from the Laffey Matrix ($255) to estimate the annual cost having trial counsels review every record of trial ($695,385). *See Laffey Matrix 2014–2015*, *supra* note 87. For defense counsel, multiply 2,727 hours by the hourly billable rate from Laffey Matrix ($300) to estimate the annual cost having defense counsels review every record of trial ($818,100). *Id.* For judges, multiply 2,727 hours by the hourly billable rate from Laffey Matrix ($460) to estimate the annual cost having judges review every record of trial ($1,254,420). *Id.* Add the totals for trial counsel ($695,385), defense counsel ($818,100), and judges ($1,254,420) to estimate the annual cost to the Army of having all three types of attorneys review every record of trial ($2,767,905).

89 *See* UCMJ, *supra* note 8, art. 64; MCM, *supra* note 4, R.C.M. 1112.

90 UCMJ, *supra* note 8, art. 66; MCM, *supra* note 4, R.C.M. 1203. Regardless of whether the defense appellate attorney alleges error, each judge on a three judge panel currently reads the entire record of trial for each case that meets the minimum sentence requirements. *See* UCMJ, *supra* note 8, art. 66; U.S. Army Ct. Criminal Appeals Internal Rules of Practice and Procedure (A.C.C.A. R.) 4(a).

91 *See* UCMJ, *supra* note 8, art. 66; A.C.C.A. R. 15.

mandatory review by a defense appellate attorney and three appellate judges is $4,581,360.[92]

In summary, the Army annually spends approximately $3,244,356 on the post-trial efforts of chiefs of military justice, approximately $4,929,137 on the post-trial efforts of paralegals, approximately $9,742,621 on the post-trial efforts of court reporters, approximately $2,767,905 by requiring three attorneys to review every record of trial before authentication, and approximately $4,581,360 by requiring appellate attorneys and judges to review every record of trial again after the convening authority's initial action. Thus, the estimated annual total cost to the Army of the efforts its personnel devote to post-trial processing is $25,265,379.

2. Contracts Related to Post-Trial

Further, the Army incurs additional post-trial costs above and beyond the salary and benefits of post-trial personnel. The most concrete of these additional costs occur when the Army contracts with outside court reporters to transcribe records of trial.[93] The Army must enter into transcription contracts because the requirement to transcribe every court-martial far exceeds the capacity of its military and federal civilian court reporters.[94] Two general court-martial convening authorities alone spent $125,000 on transcription contracts in 2014.[95] Given that there are fifty-eight general court-martial convening authorities that are active in the Army, transcription contracts likely add up to millions of dollars annually across the Army.[96]

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92 *See supra* note 87 (explaining estimated value of attorney labor hours). 818 courts-martial multiplied by the average length of a record of trial (200 pages) equals 163,600 pages to review in fiscal year 2014. *See* Barzmehri E-mail, Jan. 22, 2015, *supra* note 11. Assuming a review rate of one page-per-minute, divide 163,600 pages by 60 to estimate how many hours individual appellate attorneys and appellate judges spent reviewing records of trial in fiscal year 2014. The result is 2,727 hours. Next, multiply 2,727 hours by the hourly billable rate from Laffey Matrix ($300) to estimate the annual cost of having defense appellate attorneys review every record of trial ($818,100). *See Laffey Matrix 2014–2015*, *supra* note 87. For appellate judges, multiply 2,727 hours by the hourly billable rate from Laffey Matrix ($460) to estimate the annual cost having one judge review every record of trial ($1,254,420). *Id.* Multiply by three because three appellate judges must review every record of trial. 3 x $1,254,420 = $3,763,260. Add the totals for defense appellate attorney ($818,100) and appellate judges ($3,763,260) to estimate the annual cost to the Army of having both types of attorneys review every record of trial ($4,581,360).

93 *See* E-mail from Warrant Officer Aseba Green, Legal Administrator, XVIII Airborne Corps, U.S. Dep't of Army, to author (Jan. 22, 2015) [hereinafter WO1 Green E-mail] (on file with author); E-mail from Major Paul Carlson, Chief of Military Justice, U.S. Army Forces Command, to author (Jan. 21, 2015) [hereinafter MAJ Carlson E-mail] (on file with author).

94 *See supra* note 93.

95 *See supra* note 93.

96 *See supra* note 93. This Article assumes the Army's contracting costs are $1 million annually for purposes of calculating the military's post-trial costs.

3. The Convicted's Pay and Benefits

Next, a servicemember convicted at court-martial continues to receive costly military benefits long after the trial's conclusion (even if the court-martial sentences the servicemember to a punitive discharge from the military).[97] These costs fall into three categories: deferment or waiver of pay forfeitures, pay while in confinement, and non-pay benefits.

First, the convicted's punishment often includes forfeiture of pay or reduction in grade (i.e., military rank).[98] However, the convening authority can defer or waive pay forfeitures or rank reduction so that the military continues to pay full salary to the convicted servicemember or his family as if the conviction never happened.[99] With a few exceptions, convening authorities tend to approve pay deferments or waivers in nearly all cases where the convicted is married or has children.[100] Accordingly, the military continues to pay full salary to most convicted servicemembers for an average of between two hundred to three hundred and eighty days after sentencing.[101] Deferment and waiver of pay forfeitures cost the Army approximately $20,386,964 each year.[102]

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97 *See* UCMJ, *supra* note 8, art. 71(c); Barzmehri E-mail, Jan. 22, 2015, *supra* note 11 (explaining that the average time from sentence until a case is received at the Army Court of Criminal Appeals was 231 days in 2014); Barzmehri E-mail, Jan. 27, 2015, *supra* note 11 (explaining that the average processing time for an appeal at the Army Court of Criminal Appeals is 339 days). *See generally* Grimes, *supra* note 24 (case exceeding four years of post-trial processing).

98 *See* MCM, *supra* note 4, R.C.M. 1101.

99 *Id.* Deferment is the convening authority's power to postpone pay forfeitures or rank reduction until the convening authority takes post-trial action. *Id.* Waiver is the convening authority's power to continue paying salary to the family of the accused for six months after he takes post-trial action. *Id.* Waiver only applies to pay forfeitures that occur as a matter of law, not pay forfeitures adjudged by the court-martial. *Id.*

100 *See* Professional Experiences, *supra* note 27 (observing the deferment and waiver practices of many general court-martial convening authorities across more than eight years).

101 Approximately sixty-four percent of Soldiers are married or have children. OFFICE OF THE DEPUTY ASSISTANT SEC'Y OF DEF. (MILITARY CMTY. & FAMILY POLICY), 2013 DEMOGRAPHICS: PROFILE OF THE MILITARY COMMUNITY 118 (2014) [hereinafter 2013 DEMOGRAPHICS PROFILE OF THE MILITARY COMMUNITY]. Because deferments generally terminate when the convening authority takes initial action on the court-martial results, the average length of pay deferments is two hundred days. *See* MCM, *supra* note 4, R.C.M. 1101; Barzmehri E-mail, Jan. 22, 2015, *supra* note 11 (providing data showing that the average time between sentencing and convening authority initial action is 200 days). Because convening authorities can waive forfeitures for six months after initial action, the average length of pay deferments combined with pay forfeitures is three hundred and eighty days. *See* MCM, *supra* note 4, R.C.M. 1101; Barzmehri E-mail, Jan. 22, 2015, *supra* note 11 (providing data showing that the average time between sentencing and convening authority initial action is 200 days).

102 Assume the average duration of deferments and waivers is three hundred eighty days. *See* MCM, *supra* note 4, R.C.M. 1101. *See generally supra* note 101. Next, assume that half of convicted servicemembers receive deferments and waivers. Finally, use the pay of a servicemember at the grade of E-4 with six years of service to estimate the average pay a convicted servicemember collects through deferments and waivers. While the pay grade and

Second, many servicemembers continue to be paid while in confinement, regardless of whether or not the convening authority approves deferments or waivers of forfeitures. Every servicemember confined by a special court-martial will continue to be paid at least part of his pay and all of his allowances while in confinement.[103] This result occurs because the maximum pay forfeiture that a special court-martial can adjudge is only two-thirds of base pay.[104] And regardless of the type of court-martial, any servicemember who receives a forfeiture of less than total forfeitures remains eligible to receive all allowances (such as the basic allowances for subsistence or housing).[105] Given that the average basic allowances for subsistence and housing add up to tens of thousands of dollars each year per servicemember, the Army likely pays several mil-

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length of service data for all convicted servicemembers is unavailable, the data for sexual assault investigations suggests that the average pay grade of convicted servicemembers likely falls around E-4 or E-5. *See* DEP'T OF DEF., ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY: FISCAL YEAR 2013, at 93 (2014) (reporting that approximately half of completed sexual assault investigations included subjects in the grades of E-1 to E-4, and half included subjects in the grades of E-5 and above). The annual salary is $29,419 for an E-4 with six years of service. *See* MILITARY PAY CHART 2015, *supra* note 59. The annual basic allowance for subsistence for enlisted servicemembers is $4,415. *See id.* The average annual basic allowance for housing with dependents rate in the continental United States is $14,808 for a specialist. *Regular Military Compensation (RMC) Calculator*, U.S. DEP'T OF DEF., http://militarypay.defense.gov/Calculators/RMCCalculator.aspx (enter E-4 for the pay grade and leave the location blank, but note that this underreports the current rate because it is a prior year number) (last visited Jan. 22, 2015); *see* MCM, *supra* note 4, R.C.M. 1003 (explaining that the punishment of total forfeitures includes all allowances, such as the basic allowance for subsistence and the basic allowance for housing). $29,419 plus $14,808 plus $4,415 equals $48,642. Three hundred eighty days is 1.04 of a year. Thus, the estimated average cost of each deferment and waiver is approximately $50,588 ($48,642 multiplied by 1.04). Assuming that half of all courts-martial involved deferments and waivers, multiply 403 courts-martial by $50,588 to estimate the Army's cost of deferments and waivers that originate in a year's worth of courts-martial ($20,386,964). *See* E-mail from Homan Barzmehri, Management and Program Analyst, Army Court of Criminal Appeals, to author (Jan. 23, 2015) [hereinafter Barzmehri E-mail, Jan. 23, 2015] (on file with author) (reporting that 805 cases went to the Army Court of Criminal Appeals for review after reaching findings in 2014). Note that this is a conservative figure that may underestimate the annual costs of deferments and waivers of forfeitures. First, this estimate used the number of courts-martial convictions that qualify for review at the Army Court of Criminal Appeals (ACCA) on the theory that those cases included higher sentences and thus were very likely to include total forfeitures of pay and allowances. The actual number of courts-martial that include forfeitures is likely higher because this estimate ignored all courts-martial that did not qualify for review at ACCA. Second, this estimate assumed a rate of deferments or waivers that is probably too low. The rate of deferments and waivers is likely closer to sixty-four percent because that is the percentage of Soldiers who are married or have children (and convening authorities approve a very high rate of the deferment or waiver requests from servicemembers who have dependents). *See* 2013 DEMOGRAPHICS PROFILE OF THE MILITARY COMMUNITY, *supra* note 101, at 118; Professional Experiences, *supra* note 27 (observing the deferment and waiver practices of many general court-martial convening authorities across more than eight years).

103 *See* MCM, *supra* note 4, R.C.M. 201(f)(2), 1003.

104 *See id.*

105 *See* MCM, *supra* note 4, R.C.M. 1003.

lion dollars of pay and allowances annually to servicemembers who are in confinement.[106]

Third, convicted servicemembers receive a variety of non-pay benefits during the post-trial process. When a court-martial sentences a servicemember to a punitive discharge, the discharge does not take effect until after the convening authority takes initial action, the appellate courts complete their mandatory reviews, and then a second general court-martial convening authority takes final action.[107] This process takes an average of five hundred seventy days to complete,[108] but can last three or four years for more complex cases.[109] During the years that elapse between trial and final action, the convicted servicemembers remain in the military and thus continue to receive full military benefits. In many cases, the servicemember's pay will stop because of a punishment that includes pay forfeitures, the servicemember reaches the end of his enlistment contract, or the servicemember's commander places him in an indefinite leave status.[110] Yet regardless of the servicemember's pay status, the convicted servicemembers and their families remain entitled to free healthcare, commissary and exchange services, and other programs until the appellate courts finish all review.[111] Providing these non-pay benefits to convicted soldiers costs the Army an estimated $15,860,110 annually.[112]

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106 This amount is in addition to the cost of deferments and waivers discussed in the preceding paragraph. While worth noting, this cost is a quirk of the military justice system that is not directly related to post-trial processing. As a result, this Article does not include this category of costs in its calculation of the total costs of post-trial.

107 MCM, *supra* note 4, R.C.M. 1203, 1204.

108 *See* Barzmehri E-mail, Jan. 22, 2015, *supra* note 11 (explaining that the average time from sentence until a case is received at the Army Court of Criminal Appeals was 231 days in 2014); Barzmehri E-mail, Jan. 27, 2015, *supra* note 11 (explaining that the average processing time for an appeal at the Army Court of Criminal Appeals is 339 days).

109 *See generally* Grimes, *supra* note 24 (case exceeding four years of post-trial processing).

110 *See* MCM, *supra* note 4, R.C.M. 1203(e)(2) (explaining that the General Court-Martial Convening Authority (GCMCA) may order unexecuted portions of sentences executed after ACCA affirms); MCM, *supra* note 4, R.C.M. 1209 (providing that a conviction is not final until all appellate options have been exhausted); Grogan, *supra* note 45, at 20.

111 *See supra* note 110.

112 *See generally* ELEVENTH QUADRENNIAL, *supra* note 59. Non-cash benefits account for forty-nine percent of a servicemember's total compensation. *Id.* at 17. Because regular military compensation (RMC) is the cash portion of a servicemember's annual benefits, cash benefits account for fifty-one percent of total compensation; since average RMC was $50,747 in fiscal year 2010, the average total compensation for servicemembers in fiscal year 2010 was $99,504 ($50,747 divided by fifty-one percent). *See id.* at 17, 26. The average servicemember received non-cash benefits costing $48,757 in fiscal year 2010 ($99,504 divided by forty-nine percent). *See id.* The non-cash benefits of most interest for post-trial are in-kind benefits such as health care and commissary privileges (excluding family housing/barracks and education because those benefits are less likely to be available to a servicemember awaiting final action on a punitive discharge). To find this amount per average servicemember, first total the costs of health care compensation ($15.9 billion) and "other in-kind" compensation ($20.2 billion)

Combining the costs of deferments or waivers and non-pay benefits during the post-trial process, the convicted's pay and benefits cost the Army approximately $36,247,074 annually.[113] Additionally, the convicted servicemember may be entitled to hundreds of thousands of dollars in back pay if the appellate process eventually overturns the punitive discharge.[114]

4. Summary of Costs of the Current Post-Trial Regime

In total, the Army spends approximately $62,512,453 annually on post-trial processing (excluding actual appellate litigation).[115] However, a full estimate of the costs that the post-trial process imposes on the military must also account for the post-trial costs of the Navy, Marines, Air Force, and Coast Guard. Assuming each active component of the armed services has similar post-trial processing costs that are proportionate to its size,[116] the U.S. military spends approximately $170 million annually on post-trial processing.[117]

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to reach $36.1 billion. *See id.* This is 94.26% of total in-kind compensation ($36.1 billion divided by $38 billion). *See id.* Multiply 94.26% by 21% (total in-kind compensation's percentage of total compensation) to find the post-trial-related category of in-kind compensation's share of total compensation (19.8%). *See id.* Multiply $99,504 (servicemember average total compensation) by 19.8% (the share of the post-trial-related in-kind category) to obtain $19,702. *See id.* Thus, in-kind benefits such as health care and commissary privileges (excluding family housing/barracks and education) cost the military $19,702 per average servicemember in fiscal year 2010. To estimate the annual total cost of non-cash benefits provided to servicemembers awaiting final action on their punitive discharges, multiply $19,702 by the number of punitive discharges adjudged in 2014. 805 cases went to ACCA after reaching findings in 2014. *See* Barzmehri E-mail, Jan. 23, 2015, *supra* note 102. All 805 cases likely included a punitive discharge, given that the trigger for ACCA review is either a punitive discharge or confinement of one year (and conviction serious enough to warrant confinement for one year would almost always also warrant a punitive discharge, as well). *See* MCM, *supra* note 4, R.C.M. 1201. $19,702 x 805 = $15,860,110.

