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

Major Ryan A. Little*

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.

INTRODUCTION ................................................. 336
I. BACKGROUND .......................................... 339
II. MILITARY POST-TRIAL PROCEDURES ARE OUT OF STEP WITH CIVILIAN PRACTICES AND STANDARDS .............. 342
III. POST-TRIAL HAS GROWN INTO A LEVIATHAN THAT DEVOURS MORE RESOURCES THAN IS JUSTIFIABLE IN THE MODERN, RESOURCE-CONSTRAINED MILITARY ............ 343
A. Quantifying the Monetary Costs of the Military’s Post-Trial Process ........................................ 344

* Judge Advocate, United States Army. The author is stationed at the U.S. Military Academy at West Point. His prior military justice experience includes duties as chief of military justice (i.e., chief prosecutor), senior trial counsel, trial defense counsel, and trial counsel (i.e., military prosecutor). The author previously led a nine attorney prosecutor’s office in a major military jurisdiction and prosecuted a high-profile war crimes trial from the war in Afghanistan. The opinions in this Article represent the personal views of the author and do not represent the official position of the United States government.
1. Pay and Benefits of Post-Trial Personnel ........ 344
2. Contracts Related to Post-Trial .................. 352
3. The Convicted’s Pay and Benefits .............. 353
4. Summary of Costs of the Current Post-Trial Regime ........................................ 356

B. Putting the Costs of Post-Trial in Their Proper Context ........................................ 357
1. The Military Post-Trial Process is Considerably More Expensive than Its Civilian Counterparts... 357
3. Post-Trial Imposes Additional Costs on the Convicted...................................... 361

IV. THE RAISON D’ÊTRE FOR THE CURRENT POST-TRIAL SYSTEM NO LONGER EXISTS ..................... 363

V. PROPOSED REFORMS ................................... 365
A. Ease the Requirements for Attorneys to Review Transcripts Prior to Authentication ............. 368
B. Eliminate Promulgating Orders ........................ 370
C. Create Two Avenues for Automatic Appellate Review ........................................ 371
D. Adopt an Opt-In Procedure for Review at the Office of the Judge Advocate General (OTJAG) ......... 373
E. Adopt an Opt-In System of Appellate Review for Guilty Pleas ....................................... 374

CONCLUSION ................................................... 377
APPENDIX A ................................................... 380
APPENDIX B ................................................... 383

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?

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.\(^1\) 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 none-
thless 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
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.

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

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

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 re-
cently imposed additional limitations on the convening authority’s clemency powers for sexual
assault convictions, adjudged sentences that exceed six months confinement or include a puni-
tive discharge, or convictions for offenses that include a maximum punishment exceeding two
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, clem-
ency may be even rarer in civilian death penalty cases. Compare Michael J. Marinello, Con-
vening 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.

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 (pre-
paring 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. 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.

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. Yet the military’s unique post-trial process costs taxpayers approximately $170 million annually. 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). 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. 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. To further put the re-

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

See infra Part II and Appendix B.

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).


15 See infra Part III.A.4.


17 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

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

23 CAL. R. C T. 8.600(a); MCM, supra note 4, R.C.M. 1201.
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), while only one authority can grant clemency to the condemned civilian (the Governor).

Second, the servicemember’s first clemency review is automatic and mandatory, while the civilian must affirmatively petition the Governor for clemency. Third, the California Governor must obtain approval from the California Supreme Court in order to grant clemency in certain circumstances, while the authorities who would act on the servicemember’s clemency enjoy largely unfettered power. Fourth, the servicemember enjoys a higher probability of obtaining clemency than the civilian condemned to die.

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

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).


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. 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).

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. 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. However, the Rules for Courts-Martial and service regulations governing post-trial have created a military system that is entirely unique. No
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]ith . . . reforms that simplify the military justice system and inject flexibility for the

---

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-

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.\textsuperscript{54} The exact roster of post-trial personnel varies across jurisdictions.\textsuperscript{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.\textsuperscript{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.\textsuperscript{57} In the Army, there are approximately forty-six chiefs of military justice (thirty-six majors and ten captains).\textsuperscript{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.\textsuperscript{59}

\textsuperscript{54} The staff judge advocate, deputy staff judge advocate, and convening authority also devote time to post-trial processing. See \textit{FM 1-04}, \textit{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.


