The Deployed Court-Martial Experience in Iraq 2010: A Model for Success

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I. Introduction

The U.S. military's court-martial system is a blue ribbon system of justice, exemplifying the best in the Anglo-American adversarial system while at the same time serving the interests of the military command in preserving good order and discipline.[1] By presenting the story of the successful deployed court-martial experience of Operation Iraqi Freedom 10-11, this article demonstrates that the court-martial system, as a system of law and procedure, can function well in a deployed environment. In support, it relates the concrete experience of trying the entire range of contested general courts-martial (GCMs) and special courts-martial (SPCMs) in a deployed environment, both joint and single service, from novel "Spice"[2] cases to a double premeditated murder case.

This article discusses in detail the general and special courts-martial tried by the U.S. Army III Corps' deployed MJ team and assigned brigade trial counsel which were eighteen of the forty GCMs and SPCMs tried in theater that year, to illustrate successful deployed court-martial practice and the lessons to be drawn from it.[3] Out of these eighteen cases, twelve were contested,[4] seven were panel cases, five

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[1] Indeed, both the author's own experiences and a thoughtful recent article support this contention. *See* Note, *Prosecutorial Power and the Legitimacy of the Military Justice System*, 123 HARV. L. REV. 937 (2010). Military judges know the law and rules of evidence and are generally apolitical; trial and defense counsel are typically not overburdened with cases and are well-resourced; panel members are experienced decision-makers, intelligent, thoughtful, and compassionate; and, military court-martial procedures are highly due-process oriented. In fact, the Uniform Code of Military Justice (UCMJ) has even been criticized as overly due process-oriented. *See, e.g.*, General William C. Westmoreland & Major General George S. Prugh, *Judges in Command: The Judicialized Uniform Code of Military Justice in Combat*, 3 HARV. J. L. & PUB. POL'Y 2, 6 (1980). General Westmoreland's article was largely a criticism of what he viewed as the civilianization of the military justice system. These criticisms reflect a longstanding debate in the United States over the proper nature of military justice, one which typically intensified after major wars brought thousands of citizen-Soldiers into service. This dates back to at least the post-Civil War era. *See* LOUISE BARNETT, UNGENTLEMANLY ACTS 9-10 (2000) (contrasting views of Civil War Generals William T. Sherman and Alfred H. Terry on the subject); *see also* JOHN M. LINDLEY, "A SOLDIER IS ALSO A CITIZEN": THE CONTROVERSY OVER MILITARY JUSTICE 1917–1920 (1990); Judge Andrew S. Effron, *Military Justice: The Continuing Importance of Historical Perspective*, ARMY LAW., June 2000, at 1, 3-4.

[2] Although a particular brand name, the term "Spice" has become the generic name for a series of mood-altering substances, generally categorized as synthetic cannabinoids or synthetic marijuana. These substances are typically composed of plant material laced with foreign-produced chemicals that, when smoked, induce a "high" in the user comparable to that produced by the ingestion of marijuana. Since 1 March 2011, the chemicals used to produce Spice have been listed on Schedule I of the Schedule of Controlled Substances, thus rendering their sale, use, possession, and introduction violations of Article 112a. *See* Schedules of Controlled Substances: Temporary Placement of Five Synthetic Cannabinoids Into Schedule I, 76 Fed. Reg. 11,075 (Mar. 1, 2011); UCMJ art. 112a (2008); 21 C.F.R. § 1308 (2011). During the timeframe covered in this article, Spice" was not scheduled, but was prohibited by U.S. Forces–Iraq (USF–I) General Order 1 and punishable as a violation of Article 92. *See* Headquarters, USF–I, Gen. Order No. 1 (22 Sept. 2010) [hereinafter USF–I GO #1] (on file with author). According to the Senior Trial Counsel for 10th Mountain Division, Kandahar, Afghanistan, Spice sale and use continues to be a prevalent crime in Afghanistan. Telephone Conversation with CPT Tokay Hackett, U.S. Army Judge Advocate, Senior Trial Counsel, 10th Mountain Div., Kandahar Airfield, Afg. (25 June 2011).

[3] From 9 March 2010 through 9 February 2011, the author served as the Chief of Military Justice for USF–I and III Corps, a position that permitted him to directly supervise the courts-martial of dozens of Army Soldiers, as well as to coordinate and facilitate military justice dispositions on Sailors, Marines, Airmen, and Civilians throughout the Iraq Joint Operations Area (IJOA). These eighteen cases represent all the cases tried either entirely or partially under the supervision of the author and include cases referred by III Corps as well as by Special Operations Command (SOCCENT) and I Corps using III Corps resources. "The United States Special Operations Command Central (USSOCCENT or SOCCENT) is a subordinate unified command of joint forces for the U.S. Central Command (USCENTCOM)." *See* U.S. Army Combined Arms Ctr., Fort Leavenworth, Kan., http://usacac.army.mil/cac2/call/thesaurus/ toc.asp?id=27995. When III Corps arrived in Iraq in March 2010, there were approximately 100,000 U.S. servicemembers in Iraq and approximate 130,000 civilian Department of Defense (DoD) contractors. By the end of August 2010, that number had decreased to approximately 48,000 servicemembers and 76,000 civilian DoD contractors. About half of the servicemembers at any given time were assigned to the "USF–I Separate Brigades" which were directly administrative control (ADCON) to III Corps for military justice purposes. The rest of the servicemembers fell under three U.S. Army divisions, located in the North (USD–N), South (USD–S), and Center (USD–C) of Iraq, as well as two U.S. Air Force wings and some U.S. Navy units. Additionally, servicemembers assigned to the special forces (SOF) of the various services were ADCON directly to SOCCENT. Out of all the courts-martial tried in Iraq from February 2010 through February 2011, the vast majority were tried by III Corps and USD–C, which was then First Armored Division.

[4] In the following list, one asterisk (*) denotes that the case was a contested judge alone case; two asterisks (**) indicate that the case was a contested panel case. The number in parenthesis indicates the number of days from preferral to trial on the merits. In all cases except for *United States v.*

were GCMs, and thirteen were SPCMs. This experience suggests four attributes of a successful deployed court-martial practice:

> (1) Most cases arising in theater are best tried in theater;
> (2) Counsel must be prepared to try any type of case in theater;
> (3) Courts-martial can proceed to trial faster in theater than in garrison; and
> (4) Ownership of cases is especially important in a deployed environment.

Because these cases represent a widely dispersed jurisdiction in a hostile-fire, deployed environment, arising out of a wide range of crimes, locations and types of units,[5] their successful prosecution suggests the effectiveness of the deployed court-martial system as a whole and not just in Iraq during OIF 10–11. The lessons learned are not limited to a particular time, place, or unit. Based on these experiences, Part IV provides practical, experienced-based advice on the logistical aspects of trying cases in a deployed environment. While some practices based on Iraq-specific circumstances are now less relevant, most practices are transferable to Afghanistan or future deployed environments.

The deployability of the court-martial system does not turn entirely on the maturity of the theater,[6] the location of the court-martial, or any particular command structure, but primarily derives from the portability of the system itself and the individual military justice (MJ) practitioner's ability to marshal the assets, human and otherwise, to conduct trials in a deployed environment. A poor theater-wide MJ structure in an immature theater does not preclude the practice of MJ, but a good structure can facilitate it, so the appendices to this article discusses the theater-wide MJ structure extant in Iraq during OIF 10–11. It suggests that the creation of an echeloned, theater-wide MJ structure spearheaded by the U.S. Forces–Iraq (USF–I) Office of the Staff Judge Advocate (OSJA) facilitated deployed court-martial success.

While the court-martial system showed itself to be fully deployable during this period, there is such a thing as deployed court-martial failure, and it has little to do with the number of cases tried in the deployed environment.[7]

Pemberton, the trial lasted from one day to two weeks, thus the trial date substantially includes the day the court announced the sentence; in *United States v. Pemberton*, a twenty-eight day recess followed the first day of trial to permit a government witness to go on emergency leave. Only the principal charge is noted.

**United States v. CPT Bjork (I Corps): Art. 118 x 2; GCM; Prefer: 3 Nov. 2009, Trial 17 May 2010 (195 days)

** United States v. CPT Warren (SOCCENT): Art. 120; GCM; Pref: 1 July 2010, Trial 14 Nov. 2010 (136 days)

United States v. 1LT Wilson (III Corps): Art. 121; GCM; Pref: 8 Dec. 2010, Trial 19 Jan. 2011 (42 days)

* United States v. CW2 Brown (III Corps): Art. 83; GCM; Pref: 19 Aug. 2010, Trial: 18 Nov. 2010 (91 days)

*United States v. 1SG Pemberton (III Corps): Art. 120; SPCM; Pref: 20 Dec. 2010, Trial 24 Jan. 2011 (35 days)

*United States v. SSG Morgan (III Corps): Art. 121; SPCM; Pref: 12 Oct. 2010, Trial: 13 Jan. 2011 (93 days)

United States v. SSG Anderson (III Corps): Art. 92; SPCM; Pref: 9 Apr. 2010, Trial: 11 July 2010 (93 days)

**United States v. SGT Ferrer (SOCCENT): Art. 134; SPCM; Pref: 24 July 2010, Trial: 10 Sept. 2010 (48 days)

**United States v. SPC Shipley (SOCCENT): Art. 134; SPCM; Pref: 28 Aug. 2010, Trial: 17 Oct. 2010 (50 days)

United States v. SGT Moseley (III Corps): Art. 92; SPCM; Pref: 21 May 2010, Trial: 10 July 2010 (50 days)

**United States v. PFC Halloran (III Corps): Art. 107; SPCM; Pref: 10 Aug. 2010, Trial: 12 Sept. 2010 (33 days)

**United States v. PFC Ruffin (III Corps): Art. 92; SPCM; Pref: 6 Oct. 2010, Trial: 24 Oct. 2010 (18 days)

**United States v. PV2 Reese (III Corps): Art. 92; SPCM; Pref: 15 Dec. 2010, Trial: 12 Jan. 2011 (28 days)

*United States v. PFC Rounds (III Corps): Art. 92; SPCM; Pref: 15 Dec. 2010, Trial: 16 Jan. 2011 (32 days)

*United States v. SPC Bennett (III Corps): Art. 92; SPCM; Pref: 20 Nov (2010, Trial: 15 Jan. 2011 (56 days)

United States v. SPC Wright, L (III Corps): Art. 134; SPCM; Pref: 1 Mar. 2010, Trial 3 May 2010 (63 days)

United States v. SPC Wright, K (III Corps): Art. 134; SPCM; Pref: 1 Mar .2010, Trial 3 May 2010 (63 days)

United States v. SPC Kiger (III Corps): Art. 120; SPCM; Pref: 13 June 2010, Trial 26 Aug. 2010 (74 days)

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[5] The SOCCENT cases arose out of the Combined Joint Special Operations Forces–Arabian Peninsula (CJSOTF–AP), a unit deeply engaged in combat operations. Also, several cases arose out of military police units and the theater aviation brigade.

[6] The "maturity" of the theater refers to how long U.S forces have operated within the theater. Thus, upon the initial U.S. invasion of Iraq in 2003, the Iraq theater was "immature" whereas during the period of time covered in this article, the theater was "mature," with regularly-scheduled air transportation and well developed logistical channels. While the author asserts that the court-martial system can effectively function in even an immature theater, this is contingent upon there at least being sufficient military justice practitioners in theater to conduct courts-martial. One colleague who reviewed this article said that during his deployment as a brigade judge advocate during the early phases of Operation Iraqi Freedom (OIF), insufficient judge advocates were present in theater, the judge advocates that were present were focused on operational law, and that he himself served as the sole judge advocate for a command of five thousand Soldiers. Under these conditions, it is safe to say that—consciously or not—the command had made the decision not to deploy the court-martial system. The author, on the author hand, serving as a trial defense counsel during OIF III in 2005, participated in several contested courts-martial and found that by then, the situation had changed and a large number of military justice practitioners were present in theater. Others, including division SJA's, have related to the author accounts of robust courts-martial practice within their units even earlier.

[7] In a thoughtful article, Major Frank Rosenblatt, a U.S. Army judge advocate, compared the number of courts-martial conducted in a deployed environment with the number conducted overall in the Army to support his conclusion that the court-martial system is "non-deployable," a term he borrowed from the description given to Soldiers who are not deemed able to

Deployed court-martial failure occurs when commanders or their legal advisors labor under the erroneous presumption that it is impracticable to conduct courts-martial in the deployed environment.[8] Sometimes there are good reasons to try a case in the rear instead of in theater—but any advice influenced by the notion that the court-martial system is not fully and practically deployable is advice based on a deeply flawed premise.

II. The USF-I Military Justice Division in Theater Justice

On 1 January 2010, Multi-National Forces – Iraq (MNF-I) and Multi-National Corps – Iraq (MNC-I) were merged to form United States Forces – Iraq (USF-I). The USF–I Commander designated senior commanders and senior headquarters from each of the services (i.e., AFFOR, ARFOR, NAVFOR, MARFOR) as the senior service-specific military justice headquarters for the theater. III Corps, U.S. Army, assumed the job of ARFOR. USF-I and III Corps each had its own commander and OSJA, but the Military Justice Division (MJD) for III Corps did "double duty" for both commands, assuming a supervisory role over military justice not only for the Army units that fell under III Corps, but the rest of theater as well.

The MJD took several measures to facilitate military justice practice in theater.

1. Setting a Theater-Wide Tone for Military Justice Practice

With the creation of a theater-wide structure in support of military justice, a comprehensive military justice communication channel was opened for the first time on a theater-wide basis. With rapidly rotating units and the Army's modular force structure, this structure was highly conducive to quickly establishing relationships[9] and sharing deployment-specific experiences among many different units of difference services. The USF–I MJD established and kept updated an e-mail distribution list for both counsel and paralegals. It used this list to provide "Military Justice Sendouts" at regular intervals with all the latest military justice news from theater. These "Sendouts" included recent court-martial results and issues from around theater as well as announcement of training and practice tips. One of the immediate advantages to the USF–I Military Justice model was that it created a virtual podium from which to emphasize best military justice practices. The author's impression from feedback received in theater suggests that the mere fact of counsel at remote Forward Operating Bases (FOB) knowing that cases were being tried elsewhere in theater emboldened them to try cases in theater—this in turn affected the advice they provided commanders. Throughout the deployment, the consistent message from both the USF–I and III Corps Staff Judge Advocates was that *criminal activity that occurs in theater and is worthy of a court-martial can and should be tried in theater if the command supports it.* This was not a directive from the USF–I or III Corps Commanders, but rather a tone set within professional JA channels regarding best legal practice. In conferences, advocacy training sessions, individual case AAR's conducted either personally or remotely with the senior trial counsel or the chief of justice, monthly case reviews, and e-mail send outs, the USF–I MJD reinforced this theme.

2. Theater-Wide Training

One concern in the practice of military justice in a deployed environment is the vastly different levels of military justice experience among the TCs, most of whom the CoJ will never have met prior to deploying.[10] An important challenge was instituting a military justice training program to give counsel throughout theater both the competence and confidence to try cases and to recommend cases for trial. Training military justice trial advocates is

deploy. Major Frank Rosenblatt, *Non-Deployable: The Court-Martial System in Company from 2001 to 2009*, ARMY LAW., Sept. 2010, at 12, 13–15. The problem with comparing the number of cases tried in a deployed environment with a garrison environment is that it does not shed light on whether the court-martial system itself is "deployable," but only on whether it was "deployed." Moreover, given the OIF 10–11 experience of what seemed to be a very low incidence of criminal activity in theater, such factors as Soldiers' high morale, command decisions to leave poor performing Soldiers in the rear prior to deployment, reduced access to alcohol and drugs, and a reduction of outlets for criminal activity in a deployed environment are all, in the author's opinion, more likely responsible for the low number of deployed courts-martial than the supposed "non-deployability" of the court-martial system. As a case in point, during OIF 10-01, III Corps tried in theater nearly every case that was deemed worthy of court-martial.

[8] "[T]he common misconception that military justice is too difficult to implement or is too distracting to enforce during combat should be corrected." Captain Eric Hanson, *Know Your Ground: The Military Justice Terrain of Afghanistan*, ARMY LAW., Nov. 2009, at 36, 44.

[9] To accomplish this and other theater-wide military justice goals, III Corps MJD had to quickly establish vertical relationships among military justice practitioners. As members of the brigade commander's personal staff, often located far from division or corps headquarters, JAs can very easily "go native" in the brigade, forgetting the technical military justice chain up to Corps or Division. In today's deployed environment, the BJA (usually a major) sometimes outranks the division CoJ (often a captain), thus creating further complications. The answer should be clear: the CoJ is the staff judge advocate's primary division chief for dealing with matters of military justice for all the down trace brigades assigned to the division. If the BJA and CoJ disagree, the issue should be brought to the SJA. Never should the BJA and brigade TC write the division CoJ out of the loop. Instead, when a new brigade or division headquarters rolls into theater, the brigade and division military justice practitioners should immediately reach out to each other. Time is of the essence, and these relationships should be well-established before the first case arises.

[10] During OIF 10–11, not only were several of the brigade trial counsel fairly new, but some of the reserve component judge advocates had little to no military justice experience, although some had extensive civilian criminal law experience.

always a challenge, even in garrison.[11] Yet effective training could and did occur in the deployed environment.

The USF–I OSJA MJD held regular training events, stressing simplicity in preparation and consistency.[12] Each month, the USF–I MJD would conduct live training for available counsel at both Victory Base Complex (VBC) and Joint Base Balad (JBB).[13] Attendance by video teleconference (VTC) for other installations throughout theater was often arranged, as necessary. In addition, both on the paralegal and TC side, USF–I conducted monthly theater-wide military justice training using Adobe Connect® on various topics, such as recent case after action reviews (AAR's), the Military Rules of Evidence, and recent developments in case law. In June and December 2010, USF–I sponsored two theater-wide military justice conferences which brought together up to sixty TCs and paralegals from throughout theater. In January 2011, the USF–I Senior Trial Counsel designed and hosted a "Trial Counsel Bootcamp," spending three days in both live and VTC training, teaching up to fifteen TCs all the basic tasks of TC work. While the form and substance of the training may vary from location to location, having theater-wide emphasis and cooperation in military justice training made it more likely that training would actually occur.

In addition, the USF-I MJD was able to arrange for Army and Air Force counsel to sit as co-counsel in cases, for Air Force JAs to serve as Article 32 investigating officers on Army-referred cases, and for counsel of all service components to serve as assistant TCs on cases arising outside their brigade-sized units. Out of all the "training" methods for litigation available, none is better than actually going to court and learning by doing.[14] Some reserve component JA's who had no predeployment experience with courts-martial tried their first military cases in Iraq as assistant TC and then went on to try cases as lead counsel. Feedback regarding the training from counsel from throughout the theater was uniformly positive.

The hierarchical technical structure also facilitated paralegal training, especially in the area of witness production. The USF–I military justice senior paralegal took charge of the training process, and asserted USF–I's prerogative and responsibility to train paralegals throughout the theater. Not only did she provide live classes on witness production at both theater-wide military justice conferences but she also provided refresher training using Adobe Connect® and arranged for various paralegals to teach a number of classes on different subjects throughout the year. Without a formalized military justice structure putting the USF–I military justice senior paralegal at the top of the military justice wire diagram on the paralegal side, it would have been difficult for her to assert her prerogative to conduct the training.

3. Assisting Lower Echelon Military Justice Practitioners

Being a part of the USF–I OSJA, the USF–I MJD brought a new level of visibility and logistical support to lower echelon military justice practice.[15] For instance, for two complicated military justice missions, one involving a complex trial with many moving parts involving several units,[16] and one involving an in-country site visit for a pending stateside court-martial, the USF–I MJD drafted and submitted two Fragmentary Orders (FRAGO)[17] which were published by USF–I. The benefit of a FRAGO issued from the USF–I level was that whatever was contained in the FRAGO became the mission of the supporting units. In other words, with a higher headquarters' FRAGO directing the support, the lower unit no longer saw support to the MJ mission as an additional burden on top of the mission, but as an integral part of the mission. Depending on what the

[11] *See* Major Jay Thoman, *Advancing Advocacy*, ARMY LAW., Sept. 2011, at 35, 35 (discussing challenges of training trial advocates, including those assigned to separate units, and suggesting specific techniques for training).