113 $20,386,964 plus $15,860,110 equals $36,247,074. *See supra* notes 102, 112 and accompanying text. This figure does not include the pay and allowances a servicemember receives while in confinement separate from deferments and waivers. *See supra* notes 103–106 and accompanying text.

114 The yearly pay for staff sergeant with eight years of service is $61,859. *See supra* note 80. Thus, four years of back pay would amount to $247,436.

115 This number represents the sum of the calculations from the prior three sections of this Article. *See supra* Part III.A.1–3.

116 UCMJ, *supra* note 8, art. 2; MCM, *supra* note 4, R.C.M. 101. The UCMJ and the Rules for Court-Martial are uniform across the branches of the U.S. military. Assuming post-trial costs are similar across the services is a well-supported assumption because the same laws create the same general post-trial requirements for each service.

117 *See Active Duty Military Strength by Service*, DEF. MANPOWER DATA CTR., https://www.dmdc.osd.mil/appj /dwp/dwp_reports.jsp (last visited Jan. 29, 2015) (depicting strength as of Nov. 30, 2014). There are 1,369,472 total active duty personnel in the U.S. military. *See id.* There are 503,651 active duty personnel in the Army. *See id.* 503,651 is 36.78 percent of 1,369,472. Thus, divide the Army's approximate total annual cost of post-trial processing ($62,512,453) by 36.78 percent to estimate the military's total annual cost of post-trial processing ($169,963,167).

B. Putting the Costs of Post-Trial in Their Proper Context

Having estimated the annual cost of the military's unique and resource-intensive post-trial process, a responsible steward of taxpayer resources must ask: Is the costly system worth the benefits it provides for the convicted, the commanders, and the United States as a whole? To be clear, this Article will never argue that a convicted servicemember's post-trial rights should bend merely to save money. Rather, this Article argues that efficiency should be a part of the broader discussion (but never the whole discussion) about what changes could improve the military's post-trial system.

This section of the Article focuses on whether the unique military post-trial system actually performs well. To explore this question, this section considers in turn: (1) the return on investment in the military post-trial system when compared to civilian post-trial systems, (2) the painful tradeoffs military commanders must make in order to sustain current levels of spending on post-trial processing, and (3) a cost-benefit analysis of the military post-trial system from the convicted's perspective.

1. The Military Post-Trial Process is Considerably More Expensive than Its Civilian Counterparts

The military justice system is unique among American justice systems because it serves dual purposes: (1) enhancing the military's warfighting capabilities, and (2) accomplishing the traditional goals of a justice system (i.e., protecting the rights of the accused, punishing and deterring crime, etc.).[118] Further, "the military is, by necessity, a specialized society apart from civilian society," because the military's "primary business . . . [is] to fight or [be] ready to fight wars should the occasion arise."[119] Given the unique nature of the military itself and the military justice system as a whole, one should not demand that the military post-trial system mirror its civilian counterparts.

Nonetheless, comparing military and civilian post-trial systems helps us gauge how well the military post-trial system performs in relation to each of its dual purposes. The military post-trial system annually costs more than sixty-four times the entire federal appellate court system (when adjusted for the size of each jurisdiction).[120] The military post-

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118 *See* CRIMINAL LAW DEP'T, JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., U.S. ARMY, CRIMINAL LAW DESKBOOK, 2 PRE- AND POST-TRIAL PROCEDURE A-1 (2012), http://www.loc.gov/rr/frd/Military_Law/pdf/Crim-Law-Deskbook-8-3-12_Vol-2.pdf.

119 Parker v. Levy, 417 U.S. 733, 743 (1974).

120 *See* OFFICE OF MGMT. & BUDGET, BUDGET OF THE U.S., JUDICIAL BRANCH, FISCAL YEAR 2015, at 52 (2014), http://www.gpo.gov/fdsys/browse/collection.action?collectionCode=BUDGET&browsePath=Fiscal+Year+2015&searchPath=Fiscal+Year+2015&leafLevel

trial system annually costs more than 4.7 times California's entire appellate court system (when adjusted for the size of each jurisdiction).[121] Further, these figures significantly underestimate the relative disparity between military and civilian post-trial costs.[122]

While the cost disparity between military and civilian post-trial systems does not by itself prove the need for reform, it does provide several insights. First, there is a common misunderstanding among judge advocates that the military's post-trial system (in particular its transcription

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Browse=false&isCollapsed=false&isOpen=true&packageid=BUDGET-2015-APP&ycord=814. The estimated fiscal year 2015 budget for the eleven U.S. Circuit Courts of Appeal is $614,000,000. *Id.* at 52. In order to compare this budget with the costs of the military justice system, the author performed the following calculations to convert both numbers to a per capita basis. At the time of writing, the population of the United States was 318,857,056. *USA Quickfacts*, U.S. CENSUS BUREAU, http://quickfacts.census.gov/qfd/states/00000.html (last visited Jan. 29, 2015). In contrast, there are 1,369,472 total active duty personnel in the U.S. military. *Active Duty Military Strength by Service*, DEF. MANPOWER DATA CTR., https://www.dmdc.osd.mil/appj/dwp/dwp_reports.jsp (last visited Jan. 29, 2015) (depicting strength as of Nov. 30, 2014). Thus, the active duty military population is .43% the size of the U.S. population. Multiply the U.S. Courts of Appeal budget ($614,000,000) by .43% to obtain a scaled budget ($2,640,200) that accounts for differences in the sizes of the jurisdictions. The military's annual post-trial processing costs ($169,963,167) are 6,438 percent higher than the scaled U.S. Courts of Appeal budget ($2,640,200).

121 CAL. DEP'T OF FIN., 2014–2015 ENACTED BUDGET SUMMARY 51–52 (2014), http://www.ebudget.ca.gov/2014-15/pdf/Enacted/BudgetSummary/FullBudgetSummary.pdf. California's total 2014–15 fiscal year budget for its appellate courts is approximately $1 billion. *Id.* The budget includes all expenditures, including capital projects, personnel, facilities, equipment, etc. *Id.* In order to compare California's budget with the costs of the military justice system, the author performed the following calculations to convert the both numbers to a per capita basis. At the time of writing, California's population was 38,715,000. CAL. DEP'T OF FIN., NEW STATE POPULATION REPORT: CALIFORNIA GREW BY 358,000 RESIDENTS IN 2014 (2015), http://www.dof.ca.gov/research/demographic/reports/estimates/e-1/documents/E-1_2015PressRelease.pdf. In contrast, there are 1,369,472 total active duty personnel in the U.S. military. *Active Duty Military Strength by Service*, DEF. MANPOWER DATA CTR., https://www.dmdc.osd.mil/appj/dwp/dwp_reports.jsp (depicting strength as of Nov. 30, 2014). Thus, the active duty military population is 3.54% the size of California's population. Multiply California's appellate court budget ($1,000,000,000) by 3.54% to obtain a scaled budget ($35,400,000) that accounts for differences in the sizes of the jurisdictions. The military's annual post-trial processing costs ($169,963,167) are 476 percent higher than California's scaled appellate court budget ($35,700,000).

122 The comparisons in this paragraph significantly underestimate the military post-trial system's higher costs because this Article's estimate of military post-trial costs excluded the costs of facilities, equipment, and actual appellate litigation. *See supra* Part III.A. In contrast, the budget data for the U.S. Courts of Appeal and California's appellate court budge includes the costs of all personnel, facilities, and equipment for the entire appellate process. *See* OFFICE OF MGMT. & BUDGET, BUDGET OF THE U.S., JUDICIAL BRANCH, FISCAL YEAR 2015, at 52 (2014), http://www.gpo.gov/fdsys/browse/collection.action?collectionCode=BUDGET&browsePath=Fiscal+Year+2015&searchPath=Fiscal+Year+2015&leafLevelBrowse=false&isCollapsed=false&isOpen=true&packageid=BUDGET-2015-APP&ycord=814; CAL. DEP'T OF FIN., 2014–2015 ENACTED BUDGET SUMMARY 51–52 (2014), http://www.ebudget.ca.gov/2014-15/pdf/Enacted/BudgetSummary/FullBudgetSummary.pdf.

and authentication practices) is similar to civilian practice.[123] The cost disparity should shatter that misunderstanding. Second, the cost disparity raises questions about the military post-trial system's efficiency in protecting the convicted's rights. In other words, does the military post-trial system actually provide a convicted with protections that are sixty-four times better than the federal system? If not, then policymakers should consider improving military post-trial procedures to increase efficiency. Third, the cost disparity conflicts with Congress's stated intent that the military justice system should be in line with civilian justice systems.[124] Finally, the cost disparity highlights the painful tradeoffs that fiscally-constrained policymakers must make in order to pay for the military post-trial system.[125] To the extent that these tradeoffs undermine the military's warfighting capability, unnecessary post-trial procedures could also undermine a foundational principle of the military justice system.[126]

2. Painful Tradeoffs: What the Military Must Forgo in Order to Pay for Its Current Post-Trial Process

Because the military justice system exists in part to enhance the military's warfighting capabilities,[127] whether the military's post-trial system is performing well depends in part on what capabilities warfighters must forgo in order to maintain it. In the modern era of shrinking military budgets and increasing mission requirements, the decision to continue one military program necessarily carries with it a decision to cut other capabilities.[128] The decision to spend approximately $170 million annually on post-trial protections that far exceed those offered in civilian post-trial systems must be viewed through the prism of budget cuts that

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123 *See* Grogan, *supra* note 45, at 6 (providing excellent recommendations for reform of the convening authority initial action, but incorrectly assuming that the pre-authentication phase of post-trial "is on par with civilian criminal courts"). *See also supra* Part II; *infra* Appendix B.

124 UCMJ, *supra* note 8, art. 36 ("[P]ost-trial procedures . . . for cases . . . triable in courts-martial . . . may be prescribed by the President by regulations 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 . . . .").

125 *See infra* Part III.B.2.

126 *See* CRIMINAL LAW DESKBOOK, *supra* note 118, at A-1 (explaining that the military justice system exists to enhance the nation's warfighting capabilities as well as to accomplish the traditional goals of a justice system).

127 *See* Parker v. Levy, 417 U.S. 733, 743 (1974); CRIMINAL LAW DESKBOOK, *supra* note 118, at A-1.

128 *See generally* Marshall, *supra* note 14 (discussing military budget cuts and the effects of sequestration); *infra* notes 130–34 and accompanying text (explaining the economic theory of opportunity costs).

are forcing the Army to cut 80,000 Soldiers and inactivate one-fourth of its brigade combat teams.[129]

The theory of opportunity costs provides a useful analytical tool to evaluate the impact of maintaining the military's current post-trial process.[130] Opportunity cost is "the cost associated with opportunities that are forgone by not putting the [organization's] resources to their highest value use."[131] For example, suppose a firm owns a building in prime downtown real estate and uses that building as their headquarters. However, the firm could sell the prime downtown real estate for $10 million revenue and relocate to a less expensive location in the suburbs for $2 million in costs. At first glance, the layperson may incorrectly think the firm's decision to remain downtown makes economic sense because remaining downtown appears to have zero costs (because they already own the building) while the decision to relocate would incur expenses of $2 million. However, the decision to remain at the downtown headquarters is also a decision to forgo the $8 million profit the firm could achieve by relocating. In this example, the opportunity cost of the firm's decision to remain downtown is $8 million and must figure into the firm's analysis of how to best allocate their resources.[132] The economically sound decision for the firm would be to relocate because the higher opportunity costs of remaining downtown make relocation a more efficient use of its resources.[133] Policy analysts, economists, and business executives all include opportunity costs when comparing the costs and benefits of competing courses of action.[134]

To apply the theory of opportunity costs to the military's post-trial process, consider what other capabilities the military could obtain if it reduced its post-trial expenses and reallocated those resources to more productive uses.[135] In the most extreme scenario, the military could field three additional infantry battalions by reforming its post-trial system to match the federal appellate system.[136] Alternatively, eliminating the re-

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129 *See Report: Army Accelerating Cuts, Reorganization*, STARS & STRIPES (Oct. 21, 2013, http://www.stripes.com/report-army-accelerating-cuts-reorganization-1.248253 (reporting that budget cuts are forcing the Army to cut 80,000 Soldiers); Roulo, *supra* note 17 (explaining that budget cuts are forcing the Army to reduce the number of brigade combat teams from forty-five to thirty-three by 2017).

130 *See* DAVID L. WEIMER & AIDAN R. VINING, POLICY ANALYSIS: CONCEPTS AND PRACTICE 340–41 (3d ed. 1998).

131 ROBERT S. PINDYCK & DANIEL L. RUBINFELD, MICROECONOMICS 206 (4th ed. 1997).

132 *See id.* at 206–07.

133 *See id.*

134 *See* WEIMER & VINING, *supra* note 130.

135 *See id.*

136 *See generally* ELEVENTH QUADRENNIAL, *supra* note 59. The average servicemember received cash and non-cash benefits costing $99,504 in fiscal year 2010. *See id.* at 17, 26. Divide the military's total annual post-trial cost ($169,963,167) by $99,504 to estimate the number of infantry Soldiers the military forgoes each year to pay for its post-trial costs

quirement for multiple attorneys to review every record of trial prior to authentication could free approximately 8,181 annual labor hours[137] that could be more productively spent prosecuting additional sexual assault cases, devoting more time to sexual assault victims, or providing legal assistance services to servicemembers.[138] Regarding paralegal strength, reforming the military post-trial process to mirror the federal appellate system would allow the Army to reassign one or two additional paralegals to each brigade combat team.[139] In an example that directly benefits servicemembers and promotes retention, merely eliminating automatic appeals for guilty pleas would pay for approximately 3,289 children of servicemembers to attend a top-tier college each year.[140] The military forgoes each of these additional capabilities by not reallocating resources away from post-trial towards potentially more productive uses.

3. Post-Trial Imposes Additional Costs on the Convicted

Finally, whether the military's post-trial system performs well depends in part on the costs and benefits it creates for convicted servicemembers. On one hand, convicted servicemembers benefit from the potential opportunity to have convictions overturned or sentences re-

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(1,708). *See supra* Part III.A.4. A battalion contains between five hundred and six hundred Soldiers. *Operational Unit Diagrams*, U.S. ARMY, http://www.army.mil/info/organization/unitsandcommands/oud/ (last visited Jan. 29, 2015). Because this Article's estimate of post-trial costs excluded the costs of appellate litigation, eliminating approximately $170 million of post-trial costs would leave intact the military's ability to conduct post-trial that mirrors the federal appellate system. *See generally infra* Appendix B (comparing military and civilian post-trial systems).