\textsuperscript{56} See \textit{JAGC DIRECTORY, supra} note 55; MAJ Leone Interview, \textit{supra} note 55; \textit{FM 1-04, supra} note 52, ¶ 5-9.

\textsuperscript{57} See \textit{FM 1-04, supra} note 52, at para. 5-9.

\textsuperscript{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 \textit{JAGC DIRECTORY, supra} note 55.

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. 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). However, entries for paralegal positions in FMSweb do not specify the pinpoint assignment. For example, the TOA for the 82d Airborne Division’s military justice office lists two authorizations for “paralegal NCO.” One of these authorizations is actually for the post-trial paralegal. 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. Third, the local offices of the staff judge advocate control the pinpoint assignments of paralegals and regularly deviate from the TOA/TDA. 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, the Army spends approxi-
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

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).


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.


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 months78 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

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).


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.\textsuperscript{81} Combining these numbers, the Army’s total annual cost of

\footnotesize

$2,761.80 for a sergeant with six years of service, and $2,451.60 for a specialist with six years of service.\textsuperscript{81} Military Pay Chart 2015, supra note 59. The basic allowance for subsistence for enlisted servicemembers is $367.92 per month.\textsuperscript{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-five 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-two 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 approximate 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.

\textsuperscript{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.\textsuperscript{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://aoprls.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://aoprls.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), the Army spends approximately $9,742,621 on the post-trial activities of court reporters.

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. 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. Sometimes, the attorneys and judge must review the transcript multiple times before the judge authenticates the record of trial. 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.

---

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. Thus, the Army’s estimated annual cost of requiring three attorneys to review every record of trial is $2,767,905.

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. 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. 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. The Army’s estimated annual cost of

---


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.\footnote{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 Barzmehi 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 of 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).
}

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.\footnote{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).} 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.\footnote{94}{See supra note 93.} Two general court-martial convening authorities alone spent $125,000 on transcription contracts in 2014.\footnote{95}{See supra note 93.} 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.\footnote{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 deferrals 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

---

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 deferrals generally terminate when the convening authority takes initial action on the court-martial results, the average length of pay deferrals 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 deferrals 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 deferrals 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 deferrals 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 deferrals 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.\textsuperscript{103} This result occurs because the maximum pay forfeiture that a special court-martial can adjudge is only two-thirds of base pay.\textsuperscript{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).\textsuperscript{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-

\textsuperscript{103} See MCM, supra note 4, R.C.M. 201(f)(2), 1003.

\textsuperscript{104} See id.

\textsuperscript{105} See MCM, supra note 4, R.C.M. 1003.
lion dollars of pay and allowances annually to servicemembers who are in confinement.\footnote{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.\footnote{107} This process takes an average of five hundred seventy days to complete,\footnote{108} but can last three or four years for more complex cases.\footnote{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.\footnote{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.\footnote{111} Providing these non-pay benefits to convicted soldiers costs the Army an estimated $15,860,110 annually.\footnote{112}

\footnote{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.

\footnote{107} MCM, supra note 4, R.C.M. 1203, 1204.

\footnote{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).

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

\footnote{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.

\footnote{111} See supra note 110.

\footnote{112} See generally ELEVENTH QUADRENNIAL, supra note 59. Non-cash benefits account for forty-nine percent of a servicemember’s total compensation. \emph{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). \emph{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). \emph{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

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, DEP. 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.). 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.” 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). The military post-

The military post-trial system annually costs more than 4.7 times California’s entire appellate court system (when adjusted for the size of each jurisdiction).\textsuperscript{121} Further, these figures significantly underestimate the relative disparity between military and civilian post-trial costs.\textsuperscript{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

\textsuperscript{121} CAL. DEPT 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. \textit{Id.} The budget includes all expenditures, including capital projects, personnel, facilities, equipment, etc. \textit{Id.} In order to compare California’s 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, California’s population was 38,715,000. CAL. DEPT 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. \textit{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 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 ($35,400,000).