[12] Live training consisted of drills from *The Advocacy Trainer*. *The Advocacy Trainer* is a publication of the U.S. Army's Judge Advocate General's Corps which breaks down advocacy skills training into manageable blocks which require minimal preparation. It is essentially skills drills training. THE ADVOCACY TRAINER, CRIMINAL L. DEP'T, THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., U.S. ARMY (1997).

[13] Victory Base Complex (VBC), composed of Camp Victory, Camp Liberty, and nine other smaller installations during OIF 10–11, was centered around the Baghdad International Airport, in Baghdad, Iraq. Joint Base Balad (JBB) was a large, joint Army-Air Force base located approximately thirty minutes north of VBC by helicopter.

[14] If hands-on actual practice is not available, the next best training is observing real practice. Counsel should never miss the opportunity to sit in back of the courtroom and watch their colleagues in trial. Third in order of effectiveness (but still important) is live, interactive training.

[15] Most logistical difficulty can be overcome with the assistance of higher echelon OSJA. For instance, the panel can be entirely arranged by the division or corps. Witness priority travel and liaison actions could be coordinated through division or USF–I FRAGOs. Any staff questions, such as country clearances, could be easily disposed of if the recognized higher echelon MJ division holds itself out as ready to facilitate the lower echelon in the prosecution of its cases.

[16] Office of the Judge Advocate General, U.S. Army, Gen. Court-Martial Order No. 13 (15 Aug. 2011) (United States v. Bjork) (For reasons unrelated to the deployed trial location, the negligent homicide conviction was disapproved).

[17] This article retains the terminology of "FRAGO" to refer to fragmentary order, although in precise joint terminology, a fragmentary order issued from a joint command is a "FRAGORD." *See* U.S. DEP'T OF DEF., JOINT PUB. 5-0, JOINT OPERATION PLANNING para. 13.d (26 Dec. 2006) [hereinafter JP 5-0]. According to JP 5-0,

> [a]lthough the ultimate product [of the planning process] is an OPLAN or OPORD for a specific mission, the process is continuous throughout an operation. *Id*. Even during execution, it produces plans and orders for future operations as well as fragmentary orders (FRAGORDs) that drive immediate adjustments to the current operation.

Id.

lower echelon's mission consisted of, the USF–I MJD had the credibility as a part of the USF–I joint staff to formally and informally negotiate between units to support the lower echelon military justice mission. It could spread the logistical burdens of logistically-challenging courts-martial, and it was appropriately situated within the staff to draft and publish FRAGO's formally effectuating this coordination.[18] USF-I also continued the MNC-I practice of providing court-martial travel priority directive.[19]

4. Facilitating the Joint Experience

Notwithstanding its formal authorities, the USF–I OSJA MJD's theater-wide effectiveness stemmed mainly from its ability to encourage, assist, and facilitate the practice of military justice by the various units themselves. Nowhere was this truer than in the case of joint justice. The five joint courts-martial conducted in Iraq during OIF 10-11 were all referred by Special Operations Command (SOCCENT).[20] At the time, the SOCCENT joint command billet was filled by an Army major general, and out of the five accuseds, two were Navy Sailors[21] and three were Army Soldiers. In these cases, once SOCCENT had committed to trying the cases in theater, the USF–I OSJA MJD provided assistance to facilitate the trials. This included provision of an additional trial counsel, court reporters, and courtrooms in three of the cases as well as coordination between the III Corps and SOCCENT commanders to make III Corps panel members "available" for panel selection by the SOCCENT commander.[22] The practice of joint justice in theater also included coordinating for Air Force trial counsel and Article 32 officers to serve on cases in which the accuseds were Army Soldiers and conducting the full range of military justice actions at the behest of the USF–I senior element commanders. Joint courts-martial were not limited to just OIF 10-11. In May 2011, in the case of *United States v. HM3 Allen*, NAVCENT transferred jurisdiction of a Sailor to an Army GCMCA in Afghanistan. It is the author's understanding that the case was tried by an Army panel with Navy defense counsel, Army trial counsel, and an Army military judge.[23]

III. Four Military Justice Observations from OIF 10–11

Having discussed the USF–I military justice structure, this article now turns to actual court-martial practice in theater. This part relies primarily on eighteen special and GCMs referred by III Corps, or referred by I Corps or SOCCENT but tried by III Corps panel members and under the supervision of the USF–I MJD.[24] From these eighteen cases, one gleans four observations regarding successfully deployed court-martial practice:

> (1) Most cases arising in theater are best tried in theater;
> (2) Counsel must be prepared to try any type of case in theater;
> (3) Courts-martial can proceed to trial faster in theater;
> (4) Ownership of cases is especially critical in a deployed environment.

A. Most Cases Arising in Theater are Best Tried in Theater

It is the author's opinion that crimes which occur in theater should be tried in theater. The author's experience suggests that most commanders feel this notion instinctively. Trying cases in theater promotes deterrence and justice; maintains the will to prosecute; is practical; and maintains the credibility of the nonjudicial punishment (NJP) system.

1. Deterrence and Justice

Notions of specific and general deterrence work best when punishment is quick, fair and readily known in the community where the misconduct occurred. General deterrence also encompasses other important notions like respect for the command and for the law. Servicemembers expect the command to address criminal activity. If a serious crime occurs and the accused disappears from theater into a procedural black hole far from the unit, this naturally lowers the esteem of the command, offends the

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[18] USF–I FRAGOs were submitted to the Joint Operation Center (JOC) for staffing and publication. Judge advocates assigned to the USF–I OSJA also sat in the USF–I JOC, thus further facilitating the USF–I OSJA MJD's role in assisting with the publication of military justice FRAGOs.

[19] *See* Memorandum for J33 Air Operations, USF–I, subject: Priority Travel [for Court-Martial Personnel] (21 Sept. 2010) (on file with author).

[20] *See supra* note 3.

[21] The two Navy Sailors represented two of the three "Navy Seals" cases which received a fair amount of media coverage at the time. *See 2nd Navy Seal Cleared in Iraq Abuse*, WASH. TIMES, Apr. 23, 2010, at http://www.washingtontimes.com/news/2010/apr/23/us-clears-2nd-navy-seal-iraqi-abuse-case/. The three Army Soldiers cases were *United States v. Warren* and its two companion cases, *United States v. Shipley* and *United States v. Ferrer*. *See infra* Part III.B.

[22] MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 503(a)(3) (2008) [hereinafter MCM] ("A convening authority may detail as members of general and special courts-martial persons under that convening authority's command or made available by their commander. . . .").

[23] E-mail from Major Joshua Toman, Chief of Justice, U.S. Forces–Iraq, to author (June 28, 2011 2:04 AM) [hereinafter Toman e-mail] (on file with author); Telephone Conversation with Captain Tokay Hackett, U.S. Army Judge Advocate, Senior Trial Counsel, 10th Mountain Div., Kandahar Airfield, Afg. (25 June 2011) [hereinafter Hackett Telephone Conversation].

[24] In addition to the eighteen cases discussed in this article, the three U.S. divisions and two Air Force wings combined tried approximately twenty general and special courts-martial during OIF 10–11. In addition, SOCCENT tried two SEAL cases, which the author did not include within this eighteen.

servicemembers' sense of fairness, and leaves victims looking for justice.

An example of how deterrence and justice were bolstered by trying a case quickly in theater is the case of *United States v. Pemberton*. In *Pemberton*, a unit first sergeant (1SG) was accused of nonconsensual sexual misconduct with female Soldiers in his unit. He would ask his victims into his office on official business, close the door, and either expose himself or engage in inappropriate touching. The allegations surfaced in early December 2010. This was less than two months before III Corps' redeployment date – much further from the brigade's redeployment date – but the III Corps SJA had empowered the III Corps military justice practitioners to keep executing the military justice mission up until transfer of authority (TOA).

As soon as he heard the allegations, the brigade judge advocate (BJA) contacted the author (then serving as CoJ at USF-I). Over the next two weeks, the brigade TC and USF–I Senior Trial Counsel worked closely with the local detachment of the Army's Criminal Investigative Command (CID) and the unit's rear detachment at Fort Hood to thoroughly investigate the case. Once counsel had determined that there were at least two victims, both officers and both apparently credible, they reviewed the available evidence and immediately set to work drafting charges, even though CID was far from "finalizing" the criminal investigation. Because the CID investigation was still technically open, the trial counsel coordinated closely with CID to ensure that trial preparation interviews did not interfere with the investigation. Charges were finalized and preferred as soon as sufficient credible evidence was available. A strong, well-investigated case was ready for referral a few weeks after the misconduct surfacing.

On December 24, 2010, the case was referred to trial. A trial date was set for 24 January 2011. Despite emergency leave of important Government witnesses and defense delay requests, the accused was convicted following a fully contested trial on 22 February 2011.[25] Not only was the process expeditious, but the accused received a level of due process (even two defense counsel representing him) on par with the best civilian jurisdictions. Every member of the deployed unit, including the victims, saw that the UCMJ in a deployed environment is responsive, fast, and fair. Sending all the in-country witnesses to the rear for trial would have unacceptably intruded on the unit's deployed mission; waiting until the entire unit redeployed to try the 1SG would have meant months of delay. Trying the case in theater was superior to either of these options, providing a stronger deterrent and a better display of justice.

[25] *See infra* Part IV.A (providing a discussion of why the trial began on 24 January 2011 and was completed on 22 February 2011).

2. Retaining the Will to Prosecute

Anyone involved in the practice of military justice knows that courts-martial, while initiated and "owned" by the command, are moved forward by the will of the OSJA and the will of the assigned TC. This is largely because litigation is hard and anxious work, and there are many tempting reasons to avoid it.[26] Transferring cases to the rear results in some cases simply not being prosecuted, or in what could be termed the "garrison discount,"[27] a more lenient disposition to do away with a case the rear detachment is not inclined to try. This phenomena occurs for several reasons: first, sending a case to the rear can signal to the rear detachment that the case was not a high enough priority to try in theater;[28] second, it is often harder for the rear detachment to ascertain the impact on good order and discipline of the misconduct under deployed circumstances; third, the rear detachment, often with sparse personnel, is already laboring under its own caseload, which sometimes will receive higher priority than "someone else's" cases; and fourth, by the time the rear detachment is ready for trial, witnesses who were concentrated in one place during the deployment may be scattered all over the world.[29] While some cases are serious enough and some rear detachments are serious enough about them that the cases will be prosecuted to the same extent in garrison as in theater, others are not so. If a case's seriousness, impact, and deterrence value is closely tied to the deployed environment, the will to prosecute by a different command in the rear will be minimal.

[26] Major Rosenblatt's article cites AAR comments from counsel who said, not that they attempted to try cases in theater and failed, but that since trying cases in theater was so hard, they did not try. For instance, first the article notes that no courts-martial were conducted in Iraq before summer 2003. That fact shows merely that the decision was made not to deploy the court-martial system, not that courts-martial were nondeployable (this is true regardless of how sound the decision was). *See* Rosenblatt, *supra* note 7, at 16. One comment suggests that in 2009, just months before the OIF 10–11 period covered in this article, it was so difficult to get witnesses to Kuwait (Kuwait!) that it impeded court-martial practice. *See id*. at 17. Another notes that the 101st Airborne Division "made the decision not to try any general or special courts-martial in the deployed theater." *Id*. Such a decision could very well be based on sound reasoning, so long as that reasoning did not include the presumption that the system would not function efficiently in a deployed environment.

[27] This is a play on words of the term "deployment discount," the notion the author borrowed from the clever phrase, "deployed discount" used by Major Rosenblatt in his article. *See id.* at 20–21. As originally used by Major Rosenblatt, the term suggests that commanders in deployed environments are willing to offer more lenient dispositions because of logistical difficulties of trying cases in theater.

[28] With respect to prosecuting Reserve Component (RC) accused who are permitted to demobilize with the hope that they will be tried sometime in the future, the previous Chief of Military Justice for CJTF–1 in Afghanistan put it best when he told the author, "If it's not important enough to handle while the accused is on Title 10 status, it's probably not important enough to address at all." Telephone Conversation with Captain Brent Connelly, Chief of Military Justice, Combined Joint Task Force–1, Bagram, Afg. (2 July 2011).

[29] This is related to the concept of "ownership" of cases which is discussed *infra* Part III.D.

United States v. Anderson provides an excellent example of a case that might have withered if sent back to a rear detachment for trial. Staff Sergeant Anderson was a National Guardsman serving in a military police unit, although he was not an MP himself. He was charged with buying alcohol from local nationals and selling it to fellow Soldiers, including subordinates, in violation of USF–I General Order Number 1 (GO #1).[30] Alcohol offenses were usually disposed of through NJP, but in *Anderson* the sheer volume as well as the method of procurement (going off post for the purchase of alcohol) represented a flagrant violation of GO #1. The command forwarded the case to III Corps with a recommendation that it be referred to a special court-martial. Staff Sergeant Anderson eventually pled guilty at a special court-martial, was reduced, and spent nearly five months in prison. Not only was it important for the other Soldiers who knew of his activity to see that he was punished, but in light of the fact that all the witnesses were still located in theater and that alcohol possession is not even prohibited CONUS, the case may well have just lingered or resulted in a "garrison discount" if sent back CONUS for trial.

3. Most Cases Are More Practically Tried in Theater

When one reflects on the varied tasks, including actual combat operations, that take place in a combat environment, one might be tempted to reflexively conclude that it is just more practical to send cases to the rear for trial.[31] The OIF 10–11 experience strongly suggests otherwise.[32] Furthermore, such a conclusion fails to consider the ill effects of pulling witnesses out of theater to send CONUS to testify. Indeed, the witness production difficulties stemming from worldwide military operations affect both CONUS and deployed courts-martial. For the overwhelming majority of the cases tried at III Corps during this period, the witnesses and evidence were located in theater at the time of trial. Even in the few cases where some witnesses had already relocated CONUS and had to be brought back into theater for trial,[33] inconveniencing CONUS units to send witnesses forward was far preferable to disrupting in-theater units by sending witnesses to the rear.[34] The author had the opportunity to observe the far greater disruption caused by sending theater-based witnesses to the rear in one case in which a rear detachment requested in-theater witnesses for live testimony in a CONUS court-martial. This case caused far more disruption to the mission and consternation to the deployed commander (phone calls to the CoJ) than all the courts-martial III Corps conducted in theater.

A series of "Spice" cases[35] prosecuted by III Corps again demonstrates how some cases which are relatively easy to try in theater become prohibitively impractical to try in the rear.[36] These cases arose out of COB Adder (near An Nasiriyah, Iraq) towards the end of III Corps' deployment. A group of Soldiers were involved in the sale and distribution of Spice and alcohol. There were approximately seven related cases, with two relatively serious cases of distribution and the rest minor distribution and use. Considered as a whole, the cases represented a breakdown in discipline and flaunting of GO #1.[37] The company, battalion, and brigade were all National Guard (NG) units without extensive military justice experience, and the small Forward Operating Base (FOB) where the cases arose had scant military justice infrastructure.

Fortunately, the brigade TC, a NG JA with extensive civilian prosecution experience, had aggressively sought to educate himself on military justice procedures while in theater,[38] and by the time these cases arose, was confident enough to recommend they be prosecuted in theater. This demonstrates the necessity of deployed training programs to ensure that all military justice practitioners are confident in their abilities to advise their commanders on the full range of dispositions. To an experienced prosecutor, these were simple cases: no drug tests were available for "spice" at the time, and most of the evidence consisted of testimony from witnesses located in theater at the unit.

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[30] *See* USF–I GO #1, *supra* note 2.

[31] *See* Rosenblatt, *supra* note 7, at 16 ("[C]ommanders . . . elected to use [their assets] to send cases away rather than convene courts-martial in theater").

[32] There will always be cases which are better sent back to the continental United States (CONUS) for trial. In one case during OIF 10–11, one deployed Soldier had stolen and distributed thousands of dollars in narcotics from the pharmacy where he served as the pharmacy technician. After being interviewed by the U.S. Army Criminal Investigation Command (CID), he immediately self-referred to the combat stress clinic where he claimed to be suicidal, although he had never previously exhibited signs of mental health distress. The mental health provider recommended that the Soldier be evacuated immediately. By the time the Military Justice Division became aware that the Soldier was being evacuated, he had already left theater. Before III Corps could get the Soldier mentally cleared and get escorts to bring the accused back to theater for trial, the rest of his unit had redeployed, along with all the witnesses. That case, involving thousands of dollars in drug transactions and dozens of Soldier-purchasers, as well as the emergence of a redeployed conspirator, was serious enough that the rear detachment had ample will to try it. This case shows that circumstances dictate where the case should be tried.

[33] For example, *United States v. Bjork*, where the crime had occurred in 2006. *See infra* Part III.B.

[34] After all, the whole purpose of a rear detachment is to support forward operations. While some may suggest that it is not prudent to send military witnesses to a hostile fire zone solely for court-martial, the author suggests that temporary duty in a hostile fire zone in support of a mission—any mission—is part of a Servicemember's job description.

[35] *See supra* note 2 and accompanying text.

[36] Out of the six related cases, the two that went to trial were *United States v. Reese* and *United States v. Rounds.*

[37] *See* USF–I GO #1, *supra* note 2.

[38] By the time these cases arose, this captain had already attended several USF–I-sponsored military justice training events and had served as second chair on another unit's contested panel Spice case.

Out of the several cases, some were disposed of by discharge in lieu of court-martial and summary court-martial, but two cases went to contested trial, one judge alone and one panel. These cases, which required several Government witnesses each, simply could not have been tried practically at the rear detachment. Not only would the impact of the trial for use and distribution of substances which were legal in CONUS at the time have been diminished for CONUS personnel, but the cases would have probably been delayed so much that they would not have been tried at all.[39] Finally, sending all the witnesses to the rear to conduct courts-martial would have been a great burden on the deployed unit.

4. Credibility of the NJP System

The UCMJ permits an accused facing NJP to demand trial by court-martial. Once an accused demands trial, it is up to the command to decide whether to actually try the accused. If there is no commitment to conducting courts-martial in the deployed environment, servicemembers will quickly figure out that turning down NJP can get them out of punishment, or better still out of theater.[40] Indeed, a recent article cites some anecdotal statements from JAs arguing that servicemembers could turn down NJP with no consequences in the deployed environment.[41] In light of the OIF 10–11 experience, these claims, if true, did not likely result from any failure within the UCMJ itself.[42]

Indeed, out of the between 50,000 and 24,000[43] Soldiers that fell directly within the III Corps' GCMCA, there were only four instances in which a Soldier turned down a legitimate[44] Article 15. All four cases were referred to courts-martial. In two cases, the accused later requested that court-martial proceedings be terminated and NJP reinstated. In one of these two, the accused was a NG Soldier who committed the misconduct right before his unit redeployed and turned down the NJP on the eve of redeployment. He was extended past his original redeployment date for four months pending trial (pursuant to defense requests for delay in the court-martial proceedings), and eventually asked to return to NJP.[45] In the other two cases, the accused were tried, convicted, and punished by courts-martial. After these four cases, no other Soldier demanded court-martial after being offered legitimate NJP during OIF 10–11.

The case of *United States v. Halloran* demonstrates how a deployed JA can effectively deal with the turndown of a legitimate Article 15. *Halloran* involved a junior Soldier who had been rebuked for watching too much television at his workstation. After having been ordered to remove the TV and store it in his NCO's office, he pulled the cable television feed to the building out of the drop ceiling and cut it, while saying something like, "If I can't watch TV, no one can!" He was also disrespectful to an NCO in the execution of his duties. The company commander gave him notice of his intent to impose NJP. Private First Class Halloran demanded trial by court-martial. After the Soldier turned down a subsequent offer of a summary court-martial, the brigade TC, another reserve component JA with no previous court-martial experience but who had educated himself on military justice while in theater, had the confidence to recommend that the case be referred to SPCM. Less than a month later, after a fully contested panel case, PFC Halloran was convicted and his punishment exceeded what the company-grade commander could have imposed.[46] In the other NJP turndown case, after a contested general court-

[39] Had the rear detachment attempted to try the cases before the unit redeployed, witnesses would have had to be sent back from theater; had they delayed the case until redeployment, the Soldiers would have had to be extended on or returned to active duty in order to be tried. (National Guard commands rarely, if ever, convene courts-martial, and may lack jurisdiction over offenses arising while the offender was on Title 10 status.)