137 *See supra* note 92. As a whole, trial counsels, defense counsels, and military judges each spend approximately 2,727 hours each year reviewing records of trial. *See supra* note 92. 2,727 hours multiplied by three groups equals 8,181 annual labor hours across the military. By way of further comparison, 8,181 hours per year is equivalent to hiring four additional judge advocates. 52 weeks per year times 40 hours of work per week equals 2,080 hours. 8,181 divided by 2,080 equals 3.93 full time employees.

138 *See generally* THE INVISIBLE WAR (Chain Camera Pictures 2012) (highlighting the perception that the military fails to adequately prosecute sexual assaults); SEXUAL ASSAULT PREVENTION AND RESPONSE OFFICE, U.S. DEP'T DEF., DEPARTMENT OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY, FISCAL YEAR 2013 (2014) (discussing military sexual assault trends); Grogan, *supra* note 45, at 28 (linking commanders' decreasing use of courts-martial to the increasing complexity of post-trial).

139 *See* Roulo, *supra* note 17 (explaining that budget cuts are forcing the Army to reduce the number of brigade combat teams from forty-five to thirty-three by 2017). Meanwhile, there are approximately fifty-eight post-trial paralegals in the Army alone. *See supra* text accompanying notes 60–68.

140 The yearly cost of attending the University of Texas at Austin is $25,842. *Cost of Attendance*, UNIV. OF TEX. AT AUSTIN, http://finaid.utexas.edu/costs.html (last visited Mar. 14, 2015) (including the costs of in-state tuition, room and board, and miscellaneous expenses for two semesters). Military post-trial costs approximately $169,963,167 annually. *See supra* Part III.A.4. More than half of the military's appellate cases are guilty pleas. *See* Barzmehri E-Mail, Jan. 23, 2015, *supra* note 102. Half of $169,963,167 is $84,981,584. $84,981,584 divided by the annual cost of attending the University of Texas at Austin ($25,842) is 3,289.

duced through the post-trial process.[141] On the other hand, convicted servicemembers suffer a variety of costs created by the uncertainty and the inherently slow processing times that result from the military's elaborate post-trial procedures. First, the current post-trial process unnecessarily hampers the ability of convicted servicemembers to find civilian employment. Civilian employers are reluctant to hire servicemembers who cannot produce a Defense Department Form 214 (Certificate of Discharge or Release from Active Duty).[142] However, convicted servicemembers sentenced to punitive discharges do not receive a Form 214 until after the appellate courts complete their mandatory review and return the case to a general court-martial convening authority for final action.[143] Because this process could take years,[144] a convicted servicemember faces substantial challenges beyond his conviction when attempting to obtain employment. Second, the Army Clemency and Parole Board will not consider an inmate for parole until after the convening authority takes initial action.[145] Because the convening authority could take a year or more to complete initial action,[146] the elaborate nature of military post-trial regularly deprives parole opportunities to servicemembers who were sentenced to relatively short periods of confinement.

Whether the costs that systemic post-trial delay imposes on convicted servicemembers are acceptable depends in large part on the probability of receiving meaningful clemency or appellate relief. Unfortunately, meaningful relief is largely a mirage for most convicted servicemembers. First, convening authorities rarely grant clemency.[147] Second, Congress largely stripped commanders of their clemency author-

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141 *See* MCM, *supra* note 4, R.C.M. 1107, 1203. *But see* Marinello, *supra* note 5, at 196 (finding that convening authorities grant clemency in approximately two percent of cases).

142 *See* Professional Experiences, *supra* note 27.

143 *See* MCM, *supra* note 4, R.C.M. 1203(e)(2) (explaining that the GCMCA orders unexecuted portions of sentences executed after ACCA affirms); MCM, *supra* note 4, R.C.M. 1209 (providing that a conviction is not final until all appellate options have been exhausted). Even a convicted who waives appellate rights will regularly wait more than a year for final action and a Form 214. *See* Barzmehri E-mail, Jan. 22, 2015, *supra* note 11.

144 *See* Barzmehri E-mail, Jan. 22, 2015, *supra* note 11 (explaining that the average time from sentence until a case is received at the Army Court of Criminal Appeals was 231 days in 2014); Barzmehri E-mail, Jan. 27, 2015, *supra* note 11 (explaining that the average processing time for an appeal at the Army Court of Criminal Appeals is 339 days). *See generally* Grimes, *supra* note 24 (case exceeding four years of post-trial processing).

145 AR 15-130, *supra* note 5, ¶ 3-1.

146 *See* Barzmehri E-mail, Jan. 22, 2015, *supra* note 11 (explaining that the average time from sentence until a case is received at the Army Court of Criminal Appeals was 231 days in 2014); Barzmehri E-mail, Jan. 27, 2015, *supra* note 11 (explaining that the average processing time for an appeal at the Army Court of Criminal Appeals is 339 days).

147 *See* Marinello, *supra* note 5, at 196 (finding that convening authorities grant clemency in approximately two percent of cases).

ity.[148] Third, the procedural focus of the military's post-trial system means that any relief granted by the appellate courts tends to be procedural rather than substantive.[149] For example, the procedurally complex requirements for staff judge advocate recommendations or promulgating orders regularly cause legal error.[150] However, the remedy for this error is to return the case to the convening authority for a new initial action.[151] This remedy merely adds additional delay to the process without granting substantive relief to the convicted. As another example, the Army Court of Criminal Appeals on average issues its decisions 570 days after trial.[152] Accordingly, the court is generally unable to grant meaningful relief to sentences of less than eighteen months confinement.

IV. THE *RAISON D'ÊTRE* FOR THE CURRENT POST-TRIAL SYSTEM NO LONGER EXISTS

Despite its relatively high cost and unique procedural requirements, the military post-trial system could be justifiable if it were specifically tailored to protect against abuses that are unique to the modern military. However, the historical state of affairs that prompted lawmakers to create the military's unique post-trial system no longer exists.[153] As a result, there is room for modern military post-trial to move closer to the civilian post-trial model without sacrificing the rights of convicted servicemembers.[154] This is this Article's third rationale for reforming the military's post-trial process.

Past Presidents and Congresses built the military's unique post-trial system to address then-existing problems within the military justice system.[155] Widespread abuses of the court-martial process occurred during

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148 *See* National Defense Authorization Act for Fiscal Year 2014, H.R. 3304, 113th Cong. § 1702 (2013).

149 *See* Grogan, *supra* note 45, at 1 (arguing that military post-trial consists of outdated rules that create unnecessary procedural errors that require correction on appeal but create no substantive benefit for the convicted).

150 *See* CRIMINAL LAW DESKBOOK, *supra* note 118, at V-21–V-37, V-60–V-61.

151 *See id.*

152 *See* Barzmehri E-mail, Jan. 22, 2015, *supra* note 11 (explaining that the average time from sentence until a case is received at the Army Court of Criminal Appeals was 231 days in 2014); Barzmehri E-mail, Jan. 27, 2015, *supra* note 11 (explaining that the average processing time for an appeal at the Army Court of Criminal Appeals is 339 days).

153 *See* Grogan, *supra* note 45, at 10–17 (describing historical development of military post-trial); John A. Hamner, *The Rise and Fall of Post-Trial: Is It Time for the Legislature to Give Us All Some Clemency?*, ARMY LAWYER 1 (2007) (describing historical development of military post-trial). *See generally* Marinello, *supra* note 5 (describing historical development of convening authority clemency).

154 *See supra* Part II.

155 *See* Grogan, *supra* note 45, at 10–17 (describing historical development of military post-trial); Hamner, *supra* note 153, at 1–2 (describing historical development of military post-trial). *See generally* Marinello, *supra* note 5 (describing historical development of convening authority clemency).

the first half of the twentieth century.[156] For example, the Houston riot of 1917 resulted in the largest murder trial in U.S. history.[157] Sixty-three African-American Soldiers were tried at a single court-martial.[158] Thirteen of them were hanged en masse immediately after announcement of the sentence without providing time for a higher judicial or command authority to review the sentence.[159] Additionally, the U.S. military convened over two million courts-martial during World War II (one court-martial for every eight servicemembers).[160] Over forty-five thousand servicemembers were serving sentences of confinement as World War II ended.[161] Further, courts-martial of this era featured presiding officers who were generally not attorneys, verdicts decided by juries of officers that took guidance from their commanders, lacked defense attorneys (or any attorneys for that matter), and allowed no meaningful appellate review.[162] Americans demanded reform as servicemembers returned from the battlefields of World War II and shared their stories of "injustices committed by Americans on other Americans in the name of military necessity, good order, and discipline."[163]

Lawmakers responded by dramatically reworking the military justice system over the following four decades. Lawmakers codified a new military justice system by creating the nation's first Uniform Code of Military Justice (UCMJ) in 1950.[164] The Military Justice Acts of 1968 and 1983 further reformed and civilianized the military justice system.[165] Now, the modern military justice system features a professional and independent judiciary, licensed attorneys representing both parties, a fiercely independent trial defense bar that is protected by statute from command interference, an independent appellate court for each service, and high-quality civilian oversight through the Court of Appeals for the Armed Forces.[166] Well-established law prohibits unlawful command influence over the court-martial process.[167] Military trial practice now closely mirrors federal civilian trial practice,[168] just as the Military Rules

156 *See supra* note 155.

157 *See* Fred L. Borch III, *The Largest Murder Trial in the History of the United States: The Houston Riots Courts-Martial of 1917*, ARMY LAWYER 1, 1–3 (2011).

158 *Id.*

159 *See id.* at 2.

160 Captain John T. Willis, *The United States Court of Military Appeals: Its Origin, Operation and Future*, 55 MIL. L. REV. 39, 39 (1972).

161 *Id.* at 40–41.

162 *See supra* note 155.

163 Willis, *supra* note 160, at 39.

164 *See supra* note 155.

165 *See* Grogan, *supra* note 45, at 10–17.

166 *See supra* note 155.

167 UCMJ, *supra* note 8, art. 36; MCM, *supra* note 4, R.C.M. 104.

168 *See* UCMJ, *supra* note 8, art. 36 ("Pre-trial, trial, and post-trial procedures . . . for cases . . . triable in courts-martial . . . may be prescribed by the President by regulations which

of Evidence now closely mirror the Federal Rules of Evidence.[169] This professional system of military justice matured decades ago and is now firmly entrenched.[170]

However, lawmakers have not yet updated the military's post-trial rules to reflect the seismic shifts of the past four decades.[171] Despite small changes along the margins, the military's post-trial rules still retain the general shape they took in the 1950s and 1960s when lawmakers were responding to the deficiencies of a military justice system in which trained attorneys were largely absent.[172] For example, the general court-martial convening authority became a focal point of the post-trial process not just because of his command prerogative to maintain good order and discipline in his formation through clemency, but also because he had an important quasi-appellate review authority.[173] With a courtroom staffed with laypersons and an appellate court in its infancy, convening authority review and post-trial reviews at the Office of the Judge Advocate General were vital protections for convicted servicemembers.[174] However, the times have changed and it is time for the rules to change with them.

V. PROPOSED REFORMS

This section suggests a menu of proposed reforms to the military post-trial system. Each proposed reform is compatible with the others, but is separate and distinct. Policymakers could implement any or all of them to achieve varying degrees of increased efficiency.

Each proposed reform shares several characteristics. Each has the potential to benefit convicted servicemembers by reducing the time they spend in post-trial limbo while continuing to provide procedural rights that exceed civilian standards. Each proposed reform is mindful of the military justice system's dual purposes of enhancing warfighting capabilities while accomplishing the traditional roles of a justice system.[175] Yet none of them would restrict the rights of convicted servicemembers merely to save money.

Additionally, four fundamental ideas lie at the heart of the reforms this Article proposes. The first fundamental idea is that the post-trial

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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 . . . .").

169 MIL. R. EVID. 1102 ("Amendments to the Federal Rules of Evidence shall apply to the Military Rules of Evidence 18 months after the effective date of such amendments, unless action to the contrary is taken by the President.").

170 *See* Marinello, *supra* note 5, at 192–93.

171 *See supra* note 155.

172 *See supra* note 155.

173 *See* Grogan, *supra* note 45, at 15–16 (discussing the convening authority's quasi-appellate review authority prior to 1983).

174 *See supra* note 155.

175 *See* CRIMINAL LAW DESKBOOK, *supra* note 118, at A-1.

system should be built on the principle of opting in, rather than opting out. Currently, convicted servicemembers become automatically enrolled in the full range of costly post-trial procedures, regardless of whether they want them or not. They can opt out of some of these procedures but not others.[176] Unfortunately, opt-out systems for determining resource distributions are inherently wasteful and lead to overconsumption of scarce resources.[177] Worse (from the perspectives of economic theory and behavioral science), convicted servicemembers are entirely shielded from the costs of operating the military's expensive post-trial system.[178] In the language of economists, this is an example of the "common property resources" market failure that also causes further overconsumption of scarce resources.[179] The opt-out structure of mili-

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176 *Compare* MCM, *supra* note 4, R.C.M. 1110 (explaining a convicted's ability to waive appellate review), *with* MCM, *supra* note 4, R.C.M. 1103, 1105 (explaining transcription and authentication processes that cannot be waived).

177 *See* PINDYCK & RUBINFELD, *supra* note 131, at 19–325, 609–80. One way to conceptualize the field of microeconomics is that it describes how individuals decide how to best allocate scarce resources. *See* Gary Becker, *The Economic Approach to Human Behavior, in* FOUNDATIONS OF THE ECONOMIC APPROACH TO LAW 6, 6–11 (Avery Wiener Katz ed., 1998). *See generally* PINDYCK & RUBINFELD, *supra* note 131 (providing an overview of the field of microeconomics). Much of microeconomic analysis is based on the theory that (given certain conditions) supply and demand will set the price and quantity of a particular good or service at a level that is economically efficient (i.e., that maximizes the aggregate welfare of consumers and producers taken together). *See generally* PINDYCK & RUBINFELD, *supra* note 131; WEIMER & VINING, *supra* note 130 (applying microeconomic tools to public policy analysis). Opt-out systems for determining resource distributions lead to overconsumption by distorting the price incentives that normally influence consumer demand. *See generally* PINDYCK & RUBINFELD, *supra* note 131, at 19–325, 609–80. This disruption occurs because the act itself of opting out requires time and effort, which in turn are scarce resources that weigh into an individual's economic decision-making process. *See* Becker, *supra* note 177, at 6–11. The perverse result is that a convicted servicemember may decide not to opt out of a post-trial service to which he attaches no value at all, simply because the act of opting out would cost him more (in terms of time and effort) than passively consuming the post-trial service. *See generally* PINDYCK & RUBINFELD, *supra* note 131, at 19–325, 609–80.

178 *See* PINDYCK & RUBINFELD, *supra* note 131, at 579–680 (discussing economic efficiency, externalities, and market failures).