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. Finally, the cost disparity highlights the painful tradeoffs that fiscally-constrained policymakers must make in order to pay for the military post-trial system. 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.

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, 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. 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

---

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).


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.  

The theory of opportunity costs provides a useful analytical tool to evaluate the impact of maintaining the military’s current post-trial process. Opportunity cost is “the cost associated with opportunities that are forgone by not putting the [organization’s] resources to their highest value use.” 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. 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. Policy analysts, economists, and business executives all include opportunity costs when comparing the costs and benefits of competing courses of action.

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. 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. Alternatively, eliminating the re-

---

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).


132 See id. at 206–07.

133 See id.

134 See WeiMiv & Vinin, 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.
requirement for multiple attorneys to review every record of trial prior to authentication could free approximately 8,181 annual labor hours\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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-
duced through the post-trial process. 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). 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. Because this process could take years, 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. Because the convening authority could take a year or more to complete initial action, 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. Second, Congress largely stripped commanders of their clemency author-

---

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(c)(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).
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. For example, the procedurally complex requirements for staff judge advocate recommendations or promulgating orders regularly cause legal error. However, the remedy for this error is to return the case to the convening authority for a new initial action. 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. 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. 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. 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. Widespread abuses of the court-martial process occurred during

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 Barzehri 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); Barzehri 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).
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. For example, the Houston riot of 1917 resulted in the largest murder trial in U.S. history. Sixty-three African-American Soldiers were tried at a single court-martial. 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. Additionally, the U.S. military convened over two million courts-martial during World War II (one court-martial for every eight servicemembers). Over forty-five thousand servicemembers were serving sentences of confinement as World War II ended. 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. 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.”

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. The Military Justice Acts of 1968 and 1983 further reformed and civilianized the military justice system. 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. Well-established law prohibits unlawful command influence over the court-martial process. Military trial practice now closely mirrors federal civilian trial practice, just as the Military Rules

---

156 See supra note 155.
158 Id.
159 See id. at 2.
161 Id. at 40–41.
162 See supra note 155.
163 Willis, supra note 160, at 39.
164 See supra note 155.
165 See supra note 155.
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

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.\textsuperscript{176} Unfortunately, opt-out systems for determining resource distributions are inherently wasteful and lead to overconsumption of scarce resources.\textsuperscript{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.\textsuperscript{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.\textsuperscript{179} The opt-out structure of mili-

\textsuperscript{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).

\textsuperscript{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.

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

\textsuperscript{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

---

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


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 [commander’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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{192} Third, the military’s current authentication practice does not appear to be based on any unique characteristics of the modern military.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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-

\textsuperscript{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).

\textsuperscript{190} See supra Part II; infra Appendix B.

\textsuperscript{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.


\textsuperscript{193} See supra Part IV.

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

\textsuperscript{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

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).
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. 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. 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). 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. The court may decide to hear oral arguments regardless of whether or not the defense appellate attorney alleged legal error. 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.

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-

---

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.
209 See A.C.C.A. R. 16.
ror. If the appellate defense counsel does not allege a specific legal er-
or, then only one judge at the service court of criminal appeals would con-
duct the automatic appellate review. If the single judge finds no er-
or, 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 con-
victed because an appellate judge (and a defense appellate attorney) would still review every qualifying case. Instead, it merely focuses judi-
cial 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 re-
sources 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 app-
ellate 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. 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. In other words, the Army Court of Criminal Appeals (ACCA) currently takes an average of 339 days to review a case. This reform could reduce ACCA’s processing time to 113

---

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 tran-
script 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.\textsuperscript{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.\textsuperscript{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).\textsuperscript{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.\textsuperscript{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.\textsuperscript{218} Further, an attorney must review all courts-martial in which the convicted has waived appellate review.\textsuperscript{219} These reviews occur automatically, regardless of whether or not the convicted has expressed any interest in having his case reviewed.\textsuperscript{220} Further, they generally occur without any input from the convicted or his defense attorney.\textsuperscript{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

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

\textsuperscript{215} See \textit{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).