[40] The threat of sending servicemembers to the rear for court-martial for relatively minor misconduct for which the Servicemember turned down nonjudicial punishment (NJP) could actual incentivize minor misconduct for the purpose of leaving an austere environment early.

[41]

> Logically, servicemembers' refusal of NJP should increase where the possibility of court-martial is remote, and the recollection of two experienced TDS attorneys confirms this motivation. One said he advised clients to turn down NJP "up to ten times a month" and "more than in garrison," while the other wrote, "I advised turning down Art [Article] 15s all the time in Iraq. . . . It was the deployed environment that caused such recommendations."

Rosenblatt, *supra* note 7, at 33. The danger with this type of response by trial counsel or defense blustering is that it leads some to suggest that an accused's rights should be curtailed to remedy a spurious shortcoming of the UCMJ.

[42] Based on experience from the author's previous deployment to OIF III (2005) as defense counsel, it is certainly plausible that a legally and factually questionable Article 15 could be extensively challenged. But, in most cases where the nonjudicial punishment (NJP) was canceled, it was because, upon review following defense challenge, the Government ascertained that the facts did not support a court-martial. Because defense counsel have more time to investigate the facts in theater and make a more thorough challenge, it is possible that more NJP could be defeated in the deployed environment, but that is part of a normal system with competent defense counsel and does not make the court-martial system non-deployable. The solution is for the government to do a proper investigation and careful legal review before the commander initiates NJP proceedings.

[43] These numbers vary so greatly because the military mission was quickly drawing down during this time period.

[44] The author recalls two other turn-downs besides these four, but there, the command had not pre-vetted the NJP with their unit judge advocates and the charges at NJP did not support punishment. Therefore, the Corps office did not support referral to court-martial.

[45] This case, *United States v. F.*, is not included in the eighteen since it did not go to trial. For cases which ultimately did not go to trial, the author has elected to use initials rather than names.

[46] Even though there was no pretrial agreement with the accused, the convening authority did grant some clemency at initial action under Rule for Court-Martial 1107.

martial, the officer accused was sentenced to four months in confinement, a dismissal, and a significant fine.[47]

Also, in the Spice cases discussed in the last section, the two courts-martial actually tried resulted in appropriate punishments for the offenders. The defense in the remaining cases requested alternate disposition (discharge in lieu of court-martial, or guilty plea at summary court-martial). The command's demonstrated willingness to try the contested cases was an incentive for the defense to request and accept these consequences. What all these cases demonstrate is that without the real and palpable ability to try in-theater courts-martial, NJP would be less effective. Reviewing the theater-wide monthly NJP statistics from OIF 10-11, it appears that being prepared to court-martial Servicemembers who declined legitimate NJP influenced Servicemembers to accept NJP. For instance, throughout Iraq, from February 2010 through November 2010, Servicemembers accepted NJP well over three thousand times. Returning to the earlier claim of Servicemembers turning down NJP with impunity in the deployed environment, the author cannot recall even one instance where a Servicemember avoided discipline during OIF 10-11 by turning down a legitimate NJP offer from the command.

B. Counsel Must Be Mentally and Technically Prepared to Try Any Type of Case in Theater

Counsel should be predisposed to try cases in theater. The starting point for evaluating a case should be that it will be tried in theater. Only if overriding reasons exist should the thought process shift to sending the case to the rear. This does not diminish the commander's prerogative to try cases either in theater or in the rear. Rather, this predisposition informs the TC's thought process in advising the commander. Maintaining an initial predisposition to try cases in theater counters the human tendency to reduce one's workload.[48] Obviously, some cases truly should be tried in garrison,[49] but that should be an ending point in the thought process rather than the starting point.

The OIF 10–11 experience suggests that nearly any case can be tried in a deployed environment without defense collaboration.[50] The two most complicated cases tried by or with the assistance of III Corps during OIF 10–11 were *United States v. Bjork* and *United States v. Warren*. These cases demonstrate that nearly any case can be tried in theater *if* the will to do so is present. *United States v. Bjork* further demonstrates that some cases cannot practically be tried anywhere except in theater. To do justice, the deployed TC must be prepared to try cases in theater.

Captain Bjork was an active duty Army captain in charge of a police transition team (PTT) in Iraq in 2006. After completing his deployment, he redeployed to the United States. After his redeployment, allegations arose that he had ordered the execution of two Iraqi detainees that were in his custody in Iraq. An investigation showed that the evidence supported the accusations. Nearly three years had passed since the incident. Two potential Government witnesses were Iraqi nationals in the custody of the Iraqi Government several potential defense witnesses were also Iraqis living in Iraq. Due to the impracticality of trying the case in the United States with Iraqi witnesses, the accused was redeployed to Iraq in late 2009 so the command could determine a proper disposition. Ultimately, charges were preferred against the accused in theater, an Article 32 investigation was held, and the I Corps Commander[51] referred the case to GCM. After a fully contested panel case, in May 2010, the accused was convicted of negligent homicide and reckless endangerment.

The *Bjork* case was a hotly contested, partly classified trial before members, with extensive motions practice. Its verbatim record filled several thousand pages. The Government provided the defense an expert mitigation specialist.[52] The accused was represented by two highly experienced civilian counsel[53] and an excellent TDS counsel. The case spanned the TOA between I Corps and III Corps, and was actually tried after the GCMCA (I Corps) redeployed, and this required long-distance coordination with the convening authority.[54] The Government produced over two dozen witnesses for both sides, including civilian family members of the accused[55] and Iraqi nationals in Iraqi government custody. On top of all this, the defense requested and the Government granted a site visit,[56] so that

[47] *United States v. CW2 Brown* is discussed at length in the detailed discussion of depositions in Part IV.B.5, *infra*.

[48] A properly functioning adversarial legal system will naturally require a lot of work on the part of the trial counsel and OSJA to secure a conviction, so the temptation to transfer the case and get on with "higher priority work" is omnipresent. Besides, at heart counsel are naturally anxious about trying cases and can easily persuade themselves (and their commanders) that the best course of action is transfer.

[49] *See supra* note 32 (providing an example from OIF 10–11).

[50] Not only should defense collaboration with the government be anathema to any practitioner committed to the theoretical correctness of the Anglo-American adversarial system, but anticipating defense collaboration as a facet of prosecution renders the government's position weak.

[51] I Corps was III Corps' predecessor as the ARFOR–Iraq.

[52] The fact that the command appointed a civilian mitigation specialist in a non-capital case, and arranged to have this expert present in Iraq for the trial without significant difficulties, demonstrates the fact that due process protections available in theater can readily meet or exceed those available CONUS.

[53] As discussed in Part IV.D, during OIF 10–11, the Government experienced no significant delay or logistical burdens due to the accused exercising his right to civilian counsel.

[54] *See infra* Part IV.A (discussing GCMCA's rotating out of the theater mid-trial).

[55] *See infra* Part IV.B.5 (discussing civilian witness production).

[56] In a "site visit," typically one or both parties to a court-martial will request to return to the crime scene, sometimes accompanied by independent investigators or other experts. In another site visit coordinated

defense counsel could travel to the scene of the crime and interview villagers and Iraqi police, all in an active combat zone. Finally, in the middle of trial, the defense called, and the Government arranged production of, an Iraqi police officer from a distant province. Few cases come more complicated than *Bjork*, but the case had to be tried in theater, and the case was tried without significant difficulties. Judge Advocates and paralegals with standard JA training did the job the JAG Corps had trained them to do. If this case could be tried in theater, any case can be tried in theater. When a case like *Bjork* arises, MJ practitioners must be ready.

Another example is *United States v. Warren*. Captain Warren was a medical logistician assigned to a special operations unit in Iraq. He was accused of drugging and raping a PFC (E-3) in his containerized housing unit after inviting her over for an "evening drink." Throughout the investigation, CPT Warren vigorously maintained his innocence. For military justice purposes, his unit was directly ADCON to SOCCENT, located in Tampa, Florida. The unit was further TACON to an in-theater higher headquarters which itself was OPCON to USF–I. The unit lacked any formal relationship with the III Corps Headquarters. The case took place in a very dynamic unit whose relatively small judge advocate cell was deeply committed to advising on ongoing combat operations. As the case proceeded, the defense vigorously challenged the Government with an intensive motions practice. The complexity and coordination involved with the court-martial was notable, even necessitating the court-martialing of two alleged co-conspirators at contested panel courts-martial, all in theater, prior to CPT Warren's trial. The unit's command judge advocate sought support from USF–I and III Corps, which ultimately made a second trial counsel, panel members, a courtroom, and the USF–I Senior Court Reporter available so the unit could successfully try its case. This alone is a great example of an individual military justice practitioner looking beyond his own unit to accomplish the military justice mission. Fortunately, the busy brigade judge advocate for the unit was also an expert in criminal law and provided close supervision of the joint trial team. Not only was the case completely successful with the accused convicted following a fully contested trial before members, but it represents an instance of deployed joint justice because the case was referred by the joint GCMCA at SOCCENT and tried by a mixed Army-Air Force trial counsel team. The accused was convicted after a contested trial before members. Jurisdictional difficulties, the demands of military operations, and witness issues are all challenges in the deployed environment, but they can be overcome.

by USF–I, the CONUS-based defense counsel on a CONUS-based trial defense team requested to return to the scene of the crime in Iraq. The USF–I OSJA MJD conducted all the coordination for this visit as well.

C. Courts-Martial Proceed to Trial Faster in Theater

The eighteen cases went to trial quickly. Across the eighteen cases, trial took place an average of sixty-six days after preferral, and this average is skewed upward by *Bjork* and *Warren*. When *Bjork* and *Warren* are taken out of the equation, the average drops to fifty-four days. The fastest case was *United States v. Ruffin*, discussed in detail below, clocking in at nineteen days from preferral to sentence despite being a contested panel trial. Even *Bjork* and *Warren*, the longest and most complex cases, went from preferral to sentence in less than six months apiece. *United States v. Pemberton*,[57] though a sexual misconduct case, was preferred a few weeks after discovery of the misconduct and went to trial thirty-five days after preferral.

Contested SPCM went faster than the uncontested ones[58]—37.5 days versus 72.6 from preferral to trial. Contested panel SPCM went faster than judge alone—35.4 days versus 41.[59] Twelve out of the eighteen cases were

[57] *See supra* Part III.A.1.

[58] The average time for contested SPCMs was 37.5 days:

*United States v. 1SG Pemberton (III Corps): Art. 120; SPCM; Pref: 20 Dec. 2010, Trial 24 Jan. 2011 (35 days)
**United States v. SGT Ferrer (SOCCENT): Art. 134; SPCM; Pref: 24 July 2010, Trial: 10 Sept. 2010 (48 days)
**United States v. SPC Shipley (SOCCENT): Art. 134; SPCM; Pref: 28 Aug. 2010, Trial: 17 Oct. 2010 (50 days)
**United States v. PFC Halloran (III Corps): Art. 107; SPCM; Pref: 10 Aug. 2010, Trial: 12 Sept. 2010 (33 days)
**United States v. PFC Ruffin (III Corps): Art. 92; SPCM; Pref: 6 Oct. 2010, Trial: 24 Oct. 2010 (18 days)
**United States v. PV2 Reese (III Corps): Art. 92; SPCM; Pref: 15 Dec. 2010, Trial: 12 Jan. 2011 (28 days)
*United States v. PFC Rounds (III Corps): Art. 92; SPCM; Pref: 15 Dec. 2010, Trial: 16 Jan. 2011 (32 days)
*United States v. SPC Bennett (III Corps): Art. 92; SPCM; Pref: 20 Nov. 2010, Trial: 15 Jan. 2011 (56 days)
The average time for uncontested special courts-martial was 72.6 days.
United States v. SSG Morgan (III Corps): Art. 121; SPCM; Pref: 12 Oct. 2010, Trial: 13 Jan. 2011 (93 days)
United States v. SSG Anderson (III Corps): Art. 92; SPCM; Pref: 9 Apr. 2010, Trial: 11 July 2010 (93 days)
United States v. SGT Moseley (III Corps): Art. 92; SPCM; Pref: 21 May 2010, Trial: 10 July 2010 (50 days)
United States v. SPC Wright, L (III Corps): Art. 134; SPCM; Pref: 1 Mar. 2010, Trial 3 May 2010 (63 days)
United States v. SPC Wright, K (III Corps): Art. 134; SPCM; Pref: 1 Mar. 2010, Trial 3 May 2010 (63 days)
United States v. SPC Kiger (III Corps): Art. 120; SPCM; Pref: 13 June 2010, Trial 26 Aug. 2010 (74 days)

[59] The average time for contested panel special courts-martial was 35.4 days:

**United States v. SGT Ferrer (SOCCENT): Art. 134; SPCM; Pref: 24 July 2010, Trial: 10 Sept. 2010 (48 days)
**United States v. SPC Shipley (SOCCENT): Art. 134; SPCM; Pref: 28 Aug. 2010, Trial: 17 Oct. 2010 (50 days)
**United States v. PFC Halloran (III Corps): Art. 107; SPCM; Pref: 10 Aug. 2010, Trial: 12 Sept. 2010 (33 days)
**United States v. PFC Ruffin (III Corps): Art. 92; SPCM; Pref: 6 Oct. 2010, Trial: 24 Oct. 2010 (18 days)
**United States v. PV2 Reese (III Corps): Art. 92; SPCM; Pref: 15 Dec. 2010, Trial: 12 Jan. 2011 (28 days)

contested, and most were tried within two months of preferral. Based on the small sample size, these averages do not demonstrate a general rule, but they do show that contested cases can be tried speedily in theater. Not once were witnesses denied or discovery curtailed based on the deployed environment. Discovery practice was always complete and wide open, as required by Article 46, UCMJ, and Rule for Court-Martial (RCM) 701.[60] This undercuts any notion that deployed courts-martial require defense collaboration to take place, or take place speedily.[61] In fact, in *Pemberton*, the TC asked for the first available trial date in the electronic docketing request because he was ready for trial. The defense counsel objected and requested about two months of delay. The Government held its ground, pointing out to the court how the Government would facilitate whatever interviews or access to evidence the defense sought and that there would still be enough time before trial to produce whatever witnesses the defense was requesting. The judge denied the requested delay and the case went to trial thirty-five days after preferral. Defense cooperation was not required. The Government simply had to show its willingness to overcome the difficulties raised by the defense. By the same token, to make the cases move fast, trial counsel had to immediately make all discovery available to the defense, for example helping the defense to overcome CID's objection to releasing part of a case file. Assuming the TC is complying with both the letter and spirit of discovery as set forth in Article 46, UCMJ, excessive delay on the part of the defense will seldom be justified or granted by the court.

There are several likely explanations for the rapidity of deployed courts-martial. In a deployed environment, those JAs assigned to military justice duties, including defense counsel, can focus exclusively on military justice, if their SJA and brigade superiors put a priority on these duties (the author is not suggesting that every JA be focused on military justice, but only that those judge advocates assigned to military justice duties be permitted to perform those duties). Also, diligent TCs realized that time was short, and that they had none to waste. As units are only in theater for a year, effective deployed military justice practitioners do not sit on their laurels but are constantly preparing for the next case. Also, personnel in a deployed environment typically work seven days a week and often late into the night without any family obligations, and this probably had a lot to do with the expedited timelines. As for particular practices during OIF 10–11, the author believes that III Corps' trial-focused practice contributed to the expedited timeline.

During OIF 10–11, the III Corps military justice perspective was always focused on the contested trial. If III Corps referred a case, the working assumption among the TCs was that it would go to trial before members and that the defense would aggressively contest every aspect of it. III Corps was open to offers to negotiate and entered into pretrial agreements, but very seldom initiated plea negotiations with the defense. Counsel prepared for the contested case from day one, rather than getting into the contested mindset only after negotiations broke down. A trial-focused practice encourages decisiveness. It is a litigator's nature to want as much information as possible. Without a self-imposed practical urgency, this compulsion for thoroughness can result in unwarranted delays and inefficiency. Often, a conviction and sentence on one charge earlier is better for good order and discipline than conviction and sentence on more charges later on. The trigger for referral should not be, "Do I know everything there is to know?" but "Do I have admissible evidence supporting both guilt beyond a reasonable doubt and a sentence based on the gravamen of the misconduct?" This article does not suggest a reckless approach to charging, but a deliberate speed driven by competence and experience-based judgment.

Likewise, with trial-focused practice, decisions are never made based on perceived bargaining leverage. In a referral decision, a plea-focused approach might hold an unnecessary Article 32 and refer borderline misconduct to a GCM in the hopes of getting a deal for a SPCM referral. A trial-focused practice refers the case according to the sentence the Government hopes to get, regardless of what the defense might do, and if the right sentence is borderline between GCM and SPCM, favors SPCM referral because it is faster. This avoids abdicating control over the prosecution to the defense and discourages speculation and wishful thinking that can slow down the decision-making process. The trial-focused practitioner wants to get to trial as quickly as possible and anticipates a full contest before members.

As an example, consider the referral decision in *United States v. Pemberton*.[62] The accused's crimes were at the lower end of the sexual assault spectrum: offending officer and enlisted women by trying to kiss them, exposing his genitalia to female officers in his office, grabbing one woman's hand and putting it on his genitalia, and fondling. He was a 1SG and eligible for retirement. This increased the effect of any punitive discharge, a point the panel would

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The average time for the contested judge alone special courts-martial was 41 days.

*United States v. 1SG Pemberton (III Corps): Art. 120; SPCM; Pref: 20 Dec. 2010, Trial 24 Jan. 2011 (35 days)
*United States v. PFC Rounds (III Corps): Art. 92; SPCM; Pref: 15 Dec. 2010, Trial: 16 Jan. 2011 (32 days)
*United States v. SPC Bennett (III Corps): Art. 92; SPCM; Pref: 20 Nov. 2010, Trial: 15 Jan. 2011 (56 days)

[60] The usual squabbles between defense counsel and CID sometimes occurred, such as CID's refusal to provide a confidential source file to the defense, but after considering the arguments for confidentiality (especially since the source was already well known), the trial counsel obtained a court order from the judge requiring CID to comply with the defense request.

[61] "Thus the presence of courts-martial in the combat zone was more a factor of an offender's cooperation with the Government than an offense's impact on the mission." Rosenblatt, *supra* note 7, at 20.

[62] *See supra* Part III.A.1 and *infra* Part IV.A.

doubtless consider, though it also increased his guilt. Some jail time was definitely appropriate, but probably no more than a few years. From a military justice perspective, the most important aspects of punishment were some jail time and a punitive discharge. Balancing all this, the decision was made to refer the case to SPCM. This avoided the need for an Article 32 investigation and shortened the timeline. III Corps referred the case to trial on 24 December 2010, less than three weeks after the misconduct first arose. Private[63] Pemberton was both in jail and under sentence to a bad conduct discharge by 22 February 2011. A plea-focused approach might have held out for a GCM referral, waited until mid-January for an Article 32 investigation, suffered further delays from the Corps TOA, and not seen trial before April or May, by which time the accused's unit and brigade would have also redeployed, possibly requiring the whole process to start over in the rear under a different GCMCA.

United States v. Ruffin further exemplifies both trial-focused practice and the speed it brings to trying cases in theater. In early October 2010, Ruffin's brigade began investigating him for using and distributing Spice.[64] This occurred at a FOB with only one brigade headquarters and hardly any law enforcement assets (primarily a couple of MP officers, one of who was later court-martialed[65]). Fortunately, the brigade had a motivated TC, who actively ensured the investigation was completed both thoroughly and quickly. On 6 November, the command preferred charges against the accused. On 18 November, the case was tried. This was because the military justice practitioners involved stayed focused on the case, spent no time on speculative and compromising negotiations with the defense, quickly went from investigation to preferral and referral, and requested the next available trial date (to which the defense concurred). This shows the value of a strong investigation that might suggest to the defense that the facts will only get worse with time.

D. "Ownership" of Cases is Critical

Successful execution of the commander's decision to court-martial a Servicemember depends largely upon the will of the individual TC. It is therefore imperative that a specific TC and a specific OSJA take ownership of the case. Loss of ownership is one of the problems inherent in sending cases to the rear for trial. Taking ownership of cases is especially important nowadays, at least in the Army, with modular headquarters and cross-leveled reserve component members. Trial counsel must be ever vigilant lest they fall into the trap of considering their own units' cases as "organic" cases and down trace cases from the modular battalions as not their own, and so of lower priority. The deployed TC should be eager to take ownership of cases as well as try them.