179 *See id.* at 669–72. Some types of transactions exhibit distorted cost and pricing incentives that prevent supply and demand from reaching equilibrium at a price that is economically efficient (i.e., that maximizes the aggregate welfare of consumers and producers taken together). *See generally id.* at 296–301, 579–680. These scenarios are called market failures because the distortions cause consumers to overconsume (or underconsume) scarce resources. *See id.* at 609–80. "Common property resources" are a type of market failure that occurs where consumers can freely use scarce resources without paying for them. *See id.* at 669–72. Because individuals face no direct cost for consuming the resource, they will consume too much of it. *See id.* Eventually, this overconsumption will cause harmful costs to the broader community. *See id.* For example, consider a large lake to which an unlimited number of fishermen have access. Because the lake is a common property resource, the individual fishermen have no incentive to take into account how their fishing affects others. This causes fishermen to overfish, which over time will ruin the fishing lake. *See id.* Military post-trial and the fishing example are similar because the pricing mechanism that would normally cause individual consumers to regulate their behavior is absent in both cases. In other words, the design of the military post-trial system includes a structural bias that promotes the overconsumption of

tary post-trial, combined with the no fee environment within which convicted servicemembers decide whether or not to opt-out of post-trial services, means that convicted servicemembers overconsume post-trial services at a high rate.[180]

This overconsumption of post-trial resources directly harms two important groups. First, the overconsumption harms military commanders, military servicemembers, and ordinary Americans by diverting scarce funding away from other military programs and warfighting capabilities.[181] Second, the overconsumption harms convicted servicemembers by misallocating scarce post-trial resources away from the convicted servicemembers who would most benefit from them.[182] Given scarce post-trial resources, the decision of a convicted servicemember not to opt-out of post-trial because there is no fee (even though he has no expectation of relief and does not attach much value to the process) means that the post-trial system must devote less time and fewer resources toward considering another convicted servicemember's case (even if he has a legitimate chance for relief and attaches high value to the post-trial process).[183]

To address the problems inherent in no fee opt-out systems, the default position in each case should be minimal post-trial procedure with the opportunity to opt-in for more.[184] For example, servicemembers who feel wronged should be empowered to ask for relief. An opt-in system of post-trial distributes scarce resources where they will be most valued and conserves post-trial resources by directing them away from activities where the post-trial consumers value them less.[185] The reforms proposed in this Article attempt to move military post-trial toward an opt-in system that more efficiently allocates scarce government resources while preserving a high level of post-trial protections.

The second fundamental idea underpinning this Article's proposed reforms is the importance of providing increased discretion to the various post-trial actors. Decentralization of control makes sense because the

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post-trial resources. *See id.* But instead of merely causing poor fishing, the overconsumption of military post-trial resources causes budgetary effects which have national security implications. *See supra* Part III.B.2.

180 *See generally supra* notes 177–79.

181 In the modern era of shrinking military budgets and increasing mission requirements, the decision to continue one military program necessarily carries with it a decision to cut other capabilities. *See supra* Part III.B.2.

182 Given finite and relatively inflexible staffing levels of appellate defense counsel, appellate judges, and reviewing attorneys at each service's Office of the Judge Advocate General, the volume of post-trial cases is inversely proportional to the amount of time and attention each post-trial case receives. *See* JAGC DIRECTORY, *supra* note 55; *supra* Part III.B.2.

183 *See supra* note 182.

184 This would alleviate the overconsumption bias inherent in opt-out government programs. *See supra* notes 177–79 and accompanying text.

185 *See generally* PINDYCK & RUBINFELD, *supra* note 131, at 609–80.

post-trial actors (trial attorneys, trial judges, convening authorities, appellate attorneys, and each service's Judge Advocate General) are in the best position to know where their efforts would most effectively benefit their clients or their commands. Additionally, decentralization of control should appeal to military commanders and servicemembers alike because it is at the heart of the American way of doing battle and exercising military command.[186]

Third, each proposed reform applies the theory that people make the best and most efficient decisions when they are personally invested in the decision-making process and reap both the rewards and the costs of their decisions.[187] A servicemember who believes he was wronged will be highly motivated to ask for relief from the service appellate court or his Judge Advocate General. If a servicemember is not motivated to ask for relief, then the government should not be motivated to throw resources at pursuing rights the servicemember chooses not to exercise.

The fourth fundamental idea is that none of the proposed reforms would eliminate a currently existing post-trial right of convicted servicemembers.[188] These proposed reforms are low-hanging fruit in the sense that they increase efficiency without upsetting the scales of justice. Further, these reforms arguably benefit all convicted servicemembers to the extent that they improve post-trial processing times and improve the quality of post-trial reviews (by enabling reviewing attorneys and appellate judges to focus their efforts where they would be most likely to identify and correct legal errors).

A. Ease the Requirements for Attorneys to Review Transcripts Prior to Authentication

This Article's first proposed reform would simplify the process for authenticating court-martial transcripts. Currently, the military trial judge authenticates every court-martial transcript after it is reviewed by the court reporter, trial counsel, defense counsel, and each trial judge

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186 *See generally* U.S. DEP'T OF ARMY, DOCTRINE PUBLICATION 6-22, ARMY LEADERSHIP (2012) (discussing Army leadership theory).

187 This is a core tenet of the field of microeconomics. *See generally* PINDYCK & RUBINFELD, *supra* note 131.

188 This is the first of three criteria for post-trial reform elucidated by Navy Captain David Grogan. *See* Grogan, *supra* note 45, at 17. The reforms proposed in this Article also satisfy Grogan's remaining two criteria. Because none of the proposed reforms would restrict the convening authority's clemency power, they clearly satisfy Captain Grogan's second criteria that commanders would not perceive these proposed reforms as "compromising the meaningful exercise of the [c]ommander's lawful prerogative over good order and discipline within his or her command." *See* Grogan, *supra* note 45, at 17. Additionally, the proposed reforms satisfy Captain Grogan's third criteria that the "resulting system must work equally well in both peacetime and war" because each of the reforms would reduce the resource burden associated with military post-trial. *See* Grogan, *supra* note 45, at 17.

who presided over a portion of the proceedings.[189] This redundant process should be simplified to eliminate all mandatory attorney reviews and require the court reporter to authenticate the transcript. Importantly, this proposed reform would bring the military in line with the nearly universal practice across federal and state jurisdictions.[190]

This reform would produce clear benefits. First, it would save approximately $7.5 million and shave approximately 7,414 hours off the post-trial process annually.[191] Second, this reform would not eliminate any rights of the convicted given that the multiple attorneys who currently proofread the trial transcript have no authority to grant clemency or appellate relief.[192] Third, the military's current authentication practice does not appear to be based on any unique characteristics of the modern military.[193] Given that civilian court reporters successfully authenticate transcripts in nearly all civilian jurisdictions, the primary justification for requiring multiple attorney reviews in the military seems to be an assumption that military court reporters are too incompetent to produce an accurate record.[194] Even if that assumption were true (it is not), the more appropriate response would be to treat the disease itself by reevaluating training and standards within the court-reporter system.[195] Fourth, this reform would not prohibit the prosecution, defense, or military judge from reviewing the transcript. Rather, it would allow the various actors within the military justice system the discretion to reallocate their resources where they would be most productive. For example, if a trial counsel knows that a particular portion of the trial was crucial for an expected appeal, the trial counsel could review only that section and then move on to other endeavors that would have more impact for her com-

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189 *See* MCM, *supra* note 4, R.C.M. 1103, 1104(a); Professional Experiences, *supra* note 27 (observing a requirement for trial defense counsel to review transcripts prior to authentication that is based in local and regional Trial Defense Service policy).

190 *See supra* Part II; *infra* Appendix B.

191 Divide the Army's total annual cost of three attorney reviews ($2,767,905) by 36.78 percent to estimate the military's total annual cost of three judge reviews ($7,525,571). *See supra* notes 92, 117. Divide the Army's total annual time spent conducting three attorney reviews (2,727 hours) by 36.78 percent to estimate the military's total annual time spent conducting three attorney reviews (7,414 hours). *See supra* notes 92, 117.

192 *See* U.S. ARMY TRIAL JUDICIARY, RULES OF PRACTICE BEFORE ARMY COURTS-MARTIAL 28 (2013).

193 *See supra* Part IV.

194 *See supra* Part II; *infra* Appendix B (demonstrating that court reporters authenticate transcripts in nearly all civilian jurisdictions).

195 Current rules already allow for a record of trial to be corrected if later found to be deficient. *See* MCM, *supra* note 4, R.C.M. 1104(d). Additionally, the senior trainer of Army court reporters is already testing new training procedures and standards to improve court reporter performance. *See* SSG Glober Interview, *supra* note 70.

mand. Finally, this reform is attractive because no action would be needed from Congress.[196]

B. Eliminate Promulgating Orders

Under the current rules, the government publishes the results of a court-martial two separate times, using two separate documents. Immediately upon the conclusion of trial, the trial counsel (i.e., the prosecuting attorney) creates a report of result of trial (RROT) that summarizes the court-martial's findings as to guilt and sentence.[197] The trial counsel provides the RROT to the convicted servicemember's immediate commander, the court-martial convening authority, and confinement center.[198] The RROT serves as the primary record of the court-martial's results for the first several months of the post-trial process and continues to play a role throughout the post-trial process.[199] Later in the post-trial process, the convening authority (a senior military commander) must approve or disapprove the court-martial's findings and sentence through a procedure called initial action.[200] The convening authority's initial action is published through a promulgating order.[201] The promulgating order serves as the official public record of the court-martial's findings and sentence.[202] However, the promulgating order duplicates information already contained in the RROT while displaying it in a laboriously different format.[203] Unfortunately, the promulgating order is a frequent source of appellate litigation and legal error.[204]

The military should eliminate the promulgating order. The RROT would serve admirably as the public record of court-martial findings and sentences (particularly if it were signed by the military trial judge or the jurisdiction's chief of military justice). If the convening authority later

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196 *See* MCM, *supra* note 4, R.C.M. 1103, 1104; U.S. ARMY TRIAL JUDICIARY, RULES OF PRACTICE BEFORE ARMY COURTS-MARTIAL 28 (2013).

197 AR 27-10, *supra* note 40, ¶ 5-30.

198 MCM, *supra* note 4, R.C.M. 1101(a).

199 For example, the convening authority must consider the RROT when taking initial action. MCM, *supra* note 4, R.C.M. 1107(b)(3)(A)(i).

200 MCM, *supra* note 4, R.C.M. 1107. The convening authority may approve the findings and sentence in whole or in part, but it may not increase the punishment or overturn findings of not guilty. *Id.*

201 MCM, *supra* note 4, R.C.M. 1114.

202 *Id.*

203 *Compare* MCM, *supra* note 4, R.C.M. 1114 (requiring the contents of a promulgating order to include the type of court-martial, the command which convened it, the charges and specifications, the accused's pleas, the findings for each charge and specification, the sentence, and the action of the convening authority) *with* U.S. DEP'T OF DEF., DD FORM 2707-1, REPORT OF RESULT OF TRIAL (2013) (requiring the same information, minus the convening authority initial action).

204 *See* CRIMINAL LAW DESKBOOK, *supra* note 118, at V-21–V-37, V-60–V-61.

disapproves portions of the findings or sentence, then the changes could be easily published through an amended copy of the RROT.

This reform would provide wide-ranging benefits. First, it would generate potentially substantial indirect cost savings by reducing appellate litigation.[205] Second, it would modestly reduce the military's direct post-trial costs by reducing the number of different documents prosecutors must currently create. Third, it would modestly reduce post-trial processing times. These benefits come at no cost to the convicted, given that the promulgating order itself does not affect his post-trial rights.

C. Create Two Avenues for Automatic Appellate Review

This Article's third proposed reform would increase the efficiency of the military's system of automatic appeals. Under the current rules, all courts-martial that result in a punitive discharge or confinement of one year receive automatic appellate review.[206] After reviewing a case, the defense appellate counsel either files an "assignment of error" (i.e., a brief alleging specific legal errors) or submits the case for appeal on the merits (i.e., without a brief identifying specific legal errors).[207] Regardless of whether the convicted or his defense appellate counsel allege a specific legal error, each member of a panel of three appellate judges examines the entire transcript and record of trial in search of as-yet-unidentified potential error.[208] The court may decide to hear oral arguments regardless of whether or not the defense appellate attorney alleged legal error.[209] The service courts of criminal appeals decide all cases in either a panel of three or en banc, regardless of whether the defense appellate counsel alleges legal error.[210]

The military's system of automatic appeals should be reformed to create two avenues of automatic appellate review. The standard for triggering automatic appellate review would remain the same (sentences that result in a punitive discharge or confinement of one year). The only change would be in the role of the appellate judges. The first avenue of automatic appellate review would remain the same. If the appellate defense counsel alleges a specific legal error, then the current process would continue to apply. That is, the case would continue to be reviewed by a three judge panel at the service court of criminal appeals. The second avenue of automatic appeal would govern only those cases in which the defense appellate counsel is unable to allege specific legal er-

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205 *See id.*
206 *See* MCM, *supra* note 4, R.C.M. 1201.
207 *See* A.C.C.A. R. 3, 15(a)–15.2.
208 *See* A.C.C.A. R. 4(a).
209 *See* A.C.C.A. R. 16.
210 *See* A.C.C.A. R. 4.

ror. If the appellate defense counsel does not allege a specific legal error, then only one judge at the service court of criminal appeals would conduct the automatic appellate review. If the single judge finds no error, he would affirm the case. If the single judge identifies potential legal error, he would refer the case to the normal three judge panel. In effect, the second avenue of automatic appeal would use a one judge panel to screen out cases that do not need to be reviewed by a three judge panel.

This reform would not eliminate any post-trial rights of the convicted because an appellate judge (and a defense appellate attorney) would still review every qualifying case. Instead, it merely focuses judicial resources on the cases that are most likely to benefit from judicial review. If a trial defense counsel and an appellate defense counsel are both unable to identify any specific legal errors in a case, then it logically follows that there is a low likelihood that there is actually legal error in the case. And if there is a low likelihood that the case has legal error, then having three appellate judges redundantly review it is an inefficient use of scarce judicial resources. A more efficient use of judicial resources would be to focus the appellate court's scarce time on two areas where there is a higher return: (1) reviewing cases where the defense appellate attorney has actually alleged legal error, and (2) reducing appellate processing times by reviewing a higher volume of cases.

Further, the proposed reform would provide significant benefits to all stakeholders in the post-trial system. First, reducing the amount of time that appellate judges spend reading transcripts would directly save the military up to approximately $6.8 million annually.[211] Second, it would reduce processing times at the service courts of criminal appeals by up to two-thirds by freeing up approximately 4,942 hours of appellate judge labor each year.[212] In other words, the Army Court of Criminal Appeals (ACCA) currently takes an average of 339 days to review a case.[213] This reform could reduce ACCA's processing time to 113

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[211] *See supra* note 92. Divide the Army's estimated total annual cost of mandatory three appellate judge reviews ($3,763,260) by 36.78 percent to estimate the military's total annual cost of three judge reviews ($10,231,811). *See supra* note 117. Divide $10,231,811 by three to estimate the military's total annual cost of each judge's transcript reviews ($3,410,604). If the proposed reform leads to only one judge reviewing most cases at the service courts of criminal appeals, then the military's annual cost savings would be approximately $6,821,208.

[212] Divide the Army's total annual time spent conducting three appellate judge reviews (2,727 hours) by 36.78 percent to estimate the military's total annual time spent conducting three judge reviews (7,414 hours). *See supra* notes 92, 117. Divide 7,414 hours by three to estimate the military's annual labor hours associated with having one judge review every transcript at the service courts of criminal appeals (2,471 hours). If the proposed reform leads to only one judge reviewing most cases at the service courts of criminal appeals, then the military would save approximately 4,942 judicial labor hours each year (2,471 x 2 = 4,942).