\textsuperscript{216} See \textit{supra} Part III.B.3.

\textsuperscript{217} See \textit{supra} Part II; \textit{infra} Appendix B. No civilian jurisdiction requires three appellate judges to automatically review every conviction. See \textit{infra} Appendix B.

\textsuperscript{218} See MCM, \textit{supra} note 4, R.C.M. 1201.

\textsuperscript{219} See MCM, \textit{supra} note 4, R.C.M. 1112.

\textsuperscript{220} See MCM, \textit{supra} note 4, R.C.M. 1112, 1201.

\textsuperscript{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. 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. 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. This practice is entirely unique to the military post-trial system. No civilian post-trial system provides automatic appellate review for guilty pleas. Instead, many civilian jurisdictions limit appellate rights after guilty pleas.

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

---

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 AZ R. CRIM. P. 17.2; CA 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

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).\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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

\textsuperscript{233} See supra Part III.B.3.

\textsuperscript{234} See MCM, supra note 4, R.C.M. 921.

\textsuperscript{235} See MCM, supra note 4, R.C.M. 910.

\textsuperscript{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.\textsuperscript{237}

Although well-justified, this reform would be controversial because it would substantially narrow an existing post-trial right of convicted servicemembers.\textsuperscript{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.\textsuperscript{239}

\textbf{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.\textsuperscript{240} Instead, this Article demonstrates that the most resource-intensive aspects of military post-trial have no civilian corollary.\textsuperscript{241} Additionally, this was the first-ever study to calculate the actual costs of the military’s post-trial process.\textsuperscript{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.

\textsuperscript{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.
\textsuperscript{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).
\textsuperscript{239} See supra Part II & III; infra Appendix B.
\textsuperscript{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.
\textsuperscript{241} See supra Parts III & IV.
\textsuperscript{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.

\(^{243}\) See Criminal Law Deskbook, supra note 118, at A-1.

\(^{244}\) See Parker v. Levy, 417 U.S. 733, 743 (1974); Criminal Law Dept’, 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.

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


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).


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.


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).
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.


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).

See Cal. R. Ct. 4.1–700, 8.1–1125.

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

See Cal. R. Ct. 4.1–700, 8.1–1125.