Overlapping and shifting jurisdictions are common in a deployed environment but, properly handled, they do not impede effective deployed MJ. Any confusion in jurisdiction can be overcome through coordination between military justice practitioners to establish ownership of the case. *United States v. 1LT Wilson* illustrates this point. First Combat Aviation Brigade, or the Enhanced Combat Aviation Brigade (eCAB), as they were also known, was the only aviation brigade headquarters in Iraq from June 2010 through the departure of III Corps. Lieutenant Wilson was a mobilized National Guard MP cross-leveled to another National Guard unit for purposes of the deployment to Iraq. After cross-leveling and mobilization, he finally ended up serving as provost marshal for FOB Taji, a geographically large but infrastructure-poor FOB. As would later become apparent, making this criminally-minded Servicemember the provost marshal was like setting the fox to guard the henhouse. One night in November, a small retail store on the FOB, owned by Iraqis and operated by foreign nationals, was robbed. The perpetrators broke into the store and stole a flat screen television and three digital video projectors. The next morning, the store manager went to the Provost Marshal's Office (PMO) to file a complaint. Lieutenant Wilson took the complaint and went to the crime scene to "investigate." The manager thought it was odd that 1LT Wilson asked for window cleaner and proceeded to wipe the window clean. The accused would later admit that he and an NCO had broken into the store and stolen the goods.

First Lieutenant (1LT) Wilson had deployed with a unit that apparently felt little ownership over him, because he had been cross-leveled to their unit for the deployment and, once in theater, had been moved to a FOB far from the rest of them. This is not an uncommon in today's reserve deployments. 1LT Wilson's unit was only two weeks from redeployment when suspicion fell on him, and the PMO where he worked fell under 1st Armor Division while his NG brigade fell directly under III Corps. When the investigation began, without coordinating with the military justice personnel at III Corps or 1AD, the NG brigade reassigned him to its HHC, thus changing his MJ ADCON chain from 1AD to III Corps. The brigade then redeployed but left 1LT Wilson behind. The case was investigated partly by CID, partly by MPs, and partly by a 15-6 investigator.

The TC for the 1st Combat Aviation Brigade (CAB) – which never owned the accused, but which was located near the scene of the crime on Taji—took control of the case, even though it fell outside his unit. He managed to coordinate between all the different parties to make sure the case did not fall through the cracks—in other words, he took ownership of the case, which was subsequently tried on the merits. By agreement with his own commander and the Chiefs of Justice for III Corps and 1st AD, Wilson was assigned to 1st CAB, but set to work at the Mayor's Cell on

[63] Formerly "First Sergeant."

[64] *See supra* note 2 and accompanying text.

[65] *Infra* Part III.D (discussing United States v. Wilson).

Victory Base Complex (i.e., away from the scene of the crime).

Once ownership was established, the 1st CAB TC set to work coordinating the various investigations. The USF–I assigned an additional TC to the brigade to assist. Importantly, counsel did not wait for the military police, CID, or the unit IO to close out their investigations, but conducted their own pretrial witness interviews, drafted charges, and exercised best practices by arranging the appointment of an Article 32 officer before preferral. Despite the serious nature of the misconduct, the need for coordination to get solid ownership, and the meticulousness of counsel's approach, charges were preferred within weeks of the misconduct arising, and the accused was in jail and pending discharge within two months. It is hard to envision a jurisdictional situation messier than *Wilson*'s, but the case demonstrates that JAs and commanders can work through such issues and still do swift justice.

Ownership and jurisdictional issues are of primary concern in joint justice. The five joint courts-martial conducted in Iraq during OIF 10–11 were all referred by Special Operations Command (SOCCENT).[66] Out of the five accused, two were Sailors[67] and three were Soldiers. Once SOCCENT had committed to trying the cases in theater, the USF–I OSJA MJD provided assistance. This included provision of an additional TC, court reporters, and courtrooms in three of the cases as well as coordination between the III Corps and SOCCENT commanders to make III Corps panel members "available" for panel selection by the SOCCENT commander.[68] The practice of joint justice in theater also included coordinating for Air Force TC and Article 32 officers to serve on cases in which the accuseds were Army Soldiers and conducting the full range of military justice actions at the behest of the USF–I senior element commanders. In May 2011, in the case of *United States v. HM3 Allen*, NAVCENT transferred jurisdiction of a Sailor to an Army GCMCA in Afghanistan. It is the author's understanding that the case was tried by an Army panel with Navy defense counsel, Army TC, and an Army military judge.[69]

[66] *See supra* note 3.

[67] The two Sailors represented two of the three "Navy Seals" cases which received a fair amount of media coverage at the time. *See 2nd Navy Seal Cleared in Iraq Abuse*, WASH. TIMES, Apr. 23, 2010, at http://www.washingtontimes.com/news/2010/apr/23/us-clears-2nd-navy-seal-iraqi-abuse-case/. The three Army Soldiers cases were *United States v. Warren* and its two companion cases, *United States v. Shipley* and *United States v. Ferrer*. *See infra* Part III.B.

[68] MCM, *supra* note 22, R.C.M. 503(a)(3) ("A convening authority may detail as members of general and special courts-martial persons under that convening authority's command *or made available by their commander* . . . .") (emphasis added).

[69] Toman e-mail, *supra* note 23; Hackett Telephone Conversation, *supra* note 23.

III. Managing the Logistics of Deployed Court-Martial Practice

The remainder of this article focuses on logistical problems involved in deployed court-martial practice, and how these problems do not prevent effective deployed military justice.

A. Handling Modularity and Rapid Turnover of Units

Rapid turnover of units refers to the phenomena where unit headquarters and their subordinate units redeploy from theater (and demobilize in the case of RC units) on different time schedules. Modularity is the related concept whereby different Army unit headquarters and subordinate units are paired together for purposes of deployment only, thus they do not have any organic relationship prior to or after deployment.[70] During OIF 10–11, despite the dizzying turnover of units, rapid unit turnover and modularity did not seriously obstruct deployed court-martial practice. The typical unit was deployed between ten months to a year. During this period, all Army GCMCA's turned over at least once, including the Corps and all three division GCMCA's. While this turnover of headquarters did require reasonable planning and communication, the effort required fell well within what is normally expected of competent military justice practitioners.[71] It might be tempting to eliminate cases spanning the TOA of two units by setting a fixed date and declaring that past this date, the departing unit will no longer refer cases in theater. III Corps, however, continued to conduct courts-martial through TOA, referring the last case about two weeks before TOA, and trying its last case within a week of TOA. This approach proved successful and ensured there would be no backlog of cases for the incoming Corps headquarters.

United States v. Bjork and *United States v. Pemberton* demonstrate that even if a case ends up spanning a GCMCA's TOA, it is not a serious impediment to court-martial practice. *United States v. Bjork* spanned the I Corps to III Corps TOA. When III Corps arrived in theater, the case had already been referred to a GCM by I Corps. Significant motions practice had already taken place and the military judge had ruled on several question. Withdrawing the case from I Corps and re-referring the case under III Corps would have meant starting over since III Corps was not a "successor" GCMCA to I Corps, but simply a different

[70] *See* U.S. DEP'T OF ARMY, FIELD MANUAL–INTERIM 3-0.1, THE MODULAR FORCE intro. (28 Jan. 2008) [hereinafter FM 3-0.1].

[71] Rosenblatt, *supra* note 7, at 18, argues that confusions over which command had UCMJ authority over a Soldier made deployed military justice practice difficult. In fact, as long as *a* valid GCMCA properly refers a case, the referral will withstand scrutiny, whether or not the accused was administratively controlled (ADCON) by that GCMCA. MCM, *supra* note 22, R.C.M. 601(b) cmt. In any case, the USF-I MJD updated the theater-wide organization chart as often as changes required, thus providing clarity on jurisdiction throughout the theater.

GCMCA now deployed to theater.[72] There is no legal mechanism short of withdrawal and referral to transfer from one GCMCA to a non-successor GCMCA a case which has been referred and is not yet post trial. Withdrawing and referring this post-referral, post arraignment case in which extensive motions had been argued and legal rulings already issued would have necessitated new motions hearings with no guarantee that the military judge would have adopted his prior rulings – this also would have led to additional delay. Finally, at the time of the TOA, March 2010, the defense was already arguing speedy trial and would soon request additional delays. A withdrawal and closing out of the first court-martial record simply invited too much uncertainty about the future of the case. Instead, the commands agreed that the case would remain referred under I Corps despite I Corps' redeployment and for the incoming III Corps personnel to assist I Corps in trying the case left in theater. Through the process of picking a new panel and responding to defense requests to the GCMCA, the USF–I OSJA MJD continued to coordinate with the I Corps SJA and CoJ at Joint Base Lewis-McChord. The panel selected by I Corps withstood an eve-of-trial defense motion challenging it, and a week later, the panel returned its findings and sentence. Later, III Corps completed the record of trial and sent it back to I Corps for post-trial processing.

United States v. Pemberton, discussed above, spanned the III Corps to XVIII Airborne Corps TOA. The misconduct came to the attention of the USF–I MJD when III Corps was within seventy days of TOA. Proceeding with a III Corps referral in this situation *might* have created some minor complications, but waiting until the TOA to pass the case to the XVIII Airborne Corps for possible referral *would undoubtedly* have led to nearly three months of delay, and probably more, as no motions could be argued prior to XVIII Airborne Corps arriving and it would have taken the new Corps at least a week to get their bearings before beginning to refer cases and only then could the case have been docketed. III Corps therefore referred the case to trial notwithstanding the imminent redeployment of III Corps. The case was docketed for 24 January 2011, with III Corps set to redeploy in February. Unexpectedly, a few days before trial, not one but two important Government witnesses had to go on emergency leave because of deaths in their families.

Because 9 February was the scheduled TOA from III Corps to XVIII Airborne Corps as ARFOR-Iraq, a decision point had been reached. First, the Government could withdraw the case from the III Corps GCMCA, turn it over to the XVIII Airborne Corps and wish them luck. Like the prospect of withdrawing *Bjork* from I Corps, this would have started the entire process over, with potential defense delay requests. If the start of the trial had been delayed to wait for the witnesses to come back from emergency leave, it is quite possible that other Government or defense witnesses would then have to go on emergency leave. A second choice was just to start the case as scheduled and recess court to wait for the other witnesses to get back from emergency leave, with the likely result that the case would span the TOA's of the two GCMCA's. Because the remaining witnesses were present and a date was already on the docket, the Government decided to go ahead and start the case on 24 January, hear from the witnesses who were then available in theater, and request a continuance until 22 February to complete the trial. The military judge agreed. III Corps, but not the lead trial counsel, redeployed before the second session of trial, but the transition was seamless. XVIII Airborne personnel (including a new assistant trial counsel) supported the rest of the trial, which resulted in a conviction, and sent the record back to III Corps (now redeployed to Fort Hood, Texas) for post trial processing. *Pemberton* and *Bjork* demonstrate that rotation of higher headquarters need not delay or stop military justice actions.[73]

B. Witness Production

1. The Witness Production Burden: Distinguishing Fact from Fiction

One prevalent criticism of deployed courts-martial is that the burden of witness production precludes all but the

[72] *See* MCM, *supra* note 22, R.C.M. 601(b) (commander may refer charges to a court-martial convened by himself or a predecessor); United States v. Allgood, 41 M.J. 492, 495 (C.A.A.F. 1995) (upholding right of successor commander to refer case to court-martial convened by his predecessor). III Corps could not be considered a "successor" to I Corps in terms of RCM 601 because I Corps continued to exist as a GCMCA even after it redeployed. Prior to the creation of USF–I, MNC–I had been a permanent GCMCA in theater, so that each successive Corps Commander who took up the MNC–I Command was a successor to his predecessor. This situation changed when the numbered Army Corps took on responsibilities as the Army Force–Iraq (ARFOR) responsibility in January 2010. *See infra* notes 151–51 and accompanying text (discussing the role of the ARFOR).

[73] Citing AAR from deployed judge advocates, Major Rosenblatt suggested that modularity can serve as an impediment to deployed court-martial practice: "Modularity, a 'plug and play' concept that emphasizes interchangeable units rather than organic divisions and brigades, 'makes all areas of military legal practice difficult' because hierarchies and jurisdictions constantly shift as various units enter and exit theater." Rosenblatt, *supra* note 7, at 18 (citing an AAR from a deployed judge advocate). As suggested by the OIF 10–11 experience, upon a second look, modularity is not that significant in the overall scheme of court-martial practice. If, after reviewing the OPORD and unit taskings, military justice practitioners are still uncertain of the precise ADCON chain of the accused Servicemember, the involved military justice practitioners can simply coordinate with one another and their respective commands and execute an appropriate memorandum clarifying the ADCON chain in that particular instance. *See* U.S. DEPT OF ARMY, REG. 27-10, MILITARY JUSTICE para. 5-2(b)(1)(3 Oct. 11) [hereinafter AR 27-10] ("When appropriate, Army units, activities, or personnel may be attached to a unit, installation, or activity for courts-martial jurisdiction and the general administration of military justice."). Even if the memorandum is between the wrong parties, court-martial jurisdiction is still not defeated because referral authority is broader than ADCON authority. As long as a legitimate convening authority refers the case, it does not matter that the accused was not actually ADCON to that GCMCA's headquarters. *See* MCM, *supra* note 22, R.C.M. 601 ("Any convening authority may refer charges to a court-martial. . . . ").

most limited court-martial practice in a deployed environment.[74] During OIF 10–11, this was far from true. Moreover, during his 2005 deployment to Iraq as a defense counsel, the author saw no dearth of CONUS witnesses testifying in theater, including expert witnesses and civilian family members. In no III Corps case during OIF 10–11 did the Government feel compelled to "bargain" with the defense to waive witness production.[75] Out of the eighteen OIF 10–11 cases discussed in this article, only two of the twelve contested cases required extensive witness production from CONUS. These cases—*Bjork* and *Warren*—involved accused officers facing potential life sentences. For the other contested cases, the defense requested few if any CONUS witnesses. Because most of the cases were tried expeditiously, they involved mostly in-theater witnesses. Even in cases with significant CONUS witness production, like *Bjork*, trials could and did take place.

Witness production in theater may appear daunting, but need not be. [76] The TC may receive a long listed of requested witnesses from the defense and imagine that the court is actually going to order the government to produce them all. This idea paints a picture of the Government as operating at the mercy of the defense, a picture the defense is all too eager to encourage. It may pressure the TC into recommending alternate disposition to the command. In reality, while the witness production process provides far more due process to an accused than most civilian jurisdictions, it still places only a reasonable burden on the government to produce witnesses.[77] If the command has the will to prosecute, it can meet that burden.

Furthermore, overseas witness lists often shrink drastically before trial. By the time the court-martial takes place, all sorts of reasons have usually coalesced to limit the number of witnesses actually required to be produced—this is not just a feature of the deployed environment, but rather a phenomenon that occurs in garrison trials as well. For instance, out of all the witnesses first requested by the defense in its initial enthusiasm (usually under the pressure of a deadline to submit the production request), some civilians will decline to attend trial in a combat zone, just as they sometimes decline to travel to Korea or Japan, and cannot be forced to come.[78] In such cases, if there is an adequate substitute to live testimony, the defense must settle for the alternative or forego the testimony.[79] Certainly in the case of "good Soldier testimony," adequate substitutes will almost always be available for a witness who is truly unavailable. Sometimes the defense will have failed to speak with witnesses before requesting them, and once it does, decides not to call them after all.

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[74] *See* Rosenblatt, *supra* note 7, at 17.

[75] In one or two cases, offers to plead (OTPs) included a limitation on CONUS witnesses, but from listening to the providence inquiries, the author gathered that the defense had not intended to call any overseas witnesses in those cases, even without the waivers.

[77] Whoever asserts that the due-process requirements of the current court-martial system precludes effective combat-zone practice, see, e.g., Westmoreland & Prugh, *supra* note 1 (decrying the "civilianization" of the military justice system) is advocating for an anachronism. The extensive due process requirements of the modern system are appropriate to the way that America now wages wars. One hundred years ago, Soldiers could not fly back from a Southwestern Asian combat zone to CONUS for two weeks of leave. Now, this is not only common, but expected as of right. Even servicemembers from the smallest combat outposts get two weeks of annual leave almost anywhere in the world, with transportation into and out of theater arranged for and paid by the government. In light of this demonstrated ability to readily move persons in and out of theater, it (rightly) becomes difficult to argue that the government cannot produce virtually any necessary witness who is willing to be produced. The point is that the world in which the modern UCMJ exists is not the world of the Articles of War. Given modern transportation and logistical systems, it is not only possible to meet the most stringent of witness production burdens, but it is entirely reasonable given the way America fights its wars.

[78] "A subpoena may not be used to compel a civilian to travel outside the United States and its territories." MCM, *supra* note 22, R.C.M. 703(e)(2)(A), discussion. The MJ practitioner should still try diligently to persuade the witness to agree to come, and should document all such efforts. Paralegals should keep a log of all their witness contacts. This documentation may be needed to litigate a defense motion challenging the Government's efforts to produce the witness.

[79] The CAAF gives a straightforward explanation of the applicable law.

> We have held that "[a] trial may proceed in the absence of a relevant and necessary witness if that witness is not amenable to process." *United States v. Davis*, 29 MJ 357, 359 (CMA 1990) (citing Mil. R. Evid. 804(a) and RCM 703(b)(3), Manual, *supra*). The issue as to whether the prosecution has satisfied its duty to produce under RCM 703 "'is a question of reasonableness.' The ultimate question is whether the witness is unavailable despite good-faith efforts undertaken prior to trial to locate and present that witness." *Id.* (quoting *Ohio v. Roberts*, 448 U.S. 56, 74, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980)). Once the unavailability of a witness is established, RCM 703(b)(3) provides:
>
> > *Unavailable witness.* Notwithstanding subsections (b)(1) and (2) of this rule, a party is not entitled to the presence of a witness who is unavailable within the meaning of Mil. R. Evid. 804(a). However, if the testimony of a witness who is unavailable is of such central importance to an issue that it is essential to a fair trial, and if there is no adequate substitute for such testimony, the military judge shall grant a continuance or other relief in order to attempt to secure the witness' presence or shall abate the proceedings, unless the unavailability of the witness is the fault of or could have been prevented by the requesting party.

United States v. Baretto, 57 M.J. 127, 132-33 (C.A.A.F. 2002); *see also* United States v. Brown, No. 20010461, 2006 WL 6624692 at *4 (A. Ct. Crim. App. Oct. 27, 2006). In other words, as long as the government is willing to work with the defense to provide an adequate substitute to live testimony, such as depositions or stipulations, then it is very unlikely that a military judge will be legally compelled to abate the proceedings. Only if the testimony is essential to a fair trial, *and* there is no adequate substitute (very unlikely in the case of "good soldier" witnesses), will the military judge be required to grant a continuance or abate the proceedings.

2. Exercising Procedures to Clarify the Witness Production Requirement

An unreasonable witness request will not become manageable on its own. To get the benefit of the reasonable burdens imposed by the military justice system, the TC must be proactive. First, he must hold the defense scrupulously to rule-based and court-imposed deadlines. He must ask the defense for its production request instead of passively waiting for it. Upon receiving the request, the TC must *immediately* interview the witnesses, telephonically if necessary, and either grant or deny them.[80] If the Government denies a requested witness, it must prod the defense to comply with the Rules for Court and either file a motion to compel production or concede nonproduction.[81]

By exercising due diligence to make rapid, best-judgment decisions on which witnesses to produce, the TC can greatly expedite the process of seeing who must really be produced. The TC should avoid both a reflexive reaction to deny production and an ambivalent impulse to approve all the witnesses. The TC must be thoroughly aware of the differences between the requirements for personal production of merits witnesses, sentencing witnesses, and witnesses on interlocutory matters. For merits witnesses, the TC should carefully consider whether the defense-proffered synopsis shows that the witness is relevant, necessary, and non-cumulative.[82] If the TC's interview with the witness establishes these things, it still may be better to go ahead and produce the witness instead of litigating the adequacy of the defense counsel's summary. The predisposition should be to produce the witness. For sentencing witnesses, where there is no constitutional right to confrontation and the defense's right to production of witnesses is less broad, alternative forms of testimony are likelier to be accepted by the court.[83] For motions hearings, production of CONUS witnesses will almost never be required so long as an appropriate alternative means of testimony is available.[84] During OIF 10–11, some civilian witnesses testified by VTC, some by telephone, some through affidavits and letters, and several even testified through Skype®.[85]

While cases should always proceed with a sense of purpose, it critical in a deployed environment to move them along expeditiously. Regardless of whether the Government has denied production of a witness and regardless of how the Government anticipates the judge will rule on defense motions to compel, the TC should initiate the process to produce the witness. This includes contacting the witnesses, arranging invitational travel orders (in the case of civilians), and taking all those steps which are more easily cancelled than initiated at a later date. A competent, proficient paralegal NCO knows how to do this. After the judge rules on any motions to compel, needless orders can be cancelled.