[213] *See* Barzmehri E-mail, Jan. 27, 2015, *supra* note 11 (providing average processing times for the Army Court of Criminal Appeals).

days.[214] Third, reducing processing times at the service courts of criminal appeals would further reduce the military's post-trial expenses by creating second-order effects. For example, it would reduce the cost of non-pay benefits the military provides to convicted servicemembers during post-trial.[215] Fourth, reducing processing times at the service courts of criminal appeals would benefit convicted servicemembers by reducing the costs they suffer due to the systemic post-trial delays (such as employment difficulties associated with being in post-trial limbo).[216] Fifth, the reform would continue to provide servicemembers with appellate rights that are on par with death penalty cases in civilian post-trial systems.[217]

D. Adopt an Opt-In Procedure for Review at the Office of the Judge Advocate General (OTJAG)

Under current rules, an attorney at OTJAG must review all courts-martial that result in conviction but do not trigger automatic review by the service courts of criminal appeals.[218] Further, an attorney must review all courts-martial in which the convicted has waived appellate review.[219] These reviews occur automatically, regardless of whether or not the convicted has expressed any interest in having his case reviewed.[220] Further, they generally occur without any input from the convicted or his defense attorney.[221]

The military's system of automatic post-trial review for these cases should change to an opt-in system. Under an opt-in system, an attorney at OTJAG would be required to review a conviction only if the convicted requests review and alleges specific legal errors. The attorney at OTJAG would be required to review only the errors alleged by the convicted. Attorneys at OTJAG would continue to have discretion to review cases or issues beyond what convicted servicemembers request.

This proposed reform would reduce post-trial costs without eliminating post-trial rights of convicted servicemembers. First, the reform

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214 The current average appellate review time at the Army Court of Criminal Appeals is 339 days. *See* Barzmehri E-mail, Jan. 27, 2015, *supra* note 11. To determine how the average processing time would change if the court became three times more efficient, divide 339 by three.

215 *See supra* Part III.A.3 (discussing the costs of providing free healthcare, commissary and exchange benefits, and other programs to convicted servicemembers and their families during the post-trial process).

216 *See supra* Part III.B.3.

217 *See supra* Part II; *infra* Appendix B. No civilian jurisdiction requires three appellate judges to automatically review every conviction. *See infra* Appendix B.

218 *See* MCM, *supra* note 4, R.C.M. 1201.

219 *See* MCM, *supra* note 4, R.C.M. 1112.

220 *See* MCM, *supra* note 4, R.C.M. 1112, 1201.

221 *See id.*

would reduce the caseload of attorneys at OTJAG and allow them to focus on their core mission of developing criminal law policy for the military services. Second, it would increase a convicted servicemember's control over the post-trial process by encouraging him to focus OTJAG's attention on the issues that matter to him. Third, it would increase the quality of the review process. The trial defense attorney is well-positioned to communicate the contentious legal issues from the case because he argued them the first time. The convicted is also well-positioned to communicate the ways in which he believes he was wronged by law enforcement or the military justice system. Requiring the convicted to sharpen the issues for the OTJAG attorney means the most important issues will not be lost in the noise as the OTJAG attorney slogs through thousands of pages of dry court-martial transcripts.[222] Finally, this reform would not eliminate a servicemember's right to request relief from the Judge Advocate General. Instead, it would merely shift the onus to the convicted. If convicted servicemembers are not motivated to request relief, then it is difficult to argue they attached any value to this right in the first place.

E. Adopt an Opt-In System of Appellate Review for Guilty Pleas

Under current rules, the military's system of automatic appellate review does not distinguish between pleas of guilty or not guilty.[223] Even if the convicted plead guilty, every court-martial conviction that results in a punitive discharge or confinement of one year must be automatically reviewed by a three judge panel at the service courts of criminal appeals.[224] This practice is entirely unique to the military post-trial system. No civilian post-trial system provides automatic appellate review for guilty pleas.[225] Instead, many civilian jurisdictions limit appellate rights after guilty pleas.[226]

The military should adopt an opt-in system for appellate review of guilty pleas that more closely mirrors civilian post-trial practice. Under

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222 Transcripts for contested courts-martial are generally one thousand pages or longer. *See* United States v. Bozicevich (3d Infantry Div., Fort Stewart Aug. 10, 2011) (14,200 page record of trial); United States v. Lorance (82d Airborne Div., Fort Bragg Aug. 1, 2013) (1,000 page record of trial for two-and-a-half day trial).

223 *See* MCM, *supra* note 4, R.C.M. 1103, 1201, 1203.

224 UCMJ, *supra* note 8, art. 66 (requiring three judge panels to hear cases at the service courts of criminal appeals); MCM, *supra* note 4, R.C.M. 1201 (providing for automatic appellate review of sentences including a punitive discharge).

225 *See infra* Appendix B.

226 At least ten states restrict the convicted's ability to appeal after a plea of guilty or nolo contendere. *See* ARIZ. R. CRIM. P. 17.2; CAL. R. CT. 8.304; FLA. R. APP. P. 9.140(b)(2); ILL. SUP. CT. R. 605; KAN. STAT. ANN. § 22-3602(a) (2014); MICH. CT. R. 6.425(F); OR. REV. STAT. § 138.050 (2014); S.C. APP. CT. R. 203(d)(1)(B)(iv); TENN. R. APP. P. 3; TENN. R. CRIM. P. 37; TEX. R. APP. P. 25.2.

this reform, the service courts of criminal appeals would only review a guilty plea court-martial if the convicted servicemember requests appeal and alleges specific legal errors.[227] The service courts of criminal appeals would limit their review to the specific legal errors raised by the convicted or his defense appellate attorney.

The benefits of this reform would be profound. First, moving to an opt-in system of appellate review for guilty pleas would save approximately $85 million annually.[228] By way of comparison, this cost savings is equivalent to the cost of fielding one-and-a-half infantry battalions.[229] Second, this reform would reduce processing times at the service courts of criminal appeals by more than fifty percent.[230] This dramatic reduction in appellate processing times would be possible because mandatory reviews of guilty pleas make up more than half of the caseload at the service courts of criminal appeals.[231] Third, these reductions in appellate processing times would further reduce the military's post-trial expenses by creating valuable second-order effects. For example, it would reduce the cost of non-pay benefits the military provides to convicted servicemembers during post-trial.[232] Fourth, reducing processing times would benefit convicted servicemembers who plead not guilty. For example, faster appellate processing would reduce the costs they suffer due

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227 Because automatic appellate review would no longer apply to all guilty pleas, court reporters would only transcribe the portions of the trial that are necessary to resolve the specific issues that are raised on appeal. The government would continue to produce (at government expense) any transcript that a convicted servicemember needs for his appeal. The change is that the court reporter would only transcribe those portions of the court-martial that the defense appellate attorney identifies as necessary for the issues on appeal. For example, if the issue on appeal is the judge's denial of a defense request to admit evidence under Military Rule of Evidence 412, the defense attorney would request transcription of the motion hearing and the trial testimony of only the relevant witnesses. The government appellate attorney or the court could order additional portions of the record transcribed if necessary. Additionally, the parties could forgo the need for a transcript entirely if the appeal involves a pure issue of law or if the parties stipulate to the facts. The record of trial would continue to include the video or audio recordings of the entire court-martial, as well as the trial documents (written motions, written decisions by the trial judge, etc.). The record of trial, the opportunity to listen to key portions of the video or audio recordings, and consultation with the trial defense attorney would provide the appellate defense counsel all of the tools he would require in order to identify the portions of the trial that need to be transcribed for an appeal. This reform would bring the military post-trial system in line with the transcription practices of every other jurisdiction in the United States. *See infra* Appendix B.

228 *See supra* Part III.A.4. More than half of the military's appellate cases are guilty pleas. *See* Barzmehri E-mail, Jan. 23, 2015, *supra* note 102. Half of $169,963,167 is $84,981,584.

229 *See supra* note 136.

230 ACCA reviewed 818 cases in 2014. Four hundred twenty-seven cases were guilty pleas and 101 were mixed pleas. *See* Barzmehri E-mail, Jan. 22, 2015, *supra* note 11.

231 *Id.*

232 *See supra* Part III.A.3 (discussing the costs of providing free healthcare, commissary and exchange benefits, and other programs to convicted servicemembers and their families during the post-trial process).

to systemic post-trial delays (such as employment difficulties associated with being in post-trial limbo).[233]

While this reform creates exceptional opportunities to increase post-trial efficiency, the justice-based arguments for this reform are also strong. First, the strongest argument in favor of automatic appellate review of all convictions is based on the military's low threshold for panel (i.e., jury) convictions. In order to convict at trial, only two-thirds of a military panel must agree on guilt.[234] Given the low threshold for conviction in the military, automatic appellate review is an important protection for servicemembers who were convicted by panels. Yet this argument only applies to contested panel trials. The voting procedures of a contested panel play no role in a guilty plea to a judge.

Second, a servicemember who has admitted guilt in open court and survived the military's uniquely rigorous providency inquiry is in a weak position to claim that he was wrongfully convicted.[235] Universal access to professional defense counsel, the fierce independence and statutory protections of the military's trial defense services, and the detailed rights advisements and providency inquiry that the military trial judge must conduct before accepting a guilty plea make it unlikely that a convicted servicemember could plead guilty in the modern military justice system unless he fully understood what he was doing and felt that it was his best strategic option.[236] Further, the convicted would continue to have the option to file an appeal if there is evidence of ineffective assistance of counsel, unlawful command influence, or other procedural errors at the guilty plea. The difference is that the appellate defense attorney would have to allege the specific legal errors (and have a good faith basis to do

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233 *See supra* Part III.B.3.

234 *See* MCM, *supra* note 4, R.C.M. 921.

235 *See* MCM, *supra* note 4, R.C.M. 910.

236 *See id.*; U.S. ARMY TRIAL DEF. SERV., STANDARD OPERATING PROCEDURES (2009) (highlighting the organizational independence of the Trial Defense Service and the duties of trial defense counsel); U.S. DEP'T OF THE ARMY, PAMPHLET 27-9, MILITARY JUDGES' BENCHBOOK ¶¶ 2-1 to 2-2-8 (2014) [hereinafter DA PAM. 27-9] (requiring the accused to answer a rigorous inquiry into his understanding of the effects of pleading guilty and the details of the offenses to which the accused is admitting guilt). Military guilty pleas require several hours at a minimum complete, and sometimes require a full day in court. *See* Professional Experiences, *supra* note 27 (prosecuting and defending guilty pleas in both military and civilian courts across approximately ten years). The long duration of military guilty pleas illustrates the rigor of the safeguards in place to prevent innocent servicemembers from wrongly pleading guilty. Before accepting a guilty plea, the military trial judge must provide the accused with a detailed rights advisement. *See* DA PAM. 27-9, *supra* note 236, ¶¶ 2-1 to 2-2-8. Further, the military trial judge must conduct a providency inquiry in which he thoroughly questions the accused to ensure that the accused understands the effects of pleading guilty and can explain in detail the facts of the crimes he committed. *See id.*

it) in order to trigger an appeal, rather than merely submit a case "on the merits" without alleging specific legal errors.[237]

Although well-justified, this reform would be controversial because it would substantially narrow an existing post-trial right of convicted servicemembers.[238] However, this reform would not eliminate the right of convicted servicemembers to appeal their guilty pleas. Instead, it would merely focus the scope of potential review and shift the onus to the convicted to articulate legal error. In the end, this reform's substantial cost savings, increases in judicial efficiency, justice-based rationale, and the fact that this protection does not exist in civilian jurisdictions all weigh strongly in favor of adopting this reform.[239]

CONCLUSION

This Article attempted to broaden the discussion of how to improve the military's post-trial system. To that end, this Article reported the results of two pioneering research studies. This was the first study to methodically compare the military's post-trial process against civilian post-trial practices in all fifty states and the federal courts. Until now, there has been a widespread misperception among practitioners and policy-makers that both systems are constructed from the same building materials, but with additional protections provided to servicemembers.[240] Instead, this Article demonstrates that the most resource-intensive aspects of military post-trial have no civilian corollary.[241] Additionally, this was the first-ever study to calculate the actual costs of the military's post-trial process.[242] Until now, policymakers had no way to use the relative costs of the military and civilian post-trial systems to analyze the efficiency of the military post-trial system.

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237 Currently, defense appellate counsels regularly submit cases for appellate review without alleging specific errors or requesting specific relief. *See* A.C.C.A. R. 15.2.

238 *See* Grogan, *supra* note 45, at 17–28 (arguing that the defense bar would object to reforms which eliminate a substantive right of the accused).

239 *See supra* Part II & III; *infra* Appendix B.

240 *See* Grogan, *supra* note 45, at 6 (providing excellent recommendations for reform of the convening authority initial action, but incorrectly assuming that the pre-authentication phase of post-trial is "on par with civilian criminal courts"). Actually, the pre-authentication phase of military post-trial has no equivalent across all fifty states and the federal courts. *See supra* Part II. Additionally, the pre-authentication phase of military post-trial accounts for a large proportion of the overall costs and processing times while providing little benefit to convicted servicemembers. *See supra* Part III.

241 *See supra* Parts III & IV.

242 Other commentators who have considered post-trial reform have approached the topic from other angles. *See generally* Grogan, *supra* note 45 (considering post-trial reforms through the lens of historical and logical analysis); Hamner, *supra* note 153, at 17–18 (considering whether the convening authority should continue to play a role in the post-trial process in light of the judiciary's trend of creating additional post-trial protections for the convicted).

Using this new data as its background, this Article then set out to explore whether the military post-trial system is performing efficiently. This exploration began by acknowledging two principles that would guide it. First, a convicted servicemember's post-trial rights should not bend merely to save money. Second, the military justice system is unique among American justice systems in part because it serves dual purposes: (1) enhancing the military's warfighting capabilities, and (2) accomplishing the traditional goals of a justice system (protecting the rights of the accused, punishing and deterring crime, etc.).[243] Given the unique nature of the military itself and the military justice system as a whole, one should not demand that the military post-trial system be just like its civilian counterparts.

To gauge the efficiency of the military's post-trial process, the Article examined three areas. First, the military's post-trial system is significantly more expensive than its civilian counterparts. Given the unique nature of military justice, significant cost disparity is expected. Yet the large size of the cost disparity indicates there is room for reforms to cut wasteful practices. Second, because the military justice system exists in part to enhance the military's warfighting capabilities,[244] whether the military's post-trial system is performing well depends in part on what capabilities warfighters must forgo in order to maintain it. Given the modern era of shrinking military budgets and increasing mission requirements, the military's post-trial system's approximately $170 million annual cost requires the military to forgo significant warfighting capabilities. This result suggests that the military post-trial system does not perform well in terms of enhancing the military's warfighting capabilities.[245] Third, the military's elaborate post-trial system creates both costs and benefits for convicted servicemembers. Reforms could benefit convicted servicemembers by reducing systemic post-trial delays.

After concluding that military post-trial is both out of step with civilian post-trial and inefficiently consumes scarce military resources, this Article examined why military post-trial is designed the way that it is. In other words, being different and expensive does not necessarily mean military post-trial should change (provided that there is a good reason for being different and expensive). Instead, this Article argued that lawmakers created the military post-trial to address the deficiencies of a military justice system in which trained attorneys were largely absent.

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243 *See* CRIMINAL LAW DESKBOOK, *supra* note 118, at A-1.

244 *See* Parker v. Levy, 417 U.S. 733, 743 (1974); CRIMINAL LAW DEP'T, *supra* note 118, at A-1 (explaining that the military justice system exists to enhance the nation's warfighting capabilities as well as accomplish the traditional goals of a justice system).

245 *See* CRIMINAL LAW DESKBOOK, *supra* note 118, at A-1 (explaining that the military justice system exists to enhance the nation's warfighting capabilities as well as accomplish the traditional goals of a justice system).

Many of the military's expensive post-trial processes exist because lawmakers have not yet updated the rules to reflect the seismic shifts that have occurred over the past four decades.