See MCM, supra note 3, R.C.M. 1101.
APPENDIX B: SURVEY OF CIVILIAN POST-TRIAL SYSTEMS

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Automatic Appellate Court Review of All Sentences to Confinement for One Year or More</th>
<th>Mandatory Attorney Review of All Convictions</th>
<th>Written Transcript Prepared for All Convictions</th>
<th>Who Reviews Transcript Before Certification/Authentication After Conviction</th>
<th>Who Certifies/Authenticates the Transcript After Conviction</th>
</tr>
</thead>
<tbody>
<tr>
<td>Military Justice System</td>
<td>Yes²</td>
<td>Yes³</td>
<td>Yes⁴</td>
<td>Court Reporter, Prosecuting Attorney, Defense Counsel, All Trial Judges⁵</td>
<td>All Trial Judges Who Presided Over a Portion of the Court-Martial⁶</td>
</tr>
<tr>
<td>Federal District Court</td>
<td>No⁷</td>
<td>No⁸</td>
<td>No⁹</td>
<td>Court Reporter Only¹⁰</td>
<td>Court Reporter Only¹¹</td>
</tr>
<tr>
<td>Alabama</td>
<td>No¹²</td>
<td>No¹³</td>
<td>No¹⁴</td>
<td>Court Reporter Only¹⁵</td>
<td>Court Reporter Only¹⁶</td>
</tr>
<tr>
<td>Alaska</td>
<td>No¹¹</td>
<td>No¹⁸</td>
<td>No¹⁹</td>
<td>Court Reporter Only²⁰</td>
<td>Court Reporter Only²¹</td>
</tr>
<tr>
<td>Arizona</td>
<td>No²²</td>
<td>No²³</td>
<td>No²⁴</td>
<td>Court Reporter Only²⁵</td>
<td>Court Reporter Only²⁶</td>
</tr>
<tr>
<td>Arkansas</td>
<td>No²⁷</td>
<td>No²⁸</td>
<td>No²⁹</td>
<td>Clerk of Trial Court or Court Reporter Only³⁰</td>
<td>Clerk of Trial Court Only³¹</td>
</tr>
<tr>
<td>California</td>
<td>No³²</td>
<td>No³³</td>
<td>No³⁴</td>
<td>Court Reporter Only³⁵</td>
<td>Court Reporter Only³⁶</td>
</tr>
<tr>
<td>Colorado</td>
<td>No³⁷</td>
<td>No³⁸</td>
<td>No³⁹</td>
<td>Court Reporter Only⁴⁰</td>
<td>Court Reporter Only⁴¹</td>
</tr>
<tr>
<td>Connecticut</td>
<td>No⁴²</td>
<td>No⁴³</td>
<td>No⁴⁴</td>
<td>Court Reporter Only⁴⁵</td>
<td>Court Reporter Only⁴⁶</td>
</tr>
<tr>
<td>Delaware</td>
<td>No⁴⁷</td>
<td>No⁴⁸</td>
<td>No⁴⁹</td>
<td>Court Reporter⁵⁰</td>
<td>Clerk of Trial Court⁵¹</td>
</tr>
<tr>
<td>State</td>
<td>Court Reporter or Convicted’s Counsel (only if using specific transcriptionist requested by counsel)</td>
<td>Court Reporter Only</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>--------------</td>
<td>----------------------------------------------------------------------------------------------------------------</td>
<td>---------------------</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Florida</td>
<td>No52 No53 No54</td>
<td>Court Reporter Only60</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Georgia</td>
<td>No57 No58 No59</td>
<td>Court Reporter Only60</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Hawaii</td>
<td>No62 No63 No64</td>
<td>Court Reporter Only60</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Idaho</td>
<td>No67 No68 No69</td>
<td>Court Reporter Only70</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Illinois</td>
<td>No72 No73 No74</td>
<td>Court Reporter or Trial Judge75</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Indiana</td>
<td>No77 No78 No79</td>
<td>Court Reporter Only80</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Iowa</td>
<td>No82 No83 No84</td>
<td>Court Reporter Only85</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Kansas</td>
<td>No87 No88 No89</td>
<td>Court Reporter Only90</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Kentucky</td>
<td>No92 No93 No94</td>
<td>Court Reporter Only95</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Louisiana</td>
<td>No97 No98 No99</td>
<td>Court Reporter Only100</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Maine</td>
<td>No102 No103 No104</td>
<td>Court Reporter Only105</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Maryland</td>
<td>No107 No108 No109</td>
<td>Court Reporter Only110</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Massachusetts</td>
<td>No112 No113 No114</td>
<td>Court Reporter Only115</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Michigan</td>
<td>No117 No118 No119</td>
<td>Court Reporter Only120</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>State</td>
<td>Case Numbers</td>
<td>Court Reporter Only</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>--------------</td>