3. Logistics of Witness Production

Whenever a witness is being produced, whether from the same FOB or from CONUS, information flow between the MJD and the witness is critical. The practitioner should make early contact with the witness and keep him informed throughout the process.[86] Most contact about travel and logistics should be conducted by military justice paralegals.[87] The USF–I OSJA MJD created a standard informational brochure for civilian witnesses. It included a declassified map and information about Victory Base Complex. Such products already exist at J9 (Public Affairs) for civilian MWR visits and can easily be adopted for court-martial witness.[88]

Funding and country clearances are solvable issues for deployed witness production. Country clearances procedures vary from time to time but are usually straightforward. These Pentagon publishes these procedures on its website.[89] Once in theater, military justice

[80] MCM, *supra* note 22, R.C.M. 703(c)(2)(D) ("The trial counsel shall arrange for the presence of any witness listed by the defense unless the trial counsel contents that the witness' production is not required under this rule. If the trial counsel contends that the witness' production is not required by this rule, the matter may be submitted to the military judge.").

[81] *See* RULES OF PRACTICE BEFORE ARMY COURTS-MARTIAL 2.2.3, *available at* https://www.jagcnet.army.mil/Portals/USArmyTJ.nsf/(JAGC NetDocID)/ Rules+of+Court?OpenDocument .

[82] MCM, *supra* note 22, R.C.M. 703(b)(1).

[83] *See* United States. v. McDonald, 55 M.J. 173, 177 (C.A.A.F. 2001); MCM, *supra* note 22, R.C.M. 1001(e)(2).

[84] According to RCM 703(b), "[o]ver a party's objection, the military judge may authorize any witness to testify on interlocutory questions via remote means or similar technology if the practical difficulties of producing the witness outweigh the significance of the witness' personal appearance. . . ." MCM, *supra* note 22, R.C.M. 703(b); *id.* MIL. R. EVID. 104.

[85] The Skype witnesses were Soldiers located in theater who were needed as witnesses for a sexual assault case taking place at Joint Base Lewis-McChord (JBLM), Washington. The JBLM trial counsel and Chief of Justice coordinated with the USF–I OSJA MJD to arrange video teleconference (VTC) testimony. Unfortunately, JBLM did not have secure VTC in the courtroom. The JBLM OSJA suggested using Skype. The deployed unit, eager to avoid sending additional Soldiers to the rear, sought and received an exception to policy from the J6 (information management) section to use Skype on the government network and plug a web camera into the USB port. The example demonstrates the resourcefulness and flexibility required of the deployed judge advocate. It also verifies the old adage, "Where there's a will, there's a way."

[86] If there are multiple witnesses, standard e-mails should be sent to each witness individually, not in a group, lest the witnesses all have one another's names and e-mail addresses and start contacting one another.

[87] Victim-witness liaisons, who often perform this service in garrison, are typically unavailable in theater.

[88] These products also have the added benefit of already having been vetted for security purposes.

[89] *Country Clearance Information*, DOD FOREIGN CLEARANCE GUIDE, https://www.fcg.pentagon.mil/docs/ku.cfm#PERSONNEL (last visited Feb. 20, 2012).

practitioners should ask their higher echelon JA's for the most updated procedures. During OIF 10-11, it worked as follows: When clearance was requested, someone on the joint staff (for USF–I, in the J3 section), will send an e-mail to the sponsoring deployed point of contact (usually the CoJ, TC, or paralegal) and request the justification for the person to enter theater. During OIF 10–11, a simple explanation that the person was required as a court-martial witness was adequate. Even during these times of restricted travel (for example, during the Iraqi elections), all court-martial witness requests were approved.

Funding also was never a problem during OIF 10–11. Funding for witness travel typically comes from the GCMCA that referred the case to trial.[90] All the cases tried directly under the III Corps GCMCA were funded through the USF–I J8. To secure a line of accounting for witness production required a request by an O-6 (the SJA) and approval by an O-7 (the Deputy Chief of Staff for USF–I). Early in the deployment, the USF–I chief paralegal for military justice coordinated with the J8 to arrange an alternative, streamlined procedure. Thanks to a letter of delegation from the deputy Chief of Staff, the USF–I CoJ could make the funding request and the III Corps SJA (an O-6) could approve it. Military justice practitioners in a deployed environment should consider similar steps.

A more detailed description of how witnesses were brought into theater during OIF 10-11 can be found in Appendix D.

4. Depositions as an Alternative to Personal Presence of Witnesses

As noted earlier, there currently exists no mechanism to compel civilians to involuntarily travel OCONUS for *purposes* of testifying at a court-martial, but the Government is only required to make reasonable efforts to get the witness to come to theater. Likewise, the Confrontation Clause precludes most substitutes for the personal presence of witnesses called by the government. A CONUS deposition may be the only option. In the three such CONUS depositions ordered during OIF 10–11,[91] the Government found that they entailed neither excessive burdens nor extensive delays.

Rule for Courts-Martial 702 permits the taking of depositions. While the Government does not have subpoena power to compel a civilian witness to travel OCONUS for trial, the Government can compel a witness to attend a CONUS-based deposition.[92] Depositions are easy to take, can be requested by either party,[93] and can be ordered by the military judge or by any convening authority (including summary and special courts-martial convening authorities) who currently has the charges for disposition.[94] In other words, the deposition can be ordered even before the case gets to the GCMCA. Procedurally, the ordering authority simply orders the deposition and appoints the deposition officer.[95] If the TC is the requesting party, then the TC gives notice of the actual time, place, and date of the deposition to the defense and the deponent.[96] The deposition should be audio and video recorded.[97] Depositions require the presence of trial and defense counsel and the accused, unless waived by the defense.[98]

A deposition is not admissible unless the deponent is unavailable to testify in person.[99] To use a deposition, a party must show by a preponderance of the evidence that it took reasonable steps to procure live testimony but was unable to do so.[100] Thus, the military justice practitioner must document his efforts (and his paralegals') to persuade a civilian witness to travel, using memoranda for record (MFR) and saving e-mails. Even after a witness has refused to come, the Government should still send invitational travel orders indicating that all transportation arrangements have been made. Military justice paralegals must be prepared to testify regarding unavailability. In both cases involving CONUS depositions during OIF 10–11, military justice personnel had to testify about their efforts to produce the witnesses. In both cases, the depositions were admitted over defense objections.

An example from OIF 10-11 is *United States v. CW2 Brown.* In that case, the accused turned down NJP. While reviewing the accused's OMPF, the TC noticed discrepancies in the accused's college transcript and e-mailed it to the university registrar. The registrar replied that the transcript was patently a forgery. The relevant officer in charge of warrant officer accessions confirmed

[90] *See* AR 27-10, *supra* note 73, para. 6-5(c) (requiring commanders to fund TDS travel in support of operational deployments).

[91] Two in *United States v. CPT Bjork* and one in *United States v. CW2 Brown.*

[92] MCM, *supra* note 22, R.C.M. 703(e)(2)(A), discussion ("A subpoena may not be used to compel a civilian to travel outside the United States and its territories."), R.C.M. 703(e)(2)(B) ("A subpoena . . . may be used to obtain witnesses for a deposition. . . .").

[93] *Id.* R.C.M. 702(c).

[94] *Id*. R.C.M. 702(b).

[95] *Id*. R.C.M. 702(d).

[96] *Id*. R.C.M. 702(e).

[97] During OIF 10–11, the USF–I OSJA MJD coordinated with USF–I's Public Affairs Office (PAO) for videotaping services for in-country depositions.

[98] MCM, *supra* note 22, R.C.M. 702(g)(1)(A).

[99] Depositions are admitted under the *former testimony* exception to the hearsay rule. *Id.* MIL. R. EVID. 804(b)(1). This exception requires a finding that the declarant, or deponent, is unavailable to testify in person.

[100] *See id.*

that CW2 Brown had submitted this transcript as part of his warrant officer application packet. These facts supported a charge of Procuring an Appointment by Fraud.[101] The TC needed the testimony of the university registrar to prove the charge. Confrontation rights generally preclude alternatives to live testimony for Government witnesses over the objection of the defense (contrast this with the compulsory production requirement for defense requested witnesses).[102] Unfortunately, the civilian registrar, despite multiple e-mail invitations and phone calls, declined to come to Iraq. When dealing with an unavailable witness in a confrontation clause context (i.e., a Government witness), a deposition is likely the only means of securing the testimony for the court short of defense collaboration. This was just such a case. The process proved expedient and did not burden the command.

Despite the requirement that without a waiver, both defense counsel and the accused must be present at the deposition to satisfy the accused's confrontation rights, the *Brown* case demonstrated that this process was expedient and did not burden the command. The TC did not have to travel to the CONUS deposition location. Using the internet, he found the OSJA closest to the witness. He then called that office and spoke with a fellow JA who agreed to serve as deposition officer and provide a local TC for the deposition. The deployed TC worked with the witness over the phone, prepared a list of questions, and thoroughly briefed the CONUS TC. As for the defense, they had the choice to attend the deposition in person or waive personal attendance and their Sixth Amendment right to confrontation. Counsel and accused elected to attend. Under Army Regulation 27-10, the convening authority paid for the travel expenses of the accused and defense counsel. Doing so was as simple as providing a line of accounting (LOA) to their DTS accounts.[103] This took only two days (thanks to a skilled legal administrator) and the defense team was on a plane within five days. Within two weeks, less than the time it takes for one Servicemember to go on leave from theater and return, the entire deposition process was complete.

At trial, the defense contested both the authenticity of the deposition and the unavailability of the deponent. Fortunately, the Government had thoroughly documented its efforts to produce the witness, including an acknowledgement from the witness that he had received the Invitational Travel Orders and air travel reservations, but still refused to travel to Iraq. Over defense objection, the deposition was admitted, trial was not delayed, and the accused was convicted and sentenced to both confinement and a dismissal. A more junior accused may well have required an escort to ensure he made it to the right place. In such cases, the command may want to pair the accused with Soldiers traveling home on leave during the appropriate time period.

5. Unique Problems with Reserve Component Accused and Witnesses

One of the more curious sworn statements that came to the attention of the USF–I OSJA MJD was written by a National Guard accused. According to this statement, his co-conspirator said something like, "We're on Title 10 status, but once we get back to the states, I'll be on Title 32 status and they can't get me for [anything] I did when I was over here." Less than forty days after making this statement, the declarant was sentenced in theater by a GCM to twenty-one months in confinement and a dismissal.[104] There is no good reason why Reserve Component (RC) members who commit crimes while deployed cannot be court-martialed in the combat zone. Reserve component members, both NG and Army Reserve, can be extended on active duty and kept in theater with GCMCA approval. The unit simply needs to send up a request to the OSJA. The MJD should process it through the GCMCA and Human Resources Command.[105]

While extending on active duty any accused RC member in theater who is pending court-martial as an accused is easy, there is no clear authority to extend or recall RC members solely for witness duty.[106] The discussion to

[101] UCMJ art. 83 (2008).

[102] *See* Crawford v. Washington, 541 U.S. 36, 50–51 (2004); United States v. Blazier, 68 M.J. 439, 441 (C.A.A.F. 2010).

[103] *See* AR 27-10, *supra* note 73, para. 6-5d.

[104] *See supra* Part III.D (discussing United States v. Wilson).

[105] *See* U.S. DEP'T OF ARMY, POLICY GUIDANCE FOR OVERSEAS CONTINGENCY OPERATIONS para. 11-13(h) (2011) [hereinafter DA POLICY GUIDANCE].

[106] According to the DA Policy Guidance:

> (4) RC Soldiers who are required witnesses for court martial proceedings cannot be involuntarily retained on active duty beyond their scheduled REFRAD date. Rules for Courts-Martial (RCM) 202 and 204 suggests that only an RC suspect may be retained on active duty for the purpose of court-martial. Although RC witnesses no longer on active duty may be subject to subpoena just like a civilian witness UP RCM 703, a subpoena may not be used to compel a person to travel and testify outside of the United States. Efforts should be made by the local trial counsel to stipulate expected testimony and seek alternatives means of testimony.

DA POLICY GUIDANCE, *supra* note 105, para. 11-13(h). One trial team extensively argued an analogous issue during OIF 10–11 at the trial court level. At issue was whether the deposition of a retired Servicemember could be introduced at trial. The Servicemember had declined to voluntarily travel to Iraq for purposes of testifying at trial and the government had taken his deposition CONUS. The defense contended that the deposition was inadmissible because the government could have involuntary remobilized the member for witness duty and thus the member was not "unavailable" within the meaning of Military Rule of Evidence 804. The issue turned on the court's interpretation of 10 U.S. Code § 12301 which permits involuntary activation of retired and demobilized reserve component members "in time of war or national emergency." The court found the witness unavailable. *See* 10 U.S.C. § 12301(a) (2006). A

RCM 703(e)(1) states, "The attendance of persons not on active duty should be obtained in the manner prescribed in subsection (e)(2) [pertaining to production of civilian witnesses] of this rule." In other words, treat demobilized RC members as civilians. If they refuse to travel as civilians or voluntarily remobilize, the Government has no practical method to make them return to theater or even stay there past their Boots-on-Ground (BOG) dates.[107] A necessary and welcome change in the law would be amending 10 U.S.C. § 12301 to allow this. Unless the law is changed, however, other means can be used to get admissible testimony from demobilized RC witnesses.

Most problems with redeploying RC component witnesses are best resolved by trying the case before the witnesses redeploy. The TC must maintain awareness of the redeployment and BOG dates of all witnesses, but especially of RC witnesses. Keep in mind that the scheduled redeployment date is not necessarily the same as the BOG date. The BOG date, as things currently stand, is an absolute deadline by which the individual must be out of theater to be able to demobilize before his 365-day involuntary mobilization has run.[108] The unit's scheduled redeployment date may be weeks or months ahead of the BOG date. These two concepts are often muddled in theater, but the TC must understand and distinguish them. If a witness' live testimony is required in relatively short order, trial counsel can often take advantage of the difference between the BOG date and scheduled redeployment date to hold the witness long enough for trial. This will often constitute enough time for the witness to testify at trial in theater or at least to complete a deposition. For instance, assume that a witness mobilizes on 1 January 2010 and is in theater by 3 March 2010, subtracting the 39 days allotted for demobilization and use of accrued leave, that would give a BOG date (the absolute final date by which the RC member must depart theater) of 23 October 2010 (236 days after arriving in theater). Although the BOG date is 23 October, for operational reasons, the unit may be scheduled to redeploy on 1 October 2010. If the trial is 15 October, the witness can be retained in theater for the trial until 23 October. Do not assume that the scheduled redeployment date is the same as the BOG date. It often is not. During OIF 10–11, the redeployment date could be as long as two months before the BOG date, more than enough time to try almost any court-martial. Even if the witness' National Guard or reserve unit is redeploying, the witness can easily be reassigned to a different unit remaining in theater with appropriate duties pending redeployment. If there is resistance from the redeploying unit, as there often will be, the lower echelon military justice practitioner can coordinate with the higher echelon MJ office to address it.

If the case cannot reliably be tried before the BOG date, the TC should discuss with the witness the need for his testimony and discuss a plan to voluntarily remobilize the witness to return to theater for trial.[109] During this discussion, the TC should get the witness' civilian contact information. During OIF 10–11, state NG authorities enthusiastically worked with USF-I MJD to support *voluntary* remobilizations. It is also a good idea to take the witnesses' depositions prior to their departure, just in case they become unavailable. The Government must not encourage a witness to think that the deposition makes his return to theater unnecessary; such statements by the Government could affect the court's availability finding.

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separate provision of the same statute provides some authority for a fifteen day recall:

> (b) At any time, an authority designated by the Secretary concerned may, without the consent of the persons affected, order any unit, and any member not assigned to a unit organized to serve as a unit, in an active status in a reserve component under the jurisdiction of that Secretary to active duty for not more than 15 days a year. However, units and members of the Army National Guard of the United States or the Air National Guard of the United States may not be ordered to active duty under this subsection without the consent of the governor of the State (or, in the case of the District of Columbia National Guard, the commanding general of the District of Columbia National Guard).

10 U.S.C. § 12301(b) (2006). This authority, however, requires Secretary-level action and only permits recall of up to fifteen days. When using a deposition in lieu of live testimony from a demobilized reservist, the proponent of the deposition must exhaust all avenues of voluntary and involuntary remobilization and be able to present to the court that remobilization is truly not an option.

[107] The Boots-on-Ground (BOG) date is the maximum amount of time involuntarily mobilized servicemembers can remain in theater. The current official BOG policy is as follows:

> Effective 19 Jan 2007, RC units and/or individuals will not be involuntarily deployed to theater for more than 365 days. Unless a Soldier voluntarily extends, the 12-month BOG for RC Soldiers is no longer attainable under the new mobilization policy. RC BOG will be dependent on the amount of pre- and post-mob training a unit or Soldier requires. Therefore, RC BOG will vary by unit. Commanders shall ensure that RC Soldiers are released from theater with enough time remaining on their orders to account for travel from theater, out-process through the RC demobilization process, and to expend their accrued leave. Units/RC Soldiers should leave theater 39 days before their REFRAD/end date (which is the last day of the orders). The 39 days include travel from theater, days spent at the demobilization site, days at home station, and accrued leave. (See sub-paragraph 1-3b above.)

DA POLICY GUIDANCE, *supra* note 105, para. 1-3(d). The BOG must account for the fact that orders can be cut for no more than 365 days and must include time to complete the demobilization process, including travel time from theater (1 days), time at the demobilization station (5 days), time at home state (3 days), and for the Servicemember to expend up to 30 days of accursed regular leave. *See id.* para. 1-3(b).

[108] *See id.*

[109] Reserve Component members may always voluntarily remobilize. *See* 10 U.S.C. § 12301(d).

Instead, the witness should be told that the deposition is not a substitute for his live testimony and that the Government expects him to return voluntarily for trial.

C. Availability of Military Judges

If you build it, they will come. Some have suggested that the unavailability of military judges is an obstacle to effective deployed practice,[110] Operation Iraqi Freedom 10-11 did not reveal any difficulties with the availability of military judges. For the first six months, the Army judge was stationed in Germany but would schedule regular "court weeks" at monthly or bi-monthly intervals in Iraq and Afghanistan, just as Army judges do for Alaska and Hawaii. After the first six months and ever since, an Army military judge has been stationed in Kuwait at Camp Arifjan, and has traveled to both large and small FOBs to hold court in both established and makeshift courtrooms. Out of the eighteen cases discussed in this article, not one was delayed because a military judge was unavailable.