Finally, this Article proposed a menu of potential reforms intended to increase the efficiency of the military post-trial system, while continuing to provide convicted servicemembers with protections that far exceed their civilian counterparts. The proposed reforms include: (1) easing the requirements for multiple attorneys to review transcripts, (2) eliminating promulgating orders, (3) creating two tracks for automatic appellate review, (4) adopting an opt-in system for OTJAG review of courts-martial, and (5) adopting an opt-in system for appellate review of guilty pleas. By adopting the proposed reforms, the military could fund significant additional warfighter capabilities without jeopardizing the rights of convicted servicemembers.

APPENDIX A:
COMPARING TWO POST-TRIAL SYSTEMS: CALIFORNIA DEATH PENALTY CONVICTION VS. MILITARY GUILTY PLEA FOR MARIJUANA USE

To illustrate the scope of the problem, the following table compares the post-trial process that follows a civilian's death penalty conviction in California's state courts against the post-trial process that follows a Soldier's guilty plea for marijuana use in the military.[1] In seven of ten categories, the Soldier's misdemeanor-level guilty plea triggers a post-trial process that exceeds the protections afforded to a civilian condemned to die. The post-trial process is roughly equivalent in the remaining three categories.

	California Death Penalty (Contested Trial)	Military Misdemeanor (Guilty Plea)
Automatic review by appellate court	Yes[2]	Yes[3]
Appellate defense attorney appointed at no cost to convicted (regardless of ability to pay)	No[4]	Yes[5]
Likely duration of appellate process	Years[6]	Years[7]
Verbatim transcript of all court proceedings required	Yes[8]	Yes[9]
Who must review the verbatim transcript before it is authenticated?	Court reporter only[10]	All trial judges who presided over any portion of the proceedings, prosecutor, defense counsel, court reporter[11]
Number of authorities with power to grant clemency	1[12]	4[13]
Restrictions on authority's ability to grant clemency	Governor may only consider certain factors and must obtain approval from California Supreme Court in certain circumstances[14]	Largely unfettered authority to grant clemency[15]
What triggers clemency review?	Petition from convicted[16]	Automatic (no action needed by convicted)[17]
Must a senior attorney review the record of trial and make clemency recommendations before the verdict is approved?	No[18]	Yes (staff judge advocate recommendation)[19]
For those sentenced to confinement, does the government continue to pay the convicted's salary to him until the appeals phase is complete?	No[20]	Yes (known as deferment or waiver of forfeitures)[21]

[1] Assume the convicted Soldier is sentenced to reduction in grade, total forfeiture of pay, one month confinement, and a bad-conduct discharge at a general court-martial.

[2] CAL. R. CT. 8.600(a).

[3] MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1201 (2012) [hereinafter MCM].

[4] California provides appellate defense attorneys at taxpayer expense only to indigent defendants. *See* CAL. R. CT. 8.605; *see also Death Penalty Cases*, CAL. COURTS, http://www.courts.ca.gov/5641.htm (last visited Oct. 25, 2015).

[5] MCM, *supra* note 3, R.C.M. 1202.

[6] OFFICE OF THE ATTORNEY GEN., STATE OF CAL., A VICTIM'S GUIDE TO THE CAPITAL CASE PROCESS 2, http://oag.ca.gov/sites/all/files/agweb/pdfs/publications/deathpen.pdf (last visited Oct. 25, 2015).

[7] *See* E-mail from Homan Barzmehri, Management and Program Analyst, Army Court of Criminal Appeals, to author (Jan. 22, 2015) (on file with author) (explaining that the average time from sentence until a case is received at the Army Court of Criminal Appeals was 231 days in 2014); E-mail from Homan Barzmehri, Management and Program Analyst, Army Court of Criminal Appeals, to author (Jan. 27, 2015) (on file with author) (explaining that the average processing time for an appeal at the Army Court of Criminal Appeals is 339 days); *see also* United States v. Grimes, Army 201007202014, CCA LEXIS 63 (A. Ct. Crim. App. Jan. 31, 2014), *rev. denied*, No. 14-0493, 2014 CAAF LEXIS 829 (C.A.A.F. Aug. 11, 2014) (exceeding four years of post-trial processing).

[8] CAL. R. CT. 8.610–.622.

[9] MCM, *supra* note 3, R.C.M. 1103.

[10] CAL. R. CT. 8.320, 8.336–.344, 8.619. For all felony convictions, the court reporter prepares and certifies the written transcript. *See id.* The clerk of the trial court prepares and certifies the portion of the record that includes the papers, documents, and exhibits used at trial. *See id.* After the clerk delivers the certified transcripts, each counsel reviews the docket sheets and minute orders to determine whether the reporter's transcript is complete and reviews the court file to determine whether the clerk's transcript is complete. *See id.* The rules do not require counsel for either party to read the entire reporter's transcript. *See id.* If any counsel files a request for additions or corrections, then the judge must also certify the record as complete. CAL. R. CT. 8.619.

[11] MCM, *supra* note 3, R.C.M. 1103, 1104(a). The requirement for trial defense counsel to review transcripts prior to authentication is based in local and regional Trial Defense Service policy. This assertion is based on the author's professional experiences across eight years of military justice practice as a trial counsel, defense counsel, senior trial counsel, command judge advocate, and chief of military justice from 2007 to 2014.

[12] CAL. CONST. art. V, § 8. The President's pardon authority is limited to federal offenses. U.S. CONST. art. II, § 2.

[13] U.S. CONST. art. II, § 2 (providing pardon authority to the President); MCM, *supra* note 3, R.C.M. 1107, 1201 (2012) (providing clemency authority to the convening authority and the service Judge Advocate General); U.S. DEP'T OF ARMY, REG. 15-130, ARMY CLEMENCY AND PAROLE BOARD, ¶ 2-2 (1998) (providing for clemency through the Army Clemency and Parole Board and the Secretary of the Army). However, Congress recently imposed additional limitations on the convening authority's clemency powers for sexual assault convictions, adjudged sentences that exceed six months confinement or including a punitive discharge, or convictions for offenses that include a maximum punishment exceeding two years confinement. These new limitations apply to offenses that occurred on or after June 2014. National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113–66, § 1702, 127 Stat. 672, 954–958 (2013) [hereinafter National Defense Authorization Act for Fiscal Year 2014].

[14] CAL. CONST. art. V, § 8. For example, the California Supreme Court must recommend granting a pardon before the Governor can pardon an applicant who has been convicted of more than one felony. *Id.* Also, the Governor may only consider certain factors when acting on a murder case with a sentence to an indeterminate term of confinement. *Id.*; *see also* OFFICE OF GOVERNOR, STATE OF CAL., HOW TO APPLY FOR A PARDON (2013), https://www.gov.ca.gov/docs/How_To_Apply_for_a_Pardon.pdf (last visited Oct. 25, 2015).

15 The President's clemency power is restricted only as to impeachment. U.S. CONST. art. II, § 2. The Judge Advocate General's clemency power is unqualified. MCM, *supra* note 3, R.C.M. 1201(b)(3). Clemency is "within the sole discretion of the convening authority" and "is a matter of command prerogative." MCM, *supra* note 3, R.C.M. 1107(b)(1). However, Congress recently imposed additional limitations on the convening authority's clemency powers for sexual assault convictions, adjudged sentences that exceed six months confinement or including a punitive discharge, or convictions for offenses that include a maximum punishment exceeding two years confinement. These new limitations apply to offenses that occurred on or after June 2014. National Defense Authorization Act for Fiscal Year 2014, *supra* note 13, § 1702.

16 OFFICE OF GOVERNOR, STATE OF CAL., *supra* note 14.

17 MCM, *supra* note 3, R.C.M. 1107, 1201. Clemency by the convening authority or the service Judge Advocate General can occur without any action from the convicted. MCM, *supra* note 3, R.C.M. 1107, 1201. However, the President of the United States rarely uses his pardon authority unless requested by the convicted. *See Standards for Consideration of Clemency Petitioners*, U. S. DEP'T OF JUSTICE, http://www.justice.gov/pardon/about-office-0 (last visited Mar. 7, 2015).

18 *See* CAL. R. CT. 4.1–.700, 8.1–.1125.

19 MCM, *supra* note 3, R.C.M. 1106, 1107.

20 *See* CAL. R. CT. 4.1–.700, 8.1–.1125.

21 *See* MCM, *supra* note 3, R.C.M. 1101.

APPENDIX B:
SURVEY OF CIVILIAN POST-TRIAL SYSTEMS

Jurisdiction	Automatic Appellate Court Review of All Sentences to Confinement for One Year or More	Mandatory Attorney Review of All Convictions	Written Transcript Prepared for All Convictions	Who Reviews Transcript Before Certification/ Authentication After Conviction[1]	Who Certifies/Authenticates the Transcript After Conviction
Military Justice System	Yes[2]	Yes[3]	Yes[4]	Court Reporter, Prosecuting Attorney, Defense Counsel, All Trial Judges[5]	All Trial Judges Who Presided Over a Portion of the Court-Martial[6]
Federal District Court	No[7]	No[8]	No[9]	Court Reporter Only[10]	Court Reporter Only[11]
Alabama	No[12]	No[13]	No[14]	Court Reporter Only[15]	Court Reporter Only[16]
Alaska	No[17]	No[18]	No[19]	Court Reporter Only[20]	Court Reporter Only[21]
Arizona	No[22]	No[23]	No[24]	Court Reporter Only[25]	Court Reporter Only[26]
Arkansas	No[27]	No[28]	No[29]	Clerk of Trial Court or Court Reporter Only[30]	Clerk of Trial Court Only[31]
California	No[32]	No[33]	No[34]	Court Reporter Only[35]	Court Reporter Only[36]
Colorado	No[37]	No[38]	No[39]	Court Reporter Only[40]	Court Reporter Only[41]
Connecticut	No[42]	No[43]	No[44]	Court Reporter Only[45]	Court Reporter Only[46]
Delaware	No[47]	No[48]	No[49]	Court Reporter[50]	Clerk of Trial Court[51]

Florida	No[52]	No[53]	No[54]	Court Reporter or Convicted's Counsel (only if using specific transcriptionist requested by counsel)[55]	Court Reporter or Convicted's Counsel (only if using specific transcriptionist requested by counsel)[56]
Georgia	No[57]	No[58]	No[59]	Court Reporter Only[60]	Court Reporter and Clerk of Trial Court Only[61]
Hawaii	No[62]	No[63]	No[64]	Court Reporter Only[65]	Court Reporter Only[66]
Idaho	No[67]	No[68]	No[69]	Court Reporter Only[70]	Court Reporter Only[71]
Illinois	No[72]	No[73]	No[74]	Court Reporter or Trial Judge[75]	Court Reporter or Trial Judge[76]
Indiana	No[77]	No[78]	No[79]	Court Reporter Only[80]	Court Reporter Only[81]
Iowa	No[82]	No[83]	No[84]	Court Reporter Only[85]	Court Reporter Only[86]
Kansas	No[87]	No[88]	No[89]	Court Reporter Only[90]	Court Reporter Only[91]
Kentucky	No[92]	No[93]	No[94]	Court Reporter Only[95]	Court Reporter Only[96]
Louisiana	No[97]	No[98]	No[99]	Court Reporter Only[100]	Court Reporter Only[101]
Maine	No[102]	No[103]	No[104]	Court Reporter Only[105]	Court Reporter Only[106]
Maryland	No[107]	No[108]	No[109]	Court Reporter Only[110]	Court Reporter Only[111]
Massachusetts	No[112]	No[113]	No[114]	Court Reporter Only[115]	Court Reporter Only[116]
Michigan	No[117]	No[118]	No[119]	Court Reporter Only[120]	Court Reporter Only[121]

Minnesota	No[122]	No[123]	No[124]	Court Reporter Only[125]	Court Reporter Only[126]
Mississippi	No[127]	No[128]	No[129]	Court Reporter Only[130]	Court Reporter Only[131]
Missouri	No[132]	No[133]	No[134]	Court Reporter Only[135]	Court Reporter Only[136]
Montana	No[137]	No[138]	No[139]	Court Reporter Only[140]	Court Reporter Only[141]
Nebraska	No[142]	No[143]	No[144]	Court Reporter Only[145]	Court Reporter Only[146]
Nevada	No[147]	No[148]	No[149]	Court Reporter Only[150]	Court Reporter Only[151]
New Hampshire	No[152]	No[153]	No[154]	Court Reporter Only[155]	Court Reporter Only[156]
New Jersey	No[157]	No[158]	No[159]	Court Reporter Only[160]	Court Reporter Only[161]
New Mexico	No[162]	No[163]	No[164]	Court Reporter Only[165]	Court Reporter Only[166]
New York	No[167]	No[168]	No[169]	Court Reporter[170]	Court Reporter[171]
North Carolina	No[172]	No[173]	No[174]	Court Reporter Must Review; the Parties May Review[175]	The Parties Agree on the Contents of the Record on Appeal by Using the Settlement Procedure[176]
North Dakota	No[177]	No[178]	No[179]	Court Reporter Only[180]	Court Reporter Only[181]
Ohio	No[182]	No[183]	No[184]	Court Reporter Only[185]	Court Reporter Only[186]
Oklahoma	No[187]	No[188]	No[189]	Court Reporter Only[190]	Court Reporter Only[191]
Oregon	No[192]	No[193]	No[194]	Court Reporter Only[195]	Court Reporter Only[196]

Pennsylvania	No[197]	No[198]	No[199]	Court Reporter[200]	Court Reporter (Trial Judge Authenticates Portions if Objection)[201]
Rhode Island	No[202]	No[203]	No[204]	Court Reporter Only[205]	Court Reporter Only[206]
South Carolina	No[207]	No[208]	No[209]	Court Reporter[210]	Court Reporter[211]
South Dakota	No[212]	No[213]	No[214]	Court Reporter Only[215]	Court Reporter Only[216]
Tennessee	No[217]	No[218]	No[219]	Court Reporter, Appellant, or Appellant's Counsel; Appellee May Review (Not Mandatory)[220]	Court Reporter, Appellant, or Appellant's Counsel; Review By Trial Judge Is Discretionary[221]
Texas	No[222]	No[223]	No[224]	Court Reporter Only[225]	Court Reporter Only[226]
Utah	No[227]	No[228]	No[229]	Court Reporter Only[230]	Court Reporter and, if applicable, the Transcriber Only[231]
Vermont	No[232]	No[233]	No[234]	Court Reporter Only[235]	Court Reporter Only[236]
Virginia	No[237]	No[238]	No[239]	Court Reporter[240]	Court Reporter[241]
Washington	No[242]	No[243]	No[244]	Court Reporter[245]	Court Reporter[246]
West Virginia	No[247]	No[248]	No[249]	Court Reporter[250]	Court Reporter[251]
Wisconsin	No[252]	No[253]	No[254]	Court Reporter Only[255]	Court Reporter Only[256]
Wyoming	No[257]	No[258]	No[259]	Court Reporter Only[260]	Court Reporter Only[261]

[1] The terms "authenticate" and "certify" are used interchangeably across jurisdictions. *Compare* TEX. R. APP. P. 35.3 (providing for certification of the accuracy of the record), *with* MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1103 (2012) [hereinafter MCM] (providing for authentication of the accuracy of the record).

2 The military service courts of criminal appeals automatically review every case that results in a punitive discharge or confinement for one year, regardless of whether the convicted actually requests appellate review. MCM, *supra* note 1, R.C.M. 1201.

3 In all courts-martial, the staff judge advocate (a senior military attorney) must provide a written legal recommendation before the convening authority approves or disapproves the results of the court-martial. MCM, *supra* note 1, R.C.M. 1106. Additionally, an attorney at the service's Office of the Judge Advocate General reviews all court-martial convictions that do not qualify for automatic appellate court review (that is, the sentence does not include a punitive discharge or confinement for one year). MCM, *supra* note 1, R.C.M. 1112.