<td>--------------</td>
<td>---------------------</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Minnesota</td>
<td>No122, No123,No124</td>
<td>Court Reporter Only</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Mississippi</td>
<td>No127, No128,No129</td>
<td>Court Reporter Only</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Missouri</td>
<td>No132, No133,No134</td>
<td>Court Reporter Only</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Montana</td>
<td>No137, No138,No139</td>
<td>Court Reporter Only</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Nebraska</td>
<td>No142, No143,No144</td>
<td>Court Reporter Only</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Nevada</td>
<td>No147, No148,No149</td>
<td>Court Reporter Only</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>New Hampshire</td>
<td>No152, No153,No154</td>
<td>Court Reporter Only</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>New Jersey</td>
<td>No157, No158,No159</td>
<td>Court Reporter Only</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>New Mexico</td>
<td>No162, No163,No164</td>
<td>Court Reporter Only</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>New York</td>
<td>No167, No168,No169</td>
<td>Court Reporter Only</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>North Carolina</td>
<td>No172, No173,No174</td>
<td>Court Reporter Only, The Parties Must Review; the Parties May Review</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>North Dakota</td>
<td>No177, No178,No179</td>
<td>Court Reporter Only</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Ohio</td>
<td>No182, No183,No184</td>
<td>Court Reporter Only</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Oklahoma</td>
<td>No187, No188,No189</td>
<td>Court Reporter Only</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Oregon</td>
<td>No192, No193,No194</td>
<td>Court Reporter Only</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Pennsylvania</td>
<td>No197</td>
<td>No198</td>
<td>No199</td>
<td>Court Reporter200</td>
<td>Court Reporter (Trial Judge Authenticates Portions if Objection)201</td>
</tr>
<tr>
<td>-------------</td>
<td>-------</td>
<td>-------</td>
<td>-------</td>
<td>-------------------</td>
<td>---------------------------------------------------------------</td>
</tr>
<tr>
<td>Rhode Island</td>
<td>No202</td>
<td>No203</td>
<td>No204</td>
<td>Court Reporter Only205</td>
<td>Court Reporter Only206</td>
</tr>
<tr>
<td>South Carolina</td>
<td>No207</td>
<td>No208</td>
<td>No209</td>
<td>Court Reporter210</td>
<td>Court Reporter211</td>
</tr>
<tr>
<td>South Dakota</td>
<td>No212</td>
<td>No213</td>
<td>No214</td>
<td>Court Reporter Only215</td>
<td>Court Reporter Only216</td>
</tr>
<tr>
<td>Tennessee</td>
<td>No217</td>
<td>No218</td>
<td>No219</td>
<td>Court Reporter, Appellant, or Appellant’s Counsel; Appellee May Review (Not Mandatory)220</td>
<td>Court Reporter, Appellant, or Appellant’s Counsel; Review By Trial Judge Is Discretionary221</td>
</tr>
<tr>
<td>Texas</td>
<td>No222</td>
<td>No223</td>
<td>No224</td>
<td>Court Reporter Only225</td>
<td>Court Reporter Only226</td>
</tr>
<tr>
<td>Utah</td>
<td>No227</td>
<td>No228</td>
<td>No229</td>
<td>Court Reporter Only230</td>
<td>Court Reporter and, if applicable, the Transcriber Only231</td>
</tr>
<tr>
<td>Vermont</td>
<td>No232</td>
<td>No233</td>
<td>No234</td>
<td>Court Reporter Only235</td>
<td>Court Reporter Only236</td>
</tr>
<tr>
<td>Virginia</td>
<td>No237</td>
<td>No238</td>
<td>No239</td>
<td>Court Reporter240</td>
<td>Court Reporter241</td>
</tr>
<tr>
<td>Washington</td>
<td>No242</td>
<td>No243</td>
<td>No244</td>
<td>Court Reporter245</td>
<td>Court Reporter246</td>
</tr>
<tr>
<td>West Virginia</td>
<td>No247</td>
<td>No248</td>
<td>No249</td>
<td>Court Reporter250</td>
<td>Court Reporter251</td>
</tr>
<tr>
<td>Wisconsin</td>
<td>No252</td>
<td>No253</td>
<td>No254</td>
<td>Court Reporter Only255</td>
<td>Court Reporter Only256</td>
</tr>
<tr>
<td>Wyoming</td>
<td>No257</td>
<td>No258</td>
<td>No259</td>
<td>Court Reporter Only260</td>
<td>Court Reporter Only261</td>
</tr>
</tbody>
</table>