A military judge can preside over courts-martial of servicemembers outside his own branch of service.[111] From 2002 to 2004 in Korea, it was not unusual for a Marine military judge to hear Soldiers' cases referred by an Army GCMCA, and the Army judge in Kuwait has presided over a Sailor's trial in Afghanistan.[112] With several services conducting courts-martial in theater and the potential for Army practitioners to reach back to OTJAG and request additional judge support, military judge support will be no obstacle to deployed practice anytime soon. It is the author's understanding that the U.S. Army Trial Judiciary intends to keep a military judge stationed in the CENTCOM AOR for the present.[113]

D. Access to Defense Counsel

Accused have the right to defense counsel and must be able to communicate with them. During OIF 10–11, three civilian defense counsel[114] represented accused in theater. USF–I experienced no significant problems with getting counsel into theater or ensuring that they could communicate with their clients before they came. Defense counsel issues did not cause any significant delays of court-martial practice during this period, and defense counsel consistently represented their clients zealously

1. Military Defense Counsel

The presence of sufficient Trial Defense Service (TDS) counsel in theater to support a robust deployed court-martial practice was never an issue during OIF 10-11.[115] As of June 2011, the consensus from Iraq and Afghanistan supported the notion that adequate defense counsel support was still the norm in theater.[116] Six military defense counsel were located in Iraq at the end of February 2011. If each counsel could handle eight referred cases at once (depending on the individual counsel's abilities and the types of cases, it could be many more than this), TDS attorneys could carry forty-eight referred cases *at any one time*; the eighteen cases actually tried were well within their capabilities. This robust defense capacity was evident in the fact that TDS assigned two or three counsel to nearly every court-martial, no matter how straightforward the case.[117] The Government did the same, for training purposes. Often, TDS detailed two counsel per administrative separation board.

Naturally, the trial defense service assigns counsel to a particular geographic area based on perceived caseload. This means that if trial counsel are operating in an environment that has not seen much court-martial activity recently, defense counsel may initially be more scarce. Like the situation with military judge availability, this situation will likely correct itself if counsel engage in a robust court-martial practice. Keep referring cases and, if lack of defense counsel becomes an issue, raise it to higher technical JA echelons. For the Army, the US Army Trial Defense Service has the obligation to provide sufficient counsel to do the work, and the author's experience has been that they provide them very effectively.

As for ensuring that counsel can meet with their clients, this is just something that needs to be worked out between the parties. It really is that simple. It is not unreasonable for the Government to ask that some consultation be done by telephone or VTC,[118] though it is important to recognize that

[110] *See* Rosenblatt, *supra* note 7, at 18.

[111] *See* MCM, *supra* note 22, R.C.M. 201(e).

[112] *See supra* note 23 and accompanying text.

[113] E-mail from Major Joshua Toman, Chief of Justice, U.S. Forces–Iraq, to author (July 2, 2011 4:57 EST) (on file with author).

[114] Two civilian defense counsel represented CPT Bjork and a third civilian defense counsel represented a Soldier at an administrative separation board.

[115] This discussion of military defense counsel primarily draws on observations of the U.S. Army's Trial Defense Service (TDS), including the author's assignment as a trial defense counsel for four years, including one tour as deployed defense counsel in Iraq in 2005.

[116] On 25 June 2011, the author had the opportunity to speak at length about this subject by telephone with the Senior Trial Counsel for 10th Mountain Division and the Chief of Military Justice for the Combined Joint Task Force–1 (CJTF–1), representing the vast majority of military justice actions in Afghanistan. The author has been in regular contact with the Chief of Military Justice for USF–I for the past six months. Both Iraq and Afghanistan report that defense counsel access has not been an impediment to court-martial practice.

[117] The Government also had a policy of assigning two counsel per case, but it was solely to spread experience among counsel, not because it was required for more effective representation. On the contrary, in the author's view, in other than complex cases, multiple counsel tend to result in a loss of unity of effort.

[118] For consultations using remote communications technology, it is the government's responsibility to ensure that the client's communications with counsel remain confidential. This often requires that the unit provide a

counsel and client need some "face time" to develop rapport and prepare for trial. Rarely if ever will defense counsel flatly refuse to consult with a client over the phone. Rarely if ever will Government counsel refuse to facilitate in-person meetings between defense counsel and client. Any counsel who behave this way should seriously reevaluate their practice. If a problem develops, TC should try to work it out with the individual defense counsel, or if this fails, through his supervisory chain.

Finally, there is no reason why a deployed court-martial should be derailed by repeated defense delay requests. The defense does not unilaterally drive this process, and the Government should tailor its response to unsupported defense delay requests to facilitate the military judge's decision to deny the request. This is not to say that defense requests for delay are not sincere, but often contain pro forma language which, when put in proper context by a well composed Government response, may not meet the preponderance standard. Perceptions to the contrary often flow from some defense's counsel's The lesson here is to take defense objections, carefully analyze them, and then respond in a meaningful way, as demonstrated in the *Pemberton* case discussed above. Most military judges are not going to just "automatically" grant delay. The two Army judges who presided over most of the courts-martial during OIF 10-11 held both sides to their burden to meticulously justify "reasonable cause" for continuances.

2. Civilian Defense Counsel

An accused has a right to civilian counsel,[119] but not to indefinite delays to accommodate such counsel. Civilian defense counsel (CDC) can bring additional experience and maturity to an accused's defense and are thus an important component of the military justice system. Most CDC who regularly represent Servicemembers have extensive experience with the military, in some cases having served for long periods on active duty themselves, or just having been around the system for a long time. Many CDC understand that courts-martial move quickly, especially in theater. Yet, some CDC have accepted representation of clients whose cases have already been docketed, only to immediately request delays to accommodate their own full trial schedules. If a case is docketed before a CDC accepts representation, assuming there is still enough time to prepare for trial (which is seldom more than a few weeks for an Army court-martial), the TC should hold the CDC tightly to his burden to show reasonable cause for delay. The CDC chose to accept representation, knowing that the trial was already scheduled; this indicates that his schedule could accommodate the trial on the docketed date, and makes it harder for the CDC to persuasively argue that his schedule precludes him from trying the case then. Even if a delay is granted, it is unlikely to be as long as a delay would be if no trial date were previously scheduled.[120]

E. Courts-Martial Panels

Out of the eighteen cases discussed in this article, seven were panel cases. At least one author has suggested that panel selection may constitute an impediment to deployed court-martial practice.[121] However, USF–I had no problems with panel selection during this time period. Consistent with normal garrison practice, III Corps maintained standing panels during OIF 10-11. III Corps followed the common Army method of seeking nominations along with the members' records briefs from subordinate commands and then compiling them in a matrix for the GCMCA to select a standing panel, but this is just one way of facilitating the convening authority's selections. The J1 / G1 / S1 (personnel sections at the various command levels) should be able to provide a list of members sufficient for the GCMCA to make his consideration. If the GCMCA would like to review additional information about the members, that additional information could be provided. The *sine qua non* of panel member selection is simply that no group of members be improperly excluded.[122]

Because the USF–I GCMCA did not exercise his military justice prerogative to refer cases during OIF 10-11, the USF–I OSJA MJD did not maintain a USF–I-wide standing court-martial panel. As the highest echelon Army-specific GCMCA in theater, III Corps (ARFOR) found little difficulty in maintaining two geographically-based standing panels, drawn from the post draw-down 25,000 Servicemembers directly ADCON to III Corps for military justice purposes. For the few panel members who actually had to travel to an off-FOB location for trial, the Court-Martial Personnel Priority Movement Memorandum facilitated air movement.

Practitioners should not feel compelled to maintain a standard panel even though Army practitioners are used to standing panels. Standing panels often make sense in terms

private area for the client to use a Defense Switched Network (DSN) telephone or VTC.

[119] *See* MCM, *supra* note 22, R.C.M. 506(a).

[120] *See* Appendix D (providing notes on how CDC arranged travel into theater for trial).

[121] *See* Rosenblatt, *supra* note 7, at 17–18.

[122] Convening authorities must base their selection on the criteria set forth in Article 25. *See* UCMJ art. 25 (2008); *see also* United States v. Hodge, 26 M.J. 596, 599–600 (A.C.M.R. 1988) (holding that with respect to race, exclusion is prohibited but inclusion is not); United States v. Crawford, 35 C.M.R. 3, 7, 10 (C.M.A. 1964) (upholding result when command deliberately attempted to include panel members of accused's race; also holding that in selecting panels, lower ranks *per se* could not be excluded, but might be rare based on lack of experience or maturity); United States v. Carter, 25 M.J. 471, 473 (C.M.A. 1988) (accused has no right for panel to "reflect a representative cross-section of the military population," but does have a right to a fair and impartial factfinder).

of obviating the need to go back to the GCMCA for a new panel selection in every case. Depending on deployed circumstances, however, maintaining a standing panel may be more work than it is worth. In the absence of a standing panel, the GCMCA will need to pick members on a case-by-case basis. A general court-martial only requires five members, and a special court-martial only requires three members.[123] For good measure, it is best to select ten for each court-martial to make allowance for challenges and excusals, but generally speaking, it is simply not overly burdensome to identify ten Servicemembers in deployed commands often consisting of tens of thousands.

If a particular command lacks sufficient personnel to conveniently detail a panel, the convening authority can detail personnel from outside his own command.[124] One of the unique aspects of a dynamic hostile fire environment like Iraq in OIF 10-11 was the number of different units and GCMCA's, both located within and outside of theater, who had an interest in trying cases that arose out of their units conducting operations in theater. For these GCMCA's without enough assigned personnel in theater to conveniently form a sufficiently large panel selection pool, the III Corps Commander, on four occasions, made panel members "available" by memoranda for selection by the out-of-theater GCMCA.[125] For example, in the *Bjork* case,[126] the I Corps commander redeployed before the case was tried, and therefore selected a new panel from members made available by III Corps in theater. In *Warren*[127], SOCCENT, headquartered in Tampa, Florida, also selected members made available by III Corps. Practitioners should think broadly when it comes to member availability. Seldom, if ever, should a unit be unable to muster the three to five persons required for a panel.

F. Additional Considerations

1. Flexible Use of Trial Location

As suggested throughout this article, deployed military justice practitioners must remain flexible, keeping in mind all the resources they can draw upon. Large, established FOBs with semi-permanent courtrooms are not required for military justice.[128] During OIF 10–11, the incoming USD-N (4ID) built an excellent courtroom with minimal effort and resources.[129] On two occasions, counsel and accused flew to Kuwait, where the military judge was stationed, for hearings, using the locally available court reporter.[130]

Sometimes a case referred by a deployed GCMCA should be physically tried CONUS. Although the location of the trial may change, the deployed practitioner should not automatically equate this with withdrawal of the case from the deployed GCMCA and referral by the rear detachment convening authority. Depending on the posture of the case, it may be best to keep the referral under the original, deployed convening authority.[131] Depending on circumstances, there can be several advantages to this approach. First, if the case has already been referred and motions have been argued in theater, it eliminates the delay and extra work entailed in closing out the first record and re-litigating the issues, as would be required if the case is withdrawn from the deployed convening authority and re-referred by the rear convening authority.[132] Second, it preserves the link to the deployed command, the command with the real interest and will to prosecute the case.[133]

United States v. CPT H[134] demonstrates well this approach of continuing to use the deployed GCMCA as the convening authority for a case which has been sent to the

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[123] MCM, *supra* note 22, R.C.M. 501(a).

[124] *See id.* R.C.M. 503(a)(3).

[125] *Id.* ("A convening authority may detail as members of general and special courts-martial persons under that convening authority's command or made available by their commander. . . .").

[126] *Supra* Part III.B.

[127] *Id.*

[128] There were three permanent courtrooms in the IJOA during OIF 10–11, one on Camp Victory, one on Camp Liberty, and one on Joint Base Balad. There was also a courtroom in Kuwait that IJOA personnel would occasionally utilize for motions hearings.

[129] Contingency Operating Base (COB) Speicher had been lacking a courtroom since the previous one had burned down over a year prior. When 4ID deployed to theater, one of the first tasks for their chief of justice was to construct a courtroom. One elevated 2 x 4 served as the "bar" of the courtroom, separating the "gallery" of folding chairs from the "well" of the courtroom. Another elevated 2 x 4 delineated the "panel box" of folding chairs. The judge's dais consisted of a desk, chair, and flag, placed on top of a large rectangular structure made out of plywood. Counsel's tables were merely regular folding tables with chairs. Put it all together and it looked like a courtroom. It could have been put together anywhere, even in a tent. Within weeks of 4ID setting up the courtroom, the military judge held the first trial. If you build it, they will indeed come.

[130] Recently, the current USF–I Chief of Military Justice informed the author that this practice of going to Kuwait for select cases has continued with the recent trial of a guilty plea from Iraq in the Camp Arifjan, Kuwait courtroom. This again demonstrates the continued flexibility of deployed military justice practitioners, making common sense decisions of where to try cases. E-mail from Major Joshua Toman, Chief of Justice, U.S. Forces–Iraq, to author (July 2, 2011 4:57 EST) (on file with author).

[131] In fact, 25ID, upon taking over from 1AD as USD–C late in OIF 10–11, made the decision to retain GCMCA authority over all military justice actions at Schofield Barracks, Hawaii. While this appeared to dramatically increase the caseload of USD-C, their execution of all rear detachment military justice actions while in theater demonstrates the plausibility, in certain circumstances, of the deployed GCMCA retaining authority over select cases sent back to the rear.

[132] *See supra* note 72 and accompanying text.

[133] As discussed earlier, once the case is referred, it is under the sole control of the military judge until action. However, the convening authority always retains authority to withdraw the case or enter into a pretrial agreement. For these reasons, it is accurate to say that it is still the will of the convening command that drives the case to its final disposition.

[134] Because CPT H's request for resignation in lieu of court-martial was accepted by Human Resources Command, the author has chosen to provide no additional identifying information.

rear for trial. Captain H was a National Guardsman and commander of a Military Police company. Towards the end of his deployment, allegations arose that he had engaged in multiple acts of misconduct. Among other things, he was alleged to have provided alcohol to junior Soldiers in violation of USF–I GO #1,[135] to have maintained a sexual relationship with an enlisted Soldier, to have acted improperly towards another enlisted Soldier, and to have improperly managed field ordering funds. The misconduct came to light right before the unit's redeployment date.

Once the allegations arose, the deployed practitioners did all the right things suggested by this article to set the case up for a successful in-country prosecution. First, the brigade trial counsel, a RC JA who had not yet had the opportunity to try a court-martial, contacted the CoJ. Next, the CoJ met with the trial counsel and assigned an experienced assistant trial counsel. Immediately, the trial team met and formed an investigative plan, backward planning from the date the unit was set to redeploy. The trial team immediately flew to FOB Delta, a postage-stamp-sized FOB, to interview all the potential witnesses. While the witnesses were being interviewed, the deployed military justice practitioners were concurrently drafting charges and having them reviewed, making arrangements for the Article 32 investigation, and setting up depositions for all the potential Government witnesses, just in case the trial date went beyond their BOG dates and they subsequently declined to voluntary remobilize to testify in theater. Thanks to these efforts, within three weeks, the case was fully investigated, charges were preferred, an Article 32 hearing was conducted (presided over by an Air Force judge advocate), and twenty-one witnesses had been deposed. The III Corps Commander referred the case to a GCM, and the military judge docketed the case for trial at VBC. The witnesses, all RC members, were actually reaching their BOG dates during the week following the Article 32 investigation, so there was no way to extend them in theater.[136] The USF–I TC coordinated with the state NG headquarters to arrange for the voluntarily remobilization of the witnesses. Unfortunately, most of them declined to voluntarily remobilize for a trip back to Iraq. The Government thought it unwise to try a case entirely by deposition,[137] but did not wish to accept the defense offer of a general officer article 15 followed by retirement. The solution was to arrange for trial at a CONUS installation close to where most of the witnesses lived. The trial counsel remained focused on trying the case, not allowing himself to get distracted in a negotiating process in which the defense obviously thought of itself as having a strong hand. As it was becoming obvious that the trial counsel could not try the case in theater, the trial counsel contacted the CoJ, CONUS Army installation, in close proximity to the general area where most of the demobilized witnesses resided, and arranged to hold the III Corps-referred court-martial at that location CONUS.

The stateside GCMCA made panel members available and the stateside OSJA sent the panel nomination matrix and officer record briefs to III Corps Commander in theater could make his panel selection. The III Corps SJA coordinated with the CONUS SJA and arranged to send a paralegal from Fort Hood for the actual trial, to lessen the burden on the CONUS installation. Once everything had been internally pre-coordinated within this huge, worldwide law firm that is the JAG Corps, the TC then filed a motion with the court to move the place of trial stateside. Over the defense's objection, the judge granted the motion. Trial was set for only a month after the originally scheduled date. Within a few days, the defense submitted a request for resignation in lieu of court-martial, and CPT H received an other-than-honorable discharge.[138]

The *CPT H* case illustrates how being part of a worldwide law firm can bring tremendous assets to the table of the deployed practitioner, and also reinforces the value of fostering a trial-focused deployed military justice practice.[139] The TC did not try blustering to the defense about how he *could* move the trial CONUS. He just did it, with the full intent to try the case. There was no reason for the accused to get leniency just because the case arose in theater. Deliberate, decisive action, bringing the full range of worldwide resources to bear—this is deployed military justice.

2. Pretrial and Post-Trial Confinement

There is only one military confinement facility for Iraq and Afghanistan. This is the Theater Field Confinement Facility (TFCF) in Kuwait. It is meant to be a temporary facility, with inmates preferably residing in the facility for thirty days or less.[140] Over the past eight years, both Servicemembers and civilian contractors have been confined at the TFCF.[141] Any stays longer than thirty days require an

[135] *See* USF–I GO #1, *supra* note 2.

[136] *See supra* note 105 and accompanying text. Captain H himself could be and was extended in theater, and assigned to the VBC Mayor's Cell.

[137] There is no bright line rule of how many depositions constituting the government's case are too many depositions. Superficially, if the depositions were all properly taken, affording the accused full confrontation rights, then there seems to be no limit to the number of depositions permitted. As a matter of prudence, the author did not feel comfortable with the idea of trying the government's entire case using fifteen or more depositions.

[138] *See* U.S. DEP'T OF ARMY, REG. 600-8-24, OFFICER TRANSFERS AND DISCHARGES para. 3-13 (12 Apr. 2006) (RAR, 27 Apr. 2010).

[139] *See supra* Part II.C.

[140] *See* Headquarters, U.S. Army Central Theater Confinement Policy (17 Sept. 2007) [hereinafter ARCENT TFCF] (on file with author).

[141] Although this article has primarily focused on military justice as it pertains to military members, the majority of persons currently supporting the military operations in Iraq and Afghanistan are civilian contractors. The USF–I OSJA MJD was also responsible for military justice action vis-à-vis

advanced request signed by the requesting GCMCA.[142] During OIF 10-11, the Navy operated the TFCF. In addition to the TFCF, there may be additional detention cells (D-Cells) located in and around theater. For instance, VBC has a D-Cell at the Provost Marshall Office (PMO), meant for very temporary holding of prisoners en route. At least twice over the last eight years, Servicemembers have also been held in Detainee Internment Facilities, separately from the detainees. The latter is not an advisable practice and did not occur during OIF 10–11.[143]

To facilitate pretrial confinement, the USF–I MJD compiled a theater-wide list of military magistrates and published it to all the military justice practitioners in theater. Once a Soldier was ordered into pretrial confinement, unit escorts would escort him to Kuwait where he would be turned over to the TFCF Navy personnel. Just as in garrison, it was important that the accused's possessions be inventoried prior to his confinement and that the confinement facility's checklist be carefully followed to ensure the accused had all the necessary items in confinement.

During OIF 10-11, III Corps placed only one person into pretrial confinement, although USD-C (1AD) placed several Soldiers into pretrial confinement, including one Soldier accused of murder and another Soldier accused in a very well-known classified information leak case. In the III Corps case, the author personally walked the battalion commander through the process over the telephone. The process was not significantly harder in theater than in garrison. The unit did have to provide escorts for the accused's flight to Kuwait, but this did not prove overly burdensome.

Post-trial confinement likewise posed no significant difficulties. Military justice paralegals coordinated with the units to make sure they inventoried the accused's possessions *prior to trial* in a non-invasive and non-humiliating manner, and that the pretrial confinement checklist (provided by the TFCF) was largely complete. Once the sentence was announced, the convicted Servicemember was usually taken to eat and then to the D-Cell, if the trial took place at VBC. While at the D-Cell, two members of the unit were required to stay with the convict for continual watch. Within a day or two, the accused would be transferred to the TFCF in Kuwait, which would move the convicted Servicemember to a CONUS facility in a matter of weeks.[144]

3. Behavioral Health Issues

More than once during OIF 10–11, an accused Servicemember would go to a combat stress clinic (CSC) and claim to be suicidal or violent, especially right after charges were preferred. Instinctively they seemed to know what military justice practitioners sometimes forget: if the case gets transferred to the rear and the accused is identified as a patient rather than a suspect, the case may go away, especially for borderline felony/misdemeanor misconduct that affects good order and discipline more strongly in theater than in garrison. A "wounded warrior" accused of a GO #1 violation in theater is far less likely to be court-martialed in garrison.