4 In the military justice system, a court reporter must prepare a written transcript of all proceedings in every court-martial that results in a conviction, regardless of the severity of the sentence or whether the accused pled guilty. MCM, *supra* note 1, R.C.M. 1103.

5 In the military justice system, each transcript is reviewed by the court reporter, the prosecuting attorney (i.e., trial counsel), the defense counsel, and each judge who presided over a portion of the proceedings. MCM, *supra* note 1, R.C.M. 1103(i). Trial counsel must review every transcript prior to authentication. MCM, *supra* note 1, R.C.M. 1103(i). While the R.C.M. do not formally require defense counsel to review every transcript, it is a *de facto* requirement for many trial defense counsel based on local and regional policies within the Army's Trial Defense Service. This assertion is based on the author's professional experiences across eight years of military justice practice as a trial counsel, defense counsel, senior trial counsel, command judge advocate, and chief of military justice from 2007 to 2014 [hereinafter Professional Experiences].

6 In the military justice system, the transcript is authenticated by each trial judge who presided over a portion of the proceedings. MCM, *supra* note 1, R.C.M. 1103.

7 FED. R. APP. P. 3–4, 28.

8 *See* 28 U.S.C. § 753 (2012); FED. R. CRIM. P. 32–38. After review of the cited authorities, the author has determined that the federal system has no procedures that are similar to the staff judge advocate recommendation (SJAR) or post-conviction review by an attorney at the Office of the Judge Advocate General (OTJAG). *See* 28 U.S.C. § 753 (2012); FED. R. CRIM. P. 32–38.

9 FED. R. APP. P. 10–11. *See* 28 U.S.C. § 753(b). All criminal proceedings held in open court are recorded by electronic sound recording, shorthand, or mechanical means. However, court reporters only produce written transcripts upon request by the parties. FED. R. APP. P. 10–11; *see* 28 U.S.C. § 753(b). Generally, the convicted specifies which portions of the recordings need to be transcribed to establish the issue on appeal. *See* 28 U.S.C. § 753; FED. R. APP. P. 10. In some cases the district court judge may order all or a portion of the proceedings transcribed. 28 U.S.C. § 753(b). The parties may avoid creating a written transcript by agreeing on the issues or relying on the docket sheets. *See* FED. R. APP. P. 10.

10 *See* 28 U.S.C. § 753; FED. R. CRIM. P. 32–38.

11 28 U.S.C. § 753.

12 ALA. R. APP. P. 3–4, 28.

13 *See* ALA. R. CRIM. P. 26, 30–32; ALA. R. APP. P. 3–4. After review of the cited authorities, the author has determined that this state has no procedures that are similar to the SJAR or OTJAG review.

14 *See* ALA. R. APP. P. 10.

15 *See id.* at R. 10, 11.

16 *See id.*

17 *See* ALASKA R. APP. P. 204, 212.

18 *See* ALASKA R. CRIM. P. 32–35.2. After review of the cited authorities, the author has determined that this state has no procedures that are similar to the SJAR or OTJAG review.

19 *See* ALASKA R. APP. P. 210, 211.

20 *See id.* at R. 210.

21 *See id*.

22 ARIZ. R. CRIM. P. 31.2, 31.3.

23 *See id.* at 24–33. After review of the cited authorities, the author has determined that this state has no procedures that are similar to the SJAR or OTJAG review.

24 *See id.* at R. 31.8.

25 *See id.* at R. 31.8–.9.

26 *See id.*

27 ARK. R. APP. P. CRIM. 2, 10.

28 *See* ARK. R. CRIM. P. 33–37.4. After review of the cited authorities, the author has determined that this state has no procedures that are similar to the SJAR or OTJAG review.

29 *See* ARK. R. APP. P. CRIM. 2(c), 4, 10; ARK. R. APP. P. CIV. 6.

30 *See* ARK. R. APP. P. CRIM. 2(c), 4; ARK. R. APP. P. CIV. 6–7.

31 *See* ARK. R. APP. P. CRIM. 2(c), 4; ARK. R. APP. P. CIV. 6–7.

32 CAL. R. CT. 8.304, 8.308. California's rules for misdemeanor appeals are significantly less favorable to the convicted than its rules for felony appeals. *See* JUDICIAL BRANCH OF CAL., INFORMATION ON APPEAL PROCEDURES FOR MISDEMEANORS (2014), http://www.courts .ca.gov/documents /cr131info.pdf.

33 *See* CAL. R. CT. 4.1–.700, 8.1–.1125. After review of the cited authorities, the author has determined that this state has no procedures that are similar to the SJAR or OTJAG review.

34 CAL. R. CT. 8.320, 8.336–.344. For felony convictions, the court reporter prepares a written transcript only if the convicted appeals or if the trial judge determines that an appeal is likely. *See* CAL. R. CT. 8.320, 8.336–.344. To determine the likelihood of an appeal, the trial judge considers the facts of the case, whether the defendant has been convicted of a crime for which probation is prohibited, or if the trial involved a contested question of law important to the outcome. *Id.* The parties may forgo the creation of a transcript by entering into an agreed statement. *See id.* For misdemeanor convictions, the court reporter transcribes only those portions of the record that the appellant requests. *See* JUDICIAL BRANCH OF CAL., *supra* note 32.

35 CAL. R. CT. 8.336(d).

36 *Id.* at R. 8.320, 8.336–.344. For felony convictions, the court reporter prepares and certifies the written transcript. *Id.* at R. 8.336(d). The parties review the trial record for accuracy only for appeals from judgments of death. *See id.* at R. 8.336, 8.610–.622.

37 COLO. APP. R. 3, 4.

38 *See* COLO. APP. R. 1–46.7; COLO. R. CRIM. P. 32–60. After review of the cited authorities, the author has determined that this state has no procedures that are similar to the SJAR or OTJAG review.

39 *See* COLO. APP. R. 10.

40 *See id.* at R. 10(a)(3).

41 *See id.*

42 *See* CONN. R. APP. P. §§ 61-6(1)(a), 63-3.

43 *See* CONN. R. CRIM. P. §§ 42-1 to 43-43. After review of the cited authorities, the author has determined that this state has no procedures that are similar to the SJAR or OTJAG review.

44 *See* CONN. R. APP. P. § 68-3; STATE OF CONN. JUDICIAL BRANCH, HANDBOOK OF CONNECTICUT APPELLATE PROCEDURE 11, 13 (2014) [hereinafter CONN. HANDBOOK].

45 *See* CONN. R. APP. P. § 68-3; CONN. HANDBOOK, *supra* note 44, at 11.

46 *See* CONN. R. APP. P. § 68-3; CONN. HANDBOOK, *supra* note 44, at 11.

47 *See* DEL. R. SUP. CT. 6–7(a). Delaware requires automatic review for death sentence penalties. *See id.* at R. 35(a).

48 *See* DEL. R. SUP. CT. 1–44; DEL. CRIM. P. R. 31–61. After review of the cited authorities, the author has determined that this state has no procedures that are similar to the SJAR or OTJAG review.

49 *See* DEL. R. SUP. CT. 9, 26(f). Delaware requires an automatic verbatim transcript of the entire trial only for death penalty convictions. *Id.* at R. 35(c)(iii); *see id.* at R. 9. For class A felony convictions, the trial judge orders transcription of the trial (excluding opening and closing arguments and jury selection) and designates the party responsible for paying the costs of transcription. *Id.* at R. 9(e)(i), 26(f). The trial judge may modify or narrow the scope of the transcript order upon motion or *sua sponte*. *See id.* Class A felonies are crimes with a minimum term of incarceration of fifteen years and a maximum term of life imprisonment. 11 DEL. CODE ANN. tit. 11, § 4205(b)(1) (2014). For all felony convictions other than class A

felonies, the court reporter transcribes only those portions of the record that the parties request. DEL. R. SUP. CT. 9, 26(f).

50 *See* DEL. R. SUP. CT. 9(e)(ii), 9(e)(iv).

51 *Id.*

52 FLA. R. APP. P. 9.140(b)–(c), 9.200.

53 *See id.* at R. 9.040, 9.140; FLA. R. CRIM. P. 3.440–.853. After review of the cited authorities, the author has determined that this state has no procedures that are similar to the SJAR or OTJAG review.

54 *See* FLA. R. APP. P. 9.140, 9.200, 9.400(a)(2).

55 *See id.* at R. 9.140(f)(2), 9.200(b), 9.200(d).

56 *Id.*

57 *See* GA. CT. APP. R. 5, 11, 22, 25, 32.

58 *See* GA. CODE ANN. §§ 17-9-1 to 17-10-20 (2014). After review of the cited authorities, the author has determined that this state has no procedures that are similar to the SJAR or OTJAG review.

59 *See id.* §§ 15-6-80, 5-6-37, 5-6-41, 5-6-42, 17-8-5; GA. CT. APP. R. 5, 11, 17–19. For misdemeanor convictions, the court reporter prepares a written transcript of only those portions of the record that the convicted requests. *See* GA. CODE ANN. §5-6-41(b) (2014); *cf.* GA. CODE ANN. § 17-8-5. The court reporter prepares a written transcript of all felony convictions. *See* GA. CODE ANN. § 17-8-5(a). However, the written transcript does not include argument by counsel. *Id.* For felony trials that do not result in felony convictions, the court reporter records the trial using electronic or stenographic means but does not prepare a written transcript. *See id.* The parties do not need to create a transcript if only questions of law are at issue or if they enter into an agreed statement of the facts and issues. *See id.* §§ 5-6-37, 5-6-41(i). The state pays the transcription costs for felony convictions, but the convicted pays transcription costs for misdemeanor convictions and interlocutory appeals (unless the court finds the convicted indigent). *See id.* §§ 15-6-80, 17-8-5; GA. R. CT. APP. R. 5.

60 *See* GA. CODE ANN. § 15-14-5.

61 *Id.*; GA. CT. APP. R. 17, 19.

62 *See* HAW. R. APP. P. 3, 4(a).

63 *See* HAW. R. PENAL P. 31–55. After review of the cited authorities, the author has determined that this state has no procedures that are similar to the SJAR or OTJAG review.

64 *See* HAW. R. APP. P. 10.

65 *See id.*

66 *See id.*

67 *See* IDAHO APP. R. 11, 14, 17.

68 *See* IDAHO CRIM. R. 31–36. After review of the cited authorities, the author has determined that this state has no procedures that are similar to the SJAR or OTJAG review.

69 *See* IDAHO APP. R. 17, 24–25.

70 *See id.* at R. 26, 28.

71 *Id.*

72 *See* ILL. SUP. CT. R. 605, 606.

73 *See id.* at R. 430–51, 602–51. After review of the cited authorities, the author has determined that this state has no procedures that are similar to the SJAR or OTJAG review.

74 *See id.* at R. 471, 605–08.

75 *Id.* at R. 608.

76 *Id.* (noting that either a court reporter or the trial judge may certify the transcript).

77 *See* IND. R. APP. P. 9, 46.

78 *See* IND. R. CRIM. P. 15–24. After review of the cited authorities, the author has determined that this state has no procedures that are similar to the SJAR or OTJAG review.

79 *See* IND. R. APP. P. 9; IND. R. CRIM. P. 5, 10.

80 *See* IND. R. APP. P. 27, 28.

81 *Id.*

82 *See* IOWA R. APP. P. 6.101–.102, 6.903.

83 *See* IOWA R. CRIM. P. 2.22–.37. After review of the cited authorities, the author has determined that this state has no procedures that are similar to the SJAR or OTJAG review.

84 *See* IOWA R. APP. P. 6.801–.804. Court reporters automatically prepare verbatim transcripts only in limited circumstances, such as transcribing the testimony pursuant to a grant of immunity. *See, e.g.*, IOWA R. CRIM. P. 2.20b.

85 *See* IOWA R. APP. P. 6.801–.804.

86 *Id.*

87 KAN. STAT. ANN. §§ 22-3606, 22-3608(c), 60-2103 (2009); KAN. SUP. CT. R. 2.04, 6.02.

88 *See* KAN. STAT. ANN. §§ 22-3401–22-3612. After review of the cited authorities, the author has determined that this state has no procedures that are similar to the SJAR or OTJAG review.

89 KAN. SUP. CT. R. 2.04, 3.01–.07.

90 *See id.*

91 *See id.*

92 *See* KY. R. CRIM. P. 12.02, 12.04; KY. R. CIV. P. 76.42. The appellate court may award damages if it determines the convicted's appeal is frivolous. KY. R. CRIM. P. 12.02; KY. R. CIV. P. 73.02(4).

93 *See* KY. R. CRIM. P. 9.82–.88, 11.02–.42. After review of the cited authorities, the author has determined that this state has no procedures that are similar to the SJAR or OTJAG review.

94 *See* KY. R. CRIM. P. 12.02, 12.04, 13.04; KY. R. CIV. P. 73.08, 75.01, 75.06–.15, 76.

95 *See* KY. R. CRIM. P. 12.02; KY. R. CIV. P. 73.08, 75.01, 75.06–.15.

96 *See* KY. R. CRIM. P. 12.02; KY. R. CIV. P. 73.08, 75.01, 75.06–75.15.

97 LA. CODE CRIM. PROC. ANN. art. 914 (2014); LA. UNIF. R. CT. APP. 2-12.4.

98 *See* LA. CODE CRIM. PROC. ANN. art. 810–905.8. After review of the cited authorities, the author has determined that this state has no procedures that are similar to the SJAR or OTJAG review.

99 *See* LA. CODE CRIM. PROC. ANN. art. 843, 914, 914.1; LA. UNIF. R. CT. APP. 2-1 to 2-1.17. The requesting party's attorney must "certify that there are good grounds for [transcription of the requested portion of the trial] in light of the assignment of errors to be urged." LA. CODE CRIM. PROC. ANN. art. 914, 914.1.

100 *See* LA. CODE CRIM. PROC. ANN. art. 918.

101 *See id.*

102 ME. R. APP. P. 2, 8, 9.

103 *See* ME. R. UNIFIED CRIM. P. 32–38. After review of the cited authorities, the author has determined that this state has no procedures that are similar to the SJAR or OTJAG review.

104 ME. R. APP. P. 2, 5, 6, 8.

105 *See id.* at R. 5, 6.

106 *See id.*

107 MD. CODE ANN., MD. RULES §§ 8-201 to 8-202, 8-501 to 8-505 (West 2015).

108 *See* MD. CODE ANN., CRIM. PROC. §§ 6-101 to 6-106, 6-216 to 8-109 (West 2015). After review of the cited authorities, the author has determined that this state has no procedures that are similar to the SJAR or OTJAG review.

109 MD. CODE ANN., MD. RULES §§ 8-203, 8-411 to 8-413. Maryland "strongly encourage[s]" the parties to agree to narrow the scope of the transcription to only the testimony necessary for the appeal. *Id.* § 8-413.

110 *See id.* §§ 8-411 to 8-413.

111 *See id.*

112 MASS. R. APP. P. 3, 4(b), 16.

113 *See* MASS. R. CRIM. P. 27–30. After review of the cited authorities, the author has determined that this state has no procedures that are similar to the SJAR or OTJAG review.

114 *See* MASS. R. APP. P. 8, 16.

115 *See id.* at R. 8, 9.

116 *See id.*

117 MICH. CT. R. 7.204, 7.212, 7.219.

118 *See id.* at R. 6.420–.509. After review of the cited authorities, the author has determined that this state has no procedures that are similar to the SJAR or OTJAG review.