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.

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.

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.

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].

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.


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.


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.

See id. at R. 31.8.
25 See id. at R. 31.8–9.
26 See id.
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.
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. See 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.
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.
40 See id. at R. 10(a)(3).
41 See id.
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.
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(c)(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.


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.


56 Id.


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 the 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.


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.


65 See id.

66 See id.


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.


70 See id. at R. 26, 28.

71 Id.


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.


81 Id.


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.
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.


Id.


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.

Id.

Id.

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).

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.

See Ky. R. Crim. P. 12.02, 12.04, 13.04; Ky. R. Civ. P. 73.08, 75.01, 75.06–15, 76.

See Ky. R. Crim. P. 12.02; Ky. R. Civ. P. 73.08, 75.01, 75.06–15.

See Ky. R. Crim. P. 12.02; Ky. R. Civ. P. 73.08, 75.01, 75.06–75.15.


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.


See id.

See id.

See id.

See id.

See id.

See id.

Id.

Id.

See Me. R. App. P. 2, 5, 6, 8.

See id. at R. 5, 6.

See id.


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.

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.

See id. §§ 8-411 to 8-413.

See id.


See id. at R. 4(b).

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.


See id. at R. 8, 9.

See id.


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.
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.
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 §§ 3-5-60, 47-1-201; MONT. R. APP. P. 4, 6, 8, 9.
140 See MONT. R. APP. P. 6, 8.
141 Id.
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.
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.
156 See id.
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.
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.

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.


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.


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

See N.M. R. App. P. 22-301.


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.

See id. at R. 450.1, 460.70.

See id. at R. 460.70.

See id.

See id. at R. 28 (indicating function and content for appeals).

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.

See N.C. R. App. P. 4. See also id. at R. 9, 11–12. The court reporter or transcriber 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.

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.


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).

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).

See id. at R. 10(e).

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).

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.


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).

See U.S. v. Allbright, 590 F.3d 1182 (11th Cir. 2010).

See U.S. v. Livingston, 103 F.3d 1447 (11th Cir. 1996).

See id. at R. 2.2.

Id.
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.

See id.

See id.

See id.

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

See id. at R. 10–11.

See id.

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

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.

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.

See id.

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 on appeal contains no matter which is irrelevant to the appeal. Id. at R. 209.

See id. at R. 207.

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.

See S.D. CODIFIED LAWS §§ 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.

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.


Id.


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).
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.

See supra note 220.


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.

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).

See supra note 220.


See supra note 220.

TEX. R. APP. P. 1, 3–4, 9, 24.

See supra note 220.

TEX. R. APP. P. 1, 3–4, 9, 24.

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.

See supra note 220.

See supra note 220.

After review of the cited authorities, the author has determined that the author has determined that the state has no procedures that are similar to the SJAR or OTJAG review.

See supra note 220.

After review of the cited authorities, the author has determined that the state has no procedures that are similar to the SJAR or OTJAG review.

After review of the cited authorities, the author has determined that the state has no procedures that are similar to the SJAR or OTJAG review.

After review of the cited authorities, the author has determined that the state has no procedures that are similar to the SJAR or OTJAG review.

After review of the cited authorities, the author has determined that the state has no procedures that are similar to the SJAR or OTJAG review.

After review of the cited authorities, the author has determined that the state has no procedures that are similar to the SJAR or OTJAG review.

After review of the cited authorities, the author has determined that the state has no procedures that are similar to the SJAR or OTJAG review.

After review of the cited authorities, the author has determined that the state has no procedures that are similar to the SJAR or OTJAG review.

After review of the cited authorities, the author has determined that the state has no procedures that are similar to the SJAR or OTJAG review.

After review of the cited authorities, the author has determined that the state has no procedures that are similar to the SJAR or OTJAG review.

After review of the cited authorities, the author has determined that the state has no procedures that are similar to the SJAR or OTJAG review.

After review of the cited authorities, the author has determined that the state has no procedures that are similar to the SJAR or OTJAG review.
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.

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

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

Id.