Because of the sensitivity of this issue, mental health providers confronted with Soldiers claiming suicidal ideation often, and probably rightly, err on the side of caution and recommend immediate evacuation. This puts the commander in a difficult position: go against medical advice or let a possibly manipulative accused escape justice. III Corps faced this situation several times, as did MND-C. There is no simple way to address it. Automatically approving all such recommendations to evacuate could shut down military justice in the deployed environment. Automatically disapproving them could result in real tragedy. The best approach is to consider each case on its individual merits.

In deciding whether to keep the accused in theater, the command should work closely with the mental health provider to get as full a picture of the accused's condition as possible.[145] An important consideration is whether the

this large and very diverse international civilian workforce. There are three interrelated authorities to hold civilians in pretrial confinement. First, are the provisions of Military Extraterritorial Jurisdiction Act (MEJA), however, as recently confirmed in a discussion the author had with Mr. Robert McGovern, one of the Department of Justice attorneys currently responsible for MEJA prosecutions, the trial counsel cannot avail himself of these pretrial procedures unless the DOJ has already accepted MEJA jurisdiction. As the deployed military justice practitioner will discover, it is easily conceivable that there may be a case necessitating the pretrial confinement of a civilian where the DOJ has not yet accepted the case or flatly declined to accept MEJA jurisdiction. In these cases, the two remaining authorities to place a civilian in pretrial confinement are first the commander's inherent authority to maintain security on a military installation, and second the commander's authority under RCM 305. Both because civilian DoD contractors are subject to the UCMJ under Article 2(a)(10) and because RCM 305 fulfills the requirement for some due-process procedure, the trial counsel should follow RCM 305 when placing civilians in pretrial confinement. For purposes of the commander's role in the RCM 305 process, the military justice practitioner should have the GCMCA appoint a constructive chain of command for the civilian. In Iraq, these procedures were all set forth in Annex U (Legal) to USF–I OPORD 11-01. In Iraq, the Army's numbered Corps (the ARFOR) commander was responsible for appointing the constructive chain of command for civilian contractors.

[142] *See* ARCENT TFCF Memo, *supra* note 140, para. 5(a)(1).

[143] *See* United States v. Wise, 64 M.J. 468, 470–71, 473–74 (2007) (post-trial confinement in detainee facility), and United States v. Martinez, No. 20080372, 2008 WL 8089262 at *2, *7 (A. Ct. Crim. App. Aug. 5, 2008) (accused held in detainee facility before interrogation).

[144] *See* ARCENT TFCF Memo, *supra* note 140, para. 5(a)(1).

[145] *See* Major Kristy Radio, *Why You Can't Always Have It All: A Trial Counsel's Guide to HIPAA and Accessing Protected Health Information*, ARMY LAW., Dec. 2011, at 4, 7–9 (explaining when and how a TC can

accused has a history of mental health issues (if this exists, it may be in the defense's interest to share the relevant records with the Government). If the accused is kept in theater despite his claims of mental instability, certain additional actions can be taken to mitigate risk, such as taking the accused's weapon,[146] providing escorts, moving him into sanitized[147] quarters, etc. Three times during OIF 10–11, after a careful consideration of all the factors, the command kept accused Soldiers in theater under these circumstances. In none of these cases did the accused end up hurting himself or anyone else.

If a case is transferred to the rear, the deployed practitioner still has options. He can coordinate with the rear for prosecution, being careful not to inject unlawful command influence into the process. Or the forward command can do as III Corps did in the *CPT H.* case, and refer the case itself, but have it tried in the rear with the assistance of stateside practitioners.

IV. Conclusion

The deployed court-martial success of OIF 10–11 demonstrates that when a proper emphasis is placed on military justice in theater by both the command and military justice practitioners, the court-martial system is a fully deployable system of justice which is not overly burdensome, meets the command's disciplinary needs, and is highly protective of an accused's rights. During OIF 10–11, the author found that most misconduct that occurred in theater was best and most practically tried in theater, that some cases simply had to be tried in theater, that courts-martial proceeded to trial faster in theater than in CONUS, and that ownership of cases was extremely important.

The logistics of deployed court-martial practice were not overly burdensome during this period. In fact, the same attributes that permit the modern US military to be highly expeditionary, such as impressive logistics and transportation support, make the UCMJ highly portable. Although military justice practitioners in less mature theaters face different challenges, the author maintains that with appropriate command emphasis, courts-martial can be tried effectively even in immature theaters. This obviously requires a sufficient number of JAs assigned to military justice duties. Command emphasis and the will of the deployed TC are paramount. Especially important is the deployed practitioner's ability to look beyond his own unit to resources available throughout the theater and in the wider world beyond theater. During OIF 10–11, this was facilitated by a well-developed, theater-wide military justice structure, but even without such a structure, military justice practitioners have access to e-mail and telephone communication to coordinate support with other units and JA's, as demonstrated by the hundreds of cases successfully tried in Iraq before USF-I.

Finally, when considering whether the court-martial system set forth in the UCMJ can be effectively deployed, the mere fact that a commander decides to send some cases back to the rear or even not try any cases in theater has little bearing on the deployability of the court-martial system itself. The ready availability of efficient transportation may well make this the correct decision in a given case. But, for TC to give sound advice based on the actual capabilities provided by the UCMJ and the worldwide Judge Advocate General's Corps, deployed JAs *assigned to military justice duties* must make military justice not the "fifth priority," but their first.[148]

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acquire a Soldier's relevant health care information, including mental health information).

[146] During one of the Abu Ghraib prosecutions, the defense successfully obtained Article 13 credit by claiming the accused was stigmatized because he was deprived of his weapon. Afterwards, defense counsel frequently demanded credit when their clients were disarmed. *See* Major M. Patrick Gordon, *Sentencing Credit: How to Set the Conditions for Success*, ARMY LAW., Oct. 2011, at 7, 13 & n.65. One solution is to take the bolt while leaving the Soldier with the weapon; another is to refrain from advertising why the Soldier is disarmed (i.e., when the Soldier gets a memo to let him enter the dining facility, the memo should simply specify that the Soldier is authorized to be unarmed without saying it has to do with pending court-martial or suicide threats).

[147] By "sanitized," the author means living quarters in which items which could potentially be used as weapons have been removed.

[148] *See* Rosenblatt, *supra* note 7, at 18.

Appendix A

A Theater-Wide, Echeloned Deployed Military Justice Structure

A poor theater-wide MJ structure in an immature theater does not preclude the practice of MJ, but a good structure can facilitate it. The structure established by USF-I facilitated the practice of MJ in theater by all the services in OIF 10-11.

Those familiar with the strategic level command in Iraq prior to 1 January 2010, Multi-National Force – Iraq (MNF-I), will recall that it had no MJ division and did not exercise any military justice function. Instead, Multi-National Corps–Iraq (MNC–I) provided Corps-level military justice services for most Army units in theater and addressed civilian misconduct. Because in terms of military justice, MNC-I was largely an Army operation, it had no theater-wide military justice oversight role across the different services and units not assigned to it, although it did have such a role for its assigned separate brigades and divisions. Thus, prior to the merger of MNC-I into MNF-I resulting in the establishment of USF-I on 1 January 2010, there was no single MJ division with a theater-wide military justice mandate. With a large number of independent general and special courts-martial convening authorities (SPCMCA) of all the services spread throughout the theater, several of which did not fall under MNC-I, prior to the establishment of USF–I,[149] even under the best leadership, there was no single, coherent military justice structure throughout the theater. Under these conditions, trial counsel's field of view could become limited to their narrow, vertical technical JA channels and their individual units. This situation deprived the senior commander situational awareness on the state of military discipline throughout the theater. It also inhibited the sharing of technical expertise and trend information among practitioners. Moreover, it made it difficult to set any professional tone of practice for the theater and reduced the likelihood of consistent, theater-wide, joint mutual training and assistance in military justice matters. During this period, under many excellent SJA's, MNC-I provided most of these military justice functions, but its mandate was limited primarily to its assigned Army units. As demonstrated by the hundreds of cases successfully tried in Iraq during this period, this potential inefficiency by no means precluded the practice of military justice.

In contrast to the situation described above, the USF–I Military Justice Structure established on 1 January 2010, may well represent the first time in the Afghanistan/Iraq era of conflict that a single theater established a clear, hierarchical, military justice structure with a single OSJA having both a formal interest in and visibility over military justice practitioners of all services throughout the theater. As shown on the attached wire diagram in Appendix B, , the creation of a linear, hierarchical structure, from the lowest echelon to the OSJA for the four star level-command, meant that for the first time, a trial counsel anywhere in theater, from any service, regardless of whether his unit was ADCON to the Corps, could look up from his position and see the whole array of professional MJ support available. This is not to suggest that prior trial counsel were previously blind to theater military justice practice outside their individual units, but that there previously existed no single office with a mandate to ensure that they were not. Because Iraq was a joint environment, military justice naturally assumed a joint flavor, from inter-service sharing of resources and personnel to joint courts-martial. The USF–I Military Justice Structure reflected these joint justice aspects in two ways. First, the Secretary of Defense designated the USF–I Commander as a GCMCA.[150] As such, he had authority to court-martial any Servicemember in theater. Next, the USF–I Commander designated senior commanders and senior headquarters from each of the services (e.g., AFFOR, ARFOR, NAVFOR, MARFOR) as the senior service-specific military justice headquarters for the theater, with the vision that those headquarters would have highest level Uniform Code of Military Justice (UCMJ) authority over the Servicemembers of their individual services.[151] After the deactivation of MNC-I, the numbered Army corps already deployed in Iraq (but serving under the identity of MNC-I Headquarters up until that point) was designated the Army Force – Iraq, or "ARFOR."[152]

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[149] At the time MNC–I merged with MNF–I to form USF–I, MNC–I consisted of one joint general court-martial convening authority (GCMCA) at the MNF–I level, four Army GCMCA's (the three divisions plus MNC–I), a Navy special court-martial convening authority (SPCMCA) (the Al Asad Base Command Group), and two additional Air Wing SPCMCA's as well as nearly three dozen, Army SPCMCA's. *See* Appendix A, Official USF–I Military Justice Chart (showing theater-wide convening authorities at the end of OIF 10-11).

[150] *See* Memorandum for The Commander, U.S. Central Command, USF–I Commander, subject: Designation of as General Court-Martial Convening Authority (15 Dec. 2009) (on file with author).

[151] Each of these senior service commanders concurrently served in a high level staff position on the USF–I joint staff. The Navy one star admiral was the J35 (force protection); the Air Force two star general concurrently served in the positions of USF–I Force Strategic Engagement Cell Director and as the Director of the Air Component Coordination Element (ACCE). The Army three star general (the Corps Commander) concurrently served as the USF–I Deputy Commanding General for Operations.

[152] Thus, when MNC–I was deactivated, the deployed numbered corps again assumed its numbered identity as an active headquarters, but for military justice purposes only. In other words, the corps *qua* corps no longer exercised the full range of mission command (as it had when it was designated MNC–I), but now served as a *headquarters with administrative control (ADCON) for military justice purposes only* over all the USF–I separate brigades and the US Army Divisions. Lieutenant General Jacoby, the MNC–I commander at the time MNC–I was deactivated, would have taken GCMCA-level action prior to the merger under his title as "Commander, MNC–I," however, from 1 January 2010 on, he took GCMCA-level action over generally the same units, but now

During OIF 10-11, III Corps was the designated ARFOR for Iraq.[153] Designating these senior service-specific headquarters did not negate the USF–I Commander's statutory authority as a GCMCA to refer to court-martial cases involving any accuseds of any service, but as a matter of command discretion, that authority was not exercised during OIF 10-11 and military justice normally flowed through service channels following notification to and coordination through the USF–I OSJA in appropriate cases. The purpose of having a theater-wide military justice focus was not for one unit or service to "poach" another unit's or service's cases, but to assist and facilitate the prosecution of cases throughout the theater.[154]

Beyond a name change from MNC-I to I Corps, the USF–I SJA at the time of the merger advocated a broader military justice vision: military justice with a theater-wide, joint focus, something not previously institutionalized in theater. Given the parochial service-specific tendency of military justice, creating an IJOA-wide orientation required support from the top, formalized structures, and the right personnel. First, in the initial designation of senior element commanders, the SJA sought to formalize the position of the USF–I Military Justice Division by having the USF–I Commander direct the senior element commanders of the various services that they would receive their military justice advice from the USF–I OSJA, meaning primarily the USF–I Military Justice Division (MJD).[155] The structure was then staffed with a theater-wide, joint focus in mind: first, an Army lieutenant colonel replaced an MNC–I-era Army captain (O-3)[156] to become the first USF–I Chief of Military Justice (CoJ); an Air Force major, highly experienced in military justice, took over the position of USF–I Senior Trial Counsel; and out of the two USF–I trial counsel, one was a Navy Lieutenant (O-3), and one an Army Captain. Three paralegals, including a court reporter, initially supervised by an Army E-7, also rounded out the shop. Throughout most of OIF 10-11, both the Air Force and Navy senior element commanders were advised by Army judge advocates assigned to the USF–I MJD. These Army JA's prepared at least a dozen actions for these highest-level multi-service commanders, including "Admiral's Masts" (nonjudicial punishment (NJP)) and letters of reprimand and censure.

One must distinguish lest the word "hierarchical" conjure up the notion of unlawful command influence (UCI).[157] While the USF–I MJD did provide theater-wide visibility on MJ to the USF–I SJA, the USF–I SJA never relayed the senior commanders' views on disposition of any individual case or category of cases to lower echelon practitioners. If the four star commander had disagreed with a subordinate commander's disposition to such an extent that he thought a different disposition appropriate, presumably he would have simply withheld the case to his level under his authority as an independent GCMCA, not suggested a disposition through MJ channels.[158]

Due to the nature of a theater-wide practice involving multiple services and civilians, the USF–I OSJA MJD had several different sources and levels of authority. First, in its most conventional role, it served as the MJD for the III Corps SJA[159] preparing actions for and providing advice to the III Corps Commander.[160] In this capacity the USF–I / III Corps MJD exercised traditional military justice oversight authority over the USF–I separate brigade ("USF–I separates"), all of which

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under his title as "Commander, I Corps," notwithstanding that post-merger he exercised delegated aspects of mission command over most of those same units in his capacity as the USF–I DCG-O. Just as the same commander served as both the USF–I DCG-O and the numbered Corps Commander, so also did the USF–I Military Justice Division serve as the numbered Corps military justice division (e.g., the USF–I Chief of Military Justice also served as the III Corps Chief of Military Justice during OIF 10-11).

[153] III Corps was preceded by I Corps and succeeded by XVIII Airborne Corps as the designated ARFOR–Iraq. Using the Corps as the Army Force (ARFOR) component headquarters in a joint task force is consistent with Army doctrine. "1-20. A corps headquarters primarily serves as an intermediate-level tactical headquarters. It can also serve as an ARFOR headquarters. . . ." U.S. DEP'T OF ARMY, FIELD MANUAL–INTERIM 3-0.1, THE MODULAR FORCE para. 1-20 (28 Jan. 2008).

[154] Throughout the deployment, Air Force counsel served as trial counsel on five cases in which the accuseds were Army officers or enlisted Soldiers: *United States v. Bjork*, *United States v. Ferrer*, *United States v. Shipley*, *United States v. Warren*, and *United States v. Bennett*. Likewise, an Army counsel was designated to serve as second chair in a sexual assault case of a Soldier by an Airman, but the case terminated in an alternate disposition.

[155] *See, e.g.*, Memorandum for Rear Admiral Kevin Kovacich, U.S. Navy, subject: Designation of United States Forces–Iraq, U.S. Navy Element (30 July 2010) (on file with author). A similar memo appointed the Air Force Element commander. In practice, of course, the senior element commanders (and the USF–I Military Justice Division) coordinated closely with the various CENTCOM service component commands (e.g., AFCENT, ARCENT, MARCENT, NAVCENT).

[156] In 2009, the Chief of Justice for MNC-I had been a captain (O-3). During previous rotations, both lieutenant colonels and majors had served as Chiefs of Justice.

[157] *See* UCMJ arts. 1, 25, 37, 98 (2008); AR 27-10, *supra* note 73, paras. 2-7(b), 5-9(a)(1), 5-13(b), 18.5(a)(6), 27-5(g)..

[158] This would have followed coordination with the appropriate service component command (e.g., AFCENT, NAVCENT, ARCENT, MARCENT, SOCCENT).

[159] Concurrently the USF–I Deputy Staff Judge Advocate for Military Law and Operations.

[160] Concurrently the USF–I Deputy Commanding General–Operations (DCG-O).

were ADCON[161] for military justice purposes to III Corps.[162] Because III Corps was the second echelon GCMCA to the three Army divisions, the MJD possessed standard second echelon type authority. In other words, by virtue of the fact that the III Corps Commander could pull any of these cases to his level, the USF–I / III Corps MJD had a proprietary interest in such cases. Separate from its dual-hatted function as the III Corps MJD, the USF–I MJD performed a host of other functions, including facilitating and coordinating military justice actions between the various services; prosecuting cases which the USF–I commander retained at his level[163]; providing advice to the senior element commanders of the various services; facilitating in-theater trials convened by convening authorities outside the theater; and processing civilian misconduct, including requests under the Military Extraterritorial Jurisdiction Act (MEJA)[164] and requests to prosecute cases under Article 2(a)(10), UCMJ.[165] For these latter functions, the USF–I MJD operated under the guidance and supervision of the USF–I SJA.

While the greatest contribution of the USF–I MJD in terms of joint justice was likely the everyday coordination and facilitation effort, the greatest systemic contribution was the publication of the Notification and Coordination Memorandum (NCM), an initiative by the USF–I SJA to bring clarity to the practice of military justice in the joint environment. This binding document, appended at Annex B to this article, went through weeks of revisions and suggestions during the staffing process with all of U.S. Central Command's service component command SJA's (AFCENT, ARCENT, MARCENT, NAVCENT, SOCCENT) and all the various military justice practitioners in theater.[166] This document was signed by the USF–I Commander and thereafter expressly applied to all military justice practitioners, whether or not their units were ADCON[167] to USF–I. It specifically directed that all military justice practitioners in theater were required to report and coordinate with the USF–I Military Justice Division under specified conditions.[168] Under this formal authority, the USF–I MJD served as a coordinating element for military justice issues among all units, even when it was not directly involved in advising the USF–I or III Corps GCMCA's. Additionally, this model gave the USF–I SJA situational awareness of military justice throughout the theater. Upon the next revision of the USF–I OPORD,[169] USF–I OPORD 11-01, the NCM was incorporated into the OPORD itself, thus solidifying its status as part of the constitutive structure of the overall joint task force and further normalizing the position of the USF–I OSJA MJD as a highest echelon MJ office, not just one of many military justice offices in theater.

161

> **[A]dministrative control.** Direction or exercise of authority over subordinate or other organizations in respect to administration and support, including organization of Service forces, control of resources and equipment, personnel management, unit logistics, individual and unit training, readiness, mobilization, demobilization, discipline, and other matters not included in the operational missions of the subordinate or other organizations. Also called ADCON.

See U.S. DEP'T OF DEF., JOINT PUB. 1-02, DEP'T OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS 4 (15 May 2011) [hereinafter JP 1-02]. The other two terms are operational control (OPCON) and tactical control (TACON). Those terms are also defined in JP 1-02. *Id.*

162 With the "USF–I Separate Brigades," the USF–I MJD was the first level military justice supervisory section, with no intervening SJA. *See supra* note 3, and accompanying text. For the divisions, wings, and other units in theater, military justice for all of which were directly supervised by their respective SJA's, the USF–I MJD's authority stemmed from its position within the joint command and was formalized as set forth in this article. This difference in authority manifested itself in several ways. For instance, for the USF–I Separate Brigades, the USF–I MJD had a standing policy that no charges could be preferred without prior review at the USF–I/III Corps level, however, for other units, the USF–I MJD would offer to and often did review charge sheets prior to preferral, but such review was not mandatory.