119 *Id.* at R. 6.425(G), 7.204, 7.210.
120 *See id.* at R. 7.210.
121 *See id.*
122 MINN. R. CRIM. P. 28.01, 28.02.
123 *See id.* at R. 26–28.06. After review of the cited authorities, the author has determined that this state has no procedures that are similar to the SJAR or OTJAG review.
124 *See id.* at R. 28.01, 28.02.
125 *See id.*
126 *See id.*
127 MISS. R. APP. P. 3–4, 6, 10, 32.
128 *See* MISS. UNIF. R. CIR. & CTY. CT. PRACTICE 11.01–.05. After review of the cited authorities, the author has determined that this state has no procedures that are similar to the SJAR or OTJAG review.
129 *See* MISS. R. APP. P. 10–13.
130 *See id.*
131 *Id.* The court reporter prepares and certifies the written transcript. *Id.* The trial court clerk prepares and certifies the remaining record on appeal. *Id.* The convicted's attorney must also review the record and certify that it is correct and complete. *Id.*
132 *See* MO. SUP. CT. R. 29.11, 30.01, 30.04, 30.06, 81.04.
133 *See id.* at R. 19–36. After review of the cited authorities, the author has determined that this state has no procedures that are similar to the SJAR or OTJAG review.
134 *See id.* at R. 30.04; MO. SUP. CT. OPERATING R. 19.03.
135 *See* MO. SUP. CT. R. 30.04.
136 *Id.*
137 *See* MONT. CODE ANN. § 46-20-104 (2014); MONT. R. APP. P. 4, 6, 12.
138 *See* MONT. CODE ANN. §§ 46-16-101 to 46-21-203. After review of the cited authorities, the author has determined that this state has no procedures that are similar to the SJAR or OTJAG review.
139 *See id.* §§ 3-5-60, 47-1-201; MONT. R. APP. P. 4, 6, 8, 9.
140 *See* MONT. R. APP. P. 6, 8.
141 *Id.*
142 NEB. CT. R. APP. P. §§ 2-101, 2-109.
143 *See* NEB. REV. STAT. §§ 29-2201 to 29-4608 (after review of the cited authorities, the author has determined that this state has no procedures that are similar to the SJAR or OTJAG review).
144 NEB. CT. R. APP. P. §§ 2-101, 2-104, 2-105.
145 *See id.* §§ 2-104, 2-105.
146 *Id.*
147 NEV. R. APP. P. 3, 4.
148 *See* NEV. REV. STAT. §§ 175.481–175.543 (2013). After review of the cited authorities, the author has determined that this state has no procedures that are similar to the SJAR or OTJAG review.
149 *See* NEV. R. APP. P. 3, 4, 9–13.
150 *See id.* at R. 9–13.
151 *See id.*
152 N.H. SUP. CT. R. 4, 5, 7, 16.
153 *See* N.H. R. CRIM. P. 25–34. After review of the cited authorities, the author has determined that this state has no procedures that are similar to the SJAR or OTJAG review.
154 N.H. SUP. CT. R. 13–15, 59; N.H. R. CRIM. P. 33.
155 *See* N.H. SUP. CT. R. 13–15, 59.
156 *See id.*
157 N.J. CT. R. 2:3–2:6.
158 *See id.* at R. 3:19–3:30. After review of the cited authorities, the author has determined that this state has no procedures that are similar to the SJAR or OTJAG review.
159 *See id.* at R. 2:5–2:6.
160 *See id.*

161 *See id.* The court reporter prepares and certifies the written transcript. *See id.* The record on appeal (called the "appendix") is prepared by the convicted's attorney or both parties jointly. *See id.*

162 N.M. R. APP. P. 12-201 to -202, 12-213.

163 *See* N.M. DIST. CT. R. CRIM. P. 5-611 to 5-831. After review of the cited authorities, the author has determined that this state has no procedures that are similar to the SJAR or OTJAG review.

164 *See* N.M. R. APP. P. 12-209, 12-211; N.M. DIST. CT. R. CRIM. P. 5-704.

165 *See* N.M. R. APP. P. 12-209, 12-211, 12-212; *see also* N.M. R. APP. P. 22-301.

166 *See* N.M. R. APP. P. 22-301.

167 *See* N.Y. C.P.L.R. 450.10, 460.10, 460.70 (McKinney 2014); *see also* N.Y. CT. APP. R. 500.9, 500.12–.13.

168 *See* N.Y. C.P.L.R. 330.10–470.60. After review of the cited authorities, the author has determined that this state has no procedures that are similar to the SJAR or OTJAG review.

169 *See id.* at R. 450.1, 460.70.

170 *See id.* at R. 460.70.

171 *See id.*

172 *See* N.C. R. APP. P. 4. *See also id.* at R. 28 (indicating function and content for appeals).

173 *See* N.C. GEN. STAT. §§ 15A-1331 to 15A-1340.23 (2014). After review of the cited authorities, the author has determined that this state has no procedures that are similar to the SJAR or OTJAG review.

174 *See* N.C. R. APP. P. 4, 7, 9, 11–12.

175 *See id.* at R. 7, 9, 11–12. The court reporter or transcriptionist prepares the written transcripts requested by the parties. *See id.* at R. 7. After completion of any transcripts requested by the parties, the parties go through a process called "settlement" to agree upon a proposed record on appeal. *See id.* at R. 11. The rules do not require the parties to read all verbatim transcripts; instead, the parties have the option to read the verbatim transcripts during the settlement process. *See id.*

176 *See id.* at R. 7, 9, 11–12. The court reporter or transcriber prepares the written transcripts requested by the parties. *See id.* at R. 7, 11. After the requested transcripts are completed, the parties go through a process called "settlement" to agree upon a proposed record on appeal. *See id.* at R. 11.

177 *See* N.D. R. APP. P. 3, 4, 28.

178 *See* N.D. R. CRIM. P. 32–38 (after review of the cited authorities, the author has determined that this state has no procedures that are similar to the SJAR or OTJAG review).

179 *See* N.D. R. APP. P. 10(b). Further, North Dakota encourages the parties to agree to limit the scope of the transcript. *See id.* at R. 10(b)(3) (providing a penalty for unreasonably refusing to stipulate to exclude unnecessary portions of the record).

180 *See id.* at R. 10(e).

181 *Id.*

182 *See* OHIO R. APP. P. 3, 4(A), 16; *see also* OHIO CRIM. R. P. 32(B) (referencing notification to defendant of right to appeal if applicable).

183 *See* OHIO CRIM. R. P. 31–36. After review of the cited authorities, the author has determined that this state has no procedures that are similar to the SJAR or OTJAG review.

184 *See* OHIO R. APP. P. 3, 9–11; OHIO CRIM. R. P. 22.

185 *See* OHIO R. APP. P. 9(b)(6) (requiring the transcriber to certify the transcript as correct); *see also id.* at R. 9(b)(2) (stating that a court reporter is sufficient for transcribing the proceedings).

186 *Id.*

187 *See* OKLA. R. CRIM. APP. 2.1, 3.5.

188 *See* OKLA. STAT. tit. 22, §§ 914–982a (2014). After review of the cited authorities, the author has determined that this state has no procedures that are similar to the SJAR or OTJAG review.

189 *See* OKLA. R. CRIM. APP. 2.2, 2.5.

190 *Id.* at R. 2.2.

191 *Id.*

192 OR. REV. STAT. §§ 138.012, 138.040, 138.071 (2014); OR. R. APP. P. 1.05, 2.05, 5.45.

193 *See* OR. REV. STAT. §§ 138.510–.686. After review of the cited authorities, the author has determined that this state has no procedures that are similar to the SJAR or OTJAG review.

194 *See* OR. R. APP. P. 3.05–.45.

195 *See id.*

196 *See id.*

197 *See* PA. R.A.P. 123, 902–904, 1941, 2111.

198 *See* PA. R. CRIM. P. 648–910. After review of the cited authorities, the author has determined that this state has no procedures that are similar to the SJAR or OTJAG review.

199 *See* PA. R.A.P. 904, 1911–1924; *see also id.* at R. 115.

200 *See id.* at R. 1922. The court reporter prepares the written transcript and provides notice of completion to the parties. *Id.* The parties have the option to review the written transcript before the court reporter certifies it. *Id.* If the parties do not object to the contents of the written transcript within five days, the court reporter certifies the transcript. *Id.* The trial judge examines and certifies portions of the written transcript only if there is an objection. *Id.*

201 *See supra* note 200.

202 *See* R.I. SUPER. CT. R. APP. P. 3, 4, 16.

203 *See* 12 R.I. GEN. LAWS § 12-18-1 to 12-19-39, 12-19.3-4 (2014). After review of the cited authorities, the author has determined that this state has no procedures that are similar to the SJAR or OTJAG review.

204 *See* R.I. SUP. CT. R. 3, 10–11.

205 *See id.* at R. 10–11.

206 *See id.*

207 *See* S.C. APP. CT. R. 201, 203, 208, 243.

208 *See* S.C. R. CRIM. P. 14, 16–20, 22–24, 28–30, 37. After review of the cited authorities, the author has determined that this state has no procedures that are similar to the SJAR or OTJAG review.

209 *See* S.C. APP. CT. R. 207–09. South Carolina encourages the parties to agree to limit the scope of the transcript. *See id.* at R. 207(a)(1) (providing a penalty for parties unreasonably refusing to stipulate to exclude unnecessary portions of the record). Further, each party's attorney must certify that his designation of matters to be included in the record of trial contains no matter which is irrelevant to the appeal. *Id.* at R. 209.

210 *See id.* at R. 207.

211 *See id.* The court reporter prepares the written transcript. *Id.* Additionally, the convicted or his attorney certifies that the record on appeal "contains all material proposed to be included by any of the parties and not any other material." *Id.* at R. 210.

212 *See* S.D. CODIFIED LAWS §§ 23A-27A-9, 23A-32-2, 23A-32-15, 23A-32-16 (2014); *see also id.* §§ 15-26A-14, 15-26A-60, 23A-32-14.

213 *See id.* §§ 23A-26-1 to 23A-27-52, 23A-29-1 to 23A-33-6. After review of the cited authorities, the author has determined that this state has no procedures that are similar to the SJAR or OTJAG review.

214 *See id.* §§ 23A-32-1, 23A-32-14, 15-26A-47 to 15-26A-56. The trial court orders a written transcript of the trial when necessary to protect the convicted party's rights. *Id.* § 23A-32-1. For other criminal convictions, the court reporter prepares a written transcript if requested by the parties upon appeal. *Id.* §§ 15-26A-48, 23A-32-14. The parties may limit transcription to include only those portions of the record that are necessary to the issues on appeal. *Id.* §§ 15-26A-50, 23A-32-14. The parties may forgo the creation of a transcript by entering into an agreed statement of the facts and issues. *Id.* §§ 15-26A-55, 23A-32-14.

215 *See id.* §§ 15-26A-55, 23A-32-14.

216 *Id.*

217 TENN. R. APP. P. 1, 3–5, 27. The court discourages frivolous criminal appeals. *See* TENN. R. CRIM. CT. APP. 22.

218 *See* TENN. R. CRIM. P. 31–38 (after review of the cited authorities, the author has determined that this state has no procedures that are similar to the SJAR or OTJAG review).

219 *See* TENN. R. APP. P. 1, 24–26.

220 *See id.* at 1, 24. The court reporter, appellant, or appellant's counsel certifies the transcript as an accurate account of the proceedings. *Id.* The court reporter or appellee certifies the portions of the transcript that the appellee requested. *See id.* The trial judge must approve and authenticate the record on appeal within thirty days or it is deemed approved. *Id.*

221 *See supra* note 220.

222 TEX. R. APP. P. 1.1, 25.2, 26.2, 38.

223 *See* TEX. CODE CRIM. PROC. ANN. art. 37.01 to 37.07, 40.001 to 43.26 (West 2013). After review of the cited authorities, the author has determined that this state has no procedures that are similar to the SJAR or OTJAG review.

224 *See* TEX. R. APP. P. 12–13, 34–35. Texas rules encourage the parties to limit the scope of the transcript. *See id.* at R. 34.6(c)(3) (providing a penalty for a party that orders transcription of portions of the record that are unnecessary to the appeal).

225 *See id.* at R. 35.3.

226 *Id.*

227 UTAH R. APP. P. 1, 3–4, 9, 24.

228 *See* UTAH R. CRIM. P. 17, 21–28. After review of the cited authorities, the author has determined that this state has no procedures that are similar to the SJAR or OTJAG review.

229 *See* UTAH R. APP. P. 1, 3, 11–12.

230 *See id.* at R. 12.

231 *Id.*

232 VT. R. APP. P. 1, 3, 4, 28.

233 *See* VT. R. CRIM. P. 31–39 (after review of the cited authorities, the author has determined that this state has no procedures that are similar to the SJAR or OTJAG review).

234 *See* VT. R. APP. P. 3, 10–12.

235 *See id.* at 10(b).

236 *See id.*

237 VA. SUP. CT. R. 5A:1, 5A:6, 5A:9, 5A:22, 5A:26 to 5A:27.

238 *See* VA. CODE. ANN. §§ 19.2-295 to 19.2-316.3 (2014); VA. SUP. CT. R. 3A:15 to 3A:25. After review of the cited authorities, the author has determined that the state has no procedures similar to the SJAR or OTJAG review.

239 *See* VA. SUP. CT. R. 1:3, 5A:1, 5A:6 to 5A:8, 5A:10.

240 *See id.*

241 *See id.* Certifying the transcript becomes the trial judge's responsibility if a party objects that the contents of the transcript are erroneous or incomplete. *See id.* at R. 5A:8.

242 WASH. R. APP. P. 1.1, 5.1–.3, 10.3; *see also* WASH. REV. CODE § 10.95.100 (2014) (providing mandatory appellate review for sentences to death).

243 *See* WASH. REV. CODE §§ 10.61.003–.64.140, 10.73.010–.900. After review of the cited authorities, the author has determined that this state has no procedures that are similar to the SJAR or OTJAG review.

244 *Id.* §§ 10.64.100, 10.95.110; WASH. R. APP. P. 1.1, 9.1–9.8.

245 *See* WASH. R. APP. P. 1.1, 9.1–9.8. The parties have ten days to object to the contents of a transcript after the reporter prepares it. *Id.* at R. 9.5(c).

246 *See id.* at R. 1.1, 9.1–9.8.

247 W. VA. R. CRIM. P. 37; W. VA. R. APP. P. 1, 5, 10.

248 *See* W. VA. R. CRIM. P. 1, 31–39. After review of the cited authorities, the author has determined that this state has no procedures that are similar to the SJAR or OTJAG review.

249 *See* W. VA. R. APP. P. 1(b), 5(h), 6(b), 9(a).

250 *See id.* at R. 9(f).

251 *See id.*

252 WIS. STAT. §§ 808.03(1), 808.04(1), 809.19(1), 809.30(2)(b), 974.02(1) (2014).

253 *See id.* §§ 973.01–974.06. After review of the cited authorities, the author has determined that this state has no procedures that are similar to the SJAR or OTJAG review.

254 WIS. STAT. § 809.15(1)(a); WIS. SUP. CT. R. 71.01–.04.

255 *See* WIS. SUP. CT. R. 71.04(6), 71.04(10)(b).

256 *Id.*

257 WYO. R. APP. P. 1.02(a), 2.01(a), 2.07; WYO. R. CRIM. P. 38.

258 *See* WYO. R. CRIM. P. 31–39. After review of the cited authority, the author has determined that this state has no procedures that are similar to the SJAR or OTJAG review.

259 WYO. R. APP. P. 2.05–.07; WYO. R. CRIM. P. 55.

260 *See* WYO. R. APP. P. 3.02(d).

261 *Id.*