163 The USF–I Commander did not exercise his UCMJ authority during OIF 10-11OIF 10–11.

164 18 U.S.C. §§ 3261–3267 (2006).

165 At one point, the USF–I MJD also engaged in training its Government of Iraq (GoI) counterparts in improving their internal security courts.

166 The memorandum was staffed with all the entities listed on the distribution line. *See* Annex B.

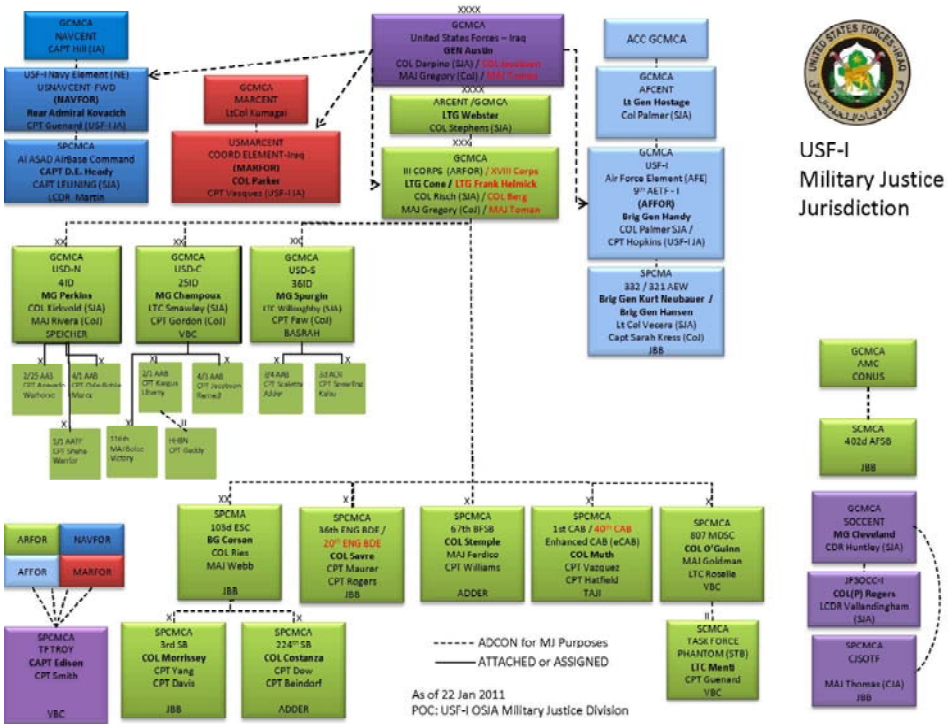
167 *See supra* note 153.

168 *See* Annex B (providing for the conditions and requirements of notification and coordination).

169 Within the USF–I command, this base document was referred to as an "OPORD." The USF–I OPORD (Operational Order) was the basic blueprint or constitution for the whole joint task force. It was published under the authority of USF–I's four-star commander. Throughout OIF 10-11, USF–I OPORD 10-01 was in effect. While referred to in theater as an "OPORD," the document probably better meets the definition of an OPPLAN (operational plan). According to Joint Publication 5-0, OPPLAN is "a complete and detailed joint plan containing a full description of the concept of operations, all annexes applicable to the plan, and a time-phased force and deployment data. It identifies the specific forces, functional support, and resources required to execute the plan and provide closure estimates for their flow into the theater." JP5-0, *supra* note 17, GL 19-20.

Appendix B

USF–I Military Justice Jurisdiction Chart



Appendix C

Notification and Coordination

HEADQUARTERS
UNITED STATES FORCES - IRAQ
BAGHDAD, IRAQ
APO AE 09342-1400

REPLY TO
ATTENTION OF

USFI-CG

JUL 01 2010

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: United States Forces – Iraq (USF-I) Policy on Notification and Coordination Requirements for Alleged and Suspected Misconduct within the Iraq Joint Operations Area (IJOA)

1. REFERENCES.

a. Memorandum, The Office of the Secretary of Defense, 15 Dec 2009, SUBJECT: Designation [of USF-I] as a General Court-Martial Convening Authority

b. ANNEX U (LEGAL) To USF-I OPORD 10-01

c. CENTCOM FRAGO 09-1619, ESTABLISHMENT OF USF-I, dated 22 Dec 09

d. Memorandum, USF-I, 6 Jan 2010, SUBJECT: Designation of Commander, USF-I, U.S. Air Force Element (Enclosed)

e. Memorandum, USF-I, 6 Jan 2010, SUBJECT: Designation of Commander, USF-I, U.S. Navy Element (Enclosed)

f. Memorandum, USF-I, 6 Jan 2010, SUBJECT: Designation as MARFOR Authority for IJOA (Enclosed)

g. Memorandum, USF-I, 6 Jan 2010, SUBJECT: Designation as NAVFOR Authority for IJOA (Enclosed)

h. Memorandum, USF-I, 6 Jan 2010, SUBJECT: Designation as ARFOR Authority for IJOA (Enclosed)

i. Memorandum, USF-I, 6 Jan 2010, SUBJECT: Designation as AFFOR Authority for IJOA (Enclosed)

2. PURPOSE. The evenhanded administration of military justice within the IJOA is of paramount importance. In addition to ensuring each servicemember is afforded due process and fairness, the imposition of disciplinary actions influences the discipline, morale, and good order of the overall force. Therefore, notification of senior personnel misconduct and other significant misconduct to USF-I is critical to ensure that the commander has a complete view of military justice as it affects force readiness within the IJOA. This policy does not alter the inherent

authority vested in the court-martial convening authorities, including my authority as a general court-martial convening authority (GCMCA), or the currently existing echelon convening authority structures.

3. APPLICABILITY. This policy applies to all servicemembers, Department of Defense (DoD) civilian employees, and DoD Contractors and subcontractors, and anyone serving with or accompanying the force throughout the IJOA regardless of branch or service component.

4. POLICY.

a. For purposes of this policy, the "service-specific force commander" refers to those commanders designated by the Commander, USF-I, as the Army Force (ARFOR), Navy Force (NAVFOR), Marine Force (MARFOR), and Air Force Force (AFFOR) commanders pursuant to Reference C, paragraph 3.C.1.B and References D through I. For all servicemembers assigned or attached to SOCCENT operating in the IJOA, notification and coordination may be made directly to USF-I Office of the Staff Judge Advocate (OSJA) consistent with paragraphs 4.b through 4.f, below.

b. The point of contact at the USF-I Office of the Staff Judge Advocate for notification and coordination under this policy is the USF-I Chief of Military Justice.

c. The following notification and coordination requirements apply to all commanders within the IJOA with servicemembers under their command who do not fall under a service-specific GCMCA physically located within the IJOA:

i. Any alleged misconduct committed by servicemembers in the grade of E-8 or above will be reported by the immediate commander to the senior service-specific force commander with a copy furnished to the USF-I OSJA within 48 hours of the unit receiving information of the alleged senior leader misconduct.

ii. Any misconduct allegedly committed by a servicemember of any grade involving individuals of a different service, either as alleged accomplices or victims, will be reported by the immediate commander to the senior service-specific force commander under USF-I with a copy furnished to the USF-I OSJA within 48 hours of the unit receiving information to that effect.

iii. Any servicemember of any grade pending potential special or general court-martial may not be transferred or redeployed out of the IJOA without at least 72 hours notice (absent exigent circumstances) to the service-specific force commander with a copy furnished to the USF-I OSJA. This will permit coordination and resolution should service-specific requirements be in conflict.

d. The appropriate level judge advocate will notify the USF-I OSJA after becoming aware of cases or allegations falling within the following two categories:

i. Any criminal case which has the potential to be high profile will be reported through judge advocate technical channels to the USF-I OSJA within 24 hours of receiving information to that effect. "High profile" cases are defined as those cases which, due to their subject matter or circumstances, have the potential to attract media attention or otherwise be tracked or inquired about by superior authority outside the IJOA.

ii. Any allegations of sexual assault, including any offense potentially punishable under Article 120, UCMJ, will be reported through judge advocate technical channels to the USF-I OSJA within 48 hours of receiving information to that effect. Any major changes in the status of the case will be updated to the USF-I OSJA.

e. When not otherwise prohibited by USF-I General Order Number 1, dated 1 January 2010, a general officer in command within the IJOA has authority to issue general orders and policies which apply geographically to all Department of Defense civilians, contractors, and servicemembers, regardless of branch of service, whose place of duty or quarters is located within that general officer's area of responsibility. The disposition of any alleged violation of the general order or policy of a commanding general of one service by a servicemember of a different service must be referred directly to the alleged violator's service-specific chain of command. The USF-I OSJA may assist with referral of the alleged misconduct to the service-specific chain of command.

f. In the case of alleged misconduct by civilians serving with or accompanying the force (e.g., Department of Defense Civilians, contractors, subcontractors), such misconduct may not be referred to the Government of Iraq (GOI) for prosecution without prior coordination with the USF-I OSJA. This requirement also prohibits informal coordination or discussion with GOI authorities about pending investigations on contractors without prior coordination with USF-I OSJA. It does not prohibit coordination to address law enforcement matters necessarily within the immediate purview of the GOI (e.g., coordination necessitated by the arrest of an American civilian off the installation) or as required by the *Agreement between the United States of America and the Republic of Iraq on the Withdrawal of United States Forces from Iraq and the Organization of their Activities during their Temporary Presence in Iraq*, Nov. 17, 2008, Article 12.

USFI-CG
SUBJECT: USF-I Policy on Notification and Coordination Requirements for Alleged and Suspected Misconduct within the Iraq Joint Operations Area (IJOA)

5. The point of contact for this action is MAJ E. John Gregory, USF-I Chief of Military Justice, at DSN 318-485-5061 and eugene.gregory@iraq.centcom.mil.

6 Encls --
as

RAYMOND T. ODIERNO
General, USA
Commanding

DISTRIBUTION:
Commander, USF-I, Army Element (ARFOR)
Commander, USF-I, Air Force Element (AFFOR)
Commander, USF-I, Navy Element (NAVFOR)
Commander, USF-I, Marine Force Element (MARFOR)
Commander, USD-N
Commander, USD-C
Commander, USD-S
Commander, JFSOCC-I
Commander, 332d AEW
Commander, 732d AEW
Commander, 103rd ESC
Commander, 402d AFSB
OIC, USNAVCENT -Fwd-Iraq
OIC, USMARCENT-Fwd-Iraq
SJA, ARFOR
SJA, 332d AEW
SJA, USD-C
SJA, USD-S
SJA, USD-N
CJA, 103rd ESC
SJA, CENTCOM
SJA, Army Materiel Command
SJA, AFCENT
SJA, NAVCENT
SJA, MARCENT
SJA, ARCENT-Fwd
SJA, SOCCENT
SJA, JFSOCC-I
SJA, Al Asad Airbase (AAAB)

Appendix D

Witness Travel Arrangements for OIF 10-11

Witness transportation during OIF 10-11 presented no significant obstacles, though it required planning ahead, flexibility, and monitoring. While some of this information is dated (and for Iraq, obsolete), it may be useful by analogy to future deployments.

For the Afghanistan/Iraq area of operations (AO), witness travel from CONUS could be conceptually divided into three phases. First, the witness must travel from CONUS to the Kuwait International Airport (KIA). Second, the witness must travel from Kuwait to Iraq or Afghanistan. And third, the witness must travel to the pinpoint location of the trial within the combat theater. Getting to KIA is easy. The witness simply uses a commercial airline ticket to fly from their departure point to KIA. If the witness is military, the witness uses the Defense Travel System (DTS),[170] to purchase the commercial ticket. If the witness is a civilian, the ticket is arranged by the Government as discussed below, along with his invitational travel orders (ITO). Once at KIA, there were two options available for witnesses to get to Iraq/Afghanistan. The first option was military air transportation (MILAIR). The second option, at least during OIF 10-11, was a fee-based commerical airline.[171] Unless extraordinary circumstances justified the significant additional cost of the commercial airline, witnesses would typically fly MILAIR from Kuwait into Iraq/Afghanistan. Assuming MILAIR transportation from KIA to Iraq/Afghanistan, once the witness arrives via commercial carrier to KIA, there were regular military ground shuttles and liaisons to get the military witness from KIA to the FOB Logistics Support Area (FOB LSA) located on the Ali Al Salem Airbase, Kuwait for further movement via MILAIR to Iraq or Afghanistan. The witness would spend from a few hours to a few days at FOB LSA[172] in Kuwait, but billeting (tents) and food (at the Dining Facility or "DFAC") were provided for all persons located on the FOB. If the witness needed to secure body armor in Kuwait, it could be arranged by coordinating with civilian personnel located at the "body armor warehouse" at the LSA on Ali Al Salem Airbase in Kuwait. Although military personnel TDY in theater were not required to have weapons, on the few occasions that incoming military defense counsel asked for weapons, the USF–I MJD arranged for loaner weapons from the USF–I Special Troops Battalion (STB), which were then hand-receipted to incoming counsel, and could have just as easily been hand-receipted to incoming military witnesses. After stopping over at FOB LSA, the witness then flies via MILAIR (usually a C-130) to Afghanistan or Sather Airbase located at the Baghdad International Airport (BIAP).[173]

A. Considerations for Military Witnesses

Because an active duty military witness will rarely be considered *unavailable* to testify in person, if the defense carries its burden to demonstrate that a merits witness is necessary, relevant and noncumulative, the Government will have to produce the witness. The good news is that active duty witnesses are relatively easy to produce. When producing active duty witnesses, first, the deployed military justice practitioner should coordinate with the witness and the witness' CONUS command. Next, the deployed unit should transmit a line of accounting (LOA) to the CONUS witness' DTS account. In the Iraq/Afghanistan case, the military witness will usually make his own travel arrangements using DTS from home station to KIA. Once the witness arrives from Kuwait to one of the larger bases in Iraq or Afghanistan, the military justice paralegals should take steps, such as arranging travel by helicopter or ground convoy. The deployed practitioner must keep the military witness informed of these steps. Witnesses who are very junior Servicemembers may need some additional hand holding, but any E-5 or above should be able to take travel orders and independently travel to the place of trial. Of course, the supporting

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[170] The Defense Travel System (DTS) is the official, web-based orders requesting and funding system for official travel in the department of defense. http://www.defensetravel.osd.mil/dts/site/index.jsp.

[171] During OIF 10-11, the fee-based commerical airline was Gryphon® Airlines. http://www.flygryphon.com/. If the command is willing to fund the additional expense of funding this carrier, then witnesses can fly directly from KIA to Baghdad, Iraq or Bagrahm, Afghanistan and skip the LSA in Kuwait entirely. During OIF 10-11, although USF–I validated the use of Gryphon® by flying trainers from the Defense International Institute of Legal Studies (DIILS) into BIAP from KIA, USF-I did not utilize the contract airline to transport witnesses. While more expensive, the deployed practitioner may want to keep this airline in mind for witnesses that may require additional accommodation, such as older family members, where avoiding MILAIR may have some benefit beyond mere comfort and convenience.

[172] During OIF 10-11, civilian witnesses were required to spend at least twenty-four hours at the define (LSA) in Kuwait.

[173] During OIF 10-11, BIAP was divided into two sides, a "civilian side" in the "Red Zone," open to civilian travelers to and from Iraq, and a "military side," also called "Sather Airbase" which was located within the Victory Base Complex (VBC) perimeter.

MJD will provide the necessary information and assist with the arrangement of in-country transportation, but at the end of the day, these are US Servicemembers who are trained to deploy.

B. Considerations for Civilian Witnesses

Production of civilian witnesses, while not overly complicated, could be tedious. It required more lead time and organization because civilians are not required be ready for immediate deployment as Soldiers are. Still, arranging a civilian's ticket to Kuwait was no harder than arranging a servicemember's. Army Regulation 27-10 empowers an OCONUS JA to coordinate with the Clerk of Court, U.S. Army Trial Judiciary, to arrange invitational travel orders (ITO).[174] During OIF 10–11, the USF–I OSJA MJD did so several times and found the process both convenient and expedient. Once the witnesses arrived in Kuwait, the deployed command (i.e., its MJ practitioners) had to ensure the witnesses reached the place of trial. They did so by coordinating with their liaisons in Kuwait to ensure the witnesses got from KIA Ali al-Salem and then onto MILAIR for transport to Iraq. Once at Baghdad International Airport (BIAP), unit personnel met the witnesses and transported them to billeting. Some installations had Distinguished Visitor's Quarters (DVQs) which were sometimes available for civilian witness lodging.

If there are a large number of witnesses or other logistical burdens, the brigade TC may want to ask the GCMCA to issue a FRAGO covering all the logistical aspects of the court-martial and assigning definite responsibilities to particular units to carry out specified tasks. This was done in the *Bjork* case. The FRAGO directed the USF–I Special Troops Battalion (STB) liaison at KIA to arrange for the witnesses to travel from KIA to BIAP. It directed the installation garrison command at VBC to provide lodging, box meals for court personnel during the day, and dining facility access for all witnesses without Department of Defense ID cards.[175] The FRAGO also directed USD-C (1AD) to provide all the logistics for a site visit by the defense counsel.[176]

With civilian witnesses, the practitioner must be aware of host and transit nation visa requirements. Kuwait, for example, requires a visa for non-DoD civilians, but the visa can be purchased upon arrival at KIA for US passport holders.[177] Iraq also required either its own visa or some other form of approval from its Ministry of the Interior. The USF–I DSJA-FWD[178] worked closely with the Ministry and could get such approval quickly. Addressing these visa requirements is another function for which a TC should be able to rely on his higher echelon MJD.

C. Considerations for Civilian Defense Counsel (CDC).

During OIF 10–11, CDC typically arranged their own transportation into the Baghdad International Airport (BIAP). They were subject to and personally responsible for the same Iraqi visa requirements as any other foreign civilians. Once they arrived at the civilian side of BIAP, sometimes TDS and sometimes Government paralegals, would drive to the civilian side of the airport (which was located outside of the VBC US-manned perimeter, but inside an Iraqi Army-manned perimeter) and pick them up. The CDC could gain access to Camp Victory with an American passport. An alternate way for civilian counsel to arrive in Baghdad (and Afghanistan) was by flying the available commercial fee-based airline out of Kuwait. To do this, CDC would purchase commercial tickets to KIA and then purchase an additional commercial ticket from KIA to Baghdad on the commercial fee-based airline. However CDC got themselves to Baghdad, once they were there, USF–I military personnel assisted them to get to the required pinpoint location inside Iraq.

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[174] *See* MCM, *supra* note 22, para. 18-22a (empowering "a representative of the convening authority" to do this).

[175] Depending on deployment location, there may be other minor considerations. For instance, during OIF 10–11, it was a theater-wide requirement that all personnel on base wear reflective belts at night, presumably to avoid being hit by errant drivers.

[176] It is important to note that this FRAGO did not come as a surprise to any of the supporting units. Both the requirements and actual draft FRAGO were carefully vetted with the responsible judge advocates in those units, in close coordination with the units' planning and operations staffs. The result was 100% "buy-in" to the FRAGO when it came time for mission execution.

[177] *Visa Services*, GENERAL CONSULATE OF THE STATE OF KUWAIT–LOS ANGELES, http://www.kuwaitconsulate.org/#!services/vstc3=visa-services (last visited Mar. 21, 2012).

[178] During OIF 10–11, the "USF–I Deputy Staff Judge Advocate (Forward)" was located in the New Embassy Company (NEC) in the "Green Zone" and so had closer access to and an established relationship with the Iraqi Ministry of Interior. While coordinating permission with the GoI MoI for each witness worked effectively for the III Corps team during OIF 10–11, the author recommends that future practitioners work with witnesses to secure regular Iraqi visitor visas. Civilian defense counsel required a civilian visa to enter Iraq.

Well-developed, theater-wide military justice structure, but even without such a structure, military justice practitioners have access to e-mail successfully tired in Iraq before USF-I.

Finally, when considering whether the court-martial system set forth in the UCMJ can be effectively deployed, the mere fact that a commander decides to send some cases back to the rear or even not try and cases intheater has little bearing on the deployability of the court-martial system itself. The ready availability of efficient transportation may well make this the correct decision in a given case. But, for TC to give sound advice based on the actual capabilities provided by the UCMJ and the worldwide Judge Advocate General's Corps, deployed JSs *assigned to military justice duties* must make military justice not the "fifth priority," but their firs.